ATTORNEY FOR APPELLANT:

JOSEPH A. COLUSSI
Madison, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

AARON D. NORMAN, SR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 69A01-0906-PC-275
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RIPLEY SUPERIOR COURT
The Honorable James B. Morris, Judge
Cause Nos. 69D01-0511-FD-147
69D01-0702-PC-01

June 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Aaron D. Norman, Sr. ("Norman Sr."), appeals his conviction on direct appeal and the post-conviction court's denial of his petition for post-conviction relief. Norman Sr. raises three issues, which we revise and restate as:

I. Whether Norman Sr. was denied effective assistance of trial counsel;

II. Whether the trial court committed fundamental error;

III. Whether the prosecutor committed prosecutorial misconduct that resulted in fundamental error; and

IV. Whether Norman Sr. is entitled to a new trial due to newly discovered evidence.

We affirm.

The relevant facts follow. S.N. and Norman Sr.'s son, Aaron Norman Jr. ("Norman Jr."), were married and had two children. At some point, S.N. moved in with Norman Sr. because Norman Jr. was "going to jail" in the Dearborn County Sheriff's Department. Trial Transcript at 48. In August 2005, Norman Jr. began serving a jail sentence.

On October 6, 2005, S.N. left Norman Sr.'s house at "about 5:30 to 6:00 o'clock in the evening," and went to her mother's home. Id. at 53. S.N. then went to the home of her friend Christina Ruff ("Ruff"). S.N. returned to Norman Sr.'s home about 3:00 or 3:30 a.m. and went to bed. At "[a]bout 1:30 or 2:00 in the afternoon," Norman Sr. woke S.N. up after Norman Jr. called from jail. Id. at 59. S.N. talked to Norman Jr. on the phone for a few minutes. S.N.'s children also woke up and were at the bottom of S.N.'s bed.

After S.N. finished talking to Norman Jr., Norman Sr. asked S.N., who was nude but covered by a blanket, "where [her] bra and panties was at," and S.N. told him "to just to go out of the room so [she] could get dressed." Id. Norman Sr. went to S.N.'s drawer, retrieved a bra and panties, pulled the blanket off of S.N., touched S.N., held S.N. around her leg, and tried to put the panties on her around her ankles. S.N. started squirming, and Norman Sr. started touching her. S.N. told Norman Sr. to stop, but Norman Sr. started "rubbing on [her] and holding [her] legs." Id. at 61. Norman Sr. rubbed S.N. on her "vaginal area" and tried to penetrate her with his finger but was unsuccessful. Id.

S.N. again asked Norman Sr. to stop so that she could get dressed, but Norman Sr. then tried to "stick his head between [her] legs, and he took his hands and was trying to pry [her] legs open." Id. at 62. Norman Sr. then asked S.N. if "he could lay with [her]," and S.N. told him no and that she wanted to get dressed. Id. at 63. Norman Sr. then put his arm around the back of S.N.'s neck and squeezed S.N.'s butt with his hand which hurt S.N. Norman Sr. then rolled S.N. on her side, and rubbed his erect penis against her through his clothes. S.N. attempted to kick Norman Sr. The children were in the room while the foregoing events occurred over a period of about "a half hour or so." Id. at 69.

Norman Sr. stopped when his mother Maxine Norman "beeped her horn" and started walking up the porch. Id. at 64. Maxine told S.N. that she wanted to take S.N. to Wal-Mart to buy her some boots for her birthday. S.N. "didn't know what to think" and "was scared to think of anything." Id. at 72. S.N. then drove her children and Norman Sr. to the Lawrenceburg Sheriff's Department to give Norman Jr. money. Maxine

followed S.N. in her own car. S.N. went into the Sheriff's Department to give the money to Norman Jr. S.N. did not speak to Norman Jr. but spoke to a person at the front desk. S.N. wanted to tell the police what had happened but was afraid that they would not believe her.

S.N., her children, Norman Sr., and Maxine then went to Wal-Mart. After shopping, Maxine gave S.N. some money, and S.N. went into U.S. Bank and deposited the money into Norman Sr.'s account. S.N. then drove her children and Norman Sr. home. Norman Sr. took the children into the house and told S.N. to pick up his son Jason. S.N. left and eventually called Ruff and told her what had happened. S.N. then told her mother-in-law, her mother, her stepfather, her stepbrother, and her daughter. S.N. also showed her mother the back of her leg where she had a bruise.

Norman Jr. then called his cell phone, which S.N. had with her. Norman Jr. asked S.N. why she was not at home, and S.N. told him that she could not go home but did not want to tell him why. Norman Jr. told S.N. that "if [she] didn't that he didn't want [her] to talk to him no more." Id. at 84. S.N. told Norman Jr. what had happened and Norman Jr. did not "believe it." Id. Norman Jr. told an officer, who contacted S.N.

S.N. spoke with Ripley County Sheriff's Deputy Rob Bradley over the phone and told him that she had been sexually battered by Norman Sr. and that she wanted the Sheriff's Department to help her get her children out of Norman Sr.'s house.

Ripley County Sheriff's Deputy Herbert Houseworth III was dispatched to Norman Sr.'s house to check on S.N.'s children. Deputy Houseworth spoke to Norman

Sr. about the allegation, and Norman Sr. told him that Norman Jr. called him at 6:30 a.m. Norman Sr. said that he took the phone to S.N., noticed that S.N. was nude, and did not look away. Norman Sr. said that there was no physical contact and that he went back into the living room. Norman Sr. then said that S.N. eventually exited the bedroom clothed and that he "basically thanked her and asked if she was mad at him." Id. at 164. Norman Sr. told Deputy Houseworth that he thanked S.N. because he had not "been with a woman for over two years" and that he thanked her for "basically having her allow him to look at her." Id.

S.N. met with police officers and told one of them that her hip was bothering her. The police officer told her to go to the hospital and then return to the Sheriff's Department after she had left the hospital. S.N. went to the hospital and then returned to the Sheriff's Department.

On November 7, 2005, the State charged Norman Sr. with sexual battery as a class D felony.[1] On November 29, 2005, Norman Sr.'s trial counsel filed a Motion for Speedy Trial which requested a jury trial "within ninety (90) days from the date of the probable cause finding for the reason that [Norman Sr.] believes that he is innocent and wishes to have an opportunity to prove said innocence before a jury in this matter as soon as possible." Appellant's Appendix at 49. On May 8, 2006, Norman Sr.'s trial counsel filed a motion in limine requesting that the State not "present any evidence of the opinion of a doctor or treating physician, that would be a medical opinion, through any form of

[1] The State also charged Norman Sr. with battery as a class A misdemeanor, but this charge was later dismissed.

evidence except for the actual treating physician or doctor who has rendered such opinion and only after a proper foundation has been laid all in accordance with Indiana Rule of Evidence 702 (a) and (b)." Id. at 81. After a hearing, the trial court granted Norman Sr.'s motion in limine.

On May 11 and 12, 2006, a jury trial was held. During the trial, the prosecutor moved to admit fourteen pages of S.N.'s medical records with the diagnosis and opinion redacted. Norman Sr.'s counsel objected and argued that the records contained portions that did not satisfy Ind. Evidence Rule 803(4), that any opinion testimony by any other treating physicians should be excluded, and renewed his objections made in his motion in limine. The court overruled the objection and admitted S.N.'s medical records.

During cross examination of S.N., Norman Sr.'s trial counsel asked S.N. if she recalled filing a protective order action against Norman Sr. S.N. testified that her protective order request indicated that she did not want Norman Sr. to have possession of a gun. Counsel then pointed out inconsistencies between S.N.'s petition for a protective order and other evidence.

S.N. repeatedly testified that she had not seen Norman Jr. for some time. Specifically, S.N. testified that she had not seen Norman Jr. since "before Thanksgiving" 2005. Trial Transcript at 151. After she testified, Norman Sr.'s counsel stated:

> After hearing the testimony of the alleged victim in this matter, specifically the testimony that she has not seen or been with Aaron Norman, Jr. since September 19th of 2005, uh, it's come to my attention that Aaron Norman Jr.'s brother, Vincent Norman has observed these two together; you know, physically in the presence of one another. Certainly this would go to the

> issue of the victim's credibility for impeachment purposes. And this is something that's just become aware of me . . . er, made aware to me at this point shortly after she made the testimony that she did on the stand. I would like to make an offer of that witness, ...

Id. at 153. The prosecutor objected based in part upon Norman Sr.'s failure to disclose Vincent Norman earlier as a possible witness. The court allowed Vincent to testify, and his testimony was that he witnessed Norman Jr. and S.N. together a week earlier and that he saw them together about once a week. Vincent also testified that he ate dinner with Norman Jr. and S.N. a week earlier and that they "were together in the same household." Id. at 254.

Norman Sr. testified that he did not remember Norman Jr. calling or telling the police officers that his son called at 6:30. Norman Sr. later testified that "maybe [he] did" take the phone to S.N. Id. at 304. He also testified that there was no banking transaction and that the officers made up the story that he saw S.N. naked, gave her a hug, and thanked her.

Norman Sr.'s trial counsel called Maxine, Norman Sr.'s mother, as a witness and Maxine testified that she had suffered multiple strokes; that she had gone to Norman Sr.'s house around 10:00 a.m.; walked in the house; and saw him sitting on the couch in the living room with one of the children. On cross examination, Maxine indicated that she had difficulty keeping things straight.

The jury found Norman Sr. guilty as charged. On July 20, 2006, the trial court sentenced Norman Sr. to two years with six months suspended.

Norman Sr. filed a motion to correct error on August 16, 2006, and a supplemental motion to correct error on January 16, 2007. He alleged that the trial court erred by failing to make a determination as to his competency and allowing hearsay testimony and the admission of medical records. Norman Sr. also alleged more than twenty claims of ineffective assistance of trial counsel and that newly discovered evidence required that his conviction be set aside.

On February 9, 2007, Norman Sr. filed a petition for post-conviction relief. The petition alleged that "[t]he grounds supporting this petition for post conviction relief . . . [are] stated in detail in the motion to correct errors . . . and the supplemental motion to correct errors." Appellant's Appendix at 302.

The trial court held a hearing on his motions to correct error and denied them on February 22, 2007. On March 9, 2007, Norman Sr. filed a notice of appeal. See Cause Number 69A05-0703-CR-150 ("Cause No. 150"). On June 28, 2007, he filed a Motion to Stay Appeal to Complete Post-Conviction Relief Proceedings in Trial Court and to Extend Time to File the Appellant's Brief. On July 9, 2007, this court granted Norman Sr.'s motion and dismissed the appeal without prejudice.

At the post-conviction hearing, Norman Sr. submitted exhibits but did not present testimony from witnesses. The post-conviction court denied Norman Sr.'s petition on May 22, 2009. On June 4, 2009, Norman Sr. filed his notice of appeal of the court's denial of post-conviction relief. See Cause No. 69A01-0906-PC-275 ("Cause No. 275").

On June 16, 2009, Norman Sr. filed a Motion to Reopen Appeal of Conviction and to Consolidate Appeal of Conviction with Appeal of Denial of Post-Conviction Relief. In his motion, Norman Sr. asked this court to allow him to raise all claims from his direct appeal and from the denial of his petition for post-conviction relief, pursuant to the Davis/Hatton procedure. On July 9, 2009, this court granted Norman Sr.'s motion. This court consolidated Cause No. 150 and Cause No. 275 under Cause No. 275.

Norman Sr. appeals the denial of his petition for post-conviction relief and also raises some freestanding issues. This is proper, as he utilized the Davis/Hatton procedure, which is outlined in Indiana Appellate Rule 37, and was thoroughly explained in Slusher v. State, 823 N.E.2d 1219 (Ind. Ct. App. 2005), based upon a request to "develop an additional evidentiary record" after a direct appeal was initiated:

> [T]he proper procedure is to request that the appeal be suspended or terminated so that a more thorough record may be compiled through the pursuit of post-conviction proceedings. This procedure for developing a record for appeal is more commonly known as the Davis/Hatton procedure. See Hatton v. State, 626 N.E.2d 442, 443 (Ind. 1993); Davis v. State, 267 Ind. 152, 368 N.E.2d 1149, 1151 (1977). As we explained, the Davis/Hatton procedure involves a termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court. If the appellate court preliminarily determines that the motion has sufficient merit, the entire case is remanded for consideration of the petition for post-conviction relief. If, after a full evidentiary hearing the post-conviction relief petition is denied, the appeal can be reinitiated. Thus, in addition to the issues initially raised in the direct appeal, the issues litigated in the post-conviction relief proceeding can also be raised. This way, a full hearing and record on the issue will be included in the appeal. If the petition for post-conviction relief is denied after a hearing, and the direct appeal is reinstated, the direct appeal and the appeal of the denial of post-conviction relief are consolidated.

823 N.E.2d at 1222 (some internal citations omitted). Thus, we have before us issues of direct appeal and issues of appeal from the denial of a petition for postconviction relief. See Williams v. State, 757 N.E.2d 1048, 1058 (Ind. Ct. App. 2001), trans. denied. "The standards of review therefore differ and will be treated accordingly." Id.

Before addressing Norman Sr.'s arguments, we observe that he does not cite to the record for the vast majority of his arguments. We acknowledge that he cites to the record in his statement of facts, but Ind. Appellate Rule 46(A)(8)(a) requires citation to the record in the argument section. See Ind. Appellate Rule 46(A)(8)(a) ("Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22."). His failure to provide supporting citations compelled this court to locate the same material in his statement of facts contained in his seventy-page brief and then review the citations in his statement of facts. This burdensome process has impeded our review especially in light of the fact that his statement of the issues reveals that he attempts to raise twenty-one claims of ineffective assistance, claims of newly discovered evidence illustrating perjury, and six claims of fundamental error.

To the extent that Norman Sr.'s arguments are based on portions of his statement of facts that do not contain citations to the record or when it is unclear in the argument section which facts Norman Sr. is relying upon, we find that Norman Sr.'s arguments are waived. See Haddock v. State, 800 N.E.2d 242, 245 n.5 (Ind. Ct. App. 2003) (noting that

"we will not, on review, sift through the record to find a basis for a party's argument"); see also Johnson v. State, 675 N.E.2d 678, 681 n.1 (Ind. 1996) (observing that the defendant failed to cite to the record and "[o]n review, this Court will not search the record to find grounds for reversal"); Keller v. State, 549 N.E.2d 372, 373 (Ind. 1990) (holding that a court which must search the record and make up its own arguments because a party has presented them in perfunctory form runs the risk of being an advocate rather than an adjudicator). To the extent that Norman Sr.'s statement of facts contains relevant portions which cite to the record, we will attempt to address the merits of his arguments.

I.

The first issue is whether Norman Sr. was denied effective assistance of trial counsel. He phrases this issue as "[d]id the trial court err in denying Aaron D. Norman, Sr.'s motion to correct errors, supplemental motion to correct errors and petition for post-conviction relief on the basis of ineffective assistance of trial counsel where his trial counsel" performed or failed to perform twenty-one separate actions. Appellant's Brief at 3. He does not separate this issue into individual arguments related to his direct appeal or petition for post-conviction relief. Our review of the record reveals that some evidence was presented both on his motion to correct error or supplemental motion to correct error and at the post-conviction hearing, while some evidence was presented during only the post-conviction proceeding. Norman Sr. does not clarify in his appellant's brief which evidence was used in support of his motion to correct error or

supplemental motion to correct error and which evidence was used in support of his petition for post-conviction relief. While the standards of review for post-conviction and direct appeal differ,[2] we conclude that Norman Sr.'s claims for ineffective assistance fail under either standard.

To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Perez v. State, 748 N.E.2d 853, 854 (Ind. 2001).

[2] In post-conviction proceedings, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. "A post-conviction 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. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

Failure to satisfy either prong will cause the claim to fail. French, 778 N.E.2d at 824. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Before addressing Norman Sr.'s various arguments, we observe that the record reveals that his trial counsel spoke with him on multiple occasions before trial, reviewed discovery, filed a response to discovery, deposed Maxine, filed a motion in limine, cross-examined witnesses, presented witnesses, and made a closing argument.

To the extent that Norman Sr. attacks his trial counsel's defense, we observe that decisions regarding what defense to present is a matter of trial strategy, which is not subject to attack through an ineffective assistance claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). We will not lightly speculate as to what may have been an advantageous trial strategy, as counsel should be given deference in choosing a strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998). Further, Norman Sr. did not submit any testimony of his trial counsel at the post-conviction hearing. "Where trial counsel is not presented in support, the post-conviction court may infer that trial counsel would not have corroborated appellant's allegations." Dickson v. State, 533 N.E.2d 586, 589 (Ind. 1989).

Norman Sr. raises twenty-one separate claims of ineffective assistance in his statement of issues. He divides these claims into seven headings in the argument section of his brief. We will address those claims raised in the argument section of his brief.

A. Trial Counsel's Preparation

Norman Sr. argues that his trial counsel's "speedy trial tactic followed by no discovery, no investigation and no preparation was ineffective." Appellant's Brief at 39. He appears to argue that his trial counsel was ineffective for failing to procure telephone records and bank records, failing to depose S.N., and failing to seek a medical expert to examine the evidence. He also argues that "[t]here was no basis for a speedy trial motion" and concludes by arguing, without citation to authority, that "the 'speedy trial' tactic of trial counsel might have been reasonable, but only if trial counsel was also prepared for trial in the event [S.N.] appeared," and that "[t]he tactic, hedged with no preparation, risked too much on a 'no show,' a risk trial counsel would not likely have employed had it been his own freedom at risk." Id. at 40-41.

Regarding the phone records, the State points out that Deputy Houseworth testified that he spoke to Norman Sr. about the allegation and that Norman Sr. told Deputy Houseworth that Norman Jr. called him at 6:30 a.m. Thus, the State argues "the absence of a call in the morning does not undermine the State's case at all." Appellee's Brief at 13. The State also argues that S.N. "explained why there was no phone call shown in the records – because [Norman Jr.] generally called using pre-paid phone

cards." Id. at 31. Norman Sr. does not point to the record to support the contention that his trial counsel did not have the phone records.

Regarding the bank records, Norman Sr.'s bank records reveal that a deposit was made and lists the deposit date as October 7. The State argues that "counsel could well decide that his client would not benefit by the admission of documents that facially support the victim's testimony and that would only dispute that testimony if one believed [Norman Sr.'s] claim that the documents do not actually mean what they say." Appellee's Brief at 12 n.3. We agree with the State.[3] Moreover, Norman Sr. does not point to the record to support the contention that his trial counsel did not have the bank record.

To the extent that Norman Sr. argues that his trial counsel was ineffective for failing to depose S.N. and learn of her relationship with Norman Jr., we observe that Norman Sr.'s trial counsel presented evidence that S.N. was lying regarding her relationship with Norman Jr. Specifically, Vincent Norman testified that he witnessed Norman Jr. and S.N. together a week prior to trial and that he saw them together about once a week. Vincent also testified that he ate dinner with Norman Jr. and S.N. a week earlier and that they "were together in the same household." Trial Transcript at 254.

[3] For the first time in his reply brief, Norman Sr. argues that "it is clear that the deposit took place at an ATM at the bank's branch in Moores Hill, Indiana as claimed by Mr. Norman and not at the bank's branch next to Wal-Mart in Aurora, Indiana, as claimed by Ms. Norman." Appellant's Reply Brief at 7. Norman Sr. did not raise the issue of the discrepancy regarding the location of the bank between the bank record and S.N.'s testimony in the arguments in his appellant's brief. Therefore, we do not address this argument. See Carden v. State, 873 N.E.2d 160, 162 n.1 (Ind. Ct. App. 2007) (holding that an issue not raised in an appellant's brief may not be raised for the first time in a reply brief).

As to Norman Sr.'s argument that his trial counsel was ineffective for failing to seek a medical expert to examine the evidence, Norman Sr. introduced an affidavit of a doctor in Nebraska which indicated that the bruise suffered by S.N. was not consistent with the type of injury S.N. described. The State argues that Norman Sr. presented only an affidavit from a Nebraska doctor who had practiced in Madison, Indiana prior to 2002 and that "[c]ounsel is not ineffective for failing to scour the country looking for doctors who had practiced in the area years earlier who might testify, based only on a review of the medical records and not based on any first-hand observation of the patient . . . ." Appellee's Brief at 16. The State also argues that "[t]he bruising was somewhat corroborative of [S.N.'s] claim to have been compelled by force to submit to the touching, but it was not necessary to prove that claim." Id.

Given that Norman Sr. did not submit any testimony of his trial counsel at the post-conviction hearing and based upon the record, we cannot say that Norman Sr. has demonstrated both that his trial counsel's preparation constituted deficient performance and that there is a reasonable probability that the result of the proceeding would have been different had Norman Sr.'s trial counsel prepared differently.[4]

B. Trial Counsel Did Not Object to Certain Testimony

[4] Norman Sr. also argues that his trial counsel was ineffective for failing to depose S.N. because with knowledge of her story he could have obtained telephone and bank records. Because we conclude that Norman Sr.'s claims of ineffectiveness regarding the bank and telephone records fail, we cannot say that Norman Sr. has demonstrated that his trial counsel was ineffective for failing to depose S.N. on this basis.

Norman Sr. argues that his trial counsel was ineffective for failing to object to certain testimony. "When an ineffective assistance of counsel claim is based on trial counsel's failure to make an objection, the appellant must show that, had a proper objection been made, it would have been sustained." Sauerheber v. State, 698 N.E.2d 796, 807 (Ind. 1998).

Norman Sr. argues that his trial counsel was ineffective for failing to object "when the State asked [S.N.] to tell the jury that she was a truth teller and that her mother, her mother-in-law, her best friend and her husband all believed she was telling the truth." Appellant's Brief at 42. Norman Sr. cites Ind. Evidence Rule 704(b), which provides that "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."

In Norman Sr.'s statement of facts, he appears to cite to the following exchange which occurred during the direct examination of S.N.:

Q. What was Aaron Norman Jr.'s thoughts, did he believe you or did he disbelieve you?

A. He didn't believe it.

Q. But LeAnn did, right?

A. Yes.

Q. And Bertha did?

A. Yes.

Q. And Christine Ruff did?

A. Yes.

Q. Did that cause some friction between you and he, the fact that he doesn't believe you?

A. Yes.

Trial Transcript at 84-85.

The State argues that even assuming that Ind. Evidence Rule 704(b) was violated, Norman Sr. has failed to demonstrate any significant prejudice from trial counsel's failure to object because this was a fleeting reference by one witness who was not a police officer or expert witness, the jury was correctly advised that it was the exclusive judge of the credibility of the witnesses, and S.N.'s testimony "was coupled with the admission, which likely would make as strong an impression on the jury, that [S.N.'s] husband did not believe her accusation." Appellee's Brief at 17. The State also argues that "[c]ounsel might well have made the strategic decision that it was better not to object so that this helpful testimony would remain in evidence than it would be to object and to lose all this testimony, including the helpful testimony." Id.

Based upon the record, which indicates that the jury was instructed that it was the exclusive judge of the evidence, and in light of the fact that Norman Sr. did not present testimony from his trial counsel, we conclude that Norman Sr. has not demonstrated that he received ineffective assistance of counsel on this basis.

Norman Sr. also argues that "[t]rial counsel raised no objection while the State asked [S.N.'s] mother, Ms. Clark, to tell the jury that she, too, was a truth teller." Appellant's Brief at 42. The following exchange occurred during the direct examination of Clark:

> Q. Do you have any reason to tell these ladies and gentlemen anything besides the truth?
>
> A. No, Sir, I have no reason.

Trial Transcript at 194. Based upon this single exchange, we conclude that Norman Sr. has not demonstrated that he was prejudiced by his trial counsel's decision not to object to the foregoing exchange.

Lastly, Norman Sr. argues that his trial counsel was ineffective for failing to object "when the State repeatedly asked Mr. Norman, Sr. to call law enforcement officers liars." Appellant's Brief at 42. In his statement of facts, Norman Sr. states that "[d]uring the State's cross-examination of Mr. Norman, Sr., the State repeatedly asked Mr. Norman, Sr. to call the two law enforcement officers who interrogated him liars." Id. at 21.

The record reveals that the prosecutor asked Norman Sr. "when the officers testified that you told them on October 7th that you asked [S.N.] if she was mad at you, that never happened, right?" Trial Transcript at 302. The prosecutor later asked Norman Sr. "why is it that these police officers are coming in here and lying about what you told them," and Norman Sr. answered: "[L]ike I said, why . . . why do . . . do I want to look at my son's wife." Id. at 306.

We observe that the following exchange occurred between Norman Sr. and his trial counsel:

> Q. Aaron, I don't mean this to be derogatory to you or anything like that, but you do have a second grade level of education . . . .
>
> A. Yes, I do.
>
> Q. . . . you don't read and write very well.
>
> A. You're right, I don't.
>
> Q. If somebody says something to you and says it to you enough, will you start repeating it?
>
> A. Well, yes, I will.

Id. at 313.

Again, given that Norman Sr. did not submit any testimony of his trial counsel at the post-conviction hearing and based upon the record, we cannot say that Norman Sr. has demonstrated both that his counsel's performance was deficient and that he was prejudiced by any deficient performance based upon the foregoing exchange.

C. Admission of Medical Records

a. S.N.'s Medical Records

Norman Sr. argues that his trial counsel was ineffective in acquiescing to the introduction into evidence of S.N.'s medical records. Norman Sr. argues that while the phrase "hip contusion" was redacted from S.N.'s medical records, her records "contained many other diagnoses and opinions." Appellant's Brief at 46. Norman Sr. argues that "the radiology report could have appeared to indicate serious injury resulting from the

alleged assault, when in fact, the report documents a pre-existing hip injury sustained by [S.N.] as a child." Id. In his statement of facts, Norman Sr. points to a radiology report which contained the following:

> Coned down AP and frog leg lateral views are obtained. There is mild subchrondal sclerosis of the acetabular roof and the femoral head. A benign bone island is noted in the femoral head. The joint space is preserved. There is a transversely oriented radiolucent line at the junction of the acetabulum and inferior pubic ramus. This line is bordered by dense lines both superiorly and inferiorly, hence, likely represent wide inter-trabecular space rather than a fracture. No gross fracture or dislocation is seen.

State's Exhibit 1.

To the extent that Norman Sr. argues that the radiology report failed to report a previous injury, such evidence was already before the jury. S.N. testified that she walked with a limp because her hip was "messed up" because she had been struck by a car when she was sixteen years old. Trial Transcript at 67. S.N. testified that her pain was partially due to a previous injury to her hip. S.N. also testified that her hip "started hurting real bad again last week" because she was cutting the grass and "pulled something." Id. at 130.

Norman Sr. also argues that "[o]ther entries in the record were highly prejudicial and were not supported by [] testimony from a witness, expert or otherwise." Appellant's Brief at 46. His statement of facts states: "The records also contained statements and entries by the health care providers such as 'reduced range of motion,' 'safety plans,' 'claims of tenderness and pain,' 'violent episode,' 'use of wheelchair' and 'patient is

escorted at this time.'" Id. at 16. To the extent that Norman Sr. suggests that certain entries were highly prejudicial, he fails to put forth a cogent argument or cite to the record. Consequently, this issue is waived. See, e.g., Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was "supported neither by cogent argument nor citation to authority"); Shane v. State, 716 N.E.2d 391, 398 n.3 (Ind. 1999) (holding that the defendant waived argument on appeal by failing to develop a cogent argument); Smith v. State, 822 N.E.2d 193, 202-203 (Ind. Ct. App. 2005) ("Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record."), trans. denied.

b. Maxine's Medical Records

Norman Sr. argues that his trial counsel was ineffective for failing to object to the admission of Maxine's medical records and the reading of diagnoses from those records. In his statement of facts, he states that "the State offered approximately 250 pages of records containing the complete medical history of Maxine Norman." Appellant's Brief at 22. However, he does not point to any specific portion of the medical records in his statement of facts or his argument section. Consequently, this issue is waived. See Haddock, 800 N.E.2d at 245 n.5 (noting that we will not, on review, sift through the record to find a basis for a party's argument"); see also Smith, 822 N.E.2d at 202-203 ("Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.").

D. Attack on Competency of Maxine

Norman Sr. argues that his trial counsel "should have demanded that the State request a competency hearing concerning Maxine, if it intended to attack her competency, and that the trial court appoint counsel or a guardian *ad litem* for Maxine Norman, if her competency was to be challenged by the State." Appellant's Brief at 49. He further argues that his "[t]rial counsel's 'opening of the door' to a competency attack and then taking no action as the State attacked was extremely prejudicial to [Norman Sr.]" Id. at 50.

The State argues that "[n]o attack was made on Maxine's competency to testify; therefore, counsel could not be ineffective for failing to object to such an alleged attack." Appellee's Brief at 21. The State argues that "[q]uestioning a witness about health issues that might affect memory is no different than questioning a witness about drug use or lack of sleep on the day in question that might impair memory." Id. at 22. The State asserts that it is not entirely clear what Norman Sr. is claiming his counsel should have done that would have made any difference, and that had his counsel demanded a competency hearing, two possible outcomes exist: (1) "the court could have found Maxine incompetent, thereby denying [Norman Sr.] a witness he seemed to feel helped his defense and thus hardly a beneficial outcome for [Norman Sr.];" or (2) "Maxine would have been found competent to testify." Id.

In light of the State's arguments and based upon the record, we cannot say that Norman Sr. has demonstrated both that his trial counsel's performance was deficient and that he was prejudiced by the deficient performance.

E. Trial Counsel's Decision Not to Object on Hearsay Grounds

Norman Sr. argues that his trial counsel was ineffective "in not objecting to a single hearsay statement or document introduced by the State." Appellant's Brief at 50. "When an ineffective assistance of counsel claim is based on trial counsel's failure to make an objection, the appellant must show that, had a proper objection been made, it would have been sustained." Sauerheber, 698 N.E.2d at 807. Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is inadmissible unless admitted pursuant to a recognized exception. Ind. Evidence Rule 802.

Without citation to the record, Norman Sr. lists a number of alleged examples of hearsay testimony. We will attempt to address his claims.

1. S.N.'s Statements Regarding Her Physician

To the extent that Norman Sr. argues that S.N. "testified that the non-appearing emergency room physician urged her to report the alleged assault to the police," Appellant's Brief at 51, his statement of facts cites to pages 88-89 of the trial transcript for the proposition that the "State questioned [S.N.] about what she told the emergency room physician, and what the emergency room physician told her, *i.e.*, urged her to report

the incident immediately to law enforcement." Appellant's Brief at 16. On direct examination of S.N., the following exchange occurred:

> Q. Who did you see at the hospital?
>
> A. Dr. Michael Welsh or David Welsh.
>
> Q. And what hospital did you go to?
>
> A. Margaret Mary in Batesville.
>
> Q. And what did he do?
>
> A. He checked me and he asked me what happened, and I told him; and he took pictures of the bruise I had on my back-side, and he wrote me out a prescription of pain medicine; and he called the Sheriff's Department, and he give . . . he told me to come here to the Sheriff's Department, and I come to the Sheriff's Department and that's where I filled out the police report at.

Trial Transcript at 88.

Even assuming that an objection would have been sustained, a failure to object does not constitute ineffective assistance of counsel if the decision to remain silent "could well have been a strategic decision by counsel." Charlton v. State, 702 N.E.2d 1045, 1051 (Ind. 1998), reh'g denied. In Bannowsky v. State, 677 N.E.2d 1032, 1035 (Ind. 1997), the Indiana Supreme Court recognized that a defense attorney might pass up an opportunity for an objection out of a desire to avoid focusing the jury's attention on a particular statement. Here, trial counsel may have decided to let the brief statement pass unremarked rather than to highlight it with even a sustainable objection. Given the facts as set forth in the record, this course of action did not exceed the bounds of reasonable

performance by a lawyer. Accordingly, Norman Sr.'s claim of ineffective assistance on this basis fails. See Pennycuff v. State, 745 N.E.2d 804, 815 (Ind. 2001) (holding that defense attorney may well have decided to let a brief statement pass unremarked and that this course of action did not exceed the bounds of reasonable performance by a lawyer).

2. Law Enforcement Officer's Testimony

Norman Sr. argues that his trial counsel failed to object when "[o]ne law enforcement officer testified that [S.N.] told him that the non-appearing emergency room physician urged her to report the assault." Appellant's Brief at 51. In Norman Sr.'s statement of facts, he states that "[a] second officer, Robert Bradley, was asked by the State to testify about what [S.N.] said the emergency room physician had said to her following his exam, *i.e.*, that [S.N.] said the physician 'urged' her to report the incident to the police." Id. at 19. Norman Sr. appears to refer to the following exchange which occurred during the redirect examination of Deputy Bradley:

> Q. And do you recall what your meeting consisted of?
>
> A. I think [S.N.] and I went over the statement that she gave, and we talked . . . she talked about the emergency room taking pictures, photographs, and that's . . . she said that the doctor had urged her to make a report to the police.

Trial Transcript at 187.

Again, even assuming that an objection would have been sustained, Norman Sr.'s trial counsel may well have decided to let the brief statement pass unremarked rather than to highlight it with even a sustainable objection, and we conclude that this course of

action under the circumstances did not exceed the bounds of reasonable performance by trial counsel. Accordingly, Norman Sr.'s claim of ineffective assistance on this basis fails. See Pennycuff, 745 N.E.2d at 815.

3. S.N.'s Testimony Regarding Conversations with her Friend and Mother-in-law

Norman Sr. argues that his trial counsel was ineffective for failing to object when S.N. testified "testified that her friend, her non-appearing husband, her mother and her non-appearing mother-in-law believed her story." Appellant's Brief at 51. We have already addressed a similar issue. See supra Part I.B. Based upon the record, which indicates that the jury was instructed that it was the exclusive judge of the evidence, and in light of the fact that Norman Sr. did not present testimony from his trial counsel, we conclude that Norman Sr. has not demonstrated both that his counsel's performance was deficient upon this basis and that the petitioner was prejudiced by any such deficient performance.

4. Maxine's Medical Records & S.N.'s Emergency Room Records

Norman Sr. argues that his trial counsel failed to object to Maxine's medical records which contained "countless hearsay statements, findings and diagnoses of non-appearing health care providers," and S.N.'s emergency room records which contained "hearsay statements, reports and findings of non-appearing health care providers." Appellant's Brief at 51. We have already addressed a similar issue. See Part I.C. Again,

we conclude that Norman Sr. does not point to any specific portion of the medical records in his statement of facts or his argument section and has waived this issue.

5. S.N.'s Written Statement

Norman Sr. argues that his trial counsel failed to object "[w]hen the State introduced the written statement which [S.N.] gave to law enforcement the day after the alleged incident during its examination of the officer." Appellant's Brief at 51. He asserts that "[t]here had been no issue raised that [S.N.] had testified to facts which were contradicted by her written statement" and that "[t]he defense had not offered the statement to impeach her on contradicting testimony." Id. at 52.

We first observe that his trial counsel questioned S.N. about the fact that her statement to police did not include the fact that she had called Christina Ruff.[5] Moreover, counsel pointed out inconsistencies between S.N.'s statement to police and other evidence. Specifically, during closing argument, counsel stated:

> I have to direct you back to the State's Exhibit 3[, S.N.'s statement to police]. That will be available to you if you need it. Basically, nowhere in here does it say that she called her friend Christine Ruff first, nowhere in here does it say that her children were at the foot of the bed. And she's signing it as it's an affirmation, that she certifies to be true and factual. State's Exhibit 6, which is a protective order here, and on the description of the incident, she writes again he held me down and tried to have sex with

[5] The following exchange occurred during recross of S.N.:

> Q. I didn't notice in that where you indicated to them that you'd called Christina Ruff?
>
> A. I might not have put it on there.

Trial Transcript at 147.

> me, and I told him to get off. My two year little girl was screaming at the bottom of the bed. Shouldn't that have been in that report also? There's a lot of inconsistencies here as far as what was said, what statements were made . . . . [S.N. is] a Mom, she's got two little kids. Why on earth would someone who is in fear of their well being or the children's well being if something like this really happened, why would they leave the children behind.

Trial Transcript at 337-338. Based upon our review of the record, we cannot say that Norman Sr. has demonstrated that he received ineffective assistance of counsel.

F. Protective Order

Norman Sr. argues that his trial counsel severely prejudiced him by reviewing with S.N. her specific allegations in her petition for a protective order and her request of the trial court "to take [Norman Sr.'s] handgun, when the handgun [Norman Sr.] had owned all his life was never an issue in the alleged assault, the police reports, the charges or the State's case-in-chief." Appellant's Brief at 53. The State argues that the actions of Norman Sr.'s counsel could have constituted a reasonable strategy.

The record reveals that his counsel presented evidence that S.N. failed to appear at three different hearings regarding her protective order against him. Moreover, during closing argument, his counsel pointed out inconsistencies between S.N.'s written statement and her petition for the protective order and later argued:

> The Prosecutor says, basically, she doesn't have to come to this protective order hearing because the bond order says that there's no contact. Okay. He doesn't have any contact with her, he has no desire to contact her after, you know making these types of allegations. But a bond order doesn't take a guy's gun away from him. If you're really fearful that a guy's going to do something to you or your family. The protective order does that. And

> she never followed up on that. Was she really worried about this guy, did it really happen. The actions don't show it.

Trial Transcript at 339-340.

Based upon the record, we conclude that trial counsel's actions may have been a strategic decision. We conclude that Norman Sr. has not demonstrated both that his trial counsel's performance was deficient and that he was prejudiced by counsel's action in reviewing with S.N. the specific allegations in her petition for a protective order.

G. Trial Counsel's Decision Not to Object During Prosecutor's Closing Argument

Norman Sr. appears to argue that his trial counsel was ineffective for failing to object to three statements made by the prosecutor during his closing argument. We will address each argument separately.

1. Time of Telephone Hours

Norman Sr. argues that that the prosecutor "argued that the inmate phone privilege policy of the Dearborn County Jail restricted outgoing calls to the hours between 8:00 a.m. and 10:00 p.m.," that "[n]o witness form [sic] the Department had testified concerning the policy," and that the prosecutor "used the phone policy argument to portray [Norman Sr.] as a liar because one investigating officer had testified that [Norman Sr.] told the officer that his son called [S.N.] at 6:30 a.m. on October 7, 2005." Appellant's Brief at 55. He appears to argue that his counsel was ineffective for failing to object to the prosecutor's statements on the ground that the statements were based on the prosecutor's personal knowledge.

During closing argument, the prosecutor stated:

> So, perhaps when [Norman Sr.] heard Maxine at her deposition, his story started to change. Not to mention that, in light of the fact that . . . the phone call placed from Dearborn Detention Center couldn't have been made at 6:30. They don't have privileges . . . phone privilege until 8:00.

Trial Transcript at 328.

Norman Sr. has not shown that an objection to the prosecutor's comments would have been sustained if made. There was testimony introduced at trial that Norman Jr. could not have made a call until 8 a.m. Specifically, the record reveals that S.N. testified that Norman Jr. could make calls from the jail between "7:30 or 8 till 9 or 10 P.M." Id. at 148. When asked by the prosecutor if it would surprise her if the telephone calls could be made between 8:00 a.m. until 10:00 p.m., S.N. indicated that she would not be surprised and that that time period sounded correct.

Based upon the record, we conclude that the prosecutor's comments were based upon the evidence in the record and were therefore not improper. See Wrinkles v. State, 749 N.E.2d 1179, 1197 (Ind. 2001) (holding that the comments of the prosecutor were fair characterizations of the evidence), cert. denied, 535 U.S. 1019, 122 S. Ct. 1610 (2002). To the extent that Norman Sr. makes other statements regarding the prosecutor's statements relating to the time the call was made, he does not develop a cogent argument. Consequently, this issue is waived. See, e.g., Cooper, 854 N.E.2d at 834 n.1; Shane, 716 N.E.2d at 398 n.3; Smith, 822 N.E.2d at 202-203.

2. Maxine's Competency

Norman Sr. argues that his trial counsel was ineffective for failing to object to the prosecutor's statements "about the competency of Maxine Norman where there had been no determination of her incompetency and no testimony from any medical expert." Appellant's Brief at 56. He cites to Ind. Professional Conduct Rule 4.4, which provides in part that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

During closing argument, the prosecutor stated:

> The Defense put on a couple witnesses, three witnesses. The first one was Maxine Norman. She's a nice lady. . . . She was here, she testified. I put medical records into evidence as to her medical inabilities. She's 81 years old, she's had multiple strokes and ladies and gentlemen, her . . . her memory is just not what it used to be. I just ask you to weigh that in consideration of her testimony.

Trial Transcript at 327.

The record reveals that Maxine had multiple strokes and that Maxine indicated that she had a little difficulty keeping things straight. Based upon the record, we conclude that the prosecutor's comments were based upon evidence in the record and were not improper. See Wrinkles v. State, 749 N.E.2d 1179, 1197 (Ind. 2001) (holding that the comments of the prosecutor were fair characterizations of the evidence).

3. Time Before Disclosure

Norman Sr. argues that his counsel was ineffective for failing to object when the prosecutor "argued that victims of sexual assault take time to disclose the assault, a

personal opinion apparently held by the Chief Deputy Prosecutor who made the argument." Appellant's Brief at 54. During closing argument, the prosecutor stated: "And as we talked about in voir dire, some victims of sexual assault take many years to ever disclose. The majority probably never do disclose. It took [S.N.] nine hours." Trial Transcript at 328.

Norman Sr. argues that "[t]here was no evidence before the jury about sexual assault victims delaying disclosure," and that "[t]he jury was left with the unfounded and unrebutted personal opinion of the Chief Deputy Prosecutor that [S.N.] had acted as traumatized sexual assault victims customarily act." Appellant's Brief at 54-55. Norman Sr. argues that "[t]his Court has found many times that the State cannot use the personal knowledge of the prosecutor or other 'facts' not supported by evidence in closing argument." Id. at 56.

The State argues that "[t]he prosecutor was not implying here that he had any special or expert knowledge in this matter," and that the prosecutor's statement "is simply urging the jury to apply their own common sense and experience that victims of sexual violations do not always report the incident immediately to the first person they see, a contention that cannot seriously be disputed and that was apparently acknowledged by jurors during jury selection." Appellee's Brief at 28.

Even assuming that the prosecutor's comments were improper, Norman Sr.'s trial counsel could have reasonably decided that objecting to the prosecutor's brief comment would draw undue attention to it. Such a choice was a reasonable strategic decision. See

Willsey v. State, 698 N.E.2d 784, 795 (Ind. 1998) (holding that even if the prosecutor's statement during closing argument was improper, counsel's failure to object may well have been grounded in a decision that an objection would call undue attention to the State's remark or would be seen by the jury as aggressive and unsympathetic), reh'g denied; see also Monegan v. State, 721 N.E.2d 243, 254 (Ind. 1999) (finding a reasonable strategic decision not to object to prosecutor's statements during closing argument and holding that defendant had not demonstrated that he had received ineffective assistance of counsel); Jackson v. State, 683 N.E.2d 560, 564 (Ind. 1997) (holding that it was within the wide range of reasonable attorney performance not to object to the prosecutor's statements during closing argument).

II.

The next issue is whether the trial court committed fundamental error.[6] The "fundamental error" rule is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002), reh'g denied. The error must be so prejudicial to the defendant's rights as to make a fair trial impossible. Ortiz v. State, 766 N.E.2d 370, 375

[6] We address this issue as a direct appeal issue because freestanding claims of trial court error must be raised on direct appeal and are not available in collateral proceedings. See Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) (holding that it is wrong to review the petitioner's fundamental error claim in a post-conviction proceeding); Lambert v. State, 743 N.E.2d 719, 726 (Ind. 2001) (holding that post-conviction procedures do not provide a petitioner with a "super-appeal" or opportunity to consider freestanding claims that the original trial court committed error and that such claims are available only on direct appeal), reh'g denied.

(Ind. 2002). In considering whether a claimed error denied the defendant a fair trial, we determine whether the resulting harm or potential for harm is substantial. Id.

Norman Sr. appears to argue that the trial court committed fundamental error by failing to "either stop the proceedings until effective counsel could be found or to prevent the State from repeatedly violating the most fundamental rules of evidence and criminal procedure in pursuit of a conviction," and by failing to question Norman Sr.'s trial counsel about his preparation and strategy. Appellant's Brief at 64. Norman Sr. argues that Indiana courts have previously addressed situations in which "a trial court . . . actively inserts itself into the trial to the prejudice of an accused," and cites Kennedy v. State, 258 Ind. 211, 280 N.E.2d 611 (1972); Stellwag v. State, 854 N.E.2d 64 (Ind. Ct. App. 2006); and Decker v. State, 515 N.E.2d 1129 (Ind. Ct. App. 1987). Id.

As discussed earlier, we cannot say that Norman Sr.'s trial counsel provided ineffective assistance. Further, here, unlike the facts in the cases cited by Norman Sr., Norman Sr. does not point to and our review of the record does not reveal that the trial court took any action which would indicate that it had crossed the barrier of impartiality. Cf. Kennedy, 258 Ind. at 217-219, 280 N.E.2d at 615-616 (holding that the trial court examined a witness "in a highly argumentative fashion approximating the typical attempt at cross-examination and impeachment" and that in the examination of another witness the trial court "took on the appearance of an advocate"); Stellwag, 854 N.E.2d at 69 (holding that the cumulative effect of the trial judge's comments crossed the barrier of impartiality where the trial court threatened the defendant in front of the jury, interrupted

the defendant during questioning and admonished the defendant to answer the prosecutor's questions, and intervened in the questioning of a witness and told the witness not to argue with the prosecutor); Decker, 515 N.E.2d at 1134 (holding that the trial court's examination of a witness exceeded the legitimate purpose for judicial interrogation of a witness and suggested to the jury that the judge believed that the witness's exculpatory testimony was false). We cannot say that the trial court's actions resulted in fundamental error.

III.

The next issue is whether the prosecutor committed prosecutorial misconduct that resulted in fundamental error. Norman Sr. argues:

> The State is never entitled to place self-vouching, truth telling, hearsay testimony before the jury. The State is never entitled to have one witness call another a liar. The State is never entitled to introduce medical records containing diagnoses, cumulative statements and prejudicial entries as business records without a sponsoring medical expert witness. The State is never entitled to attack a fact witness competency in the presence of a jury. The State is never entitled to cross-examine a fact witness by reading inadmissible medical diagnoses of the fact witness to attack the witness' competency in the presence of the jury. The State is never entitled to base closing arguments on a prosecutor's personal opinions about psychological/medical issues. Despite time-honored fundamental rules against such conduct, the State repeatedly violated those rules in pursuit of a conviction.

Appellant's Brief at 68-69.

Initially, we observe that Norman Sr. again fails to cite to the record. Further, Norman Sr. fails to put forth a cogent argument or cite to authority. Consequently, this issue is waived.

IV.

The next issue is whether newly discovered evidence requires a new trial. Norman Sr. phrases the issue as "[d]id the trial court err in denying [Norman Sr.'s] motion to correct errors, supplemental motion to correct errors and petition for post-conviction relief where" newly discovered evidence reveals that his conviction was based upon perjury. Appellant's Brief at 5. Norman Sr. does not separate his arguments related to his direct appeal from those related to his petition for post-conviction relief. Nor does he clarify in his appellant's brief which evidence was used in support of his motion to correct error or supplemental motion to correct error and which evidence was used in support of his petition for post-conviction relief. While the standards of review for post-conviction and direct appeal differ, we conclude that Norman Sr.'s claim fails under either standard.

The Indiana Supreme Court has enunciated nine criteria for admission of newly discovered evidence:

> [N]ew evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

Taylor v. State, 840 N.E.2d 324, 329-330 (Ind. 2006) (quoting Carter v. State, 738 N.E.2d 665, 671 (Ind. 2000)). We analyze these nine factors with care, as the basis for newly discovered evidence should be received with great caution and the alleged new

evidence carefully scrutinized. Id. at 330. "The movant has the burden of showing that the newly discovered evidence meets all nine prerequisites for a new trial." Allen v. State, 716 N.E.2d 449, 456 (Ind. 1999). "Although determining the credibility of witnesses is normally the function of the jury, when ruling on a motion for new trial based on newly discovered evidence the trial court must assess the credibility of any proffered new evidence." Id. "We review the trial court's ruling for an abuse of discretion." Id.

Norman Sr. appears to argue that S.N. committed perjury at various points during the trial. Specifically, he argues that S.N. committed perjury when she: "testified at trial to last seeing Mr. Norman, Jr. in the Fall of 2005 shortly after charges were filed against Mr. Norman, Sr.;" testified "about receiving telephone calls from her husband on October 7, 2005, with the most critical one she claimed being made at 1:30 p.m., her starting reference for the alleged one-half hour to one hour assault;" and testified "about the bank transaction." Appellant's Brief at 56, 58-59. We will address these arguments separately.

1. When S.N. Last Saw Norman Jr.

Norman Sr. appears to argue that S.N. committed perjury when she testified that she had not seen Norman Jr. since Thanksgiving 2005. Without citation to the record, Norman Sr. cites to "letters she and others wrote to the Dearborn Superior Court," "unrebutted medical records," the fact that "Mr. Norman, Jr. was finally apprehended in March of 2007 while living with [S.N.]," and letters written by S.N. and "other family

members . . . to the Dearborn Superior Court confirming that the two had been together prior to and after the jury trial." Id. at 57.

In Norman Sr.'s statement of facts, he states that S.N. gave birth to a child on September 9, 2006. He points to a birth certificate which indicated that S.N. gave birth to a son on September 9, 2006 and that "AARON DWAYNE NORMAN" was the father. Petitioner's Exhibit 11. Norman Sr. also cites to Petitioner's Exhibits 5, 7, 10, and 13 and states that medical records "show that the child born on September 9, 2006 was conceived by [S.N.] in late December, 2005 or early January, 2006." Appellant's Brief at 28. Petitioner's Exhibit 5 consists of an affidavit of Melinda Blanken[7] which attaches a photograph allegedly taken of Norman Jr., S.N., and children at the end of December 2006. Petitioner's Exhibit 7 consists of forty-nine unnumbered pages.[8] Norman Sr. states that Exhibit 7 shows that S.N. repeatedly listed Norman Jr.'s address as her address before the jury trial. Norman Sr. also states that Exhibit 7 shows that Norman Jr. was with S.N. after the jury trial. Petitioner's Exhibit 8 is a deposition of S.N. dated February 2008 in which she stated that Norman Jr. was arrested at her house on March 3, 2007 for escape from work release. Petitioner's Exhibit 10 contains gynecology progress notes and medical records. Petitioner's Exhibit 13 contains letters pertaining to the sentencing of Norman Jr. after his violation of probation. Norman Sr. does not point to a specific

[7] The affidavit does not specify Melinda Blanken's relation to S.N. or Norman Sr.

[8] Norman Sr. cites to Exhibit 7 generally and does not cite to any particular portion of the forty-nine page exhibit. As previously mentioned, to the extent that Norman's arguments are based on portions of his statement of facts that do not contain citations to the record or when it is unclear in the argument section which facts Norman is relying upon, we find that Norman's arguments are waived.

portion of the letters indicating the specific date that Norman Jr. left jail or the date that he began residing with S.N. and her children.

As previously stated, Vincent Norman's testimony was before the jury that S.N. was not being truthful regarding whether she had seen Norman Jr. since Thanksgiving 2005. Further, S.N. testified in a deposition dated February 22, 2008, that the birth certificate was not correct regarding Norman Jr. being the father of her child born on September 9, 2006. S.N. also stated that the father of the child was a man from Florida. Lastly, S.N. stated that Norman Jr. was arrested at her house on March 2, 2007 for escape but that he did not begin living with her until July 2006.

Based upon the record, we cannot say that Norman Sr. has demonstrated that such evidence is not merely impeaching, that the evidence is worthy of credit, or that it will probably produce a different result at retrial.

2. Phone Records & Bank Records

In his statement of facts, Norman Sr. states that S.N. "testified that she woke up on October 7, 2005 in the afternoon at approximately 1:30 to 2:00 p.m. when her husband, Mr. Norman, Jr., called her from the Dearborn County Jail." Appellant's Brief at 12. Norman Sr. argues that "[t]he land line and cellular phone records of Mr. Norman, Sr. and Maxine Norman established that her testimony was fabricated as Mr. Norman, Sr. claimed." Id. at 58-59. In his statement of facts, he states that "[b]oth the land line and cellular telephone records of Mr. Norman, Sr. were obtained. They show that no calls

were received in his home or on either of his two cellular phones from Mr. Norman, Jr. at any time on October 6 or October 7, 2005." Id. at 27.

The State argues that these records "were available prior to trial had due diligence been used to obtain them." Appellee's Brief at 31. The State argues that S.N. "explained why there was no phone call shown in the records – because [Norman Jr.] generally called using pre-paid phone cards." Id. at 31. The State also points out that Norman Sr. "himself had told two police officers that there was a phone call" and argues that "if the absence of a call would have impeached [S.N.'s] credibility on this point, it also would have impeached [Norman Sr.'s] credibility." Id. at 32.

To the extent that Norman Sr. argues that S.N. testified falsely about the bank transaction, his bank records show that a deposit was made and lists the deposit date as October 7. An affidavit of Norman Sr. states that an ATM deposit "was made on October 6, 2005 and posted on October 7, 2005, because it was made after 1:30 p.m. on October 6, 2005." Petitioner's Exhibit 3. The State argues that "[t]he bank records show a deposit being made on October 7th," and that "[t]his evidence corroborates her testimony; thus, it could not create a strong probability of a different result on retrial." Appellee's Brief at 31. The State also argues that even if it did not corroborate S.N.'s testimony it would be merely impeaching and not material.

As previously mentioned, Norman Sr. does not point to the record to support the contention that his trial counsel did not have the telephone records or the bank records. Further, we cannot say that Norman Sr. has demonstrated that such evidence is not new,

merely impeaching, that the evidence is worthy of credit, or that it will probably produce a different result at retrial.[9]

For the foregoing reasons, we affirm the trial court's denial of Norman Sr.'s motion to correct error and the post-conviction court's denial of Norman Sr.'s petition for post-conviction relief.

Affirmed.

MATHIAS, J., and BARNES, J., concur.

[9] Norman Sr. cites Francis v. State, 544 N.E.2d 1385 (Ind. 1989), reh'g denied, in which the Indiana Supreme Court held that the defendant had made a sufficient showing that the newly discovered evidence met the prerequisite for a new trial where two new witnesses indicated that they saw the victim with another person at the time that she claimed she was forced to engage in sexual intercourse with the defendant. 544 N.E.2d at 1386-1388. Here, unlike in Francis, Norman Sr. did not present affidavits from witnesses indicating that S.N. was some place other than in Norman Sr.'s house when the attack occurred.