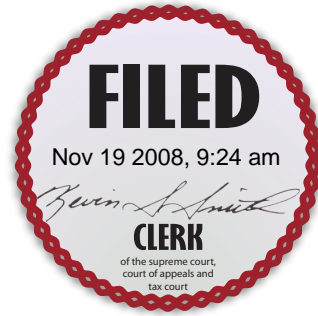


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

CHARLES E. KINGERY, JR.,
Michigan City, Indiana

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CHARLES E. KINGERY, JR.,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 49A02-0806-PC-478

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
The Honorable W.T. Robinette, Commissioner
Cause No. 49G03-9302-PC-017408

November 19, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Charles E. Kingery, Jr. appeals the denial of his petition for post-conviction relief. Kingery contends that the post-conviction court erroneously concluded that he did not receive the ineffective assistance of trial counsel, raising eight alleged instances of ineffective assistance of counsel and arguing that their cumulative effect requires reversal of the post-conviction court's denial of post-conviction relief. Finding no error, we affirm.

FACTS

The underlying facts, as stated by our Supreme Court in Kingery's direct appeal, are as follows:

Late in the afternoon of April 1, 1991, the victim, George Wildrick, arrived at Van's Tavern, an establishment which Wildrick frequently patronized. Van's Tavern was hosting a pool tournament, and about 7:00 p.m., Charles Kingery and a friend, John Smith, arrived to compete in that tournament. George Wildrick spent several hours in Van's, displaying large amounts of cash, consuming several drinks, and announcing his plan to visit later another tavern, the Goldfinger Lounge. Witnesses who spoke with George Wildrick as he left Van's Tavern at closing, between 2:30 and 3:00 a.m., testified that Wildrick again stated his plan to have another drink at the Goldfinger Lounge, and was looking for someone to join him there.

Kingery and Smith played pool at Van's Tavern until approximately 1:00 a.m. Smith then left for home. Kingery told Smith that he intended to head home shortly. However, Melissa Haynes, the woman with whom Kingery lived, testified that Kingery did not arrive home until more than two hours later, a little after 3:00 a.m.

State's witness Heidi Marter was awake that morning around 3:00 a.m. when she heard, outside her home near the Goldfinger Lounge, three gunshots. Peering out her window, she saw a person, motionless, sitting upright in a large pickup truck parked near the lounge. A man, standing outside the truck, reached inside, opened the driver's side door, lifted the person from inside the truck and placed that motionless individual on the

ground. Marter then saw the man look under the truck's seats and wipe down the truck's interior, particularly the passenger area and the steering wheel. He ran his hands up and down the length of the motionless individual's body. Using a rag, the man rolled up the truck's window, left the rag in the window, shut the door and walked toward the Goldfinger Lounge.

Marter left her home and drove over to the scene. She found the victim, George Wildrick, laying on his left side in a pool of blood. She quickly returned home to call the police. After notifying the police, she again looked out her window, and saw that the man whom she had seen earlier had returned. He pulled up next to the body in a small, light-colored pickup truck, got out of the truck, turned the lights of the victim's truck off, wiped down the inside of the victim's truck a second time, returned to his truck, and drove away.

Witness Steven Ross was driving toward the Goldfinger Lounge around 3:30 a.m. when he saw a small white truck speeding in the opposite direction. Finding police at the lounge when he arrived, and discovering that they were looking for a white truck, he told them that he had just seen a white truck speeding away from the Goldfinger.

Arriving at the crime scene at approximately 4:30 that morning, a deputy coroner recovered several items from Wildrick's body, including a pair of sunglasses. These sunglasses were later found to contain a bloody fingerprint which the State demonstrated belonged to Kingery. At the end of an extended investigation, Kingery was charged with murder, felony murder, and robbery. After a jury trial, Kingery was convicted of murder and Class A robbery, but sentenced as if he had been convicted of murder and class B robbery.

Kingery v. State, 659 N.E.2d 490, 492 (Ind. 1995).

On direct appeal, Kingery raised arguments regarding the sufficiency of the evidence, a jury instruction error, prosecutorial misconduct, and a sentencing error. Id. Our Supreme Court held that the trial court had improperly reduced Kingery's robbery conviction from a class A to a class B felony and ordered the trial court to revise it to a

class C felony robbery conviction. Id. at 496. The trial court was affirmed in all other respects. Id. at 498.

On February 24, 2006,¹ Kingery filed a petition for post-conviction relief, arguing, among other things, that his trial counsel was ineffective for failing to offer certain items of evidence at trial and for failing to object to testimony and alleged instances of prosecutorial misconduct. On April 22, 2008, after six evidentiary hearings were held on Kingery's post-conviction relief petition, the post-conviction court denied Kingery's petition, and issued the following findings of fact and conclusions of law:

- a. Mr. Crawford testified that he thinks he did everything reasonable in preparation of his client's defense including: hiring a private investigator, retaining and calling a fingerprint expert witness, having a polygraph done of Kingery, and taking depositions of essential witnesses.

- c. Regarding challenges to the chain of custody of the glasses, Mr. Crawford testified that generally – unless he finds some evidence that there might be a gap – then he doesn't like to go into that at trial. He testified that to have the State go through every person who touched the item, in his opinion, bolsters or strengthens the State's case and dramatizes the State's effort; that unless the police department is very sloppy which is not the case here (in Marion County) then letting the State go into great detail in this area does not help the defense.
- d. Mr. Crawford recalls that the defendant said he had gotten home around 3:00; therefore, whether the time of the shooting was 3:00 or 3:30 was not significant. As to utilizing an alibi defense, Mr. Crawford is sometimes hesitant to do so and believes it is a tough defense because the jury tends to be moved from knowing the

¹ The State does not raise a laches argument in support of its position that the post-conviction court should be affirmed.

defense does not have to prove anything to wanting more and expecting proof from the defense. He hesitates to use alibi defenses unless they are pretty good, otherwise juries can be insulted by them.

- e. When questioned by Mr. Spencer as to whether portions of the deputy prosecutor's closing argument constituted improper vouching for the credibility of expert witnesses, Mr. Crawford answered that he did not consider it improper vouching because both witnesses were one hundred percent certain as deputy prosecutor Sells had represented.

Mr. Crawford also testified that his legal strategy is to be very hesitant to object during closing argument because usually the Judge instructs the jury that what the lawyers say is not evidence but instead argument, and because the jury can view objections during closings as an effort to disrupt opposing counsel's presentation. . . . Mr. Crawford additionally recalls no instance where deputy prosecutor Sells hugged the wife of the victim during closing arguments.

- f. As to not objecting to testimony of the Brass Flamingo manager's testimony that dancers had told him Kingery was tipping them large amounts of money, Mr. Crawford does not specifically recall why he did not object or the context as to whether this testimony may have fit into the 19 exceptions to the hearsay rule. As a general rule, whether Mr. Crawford would object to hearsay would also depend on whether the testimony is helpful to the defense. Mr. Crawford also testified that he did talk with Don Noe, from the Brass Flamingo, prior to trial.
- g. . . . Likewise, Mr. Crawford did not offer the 911 transcript into evidence as he did not think it was helpful to the defendant. Mr. Crawford does not recall the time of the murder being of great significance as the defendant's alibi was that he was home and asleep by 3:00 a.m. so he could not have been at the Goldfinger at 3:00 a.m. Mr. Crawford does not believe the time being 3:30 instead of 3:00 would have assisted his alibi much. . . .

- i. Mr. Crawford does not recall why he decided not use Gene Gholson as a witness at trial. Mr. Crawford did make note of his name and phone number (Petitioner's Exhibit H) and thinks he talked with Mr. Gholson, but cannot presently remember what Mr. Gholson said.

CONCLUSIONS OF LAW

3. . . . The record in Kingery's case shows thorough and competent defense work by Mr. Crawford on his client's behalf. The pretrial record reflects that counsel took depositions of at least 10 State's witnesses, filed successful motions for defendant to attend depositions, filed a motion for a speedy trial, filed a list of 13 potential witnesses and 1 exhibit, and filed a motion to allow defendant access to a haircut a few days before trial. At trial, Mr. Crawford moved for a separation of witnesses, presented an opening statement, skillfully cross-examined each of the State's 22 case in chief witnesses and conducted 7 re-cross examinations, made appropriate objections throughout the State's case, moved for directed verdict at the close of the State's case as to each count, presented evidence and the testimony of 11 witnesses for the defense, tendered a final jury instruction, and presented a closing argument consistent with the theory of defense. The Court finds that trial counsel subjected the State's case to meaningful adversarial testing and performed well within the objective standards of reasonable performance based upon prevailing professional norms. . . .

c. . . .

- 1) . . . In the case at bar, the prosecutor's comments were supported by the record or inferences therefrom, and any objection would have been overruled. This Court specifically notes with that the allegation of hugging the victim's wife is not supported by the record. . . . This

Court defers to Mr. Crawford's strategy and finds it reasonable. . . .

- 2) . . . The Indiana Supreme Court in Kingery's appeal found that the evidence of Kingery's prior fingerprints was offered for a valid purpose. . . . Further, given the context of this evidence at trial, that Mr. Crawford was not questioned on this issue at the post-conviction hearing, and that no particular emphasis was given to this evidence either party either during the testimony or closing arguments, this Court finds Petitioner has not proven deficiency or prejudice as to this claim. . . .

- 4) . . . Petitioner has not proven that an objection by Mr. Crawford would have been sustained, nor prosecutorial misconduct, nor prejudice. Similarly, the State's evidence pertaining to purchase of the handgun after the murder was relevant evidence showing access to firearms as well as impeachment of defendant's statement that he did not own or like guns. . . .

- 9) . . .
d. . . . Gene Gholson did testify at a post-conviction hearing, nonetheless, this Court finds that Petitioner has not proven prejudice as to the absence of his testimony at trial. . . .

i. Petitioner alleges that trial counsel failed to present evidence of fingerprint analysis showing the prints on shell casings collected from the crime scene were not Kingery's. Petitioner presented no post-conviction evidence to support this claim.

Appellant's App. p. 59-81 (internal citations omitted). Kingery now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. 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. Post-conviction procedures do not afford petitioners with a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel’s representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. Second, the defendant must show that the deficient performance resulted in prejudice. 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. If a claim of ineffective assistance can be disposed by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

II. 911 Transcript

Kingery argues that his trial counsel should have used the transcript from Heidi Marter's call to 911 to establish the chronology of events surrounding the shooting. Kingery points out that the transcript reveals that Martar called 911 at exactly 3:30 a.m. and that Martar testified that the shooter returned while she was still talking to dispatch; therefore, the shooter was still at the crime scene until at least 3:34 a.m. Kingery maintains that the failure to introduce the transcript into evidence crippled his alibi defense because the prosecutor was able to show that the shooting occurred around 3:00 a.m. Melissa Haynes, Kingery's alibi witness, testified that Kingery arrived home around 3:05 or 3:10 a.m. Thus, without the transcript, the jury could conclude that Kingery had enough time to shoot Wildrick and still make it home by 3:05 or 3:10 because Kingery lived close to the Goldfinger Lounge. On the other hand, Kingery asserts that if the transcript had been used, the jury could not have reached that conclusion because the transcript revealed that the shooter returned sometime around 3:30, and Kingery had been at home for at least twenty minutes.

In resolving this issue, we note that our Supreme has held that “[c]ounsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001). In addition, counsel’s conduct is assessed on facts known at the time and not through hindsight. State v. Moore, 678 N.E.2d 1258, 1261 (Ind. 1997).

At the post-conviction hearing, trial counsel testified that he thought the exact time after 3:00 a.m. in which the shooting took place was insignificant because Kingery’s alibi evidence showed that he was home around 3:00 a.m. Therefore, he would have been home at the time of the shooting. PCR Tr. p. 268. In addition, trial counsel testified that, in his opinion, Kingery did not have a strong alibi defense because the only alibi witness was Haynes, who was Kingery’s girlfriend at the time of the shooting. Id. at 269. Moreover, trial counsel expressed his reservation about using alibi defenses because they can move a jury from knowing that the defense has nothing to prove to wanting more evidence from the defense. Id. In light of these circumstances, we cannot say that trial counsel’s strategic decision to avoid relying on Kingery’s alibi defense fell below an objective standard of reasonableness. Thus, this claim fails.

III. Fingerprints on the Shell Casings

Kingery asserts that his trial counsel was ineffective because he failed to present evidence that fingerprints, other than Kingery’s, were found on three shell casings at the

crime scene. Initially, we observe that Kingery failed to elicit any testimony from his trial counsel as to why he did not present such evidence. Instead, Kingery only submitted two exhibits. One exhibit was a limited fingerprint analysis consisting only of a request for a fingerprint comparison and the results that the fingerprints did not belong to Kingery. The other exhibit was a list of evidence collected at the crime scene. No supporting testimony was offered to explain the relevance or significance of these two exhibits.

Because Kingery failed to elicit any testimony from trial counsel, we may infer that trial counsel would not have corroborated Kingery's allegation that the failure to use this evidence fell below an objective standard of reasonableness. See Dickson v. State, 533 N.E.2d 586, 589 (Ind. 1989) (holding that in the absence of counsel's support, courts may infer that counsel would not corroborate the allegation that he or she rendered ineffective assistance). Moreover, the post-conviction court specifically determined that Kingery "presented no post-conviction evidence to support this claim," and therefore, "[t]his claim must fail." Appellant's App. p. 81. As the post-conviction court properly concluded that Kingery's exhibits alone were insufficient to support his claim, we will not disturb this conclusion.

Finally, even if we assume solely for argument's sake that trial counsel was unreasonable in failing to use the fingerprints on the shell casings, Kingery has failed to prove prejudice because there was other circumstantial evidence linking Kingery to the murder, including the similarities between Kingery's truck and the truck at the

Goldfinger Lounge, the fact that Kingery was in the same tavern as Wildrick on the night of Wildrick's death, the presence of Kingery's fingerprint on a pair of sunglasses found at the scene, the fact that Kingery owned a handgun that was consistent with the murder weapon, and the fact that Kingery could have seen the amount of money that Wildrick had in his wallet. Therefore, even if trial counsel had introduced evidence regarding the fingerprints on the three shell casings, the jury could still have found Kingery guilty of murder beyond a reasonable doubt. Thus, Kingery's claim of ineffective assistance of counsel on this basis fails.

IV. Gholson's Testimony

Kingery next maintains that trial counsel was ineffective because he failed to call Gene Gholson as a witness at trial. At the trial, the State introduced evidence that Kingery owned a Llama forty-five-caliber semi-automatic handgun, which was consistent with the gun used to kill Wildrick. Four days after Wildrick was shot, Kingery reported that his gun had been stolen from his vehicle while it was parked at a sports complex. Deputy Sheriff Debra VanCleave testified at trial that Kingery's theft was the only break-in at the complex that day, and that she thought it was "strange" because there were more expensive vehicles that were untouched. Trial Tr. p. 568.

In response to Deputy VanCleave's testimony, trial counsel presented testimony from the manager of the sports complex that break-ins do occur at the complex. At the post-conviction hearing, Gholson testified that his vehicle was broken into on the same day as Kingery's. Gholson claimed that he reported the break-in to a security officer.

Although trial counsel testified that he probably contacted Gholson prior to trial, he could not recall the content of the conversation.

Again, we note that counsel is given considerable discretion in choosing trial strategy and tactics, and we give those decisions considerable deference. Timberlake, 753 N.E.2d at 603. The decision as to which witnesses to call is generally one of trial strategy. Wrinkles v. State, 749 N.E.2d 1179, 1200 (Ind. 2001).

We note that Gholson's testimony is not particularly compelling because Kingery is a former teammate of Gholson's and a friend of Gholson's step-brother. In addition, the circumstances surrounding the missing handgun are still suspicious because of the proximity of the theft to Wildrick's killing and Kingery's statement to the police that "he didn't like guns and he didn't have a gun, he didn't even own a gun." Trial Tr. p. 418. Therefore, we cannot say that trial counsel's failure to offer Gholson's testimony at trial fell below an objective standard of reasonableness.

V. Evidence of a Struggle

Kingery argues that his trial counsel was ineffective for failing to use the autopsy report and crime scene photos to contradict the prosecutor's theory that Wildrick was ambushed. In his petition for post-conviction relief, Kingery argued that his trial counsel was ineffective for agreeing to not send Wildrick's autopsy report for the jury to review during deliberations. In addition, Kingery argued that his trial counsel was ineffective for failing to cross-examine the pathologist concerning Wildrick's other injuries that were consistent with a struggle. To the extent that Kingery argues something different on

appeal, the claim is waived. See Allen v. State, 749 N.E.2d 1158, 1171 (Ind. 2001) (citing Ind. P-C.R. 1(8)) (stating that claims not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal).

Kingery challenges trial counsel's agreement to refrain from permitting the jury to review the autopsy report during deliberations, emphasizing that the report described injuries on Wildrick that were consistent with a struggle. Even assuming that Kingery has properly preserved this issue on appeal, we once again recognize that counsel is given considerable discretion choosing trial strategy and tactics, and we give those decisions considerable deference. Timberlake, 753 N.E.2d at 603.

Trial counsel was questioned during the post-conviction relief hearing about his decision not to permit the jury to review the autopsy reports. Trial counsel explained that "in a murder case, I don't like the jury to spend too much time concentrating on the dead body. . . . I find that to be very detrimental to my clients." PCR Tr. p. 246. Inasmuch as this explanation is reasonable, Kingery's claim that his trial counsel was ineffective on this basis fails.

Kingery also maintains that trial counsel should have cross-examined the pathologist about the injuries in the autopsy report that could have been characterized as defensive wounds. This court has previously held that the nature and extent of cross-examination is a matter of strategy left to trial counsel. Waldon v. State, 684 N.E.2d 206, 208-09 (Ind. Ct. App. 1997). At the post-conviction hearing, trial counsel was not specifically questioned about his cross-examination of the pathologist. Therefore, we

may infer that trial counsel would not have corroborated Kingery's allegations that failure to cross-examine the pathologist about the alleged defensive injuries fell below an objective standard of reasonableness. Dickson, 533 N.E.2d at 589. In sum, because the nature and extent of cross-examination is a matter of strategy on which we defer to trial counsel, we conclude that Kingery has failed to prove that his trial counsel was ineffective for failing to cross-examine the pathologist regarding the alleged defensive wounds.

VI. Failure to Object

Kingery argues that his trial counsel was ineffective for failing to object to the chain of custody of the sunglasses, the fingerprint records from prior arrests, alleged hearsay testimony from Donald Noe, and several alleged instances of prosecutorial misconduct. In Jackson v. State, our Supreme Court held that when a defendant bases an ineffective assistance of counsel claim on counsel's failure to object at trial, the defendant must show that a proper objection, if made, would have been sustained. 683 N.E.2d 560, 563 (Ind. 1997).

A. The Sunglasses

Kingery maintains that trial counsel should have made a more detailed objection to the introduction of the sunglasses containing Kingery's fingerprint based upon alleged deficiencies in the chain of custody. Specifically, Kingery asserts that trial counsel should have objected because someone other than Deputy Coroner Leonard Fields signed Fields's name on the evidence envelope and that his trial counsel should have required

the introduction of the chain of custody form. Similarly, Kingery points out that although more than two individuals testified that they had handled the sunglasses, only two names appear on the chain of custody form.

Furthermore, Kingery argues that there was a missing link in crime scene specialist, John Brooks's, testimony regarding the chain of custody because Brooks testified that he took the sunglasses to David Willoughby; however, there is evidence that crime lab technician, David Zauner, possessed the sunglasses before Willoughby. Moreover, Kingery maintains that although forensic expert Jack Jacobia testified at the post-conviction hearing that there were white specks on the sunglasses, implying that someone performed a "super glue process" to reveal latent fingerprints, none of the fingerprint examiners have ever stated that they conducted this process. Appellant's Br. p. 21.

Finally, Kingery asserts that someone broke the seal of the evidence envelope containing the sunglasses and then resealed the envelope and left it in a storage facility. Kingery bases this allegation on testimony of forensic scientist, Judith Macehko, who testified that when she received the sunglasses from the property room, the seal of the evidence envelope "had been broken" and resealed with staples. PCR Tr. p. 310-11. Under these circumstances, Kingery alleges that all of these occurrences create an inference of "foul play" and prove that trial counsel should have made "a more thorough objection" to the admission of the sunglasses. Appellant's Br. p. 19-23

Initially, we infer from Kingery's use of the term "foul play," that he is arguing that the prosecution or the police intentionally tampered with the evidence. Although Kingery asserts that the circumstances above create an inference of evidence tampering by the prosecution, he cites no legal authority for this proposition and indeed, the law is to the contrary. Specifically, although the prosecution must give "reasonable assurances that the property passed through various hands in an undisturbed condition," the prosecution is not required to establish a perfect chain of custody and slight gaps go to the weight of the evidence, not to its admissibility. Bell v. State, 881 N.E.2d 1080, 1084 (Ind. Ct. App. 2008). Furthermore, there is a presumption that public officers handle exhibits with regularity, and merely raising the possibility of tampering is insufficient to make a successful challenge to the chain of custody. Id. Thus, we will not infer that a public officer has tampered with evidence, but instead, require actual proof that such tampering has occurred.

Fields testified that he found the sunglasses on Wildrick and placed them in an evidence envelope on April 2, 1991. Trial Tr. p. 353-54. Later that day, Fields gave the evidence envelope containing the sunglasses to Brooks. Id. at 325, 355. Brooks testified that he transferred the envelope containing the sunglasses to Willoughby. Id. at 325. After Willoughby was finished, he transferred them back to Brooks, who then transferred them to the Indianapolis Police Department (IPD) property room. Id. at 326.

Forensic scientist, Michael Flannery testified that he received the envelope containing the sunglasses on January 28, 1993, and he, along with Zauner, reexamined

the sunglasses. Id. at 658, 784-85. Macechko testified that she obtained the sunglasses from the IPD property room on April 5, 1993, conducted more tests, and returned them to the property room on May 3, 1993. Id. at 616; PCR Tr. p. 315. Thus, from the record, we can find no gaps in the chain of custody sufficient to prove that a more detailed objection by trial counsel would have led to the exclusion of the sunglasses.

Although Fields's initials appear on the evidence envelope, he testified that he did not place them there. However, we do not agree with Kingery's assertion that this implies tampering by the prosecution because both Fields and Brooks testified that Fields gave the envelope containing the sunglasses to Brooks on April 2, 1991. Similarly, we cannot say that Kingery successfully proved tampering merely because certain individuals, whose names do not appear on the custody form, testified that they handled the evidence.

Likewise, Kingery's assertion that there is a gap in Brooks's testimony because of evidence that Zauner had custody of sunglasses before Brooks transferred custody to Willoughby is unavailing. Although Zauner testified in a deposition that he vaguely remembered taking a "quick look" at the sunglasses in 1991, he was asked to do so by Brooks while Brooks still had custody of the sunglasses. Appellant's Ex. AA p. 5-8.

Furthermore, although Jacobia testified that he noticed "white specks" on the sunglasses, Kingery mischaracterized Jacobia's testimony when he asserted that this implied the use of a "super glue process." Appellant's Br. p. 21. Jacobia testified that he did not know how the specks got on the sunglasses, and that the specks could have

resulted from a super glue process. PCR Tr. p. 335-36. Moreover, Jacobia testified on cross-examination that he does not believe that someone tampered with the sunglasses. Id. at 338.

We also reject Kingery's claim that Macechko's testimony establishing that the envelope containing the sunglasses had a broken seal and was stapled shut when she received it necessarily proved that the State had tampered with the evidence. In our view, those circumstances demonstrate that someone did not follow proper procedures for sealing evidence envelopes. That said, because we presume that public officers handle evidence with regularity, it is apparent that Kingery has raised only the possibility of tampering.

Finally, Kingery asserts that he is entitled to post-conviction relief because his trial counsel should have explained the "mysterious occurrences" surrounding the sunglasses to the jury to help them weigh the significance of Kingery's fingerprint on the sunglasses. Appellant's Br. p. 23. As stated earlier, counsel is afforded great deference in selecting what strategies and tactics to use during trial. Timberlake, 753 N.E.2d at 603. Trial counsel testified at the post-conviction hearing that unless there is a significant gap in the evidence, he does not "like to go to the chain of custody." PCR Tr. p. 267. Trial counsel explained that "[i]t dramatizes the State's effort to present the evidence and I think it hurts the defense unless you've got a real sloppy police department." Id. As we concluded above, there was no significant gap in the chain of custody of the sunglasses. Therefore, trial counsel made a reasonable strategic decision to avoid highlighting the

chain of custody, and Kingery's claim of ineffective assistance of counsel necessarily fails.

B. Fingerprint Records from Prior Arrests

Kingery next argues that his trial counsel was ineffective for failing to object when the prosecution elicited testimony regarding fingerprint cards from Kingery's prior arrests.

We note that on direct appeal, Kingery argued that the prosecution's presentation of this evidence constituted fundamental error. Kingery, 659 N.E.2d at 494. Our Supreme Court disagreed and concluded that Kingery's counsel had invited the error, but that the error was not fundamental because the evidence "was offered to help the jury understand the procedure which fingerprint experts used to identify Kingery's fingerprint on Wildrick's sunglasses." Id. at 495.

At this juncture, it is apparent that Kingery is merely restating the issue by maintaining that trial counsel was ineffective for not objecting to this evidence. However, restating the issue will not avoid claim preclusion. See Overstreet v. State, 877 N.E.2d 144, 150 n.2 (Ind. 2007) (holding that "[a] petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error."). As a result, Kingery's claim as to trial counsel's failure to object to the prosecution eliciting testimony regarding the fingerprint cards is barred on the grounds of res judicata. Id.

In a related argument, Kingery argues that his trial counsel was ineffective for inviting the error that led to the testimony regarding the fingerprint cards. Trial counsel testified at the post-conviction hearing that he believed the strongest evidence against Kingery was Flannery's testimony that Kingery's fingerprint was on Wildrick's sunglasses. To rebut Flannery's testimony, trial counsel questioned other fingerprint analysts who had used Kingery's fingerprints from prior arrests to compare with the fingerprint on the sunglasses. Those analysts concluded that the fingerprint on the sunglasses was not Kingery's. Thus, it is apparent that trial counsel decided that it was in Kingery's best interest to elicit testimony involving Kingery's fingerprint cards from prior arrests to rebut Flannery's testimony. In our view, trial counsel's strategic decision was reasonable, and Kingery has failed to prove that his trial counsel was ineffective on this basis.

C. Hearsay Testimony

Kingery argues that his trial counsel was ineffective for failing to object to the alleged hearsay testimony of Donald Noe, who was the manager at the Brass Flamingo, which is "a topless go-go bar." Trial Tr. p. 530. Noe testified that shortly after Wildrick was killed, Kingery was in his bar, and the dancers told Noe that he was tipping them well. Noe testified that because dancers make so much money, they do not brag unless they are being tipped fifty to a hundred dollars. This testimony was used by the prosecution during closing argument to imply that Kingery was spending money that he had taken from Wildrick after killing him.

Noe's testimony was hearsay because he was testifying about an out-of-court statement for the truth of the matter asserted, which was that Kingery was spending a large amount of money shortly after Wildrick was killed. See Ind. R. Evidence 801(c) ("Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). However, we note that this statement was cumulative of Noe's other testimony that, when he approached Kingery about his high-spending, Kingery told Noe that he had "won a scratch-off [lottery] ticket or something," for either \$5,000 or \$10,000. Trial Tr. p. 537-38. Hence, even though Noe's testimony regarding the alleged conversation that he had with the dancers could have been objected to as improper hearsay evidence, his remaining testimony rendered the admission of that hearsay testimony harmless error. See Robinson v. State, 693 N.E.2d 548, 553 (Ind. 1998) (holding that although hearsay evidence is generally inadmissible, erroneous evidence that is cumulative of other, properly admitted evidence does not establish prejudice). Therefore, trial counsel's failure to object to the admission of Noe's improper hearsay testimony did not prejudice Kingery. As a result, Kingery's claim of ineffective assistance of counsel fails on this basis.

D. Prosecutorial Misconduct

Kingery argues that his trial counsel was ineffective for failing to object to six alleged instances of prosecutorial misconduct. Of these six instances, Kingery cites relevant legal authority to only one of them. Generally, a party waives any issue on

appeal where the party fails to develop a cogent argument or provide adequate citation. Smith v. State, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005); see also Ind. Appellate Rule 46(A)(8)(a) (“Each contention must be supported by citations to the authorities, statutes, and the Appendix. . . .”). We acknowledge that Kingery chose to represent himself in this matter; however, pro se litigants are held to the same standard as licensed attorneys and must comply with the appellate rules to have their claims decided on the merits. Smith, 822 N.E.2d at 203. Thus, Kingery has waived the five alleged instances of prosecutorial misconduct for which is has failed to provide adequate citation.

Proceeding to Kingery’s only claim of error that has not been waived, Kingery maintains that his trial counsel should have objected when the prosecution elicited testimony concerning a handgun in Kingery’s possession that was unconnected to the Wildrick shooting. This court has previously stated that “[a] claim of prosecutorial misconduct requires a determination that there was misconduct by the prosecutor and that it had a probable persuasive effect on the jury's decision.” Overstreet v. State, 783 N.E.2d 1140, 1154 (Ind. Ct. App. 2003). Furthermore, “[a]bsent clear error and resulting prejudice, the trial court’s determination of violations and sanctions will be affirmed.” Id.

Generally, it is improper to present evidence of weapons owned by the defendant, but not used in the crime for which the defendant is charged, because such evidence is irrelevant and highly prejudicial. Stringer v. State, 853 N.E.2d 543, 547 (Ind. Ct. App. 2006). However, the post-conviction court determined here that the prosecution’s “evidence pertaining to purchase of the handgun after the murder was relevant evidence

showing access to firearms as well as impeachment of defendant's statement that he did not own or like guns." Appellant's App. p. 75. We agree with post-conviction court that in light of Kingery's statement to police that "he didn't like guns and he didn't have a gun, he didn't even own a gun," trial tr. p. 418, evidence that Kingery purchased a handgun after the murder was relevant to rebut his assertion that he disliked firearms. Thus, the prosecutor's line of questioning with regard to this issue was not misconduct, and Kingery has failed to prove that an objection by trial counsel would have been sustained. Therefore, Kingery has not demonstrated that his trial counsel was ineffective on this basis.

VII. Cumulative Prejudice

Finally, Kingery claims that the alleged cumulative prejudicial effects of his trial counsel's deficient performance entitle him to post-conviction relief. However, the State contends that Kingery has waived this issue on appeal because he failed to argue cumulative prejudice to the post-conviction court.

In our view, Kingery has not waived this claim in light of our Supreme Court's pronouncement that counsel's errors "that are not individually sufficient to prove ineffective representation may add up to ineffective assistance when viewed cumulatively." French v. State, 778 N.E.2d 816, 826 (Ind. 2002).

On the other hand, we concluded above that with the exception of one claim, Kingery has failed to show that trial counsel's performance fell below an objective standard of reasonableness. More specifically, the only remaining claim is Kingery's

assertion that his trial counsel was ineffective for failing to object to Noe's hearsay testimony. At the post-conviction hearing, trial counsel testified that he did not know why he did not object to Noe's testimony. Even assuming that the failure to object amounted to deficient performance, we concluded that the admission of the hearsay evidence amounted to harmless error in light of the other evidence that was properly admitted. Thus, we determined that Kingery failed to establish any prejudice in light of his trial counsel's failure to object. See Wentz, 766 N.E.2d at 360.

In sum, Kingery has not demonstrated that this single instance of trial counsel's alleged deficient performance amounted to cumulative prejudice so as to warrant a reversal of the denial of his petition for post-conviction relief. Thus, for all of these reasons, Kingery's claims of ineffective assistance of trial counsel fail.

The judgment of the post-conviction court is affirmed.

NAJAM, J., and MAY, J., concur.