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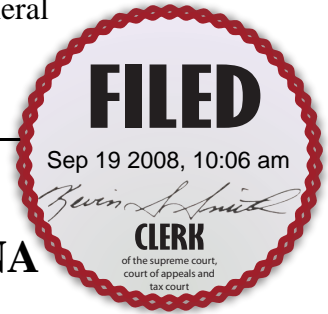
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**IN THE
COURT OF APPEALS OF INDIANA**

GREGORY S. CAMPBELL,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 29A04-0701-PC-71

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Wayne A. Sturtevant, Judge
Cause No. 29D05-0312-FD-7781

September 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Gregory S. Campbell appeals the denial of his pro se petition for post-conviction relief. We affirm.

Issues

Campbell raises the following issues:

- I. Did he receive ineffective assistance of trial and appellate counsel based on their failure to challenge the sufficiency of evidence?
- II. Was his trial counsel ineffective in failing to object to a trial date set beyond the seventy-day limitation under Indiana Criminal Rule 4(B)(1)?
- III. Was his trial counsel ineffective in failing to object to the State's failure to respond to a notice of alibi defense?
- IV. Was his trial counsel ineffective in failing to object to a jury instruction regarding the definition of auto theft?
- V. Was his trial counsel ineffective in failing to object to the admission of a vehicle title and registration?
- VI. Was his trial counsel ineffective in failing to submit a jury instruction regarding venue?
- VII. Was his trial counsel ineffective in agreeing to an extension of time within which the State could file a habitual offender enhancement?
- VIII. Was his trial counsel ineffective in failing to discover and introduce as evidence a surveillance video?
- IX. Was his trial counsel ineffective in failing to object to the State's use of an out-of-court photographic array and to a subsequent in-court identification allegedly derived from it?
- X. Was his trial counsel ineffective in failing to hire a forensic expert to examine a videotape, fingerprints, and DNA evidence?

Facts and Procedural History

In Campbell's direct appeal, we recited the following facts:

In early November 2003, a van was stolen from Globe Industrial Supplies ("Globe") in Fishers, Indiana. On November 25, 2003, a Globe employee noticed the stolen van was parked outside a Hamilton County Days Inn and called the police.

Police officers went to the Days Inn and conducted surveillance on the van. Hamilton County Sheriff's [Captain] Kevin Jowitt ('[Captain] Jowitt') noticed that a blue truck was parked next to the van and that both vehicles had backed into the parking space in the same manner.

During police observation, a second truck arrived at the Days Inn and parked on the other side of the van in the same manner as the other truck. Two women and a man exited this truck, and the man touched the backdoors of the van as though he were making sure they were locked. One of the trucks was registered to Campbell, and the other was registered to 'Tracy and Rhonda Campbell.'

Later that evening officers observed a male and a female enter the van, drive to a shopping center, and return to the Days Inn. During the return trip, [Captain] Jowitt noticed that the van's occupants looked similar to the people he saw at the Days Inn. Soon thereafter, the van again exited the Days Inn parking lot. As the van drove through a nearby intersection, [Captain] Jowitt was able to recognize Campbell for a two-to-three second period. When the officers attempted to execute a traffic stop, Campbell jumped out of the van and evaded capture.

On December 1, 2003, the State charged Campbell with Class D felony auto theft. Campbell was arrested on the following day and was later alleged to be an habitual offender. On December 9, 2003, Campbell requested a speedy trial, and his trial was set for March 25, 2004. However, during a December 23, 2003 hearing, the court rescheduled Campbell's trial to February 26, 2004.

On February 18, 2004, seventy-one days after Campbell's speedy trial request, Campbell filed a motion for discharge, alleging that he was not brought to trial within seventy days. On February 20, 2004, the trial court denied Campbell's motion based upon his failure to object when his trial was set outside of the seventy-day period.

Campbell was found guilty as charged and sentenced to three years executed for his Class D felony auto theft conviction and to a consecutive sentence of four and one half years executed for his habitual offender determination.

Campbell v. State, No. 29A02-0409-CR-765, slip op. at 2-3 (Ind. Ct. App. July 19, 2005).

On direct appeal, Campbell challenged the sufficiency of evidence to sustain his convictions and asserted that he was deprived of his right to a speedy trial pursuant to Indiana Criminal Rule 4. This Court affirmed Campbell’s convictions. Campbell filed a pro se petition for post-conviction relief on May 26, 2006, and amended his post-conviction petition on August 17, 2006. The trial court held a two-part hearing on August 10, 2006, and October 17, 2006. On December 18, 2006, the post-conviction court denied Campbell’s petition. This appeal ensued.¹ Additional facts will be provided as necessary.

Discussion and Decision

Campbell contends that the post-conviction court erred in denying his petition. The petitioner in a post-conviction proceeding “has the burden of establishing grounds for relief by a preponderance of the evidence.” Ind. Post-Conviction Rule 1(5); *Brown v. State*, 880 N.E.2d 1226, 1229 (Ind. Ct. App. 2008), *trans. denied*. When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing a negative judgment. *Brown*, 880 N.E.2d at 1229. Therefore, “[o]n 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.* Here, the post-conviction court entered extensive findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). “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.” *Brown*, 880 N.E.2d at 1230 (citation and quotation marks omitted).

¹ Campbell has filed a motion to submit additional replies for consideration in his reply brief, which we deny in an order issued simultaneously with this decision.

Campbell claims that he was denied his constitutional right to effective assistance of trial and appellate counsel. The standard of review for an ineffective assistance of counsel claim is the same for both trial and appellate counsel. *Trueblood v. State*, 715 N.E.2d 1242, 1256 (Ind. 1999), *cert. denied*. A petitioner must satisfy two components to prevail on his ineffective assistance claim. *Brown*, 880 N.E.2d at 1230. He must demonstrate both deficient performance and prejudice resulting from it. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is “representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the ‘counsel’ guaranteed by the Sixth Amendment.” *Brown*, 880 N.E.2d at 1230. “[C]ounsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). Prejudice occurs when a reasonable probability exists that, “but for counsel’s errors the result of the proceeding would have been different.” *Brown*, 880 N.E.2d at 1230.

I. Challenge to Sufficiency of Evidence

Campbell first claims that his trial and appellate counsel both failed to provide an effective challenge to the sufficiency of evidence to sustain his conviction for auto theft. To the extent that he now challenges his trial counsel’s failure to raise the sufficiency issue, such as through a motion for a judgment on the evidence, he has waived this issue by failing to raise it in either his original or amended petition for post-conviction relief. “Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-

conviction appeal.” *Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001), *cert. denied*.²

To the extent that Campbell challenges his appellate counsel’s failure to raise the sufficiency issue, our supreme court has stated:

Ineffectiveness is rarely found when the issue is failure to raise a claim on direct appeal. The decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. We give considerable deference to appellate counsel’s strategic decisions and 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. We review the totality of appellate counsel’s performance to determine whether the defendant received constitutionally adequate assistance.

Brown, 880 N.E.2d at 1230 (citations, emphases, and internal quotation marks omitted).

Campbell asserts that his appellate counsel should have challenged sufficiency based on the State’s alleged failure to prove that he knowingly exerted unauthorized control over the vehicle.³ Indiana Code Section 35-43-4-2(a) provides in pertinent part, “A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.” “Generally, the unexplained possession of recently stolen property is sufficient

² Campbell also asserts that his trial counsel was ineffective for failing to challenge sufficiency by not objecting to jury instructions on elements of the crime. To establish such a claim, he “must first prove that a proper objection would have been sustained.” *Walker v. State*, 779 N.E.2d 1158, 1161 (Ind. Ct. App. 2002) (citation and quotation marks omitted), *trans. denied*. He specifically asserts that the trial court erroneously instructed the jury on the elements of receiving stolen property instead of auto theft. We disagree. The jurors were instructed that they must find a knowing possession with intent to deprive. As discussed *infra*, a conviction for auto theft can be based on a subsequent knowing exertion of unauthorized control over a stolen vehicle. See *Gibson v. State*, 533 N.E.2d 187, 189 (Ind. Ct. App. 1989).

³ We note that Campbell’s appellate counsel challenged the sufficiency of evidence on other grounds not in issue here.

evidence from which the trier of fact may infer the actual theft.” *Buntin v. State*, 838 N.E.2d 1187, 1190 (Ind. Ct. App. 2005). The greater the lapse of time between the theft and the possession, the greater need there is for a showing of other circumstances to support a finding that the theft was “recent.” *Gibson v. State*, 533 N.E.2d 187, 189 (Ind. Ct. App. 1989). Here, Campbell was not charged with the initial taking of the vehicle but with the subsequent knowing unauthorized control over it. “A person’s control over a car which he knows is stolen is, of course, unauthorized.” *Id.* at 190 n.2.

In *Buntin*, we held that the evidence was insufficient to sustain the defendant’s conviction for auto theft where five days had elapsed between the theft and the defendant’s apprehension while in possession of the stolen vehicle, and the State failed to present any other corroborating evidence. In *Gibson*, we affirmed the defendant’s auto theft conviction where his unexplained possession of a vehicle two days after it was stolen was accompanied by evidence of a damaged steering column, defendant’s possession of a screwdriver, and his refusal to identify himself to police.

Here, approximately three weeks elapsed between the date of the theft and the date of Campbell’s apprehension. Campbell asserts that the State failed to present corroborating evidence sufficient to sustain the conviction. We disagree. Curiously, Campbell relies on the fact that he was not apprehended near the van. The reason for this is that he fled the van when police attempted to execute a traffic stop. “Evidence of flight may be considered as circumstantial evidence of consciousness of guilt.” *Brown v. State*, 563 N.E.2d 103, 107 (Ind. 1990).

Moreover, Hamilton County evidence technician Detective Thurl Cecil testified that when he processed the stolen van, he noticed that it no longer needed a key to start the engine, but that it started merely by turning an outside ring around the normal place a key would be inserted. Tr. at 228-29. As in *Gibson*, this evidence tended to corroborate the State's assertion that Campbell knew that the control he exerted was unauthorized.

Finally, Campbell relies on the incredible dubiousity rule to challenge Captain Jowitt's identification of him as the man who touched the back doors of the van at the motel parking lot and the man who drove the van prior to the traffic stop. "Incredibly dubious or inherently improbable testimony is that which runs counter to human experience, and which no reasonable person could believe." *Baltimore v. State*, 878 N.E.2d 253, 259 (Ind. Ct. App. 2007) (citation and internal quotation marks omitted), *trans. denied*. The incredible dubiousity rule is rarely applied. *Frye v. State*, 850 N.E.2d 951, 955 (Ind. Ct. App. 2006), *trans. denied*. Instead, it is limited to circumstances "where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt." *Sisson v. State*, 710 N.E.2d 203, 206 (Ind. Ct. App. 1999), *trans. denied*. Captain Jowitt was not the sole witness, his testimony was not contradictory or coerced, and circumstantial evidence of Campbell's guilt existed. Therefore, the incredible dubiousity rule does not apply. Based on the foregoing, we conclude that Campbell's appellate counsel was not ineffective for failing to challenge the sufficiency of the evidence on the grounds now asserted by Campbell.

II. Trial Date

Campbell next asserts that his trial counsel was ineffective in failing to object to a trial

date set beyond the limitation of Indiana Criminal Rule 4(B)(1). Campbell moved for an early trial and was therefore entitled to be brought to trial within seventy calendar days. Ind. Criminal Rule 4(B)(1). Campbell raised the Criminal Rule 4 issue on direct appeal, which we resolved as follows:

It is well established that a defendant must maintain a position reasonably consistent with his speedy trial request and must object at his earliest opportunity to a trial setting beyond the seventy-day time period. Hill v. State, 777 N.E.2d 795, 797-98 (Ind. Ct. App. 2002), trans. denied. Once a trial date is set beyond the limits set forth in Criminal Rule 4, “the defendant must file a timely objection to the trial date or waive his right to a speedy trial.” Id. (quoting Sweeney v. State, 704 N.E.2d 86, 102 (Ind. 1998)). A defendant’s failure to object timely will be deemed acquiescence in the setting of that date. Id. (citing Vermillion v. State, 719 N.E.2d 1201, 1204 (Ind. 1999)).

Though Campbell did not object to his February 26, 2004 trial setting, he claims waiver is inapplicable here because he was lulled into believing the trial court was complying with his Criminal Rule 4 rights when it reset his trial date from March 25, 2004 to February 26, 2004.

We need not determine whether a trial court can lull a defendant into acquiescing to a Criminal Rule 4 violation. Campbell’s Criminal Rule 4 objection occurred one day after the expiration of his seventy-day deadline. This is simply too coincidental to believe that Campbell was unaware of his pending seventy-day deadline. Campbell did not object to his trial date until after the expiration of this deadline in the hopes of obtaining discharge. Such action amounts to acquiescence and/or invited error.

Campbell, slip op. at 5.

Campbell now asserts that his trial counsel’s failure to timely object to the trial date amounted to deficient performance that prejudiced his case. The post-conviction court found that Campbell failed to demonstrate that the State would have been unable to bring him to trial within seventy days had a timely objection been made. Moreover, even if the State had agreed to release Campbell on his own recognizance and thereby avoid the application of the seventy-day limit, his circumstances would not have changed, as he was also being confined

in another pending cause. In sum, we find no prejudice to Campbell.

III. Notice of Alibi Defense

Campbell contends that his trial counsel was ineffective for failing to compel the State to respond to his notice of alibi. Indiana Code Section 35-36-4-2 provides:

(a) When a defendant files a notice of alibi, the prosecuting attorney shall file with the court and serve upon the defendant, or upon his counsel, a specific statement containing:

- (1) the date the defendant was alleged to have committed the crime; and
- (2) the exact place where the defendant was alleged to have committed the crime;

that he intends to present at trial. *However, the prosecuting attorney need not comply with this requirement if he intends to present at trial the date and place listed in the indictment or information as the date and place of the crime.*

(Emphasis added.) Where the State does not respond to the defendant's notice of alibi, it is limited to offering evidence that shows defendant at the time and place raised in the indictment or information. Ind. Code § 35-36-4-3; *Hubbell v. State*, 754 N.E.2d 884, 889 (Ind. 2001).

“Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference.” *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied*. “A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* Strategies are assessed based on facts known at the time and will not be second-guessed even if the strategy in hindsight did not serve the post-conviction petitioner's best interests. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997). At the first post-conviction hearing, Campbell's trial counsel testified that he made a strategic decision to abandon the alibi defense. P-CR Tr. at 29-30. Campbell's trial counsel further testified that the two alibi

witnesses “would have hurt [Campbell] if they had been called to testify.” *Id.* at 30. We conclude that trial counsel was not ineffective deciding not to pursue the alibi defense.

IV. Jury Instruction

Campbell next contends that his trial counsel was ineffective based on his failure to object to a variance between the auto theft statute and the jury instruction. Indiana Code Section 35-43-4-2.5 provides in pertinent part:

(b) A person who knowingly or intentionally exerts unauthorized control over the motor vehicle of another person, with intent to deprive the *owner* of:

- (1) the vehicle’s value or use; or
 - (2) a component part ... of the vehicle;
- commits auto theft, a Class D felony.

(Emphasis added.) The corresponding instructions provided in pertinent part:

PRELIMINARY INSTRUCTION NO. 4

The statute defining the offense in Auto Theft, which was in force at the time of the offense charged, reads in relevant part as follows:

“A person who knowingly or intentionally exerts unauthorized control over the motor vehicle of another person, with intent to deprive the *other person* of any part of its value or use, commits theft, a class D felony.”

Appellant’s App.⁴ (Emphasis added.)

FINAL INSTRUCTION NO. 3

The statute defining the offense of Auto Theft as charged in this case is defined by statute as follows:

“A person who knowingly ... exerts control over the motor vehicle of another person, with the intent to deprive the *owner* of:

- (1) the vehicle’s value or use;
- ... commits auto theft, a class D felony.

⁴ We note that Campbell failed to number the pages in his appellant’s appendix and supplemental appendix as required by Indiana Appellate Rule 51(C).

Before you may convict the defendant, the State must have proved the following:

The defendant

1. knowingly
2. exerted control over the motor vehicle of another person
3. the control was unauthorized, and
4. the defendant intended to deprive the *other person* of the value or use of the motor vehicle.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty.

Id. (Emphases added.)

The instructions contained the term “other person,” while the statute uses the term “owner.” Thus, a variance existed. However, we conclude that Campbell was not prejudiced by the variance. As Campbell admits in his brief, “it is logical that the jury would realize that the other person equated to ‘owner’. After all, who else would that other person be, other than the owner?” Appellant’s Br. at 23. Accordingly, Campbell’s ineffectiveness claim fails.⁵

V. Vehicle Title and Registration

Campbell also asserts that his trial counsel was ineffective based on his failure to object to the admission of the stolen van’s title and registration. He has waived argument on this issue by failing to present a cogent argument with citations to relevant authority. Ind. Appellate Rule 46(A)(8); *Moore v. State*, 869 N.E.2d 489, 491-92 (Ind. Ct. App. 2007).

⁵ To the extent that Campbell argues that his trial counsel was ineffective for not objecting to the instructions based on a failure to identify the owner as a corporation, he has waived this claim for failing to raise it in the petition for post-conviction relief. *Allen*, 749 N.E.2d at 1171. Waiver notwithstanding, preliminary instruction number three specifically refers to the stolen van as “the motor vehicle of Globe Industrial Supplies, Inc.” Appellant’s App.

Waiver notwithstanding, a defendant who challenges his counsel's failure to object must show that if a proper objection had been made, it would have been sustained. *Jackson v. State*, 683 N.E.2d 560, 563 (Ind. 1997). The post-conviction court found that Campbell had failed to make such a showing and that he "gives no valid legal reason why the witness should not have been permitted to identify either document or why the documents themselves would not have been admissible." Supp. App.

Campbell challenges the form of the title and registration due to a lack of signature on the registration. We note, however, that the title does not appear to be missing any required signatures. State's Exhibit 1. Moreover, an employee and agent of Globe, the owner of the stolen van, testified regarding the van's ownership. As this testimony independently established ownership, the title and registration were cumulative, and Campbell was not prejudiced by his counsel's failure to object to their admission. Therefore, he has failed to establish ineffective assistance of counsel.

VI. Venue Instruction

Campbell next contends that his trial counsel was ineffective in failing to submit a jury instruction on venue. "[F]ailure to submit an instruction is not deficient performance if the court would have refused the instruction anyway." *Rouster v. State*, 705 N.E.2d 999, 1009 (Ind. 1999).

Campbell asserts that Hamilton County was not the place in which his acts occurred. "The right to be tried in the county in which the offense was committed is a constitutional and a statutory right. See Ind. Const. art. I, § 13; Ind. Code § 35-32-2-1(a) (1998)." *Cutter v. State*, 725 N.E.2d 401, 408 (Ind. 2000). However, venue is not an element of the offense and

is commonly an issue for determination by the jury. *Id.* When venue turns on issues of fact, “a trial judge may refuse to instruct the jury on venue if it presents no genuine issue.” *Id.* at 409.

Here, Captain Jowitt testified that on November 25, 2003, Campbell exerted control over the stolen van on westbound Interstate 465 from Keystone Avenue to Michigan Road, a route that includes about five miles of travel through Hamilton County. Tr. at 155. Campbell neither objected nor presented any evidence to contradict this testimony. We also note that Campbell was not charged with the initial taking of the van, but was charged with knowingly exerting unauthorized control over it as he drove it through portions of Hamilton County. As the trial court could have properly refused a venue instruction, Campbell’s trial counsel’s performance was not deficient for failing to submit one.

VII. Extension of Time for Habitual Offender Enhancement

Campbell next contends that his trial counsel was ineffective for agreeing to a joint motion for extension of time within which the State could file a habitual offender enhancement. Again, he has failed to present a cogent argument with citations to relevant authority and has waived this challenge on appeal. Ind. Appellate Rule 46(A)(8); *Moore*, 869 N.E.2d at 491-92.

Waiver notwithstanding, we reiterate that on review we give deference to trial counsel’s choice of strategy and tactics. *Timberlake*, 753 N.E.2d at 603. At the post-conviction hearing, trial counsel testified that the joint motion for extension of time was a strategy employed because there was still a chance that Campbell would agree to plead guilty pursuant to ongoing plea negotiations. P-CR Tr. at 62-63. We find no deficient performance

here.

VIII. Surveillance Video

Campbell also contends that his trial counsel was ineffective in failing to discover and introduce an allegedly exculpatory surveillance video taken at a Speedway gas station where Campbell stopped during the time the officers were surveilling him. Specifically, he argues that the video would have established that the driver of the stolen vehicle was a man who bore a physical resemblance to him. We reiterate that to prevail on the basis of ineffective assistance of counsel, Campbell must allege and prove both deficient performance and prejudice resulting from it. *Strickland*, 466 U.S. at 687. Once again, he has failed to develop and support this argument and therefore has waived it. Ind. Appellate Rule 46(A)(8); *Moore*, 869 N.E.2d at 491-92.

Waiver notwithstanding, the record indicates that the surveillance video lacked evidentiary value. At the post-conviction hearing, Campbell’s trial counsel testified that he had seen the video and that the black-and-white video was “very grainy” and “[y]ou couldn’t see anything.” P-CR Tr. at 69.⁶ Likewise, when police determined that the video lacked evidentiary value, they returned it to Speedway, where it was subsequently destroyed. *Id.* at 84. Based upon both parties’ undisputed assessments that the video lacked evidentiary value, trial counsel was not ineffective in failing to introduce it as evidence.

IX. Photographic Array

Campbell next asserts that his trial counsel was ineffective for failing to object to the

⁶ This testimony contradicts Campbell’s argument that his trial counsel failed to discover the surveillance video.

State's use of an out-of-court photographic array and to a subsequent in-court identification allegedly derived from it. Again, we note that to prevail on this basis, Campbell must demonstrate that the trial court would have sustained a proper objection. *Glotzbach v. State*, 783 N.E.2d 1221, 1224 (Ind. Ct. App. 2003).

Specifically, Campbell contends that Captain Jowitt's out-of-court and in-court identifications of him were tainted and therefore would have been suppressed had a proper objection been made. Due process requires suppression of testimony concerning a pre-trial identification when the procedure employed is impermissibly suggestive. *Hyppolite v. State*, 774 N.E.2d 584, 594 (Ind. Ct. App. 2002), *trans. denied* (2003). "A photographic array is impermissibly suggestive if it raises a substantial likelihood of misidentification given the totality of the circumstances." *Id.*

A trial court considers certain factors to evaluate the likelihood of a misidentification: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; and (4) the level of certainty demonstrated by the witness.

Williams v. State, 774 N.E.2d 889, 890 (Ind. 2002) (citation omitted).

The post-conviction court examined the array and found that it was not unduly suggestive such as to taint either the identification from the array or the subsequent in-court identification. Supp. App. Campbell challenges the legitimacy the photographic array based on the date printed on his photograph. Every photo in the array contained an image number and date, but Campbell's was the only one dated August 2003. Defense Exhibit C. Specifically, Campbell argues that, as the officer who requested a NCIC report on him,

Captain Jowitt would have been put on notice of criminal activity that would have subjected Campbell to being photographed in August 2003. Thus, he asserts that Captain Jowitt's access to his criminal history linked him by undue suggestion to the photo dated as such. However, of the two NCIC reports introduced at the post-conviction hearing, neither indicated that Campbell had been arrested in August 2003.⁷

At the post-conviction hearing, Captain Jowitt testified that his basis for choosing Campbell's photo from the array was his November 25, 2003, observation of Campbell driving the stolen vehicle. P-CR Tr. at 182. The record before the trial court indicates that Captain Jowitt had an unobstructed view of Campbell driving the stolen vehicle. Tr. at 151. He testified that, while at a stoplight during the pursuit, he had "two-to-three seconds" to look at the driver: "I was really focusing on the driver of the vehicle in an attempt to see who it was.... I was able to devote my full attention to looking at the vehicle." *Id.* at 152. He further testified that he could make out the facial features of the driver when the vehicle turned off of Interstate 465 and into the Pyramids area. *Id.* at 159. He then made an in-court identification of Campbell as the driver of the stolen vehicle. *Id.*⁸ The record supports Captain Jowitt's testimony that his identification was based on his personal observations of

⁷ The first NCIC report, introduced as P-CR Exhibit I, did not include a photograph of Campbell and indicated neither an arrest nor a conviction in August 2003. The more extensive NCIC report, introduced as P-CR Exhibit D, showed no arrests in August 2003, but indicated that Campbell had entered a guilty plea on an unrelated charge on August 25, 2003.

⁸ To the extent that Campbell bases this argument on the incredible dubiousity rule, we have already concluded that the rule is inapplicable in this case. We also note that any argument regarding the circumstances of Captain Jowitt's identification based on his surveillance of Campbell would go to the weight rather than the admissibility of evidence.

Campbell on November 25, 2003, and not on the date printed on Campbell's photograph.

In sum, Campbell has failed to demonstrate that the photo array was unduly suggestive and that any objection to its use would have been sustained. Therefore, his ineffectiveness claim fails.

X. Failure to Hire Expert

Finally, Campbell contends that his trial counsel was ineffective in failing to hire forensic experts to examine fingerprints, a videotape, and DNA evidence. In his post-conviction petition, Campbell limited this argument to failure to engage a "Latent Forensic Fingerprint Expert." Supp. App. Therefore, to the extent he now adds to his argument, those added claims are waived. *Allen*, 749 N.E.2d at 1171.

Specifically, Campbell asserts that the stolen van contained fingerprints belonging to another individual who generally fit his physical description. Indiana Evidence Rule 702(a) provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, *may* testify thereto in the form of an opinion or otherwise." (Emphasis added.) In *Ritchie*, our supreme court held that defense counsel's failure to obtain another expert witness to counter the State's experts after the State destroyed the credibility of the defense's expert did not amount to ineffective assistance of counsel. 875 N.E.2d at 715-16.

Here, State's witness Detective Thurl Cecil, a latent fingerprint expert, testified at the post-conviction hearing that he performed the fingerprint testing in this case and that the testing established that no additional analysis would have been fruitful. P-CR Tr. at 101.

Campbell did not present any contrary evidence. Thus, “it is at best wholly speculative that [any additional] expert testimony ... would have affected the outcome of the trial.” *Ritchie*, 875 N.E.2d at 715-16. As such, Campbell’s claim fails.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.