MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Mark Small
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

J.T. Whitehead
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Robert Kadrovach,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 30, 2021

Court of Appeals Case No. 21A-PC-908

Appeal from the Marion Superior Court

The Honorable Mark D. Stoner, Judge

The Honorable Jeffrey L. Marchal, Magistrate

Trial Court Cause Nos. 49D32-1710-PC-38529 49G06-1710-PC-38529

Najam, Judge.

Statement of the Case

[1] Robert Kadrovach appeals the post-conviction court's denial of his petition for post-conviction relief. Kadrovach raises the following restated issues for our review:

1. Whether the post-conviction court erred when it concluded that he did not receive ineffective assistance of trial counsel.

2. Whether the post-conviction court erred when it concluded that he did not receive ineffective assistance of appellate counsel.

[2] We affirm.

Facts and Procedural History

[3] In Kadrovach's direct appeal, this Court stated the facts and procedural history as follows:

> Around 10:00 p.m. on June 21, 2014, Ohnjay Walker and a group of his friends left a backyard barbeque on Indianapolis's far northeast side and headed for a downtown bar. Kadrovach was operating a hotdog stand in a parking lot across from the bar, with the assistance of Frank McCampbell. After Walker and his friends spent some time inside the bar, they decided to buy some hotdogs from Kadrovach. During the transaction, McCampbell spilled jalapeno peppers on a couple of Walker's friends, and two of them asked for a refund. Kadrovach refused to give them refunds, and a scuffle ensued. Walker said that he wanted a bag of chips in lieu of a refund, and as he reached for the chips, McCampbell shoved him. The scuffle escalated to a fight, and two of Walker's friends noticed that Kadrovach had pulled out a

> knife. Walker turned to walk away, and Kadrovach struck him in the head with the knife. With the blade of the knife lodged in his skull and blood running down the side of his head, the mumbling and slouching Walker attempted to get to his friend's vehicle. Friends and bar personnel phoned 911, and police arrived on the scene. Officers took statements, found the knife handle on the ground nearby, and arrested Kadrovach.
>
> With the blade still embedded in his skull, Walker was taken to a nearby hospital, where he underwent a craniotomy. The attending neurosurgeon explained that the knife had to be removed slowly to avoid fatal blood loss. The knife had penetrated to the midline of Walker's brain, in close proximity to the carotid and middle cerebral arteries, in an area vital to motor function and short-term memory.
>
> The State charged Kadrovach with class A felony attempted murder and class B felony aggravated battery. During his trial, he did not object to the jury instructions that addressed the elements of attempted murder. The jury found him guilty as charged, and the trial court merged the aggravated battery conviction into the attempted murder conviction.

Kadrovach v. State, 61 N.E.3d 1241, 1242 (Ind. Ct. App. 2016), *trans. denied*. On October 8, 2015, Kadrovach was sentenced to thirty years executed, with twenty years served in the Indiana Department of Correction and ten years served with Marion County Community Corrections.

[4] On direct appeal, Kadrovach raised the sole issue that the trial court fundamentally erred in instructing the jury as to the mens rea necessary to convict him of attempted murder. We affirmed the trial court's judgment,

finding that he failed to establish fundamental error. *Id.* The Indiana Supreme Court denied Kadrovach's transfer petition on January 19, 2017.

[5] On October 6, 2017, Kadrovach filed a petition for post-conviction relief, alleging that he had received ineffective assistance from his trial and appellate counsel; the trial court erred in admitting hearsay testimony; prosecutorial misconduct; a violation of *Brady v. Maryland*, and inadequate jury instructions. A fact-finding hearing was held on January 6, 2021, after which the post-conviction court entered findings and conclusions in which it denied Kadrovach's petition for post-conviction relief. This appeal ensued.

Discussion and Decision

Standard of Review

[6] Kadrovach appeals the post-conviction court's denial of his petition for post-conviction relief. Our standard of review in such appeals is clear:

> "The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence." *Campbell v. State*, 19 N.E.3d 271, 273-74 (Ind. 2014). "When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Id*. at 274. In order to prevail on an appeal from the denial of post-conviction relief, a petitioner must show that the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993). Further, the post-conviction court in this case entered 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." *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (internal quotation omitted).
>
> When evaluating an ineffective assistance of counsel claim, we apply the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009). To satisfy the first prong, "the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002) (citing *Strickland*, 466 U.S. at 687-88). To satisfy the second prong, "the defendant must show prejudice: a reasonable probability (i.e.[,] a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Id.* (citing *Strickland*, 466 U.S. at 694).

Humphrey v. State, 73 N.E.3d 677, 681-82 (Ind. 2017). Failure to satisfy either of the two prongs will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

Assistance of Trial Counsel

[7] Kadrovach first asserts that the post-conviction court erred when it denied his petition because, according to Kadrovach, he received ineffective assistance of trial counsel. Kadrovach alleges ineffective assistance from his trial counsel on four grounds. He alleges that counsel: (1) should have asserted a self-defense argument at trial in addition to his defense alleging that he "never . . .

handled the knife in [the] case"; (2) should have investigated the existence of surveillance video of the incident; (3) should have allowed Kadrovach to testify in his own defense; and (4) should not have allowed the trial to proceed because Kadrovach had suffered a stroke during the trial. Tr. Vol. II at 12. We address each argument in turn.

1. Self-Defense

[8] Kadrovach asserts that his trial counsel rendered ineffective assistance when counsel failed to "provide any proof of [Kadrovach's] strategy of self-defense." Appellant's Br. at 14. During closing arguments, Kadrovach's counsel "advanced reasons why self-defense could or should be considered by the jury" but, Kadrovach maintains, counsel did so without presenting any evidence upon which the jury could have relied. *Id.*

[9] "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002). Counsel has wide latitude in selecting trial strategy and tactics, which we afford great deference. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). We "will not speculate as to what may have been counsel's most advantageous strategy, and isolated poor strategy, bad tactics, or inexperience does not necessarily amount to ineffective assistance." *Sarwacinski v. State*, 564 N.E.2d 950, 951 (Ind. Ct. App. 1991) (citation omitted).

[10] Kadrovach's trial counsel testified at the post-conviction hearing that Kadrovach was facing charges of attempted murder and aggravated battery, and

that, based on conversations he had with Kadrovach, "it was determined that a self-defense claim would not be something that we could appropriately establish or present before the jury as a viable argument[,]" which "left us with a sufficiency of the evidence claim with regards to both counts." Tr. Vol. II at 6. Counsel also testified that the trial strategy for the attempted murder charge "was to attempt and establish that there was insufficient proof beyond a reasonable doubt to show that there's any specific intent to kill." *Id.* Regarding the aggravated battery charge, counsel told the court that the strategy "largely was to argue that there's an insufficient showing that [Kadrovach] had ever been in possession of the knife that was used in the stabbing[.]" *Id.* at 7. Counsel testified that Kadrovach "wanted to pursue several different alternative theories of defense" over the course of counsel's representation, including self-defense, but because Kadrovach was "extremely vehement" that he had not handled the knife, "there [was] no ability to present the self-defense argument[.]" *Id.* at 8. Counsel further testified that Kadrovach was "in agreement" with the trial strategy that was pursued. *Id.*

[11] Given that Kadrovach was adamant that he did not handle the knife used in the stabbing, it was not unreasonable – and, arguably, it was prudent – that trial counsel would not argue self-defense but instead pursued the mens rea and insufficient-evidence defenses. *Id.* at 9. Trial counsel's decision not to argue self-defense was a strategic decision and does not constitute deficient performance. "Few points of law are as clearly established as the principle that [t]actical or strategic decisions will not support a claim

of ineffective assistance." *See McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002) (internal quotation and citation omitted). And because we hold that Kadrovach's trial counsel's representation did not fall below an objective standard of reasonableness, we need not address whether Kadrovach was prejudiced. Accordingly, the post-conviction court's determination that Kadrovach's counsel was not ineffective on this claim was not clearly erroneous.

2. Surveillance Video

[12] Next, Kadrovach argues that his counsel was ineffective for his failure to investigate the existence of surveillance video from a nearby business that might have capture the incident. Kadrovach testified at the post-conviction hearing that he asked his counsel to obtain surveillance video of the incident, and he further testified that he believed the outcome of his trial would have been different had counsel obtained the video, telling the court, "I know a photo's worth a thousand words[.]" Tr. Vol. II at 19-20. To establish that counsel was ineffective for failing to investigate, a petitioner is required to go beyond the trial record to show what the investigation would have produced had it been undertaken. *McKnight v. State*, 1 N.E.3d 193, 201 (Ind. Ct. App. 2013).

[13] Kadrovach's counsel attempted to locate and obtain surveillance video of the incident but ultimately came to the conclusion that no video existed. Counsel testified that he investigated the scene of the crime and "[t]here did not appear to be any surveillance cameras in the area that would likely have recorded anything." Tr. Vol. II at 13. Counsel also testified that he spoke with the

owner of a nearby business, but the owner indicated that "he did not have any information." *Id.* at 14. Counsel told the post-conviction court that he had "significant discussion" with the State, and the State "never provided surveillance footage of any kind[,] and the prosecutor indicated that "he was not aware of any surveillance footage[.]" *Id.* Counsel testified that he did not serve a subpoena on the police department that responded to the incident "to determine whether or not any surveillance footage existed" because he suspected that "the response would have been that that's outside of their control and purview" as counsel was "not aware of any city[-]owned surveillance footage that might have been there." *Id.* at 15.

[14] Kadrovach's mere speculation that the surveillance video, that he believed existed, would have been helpful in his case is insufficient to establish that his trial counsel was deficient or that, but for trial counsel's failure to obtain the evidence, the result of the proceeding would have been different. Kadrovach has failed to demonstrate that his trial counsel's performance was deficient or that he suffered prejudice from the alleged deficiency. The post-conviction court's denial of his petition on this claim was not clearly erroneous.

3. Decision to Testify

[15] Kadrovach next claims that his trial counsel denied him effective assistance by failing to allow Kadrovach to testify in his own defense. Kadrovach maintains that he had "several hundreds" of conversations with counsel about his desire to testify, and that he did not know that he "wasn't testifying until [he] was

incarcerated in cuffs and being brought back and seeing the trial was over." *Id.* at 24, 25.

[16] A defendant in a criminal proceeding has an absolute constitutional right to testify as part of his defense. *Phillips v. State*, 673 N.E.2d 1200, 1201-02 (Ind. 1996). The decision of whether or not to testify is controlled by the defendant, and defendant's counsel is ethically bound to abide by the defendant's decision in the matter. *Id.* at 1202; *see also Rules of Professional Conduct* 1.2(a) (2005) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to . . . whether the client will testify."). We will not conclude that a defense lawyer violated this right unless the lawyer specifically forbade the defendant to testify. *See Correll v. State*, 639 N.E.2d 677, 681-82 (Ind. Ct. App. 1994). In *Correll*, this Court held that, absent any testimony by Correll that his trial counsel had forbidden him to testify, his claim after conviction that his lawyer would not let him testify and that he perceived he would not be allowed to testify did not substantiate the denial of his right to testify for purposes of an ineffective assistance of counsel claim. *Id.*

[17] Also in *Correll*, we noted that "it is extremely common for criminal defendants not to testify, and there are good reasons for this[.]" *Id.* at 681 (quoting *Underwood v. Clark*, 939 F.2d 473, 475 (7th Cir. 1991)). Whether a defendant should testify is a matter of trial strategy. *White v. State*, 25 N.E.3d 107, 134 (Ind. Ct. App. 2014), *trans. denied.* "We will not lightly speculate as to what may or may not have been an advantageous trial strategy as counsel should be

given deference in choosing a trial strategy which, at the time and under the circumstances, seems best." *Id.*

[18] Here, neither Kadrovach nor his counsel testified at the post-conviction hearing that counsel forbade Kadrovach from testifying. And when counsel was asked on direct examination if he was aware that Kadrovach wanted to testify, counsel answered in the affirmative and told the post-conviction court that the decision that Kadrovach would not take the stand was one of trial strategy—specifically:

> What I recall at that point is after the State rested and the jury was excused, [the trial court judge] asked with regards to Mr. Kadrovach as to whether or not he wanted to testify, and he asked if Mr. Kadrovach wanted to speak with me privately before making that decisions, and we did recess at that point in time and went back to the court offices. . . .
>
> My discussion with him as far as his testifying is concerned was that I did not believe that there was any value in his testifying. At that point in time there had already been a significant amount of arguing in front of the jury and outside the presence of the jury regarding the [witness] who provided a perjured statement that she had been an eyewitness to the incident. That was a significant blow to Mr. Kadrovach's credibility in my opinion, and placing him on the witness stand would have exposed him to cross-examination on that point. It was not a situation we would be able to avoid and I thought that would further affect his credibility.
>
> Given that we were also not able to pursue a self-defense argument[,] . . . I explained to him and presented the argument that based [on the defense theory] we were pursuing, . . . I did

> not believe that his testimony would have in any way, shape or form further added to those arguments and [would have] exposed him to greater peril and liability on cross.
>
> Mr. Kadrovach indicated that he agreed with me, . . . [the trial court judge] went through a checklist of issues regarding [Kadrovach's] absolute right and ability to testify in his own defense, and Mr. Kadrovach indicated that he was not interested in testifying at that point in time, that he understood that he had the right, and that after consultation he had decided that he did not want to testify.

Tr. Vol. II at 11-12.

[19] Kadrovach does not dispute that he was aware of his right to testify and that, after consulting with his attorney, he agreed that he would not testify. And no testimony was presented at the post-conviction hearing that counsel forbade Kadrovach from testifying. Thus, Kadrovach has failed to establish that his counsel's performance was defective. *See, e.g., Canaan v. State*, 683 N.E.2d 227, 229-30 (Ind. 1997) (rejecting Canaan's ineffectiveness of trial counsel claim where counsel testified that she had advised him against testifying during the penalty phase because she feared he would appear cold and unsympathetic to the jury), *cert. denied*, 524 U.S. 906 (1998). Counsel's advice was a reasonable trial strategy, one which we will not second-guess. *See White*, 25 N.E.3d at 134. The post-conviction court did not err by denying relief on this claim.

4. Medical Condition

[20] Kadrovach also argues that his trial counsel was ineffective for allowing the trial to proceed after he had suffered a stroke. Kadrovach maintains that, during his trial, he "was suffering from a medical condition that was significant and rendered him deaf," and that he "could not understand the proceedings because he could not hear them." Appellant's Br. at 16. However, Kadrovach does not offer a cogent argument or cite to any case law to support his claim. Therefore, we hold that Kadrovach waived this argument on appeal by failing to present a cogent argument. *See Martin v. Hunt*, 130 N.E.3d 135, 138 (Ind. Ct. App. 2019) (held that appellant waived issues on appeal by failing to present a cogent argument).

[21] Waiver notwithstanding, even if we were to accept Kadrovach's allegation regarding his attorney as true – that is, that his attorney should not have allowed his trial to continue after he experienced a medical condition – Kadrovach has failed to establish that he suffered any prejudice. Thus, his claim fails.

Assistance of Appellate Counsel

[22] Finally, Kadrovach contends that he was denied effective assistance of appellate counsel because counsel "never consulted with [Kadrovach] about [which] issues to raise [on appeal]" and because counsel "failed to consult [with Kadrovach]." Appellant's Br. at 17.

[23] We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Williams v. State*, 724 N.E.2d 1070, 1078 (Ind. 2000), *cert. denied*, 121 S. Ct. 886 (2001). Ineffective assistance of appellate counsel claims fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Garrett v. State*, 992 N.E.2d 710, 724 (Ind. 2013). To show that counsel was ineffective for failing to raise an issue on appeal, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *Reed v. State,* 856 N.E.2d 1189, 1195 (Ind. 2006). To evaluate the performance prong when counsel failed to raise issues upon appeal, we apply the following test: (1) whether the unraised issues are significant and obvious from the face of the record, and (2) whether the unraised issues are "clearly stronger" than the raised issues. *Id.* If the analysis under this test demonstrates deficient performance, then we examine whether "the issues which . . . appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial." *Id.* Ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. *Id.* at 1196.

[24] We first note that Kadrovach failed to present the testimony of his appellate counsel at the post-conviction hearing. When a petitioner has not produced the testimony of counsel, a post-conviction court may infer that petitioner's counsel

would not have corroborated the petitioner's allegations of ineffective assistance of counsel. *See Dickson v. State*, 533 N.E.2d 586, 589 (Ind. 1989). Furthermore, Kadrovach provided no evidentiary support for his ineffective assistance of appellate counsel claims, and he has not told this Court what issues his appellate counsel should have presented on direct appeal. As such, Kadrovach has failed to carry his burden of proof. Thus, the post-conviction court did not err in rejecting Kadrovach's claims of ineffective assistance of appellate counsel.

[25] We find that Kadrovach failed to demonstrate both ineffective assistance of trial counsel and appellate counsel. Therefore, we conclude that the post-conviction court did not err when it denied Kadrovach's petition for post-conviction relief. The judgment of the post-conviction court is affirmed.

[26] Affirmed.

Vaidik, J., and Weissmann, J., concur.