MEMORANDUM DECISION

APPELLANT *PRO SE*

Justin Alexander
Michigan City, 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

Justin Alexander,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

July 24, 2023

Court of Appeals Case Nos.
22A-PC-1612
22A-PC-1621
22A-PC-1622

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause Nos.
02D05-1504-PC-58
02D04-1504-PC-59
02D06-1504-PC-60

Memorandum Decision by Judge Bradford
Judges Riley and Weissmann concur.

Bradford, Judge.

Case Summary

[1] Over the course of eleven days, Justin Alexander committed a series of crimes for which the State charged him under three cause numbers: Cause Number 02D04-1302-FB-18 ("FB-18") charged Alexander with Class B felony burglary with a habitual-offender enhancement; Cause Number 02D06-1301-FB-7 ("FB-7") charged him with Class B felony robbery with a habitual-offender enhancement; and Cause Number 02D04-1301-FB-4 ("FB-4") charged him with Class B felony unlawful possession of a firearm by a serious violent felon ("SVF"), Class C felony receiving stolen auto parts, Class D felony resisting law enforcement, Class A misdemeanor resisting law enforcement, with another habitual-offender enhancement. Juries found Alexander guilty as charged in FB-18 and FB-7, and Alexander pled guilty as charged to the charges in FB-4. The trial court found Alexander to be a habitual offender in each cause number and sentenced him to an aggregate sixty-two-year term.

[2] Alexander appealed his sentence and convictions, which we affirmed. Alexander subsequently filed a petition for post-conviction relief ("PCR") alleging, among other things, that his trial and appellate counsel had provided ineffective assistance, which the post-conviction court denied. Alexander filed three appeals, which we have consolidated, arguing that (1) his convictions

were supported by insufficient evidence; (2) the trial court abused its discretion in allowing the State to file an allegedly untimely habitual-offender information; (3) his sentence was inappropriate in light of the nature of his offenses and his character; and (4) his trial and appellate counsel provided ineffective assistance. We affirm.

Facts and Procedural History

[3] Over the course of eleven days from December 31, 2012, to January 11, 2013, Alexander committed a series of crimes. Our prior decision on Alexander's direct appeal establishes the facts and procedural history. Regarding FB-18, we explained that:

> On December 31, 2012, Barbara Nagy and her family left their house to attend a New Year's Eve party. They locked all of the house's doors and ensured that the windows were closed but left at least one window unlocked. When they returned home at 6:00 p.m. the next day, the front door was unlocked. A screen had been removed from the kitchen window and was on the ground outside. Someone had stolen their televisions, computers, game consoles, and a handgun. An officer was dispatched to the scene, and he found a palm print on a coffee table. A fingerprint examiner subsequently matched the palm print to Alexander. In addition, Alexander was later arrested after a vehicle chase as discussed below [in the facts from cause 403], and he had Nagy's gun at the time of the arrest. The Nagys did not know Alexander and had not given him or anyone else permission to enter their home in their absence.
>
> The State charged Alexander with Class B felony burglary. Later, the State amended the charging information to add an

> habitual offender enhancement. The burglary charge was tried to a jury, and the jury found Alexander guilty. The habitual offender enhancement was tried to the bench, and the judge determined that Alexander was an habitual offender.

Alexander v. State, Nos. 02A03-1310-CR-403, 02A03-1310-CR-404, and 02A03-1310-CR-405, 2014 WL 2202821, at *1 (Ind. Ct. App. May 28, 2014).

[4] Regarding FB-7, we noted:

> At five in the morning on January 7, 2013, fifty-nine-year-old Wanda Boehme stopped at a convenience store on her way to work. She noticed that a man, later identified as Alexander, watched her check out at the cashier's stand and transact business at the store's lottery machine before he walked outside. Boehme returned to her car, and Alexander followed her to her employer's parking lot. When she parked, she saw Alexander park his car in a nearby alley.
>
> Boehme waited for a while before getting out of her car because the situation "didn't feel good." CR–403 Trial Tr. p. 34. When she did, Alexander approached her with a handgun. Boehme swung her purse at him, but he backed her up against her car and demanded money. She gave him her cash. When Alexander demanded more, Boehme pressed the alarm button on her key fob, and the car alarm activated. Alexander told her to turn it off. Boehme refused, saying "shoot me, go ahead and shoot me they know who you are." *Id.* at 37. Alexander left and was apprehended several days later during a vehicle chase. ... After his arrest, an officer transported him to the hospital for treatment. Alexander complained of being pepper sprayed during the arrest, saying "I know I been robbing and stuff but there's no cause for this." *Id.* at 76.

> The State charged Alexander with Class B felony robbery. Later, the State amended the charging information to add an habitual offender enhancement. The robbery charge was tried to a jury, and the jury found Alexander guilty. The habitual offender enhancement was tried to the bench, and the judge determined that Alexander was an habitual offender.

Id. at *1.

[5] Regarding FB-4, we explained:

> On January 11, 2013, Officer Stephanie Souther was on patrol when she saw a Toyota Camry that had been reported as stolen and as being involved in an armed robbery. She and other officers attempted to stop the Camry, but its driver, later identified as Alexander, refused to stop. Alexander lost control of the car during the subsequent chase and crashed into a house's front porch.
>
> As Souther and other officers approached the car, Alexander crouched down and disappeared from view for a few seconds. Souther believed he was looking for a weapon. Next, he tried to get out of the car, but damage from the crash prevented it. Alexander then tried to put the car into reverse and back up, even though Souther was standing right behind the car. The car was stuck, and officers took Alexander into custody. They searched the Camry and found [a] gun between the front passenger seat and the door.
>
> The State charged Alexander with unlawful possession of a firearm by a serious violent felon, a Class B felony; receiving stolen auto parts, a Class C felony; and two counts of resisting law enforcement, one as a Class D felony (fleeing in a vehicle) and one as a Class A misdemeanor (refusing to cooperate at the crash site). Later, the State amended the charging information to

> add an habitual offender enhancement. Alexander pleaded guilty to all charges except the habitual offender enhancement. The enhancement was tried to the bench, and the court determined that he was an habitual offender.

Id. at *2.

[6] In his direct appeal, Alexander argued that the evidence had been insufficient to support his conviction in FB-18, the trial court had abused its discretion in allowing the State to amend the charging informations in all three cause numbers to add habitual-offender enhancements, the trial court had abused its discretion in sentencing him, and that the sentence imposed was inappropriate. *Id*. at *2–3. We affirmed the trial court's judgment in each case but remanded them to the trial court for clarification of the sentencing orders. *Id*. at *7.

[7] In April of 2015, Alexander sought PCR, alleging, among other things, that his trial and appellate counsel had been ineffective for failing to argue that his aggregate sentence was inappropriate on the grounds that his crimes constituted a single episode or challenge the late filing of the habitual-offender information or the sufficiency of the evidence supporting his convictions in FB-18 and FB-7. The post-conviction court ordered Alexander to submit the cause for relief by affidavit, which he did on November 1, 2021. That December, the State submitted proposed findings of fact and conclusions of law. In April of 2022, the post-conviction court denied Alexander's petitions.

Discussion and Decision

[8] Indiana Post-Conviction Rule 1(1) enables a petitioner who has exhausted his direct appeals to challenge the correctness of his conviction or sentence by filing a PCR petition. Our post-conviction rules "create a narrow remedy for subsequent collateral challenges to convictions." *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). A "petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard of review on appeal." *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001). "The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence." Ind. P-C.R. 1(5). We will reverse the post-conviction court's findings "only upon a showing of clear error … which leaves [us] with a definite and firm conviction that a mistake has been made." *Hollowell v. State*, 19 N.E.3d 263, 269 (Ind. 2014) (citing *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)). Put simply, a petitioner must show that the evidence "leads unerringly and unmistakably to a conclusion opposite that reached" by the post-conviction court. *Id*. at 269.

I. Alexander's Claims of Trial Court Error

[9] To start, Alexander makes a series of freestanding claims alleging trial court error and challenging his convictions, status as a habitual offender, and sentence. Across his three briefs, Alexander argues that the State presented insufficient evidence of burglary and robbery, the habitual-offender enhancements were supported by improper prior convictions, the trial court abused its discretion in allowing the State to amend each of the charging

informations to add a habitual-offender enhancement, and his sentences are inappropriate. For its part, the State argues that Alexander's freestanding claims are either barred by res judicata or waived. We agree with the State.

A. Res Judicata

[10] Res judicata "prevents the repetitious litigation of that which is essentially the same dispute." *State v. Holmes*, 728 N.E.2d 164, 168 (Ind. 2000). Notably, res judicata prevents issues that were raised and decided on direct appeal from being litigated again on post-conviction review. *Ben-Yisrayl*, 738 N.E.2d at 258. Our case law clarifies that "where an issue, *although differently designated*, was previously considered and determined upon a criminal defendant's direct appeal, the State may defend against defendant's post-conviction relief petition on grounds of prior adjudication or res judicata." *Cambridge v. State*, 468 N.E.2d 1047, 1049 (Ind. 1984) (emphasis in original).

[11] Across his three briefs, Alexander argues that (1) the State presented insufficient evidence to support his burglary conviction, (2) the trial court abused its discretion in allowing the State to add a habitual-offender enhancement to each case, (3) the trial court abused its discretion at sentencing, and (4) his sentence is inappropriate. However, we previously addressed each of these claims in Alexander's direct appeal. *See Alexander*, 2014 WL 2202821, at *1. As a result, res judicata bars our review of them now.

[12] Specifically, we have already concluded that the State had presented evidence "sufficient to establish beyond a reasonable doubt" that Alexander had

committed the burglary in FB-18. *Alexander*, 2014 WL 2202821, at *3. Likewise, we previously concluded that "the [trial] court did not abuse its discretion in permitting the amendments[.]" *Id*. at *3–4. Further, we found "no abuse of discretion" in the trial court's sentencing of Alexander and concluded that Alexander's sentence for each case was not inappropriate under Indiana Appellate Rule 7(B). *Id*. at *5–7. Indeed, "we affirm[ed] Alexander's sentence," and only remanded the sentencing orders for clarification. *Id*. at *7. Even if Alexander's arguments differ slightly from his direct appeal claims, these issues have been raised and addressed. *See Cambridge*, 468 N.E.2d at 1049. Therefore, res judicata now precludes them from a second appellate review. *Ben-Yisrayl*, 738 N.E.2d at 258.

B. Waiver

[13] Alexander's remaining freestanding claims of trial court error are unavailable for appellate review because he has waived them. More specifically, we cannot review Alexander's claim that the State presented insufficient evidence to support his robbery conviction or his habitual-offender enhancements. Our case law is clear: post-conviction procedures do not provide the petitioner with a "super appeal." *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002). In other words, the post-conviction process is merely a "narrow remedy for subsequent collateral challenges to convictions." *Ben-Yisrayl*, 738 N.E.2d at 258. Consequently, issues that were known or available to defendants on direct appeal—but not presented—are not available for post-conviction review. *Bunch*

v. State, 778 N.E.2d 1285, 1289 (Ind. 2002) (citing *Lowery v. State*, 640 N.E.2d 1031, 1036 (Ind. 1994)).

[14] Our decision in Alexander's direct appeal indicates that he did not challenge the sufficiency of the evidence to sustain either his robbery conviction or his habitual-offender enhancements on direct appeal. *See Alexander*, 2014 WL 2202821, at *1–7. As a result, the issues are waived, and Alexander cannot now seek appellate review of those claims. *See Bunch*, 778 N.E.2d at 1285.

II. Ineffective Assistance of Counsel

[15] Alexander also claims that both his trial and appellate counsel had provided him with ineffective assistance. "The right to effective counsel is rooted in the Sixth Amendment to the United States Constitution." *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "'The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). Our "'benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Id.* (quoting *Strickland*, 466 U.S. at 686). However, we begin with the strong presumption that counsel rendered adequate legal assistance. *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018) (citing *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002)).

[16] To rebut that presumption, a petitioner must show that (1) "counsel's performance was deficient based on prevailing professional norms[,]" and (2) "the deficient performance prejudiced the defense." *Id*. (citing *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012)). Counsel is "afforded considerable discretion in choosing strategy and tactics." *Id*. (citing *Strickland*, 466 U.S. at 689). "[I]solated mistakes, poor strategy, inexperience and instances of bad judgment do not necessarily render representation ineffective." *Id*. at 984. We, however, need not evaluate counsel's performance if the defendant suffered no prejudice; therefore, many ineffective assistance claims can be resolved by the prejudice inquiry alone. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999); *Williams*, 706 N.E.2d at 154.

[17] The Sixth Amendment also entitles a criminal defendant to the effective assistance of counsel during his direct appeal as a matter of right. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). "The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel." *Trueblood v. State*, 715 N.E.2d 1243, 1256 (Ind. 1999) (citing *Lowery*, 640 N.E.2d at 1048). "Even if counsel's choice is not reasonable, to prevail, petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different." *Stevens*, 770 N.E.2d at 760 (citing *Bieghler v. State*, 690 N.E.2d 188, 192–93 (Ind. 1997)).

[18] The Indiana Supreme Court has recognized three categories of appellate counsel ineffectiveness: (1) denying access to an appeal, (2) failing to raise an issue, and (3) insufficiently presenting and developing an issue. *Bieghler*, 690

N.E.2d at 193–95. However, ineffectiveness is rarely found when counsel neglects to raise an issue because "'the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel.'" *Id*. at 193 (quoting Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. VA. L. REV. 1, 21–22 (1994)).

[19] In his PCR petition, Alexander raised three claims of ineffective assistance of appellate counsel: (1) counsel had failed to challenge the sufficiency of the evidence on his burglary and robbery convictions; (2) counsel had failed to argue that his sentence was inappropriate on grounds that his criminal conduct constituted a single episode; and (3) counsel had failed to challenge the addition of the habitual-offender enhancement. Alexander's appellate counsel raised—and lost—each of these issues on direct appeal. *See Alexander*, 2014 WL 2202821 at *3–7.

[20] When it comes to FB-18, we agree with the State that Alexander fails to establish his ineffectiveness claims regarding his trial counsel. In his brief relating to FB-18, Alexander claims that trial counsel had provided ineffective assistance by not challenging the sufficiency of the evidence supporting that conviction at trial. However, the fact that Alexander's appellate counsel raised, and lost, a claim relating to the sufficiency of the evidence to sustain Alexander's burglary conviction establishes that Alexander was not prejudiced by his trial counsel's failure to challenge the sufficiency of the evidence at trial. *See Weisheit*, 109 N.E.3d at 983. Further, the decision of what issues to raise is a strategic one over which trial counsel had discretion. *Id*. As a result, we

agree with the post-conviction court's decision to deny Alexander's ineffectiveness of trial counsel claim in FB-18.

[21] Moreover, Alexander's claim for appellate counsel's ineffective assistance also fails. On direct appeal, appellate counsel challenged the sufficiency of the evidence supporting the burglary conviction and argued that the trial court had abused its discretion in permitting the State to amend the charging informations to include the habitual-offender enhancements. *See Alexander*, 2014 WL 2202821, at *3–7. We have already determined that the evidence was sufficient to sustain Alexander's conviction and that the trial court had not abused its discretion in permitting the amendments. *Id.* Alexander has failed to show how his appellate counsel had been deficient or how he had suffered any prejudice by his appellate counsel's performance in raising these issues.

[22] Further, when it comes to his conviction for robbery under FB-7, Alexander argues that his "[t]rial and appellate counsel neglected to present, raise, argue or challenge [the] findings" supporting his conviction. Case No. 1612, Appellant's Br. p. 19. However, because Alexander does not clearly explain exactly how his trial and appellate counsel were ineffective in this regard, his argument is waived. Under Indiana Appellate Rule 46(A)(8)(b), an argument "must contain the contentions of the appellant […] supported by cogent reasoning[,]" and "[e]ach contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal[,]" which Alexander has failed to do. As a result, we cannot provide meaningful appellate review of this issue; thus, Alexander has waived it. *Dridi v. Cole Kline*

LLC, 172 N.E.3d 361, 366 (Ind. Ct. App. 2021) (citing *In re Garrad*, 985 N.E.2d 1097, 1104 (Ind. Ct. App. 2013), *trans. denied*).

[23] Additionally, Alexander argues that his trial and appellate counsel provided ineffective assistance when they did not challenge his sentence on the basis that his crimes constituted a single episode of criminal conduct thereby limiting his aggregate sentence. That argument fails for two reasons. First, at the time Alexander committed the underlying offenses, Indiana Code section 35-50-1-2(c) provided that

> *except for crimes of violence*, the total of the consecutive terms of imprisonment […] to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

(emphasis added). At the time of Alexander's sentencing, Indiana Code section 35-50-1-2(a)(13) listed Class B felony burglary as a crime of violence. As a result, the restriction on the number of consecutive terms did not apply to Alexander and the trial court could impose consecutive sentences for his multiple convictions.

[24] Second, when Alexander committed these crimes, Indiana Code section 35-50-1-2(b) defined an "episode of criminal conduct" as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." Alexander's string of crimes is not that. Alexander committed his crimes over the course of eleven days involving multiple victims and locations including the

Nagy family residence, the parking lot of a convenience store, and on the road when he had been spotted by police. *Alexander*, 2014 WL 2202821, at *1–3. Alexander has failed to show that either his trial or appellate counsel had performed deficiently on this point or that he had suffered prejudice because of their performance. *Timberlake*, 753 N.E.2d at 603.

[25] When it comes to the habitual-offender enhancements in his three cases, Alexander argues that his trial and appellate counsel were ineffective for failing to challenge the sufficiency of the evidence supporting the enhancements. We, however, disagree. At the time of Alexander's sentencing in 2013, his prior felonies were all Class D or Level 6 felonies and the statute at the time allowed such felonies to support his habitual-offender status. *See* Ind. Code § 35-50-2-8. Alexander's trial and appellate counsel cannot have been ineffective for failing to anticipate changes in the law. *Overstreet v. State*, 877 N.E.2d 144, 161 (Ind. 2007) (concluding that counsel's performance cannot be deemed ineffective for failing to anticipate changes in the law). Consequently, Alexander's trial and appellate counsel did not provide ineffective assistance when they did not challenge the sufficiency of the evidence supporting Alexander's habitual-offender enhancements.

[26] Finally, Alexander argues that his trial counsel provided ineffective assistance when he failed to object to the late addition of the habitual-offender enhancements. Again, we disagree. On direct appeal, we concluded that the trial court had not abused its discretion in allowing the late amendments because doing so "did not deprive [Alexander] of a reasonable opportunity to

defend himself against the habitual offender allegations." *Alexander*, 2014 WL 2202821, at *4. As a result, Alexander cannot prove that his defense was prejudiced by trial counsel's decision not to object to the late amendments. *See Weisheit*, 109 N.E.3d at 983. In short, given our strong presumption that counsel provided adequate legal assistance, we conclude that Alexander has failed to establish that his trial and appellate counsel were ineffective and is consequently not entitled to post-conviction relief. *See Weisheit*, 109 N.E.3d at 983.

[27] The judgment of the post-conviction court is affirmed.

Riley, J., and Weissmann, J., concur.