MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Michael Williams,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

January 25, 2022

Court of Appeals Case No. 20A-PC-1582

Appeal from the Allen Superior Court

The Honorable Wendy Davis, Judge

Trial Court Cause No. 02D05-1412-PC-175

Pyle, Judge.

Statement of the Case

[1] Michael Williams ("Williams"), pro se, appeals the post-conviction court's denial of his petition for post-conviction relief. Williams argues that the post-conviction court erred by denying him post-conviction relief on his claim of ineffective assistance of trial counsel. Concluding that there was no error, we affirm the post-conviction court's judgment.

[2] We affirm.

Issue

Whether the post-conviction court erred by denying post-conviction relief to Williams.

Facts[1]

[3] On May 16, 1989, Norman Moore ("Moore") and Paul Ward ("Ward") were driving to school, and they stopped for a school bus. Williams, who was driving in the car behind them, stopped his car very close to Moore and Ward "[l]ike he was mad." (Trial Tr. 16). After the school bus had pulled away, Williams drove his car beside Moore and Ward's car and started swearing at

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[1] Williams did not file a direct appeal; thus, we glean the facts of his offense and trial from Williams' jury trial transcript, of which the post-conviction court took judicial notice. This Court directed the clerk of the trial court to transmit the trial transcript to our Court for appellate purposes. While this jury trial transcript is labeled as an Exhibit Volume, we will cite to it as "Trial Tr."

Additionally, we note that Williams originally filed a two-volume Appendix in January 2021. Thereafter, the State filed a motion for a conforming Appendix, and this Court granted that motion. Williams then filed a three-volume Appendix in August 2021, and it is this Appendix that we will reference. We note that Williams mislabeled Volume 2 as being Volume 1 and mislabeled Volume 3 as being Volume 2; however, we will cite to them as Volume 2 and 3.

them. Williams then parked his car in a caddy-corner position in front of Moore and Ward's car, exited his car, and continued swearing at them. After Moore and Ward exited their car, Williams and Moore started fighting, and then Ward joined the fight. Williams walked back to his car, grabbed a "machete," and then swung it at Moore, who jumped backwards. (Trial Tr. 17). Williams got into his car, said he would "get" Moore and Ward, and then left the scene. (Trial Tr. 47).

[4] The following day, around 2:00 p.m., Williams was driving his car with Roland Williams ("Roland") as a passenger. As Williams drove down John Street, he saw Moore sitting on the porch of Moore and Ward's shared house. From his car, Williams started arguing with Moore. Williams yelled for Moore to "[m]eet [him] at this lot at five o'clock[,]" and Moore responded, "If we gonna do anything why not just do it now and get it over with?" (Trial Tr. 20). When Ward exited the house, Williams parked his car, got out, and started arguing with Ward on the sidewalk in front of the house. Ward told Williams that "if he wasn't man enough to end it now then there was no meeting later on." (Trial Tr. 55). Moore, who stayed on the porch, saw that Williams had a machete in his hand. Ward got a tire iron from his own car. Williams then started approaching Ward with the machete. At that time, Ward's grandmother ("Ward's grandmother"), who lived next door, came out of her house, headed toward Ward, and yelled, "Get out of the way, he's got a knife, he's got a knife." (Trial Tr. 49). Moore left the porch, went down to the sidewalk, and took the tire iron from Ward. Williams approached Moore, and

Moore swung the tire iron towards Williams. Williams "kept coming at" Moore as Moore was "backing up[.]" (Trial Tr. 21, 53). Moore tripped over the curb, fell backwards, and dropped the tire iron. (Trial Tr. 21). Williams then cut Moore's abdomen with the machete, causing a laceration that later required fifty staples and a one-week hospitalization. Williams ran to his car and fled the scene. Ward's grandmother called the police.

[5] Fort Wayne Police Detective Alfred Figel ("Detective Figel"), who was near the scene, heard the dispatch about the incident. The dispatch included the license plate of the perpetrator's car. After discovering that the license plate belonged to Williams, Detective Figel then went to Williams' house where he found Williams and Roland on the front porch. The detective, who was in plain clothes, identified himself as a police officer. Detective Figel asked if either of the men was Williams, and Williams acknowledged that he was. Upon the detective asking Williams "if he had been involved in an earlier altercation on John Street where the cutting had taken place[,]" Williams responded that "he had been." (Trial Tr. 32). Williams also admitted that he had been involved in the cutting of Moore, and he invited the detective into his house where he gave the detective a knife that he claimed he had used to cut Moore. There was no visible blood on the knife. Detective Figel took Williams and the knife back to the crime scene on John Street. While there, Ward and Ward's grandmother told the police that the knife that Williams had given Detective Figel was not the same knife that he had used to cut Moore. They stated that Williams had used a much longer knife.

[6] The State charged Williams with Class C felony battery. The trial court held a jury trial in November 1989. Williams was represented at trial by Kenneth Scheibenberger ("Trial Counsel Scheibenberger"). Williams' theory of defense was self-defense. During Trial Counsel Scheibenberger opening statement, he told the jury, in relevant part, the following:

> On May 16, 1989, . . . Mr. Moore and another fellow . . . w[ere] blocking traffic. [Williams] honked at him trying to get him [to] move his car. These people in the car started yelling all sorts of things at him. [Williams] pulled around the car and got out and asked, tried to find out what was going on. These two guys jumped out of the car and proceeded to beat him up. [Williams] then . . . got away from them and went back to his car where he had this knife and pulled it out and they immediately backed off and everything was fine as far as [Williams] was concerned. The next day[,] he's driving down the street and he sees these guys up on the porch of this house and one of them motions for him to come back. *So[,] in [Williams'] back [sic] judgment here he stopped his car and backed it up and got out of the car.* As he's getting out of the car[,] he sees Mr. Moore pick up a rock. He sees Mr. Ward go to a car and pull out a crow bar so he's not going to stand there undefended. He takes his knife with him. . . . All of a sudden[,] Mr. Moore drops his rock he's carrying and grabs a hold of this crow bar and takes a swing at [Williams] . . . [Williams] did what I suppose most people would do when faced with an attack by a deadly weapon -- a crowbar can be just as deadly as a knife -- he struck back and cut Mr. Moore. He immediately left the scene and went home. When the police came[,] I think the testimony will show you he was very cooperative. He told them the knife was in the house, gave them the knife, they took the knife and Mr. Williams back to the scene where Mr. Williams was identified as the perpetrator of this thing. . . . *We have to testify not only [Williams], but also Roland Williams, who was a passenger in [Williams'] car the date this thing happened.* It will be up to you to

> decide who you're going to believe and who you're not going to believe.

(Trial Tr. 7, 8) (emphases added).

[7] At trial, Detective Figel testified about receiving the incident dispatch and talking to Williams on his porch:

> Yes, I identified myself as I was in plain clothes at the time[,] and I asked if either one of them was Michael Williams[,] and the defendant acknowledged that he was. I proceeded to ask him at that time if he had been involved in an earlier altercation on John Street where the cutting had taken place. He stated, yes, that he had been. At that time[,] I asked him if he had in fact cut somebody[,] and he stated that he had[,] and I asked him if he had the knife. At that point[,] he said, "Yes, it's in the house."
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> * * * * *
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> He actually invited me in[,] and we went into his house[,] and he went to the kitchen and opened a drawer and produced a -- like a butcher knife type thing, a kitchen knife utensil. He said this was the knife that he had.

(Trial Tr. 32). Williams trial counsel did not object to the testimony.

[8] When the State then moved to introduce the knife into evidence, Trial Counsel Scheibenberger asked Detective Figel the following preliminary questions:

> Q Prior to talking to Mr. Williams about his situation[,] did you advise him of his Miranda Rights?
>
> A No sir, I did not.
>
> Q He was certainly a suspect at that time, wasn't he?

A At that time, I did not consider that a custodial interrogation. I was merely questioning him to find out if he had been involved.

Q Well, after you interrogated him you arrested him and took him downtown, didn't you?

A I actually never did interrogate him, sir.

Q Asking if he'd been involved in an altercation with a guy and asking him whether he'd cut somebody wasn't an interrogation?

A I was merely trying to obtain information.

(Trial Tr. 33-34). Williams' counsel then stated that he had no objection to the admission of the knife.

[9] Trial Counsel Scheibenberger cross-examined the State's witnesses to highlight that Moore had first swung the tire iron at Williams and that Moore and Ward had made comments urging Williams to fight with them right then instead of later as Williams had proposed. Also, when discussing the final jury instructions, Trial Counsel Scheibenberger made sure that the trial court included a tire iron in the instruction defining a deadly weapon.

[10] During closing arguments, Trial Counsel Scheibenberger explained to the jury that he had not called Williams or Roland as witnesses because the State had failed to meet its burden of proving beyond a reasonable doubt that Williams was guilty of the battery. Counsel acknowledged that Williams had cut Moore but argued that he had done so in self-defense. Trial Counsel Scheibenberger argued that when Moore swung at Williams with the tire iron, which was a

deadly weapon, Williams then "defended himself" and "had the right to defend himself with that knife." (Trial Tr. 108, 110). Trial Counsel Scheibenberger stated that the evidence had showed that Williams "did what anybody . . . would have done if we had a weapon on ourselves" and that Williams had "protect[ed]" himself by "slash[ing] out" at Moore after Moore had swung the tire iron at Williams. (Trial Tr. 105). Counsel further stated that Williams "didn't continue th[e] fight" but "got away and left" and then "cooperated" with the police by talking to them and giving them the knife. (Trial Tr. 107). Trial Counsel Scheibenberger argued that, based on the evidence presented by the State, "[w]e didn't present anything. We didn't have to. Remember I told you that. Quite frankly, we were going to, but we decided we weren't going to do that because of the evidence [and] the way it came out." (Trial Tr. 107).

[11] In the State's rebuttal closing argument, the prosecutor told the jury the following:

> You will recall [Williams'], [Trial Counsel] Scheibenberger's, opening statement. *He said that [Williams] exercised bad judgment* in stopping on May 17, in front of the home of Norman Moore and Paul Ward and [Ward's grandmother]. . . . He also exercised bad judgment driving down the street on John Street and slamming on his brakes on May 17, stopping the car when he noticed . . . [Moore][] and [Ward] at their home. He exercised bad judgment in calling him to come out for a fight. He exercised bad judgment in aggressing towards [Ward]. He exercised bad judgment in carrying a machete under the seat of his car. And he exercised bad judgment in slicing Norman Moore. [Moore has] to carry that scar now for the rest of his life, that huge scar across

> his body, because of the bad judgment of [Williams]. Your job today is to exercise good judgment.

(Trial Tr. 112-13) (emphasis added). The jury found Williams guilty as charged.

[12] During Williams' sentencing hearing, Trial Counsel Scheibenberger argued that the trial court should impose a minimum two-year executed sentence. In support of his mitigation argument, Trial Counsel Scheibenberger told the trial court that a few weeks after the May 1989 crime for which Williams had been convicted, Moore and Ward had met Williams at a park and had "proceeded to pound the crap out of [Williams]." (App. Vol. 3 at 201). Williams' counsel told the trial court that he had photographs to document Williams' injuries and that Williams had filed a police report.

[13] The trial court imposed a five (5) year sentence with two (2) years executed and three (3) years on probation. At the end of the sentencing hearing, the trial court advised Williams that he was "entitled to take an appeal from the judgment and sentencing in []his case" and then explained the process for doing so, including Williams' right to appointed counsel for the appeal. (App. Vol. 3 at 205). The trial court then asked Williams if he would like to appeal, and Williams stated, "No." (App. Vol. 3 at 206). Trial Counsel Scheibenberger then told Williams that if he "change[d] [his] mind about the appeal[,]" he should let counsel know within thirty days. (App. Vol. 3 at 206). Williams then replied, "Okay." (App. Vol. 3 at 206). Counsel also told Williams that he believed that any appeal would not be successful but that the decision was up to

Williams, who was the one serving the sentence. Williams did not file a direct appeal.

[14] Williams originally filed a pro se post-conviction petition in 1999 and then withdrew it in 2001 after the State Public Defender filed a notice of non-representation. In December 2014, Williams filed another pro se petition for post-conviction relief. The following month, the State Public Defender filed a notice of non-representation. Williams then filed an amended post-conviction petition in February 2015 and alleged multiple claims of ineffective assistance of trial counsel. Specifically, Williams claimed that trial counsel had rendered ineffective assistance by failing to: (1) file a motion to suppress Williams' statement to Detective Figel based on the ground that Williams had not been advised of his *Miranda* rights; (2) object to photographs of the crime scene; (3) object to Detective Figel's testimony regarding Williams' statement based on the ground that Williams had not been advised of his *Miranda* rights; (4) fulfill a promise made in counsel's opening statement that he would call Williams and Roland as witnesses; (5) conduct a meaningful pretrial investigation; (6) object to the prosecutor's closing argument; (7) introduce evidence at trial that Williams had been beaten up by Ward and Moore a few weeks after the May 1989 crime had occurred; (8) render effective assistance in the aggregate; and (9) file a direct appeal. Williams also filed a motion for the post-conviction court to take judicial notice of his trial and sentencing hearing.

[15] The parties were to submit the case by affidavits. After various procedural activities not relevant to our review of the issues, Williams filed an affidavit and

exhibits in support of his post-conviction petition in May 2020.[2] Williams did not include an affidavit from Roland. Nor did Williams include an affidavit from Trial Counsel Scheibenberger as counsel was dead at the time of this post-conviction proceeding.

[16] Williams' exhibits included a 1989 police report, detailing a statement that Williams had made to Detective Ron Firks ("Detective Firks") at the police station. This report indicates that Williams had stated that Moore had dropped the tire iron at the time that Williams had cut Moore "in retaliation[.]" (App. Vol. 2 at 127). Williams' exhibits also included another 1989 police report, detailing a statement that Roland had made to Detective Figel. This report reveals that Roland had told the police that Williams had stopped his car when he had seen Moore on his porch, had engaged verbally with Moore and Ward, and then had taken his knife and cut Moore.

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[2] Williams had also previously submitted an affidavit and exhibits in support of his post-conviction petition in 2016. Based on the parties' briefs and the post-conviction court's order, these prior exhibits were also considered during this post-conviction proceeding. These exhibits included, among others, an August 1989 letter, to Williams from Trial Counsel Scheibenberger, in which counsel informed Williams that the prosecutor had offered a plea agreement. Williams' exhibits also included an April 2001 letter, to Williams from the State Public Defender, in which the deputy public defender explained why Williams "d[id] not have issues suitable for a post-conviction action." (App. Vol. 3 at 13). Specifically, the deputy public defender informed Williams that she had spoken with Roland, whose statement "was not helpful to [Williams'] case." (App. Vol. 3 at 13). Additionally, the deputy public defender stated that she had spoken with Trial Counsel Scheibenberger, who had made a strategic decision not to call Williams as a witness and had "argued [Williams'] self[-]defense theory to the jury by his questions on cross[-]examination of the State's witnesses." (App. Vol. 3 at 13). The deputy public defender also explained that [i]n [Williams'] case, it w[ould have been] hard to make a believable claim of self[-]defense anyway since [Williams had been] at the victim's house uninvited and [had] instigated the fight." (App. Vol. 3 at 13). Lastly, the deputy public defender informed Williams that he had no issue in regard to his *Miranda* argument because Williams had not been in custody at the time he had spoken to the detective and had given him the knife.

[17] In June 2020, Williams sent the State a proposed plea agreement in relation to his post-conviction petition. Williams proposed that he would dismiss his post-conviction petition with prejudice if the State would reduce his eighty-year sentence from a 1998 cause in which he had been convicted of Class A felony attempted murder and Class A felony attempted robbery and adjudicated to be an habitual offender. Apparently, Williams' Class C felony battery from this post-conviction case had been used as an underlying offense for the habitual offender adjudication. The State refused Williams' proposed plea offer.

[18] In July 2020, the post-conviction court issued an order denying Williams' petition for post-conviction relief on his claims of ineffective assistance of trial counsel. Williams now appeals.

Decision

[19] Williams argues that the post-conviction court erred by denying him post-conviction relief. At the outset, we note that Williams has chosen to proceed pro se. It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. Thus, pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so. *Id.* "We will not become a party's advocate, nor will we address arguments that are inappropriate, improperly expressed, or too poorly developed to be understood." *Barrett v. State*, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005), *trans. denied*.

[20] Our standard of review in post-conviction proceedings is well settled.

> We observe that post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who appeals the denial of PCR faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. The appellate court must accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. If a PCR petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court.

Shepherd v. State, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010) (internal case citations omitted), *trans. denied.* "We review the post-conviction court's factual findings under a 'clearly erroneous' standard but do not defer to the post-conviction court's legal conclusions." *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007), *reh'g denied*, *cert. denied*. Additionally, "[w]e will not reweigh the evidence or judge the credibility of the witnesses; we examine only the probative evidence and reasonable inferences that support the decision of the post-conviction court." *Id.*

[21] A claim of ineffective assistance of counsel requires a petitioner to show that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that "'there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Davidson v. State*, 763 N.E.2d 441, 444 (Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *reh'g denied*), *reh'g denied*, *cert. denied*. "A reasonable probability arises when there is a 'probability sufficient to undermine confidence in the outcome.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). "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.* Therefore, if we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008). Moreover, isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Because counsel is afforded considerable discretion in choosing strategy and tactics, a strong presumption arises that counsel rendered adequate assistance. *Id.*

[22] On appeal, Williams contends that his trial counsel rendered ineffective assistance by failing to: (1) conduct a meaningful pretrial investigation; (2) move to exclude Williams' statement to Detective Figel based the ground that

Williams was not advised of his *Miranda* rights;[3] (3) fulfill a promise made in counsel's opening statement that he would call Williams and Roland as witnesses; (4) object to the prosecutor's closing argument; (5) introduce evidence at trial that Williams had been beaten up by Ward and Moore a few weeks after the May 1989 crime had occurred; and (6) file a direct appeal.[4]

[23] We first address Williams' argument that his trial counsel rendered ineffective assistance by failing to conduct a meaningful pretrial investigation. Specifically, Williams asserts that his trial counsel's performance was deficient because he did not visit the crime scene, did not interview police officers, and did not interview Roland as a proposed witness.

[24] "When deciding a claim of ineffective assistance of counsel for failure to investigate, we apply a great deal of deference to counsel's judgments." *Boesch v. State*, 778 N.E.2d 1276, 1283 (Ind. 2002), *reh'g denied*. "[E]stablishing failure

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[3] Williams argues that his trial counsel should have excluded his statement by filing a motion to suppress and by objecting to Detective Figel's testimony. Because both allegations of ineffective assistance of counsel are based on the same *Miranda* argument, we will address both arguments jointly.

[4] Williams also contends that his trial counsel rendered ineffective assistance by failing to communicate an offer of a plea agreement to Williams. We need not review this alleged claim because Williams did not include it in his post-conviction petition. Our Indiana Supreme Court has explained that "any '[i]ssues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal.'" *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002) (quoting *Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001), *reh'g denied*, *cert. denied*), *reh'g denied*, *cert. denied* (alteration made in *Stevens*). *See also* Ind. Post-Conviction Rule 1(8) ("All grounds for relief available to a petitioner under this rule must be raised in his original petition."). Because Williams did not raise this plea offer claim in his post-conviction petition, he has waived appellate review of these assertions of ineffective assistance. *See, e.g.*, *Allen*, 749 N.E.2d at 1171 (holding that the petitioner could not raise claims in his post-conviction appeal when he had not raised them in his post-conviction petition). Even if we were to review the issue, Williams would not be entitled to relief because his exhibits show that his trial counsel sent Williams a letter in August 1989 to notify Williams of the proposed plea agreement.

to investigate as a ground for ineffective assistance of counsel requires going beyond the trial record to show what an investigation, if undertaken, would have produced." *McKnight v. State*, 1 N.E.3d 193, 201 (Ind. Ct. App. 2013). "'This is necessary because success on the prejudice prong of an ineffectiveness claim requires a showing of a reasonable probability of affecting the result.'" *Id.* (quoting *Woods v. State*, 701 N.E.2d 1208, 1214 (Ind. 1998), *reh'g denied*, *cert. denied*).

[25] First, Williams has waived his argument that trial counsel's performance was deficient because counsel did not visit the crime scene and did not interview police officers. Williams makes no argument, let alone cogent argument, regarding these alleged deficiencies. Thus, Williams has waived review of these arguments, and we will not address them. *See* Ind. App. Rule 46(A)(8)(a). *See also Griffith v. State*, 59 N.E.3d 947, 958 n.5 (Ind. 2016) (noting that the defendant had waived his arguments by failing to provide cogent argument).

[26] Additionally, Williams is not entitled to relief on his claim that his trial counsel rendered deficient performance by failing to interview Roland. Aside from Williams' self-serving statement in his post-conviction petition, he has presented nothing to show that his trial counsel did not interview Roland prior to trial. *See Popplewell v. State*, 428 N.E.2d 15, 17 (Ind. 1981) (providing that a court is not obligated to believe a petitioner's self-serving testimony). Moreover, Williams' argument that his trial counsel rendered ineffective assistance by failing to interview Roland is actually focused on his argument that trial counsel was ineffective by failing to call Roland as a witness at trial.

We will address that argument below when we address Williams' argument that his trial counsel was ineffective by failing to call Williams and Roland as witnesses. Accordingly, we conclude that Williams has failed to show that the post-conviction court erred by denying post-conviction relief on this claim.

[27] Next, we turn to Williams' ineffective assistance of counsel claim regarding the exclusion of his statement made to Detective Figel. The record reveals that the detective went to Williams' house and talked to Williams on his front porch. At that time, Williams acknowledged that he had been involved in the cutting incident on John Street. Williams then invited the detective into his house and gave him a knife that he said he had used in that incident.

[28] Williams contends that Trial Counsel Scheibenberger's performance was deficient because he failed to file a motion to suppress Williams' statement and failed to object to Detective Figel's trial testimony. He contends that his statement was inadmissible because he was in custody when he spoke to Detective Figel and because the detective had not advised Williams of his *Miranda* rights.

[29] To demonstrate ineffective assistance of trial counsel for failure to object or failure to file a motion, a petitioner must prove that an objection would have been sustained or the motion would have been granted if made and that he was prejudiced by counsel's failure to make an objection. *Kubsch v. State*, 934 N.E.2d 1138, 1150 (Ind. 2010), *reh'g denied*; *Talley v. State*, 51 N.E.3d 300, 303 (Ind. Ct. App. 2016), *trans. denied*.

[30] Here, however, we need not determine whether an objection would have been sustained because our review of this ineffective assistance of counsel claim can be resolved by addressing only the prejudice prong. *See Henley*, 881 N.E.2d at 645 (explaining that if our Court can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient). Williams contends that he was prejudiced by the admission of his statement because it "undermined his claim of self-defense." (Williams' Br. 25). We disagree.

[31] A person who asserts a claim of self-defense admits the elements of the offense, in this case battery with a knife, were committed but claims that he was justified in engaging in that conduct. Because Williams' defense at trial was self-defense, his defense necessarily included an acknowledgement that he had cut Moore. Thus, Williams' statement was consistent with his self-defense claim and did not undermine it. Moreover, the record on appeal suggests that Trial Counsel Scheibenberger used Williams' statement as part of his trial strategy. Specifically, in counsel's opening and closing statements, counsel highlighted that Williams had been cooperative with police when he had spoken to them at his house, told them what had happened, and gave them the knife. Therefore, Williams has failed to meet his burden of showing that the post-conviction court erred by denying post-conviction relief on this claim.

[32] Williams' next argument is that he received ineffective assistance of counsel when his trial counsel failed to fulfill a promise made during his opening statement. Specifically, Williams contends that his trial counsel performed

deficiently by failing to call Williams and Roland as witnesses despite telling the jury that they were available to testify.

[33] "The determination of whether or not a defendant should testify is a matter of trial strategy." *Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998). Indeed, "[t]his Court 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.*

[34] Even assuming that counsel's statements made during opening statements rendered counsel's performance deficient, Williams has failed to meet his burden of showing that he was prejudiced by counsel's performance. To show how he and Roland would have testified, Williams points to his and Roland's police statements from 1989. These 1989 police reports reveal that Williams had stated that Moore had dropped the tire iron at the time that Williams had cut Moore "in retaliation" and that Roland had told the police that Williams had stopped his car when he saw Moore on his porch, had engaged verbally with Moore and Ward, and then had taken his knife and cut Moore. (App. Vol. 2 at 127).

[35] The post-conviction court concluded that Williams had failed to show that he was prejudiced by trial counsel's failure to call him or Roland as a witness. The post-conviction court noted that Williams' submitted evidence of how he and Roland would have testified merely reinforced the fact that Williams did not act in self-defense because "Williams [ha]d not cut Moore with the knife to prevent

Moore from hitting [Williams] with the tire iron, but rather [had] cut Moore at a time when Moore could not have hit [Williams] with the tire iron." (App. Vol. 2 at 98). We agree with the post-conviction court that Williams has made no showing that there is a reasonable probability that, but for his trial counsel's alleged errors, the result of the proceeding would have been different. Accordingly, we affirm the post-conviction court's denial of post-conviction relief on this ineffective assistance of counsel claim. *See French*, 778 N.E.2d at 824 (holding that a petitioner's failure to satisfy either of the two prongs of an ineffective assistance of counsel claim will cause the claim to fail).

[36] Next, we review Williams' ineffective assistance claim regarding counsel's failure to object to the prosecutor's closing statement, which he contends included a misstatement by the prosecutor. Specifically, Williams contends that the prosecutor improperly referred to Williams' counsel's opening statement, in which the transcript reflects that counsel stated that Williams had used "back judgment" when he saw Moore on the porch, backed up his car, and got out of the car. (Trial Tr. 8).

[37] To demonstrate ineffective assistance of trial counsel for failure to object, a petitioner must prove that an objection would have been sustained if made and that he was prejudiced by counsel's failure to make an objection. *Kubsch*, 934 N.E.2d at 1150. Here, however, we need not determine whether an objection would have been sustained because our review of this ineffective assistance of counsel claim can be resolved by addressing only the prejudice prong. *See Henley*, 881 N.E.2d at 645 (explaining that if our Court can dismiss an

ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient).

[38] The post-conviction court found that the court reporter may have "mis-transcribed" what Williams' counsel had said in his opening statement when the court reporter typed "back judgment" in the transcript. (App. Vol. 2 at 94). Nevertheless, the post-conviction court concluded, in relevant part, that Williams had not shown that he was prejudiced by counsel's lack of objection to the prosecutor's closing argument. The post-conviction court concluded that even if an objection to the phrase "bad judgment" would have been made and sustained, Williams had failed to show that the outcome of the trial could have been different because, based on the evidence at trial, the prosecutor could have nevertheless argued that Williams had used bad judgment.

[39] Again, we agree with the post-conviction court. Here, the prosecutor's statement that Williams had used bad judgment on the day of the crime was a fair comment on the evidence presented at trial. *See Wrinkles v. State,* 749 N.E.2d 1179, 1197 (Ind. 2001) (explaining that the prosecutor's references to defendant as a "psychopath" and "sociopathic" were fair characterizations of the evidence), *cert. denied*; *Malloch v. State*, 980 N.E.2d 887, 909 (Ind. Ct. App. 2012) (explaining that the prosecutor's closing argument comment that the defendant had engaged in frotteurism was a fair comment on the evidence, which showed that the defendant had put his finger in the victim's vagina while she was asleep), *trans. denied*. Accordingly, Williams has failed to show that the

post-conviction court erred when it denied post-conviction relief on this claim of ineffective assistance of counsel.

[40] We now turn to Williams' argument that the post-conviction court erred by denying post-conviction relief on his claim that he received ineffective assistance of counsel when his trial counsel failed to introduce evidence during trial that "[Moore] and his associates beat [Williams] a few weeks *after* the May 17th incident[.]" (Williams' Br. 33) (emphasis added). Williams contends that this evidence of a fight that had happened a few weeks *after* the crime for which he was convicted would have been relevant to his theory of self-defense and admissible evidence of Moore's violent character and Williams' fear *at the time* of the crime. We disagree.

[41] Here, any attempt by trial counsel to introduce post-crime evidence would have been meritless, and "counsel will not be deemed ineffective for failing to present meritless claims." *Vaughn v. State*, 559 N.E.2d 610, 615 (Ind. 1990). While evidence of a "victim's reputed character, propensity for violence, prior threats and acts, if known by the defendant, may be relevant to the issue of whether a defendant had fear of the victim prior to utilizing deadly force against him[,]" *Brand v. State*, 766 N.E.2d 772, 780 (Ind. Ct. App. 2002), *reh'g denied*, *trans. denied*, evidence of acts that occur *after* the crime are not relevant to a defendant's state of mind or reasonable fear at the time of the crime. *See Welch v. State*, 828 N.E.2d 433, 437 (Ind. Ct. App. 2005). Therefore, any evidence of events that occurred after Williams had stabbed Moore was not relevant or admissible to show Williams' state of mind or reasonable fear at the time he

had cut Moore with the machete. *See id.* (holding that evidence of events that occurred after the defendant had stabbed the victim was not relevant to the defendant's state of mind at the time of the stabbing). Because the proffered post-crime evidence would not have been admissible at trial, Williams has failed to show that the post-conviction court erred by denying relief on this claim.

[42] Lastly, we review Williams' argument that his trial counsel rendered ineffective assistance by advising Williams not to appeal. Williams quotes from the sentencing hearing, during which he told the trial court "No" when asked if he wanted to appeal. (App. Vol. 3 at 206). Williams asserts that he in fact wanted to appeal but that his trial counsel had advised him to refuse an appeal.

[43] As noted by the post-conviction court, the sentencing transcript does not support Williams' claimed version of events. Indeed, the sentencing transcript reveals that the trial court advised Williams that he was "entitled to take an appeal from the judgment and sentencing in []his case" and then explained the process for doing so. (App. Vol. 3 at 205). The trial court then asked Williams if he would like to appeal, and Williams stated, "No." (App. Vol. 3 at 206). Trial Counsel Scheibenberger then told Williams that if he "change[d] [his] mind about the appeal[,]" he should let counsel know within thirty days. (App. Vol. 3 at 206). Williams then replied, "Okay." (App. Vol. 3 at 206).

[44] "A decision not to file a notice of appeal at all will be appropriate if the lawyer has consulted adequately with h[is] client about the decision." *Vinyard v. United*

States, 804 F.3d 1218, 1225 (7th Cir. 2015) (citing *Roe v. Flores-Ortega,* 528 U.S. 470, 478 (2000)). "And of course, a defendant who instructs his attorney not to appeal cannot claim deficient performance when the attorney complies with his wishes." *Vinyard*, 804 F.3d at 1225 (citing *Flores-Ortega,* 528 U.S. at 477).

[45] Because the record shows that, after consultation, Williams instructed his trial counsel that he did not want to appeal, Williams cannot show that his counsel performed in a deficient manner when counsel followed Williams' wishes. *See id.* Moreover, even if counsel's performance had been deficient, Williams has made no showing that there is a reasonable probability that, but for his trial counsel's alleged errors, the result of the proceeding would have been different. Accordingly, we affirm the post-conviction court's denial of post-conviction relief on Williams' ineffective assistance of trial counsel claims.

[46] Affirmed.

May, J., and Brown, J., concur.