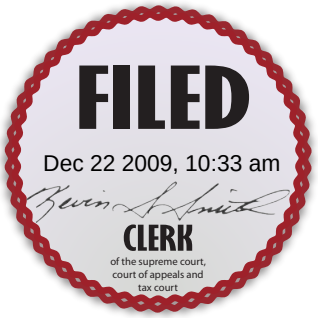

APPELLANT PRO SE:

ANTHONY BARNETT
Michigan City, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

ANTHONY BARNETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 22A01-0810-PC-505
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FLOYD SUPERIOR COURT
The Honorable J. Terrence Cody, Special Judge
Cause No. 22D01-0509-PC-2

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Anthony Barnett appeals the denial of his petition for post-conviction relief. Barnett alleges he received ineffective assistance from both trial and appellate counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

Cynthia Bogard quit working in 1996 to take care of David Carter, the father of one of her children. After David died, Bogard lived by herself and developed agoraphobia. Although she rarely left her home, in 2002 she met Jeanette Lewis on her way home from church. Lewis started bringing people to Bogard's house to smoke crack. Barnett and his brother, Herschel, were among the people who would use drugs at Bogard's house. On several occasions, Barnett brought along women who would have sex with him in exchange for drugs.

Bogard sometimes smoked crack as well, but primarily, she wanted company and "just went along with what they did." (Tr. at 50.) After a while, Bogard began to feel uncomfortable because she was no longer in control of her home. Several times, Bogard asked Barnett to stop coming over, but he laughed at her requests.

At the time, Barnett was divorced from his wife, Tonya, but they had begun living together again. On December 10, 2002, Bogard decided to call Tonya and tell her what Barnett was doing at her house in the hope that Tonya would stop it.

That day, Herschel and someone named David came over to Bogard's house. While Herschel and David were there, someone began banging on the door so hard "it sounded like the door was gonna come open." (*Id*. at 74.) Bogard "went to the door and I opened it up about this much, which is what I always do. I always look out the door

before I open the door. And when I did that I saw that it was [Barnett] and he took and he pushed the door open." (*Id*. at 75.) Bogard did not invite him in.

Barnett pushed Bogard down and started screaming that she had "ruined his life with his wife." (*Id*. at 78.) He said he had brought Rodney McNeary and "some girl from California" to help beat her up, and he also said he had a gun in the car that he always carried with him. (*Id*. at 78.) He stomped on Bogard with his heel and threatened to kill her if she did not call Tonya and recant. Herschel intervened, saying "she's an old lady, you're going to hurt her." (*Id*.)

Barnett got the phone, dialed Tonya's number, and had Bogard talk to her. Bogard took the phone onto the back porch. Bogard told Tonya that Barnett was there and that he wanted her to say she had lied.

After speaking to Tonya, Bogard fled to her neighbor's house. Erin Rissler let her in, and Rissler's mother called the police. Bogard had a knot on her head that was bleeding, and her shoulder hurt. She had bruises on her shoulder, chest, and head. Dr. William Smock testified that one of the bruises on her chest near her shoulder was a pattern injury caused by the heel of a shoe. According to Dr. Smock, it takes "a hell of a lot of force" to cause a pattern injury, and falling against the edge of a table would not involve sufficient force to create a pattern injury. (*Id*. at 386.) Dr. Smock testified the injury was consistent with Bogard's account of the attack.

Barnett was initially charged with Class C felony battery.[1] An amendment to the information added an habitual offender charge,[2] and a second amendment added charges of Class A felony burglary[3] and Class D felony intimidation.[4]

At trial, Tonya confirmed that Bogard had called her and told her Barnett was having sex with another woman. Barnett told Tonya that Bogard was lying, and he said he would "get it straightened out." (*Id*. at 271.) Tonya then received a second call from Bogard. Bogard said she was "sorry for getting in the middle of this," but she denied having lied about what Barnett was doing at her house. (*Id*. at 274.) Bogard also said she thought her shoulder was broken and she needed to go to the hospital. Tonya could hear Barnett "hollering" in the background. (*Id*. at 275.) On cross examination, defense counsel asked Tonya whether she knew Barnett to carry a gun, and she said he did not. On redirect examination, the prosecutor attempted to impeach Tonya with a police report of a domestic dispute between Tonya and Barnett to establish that Barnett had access to a gun.

Barnett called Gary Brown, who testified he was one of the people who had used drugs at Bogard's house. On December 10, 2002, Brown happened to be passing Bogard's house when he saw Barnett knocking on her door. He approached Barnett to see what was happening. Brown testified Bogard opened the door and motioned for them to come inside. Barnett "said something to [Bogard] about why was she calling his wife," (*id*. at 434), and told her "she needed to call his wife and get that straightened out."

[1] Ind. Code § 35-42-2-1(3).
[2] Ind. Code § 35-50-2-8.
[3] Ind. Code § 35-43-2-1(2).
[4] Ind. Code § 35-45-2-1.

(*Id*. at 436.) Bogard told him to leave, and it "looked like they wanted to collide." (*Id*. at 438.) However, Bogard's dog got in the way, and she fell backwards over the dog. Brown claimed Bogard got up right away and did not act like she was hurt. Brown testified Barnett did not hit Bogard, kick her, or stomp on her.

Barnett also presented testimony of an expert witness, Dr. George R. Nichols. Dr. Nichols disagreed with some of Dr. Smock's conclusions, but acknowledged that the pattern injury was not consistent with falling backwards over a dog.

Barnett was found guilty as charged. We affirmed his convictions on appeal, and our Supreme Court denied transfer. Barnett then petitioned for post-conviction relief, which was denied.

DISCUSSION AND DECISION

Barnett argues both trial and appellate counsel were ineffective. Specifically, he asserts trial counsel was ineffective because: (1) he did not use a police report to impeach Bogard's testimony that she did not invite Barnett into her house; (2) he did not object to the admission of Bogard's medical records; (3) he did not call two witnesses he mentioned in *voir dire*; and (4) he did not object under Ind. Evidence Rule 404(b) to Tonya's testimony about whether Barnett had access to a gun. He argues appellate counsel was ineffective because: (1) although he raised the issue of whether the information was properly amended to include the habitual offender count, he did not demonstrate that the issue had been preserved; and (2) he did not challenge the second amendment to the information, which added the burglary and intimidation charges.

The petitioner bears the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *reh'g denied*, *cert. denied* 537 U.S. 839 (2002). Barnett is appealing from a negative judgment, and to the extent his appeal turns on factual issues, he must convince us "that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the postconviction court." *Id*. We will reverse "only if the evidence is without conflict and leads only to a conclusion contrary to the result of the postconviction court." *Id*.

To prevail on a claim of ineffective assistance of counsel, the petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance so prejudiced the petitioner that he was denied a fair trial. *Coleman v. State*, 694 N.E.2d 269, 272 (Ind. 1998) (citing *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*). There is a strong presumption that counsel rendered adequate assistance. *Id*. "Evidence of isolated poor strategy, inexperience or bad tactics will not support a claim of ineffective assistance." *Id*. at 273. "Counsel's performance is evaluated as a whole." *Lemond v. State*, 878 N.E.2d 384, 391 (Ind. Ct. App. 2007), *trans. denied*. To establish the prejudice prong of the test, Barnett must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "Prejudice exists when the conviction or sentence resulted from a breakdown in the adversarial process that rendered the result of the

proceeding fundamentally unfair or unreliable." *Coleman*, 694 N.E.2d at 272.

1. Trial Counsel

A. Impeachment of Bogard

In a document titled "Report of Investigation," Sergeant Keith Whitlow wrote, "Bogard allowed Barnett into her home, at which time he physically attacked her." (PCR Ex. 3.) Barnett's defense to the burglary charge was that Bogard invited him into her house. Therefore, Barnett argues trial counsel should have used the Report of Investigation to impeach Bogard's testimony that Barnett forced his way into her house.

The Report of Investigation was based on Bogard's interview with the police. The tape recording of that interview was played for the jury. The jury could hear for itself whether Bogard said that she allowed Barnett into her home. Therefore, we conclude that failure to use the Report of Investigation could not have prejudiced Barnett.

B. Medical Records

Bogard's medical records were admitted at trial. Barnett raises an issue he states as, "Defense counsel rendered ineffective assistance of counsel when he failed to object at trial to the admission of the medical report that was in violation of Evidence Rule 702: and his failure to investigate the medical report was a deficient performance." (Amended Br. of Appellant at 29.) However, his argument is less than clear. On one hand, he argues the records should not have been admitted because the preparers were not subject to cross-examination and because they were not qualified as experts under Evid. R. 702. On the other hand, he argues counsel should have used the reports to establish that Bogard did not experience extreme pain, which was the serious bodily injury on which

the State relied to enhance the charge of battery. Thus, it is unclear whether Barnett believes the records should or should not have been admitted.

To the extent Barnett argues the medical records should not have been admitted, we conclude any error was harmless, because Bogard's injuries and level of pain were established by other evidence. *See Bullock v. State*, 903 N.E.2d 156, 162 (Ind. Ct. App. 2009) (erroneous admission of cumulative evidence is harmless). Bogard testified her head was bleeding and her shoulder, back, and legs hurt. She had bruises, one of which was a pattern injury caused by the heel of a shoe. Dr. William Smock testified it takes "a hell of a lot of force" to create a pattern injury, and falling on the edge of a table would be insufficient. (Tr. at 386.) Bogard testified she has previously had broken bones, but the beating from Barnett was the most painful experience she had ever had. Bogard testified her shoulder still hurts and she cannot sleep on that side of her body.

Barnett does not identify anything from the medical records that is favorable to the State and not cumulative of the witness testimony. Instead, he appears to argue the records contradict Bogard's claim that she was in extreme pain, and trial counsel should have pointed out that her pain rating was a six or seven on a scale of ten.[5] To the extent Barnett is arguing trial counsel's method of refuting Bogard's claim of extreme pain was deficient, we must disagree. Trial counsel presented testimony of an expert witness, Dr. George Nichols, who disagreed with Dr. Smock's testimony that the pattern injury could

[5] At the post-conviction hearing, Barnett called Dr. Joseph Bruckman, the Medical Director of the hospital where Bogard was treated. Dr. Bruckman testified the pain rating is "somewhat subjective," (PCR Tr. at 25), but a six or seven would generally equate to "moderately severe" pain. (*Id*. at 27.)

Barnett also asserts, without citation to the record, that Bogard was not given pain medication while she was at the hospital. We will not search the record to find support for that contention. Therefore, any argument based on the alleged lack of pain medication is waived. *See McReynolds v. State*, 901 N.E.2d 1149, 1154 (Ind. Ct. App. 2009).

not have been caused by falling against a sharp edge. Dr. Nichols testified he had reviewed Bogard's medical records and found she had very few injuries and was likely wrong when she said the beating had lasted four or five minutes. In his closing argument, trial counsel also pointed out that Bogard had initially exaggerated her injuries to the police:

> She said she was kicked and stomped and that she was bruised from head to toe, her tail bone was bruised, her kidneys were bruised, her ribs were bruised, her shoulder was dislocated, she had a mild concussion. She made that statement to the police the day after that happened, but she did not count on the medical records contradicting her. She said she was treated for all of these things.
>
> Well, let's see what it says. Final diagnosis, contusion, and we all know right now that that means bruise, to shoulder chest and head.

(*Id*. at 592.) We cannot say trial counsel's efforts to discredit Bogard and Dr. Smock fell below an objective standard of reasonableness.

C. Failure to Call Witnesses

During *voir dire*, trial counsel told the prospective jurors, "Mr. Owen's [the prosecutor] already gone over with you a list of his witnesses and I wanted to ask about my witnesses as well." (PCR Ex. 10 at 184.) Trial counsel then asked if anyone knew Gary Brown, Rodney McNeary, or Hershel Barnett. In his opening statement, trial counsel mentioned that Barnett went to Bogard's house with McNeary. He also stated Herschel and Gary were in the living room and saw Bogard fall over her dog. In his case-in-chief, trial counsel called Gary, but not Herschel or McNeary.

At the post-conviction hearing, trial counsel explained why he did not call Herschel or McNeary as witnesses:

> In the case of Mr. McNeary and Herschel Barnett, their stories kept changing. When I would talk with them about it their stories kept changing. Gary Brown's story stayed, not only stayed consistent, but also reflected the events as my client had related them to me as to what had happened.
>
> I didn't want to put two or three witnesses on the stand that were going to tell different stories about what it, different-different facts about what had happened. I wanted Mr. Brown to tell one good solid recitation of what had, of what had happened and I thought he was, of the three he was the most credible, and he was the one that told a consistent story, and one whose story was consistent with the facts as my client had related them to me.

(PCR Tr. at 133-34.) Barnett asked trial counsel why he would mention these witnesses to the jury if he was not going to call them. Trial counsel responded, "I don't know where at the point that I was interviewing the people where the story started to change." (*Id*. at 136.)

Barnett argues that, although not calling Herschel and McNeary as witnesses would ordinarily be a reasonable strategy, failing to call them was deficient performance in light of the fact that trial counsel referred to them as witnesses during *voir dire* and mentioned them during his opening statement. He relies on several decisions where federal courts have found ineffective assistance of counsel because trial counsel did not keep promises made to the jury during opening statements: *United States ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003), *reh'g and suggestion for reh'g en banc denied*; *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002); and *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988), *reh'g denied*.

Hampton was tried for several charges arising out of an attack on three Latinos by members of a gang during a concert. In his opening statement, trial counsel told the jury

that Hampton would testify he was present at the concert and had seen what had happened, but was not involved in the attack. Trial counsel also stated he would present evidence that Hampton was not a member of a gang. However, the only evidence trial counsel presented was the testimony of a police officer, who contradicted one of the eye-witness' testimony that he had picked Hampton out of a line-up.

The Seventh Circuit held this was ineffective assistance of counsel:

> We may assume, without deciding, that it was reasonable for Rodgon [trial counsel] to advise Hampton not to testify and not to present testimony from other witnesses about his lack of gang ties; such decisions are often motivated by strategic considerations that command deference from the judiciary. But Rodgon promised the jury that it would hear from Hampton and that it would also hear evidence that he had no gang involvement, and he reneged on his promises without explaining to the jury why he did so. Turnabouts of this sort may be justified when "unexpected developments . . . warrant . . . changes in previously announced trial strategies." *Ouber v. Guarino*, 293 F.3d 19, 29 (1st Cir. 2002) (citing *Dutton v. Brown*, 812 F.2d 593, 598 (10th Cir. [1987]), *cert. denied*, 484 U.S. 836, 108 S. Ct. 116, 98 L. Ed. 2d 74 (1987)); *see also, e.g.*, *Drake v. Clark*, 14 F.3d 351, 356 (7th Cir. 1994). However, when the failure to present the promised testimony cannot be chalked up to unforeseeable events, the attorney's broken promise may be unreasonable, for "little is more damaging than to fail to produce important evidence that had been promised in an opening." *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988); *see also Washington v. Smith*, [219 F.3d 620, 634 (7th Cir. 2000)] (failure to produce witness identified in notice of alibi and mentioned during voir dire gave rise to "negative inference" against the defendant).

Hampton, 347 F.3d at 257 (some citations omitted).

Hampton is distinguishable. Hampton's trial counsel did not want him to testify because there was evidence Hampton had left the concert with people implicated in the attack, and if Hampton testified that he was present at the concert, he might be found guilty by association. Hampton's counsel was unable to present evidence that Hampton

was not involved in a gang because counsel had not investigated potential witnesses. In contrast, Barnett's trial counsel identified three potential witnesses who would testify that Bogard fell over her dog. However, two of those witnesses started giving inconsistent accounts of the incident. Barnett asserts, without citation to the record, that trial counsel was aware of these witnesses' weaknesses before he mentioned them to the jury. On the contrary, trial counsel testified he would not ordinarily mention a witness whom he did not intend to call and he was unsure at what point the witnesses started giving inconsistent statements. We note that *voir dire* and opening statements occurred nearly a month before trial counsel presented his case; thus, there was a significant window of time in which Herschel and McNeary may have changed their stories.

The *Hampton* court also emphasized the particular harm caused when trial counsel promises the defendant will testify, but does not deliver on that promise:

> The jury was [led] to believe that Hampton had a story to tell that was diametrically opposed to that of his accusers; it was told, in essence, that there were two versions of what occurred and that it would have the opportunity to evaluate Hampton's own credibility in choosing between those versions. In the end, however, the jury never heard a second version of what occurred – from Hampton or any other eyewitness; it heard only the State's account of events. And in that context, Hampton's unexplained failure to take the witness stand may well have conveyed to the jury the impression that in fact there was no alternate version of the events that took place, and that the inculpatory testimony of the prosecution's witnesses was essentially correct. *See Harris v. Reed*, [894 F.2d 871, 879 (7th Cir. 1990)] (failure to present exculpatory testimony as promised "left the jury free to believe [the prosecution's witness's] account of the incident as the only account"); *see also Ouber*, 293 F.3d at 34.

Id. at 258.

Barnett's trial counsel did not promise Barnett would testify, and he did present some evidence of Barnett's version of the incident. Nor is it obvious that the jury inferred Herschel and McNeary were not called because they would give evidence favorable to the State. The State acknowledged Herschel was an eye-witness to the incident and McNeary was present at the scene. Therefore, the jury might just as well wonder why the State did not call these witnesses.

Ouber is distinguishable for many of the same reasons. Ouber delivered cocaine to an undercover officer. Ouber and the officer were the only witnesses to the transaction. Ouber's defense was that her brother had bullied her into running an errand for him, and she was unaware that drugs were involved. Trial counsel promised the jury multiple times that Ouber would testify, but inexplicably, he later urged her not to testify. Ouber decided not to testify, and she was convicted. Like in *Hampton*, any weaknesses of the defendant's testimony were known to defense counsel before the promise was made. In fact, trial counsel had represented Ouber in two previous trials on the same charges that had resulted in hung juries, and she had testified in the previous trials.

In *Anderson*, trial counsel told the jury he would call a psychiatrist and a psychologist, who would testify Anderson was "walking unconsciously toward a psychological no exit . . . . Without feeling, without any appreciation of what was happening, Bruce Anderson on that night was like a robot programmed for destruction." 858 F.2d at 17. This statement was based on reports from the promised witnesses, and those witnesses were available to testify. However, trial counsel inexplicably decided not to call those witnesses. Once again, there was no unexpected event that necessitated a

change in trial strategy. Barnett's trial counsel testified he decided not to call Herschel and McNeary because they changed their stories. Unlike the defendants in *Hampton*, *Ouber*, and *Anderson*, Barnett has not shown trial counsel was aware of any problems with the potential witnesses during *voir dire* and opening statements.

D. 404(b) Evidence

Bogard testified Barnett told her "he had a gun in the car that he carried with him all the time." (Tr. at 82.) On cross-examination of Tonya, defense counsel asked whether Barnett carries a gun:

Q Uh, Ma'am, uh, does [Barnett] carry a gun that you know of?
A No.
Q Have you ever seen him have a gun with him, as you recall?
A No.
Q You ever know of him to have anything to do with guns that you recall?
A In the past, yeah.
Q But now?
A No.

(*Id*. at 283.) On re-direct, the State followed up on this line of questioning:

Q . . . [H]e doesn't carry a gun now, is that what you're saying?
A No. I don't know that he ever carried one.
Q But he's had guns?
A Yeah.
Q He knows what a gun is, right?
A Probably. Not in my house.
Q Okay. Not in your house, but outside your house he'd definitely had guns, has he not?
A Not that I've seen, not, we don't discuss stuff like that.

(*Id*. at 283-84.)

The State then attempted to impeach Tonya using a police report of a domestic dispute between her and Barnett.[6] Tanya acknowledged she and Barnett had an altercation in November 2002, and she called 911 about it. She denied that Barnett said anything about shooting her or wanting to kill her. The police asked her whether Barnett had access to a gun, and she told them she had a gun in the house, but she kept the bullets separate from the gun, and Barnett did not know where they were.

Barnett argues trial counsel should have objected to this line of questioning under Evid. R. 404(b),[7] which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

"In order to prove ineffective assistance of counsel due to the failure to object, a defendant must prove that an objection would have been sustained if made and that he was prejudiced by the failure." *Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind. 2001), *cert. denied*.

Trial counsel was the first to ask Tonya about Barnett's access to weapons, presumably to discredit Bogard's testimony that he carried a gun in the car and threatened to use it. Tonya claimed Barnett currently did not carry a gun, but had involvement with guns in the past. On redirect, the State attempted to clarify her testimony. Possession of or access to a weapon is not necessarily a "bad act" for purposes of Evid. R. 404(b). *Pickens v. State*, 764 N.E.2d 295, 299 (Ind. Ct. App. 2002), *trans. denied*. The State did

[6] Contrary to Barnett's argument, this report was not admitted into evidence.
[7] Trial counsel did make objections on other grounds, but the trial court overruled those.

not inquire into the domestic dispute until Tonya, who acknowledged she still had feelings for Barnett, demonstrated a reluctance to answer. Despite the State's attempt to impeach Tonya, she denied that threats were made and claimed Barnett did not know where she kept the bullets for the gun. Therefore, we conclude the evidence was admissible to prove Barnett had access to a gun, and an objection under Evid. R. 404(b) would not have been sustained.

Barnett also argues the prosecutor's commentary on this evidence during his closing argument was improper. The prosecutor argued Tonya "helped establish that [Barnett] is violent. In cross examination we were able to point out that [the] same thing had happened to her, where he had threatened to kill her. There was a gun in the house and she called the police." (Tr. at 569.) This argument invites the jury to use Tonya's testimony as evidence that he acted in a similar manner toward Bogard; therefore, a proper objection would have been sustained. *See Camm v. State*, 908 N.E.2d 215, 231 (Ind. 2009) (character evidence may not be used to raise the "forbidden inference" that the defendant acted in conformity with that character trait).

However, we conclude the failure to object to this argument was an isolated mistake that does not undermine our confidence in the outcome. Barnett's witness, Gary Brown, testified Barnett was at Bogard's house on the date in question and said something to Bogard about her call to Tonya. Brown testified Bogard was injured when she fell backwards over her dog. However, Barnett's own expert witness acknowledged that this would not account for the pattern injury on Bogard's chest. Therefore, we think it is unlikely the jury found Barnett was violent toward Bogard simply because of a

passing reference to Tonya's testimony in the prosecutor's closing argument.

2. Appellate Counsel

Claims of ineffective assistance of appellate counsel are also evaluated under the *Strickland* standard. *Bieghler v. State*, 690 N.E.2d 188, 192 (Ind. 1997), *reh'g denied*, *cert. denied*. Our Supreme Court has recognized three categories of ineffective appellate counsel claims: (1) denying access to appeal; (2) failing to raise issues; and (3) failing to present issues competently. *Id.* at 193-195.

Barnett claims appellate counsel inadequately challenged the first amendment to the information and should have challenged the second amendment. The original information was filed on December 13, 2002. It alleged he committed Class C felony battery and Bogard's injuries included a bruised kidney, bruised ribs, and a dislocated shoulder. An amended information filed on February 4, 2003 added an habitual offender charge. An initial hearing on the amended information was held on February 5, 2003. Although counsel had been appointed for Barnett, the chronological case summary reflects Barnett was present at the hearing without counsel. Barnett did not object to the amendment.

A second amended information was filed on February 12, 2003, and a hearing was held the same day. The battery charge was amended to allege the serious bodily injury to Bogard was extreme pain. The second amended information also added one count of burglary and one count of intimidation. The burglary charge alleged Barnett entered Bogard's home with intent to commit intimidation and the offense resulted in bodily injury to Bogard, specifically bruising, an injury to her shoulder, and a cut to her head.

The intimidation charge alleged Barnett threatened to kill Bogard if she did not call his wife.

At the time of the hearing, trial was set for February 18, 2003. Trial counsel objected to the second amended information because it was untimely. The court overruled the objection, but offered to continue the trial. Barnett initially refused a continuance, but he moved for and was granted a continuance the next day. The trial was reset for March 31, 2003, and after another continuance requested by Barnett, the trial commenced on April 14, 2003. On April 16, due to a problem scheduling a witness, the trial was recessed until May 12 and concluded on May 13.

A. First Amendment to the Information

On direct appeal, counsel argued the court improperly allowed the State to amend the information to include the habitual offender charge. We found the argument waived because Barnett did not seek a continuance. *Barnett v. State*, 22A04-0312-CR-616 (Ind. Ct. App. Sept. 29, 2004). Appellate counsel sought transfer. In its order denying transfer, our Supreme Court noted Barnett had sought a continuance. However, the Court held Barnett was "obligated to object to the Appellee's amendment of the Information, which the Appellant did not do. Accordingly, the Court of Appeals' opinion correctly determined the Appellant has not preserved the issue for review, albeit for an incorrect reason . . . ." (PCR Ex. 4.)

Barnett argues counsel's presentation of the issue was inadequate. He acknowledges no objection was lodged during the initial hearing on the first amendment;

however, he notes he was without counsel at that hearing.[8] Therefore, he argues, appellate counsel should have argued the objection lodged at the hearing on the second amended information was sufficient to preserve the issue. Assuming *arguendo* that trial counsel could have made a timely objection to the first amendment at the February 12, 2003 hearing, he simply did not do so. Trial counsel explicitly stated he was objecting to the second amended information. Therefore, appellate counsel could not have presented the issue any differently.

B. Second Amendment to the Information

Counsel did not challenge the second amendment on appeal, and Barnett argues the failure to do so constitutes ineffective assistance. When a defendant challenges appellate counsel's failure to raise an issue, we evaluate whether the unraised issue is significant and obvious from the face of the record and whether it is clearly stronger than the issues raised. *Bieghler*, 690 N.E.2d at 194. An unraised issue is not "obvious" if the interpretation of the legal authority that might have supported the issue was not obvious when appellate counsel filed the brief. *McCurry v. State*, 718 N.E.2d 1201, 1206 (Ind. Ct. App. 1999), *trans. denied*.

At the time of Barnett's appeal, an information could be amended in matters of substance any time up to thirty days before the omnibus date. Ind. Code § 35-34-1-5 (2003). However, decisions interpreting the statute permitted amendments at any time so long as the substantial rights of the defendant were not prejudiced. *See e.g., Tripp v. State*, 729 N.E.2d 1061, 1064-65 (Ind. Ct. App. 2000) (permitting late amendment

[8] The record does not reflect the reason why Barnett was without counsel at this hearing.

because Tripp was given notice of the amendment, was given an opportunity to challenge the amendment, and was granted a continuance to prepare his defense).[9]

We addressed an argument similar to Barnett's in *Shaw v. State*:

> In fact, at the time of Shaw's appeal, there appeared to be no case law in which a court had invalidated any amendment. While some decisions included *dicta* indicating an amendment of substance would be invalidated if it was untimely, those decisions ultimately upheld the amendments because they were not prejudicial to the defendant. *See Haak v. State*, 695 N.E.2d 944, 952 (Ind. 1998); *Wright v. State*, 593 N.E.2d 1192, 1197 (Ind. 1992) (abrogated by *Fajardo*); *Sharp*, 534 N.E.2d [708, 714-15 (Ind. 1989), *reh'g denied, cert. denied*]. Appellate counsel would not have been able to demonstrate prejudice because Shaw had been granted a continuance to prepare for his trial on the amended charges. In a similar case, we recently found appellate counsel was not ineffective for failing to argue in 2003 that the court erred in allowing an amendment of substance after the omnibus date. *Singleton v. State*, 889 N.E.2d 35, 41-42 (Ind. Ct. App. 2008).

898 N.E.2d 465, 470 (Ind. Ct. App. 2008), *trans. denied*. Barnett was granted a continuance to prepare for trial on the amended charges, and cases such as *Tripp* would have led counsel to believe the issue was unlikely to succeed on appeal. Therefore, the issue was neither obvious nor clearly stronger than the issues raised. *See id*.

CONCLUSION

Barnett has not demonstrated ineffective assistance of either trial or appellate counsel. Therefore, we affirm the judgment of the post-conviction court.

Affirmed.

BAKER, C.J., and BARNES, J., concur.

[9] Several years after Barnett's appeal, this interpretation was rejected by our Supreme Court in *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007). The statute has since been amended to allow amendments of substance as long as the substantial rights of the defendant are not prejudiced. *See Laney v. State*, 868 N.E.2d 561, 565 n.1 (Ind. Ct. App. 2007), *trans. denied*.