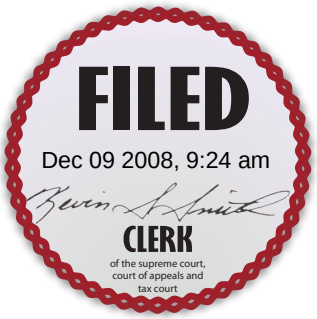

PRO SE APPELLANT:

ALLEN SLUSSER, JR.
Pendleton, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

ALLEN SLUSSER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 91A04-0806-PC-376
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Rex W. Kepner, Judge
The Honorable Robert W. Roth, Senior Judge
Cause No. 91D01-9506-CF-80

December 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Allen Slusser Jr. was convicted of attempted murder for shooting James Haas. Following his conviction for Class A felony attempted murder, Slusser filed a petition for post-conviction relief, which was denied. On appeal of this denial, he contends that his trial counsel was ineffective for failing to properly advise Slusser regarding a possible lesser-included offense instruction, failing to investigate the forensics behind the constitution and trajectory of the bullet that struck Haas, and failing to object to prosecutorial misconduct. He also contends that his appellate counsel, who was the same as his trial counsel, was ineffective for failing to admit to these alleged trial errors or challenge Slusser's sentence. Because Slusser suffered no prejudice from any of the errors he alleges, both ineffectiveness claims fail. We therefore affirm the post-conviction court.

Facts and Procedural History

The following facts are taken from this Court's unpublished memorandum decision in Slusser's direct appeal of his conviction for Class A felony attempted murder:[1]

> The facts favorable to the judgment are that at approximately noon on June 2, 1995, [Kevin] Regan, accompanied by Slusser, drove his El Camino to Brando's Tavern in Monticello. The car was parked in the parking lot behind the back door of the bar. Slusser and Regan drank steadily all day and into the evening. The owner of Brando's, James Haas, was tending bar that day. At approximately 10:00 p.m. that evening, Regan and Haas argued about how much money Regan had given Haas when paying the bar tab. Regan insisted that he had given Haas a $100 bill, while Haas maintained he received a $20 bill. Slusser told Regan the bill was a $20 and both men left the bar. Once outside, Regan re-entered the bar to

[1] Ind. Code §§ 35-42-1-1(1); 35-41-5-1.

> apologize to Haas. Regan exited, than re-entered the bar and resumed the dispute. Regan stated that if he did not receive more money from Haas, everyone in the bar would be shot and Slusser would "shoot [Haas] right where [he stood]." Further, Regan stated that everyone in the bar would be killed if anyone came near Regan.
>
> At this point, Haas escorted Regan to the back door, shoved him out the door, and both men fell on the ground. When Haas began to return to the bar, he was shot in the back with a 30-30 caliber rifle. The bullet exited Haas and became embedded in an interior wall of the tavern. The 30-30 caliber bullet was recovered and positively identified as having been fired from a 30-30 rifle which belonged to Slusser.[2]
>
> Amanda Batts observed Slusser near the back door of the bar approximately five to ten seconds after hearing the gunshot. Batts and Jack Judd saw Slusser drag Regan, who was unconscious, to the El Camino and drive away. Later that night, police obtained a search warrant for Regan's house and car. Regan informed the police that Slusser's 30-30 caliber rifle and brown leather case were in the El Camino. Upon searching the El Camino, police found three 44-40 caliber casings and one 30-30 caliber casing. An officer noticed, while searching Regan's premise[s], that Slusser's car was parked in the front yard. The police did not have a search warrant for Slusser's car, but looked into Slusser's car window with a flashlight and saw, in plain view, a portion of a brown leather rifle case identical to the one Regan described. The officer obtained a search warrant for Slusser's car and seized the case and the rifle, which was in the case. The rifle, capable of holding six cartridges in the magazine and one cartridge in the chamber, contained six live rounds.
>
> Regan and Slusser were arrested after the warrants were executed. During jail procedures, a live 30-30 caliber shell was found in Slusser's pants pocket. Regan called Curtis Pallidino from jail and stated that "he had done it protecting his little buddy." Although Regan did not identify who "he" was, Pallidino assumed that Regan was referring to Slusser.

Slusser v. State, No. 91A02-9606-CR-385, slip op. at 2-4 (Ind. Ct. App. June 20, 1997) (internal citations and footnote omitted), *trans. denied*; Appellant's App. p. 66-68.

The State charged Slusser with Class A felony attempted murder. At trial, two of the bar's patrons the night of the shooting testified about statements Regan had made before the shooting. Dale Tarter testified that Regan had said that "if you don't leave me

[2] Although forensic examiners determined that the bullet was fired from Slusser's rifle, there was not a sufficient quantity of DNA on the sample for analysis.

alone . . . my buddy will come in here and kill every mother f'er in here." Trial Record p. 217. Richard Bookwalter testified that Regan had said that if Haas didn't give Regan a $100 bill "then he would get shot and everybody in the place was getting shot." *Id.* at 195. The State, after granting him use immunity, also called Regan himself to the stand to testify. Regan responded to many of the questions asked of him that he did not remember the events on the evening of the shooting.

After the conclusion of the presentation of the evidence, the trial court asked Slusser's counsel if Slusser wished for a jury instruction on the lesser-included offense of attempted aggravated battery. Slusser's defense counsel responded that he had discussed with Slusser the possibility of a lesser-included offense instruction, and Slusser had refused the instruction. The jury convicted Slusser of attempted murder. In sentencing Slusser, the trial court identified four aggravating circumstances: (1) Slusser's prior adult criminal history, which included two felony convictions and five misdemeanor convictions; (2) the high risk that Slusser would commit other crimes; (3) the serious physical and emotional harm to Haas; and (4) that imposition of less than the maximum sentence would depreciate the seriousness of the crime. *Id.* at 131. The trial court found no mitigating circumstances. On April 9, 1996, the trial court sentenced Slusser to forty-five years, the maximum term for a Class A felony at that time, executed in the Indiana Department of Correction.

Slusser appealed his conviction on the grounds that the trial court erroneously admitted hearsay statements previously made by Regan, that the trial court abused its discretion by admitting into evidence the rifle and case, and that the evidence was

insufficient to support his conviction. On his direct appeal, this Court affirmed his conviction, and our Supreme Court denied transfer.

Slusser, *pro se*, filed a post-conviction relief petition on March 23, 1998. On September 17, 2001, Slusser, now by counsel, filed an amended petition. After the State answered, the post-conviction court held an evidentiary hearing. Slusser's counsel withdrew from his case in 2001. Slusser obtained new counsel in 2002, and the post-conviction court held another evidentiary hearing in 2005. On July 24, 2007, Slusser filed a motion seeking leave to amend his post-conviction relief petition to add a claim of ineffective assistance of appellate counsel for the failure to appeal his sentence. The post-conviction court considered both the petition and the amended petition and denied both on May 19, 2008. Slusser now appeals.

Discussion and Decision

Slusser contends that the post-conviction court erred in denying his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id*. To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id*. at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal

conclusions, "'[a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.'" *Id*. (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g denied*).

On appeal, Slusser alleges both trial and appellate counsel ineffectiveness. We review the effectiveness of trial and appellate counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh'g denied*. A claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome." *Id*. (quoting *Strickland*, 466 U.S. at 694). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

I. Trial Counsel

Slusser first argues that his trial counsel was ineffective for failing to properly advise him regarding a possible lesser-included offense instruction, failing to investigate the forensics behind the bullet's constitution and trajectory, and failing to object to prosecutorial misconduct.

A. Lesser Included Offense Instruction

In the section of his brief titled "Statement of the Issue," Slusser argues that at issue is "[w]hether Appellant-Petitioner was denied his state and federal constitutional right to effective assistance of counsel because trial counsel failed to object to [in]appropriate instructions, and failed to allow a lesser-included offense of aggravated battery." Appellant's Br. p. 6. In his Argument section, Slusser states that "[he] has proven by a preponderance of the evidence that the trial counsel was ineffective for not properly informing Slusser as to the lesser included offense instruction leading to Slusser refusing the instruction when the instruction was available . . . ." *Id.* at 22. However, Slusser fails to provide any record citations or authority for this argument. Slusser has thus failed to make a cogent argument in this regard and has waived the issue on appeal. *See* Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning."); *Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005) (holding that failure to develop a cogent argument waives the issue for appellate review), *trans. denied.*

B. Failure to Investigate

Slusser alleges in his "Summary of Argument" that his trial counsel was ineffective for failing to investigate the chain of custody of the bullet or bullet fragments, to object to the chain of custody, to investigate and demonstrate that no DNA evidence was recovered from the bullet that allegedly struck Haas and pierced the wall, to weigh the bullet fragments removed from the victim and the wall and compare them to an unfired bullet, and to investigate the angles and ballistics regarding from where the shot

was fired and where it traveled. In the Argument section itself, Slusser argues only that "[t]he failure of trial counsel to properly investigate and call a witness as to the proposed trajectory of the bullet according to the State, and the bullet and fragments clearly prejudiced Slusser." Appellant's Br. p. 14.

Slusser must identify what additional information would have been discovered and how he was prejudiced by the absence of this information. *Williams v. State*, 771 N.E.2d 70, 74 (Ind. 2002). However, Slusser does not allege what information these proposed investigations would have uncovered, much less how the absence of this information impaired his case. Thus, this allegation of ineffective assistance of trial counsel fails.

C. Prosecutorial Misconduct

Slusser argues that his trial counsel erred by failing to raise the issue of prosecutorial misconduct. Slusser alleges that the prosecutor at his trial committed misconduct by calling witnesses to the stand to testify regarding Regan's statements. Specifically, Slusser argues that the prosecutor planned to use these witnesses to introduce inadmissible hearsay evidence. Slusser also argues that the prosecutor violated his Sixth Amendment right to confrontation because "the State put[] Regan and others on the stand when the State knew [Regan] could not remember the events. . . ." Appellant's Br. p. 17.

1. Hearsay

Slusser alleges that the prosecutor committed misconduct, arguing that the State's "sole purpose for placing Mr. Regan on the stand was to be able to enter in Mr. Regan's previous statements which were inadmissible unless Mr. Regan testified." Appellant's

Reply Br. p. 4. Slusser is referring to the testimony of Tartar and Bookwalter regarding statements previously made by Regan that implicated Regan and Slusser.

Our Court has already addressed whether Slusser was prejudiced by the introduction of these hearsay statements at trial. On direct appeal, Slusser argued that the admission of these statements was reversible error. In its unpublished memorandum decision on Slusser's direct appeal, our Court agreed that the trial court erred by admitting testimony regarding Regan's previous statements but wrote that "[s]uch error is disregarded as harmless error, however, because it does not affect the substantial rights of Slusser in view of the strength of the evidence that supports the proposition that Slusser shot Haas." *Slusser*, No. 91A02-9606-CR-385, slip op. at 5; Appellant's App. p. 69.

"Although differently designated, an issue previously considered and determined in a defendant's direct appeal is barred for post-conviction review on grounds of prior adjudication—res judicata." *Overstreet v. State*, 877 N.E.2d 144, 150 n.2 (Ind. 2007) (citing *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006)). To succeed on his ineffective assistance of counsel claim in the instant appeal, Slusser must prove that he was prejudiced by defense counsel's failure to object or take corrective action after the introduction of the hearsay testimony. First, we note that Slusser's counsel *did* object at trial to the introduction of these hearsay statements. But more importantly, because it has already been determined that Slusser suffered no prejudice from the introduction of the hearsay statements, this issue is barred by the doctrine of res judicata regardless of how Slusser styles it.

2. Confrontation

Slusser argues that the "State and the Defense knew that Mr. Regan was going to claim memory loss and that he was highly intoxicated as he had been drinking all day."[3] Appellant's Reply Br. p. 4. According to Slusser, the prosecutor committed misconduct by placing Regan on the stand when he could not remember the shooting, violating Slusser's Sixth Amendment right of confrontation.

The right of confrontation is a fundamental right ensured by the Sixth Amendment. *Brady v. State*, 575 N.E.2d 981, 985 (Ind. 1991). The right is honored where the defense is given a full and fair opportunity to probe and expose testimonial infirmities through cross-examination. *Id.* (citing *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985)). The United States Supreme Court held in *United States v. Owens*, 484 U.S. 554, 558 (1988), that the Confrontation Clause is satisfied as long as the declarant testifies, even if the declarant is unable to recall the events in question. *Fowler v. State*, 829 N.E.2d 459, 466 (Ind. 2005), *reh'g denied*. "The feigned or real absence of memory is itself a factor for the trier of fact to establish, but does not render the witness unavailable." *Id.* Regan did respond to a number of questions regarding the shooting and the preceding events by asserting that he did not remember. But Regan, who was given use immunity so that he could testify freely,[4] was present and did not refuse to answer

[3] Slusser is referring to Regan's testimony that he had been drinking the day of the shooting. Regan did not testify that he had been drinking the day of the trial itself.

[4] Slusser also relies on *Tucker v. State*, 534 N.E.2d 1110 (Ind. 1989), for the proposition that the trial court erred in permitting a co-defendant who had been granted use immunity to testify. However, *Tucker* is inapposite because in that case all parties knew in advance that the witness would invoke the Fifth Amendment and the trial court refused to instruct the jury to disregard the event. Here, Regan did not invoke his Fifth Amendment privilege or otherwise refuse to testify, and Slusser has presented no evidence showing that he or the prosecutor knew Regan would testify that he did not remember the events in question. Thus, Slusser's argument in this regard is unavailing.

questions. Slusser had the opportunity to cross-examine Regan, and did so extensively. Thus, Slusser's Sixth Amendment right of confrontation was not violated. We cannot say that Slusser has demonstrated prosecutorial misconduct to which his counsel should have objected. Because Slusser has failed to show prejudice from any of the trial errors he alleges, Slusser has failed to show ineffective assistance of trial counsel.

II. Appellate Counsel

Slusser next argues that his appellate counsel, who was the same as his trial counsel, was ineffective for failing to admit to the errors he made at trial as alleged by Slusser above. Where we determine that a defendant did not receive ineffective assistance of trial counsel, the defendant "can neither show deficient performance nor resulting prejudice as a result of his appellate counsel's failure to raise [the] argument[s] on appeal." *Davis v. State*, 819 N.E.2d 863, 870 (Ind. Ct. App. 2004), *trans. denied*. Slusser's ineffective assistance of appellate counsel claim regarding the errors Slusser alleges above thus fails.

Slusser next contends that his appellate counsel was ineffective for failing to challenge his sentence.[5] Slusser argues that his appellate counsel was ineffective for failing to challenge the aggravators and mitigators found by the trial court. Slusser also argues that his appellate counsel was ineffective for failing to argue that his forty-five-

[5] To the extent Slusser argues that the sentencing issue is one of first impression before this Court, we note that freestanding claims of fundamental error are not available in post-conviction proceedings. *Taylor v. State*, 882 N.E.2d 777, 781 (Ind. Ct. App. 2008) (citing *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002)). In post-conviction proceedings, claims that are known and available at the time of direct appeal, but are not argued, are waived. *Id.* Thus, we focus on Slusser's argument that he received ineffective assistance of appellate counsel, which is available on post-conviction review. *See id.*

year sentence, the maximum[6] for a Class A felony, is manifestly unreasonable in light of the nature of the offense and his character.

A. Aggravators and Mitigators

Slusser argues that appellate counsel was ineffective for failing to object to the aggravators and mitigators found by the trial court. Slusser argues that the trial court improperly found all four aggravators: (1) Slusser's prior adult criminal history, which included two felony convictions and five misdemeanor convictions; (2) the high risk that Slusser would commit other crimes; (3) the serious physical and emotional harm to Haas; and (4) that imposition of less than the maximum sentence would depreciate the seriousness of the crime. Slusser also argues that the trial court failed to find several mitigators, including his military service, work history, and academic achievements.

If a trial court finds aggravating or mitigating circumstances that justify variance from the presumptive sentence, the record must disclose the court's reasons for selecting the imposed sentence. *Gregory v. State*, 644 N.E.2d 543, 545 (Ind. 1994), *reh'g denied*. A trial court must justify its enhancement of a sentence with more than a mere list of the aggravators. *Id.* The trial court must explain the reasoning and logic supporting the

[6] The parties disagree as to whether forty-five years was the maximum sentence for a Class A felony. A review of the legislative history for Indiana Code § 35-50-2-4, the Class A felony sentencing statute, reveals that in 1994 the statute was amended to change the maximum sentence from fifty years to forty-five years. *See* P.L. 164-1994 (eff. July 1, 1994). Thus, on June 2, 1995, the day of the shooting, the presumptive term for a Class A felony was twenty-five years and the maximum sentence was forty-five years. Ind. Code § 35-50-2-4 (1995). After the shooting but before Slusser's sentencing in 1996, the statute was amended again to change the presumptive term back to thirty years and the maximum back to fifty years. *See* P.L. 148-1995 (eff. July 1, 1995). However, because "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime," *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007), Slusser correctly asserts that he received the maximum sentence.

Additionally, in 2005, the Indiana General Assembly replaced the former presumptive sentencing scheme with the current advisory sentencing scheme. *See* P.L. 71-2005 (eff. Apr. 25, 2005). Because the presumptive scheme was in place at the time of the crime, we address Slusser's sentence under the former presumptive scheme. *Gutermuth*, 868 N.E.2d at 431 n.4.

sentence. *Id.* "The sentencing court should (1) identify the significant aggravators and mitigators, (2) relate the specific facts and reasons which lead the court to find those aggravators and mitigators, and (3) demonstrate that it has balanced the aggravators against the mitigators in reaching its sentence." *Id.*

However, Slusser, as the appellant, has the responsibility to present a sufficient record that supports his claim in order for this Court to conduct an intelligent review of the issues. *Titone v. State*, 882 N.E.2d 219, 220 (Ind. Ct. App. 2008). The Indiana Supreme Court has "held that without submitting a *complete* record of the issues for which an appellant claims error, the appellant waives the right to appellate review." *Miller v. State*, 753 N.E.2d 1284, 1287 (Ind. 2001) (emphasis added), *reh'g denied*; *see also Lightcap v. State*, 863 N.E.2d 907, 911 (Ind. Ct. App. 2007) (finding defendant's sufficiency of the evidence argument waived because he "failed to provide this court with a copy of the testimony and evidence presented at his criminal trial upon which the trial court based its decision to revoke his probation").

Here, the record shows that Slusser filed his Notice of Appeal on June 12, 2008. In the Notice of Appeal, Slusser asked the court reporter to assemble and transcribe the entire court record. However, Slusser has not provided us with either the pre-sentence investigation report or the transcript of the April 9, 1996, sentencing hearing. Slusser alleges in his brief that on June 25, 2008, he filed a motion specifically requesting the transcript of the sentencing hearing. No such motion appears before us. We note that in Slusser's Appellant's Case Summary, filed on July 2, 2008, he includes the sentencing

hearing in the list of hearings for which he requested transcripts. But listing a hearing in the case summary is not the same as filing a motion.

On July 29, 2008, the same day he filed his brief and appendix, Slusser filed a motion asking our Court to incorporate into the record on the instant appeal the entire record and transcript from all previous proceedings. Our Court granted this motion, but on August 18, 2008, Slusser filed another motion, asking our Court to compel the trial court to complete the transcript for a January 2008 post-conviction hearing because "[o]n August 12th, 2008 the appellant received the entire Record and Transcript except the transcription of the proceedings that took place on January 8th, 2008." Our Court denied this motion, noting that Slusser had already filed his brief and appendix and gave no explanation as to why he needed the transcript.

Slusser had the responsibility to ensure that the record supporting his sentencing claim, which included the transcript of the sentencing hearing and the pre-sentence investigation report, was complete or otherwise alert our Court to the absence of necessary parts of the record before he submitted his brief, and he failed to do so. Because Slusser has failed to include the pre-sentence investigation report and the transcript of the sentencing hearing, he has failed to demonstrate based on evidence in the record that the trial court improperly found the four aggravators and erroneously failed to find his suggested mitigators. Thus, Slusser has not shown prejudice and this ineffective assistance of appellate counsel claim fails.

B. Manifestly Unreasonable

Slusser argues that his appellate counsel was ineffective for failing to object to the reasonableness of his sentence. Slusser argues that his sentence is manifestly unreasonable[7] in light of the nature of his offense and his character. First, we note that at the time of Slusser's sentencing and at the time of his direct appeal, we reviewed sentences under the manifestly unreasonable standard, which provided that we could revise a sentence if we found it "manifestly unreasonable in light of the nature of the offense and the character of the offender." *Zenthofer v. State*, 613 N.E.2d 31, 35 (Ind. 1993); *Duncan v. State*, 862 N.E.2d 322, 324 n.3 (Ind. Ct. App. 2007), *trans. denied*; *see also* Ind. Appellate Rule 17(B) (1996).

A sentence is not manifestly unreasonable unless no reasonable person could find the sentence appropriate to the particular offense and offender for which it was imposed. *Scheckel v. State*, 655 N.E.2d 506, 511 (Ind. 1995). Under Article VII, Section 6 of the Indiana Constitution, we have the constitutional authority to review and revise sentences. However, our review is very deferential to the trial court. *Ketcham v. State*, 780 N.E.2d 1171, 1182 (Ind. Ct. App. 2003), *trans. denied*. Slusser carries the burden of demonstrating from the record that his sentence is manifestly unreasonable. *Perry v. State*, 447 N.E.2d 599, 601 (Ind. 1983).

Because Slusser has failed to provide this Court with the transcript of the sentencing hearing and the pre-sentence investigation report, we are unable to determine from the record before us whether Slusser's sentence is manifestly unreasonable. Slusser argues that his offense is not among the worst of its type and that his maximum

[7] Since the time of Slusser's crime, the rule has been amended so that relief is granted only if the sentence is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B) (eff. Jan. 1, 2003).

punishment does not fit his character and criminal history. However, we know nothing about the details of his offense as discussed by the trial court at sentencing and we know nothing from the record before us about the details of Slusser's criminal history and character. Thus, we cannot say that the sentence imposed by the trial court was manifestly unreasonable, nor can we point to any deficiency in counsel's performance in this regard. Thus, Slusser's claim of ineffectiveness of appellate counsel regarding sentencing fails. Because Regan cannot demonstrate prejudice from any of the errors he alleges, his ineffective assistance of appellate counsel claim fails.

The judgment of the post-conviction court is affirmed.

KIRSCH, J., and CRONE, J., concur.