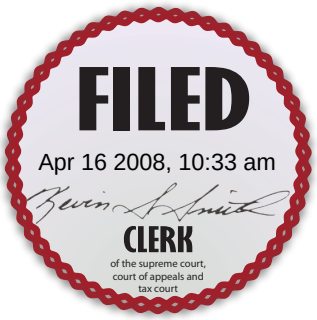

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IN THE
COURT OF APPEALS OF INDIANA

SAMMIE L. BOOKER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 48A05-0609-PC-534
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0112-CF-398

April 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Sammie L. Booker appeals the denial of his petition for post-conviction relief. We affirm.

Issues

We consolidate and restate Booker's issues as follows:

I. Whether the post-conviction court abused its discretion in failing to produce certain witnesses at the evidentiary hearing;

II. Whether the post-conviction court abused its discretion in failing to make a motion to transfer the record from Booker's trial into the post-conviction proceedings;

III. Whether the post-conviction court abused its discretion in denying Booker's motion to strike the second page of his medical records;

IV. Whether Booker has waived freestanding claims of error;

V. Whether Booker received ineffective assistance of trial counsel; and

VI. Whether Booker received ineffective assistance of appellate counsel.

Facts and Procedural History

We recited the following facts most favorable to the verdict in Booker's direct appeal:

> Felicia Chapman hired Booker to care for her two daughters—D., age seven and D.H., age six—in November 2001. On December 22, 2001, D. complained of a burning sensation when she urinated. The following day, D. was in severe pain, so Chapman's ex-husband took D. to the hospital. In the emergency room, a yellow vaginal discharge was noticed, and part of the discharge was taken as a sample to be tested. The laboratory reported that gonorrhea was present in the discharge. In response to some questions, D. told a treating nurse that "Sammie" had come into her bed at night. When the nurse asked D. if "Sammie" had touched her where he should not have, D. replied in the negative. However, a family case manager from the Madison County Division of Family and Children—called by hospital personnel—interviewed D. D. told the case manager that Sammie—and no one else—had touched her private areas. Hospital personnel ran tests on D.H., which showed that she was

> infected with gonorrhea as well. Chapman, her husband, and Booker were tested for gonorrhea, but only Booker tested positive for the disease.
>
> On December 26, 2001, Anderson Police Department Detective Heather McClain interviewed Booker. During the interview, which was videotaped, Booker admitted to Detective McClain that his finger may have "accidentally" entered D.'s or D.H.'s vagina while the girls wrestled with him. State's Ex. 9. Booker, however, denied intentionally touching them inappropriately.
>
> On December 27, 2001, the State charged Booker with child molesting. The charges alleged that Booker had performed criminal deviate conduct on D. on two occasions and on D.H. on one occasion by digitally penetrating their vaginas. Thereafter, Booker moved that the counts against him be severed for separate trials. Booker argued that he had an absolute right to severance of the counts because the offenses were joined solely because they were of the same or similar character. The trial court denied Booker's request.
>
> On June 14, 2002, Booker's court-appointed public defender filed a petition with the trial court requesting funds—because of Booker's indigency—for a child psychologist to assist him in preparing a defense. Specifically, Booker asked "that a child psychologist trained and experienced in interviewing assess the credibility of the alleged victims and the reliability of their statements." Appellant's App. p. 14. Again, the trial court denied Booker's request.
>
> At a jury trial commencing June 25, 2002, D. and D.H. testified that Booker had been their babysitter. Tr. p. 130, 145. The girls testified that Booker had placed his finger in their vaginas while they were in bed. Tr. p. 134, 135, 146, 147.
>
> Booker was found guilty of all counts. Thereafter, the trial court sentenced Booker to twenty years for each count, with counts I and II to run consecutively and count III to run concurrent to counts I and II. Thus, Booker's total sentence was forty years.

Booker v. State, 790 N.E.2d 491, 493-94 (Ind. Ct. App. 2003), *trans. denied*.

Booker's appellate counsel raised the following issues: (1) whether the trial court erred in denying Booker's request to sever the charges; (2) whether the trial court abused its discretion in denying the appointment of the expert witness; and (3) whether Booker's sentence was inappropriate. *Id*. at 492-93. On June 18, 2003, we affirmed Booker's convictions and sentence, and our supreme court denied his petition to transfer.

On July 25, 2003, Booker filed with this Court a pro se petition for a copy of the record of proceedings. On August 14, 2003, this Court issued an order granting permission to the Indiana Public Defender to withdraw a copy of the transcript for the purpose of copying it, after which it could be transmitted to Booker for his review. The order further states that if the public defender had agreed to serve as Booker's counsel and that if Booker wished to continue to be represented by the public defender, then Booker was not entitled to a copy of the record of proceedings at public expense, and the public defender was relieved of any obligation to make a copy of the record.[1]

On December 22, 2003, Booker filed a pro se petition for post-conviction relief. On June 10, 2005, Booker filed an amendment to the petition. On August 17, 2005, Booker filed with this Court a verified motion to withdraw the record and for an order instructing the clerk to transmit the record to the trial court for use in the post-conviction proceedings. On September 6, 2005, this Court issued an order that reads in pertinent part as follows:

> The Court having examined said Motion and being duly advised, now finds that the same should be denied as prayed.
>
> If the trial judge determines that he needs to review the record of the proceedings from the Appellant's prior, direct appeal, in order to rule upon the Appellant's Petition for Post-Conviction Relief, this Court will entertain a similar motion by the trial court.

Appellant's App. at 64.

The post-conviction court held evidentiary hearings on November 10, 2005, March 3, 2006, and June 30, 2006. On April 28, 2006, Booker filed without permission an additional amendment to his petition, which was stricken by the post-conviction court on the State's

[1] Apparently, the public defender represented Booker at some point following his appeal. At the

motion. On August 25, 2006, the post-conviction court entered findings of fact, conclusions of law, and an order denying Booker's petition.

On May 10, 2007, Booker filed his pro se appellant's brief and appendix. On the State's motion, this Court ordered Booker to file a supplemental appendix, which he did on September 18, 2007. On October 29, 2007, the State filed its appellee's brief. On December 4, 2007, Booker filed a pro se brief with white covers entitled "Brief of Appellant"; we presume that Booker intended this to be a reply brief. Because Booker filed this brief well beyond the fifteen-day limit mandated by Indiana Appellate Rule 45(B)(3),[2] we hereby sua sponte strike the brief as untimely and will not consider it in this appeal.[3]

Discussion and Decision

Booker appeals the denial of his petition for post-conviction relief. We employ the following general standard of review:[4]

> A defendant who has exhausted the direct appeal process may challenge the correctness of his convictions and sentence by filing a post-conviction petition. Post-conviction procedures do not provide an opportunity for a super-appeal. Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. Post-conviction proceedings are civil proceedings, and a defendant must establish his claims by a preponderance of the evidence. Because the

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post-conviction hearing, Booker stated that he "fired them because [he] didn't trust them." Tr. at 37.

[2] *See* Ind. Appellate Rule 45(B)(3) ("Any appellant's reply brief shall be filed no later than fifteen (15) days after service of the appellee's brief.").

[3] We are entering an order to this effect contemporaneously with this memorandum decision.

[4] Indiana Appellate Rule 46(A)(8)(b) provides that an appellant's argument "must include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues." Booker offers no general standard of review for post-conviction proceedings, and his statement of the standard for review for ineffective assistance of counsel claims is perfunctory, at best. We remind Booker that "[p]ro se litigants without legal training are held to the same standard as trained counsel and are required to follow procedural rules." *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*.

> defendant is now appealing from a negative judgment, to the extent his appeal turns on factual issues, he must convince the appellate court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. In other words, the defendant must convince us that there is no way within the law that the court below could have reached the decision it did. We do not defer to the post-conviction court's legal conclusions, but we do accept its factual findings unless they are clearly erroneous.

Parish v. State, 838 N.E.2d 495, 499 (Ind. Ct. App. 2005) (citations and quotation marks omitted).

I. Failure to Produce Witnesses

Indiana Post-Conviction Rule 1(9)(b) provides in pertinent part,

> If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the witness' testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the proposed witness' testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena.

The post-conviction court has discretion to determine whether to grant or deny the petitioner's request for a subpoena. *Allen v. State*, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003), *trans. denied*. "An abuse of discretion has occurred if the court's decision is against the logic and effect of the facts and circumstances before the court." *Id*.

Booker requested subpoenas for several witnesses, including his trial counsel, Donald Hurst, and the trial court judge and clerk. At the first evidentiary hearing in November 2005, the post-conviction court specifically stated that it would not issue a subpoena for the trial

court judge and clerk.[5] The chronological case summary ("CCS"), however, reflects that subpoenas were issued for all three persons prior to the third evidentiary hearing in June 2006. The trial court judge and clerk did not appear, and the prosecutor stated that service was unable to be obtained on Hurst.

On appeal, Booker contends that the post-conviction court erred in "failing to produce" these witnesses. Appellant's Br. at 7-8. Booker claims that he was entitled to the production of these witnesses pursuant to several constitutional provisions, but he does not explain the relevance of those provisions or offer any analysis in this regard. We note that Post-Conviction Rule 1(9) does not require the post-conviction court to guarantee a witness's attendance at an evidentiary hearing. Further, as the State observes, Booker apparently did not submit the affidavits required by the rule, which indicates that he was not entitled to subpoenas. Accordingly, we find no abuse of discretion.

II. Failing to File Motion to Transfer Trial Record

Booker acknowledges that in a post-conviction proceeding, the trial transcript "must be entered into evidence just as any other exhibit[.]" *State v. Hicks*, 525 N.E.2d 316, 317 (Ind. 1988).[6] Booker contends that the post-conviction court erred in failing to move sua sponte to transfer the trial record for use at his evidentiary hearing, as authorized in this Court's order dated September 6, 2005. Simply because the post-conviction court was

[5] Booker wanted to question the trial court judge and clerk regarding the warrant used to compel him to undergo medical testing for gonorrhea. We discuss this issue in greater detail later in this opinion.

authorized to make a motion to transfer the trial record does not mean that it was *required* to do so. The State points out that pursuant to Post-Conviction Rule 1(5), Booker had the "burden of establishing his grounds for relief by a preponderance of the evidence." As such, we find no grounds for reversal here.[7]

III. Denial of Motion to Strike

Next, Booker contends that the post-conviction court erred in denying his motion to strike the second page of his medical records. Booker requested a copy of his medical records from the hospital that tested him for gonorrhea and submitted the two-page document during the June 2006 evidentiary hearing. The second page indicates that he was prescribed medication for gonorrhea. Booker suggests that this page was fabricated.[8] We note, however, that emergency room physician Dr. Gregory Pugh testified to the contents of the disputed page and that Booker did not object to or move to strike his testimony. The admission of evidence that is cumulative of other evidence admitted without objection does not constitute reversible error. *Wolfe v. State*, 562 N.E.2d 414, 421 (Ind. 1990). As such, Booker is not entitled to relief on this issue.

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[6] "[A] post-conviction court cannot take judicial notice of the transcript of the evidence from the original proceedings absent exceptional circumstances." *State v. Lime*, 619 N.E.2d 601, 604 (Ind. Ct. App. 1993), *trans. denied* (1994). The post-conviction court denied Booker's request to take judicial notice of the trial transcript. Tr. at 5. On appeal, Booker does not contend that exceptional circumstances existed in this case.

[7] Booker claims that he "verbally submitted the trial transcript as exhibit A and the court accepted the admission of the transcripts." Appellant's Br. at 9 (citing Appellant's App. at 340). The State points out that the court reporter identified the offered exhibit as a partial transcript, which is only five pages long. Appellee's Br. at 11 (citing Appellant's App. at 529, 534-38).

[8] Because we do not have the trial record before us, we have no way of knowing whether the medical records Booker submitted at the post-conviction hearing differ from any medical records submitted at trial. Dr. Pugh's testimony at the post-conviction hearing strongly suggests that the disputed second page was not fabricated.

IV. Freestanding Claims of Error

Booker raises several allegations of prosecutorial misconduct and challenges the validity of the warrant that compelled him to undergo testing for gonorrhea. Booker may not raise these freestanding claims of error, whether characterized as fundamental or otherwise, in a post-conviction proceeding. *See Randolph v. State*, 802 N.E.2d 1008, 1012 (Ind. Ct. App. 2004) ("Issues available, but not raised, at trial or on direct appeal are waived for post-conviction proceedings. Additionally, our supreme court has held that freestanding allegations of fundamental error are not available in post-conviction proceedings.") (citations omitted). To the extent they are raised in the context of an ineffective assistance of counsel claim, we address them below.[9]

V. Ineffective Assistance of Trial Counsel

Booker alleges that he was denied the effective assistance of trial counsel in nine separate instances. Regarding ineffectiveness claims, our supreme court has stated,

> A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *accord Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). First, the defendant must show that counsel's performance was deficient. *Strickland*, 466 U.S. at 687. This requires a showing that counsel's

[9] Booker asserts that the prosecutor committed misconduct by amending the charging information during trial, by "charg[ing] and prosecut[ing] Booker on allegations that his evidence contradicted at trial[,]" by editing Booker's videotaped statement prior to trial, and by "coaching [the] victims before they testified at trial." Appellant's Br. at 26-30. The only issue that we do not address below is the "coaching" allegation, which the post-conviction court addressed as follows:

> The Deputy Prosecutor testified that during his closing he was using sarcasm as a response to the defense that he had coached the child victims. He stated something to the effect that, "if he had coached the victims he didn't do a very good job because he couldn't get them to say anything on the stand". This issue was taken out of context by [Booker], and since the record was not submitted, cannot be put into the proper context. This issue was waived.

Appellant's App. at 152. We find no reason to disagree with this assessment.

> representation fell below an objective standard of reasonableness, *id*. at 688, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment, *id*. at 687. Second, the defendant must show that the deficient performance prejudiced the defense. *Id*. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.
>
> Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. *Id*. at 689. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id*. at 690. The *Strickland* Court recognized that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. *Id*. at 689. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. The two prongs of the *Strickland* test are separate and independent inquiries. Thus, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice that course should be followed.

Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001) (quotation marks, alterations, and some citations omitted), *cert. denied* (2002). We address each of Booker's claims as best we can, given the limited record before us on appeal.

1. Insufficient Preparation

Booker contends that his trial counsel, Donald Hurst, "was ineffective for not demanding more time to prepare for Booker's trial after seeing that he was only given two (2) months and (10) days to prepare for trial and that he had not properly conferred with his client causing Booker to file a motion to have Mr. Hurst rescinded[.]" Appellant's Br. at 11-12. Booker claims that he "knows for a fact the trial would have been different had Mr. Hurst had more time to prepare for the Trial." *Id*. at 12. This bald assertion is insufficient to

carry Booker's burden of establishing prejudice by a preponderance of the evidence. As such, this claim fails.

2. Failure to Request Copy of Warrant

Booker argues that Hurst was ineffective in failing to request a copy of the *Davis v. Mississippi* warrant[10] used to compel him to undergo testing for gonorrhea; if Hurst had done so, Booker claims, he would have noticed that the warrant did not bear a judge's signature or a clerk's file stamp or seal and therefore was invalid.

We note that "the signature of the issuing judge on a search warrant is a ministerial requirement, and the failure of the judge to sign the original or a copy of the warrant does not invalidate the warrant provided the judge found probable cause existed and intended to issue the warrant." *Webster v. State*, 579 N.E.2d 667, 669 (Ind. Ct. App. 1991). The record before us contains a signed order granting the application for the *Davis* warrant; both the order and the warrant are dated December 26, 2001.[11] The foregoing indicates that the judge found probable cause existed and intended to issue the warrant. Neither the order nor the warrant bears the clerk's file stamp or seal; that said, Booker cites no relevant authority for his suggestion that these documents must bear such hallmarks and that any defect in this regard would render them invalid.[12] Moreover, Booker does not even attempt to establish that the

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[10] *See Davis v. Mississippi*, 394 U.S. 721 (1969).

[11] The State offered the order into evidence at the post-conviction hearing, and Booker did not object to its admission.

[12] The only semblance of an argument that Booker makes in this regard relies on a version of Indiana Trial Rule 44 that was amended in 2004 regarding the rules for authenticating public documents. Trial Rule 44 now states that "[t]he rules concerning proof of official records are governed by the Rules of Evidence." Because Booker's claim is premised on the warrant's validity, rather than on its admissibility, both Trial Rule 44 and the Indiana Evidence Rules are irrelevant to this issue.

result of his trial would have been different if the warrant had been declared invalid. Consequently, Booker's claim fails.[13]

3. Failure to Challenge Probable Cause Affidavit as to D.

Booker first contends that Hurst

> was ineffective for not pointing out to the court the defect in [D.'s] probable cause [affidavit] regarding where on her body the alleged touching occurred by Booker, when she was in bed. Booker pointed out [the] defect at the hearing to the [post-conviction] court, showing that the statement made by [D.] is not enough to have Booker charged with a B-felony yet, Booker is convicted of a B felony.

Appellant's Br. at 14 (citation to appendix omitted).

The probable cause affidavit as to D. indicates that she told the investigating officer that on one occasion "[s]he was in her bed in her bedroom when she was awakened by [Booker] touching her private parts, beneath her clothing, with his hand." Appellant's App. at 558. Booker seems to suggest that D.'s statement would support only a charge of class C felony child molesting for "fondling," rather than a charge of class B felony child molesting for "deviate sexual conduct." *See* Ind. Code § 35-42-4-3 (child molesting statute); Ind. Code § 35-41-1-9 (defining "deviate sexual conduct" in pertinent part as an act involving "the penetration of the sex organ … of a person by an object"). Booker neglects to mention, however, that D. also told the investigating officer that on two occasions Booker had "touched her on the 'inside' of her private parts[,]" which to the officer indicated "penetration of [Booker's] finger(s) into [D.'s] vaginal opening." Appellant's App. at 558.

In other words, the probable cause affidavit supported two counts of class B felony molesting.[14]

To the extent Booker argues that D.'s statements in the probable cause affidavit are inaccurate or that they differed from her pretrial statements and trial testimony—which is impossible to determine based on the sparse record before us—Booker simply fails to establish either that Hurst performed deficiently in failing to object to the charging information or that he was prejudiced thereby. Consequently, this claim fails.

4. Failure to Challenge Probable Cause Affidavit as to D.H.

With respect to D.H., Booker makes two arguments:

> The state begin [sic] Booker's trial with allegations of booker [sic] giving [D.H.] gonorrhea by hand while wrestling with her and her sister. According to [D.H.'s] probable cause, Booker was the babysitter. Yet, in her video statement her mother was upstairs asleep according to [D.H.'s] testimony. Booker argued at the [post-conviction] hearing that he was never around when the mother was asleep.
>
> ….
>
> In this probable cause the court did not look at the allegations in a common sense manor [sic]. Had Mr. Hurst pointed out the fact that it is impossible to give someone gonorrhea by hand and especially by wrestling with them, its [sic] more likely than not that the charge on Booker would have been dropped.

Appellant's Br. at 15.

Regarding Booker's first argument, any inaccuracies in D.H.'s probable cause affidavit regarding her mother's presence or absence are simply irrelevant. As for Booker's

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[13] Booker obtained a copy of the warrant and the warrant application from the hospital that performed the medical testing. The warrant application bears a hospital file stamp dated December 26, 2001, whereas the warrant does not. Booker's contention that he was compelled to undergo medical testing pursuant to the warrant application, rather than pursuant to the warrant itself, is pure speculation.

[14] According to the probable cause affidavit, Booker himself admitted that he had "accidentally" inserted his finger into D.'s vagina two or three times. Appellant's App. at 558.

second argument, we observe that at the post-conviction hearing, Dr. Pugh reaffirmed the opinion he offered at trial that a person could transmit gonorrhea to another person by hand. *See* Tr. at 126. We may not reweigh the evidence in Booker's favor. As such, Booker's claim fails.

5. Failure to Present Booker's Complete Medical Records

Next, Booker argues that "[t]rial counsel was ineffective for not presenting Booker's full medical records as a [sic] exhibit at Booker's trial. Had he done so Booker would have been acquitted at trial due to the fact there was no documentation showing any treatment for gonorrhea listed inside of his medical records." Appellant's Br. at 16. At the post-conviction hearing, Dr. Pugh reaffirmed that he treated Booker for gonorrhea and that the medical records introduced at trial established this fact. This claim fails as well.

6. Failure to Depose State's Witnesses

Booker contends that trial counsel was ineffective in failing to "interview the states [sic] witnesses and find out all possibilities of how sexually transmitted diseases can be spread as the stated [sic] alleged in Booker's case." *Id*. Booker offers no proof, however, that counsel actually failed to interview the State's witnesses. Booker goes on to claim that "[t]he states [sic] theory is that Booker masturbated and gave the victims gonorrhea, but that's impossible while wrestling with the children and them not seeing his private part." *Id*. at 17. Perhaps the simplest way to refute this nonsensical argument is to observe, as did the post-conviction court, that a person may masturbate without others seeing his "private part" and that Booker did more than "wrestle" with his victims.

At the post-conviction hearing, Dr. Pugh acknowledged that he had did not know of anyone "who ha[d] definitely given somebody a sexually transmitted disease … by penetrating them with their fingers[.]" Tr. at 137. We agree with the State, however, that while "Dr. Pugh's post-conviction testimony about the transmission of gonorrhea may have been beneficial to [Booker], the present record is far too limited to discern whether its absence at trial caused [him] prejudice. In fact, the present record is too limited to show whether similar evidence was presented at trial." Appellee's Br. at 18. Moreover, the evidence of Booker's gonorrhea is merely incidental to and corroborative of the evidence regarding the actual molestations, which was provided by the victims' testimony and by Booker's videotaped statement. In other words, Booker has failed to establish prejudice.

7. Failure to Object to Booker's Videotaped Statement

Booker claims that trial counsel was ineffective in failing to object to the admission of his videotaped statement, in which he admitted that he "accidentally" inserted his finger into the vaginal opening of each victim. He complains that the videotape shown to the jury was edited and that he was unable to prove "exactly what was edited out" and when the editing occurred because his trial counsel did not appear at the post-conviction hearing. *Id.*[15] At the hearing, the prosecutor testified that he gave Booker's counsel a copy of the original videotape "long before" trial and that the "edited version would not have been made until the trial had started." Tr. at 208. The prosecutor further stated that he knew that Booker's

[15] The State asserts that "where a Petitioner fails to present testimony from his trial counsel, the post-conviction court can presume that counsel would not have corroborated the petitioner's claims." Appellee's Br. at 18 (citing *Stevens v. State*, 701 N.E.2d 277, 282 (Ind. 1998)). This assertion is disingenuous in this case, given that the post-conviction court was unable to obtain service on Booker's trial counsel.

counsel would have been notified of any edits if the videotape "was admitted as an exhibit" and that any exculpatory statements would not have been edited out. *Id*. at 200-01.

Although Booker's trial counsel did not appear at the hearing and thus was unable either to confirm or deny this version of events, we would find Booker's claim meritless in any event. The crux of Booker's confusing argument appears to be this:

> By the prosecutor not being able to produce on [sic] original copy of Booker [sic] video statement with documentation showing the original and edited version [sic] Booker argued that the showing of the video statement was prejudicial, due to the fact, it showed Booker admitting to a crime that the states [sic] evidence showed did not occurr [sic]. Booker could not admit to sticking his finger inside either victims [sic] vagina if there was evidence in the states [sic] possession that showed neither victim showed any signs of being penetrated.

Appellant's Br. at 18.

As the post-conviction court bluntly (and correctly) informed Booker at the hearing, however,

> [T]he evidence was, there was no visible signs that they had been penetrated. That doesn't mean they weren't. When the doctor looks at them, he can't see any sign. That doesn't mean they weren't.… [U]nder Indiana law, if you put your finger in those little girls' private area, one sixty-fourth (1/64) of an inch, you're a child molester.

Tr. at 219; *see Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002) ("Proof of the slightest penetration is sufficient to sustain convictions for child molesting."), *trans. denied* (2003). In other words, Booker's admissions were not inconsistent with either the State's medical evidence or the criminal charges against him. Given this fact, we reject Booker's purely speculative argument that a "missing" portion of the videotape might have "caus[ed]

the jury to miss something that could have, [sic] rendered a different verdict at Booker's trial." Appellant's Br. at 19.

8. Failure to Object to Amendment of Charging Information

Booker asserts that trial counsel was ineffective in failing to object to the State's motion, made during trial, to amend the charging information to allege that he had committed child molesting by inserting his finger into the "sex organ," rather than into the "vagina," of each victim. Booker argues,

> By the prosecutor amending the charges (7) seven days into Booker's trial, he relieved the state of its burden of proof at Booker's trial and at the same time broadening [sic] its basis for a conviction on Booker. Due to the fact the prosecutor knew on December 23, 2001, that there was no physical evidence of either child being penetrated, which is (4) four days before these charges were brought about on Booker. Therefore, by the prosecutor changing the element "vagina" to "sex organ" seven days into Booker's trial the amendment denied Booker a fair trial.

Appellant's Br. at 19.

Booker does not even mention Indiana Code Section 35-34-1-5, which governs the amendment of charges and, at the time of Booker's trial, differentiated among immaterial defects (which could be amended at any time), amendments as to matters of substance (which could be made up to thirty days before the omnibus date for felonies), and amendments as to matters of form (for which the statute gave inconsistent deadlines, either thirty days before the omnibus date for felonies or "at any time before, during, or after the trial" if the amendment did not "prejudice the substantial rights of the defendant"). Neither does Booker mention *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007), in which our supreme court

attempted to clarify the difference between amendments of form and substance for purposes of the statutory deadlines.

In *Fajardo*, our supreme court noted that several of its prior decisions had "permitted amendments as to matters of substance simply on grounds that the changes did not prejudice the substantial rights of the defendant, without regard to whether or not the amendments were untimely." *Id*. at 1206 (citing, *inter alia*, *Kindred v. State*, 540 N.E.2d 1161, 1170 (Ind. 1989), and *Wright v. State*, 593 N.E.2d 1192, 1197 (Ind. 1992), *cert. denied*). The *Fajardo* court abandoned that approach, however, and stated that

> the first step in evaluating the permissibility of amending an indictment or information is to determine whether the amendment is addressed to a matter of substance or one of form or immaterial defect. As noted above, an amendment is one of form, not substance, if both (a) a defense under the original information would be equally available after the amendment, and (b) the accused's evidence would apply equally to the information in either form. And an amendment is one of substance only if it is essential to making a valid charge of the crime.

Id. at 1207 (citation omitted).

Based on *Fajardo* and the limited record before us, we agree with the post-conviction court that the amendment in this case was one of form and that it did not prejudice Booker's substantial rights. Amending "vagina" to "sex organ" did not affect the availability of Booker's defense (which we presume was either that he did not penetrate the victims' sex organs or that he accidentally did so), and evidence to this effect would have applied equally to the information in either form. Moreover, we agree with the State that even if the amendment was one of substance, based on the pre-*Fajardo* cases cited above, Booker's "counsel would not have known that an objection had any merit." Appellee's Br. at 20

(citing *McCurry v. State*, 718 N.E.2d 1201, 1206 (Ind. Ct. App. 1999) ("[O]nly the precedent available to appellate counsel at the time of the direct appeal is relevant to [the] determination of whether counsel was ineffective."), *trans. denied* (2000)). The State also points out that Booker "cannot show prejudice because the limited record indicates that [Booker] did penetrate the victims' vagina[s]." *Id*. (citing *Booker*, 790 N.E.2d at 493). In sum, Booker's claim fails.

9. Failure to Withdraw "Properly" from Booker's Case

Booker claims that trial counsel was ineffective "for not taking the proper steps to withdraw from Booker's case[.]" Appellant's Br. at 20. Booker states that "Mr. Hurst abandoned him after he was convicted and forced someone else to take over his mess. Had Mr. Hurst not quit as a public attorney he could have filed a motion to correct error's [sic] regarding the issues that caused Booker to be prejudiced throughout Booker's trial." *Id*. As the post-conviction court unsuccessfully attempted to explain to Booker at the hearing, most issues no longer must be raised in a motion to correct error to preserve them for appeal. There are only two exceptions: "(1) [n]ewly discovered material evidence, including alleged jury misconduct," and "(2) [a] claim that a jury verdict is excessive or inadequate"; "[a]ll other issues and grounds for appeal appropriately preserved may be initially addressed in the appellate brief." Ind. Trial Rule 59(A). Given that the first exception is not implicated and

that the second is inapplicable, Booker cannot establish that he was prejudiced by Hurst's failure to file a motion to correct error before he withdrew from the case.[16]

VI. Ineffective Assistance of Appellate Counsel

Booker asserts four grounds of ineffective assistance of appellate counsel. The two-prong *Strickland* standard applies to such claims. *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006), *trans. denied*, *cert. denied*.

> Indiana courts recognize three basic categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal, (2) failing to present an issue upon appeal, and (3) failing to present issues completely and effectively. Ineffectiveness is rarely found when the issue is the failure to present a claim upon appeal. This is so because the decision of what issue or issues to present upon appeal is one of the most important strategic decisions made by appellate counsel. In analyzing such a claim, we first consider whether the unraised issues were significant and obvious upon the face of the record. We will not find deficient performance in appellate counsel's choice of some issues over others when the choice was reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made.

Id. at 682 (citations omitted). We address each of Booker's claims in turn.

1. Failure to Present Ineffective Assistance of Trial Counsel Issue

Booker asserts that appellate counsel was ineffective in failing to argue that his trial counsel was ineffective. Booker cannot establish prejudice on this ground because "a Sixth Amendment claim of ineffective assistance of trial counsel, if not raised on direct appeal,

[16] At the conclusion of this section of his appellate brief, Booker argues that we are required to "address the cumulative prejudice according to the accused to see whether the result is unreliable, necessitating reversal under the substandard performance prong or cumulative prejudice prongs of its two-prong test." Appellant's Br. at 22. We first note that Booker did not raise this issue below and therefore has waived it on appeal. *See Emerson v. State*, 812 N.E.2d 1090, 1098-99 (Ind. Ct. App. 2004) ("Issues not raised in a petition for post-conviction relief may not be raised for the first time on appeal."). Waiver notwithstanding, we further note that we have found no prejudice whatsoever and thus there is no "cumulative prejudice" to address.

may be presented in postconviction proceedings." *Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998), *cert. denied* (1999). Moreover, as we have just determined, Booker had no valid ineffectiveness claims to raise.

2. Failure to Present Jury Instruction Issue

Booker also asserts that appellate counsel was ineffective in failing to challenge a jury instruction to the effect that a conviction may be based on the uncorroborated testimony of the victim. In *Ludy v. State*, 784 N.E.2d 459 (Ind. 2003), which was decided almost two years after Booker's trial and three days after appellate counsel filed Booker's brief, our supreme court held that giving such an instruction is error and that the "new rule applies to Ludy and others whose cases properly preserved the issue and whose cases are now pending on direct appeal." *Id*. at 462. The court did not reverse Ludy's conviction, however, because "aside from the victim's testimony there was substantial probative evidence establishing the elements of the charged offenses." *Id*. at 463.

The State observes that "[w]ithout the record, particularly the challenged instruction and the other instructions, it is unclear if the instruction was given as alleged, if [Booker] preserved an objection, or if [Booker] was prejudiced." Appellee's Br. at 22. The post-conviction court noted that Booker's conviction was also supported by medical evidence, Tr. at 161, and Booker himself admitted to inserting his finger into each victim's sex organ. Moreover, Booker's argument is based on a change in the law that occurred after his appellate counsel filed a brief. "[T]he failure to anticipate or effectuate a change in existing

law cannot support an ineffective assistance of appellate counsel claim." *Concepcion v. State*, 796 N.E.2d 1256, 1263 (Ind. Ct. App. 2003), *trans. denied*.[17]

3. Failure to State Proper Facts in Appellate Brief

Booker claims that appellate counsel "was ineffective for failing to properly state fact's [sic] inside Booker's appeal brief regarding [the victims' parents] being tested for gonorrhea as Booker was, and only Booker tested positive." Appellant's Br. at 24. Booker's claim is based solely on a reference to our opinion in his direct appeal. *Id*. (citing Appellant's App. at 588). We must agree with the State that "[t]he present record is inadequate to show whether this Court misstated the facts or whether that misstatement was caused by [Booker's] appellate counsel." Appellee's Br. at 23. More to the point, Booker has failed to establish that he was prejudiced by any misstatement. Therefore, his claim fails.

4. Failure to File Motion to Correct Error

Finally, Booker claims that appellate counsel was ineffective in failing to file a motion to correct error before initiating a direct appeal. The State points out that Booker "cannot show prejudice because all issues were still available [either on] appeal or through post-conviction proceedings." *Id*. (citing *Woods*, 701 N.E.2d at 1220). Consequently, we affirm the denial of Booker's petition for post-conviction relief.

Affirmed.

BAILEY, J., and NAJAM, J., concur.

[17] Because Booker does not contend that appellate counsel should have filed a notice of additional authority citing *Ludy*, we do not address that consideration here.