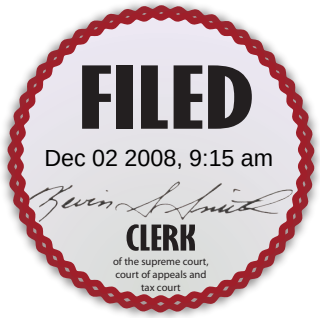

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IN THE
COURT OF APPEALS OF INDIANA

ALFRED W. COMER, JR.	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 45A05-0804-PC-245
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION, ROOM 3
The Honorable Natalie Bokota, Magistrate
The Honorable Diane Ross Boswell, Judge
Cause Nos. 45G03-0703-PC-4 and 45G03-0302-MR-1

December 2, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Alfred W. Comer, Jr. (Comer), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUES

Comer has presented five issues for our review, which we restate as:

(1) Whether irregularities with the jury warrant a new trial;

(2) Whether either of his pre-trial counsels provided ineffective assistance of counsel;

(3) Whether his trial counsel provided ineffective assistance of counsel;

(4) Whether his appellate counsel provided ineffective assistance of counsel; and

(5) Whether fundamental errors not addressed by the post-conviction court in its Order denying Comer's petition for post-conviction relief warrant reversal.

FACTS AND PROCEDURAL HISTORY

We stated the facts from Comer's direct appeal in our unpublished memorandum decision, as follows:

> Comer and Antoinette Anthony ("Toni") lived together in an apartment in Hammond. On February 2, 2003, at approximately 6:00 a.m., Toni visited a neighborhood gas station where she was a regular customer and told the cashier that "she didn't want to go home because her and her boyfriend were fighting." (Tr. 145.)
>
> Later that day, Comer sent his neighbor Adam Scott ("Scott") to buy crack cocaine. Scott and Comer smoked the crack cocaine together, and Comer's demeanor began to change. Scott left after noticing that Comer "was getting very paranoid" and "saying people were out to get him." (Tr. 91-2.)

> Several hours later, Comer appeared at Scott's apartment. Comer was sweating heavily and appeared "very nervous and agitated." (Tr. 94.) Comer told Scott that drug dealers were holding Toni hostage. Scott and Comer walked together to a nearby restaurant to use the telephone. During the walk, Comer claimed that people in passing cars were drug dealers who had Toni. When they reached the restaurant, Comer called police and reported "someone had killed his wife." (Tr. 96.)
>
> Hammond police officers responded to Comer's call and met him at the restaurant parking lot. Comer led the officers back to his locked apartment. The officers used Comer's key to get inside and immediately observed Toni's lifeless body on a mattress in the living room. Toni had a fractured skull and was lying in a pool of blood. She had suffered blunt force trauma to her head and strangulation.
>
> On February 10, 2003, Hammond police officers returned to the apartment with Toni's mother. Detective Brett Plemons turned over a chair and heard something fall inside. Detective Plemons put his hand inside the torn covering of the chair and pulled out a hammer inside a white sock, bloodstained clothing, weather stripping, and a belt. Comer later told fellow inmate Scott Gamblin that he hid the hammer under a chair along with his pants and also stated that, "if I wasn't so high I would have got rid of the hammer instead of hiding it." (Tr. 574.) Comer also told fellow inmate Frank Zyzanski that he was so high he was not certain whether he had stabbed Toni or beat her to death with a hammer.
>
> On February 11, 2003, the State charged Comer with murder by means of a hammer. Comer's jury trial commenced on October 25, 2004. He was convicted as charged and sentenced to sixty years imprisonment. On April 12, 2005, Comer filed a petition for permission to file a belated appeal, which was granted after a hearing. On May 25, 2005, Comer filed a notice of appeal.

Comer v. State, No. 45A03-0505-CR-22, slip op. pp. 2-4 (Ind. Ct. App. August 14, 2006). On appeal, Comer challenged the evidentiary value of certain DNA evidence and the sufficiency of the evidence. *Id*. at 4. We concluded that even if the DNA evidence was unreliable, the evidence was sufficient to prove Comer guilty beyond a reasonable doubt. *Id*. at 5.

On March 5, 2007, Comer filed a petition for post-conviction review. The post-conviction court held a hearing on several days, following which, the post-conviction court made the following findings of fact:

> 1. On February 11, 2003, the State charged Alfred Comer with the murder of Antoinette Anthony.
>
> 2. On February 18, 2003, then Deputy Public Defender Salvador Vasquez entered his appearance as counsel for Comer but ultimately withdrew on May 30, 2003.
>
> 3. During his three-month tenure as counsel, attorney Vasquez filed a notice of defense of mental disease or defect and a motion to determine competence to stand trial. The Court subsequently found the petitioner competent and scheduled a jury trial for August 11, 2003.
>
> 4. On June 23, 2003, Deputy Public Defender Kelly White-Silvera entered her appearance. On June 27, 2003, she filed [a] "Request for Early Release of Information Concerning DNA Testing" and a memorandum in support thereof. The request was granted but delays in the receipt of the DNA results ultimately formed the bases for continuances of the jury trial.
>
> 5. Private attorney Jerry Jarrett entered an appearance on April 27, 2004. A jury trial began on October 25, 2004. On November 4, 2004, the jury found Comer guilty of murder.
>
> * * * *
>
> 8. On March 18, 2005, Comer petitioned the trial court for the appointment of a public defender to pursue a direct appeal. The request was granted. On April 12, 2005, the deputy public defender sought permission to file a belated notice of appeal which was granted. Notice of Appeal was filed on May 25, 2005.
>
> * * * *
>
> 11. On March 5, 2007, the petitioner filed a pro se petition for post-conviction relief alleging ineffective assistance of counsel. He parses the claim into three subcategories based on the type of counsel:

pretrial, trial and appellate counsel. Many claims raised in the petition were not ultimately briefed in petitioner's proposed findings of fact and conclusions of law. In addition, some issues were argued in petitioner's proposed findings of fact and conclusions of law despite having never been ple[]d in the petition for post-conviction relief. We address only those claims both ple[]d and briefed.

* * * *

15. The [post-conviction court] conducted evidentiary hearings on August 7 and 17, 2007, October 12 and 29, 2007, and November 15, 2007. The petitioner presented the testimony of Judge Salvador Vasquez, attorneys Jerry Jarrett and Charles Stewart, Detectives Brett Plemons and Ezequel Hinoj[o]sa and finally, Laowida Barge, his mother. Although the court subpoenaed attorney White-Silvera and she did appear, the defendant did not call upon her to testify. The court also took judicial notice of the trial and post-conviction files herein and obtained the record of proceedings from the clerk of the Indiana Court of Appeals for use in ruling upon the petition.

16. Over the course of the five evidentiary settings, a great deal of testimonial evidence was presented; some of it relevant to claims before us, some not. Based upon the testimony of Judge Vasquez, we find the following. As counsel for Comer, Vasquez received one [S]tate's discovery response. He did not challenge probable cause because in his reasoned opinion there was probable cause for Comer's arrest. He did not file for a fast and speedy trial because Comer did not request it and Vasquez did not believe it was in Comer's best interests to do so. Although he cannot remember specifically what triggered the filing of a motion for determination of competency, Vasquez indicated that he would have seen Comer and observed something in that meeting that effected the filing. He conducted all necessary investigation and filed all appropriate motions he deemed necessary within the short amount of time he represented Comer, his pleadings included a Notice of Defense of Mental Disease or Defect and the previously discussed Motion to Determine Competence to Stand Trial. Vasquez received no DNA evidence during his three-month tenure as counsel. Upon withdrawing his appearance he turned all discovery materials over to successor counsel, Kelly White-Silvera.

17. Concerning the allegations of trial counsel ineffectiveness, we find that Jarrett had a definite theory and strategy concerning the case. His

theory was actual innocence which was supported by the fact that no evidence incriminating Comer was found at the crime scene when the body was initially discovered. Because evidence was found at the crime scene days after the initial search, Jarrett further theorized that the evidence had been planted and was insufficient to convict his client. His strategy was to attack the evidence as presented showing [its] insufficiency.

18. Jarrett presented his theory to the jury by using the State's evidence as it existed. The evidence included the following: Comer cooperated with law enforcement; he had no access to the apartment between the time that the body was found and the evidence was found; the apartment was unsecured after the initial search and entered by numerous people between the first and second searches thereby potentially contaminating any DNA that might be discovered. The sum of these facts, he urged the jury, was that the jury should not find the evidence credible.

19. Jarrett and Comer discussed the case many times and corresponded about it by letter. Jarrett told Comer's mother, who had in fact retained his services, that he had a case pending against him in federal court. Although the federal case was pending, it did not interfere with Jarrett's representation of Comer.

20. Jarrett does not recall whether he requested the 911 tape in discovery. We note that the court's trial file, of which we have taken judicial notice, contains an order of discovery. On February 13, 2003, the trial court ordered the parties to provide one another with pre-trial discovery including, "an itemized list and the opportunity to inspect any books, papers, documents, photographs or other tangible objects either party intends to use for impeachment or as evidence at hearings or at trial." The discovery order also instructed the exchange of "Any evidence which would tend to negate the guilt of the defendant, mitigate the degree of the offense, or reduce the punishment for the offense." Counsel recalls that the State, through [its] police agents, tried to obtain the 911 tape but [was] unsuccessful due to equipment failure. There was no evidence to suggest that the tape would have contained exculpatory evidence. Counsel's position was that the lack of the tape did not affect his strategy for the trial.

21. Counsel was aware of Frank Zyzanski's criminal history at the time of the trial. He believed that Zyzanski was attempting to get help for

himself when he provided information on Comer and counsel used this as evidence of bias at trial. (ROP, pp. 639-46).

22. Jarrett did not obtain a copy of a conversation between Bernie Carter and Ezequel Hinojosa because he did not think that conversation was relevant to the defense.

23. Jarrett did not object to having a detective sit at counsel table with the [S]tate during the trial because the law permits it.

24. Jarrett is not aware of any conflict of interest with witnesses the State used at the trial.

25. Jarrett has never taken any course in DNA analysis. He did not challenge the State's failure to produce DNA results. He reasoned that Comer's DNA would logically be found at the crime scene because Comer lived there when Anthony was killed. Therefore, the possible presence of Comer's DNA would not be inculpatory. For these reasons, Jarrett saw no need to move to suppress the items found in the apartment even though he recognized that they were seized without benefit of a search warrant.

26. Jarrett initially objected to the use of the term "blood spatter" to describe the spots on the wall of the crime scene. (ROP, p. 399)[.] He ultimately utilized the possibility that the spots were blood to his client's advantage. He pointed out to the jury the inconsistency between the bloody crime scene and his client's blood free appearance upon arrest. (ROP, pp. 1210-11)[.]

27. Jarrett did not move to suppress items of evidence because, as previously discussed, the evidence supported his theory of innocence and insufficiency. For example, Comer's clothes had no blood on them despite the bloodiness of the murder at issue. Therefore, counsel did not want to suppress the admission of Comer's clothes because the lack of blood supported his theory of actual innocence. The fact that the officers failed to properly secure the crime scene and failed to preserve the chair and the mattress buttressed his argument that the physical evidence was mismanaged. In addition, no evidence obtained from the mattress cuttings or contents of the chair incriminated Comer and therefore, counsel did not want [its] admission suppressed.

28. Jarrett cannot remember whether he objected to the admission of the hammer located in the apartment. However, he believed that the hammer would have been admitted despite an objection. The State had evidence that Comer told fellow Lake County Jail inmate Frank Zyzanski that he killed the victim but was so high he did not know if he stabbed her or beat her to death with a hammer.

29. Jarrett cannot recall whether he objected to the admission of the statement Comer made to Detective Hinojosa on February 2, 2003, but its admission did not undermine his theory of the case. He maintained that the Detective's sloppy investigative work, as shown by the failure to record the statement, buttressed the defense theory of innocence and investigative mismanagement.

30. Overall, Jarrett maintained that he was prepared for the trial. He investigated all witnesses and conducted all interviews he needed to represent the petitioner.

31. Concerning appellate counsel Charles Stewart the petitioner contends that the discarded mattress and chair were potentially exculpatory and their destruction or loss proof of a due process violation. He asserts that Stewart should have raised this issue on direct appeal because it was a stronger claim than the one pursued. Charles Stewart viewed the evidence, or lack thereof, as supporting an insufficiency claim. He made a professional judgement based on the entire record of the case, his knowledge, education and experience gained during the course of thirty years as an attorney practicing criminal law that the best argument for the petitioner on appeal was insufficiency of the evidence.

(Appellant's App. pp. 324-331). Based on these findings, the post-conviction court concluded:

> [Comer] has failed to prove that he was denied the effective assistance of counsel. No evidence presented shows that the performances of Salvador Vasquez, Kelly White-Silvera, Jerry Jarrett, or Charles Stewart, fell below the norms of prevailing professional practice at the time of trial or appeal. Moreover, the petitioner has not demonstrated a reasonable probability that the outcome of the trial would have been different but for counsels' performance. [Comer] merely lists a litany of possible errors in the trial that he failed to raise on direct appeal and presents them as ineffective assistance of counsel claims.

(Appellant's App. p. 333). Accordingly, the post-conviction court denied Comer's petitioner for post-conviction relief.

Comer now appeals. Additional facts will be presented as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

Post-conviction hearings do not afford defendants the opportunity for a "super appeal." *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004). The petitioner has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *see also id.* Because Comer is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no way within the law that a post-conviction court could have denied his post-conviction relief petition. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

II. *Jury Irregularities*

a. *Excused Juror and Polled Responses*

Comer's first contention of jury irregularities is that a juror who had been excused, somehow rejoined the jury and was present when the jury was polled.[1] Additionally, Comer contends that his right to have twelve jurors was violated because upon polling the jury after it returned its verdict, the trial court only asked eleven jurors if they had voted for the tendered verdict.

We first note that Comer initially raises these claims as freestanding claims. If an issue was known and available but not raised on direct appeal, it is procedurally defaulted, and if it was raised on appeal, but decided adversely, it is *res judicata*. *Bunch v. State*, 778 1285, 1289 (Ind. 2002). As a general rule, most freestanding claims of error are not available in a post conviction proceeding because of the doctrines of waiver and *res judicata*. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). These issues were available on direct appeal, but were not pursued.

Additionally, Comer did not advance either of these contentions in his petition for post-conviction relief, and the State would have had no opportunity to prepare for these contentions at the post-conviction hearing. With sufficient notification of these contentions,

[1] The State assumes that Comer is confused because two separate prospective female jurors had the last name Webb, the juror who was dismissed, and another that was impaneled. However, we were unable confirm this explanation from the record that is before us.

the State may have been able to review the recording of Comer's trial or subpoena the jurors to rebut Comer's claims. Any issue not raised in a petition for post-conviction relief may not be raised for the first time on post-conviction appeal. Ind. Post-Conviction Rule 1(8); *Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001). Comer claims that his failure to present these contentions in his petition for post-conviction relief should be excused because he did not receive the *voir dire* transcript until thirteen days prior to the post-conviction hearing. The appropriate remedy for Comer would have been to move for a continuance. *See O'Connell v. State*, 742 N.E.2d 943, 948 (Ind. 2001) (Holding that when confronted with surprise evidence, the appropriate remedy is to move for a continuance, and failure to do so may waive any alleged error.). However, Comer does not contend that he attempted to postpone the hearing because he was not prepared. Therefore, Comer has waived these claims.

b. *Improper Voir Dire*

Comer next argues that his counsel engaged in improper *voir dire* with the prospective jurors. Again, Comer raises this claim initially as a freestanding claim, and this claim was available when Comer's direct appeal performed, but was not pursued for one reason or another. Therefore, the claim is technically waived. *See Bunch*, 778 N.E.2d at 1289. But, because Comer raises this same claim under the guise of an ineffective assistance of counsel claim later in his brief, and he articulated this claim in his petition for post-conviction review, we will address the merits of the claim here.

Specifically, he contends that his counsel conveyed to the prospective jurors various legal theories and principles involved in the case—namely those related to drugs and

domestic violence. He cites to *Rieth-Riley Construction Co. v. McCarrell*, 163 Ind. App. 613, 325 N.E.2d 844 (1975), for the proposition that it is reversible error for parties to inform the prospective jurors of the various legal theories and principles involved in the case. In that case, Rieth-Riley complained of improper *voir dire* from McCarrell, specifically that the trial court "permitted McCarrell to indoctrinate the prospective jurors on the theory" at issue in the trial. *Id*. at 627, 325 N.E.2d at 853. We relied upon our supreme court's decision in *Robinson v. State*, 260 Ind. 517, 297 N.E.2d 409 (1973), which stated:

> We are aware of the practice, one of long standing in our courts, of lawyers trying their cases by their voir dire examination of the jury. It is so engrained in our state as to have become accepted as tactically proper and necessary. In no sense, however, does it coincide with fair trial standards, among the objects of which are to provide an impartial and unbiased jury capable of understanding in intelligently assessing the evidence. Much time and energy are consumed in interrogating not with a view towards culling prospective jurors because of bias or prejudice but to the end that bias and prejudice may be utilized to advantage and prospective jurors cultivated and conditioned, both consciously and subconsciously, to be receptive to the cause of the examiner. Many excellent lawyers genuinely believe that their case has been determined by the time the jury has been sworn, and they may well be correct. We think this practice is repugnant to the cause of justice and should terminate. We think also that this can be best accomplished by the trial judge's assumption of a more active role in the voir dire proceedings and by exercising, rather than abdicating, his broad discretionary power to restrict interrogation to that which is pertinent and proper for testing the capacity and competence of the jurors.
>
> It has been said that the ultimate function of voir dire is to explore the nuances of conscience to determine whether a prospective juror is able to participate fairly in the deliberations on the issue of guilt, confining his judgment to the facts as presented, and that the overall purpose of voir dire examination of jurors is to determine the real state of their minds so that a fair and impartial jury can be chosen.
>
> The extent to which a party may examine a prospective juror touching his qualifications to serve is not governed by fixed rules, but rests largely in the

> discretion of the trial court. It has been held to be improper to examine jurors as to how they would act or decide in certain contingencies or in case certain evidence should be developed on the trial.

Id. at 628, 325 N.E.2d at 853-54 (punctuation and citations omitted). We concluded that if Rieth-Riley had properly preserved the issue for appellate consideration it would have required reversal. *Id*. at 629, 325 N.E.2d at 854.

However, here, Comer argues that his own counsel engaged in this improperly advantageous form of *voir dire*. As such, the improper *voir dire* by his counsel would have been an undeserved benefit for Comer. Therefore, we conclude that Comer has failed to demonstrate that he was prejudiced by his counsel's *voir dire*.

III. *Assistance of Pre-Trial Counsel*

Comer contends that the post-conviction court erred when it found that his pre-trial counsel, first Salvador Vasquez (Vasquez) and then subsequently Kelly White-Silvera (White-Silvera), were not ineffective. Specifically, Comer contends that his pre-trial counsel was ineffective for: (a) failing to file a motion to dismiss the charges for lack of probable cause; (b) failing to move for a fast and speedy trial pursuant to Ind. Criminal Rule 4(B); and (c) failing to perform certain investigations that could have led to the suppression of certain evidence.

To establish a violation of the right to effective counsel as guaranteed by the Sixth Amendment, petitioners typically must establish both prongs of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*, namely that counsel performed deficiently and the deficiency resulted in prejudice. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008).

This is true for both claims of ineffective assistance of trial and appellate counsel. *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997). The defendant must prove (1) his or her counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's failure to meet prevailing professional norms, the result of the proceeding would have been different. *Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *reh'g denied, trans. denied* (citing *Strickland*, 466 U.S. at 690). Because all criminal defense attorneys will not agree on the most effective way to represent a client, "isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Bieghler*, 690 N.E.2d at 199. Thus, there is a strong presumption that counsel rendered adequate assistance and used professional judgment. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id*.

a. *Failing to Move to Dismiss Charges*

As for Comer's first contention that pre-trial counsel was ineffective, he simply states that as of the time he was arrested and initially held there was "no warrant, no probable cause and no DNA or physical evidence that linked Comer to the death." (Appellant's Br. p. 57). Comer's characterization is not accurate. The probable cause affidavit was filed on February 11, 2003. By Comer's own contention, the hammer with blood on it and bloody clothes were found by investigators on February 10, 2003. Therefore, the State did have physical evidence prior to alleging it had probable cause to arrest and charge Comer.

Moreover, Comer does not address the contentions of the probable cause affidavit or make argument as to why these allegations do not rise to the level of probable cause. Rather, his argument is that much of the evidence used to convict him had not been discovered at the time he was arrested for the murder. Simply stating that the State presented more or stronger evidence at trial to convict than it had used to allege probable cause does not prove that probable cause to arrest was lacking. "Probable cause adequate to support a warrantless arrest exists when, at the time of the arrest, the officer has knowledge of facts and circumstances that would warrant a person of reasonable caution to believe that the suspect committed a [felony]." *Ware v. State*, 859 N.E.2d 708, 720 (Ind. Ct. App. 2007), *reh'g denied, trans. denied*. The evidence necessary to meet the probable cause requirement for a warrantless arrest is determined on a case-by-case basis, and is less than the level of proof necessary to establish guilt beyond a reasonable doubt. *Id*. Furthermore, Vasquez testified at Comer's post-conviction hearings that he believed the State had probable cause to hold and charge Comer, and Comer did not examine White-Silvera to obtain her testimony on this point. For all of these reasons, we conclude that Comer's pre-trial counsel was not ineffective by not filing a motion to dismiss for lack of probable cause.

b. *Failing to Move for Fast and Speedy Trial*

Comer next contends that his pre-trial counsel was ineffective for failing to file a motion for a speedy trial. However, Comer has not alleged that he requested a speedy trial, and Vasquez testified at the post-conviction hearing that he did not think a speedy trial was in Comer's best interest. Comer has not presented any contention that a speedy trial would

have altered the outcome of his trial. Therefore, we conclude that Comer's counsel was not ineffective for not filing a motion for a speedy trial.

c. *Failing to File a Motion to Suppress*

Comer contends that if his pre-trial counsel had filed a motion to suppress evidence, it would have been granted because: (1) he was interrogated and his mouth was swabbed for a DNA sample while being held without probable cause; and (2) when officers found certain evidence in Comer's apartment on February 10, 2003, they were present in the apartment without a warrant. As for Vasquez, he represented Comer for a short period of time and Comer has not even alleged that Vasquez was aware of what evidence the State intended to use at trial, let alone provided proof that Vasquez would have become aware of a basis to file a motion to suppress during his short tenure as Comer's counsel. As for counsel White-Silvera, Comer did not call her to testify. Therefore our strong presumption that counsel rendered adequate assistance and used professional judgment prevents us from concluding she was ineffective for not filing a motion to suppress. *See Timberlake*, 753 N.E.2d at 603.

IV. *Assistance of Trial Counsel*

Comer argues that his trial counsel was ineffective because: (a) trial counsel had a criminal charge pending against him at the time of Comer's trial; (b) trial counsel conceded Comer's guilt; (c) trial counsel failed to file a motion to dismiss because the State had lost a crucial piece of evidence; (d) trial counsel failed to move to dismiss because of a fatal variance; (e) trial counsel did not move to continue the trial due to certain discovery shared by the State; (f) trial counsel failed to object to the admission of certain prejudicial evidence;

and (g) trial counsel failed to file a motion to suppress evidence that was the product of Comer's illegal detention without probable cause.

a. *Trial Counsel's Pending Criminal Matter*

Comer contends that because his trial counsel was facing a criminal charge in federal court and representing himself *pro se* at the time that he represented Comer, his trial counsel had a conflict of interest, which impeded his ability to represent Comer. Essentially, Comer's claim is that because his attorney had an important matter pressing in his own life, that matter conflicted with a single-minded representation of Comer's interests.

Comer cites two United States Supreme Court decisions for support: *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333 (1980) and *Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 67 L.Ed.2d 220 (1981). In *Cuyler*, two privately hired attorneys jointly represented three men charged with the same murder. *Cuyler*, 446 U.S. at 338, 100 S. Ct. at 1712. In addressing potential ineffective assistance due to conflicts arising from multiple representation, the Court determined that the Sixth Amendment to the United States Constitution protects defendants who hire attorneys as well as those who are represented by court appointed attorneys. *Id*. at 344, 100 S. Ct. at 1716. In *Wood*, an attorney represented three employees convicted of distributing obscene materials on behalf of their employer and the attorney was an agent of the employer. *Wood*, 450 U.S. at 266-67, 101 S. Ct. at 1101. The employer had paid legal expenses on behalf of the employees, but did not pay certain fines that the employees were unable to pay, and the employer had an interest in determining whether equal protection would protect the employees from being jailed for not paying those

fines. *Id*. Because of the possibility that the attorney was influenced by the employer's interest, the Court remanded for a consideration of a possible conflict of interest with instructions to hold a new hearing if one was found. *Wood*, 450 U.S. at 273-73, 101 S. Ct. at 1104.

"Conflict of interest" has been defined as: "A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent." BLACK'S LAW DICTIONARY, 295 (7TH Ed. 1999). However, Comer has not presented any allegation of multiple-representation on the part of his counsel. Comer does not allege that the criminal matter facing his trial counsel had anything to do with Comer or the charges he was facing. The cases that Comer has cited do nothing to further his contention that his trial counsel's important personal matter distracted him from representing Comer effectively. Therefore, we conclude Comer has failed to present a viable claim of conflict of interest that warrants post-conviction relief.

b. *Comer's Contention that Trial counsel Conceded His Guilt*

On this point, Comer first argues that his trial counsel conceded his guilt during jury selection by stating that the jury must presume that Comer was "not guilty or innocent." (Appellant's App. p. 486). Comer seems to suggest that in this statement by trial counsel, the word "not" is modifying both the words guilty and innocent. However, Comer's trial counsel was informing the jury that "not guilty" is akin to what they may understand as the concept of innocence.

Further, Comer contends that the following colloquy, wherein his trial counsel cross-examined Assistant Chief Hinojosa (Hinojosa) of the Hammond Police Department, was a concession by his trial counsel of his guilt:

Trial counsel:	Did an interview ensue of Mr. Comer at that time?
Hinojosa:	No.
Trial counsel:	And why not?
Hinojosa:	He advised that he did not want to speak without an attorney.
Trial counsel:	And I assume that's a right he has?
Hinojosa:	Absolutely.

(Trial Tr. p. 731). Essentially, Comer asserts a *Doyle* violation. *See Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976). "In *Doyle*, the United States Supreme Court held that using a defendant's post-arrest, post-*Miranda* silence to impeach an exculpatory story told for the first time at trial violated the defendant's due process rights." *Teague v. State*, 891 N.E.2d 1121, 1125 (Ind. Ct. App. 2008). Although the information that Comer asked that he be permitted to speak to an attorney prior to being interviewed came out during Assistant Chief Hinojosa's testimony, the jury was clearly informed that this was a right of Comer's, and this information was not used to impeach Comer's defense at any time.

For both of these reasons, we conclude that Comer has not proved that his trial counsel conceded his guilt at any time; nor has Comer shown that a *Doyle* violation occurred. Thus, Comer has not proven any deficient performance by his trial counsel for either reason.

c. *Lost Evidence*

Comer argues that his trial counsel was ineffective for failing to file a motion to dismiss due to the fact that the State had lost evidence, which Comer alleges had exculpatory value. Specifically, Comer contends that the State did not preserve the chair in which the murder weapon and bloody clothes were found. Comer contends that the chair would have proven his innocence because the jury would have determined that all of the items investigators said they found inside of the chair could not have been concealed inside the chair if the jury had viewed the chair.

When the State has, in bad faith, failed to preserve potentially exculpatory evidence, the State deprives the defendant of due process. *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S. Ct. 333, 337, 102 L.Ed.2d 281 (1988), *reh'g denied*. However, we need not evaluate whether the State acted in bad faith by not preserving the chair because Comer's argument fails in its primary assertion. The State entered into evidence photographs of the chair with the items the State's witnesses testified were found inside. (*See* Exhibits 18, 20, and 21). From these photographs the jury had ample opportunity to determine whether the clothes and murder weapon would have fit inside as the investigators had testified. Thus, we conclude that Comer has not proven any prejudice from the loss of the chair prior to trial.

d. *Fatal Variance*

Comer argues that there was a fatal variance between the charging Information and the evidence that was presented against him at trial. Specifically, Comer contends that his trial counsel should have moved to dismiss the case because the Certificate of Death concluded

that the victim died from strangulation, but Comer was prosecuted for killing the victim with "blunt force." (Appellant's Br. p. 68).

We most recently described variances in *Reinhart v. State*, 881 N.E.2d 15, 16 (Ind. Ct. App. 2008), by stating:

> A variance is an essential difference between proof and pleading. Not all variances, however, require reversal and as a general proposition, failure to make a specific objection at trial waives any material variance issue. Nevertheless, a variance is deemed fatal if the defendant is misled by the charge in the preparation and maintenance of his defense, [and if he was] harmed or prejudiced thereby.

(Citations omitted).

That being said, Comer's brief does not accurately depict the charging Information or the Certificate of Death. Comer was charged and convicted of killing the victim "by means of a hammer." (Appellant's Direct Appeal App. p. 10). The Certificate of Death states the cause of death as being: "Extensive fracture of skull *and* strangulation of neck." (Appellant's PCR App. p. 492) (emphasis added). Moreover, Comer's argument fails to acknowledge that the Certificate of Death was not the only evidence submitted which supports the jury's conclusion that Comer killed the victim by means of a hammer. Testimony and photographs were submitted to the jury as well. For both of these reasons, we conclude that there was no fatal variance between the charging Information and evidence submitted to convict Comer, and, therefore, his trial counsel could not have been ineffective by not moving to dismiss for that reason.

e. *Continuance*

Comer argues that his trial counsel provided ineffective assistance of counsel because he did not move for a continuance after the State shared discovery five weeks before trial. However, Comer presented no evidence to the post-conviction court that his trial counsel was unprepared to go to trial due to the State's sharing of this information or evidence. Therefore, Comer did not prove that his trial counsel's failure to move for a continuance was a deficiency in any way.

f. *No Objection to the Admission of Evidence*

Comer argues that his trial counsel provided ineffective assistance of counsel because he did not object to the admission of photographs of spots on the wall, a bath towel and other items found inside a brown bag, and the hammer which the State proved to be the murder weapon. When an ineffective assistance of counsel claim is based on a failure to object to the admission of evidence, the appellant must first demonstrate that the objection would have been sustained had defense counsel objected at trial. *Culver v. State*, 727 N.E.2d 1062, 1066 (Ind. 2000), *reh'g denied*.

First, Comer contends that if an objection to the hammer had been lodged, it would have been sustained because the State had not proved that the hammer was the murder weapon. We disagree. The hammer was found hidden inside a chair in the room where the victim was murdered with blood on it. Due to large gashes in the victim's head, even a lay witness could tell that the victim had obviously been bludgeoned with an object like a

hammer. This evidence alone would be sufficient to support a trial court's decision to admit the hammer as evidence.

Additionally, Comer contends that if an objection would have been made to State's Exhibit 111, a photograph of a bath towel and other items found inside a paper bag, the objection would have been sustained because Detective Wendy Jo Gardner (Detective Gardner) had testified that the bag was found on a chair in the kitchen, as opposed to inside the chair in the living room. Comer is correct that Detective Gardner testified that the brown bag was found on a chair in the kitchen, but he has not cited to any place in the record where conflicting evidence stated the items depicted in State's Exhibit 111 were found inside a chair in the living room. To the contrary, State's Exhibits 123 through 130 were photographs of the items that were found inside of the chair in the living room. (Trial Tr. pp. 522-30). Thus, Comer has not presented us with grounds for an objection to State's Exhibit 111, or, for that matter, that such an objection would have been sustained.

Furthermore, Comer's trial counsel testified at the PCR hearing that one of his strategies at trial was to permit the State to depict a gory murder scene and then highlight the fact that Comer had no blood on him or his clothes when he interacted with the police the same day that the crime occurred. Therefore, his trial counsel's decision not to object to the admission of the photographs of spots on the wall was consistent with his strategy and not deficient in any way. Moreover, Comer only complains that the photographs would lead the jury to conclude that the victim was injured by blows to the head that caused blood to splatter. Other photographs of the victim alone would lead the jury to conclude this same

fact, and Comer does not challenge the admissibility of the photographs of the mutilated victim. Therefore, Comer has not demonstrated any prejudice suffered by the admission of the photographs of the spots on the walls.

g. *Motion to Suppress*

Comer argues that his trial counsel was ineffective for failing to file a motion to suppress evidence that was the product of what he characterizes as his unlawful detention. Specifically, Comer contends that his trial counsel should have moved to suppress the testimony from his two fellow inmates who testified that Comer shared details about the murder with them.

To support his contentions, Comer "cherry-picks" a statement elicited from Detective Brett Plemons that on February 10, 2003, the State did not have any DNA or physical evidence linking Comer to the murder. However, it was that same day that investigators found the evidence concealed inside the chair in the living room, and then on February 11, 2003, the State submitted the affidavit of probable cause and charged Comer with the murder. It is apparent that Detective Plemons was testifying that prior to finding the evidence concealed inside of the chair in the living room, the State did not have any physical evidence linking Comer to the murder. Therefore, Comer has not proven that he was unlawfully detained, and, consequently, has not proven that his trial counsel's performance was deficient in any way for not having filed a motion to suppress evidence that was the product of Comer's detention.

V. *Assistance of Appellate Counsel*

Comer contends that his appellate counsel was ineffective by: (a) denying Comer access to his appeal; (b) failing to raise all issues; and (c) failing to present issues completely. The standard of review for claims of ineffective assistance of appellate counsel is the same as for trial counsel. *Allen v. State*, 749 N.E.2d 1158, 1166 (Ind. 2001). Indiana courts recognize three basic categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal; (2) failing to raise an issue on appeal; and (3) failing to present an issue completely and effectively. *Bieghler v. State*, 690 N.E.2d 188, 193-95 (Ind. 1997).

a. *Comer's Access to His Appeal*

Comer argues that his appellate counsel denied him "access to his appeal." (Appellant's Br. p. 106). Specifically, Comer's contention is that he wrote his appellate counsel and his mother called his appellate counsel several times, but the attorney never sent any return correspondence, returned any phone calls, or saw Comer in jail. During the post-conviction hearing, Comer's appellate counsel stated frankly that it is not his general practice to return letters, phone calls, or consult with the appellants of the criminal appeals he works on; however, he does encourage clients to send letters relaying their concerns and suggestions.

In making his argument, Comer cites to *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000) and contends that the Court held "that there is a constitutionally imposed duty on an attorney to consult with a defendant about his appeal." (Appellant's Br. p. 106). To the contrary, the Court stated in *Roe*:

> And, while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices. We cannot say, as a *constitutional* matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient. Such a holding would be inconsistent with both our decision in *Strickland* and common sense.

Id. at 479, 120 S. Ct. at 1036 (citations omitted). Comer has not cited to, nor have we found, any specific Indiana rule requiring appellate attorneys to consult with clients in order to provide effective assistance on appeal.

Moreover, Comer's argument has misinterpreted what "access to appeal" means in Indiana law. A denial of access to appeal "occurs when counsel's nonfeasance or malfeasance acts to deprive the appellant entirely of his right to review." *Bieghler*, 690 N.E.2d at 193. Comer's appellate counsel perfected an appeal on his behalf, and we conducted a review of the sufficiency of the evidence presented to convict him. Therefore, Comer has not been denied access to an appeal.

b. *Waiver of Issues*

Comer argues that his appellate counsel was ineffective for failing to raise certain issues: (1) that Comer's due process rights were violated by only eleven jurors responding when polled on the verdict; (2) that a juror who had been excused was permitted to rejoin the jury and help decide the verdict of the jury; (3) that relatives were permitted to serve on his jury panel; (4) that Comer's due process rights were violated by the State losing the chair in which the murder weapon and other evidence was concealed; and (5) that Comer's trial

counsel had engaged in improper *voir dire* by educating the jury on the various legal issues of the case.

Ineffectiveness is very rarely found in cases were the petitioner had a direct appeal, but contends other issues should have been raised. *Bieghler*, 690 N.E.2d at 193. One reason is that the decision of what issues to raise is one of the most important strategic decisions made by appellate counsel. *Id*. Experienced advocates emphasize the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues. *Id*. at 194. As such, in order to succeed on a claim that appellate counsel was ineffective for failing to raise certain issues, the post-conviction petitioner must show that the ignored issues were clearly stronger than the issue presented. *Id*.

However, here we need not determine whether the issues Comer now contends his appellate counsel should have raised were stronger than the issue raised. As we have already discussed, Comer did not raise issues of juror irregularities (issues number 1 through 3) in his petition for post-conviction review. Therefore, Comer has waived review of those claims. *See* Ind. Post-Conviction Rule 1(8); *see also Allen*, 749 N.E.2d at 1171 (Ind. 2001). Further, we have already addressed the merits of the Comer's claims that his due process rights were violated by the State losing the chair that concealed the murder weapon and that his counsel engaged in improper *voir dire*. For the same reasons discussed above, neither of these issues would have resulted in relief for Comer on direct appeal, and therefore, Comer's appellate counsel could not have been ineffective by not raising them on appeal.

c. *Failing to Raise Issues Completely*

Finally, Comer argues that his appellate counsel was ineffective for failing to completely challenge the sufficiency of the evidence on appeal. Specifically, Comer contends that his appellate counsel should have argued that there was not sufficient evidence to prove the elements of knowledge or intent.

Comer is correct in asserting that in order to prove that he committed murder, the State was required to prove not only that Comer killed the victim, but that he did it knowingly or intentionally. *See* I.C. § 35-42-1-1. But Comer does not argue how the evidence submitted by the State was insufficient to prove that the killing of the victim was knowing or intentional, which he must do in order to demonstrate prejudice. Thus, Comer has not proven that his appellate counsel was ineffective by failing to challenge the sufficiency of the State's evidence to prove the elements of knowledge or intent.

VI. *Post-Conviction Court's Failure to Address Contentions*

Finally, Comer contends that the post-conviction court erred by failing to address four of his contentions raised in his petition for post-conviction relief. One of the contentions is that his trial counsel was ineffective during *voir dire* by giving the jury legal theories and principles involved in the case, and we have already rejected this contention above.

Comer also contends two other errors occurred during *voir dire*. First, that his counsel failed to object to the State's "educating of the jury trying the case and seeking to convince the jury on factors other [than] guilt." (Appellant's Br. p. 122). Second, Comer contends that "Counsel was ineffective during . . . the *voir dire* examination when one potential juror

asked . . . [‘]Is this [d]omestic [v]iolence[?’ and] Counsel blurted out [‘]It’s possible![’].” (Appellant’s Br. p. 122). Although Comer presented sections of the *voir dire* transcript in his Appendix to address other contentions, he has not presented us with the *voir dire* transcript, especially the necessary sections to review these two contentions. Comer merely cites to his own petition for post-conviction review and his proposed findings of facts and conclusions of law. Comer’s personal account of what happened in these two instances is not sufficient for us to review his contentions, and therefore they are waived. *See* Ind. Appellate Rule 46(A)(8)(a) (“Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on.”).

Comer’s last contention is that his counsel was ineffective for failing to obtain photos from an ATM machine located at a bowling alley, but Comer did not present any evidence that those photos would have had any bearing on the outcome of his trial. Therefore, Comer has not proved any prejudice from his counsel’s failure to obtain these photos.

CONCLUSION

Based on the foregoing, we conclude that Comer has not proven that the post-conviction court erred in any way.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.