MEMORANDUM DECISION

APPELLANT PRO SE

Gerald A. Kemper
Pendleton, 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

Gerald A. Kemper,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 14, 2021

Court of Appeals Case No. 21A-PC-177

Appeal from the Dearborn Circuit Court

The Honorable James D. Humphrey, Judge

Trial Court Cause No. 15C01-1911-PC-17

Mathias, Judge.

[1] After a 2014 jury trial, Gerald Kemper was convicted of five felonies for his role in the armed robbery of a Lawrenceburg, Indiana gas station. The trial court

vacated two of the convictions due to double-jeopardy concerns and sentenced Kemper to an aggregate sixty-year term. On direct appeal, a panel of this court found insufficient evidence to support one of the convictions and affirmed in all other respects. Kemper then filed a petition for post-conviction relief, which the court denied. He appeals, contending that the post-conviction court erred when it concluded he was not denied effective assistance of counsel.

[2] We affirm.

Facts and Procedural History

[3] In June 2012, Kemper and his long-time friend Malik Abdullah lived "around the corner from each other" in Forrest Park, Ohio, which is located near the Ohio-Indiana border. DA Tr. Vol. I, p. 182. [1] On June 17, they corresponded via text message about plans for that evening; plans that culminated in the armed robbery of a Lawrenceburg, Indiana gas station.

[4] Just before 8:00 p.m. on June 17, Kemper sent back-to-back text messages to Abdullah, first asking, "Are we good for tonight bro," and then stating, "It's on I don't have the car tho." DA Ex. Vol. at 105. Abdullah requested Kemper's location, to which he responded "Debbies," a local bar the two men frequented. *Id.* at 105–06; DA Tr. Vol. I, pp. 181, 231–32. Abdullah met Kemper at the bar, where the two stayed for a couple of hours. While there, they discussed going to

[1] We use the prefix "DA" throughout when referring to record documents in Kemper's direct appeal. Citations without a prefix are to record documents in this appeal.

Lawrenceburg later that night. Around 10:00 p.m., the men left the bar and Abdullah drove Kemper home. Abdullah then drove a short distance to his mother's house, where he was staying, and "slept a little bit" before meeting back up with Kemper. *Id.* at 182–83.

[5] About an hour later, at 11:08 p.m., Abdullah text-messaged Kemper, "What up." DA Ex. Vol. at 106. Kemper responded, "11:30 come thru," to which Abdullah countered, "Twelve." *Id.* Kemper replied, "Ok bro." *Id.* Then, at 12:14 a.m., Abdullah text-messaged Kemper, "Outside," Appellant's App. p. 157, and, fourteen minutes later, Kemper placed a twelve-second call to Abdullah, DA Ex. Vol. at 115. At some point during this timeframe, "around midnight," Abdullah picked Kemper up and began driving the approximately "twenty minutes" to Lawrenceburg. DA Tr. Vol. I, pp. 182, 191.

[6] Once in Lawrenceburg, they talked about going to either a strip club or casino, but Kemper "didn't want to go" because "he said he had something else for [them]." *Id.* at 191. So, they left and returned to Abdullah's mother's house in Forest Park. Once there, Abdullah let Kemper borrow the car. Kemper left and returned in the vehicle about two hours later, sometime "after 3:00 [a.m.]" *Id.* at 194. When Abdullah came out of the house, Kemper "said he needed to make another run," so Abdullah got in the car and Kemper "continued to drive." *Id.* at 193–94. Kemper, who was wearing "normal clothes" earlier, now had "different clothes on, dark colored clothes on." *Id.* at 190, 195. Though the two "didn't discuss" going back to Lawrenceburg, that is where they "ended up." *Id.* at 194.

[7] This court previously described what happened next:

> Once back in Lawrenceburg, Kemper slowed the vehicle as he passed a BP station. He initially drove past the BP station and continued to drive around the area. However, he eventually returned to the BP station and parked the vehicle. Kemper then tied a black t-shirt around his head and removed a gun from his pocket. Abdullah, who was in the passenger's seat, "was in shock" as he watched Kemper exit the vehicle and proceed toward the BP station. [DA] Tr. [Vol. I,] p. 201. Abdullah remained in the car and eventually moved to the driver's seat, preparing to drive away.
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> Kemper entered the BP station and aimed his gun at James Lafollette, who was working behind the counter that morning. Kemper demanded that Lafollette give him the money in the register. Lafollette froze in fear and did not respond for a few seconds. Kemper then aimed the gun at Lafollette's leg and shot him in the thigh. Kemper continued to demand money from Lafollette, who at this point opened the register and told Kemper to take it. Kemper took the money and left the BP station. Lafollette called 911.
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> Upon leaving the station, Kemper was spotted by Jack Morgan, a newspaper delivery man. Morgan watched as Kemper returned to Abdullah's vehicle. Thinking Kemper looked suspicious, Morgan called 911 and followed Abdullah's vehicle as it drove away. He continued to follow the vehicle as it went onto U.S. 50 and accelerated to around 90 or 100 miles per hour. Morgan eventually saw a police vehicle approaching him and pulled over. As he pulled over, Morgan watched Abdullah's vehicle continue on U.S. 50.
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> Abdullah soon noticed police vehicles with their lights on headed in the opposite direction. He turned onto I–275 in an attempt to

evade them. However, fearing an eventual shootout with the police, Abdullah quickly decided to drive off the road and into the woods by the side of the interstate. The vehicle crashed through a fence and some trees and eventually came to a stop. Kemper then jumped out of the vehicle and ran off into the woods.

Abdullah remained in the vehicle until sunrise. By this point, he had received several phone calls from Kemper telling him to get out of the area. Abdullah exited the vehicle and proceeded to walk toward U.S. 50. Kemper phoned Abdullah again and told him to stay out of the open. Abdullah was eventually pulled over by police as he walked down U.S. 50.

The State filed an initial charge on July 14, 2012, against Abdullah and "John Doe," as the investigation had not yet led to Kemper. However, police later identified Kemper through discovery of the gun used to commit the crime and a search of Abdullah's vehicle and cell phone. The State amended its initial charge to include Kemper, charging him with robbery resulting in bodily injury, robbery while armed with a deadly weapon, conspiracy to commit robbery while armed with a deadly weapon, aggravated battery, and unlawful possession of a firearm by a serious violent felon. Prior to trial, Abdullah entered into a plea agreement with the State in which he pleaded guilty to conspiracy to commit robbery.

Kemper's jury trial began on May 7, 2014. During trial, the defense learned that the State had in its possession a videotaped interview with Jack Morgan in which Morgan identified someone other than Kemper as the robber. The defense argued that it had never been given a copy of this interview and moved for a mistrial. The prosecution maintained that it had sent the defense a copy. The trial court denied the motion, allowing the defense time to view the videotaped interview and use it to

> impeach Morgan's testimony. The trial concluded on May 14, 2014, and the jury found Kemper guilty as charged.
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> The trial court vacated Kemper's convictions for robbery while armed with a deadly weapon and aggravated battery on double jeopardy grounds. Kemper remained convicted of robbery resulting in bodily injury, conspiracy to commit robbery while armed with a deadly weapon, and unlawful possession of a firearm by a serious violent felon. The trial court then sentenced Kemper to twenty-year consecutive terms for each of these remaining convictions, resulting in an aggregate sentence of sixty years.

Kemper v. State, 35 N.E.3d 306, 307–09 (Ind. Ct. App. 2015*), trans. denied*.

[8] Kemper appealed, raising the following four claims: (1) the trial court erred in denying his motion for mistrial; (2) the State presented insufficient evidence to support his convictions; (3) his convictions violated double-jeopardy principles; and (4) his sentence was inappropriate in light of the nature of the offenses and his character. *Id.* at 309. A panel of this court rejected the first claim, but concluded that the evidence was insufficient to support his conspiracy conviction and vacated it, reducing his sentence to forty years. *Id.* at 310–11. At the outset of that discussion, however, the panel found that Kemper waived his sufficiency arguments on the other convictions "for failure to adequately present the issues and support his arguments with cogent reasoning." *Id.* at 310 n.4. The court also declined to address Kemper's double-jeopardy arguments because they related to the vacated conspiracy conviction. *Id.* at 312 n.5. And the panel found that Kemper's sentence was not inappropriate. *Id.* at 312–13.

[9] In May 2019, Kemper filed a petition for post-conviction relief, alleging that he received ineffective assistance of both trial and appellate counsel. The court held a two-day evidentiary hearing on Kemper's petition in October 2020. At that hearing, Kemper questioned his two trial attorneys, his appellate attorney, and the detective who created summary exhibits of cell-phone evidence that were admitted during trial. On January 7, 2021, the court entered an order denying Kemper's petition. He now appeals.

Standard of Review

[10] In appealing from the denial of post-conviction relief, Kemper proceeds from a negative judgment. *See, e.g.*, *McDowell v. State*, 102 N.E.3d 924, 929 (Ind. Ct. App. 2018) (quoting *Manzano v. State*, 12 N.E.3d 321, 325 (Ind. Ct. App. 2014), *trans. denied*), *trans. denied*. As such, he must convince us that the evidence unmistakably and unerringly leads to a conclusion opposite the one reached by the post-conviction court. *Id.* In making this determination, we consider only the evidence and reasonable inferences supporting the court's judgment. *Id.* If Kemper fails to meet this "rigorous standard of review," we will affirm. *Shepherd v. State*, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010), *trans. denied*.

[11] The post-conviction court entered findings of fact and conclusion of law in accordance with Post-Conviction Rule 1(6). Though we do not defer to the court's legal conclusions, we review the factual findings for clear error—that which leaves us with a definite and firm conviction that a mistake has been made. *State v. Cozart*, 897 N.E.2d 478, 482 (Ind. 2008).

Discussion and Decision

[12] Kemper argues that the post-conviction court erred in denying him relief on his claims that he received ineffective assistance of both trial and appellate counsel. To succeed on those claims, Kemper was required to make the following two showings by a preponderance of the evidence: (1) counsels' performance was deficient by falling below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsels' deficient performance, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *Harris v. State*, 861 N.E.2d 1182, 1186–87 (Ind. 2007).

[13] In analyzing the post-conviction court's conclusion that Kemper failed to meet his burden, we are guided by several well-settled principles. There is a strong presumption that counsel rendered adequate assistance and used reasonable professional judgment throughout the proceedings. *See, e.g.*, *Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019). Kemper "must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). To the latter, we afford "great deference to counsel's discretion to choose strategy and tactics." *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002). And "we should resist judging an attorney's performance with the benefit of hindsight." *McKnight v. State*, 1 N.E.3d 193, 200 (Ind. Ct. App. 2013), *trans. denied*; *see McCary*, 761 N.E.2d at 392 ("Even the best and brightest criminal defense attorneys may disagree on ideal strategy or the most effective approach in any given case."). It is for these reasons that

"isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Harris*, 861 N.E.2d at 1187 (citations and quotations omitted).

[14] With these principles in hand, we now address Kemper's claims of ineffective assistance of counsel in turn. And we ultimately conclude that Kemper has failed to demonstrate that the evidence unmistakably and unerringly leads to conclusions opposite those reached by the post-conviction court.

I. The court did not err in concluding that Kemper failed to establish he received ineffective assistance of trial counsel.

[15] Kemper claims his trial counsel provided ineffective assistance by: (1) failing to object to or further investigate certain cell-phone evidence; (2) failing to object to testimony from Abdullah that allegedly violated a limine order; and (3) failing to object to testimony and comments that purportedly constitute improper vouching. Before explaining why the post-conviction court did not err in rejecting each claim, we note that Kemper's arguments are largely premised on counsel not objecting at various points during trial. To demonstrate ineffective assistance based on a failure to object, Kemper must establish that the objection would have been sustained, that counsels' failure to object was unreasonable, and that the lack of an objection resulted in prejudice. *See McCary*, 761 N.E.2d at 392; *McKnight*, 1 N.E.3d at 202. We now take each of Kemper's claims of alleged trial-counsel error in turn.

A. Kemper has not established that trial counsel performed deficiently for actions relating to cell-phone evidence.

[16] Kemper first asserts trial counsel was ineffective for failing "to investigate the State's evidence favorable to the defense or State's evidence that should have been excluded." Appellant's Br. at 11. Kemper's argument is premised on the following: a text message, sent by Abdullah at 12:14 a.m. the morning of the robbery telling Kemper that he was "outside"; and other text messages exchanged by Abdullah and his girlfriend during the hours before the robbery. Kemper maintains that this evidence proves that a detective and Abdullah committed perjury. *Id.* at 11, 16, 24, 26. In Kemper's view, had trial counsel properly investigated this evidence, counsel "would have discovered [a] bomb shell favoring the defense." *Id.* at 16. On this claim, the post-conviction court concluded that Kemper failed to show that trial counsel performed deficiently. Appellant's App. p. 21. Kemper has not demonstrated that this conclusion is clearly erroneous. To explain why, we briefly provide necessary context.

[17] During Kemper's trial, the State sought to admit Exhibit 32, a disc containing Abdullah's "complete" cell-phone records for a ten-day period. DA Tr. Vol. II, pp. 294–95. But the parties expressed two concerns with this exhibit. First, the records spanned "several hundred" pages. *Id.* at 302. Kemper's lead trial counsel objected to the exhibit's admission, opining that "ninety percent . . . ninety-five percent [of those records] are totally irrelevant in this case." *Id.* at 295, 302. Second, both Kemper's counsel and the court were concerned with presenting the voluminous record to the jury because Kemper

and Abdullah, who corresponded frequently, were allegedly involved in "two other robberies" that occurred during the same timeframe encompassed by the cell-phone records. *Id*. at 299. The concern was that the exhibit likely included "other stuff . . . that's going to create a lot of confusion" among the jury. *Id.* at 297. The State ultimately withdrew its request to admit Exhibit 32, and everyone agreed the State would instead submit three sets of summary exhibits created by Detective Beetz: Exhibit 28, which included text messages between Abdullah's phone and one of Kemper's phones; Exhibit 29, which included text messages between Abdullah's phone and Kemper's other, newer phone; and Exhibit 33, which included call-log information between Abdullah's phone and Kemper's newer phone. *Id.* at 302–03; DA Ex. Vol. at 103, 105–06, 115–16.

[18] Kemper's first allegation of ineffective assistance stems from trial counsels' performance related to a text message that was omitted from Exhibit 29. That summary exhibit includes the following messages exchanged by Abdullah and Kemper on June 17 and June 18.

Time	From	To	Content
11:08 p.m.	Abdullah	Kemper	What up
11:12 p.m.	Kemper	Abdullah	11:30 come thru
11:39 p.m.	Abdullah	Kemper	Twelve
11:40 p.m.	Kemper	Abdullah	Ok bro
8:01 a.m.	Abdullah	Kemper	Im good bra im at home

Ex. Vol. at 106. Missing from the exhibit, however, is a text message sent by Abdullah at 12:14 a.m. informing Kemper that he was "[o]utside." Appellant's App. p. 157. Exhibit 29 was introduced at trial through Detective Beetz who confirmed the text messages in the table were "true and accurate summar[ies] of the voluminous [cell-phone] records." DA Tr. Vol. II, p. 303; *see also id.* at 294, 314. But because the summary exhibit did not include the 12:14 a.m. text message, Kemper argues that "trial counsel was ineffective by not objecting to [Exhibit 29] . . . and then impeaching Detective Beetz . . . since he testified under oath that [it] was a complete summary, **thus committing perjury**." Appellant's Br. at 11. The post-conviction court found Kemper's claim "misplaced and inaccurate." Appellant's App. p. 20. We agree.

[19] Detective Beetz did not commit perjury by testifying that Exhibit 29 "was a complete summary" when it did not include an innocuous, one-word text message. A summary, by its very nature, would not include every text message between the two men. *See* Tr. p. 35 (Kemper's lead trial attorney explaining, "A summary means you're summarizing, you're not listing everything."). It is therefore unlikely that an objection by trial counsel would have been sustained. Further, inclusion of the 12:14 a.m. text message in the summary exhibit would have corroborated Abdullah's testimony that he picked up Kemper "around midnight." DA Tr. Vol. I, pp. 183, 190. As the post-conviction court found, "Rather than exculpatory, this text message is potentially inculpatory." Appellant's App. p. 20. Thus, not only would any objection by trial counsel to

Exhibit 29 have been futile, it also could have harmed Kemper's defense.[2] *See Stevens v. State*, 770 N.E.2d 739, 746–47 (Ind. 2002) ("A decision to not object to evidence when the objection may be more damaging than the evidence is within the wide range of professionally competent assistance."). In short, Kemper has failed to show deficient performance on this claim.

[20] Kemper's next, related argument is that trial counsel provided ineffective assistance by failing to investigate and use text messages contained in Exhibit 32—the entirety of Abdullah's cell-phone records—between Abdullah and his girlfriend during the hours preceding the robbery. The text messages relevant to Kemper's claims were sent between 8:12 p.m. on June 17, which was Father's Day, and 2:11 a.m. on June 18. *See* Appellant's Br. at 20–24. During this timeframe, Abdullah's girlfriend was at work. *See* Appellant's App. pp. 201–02. The June 17 messages include correspondence about Abdullah's gambling problem, debt he owed his girlfriend, and allegations of infidelity. *See id.* at 172–84, 192–93, 198–211. The June 18 messages include Abdullah telling his girlfriend at 12:47 a.m. that he was at her house; and then, replying about twenty minutes later, "Wow!! U Know what to do," in response to his girlfriend asking if he saw a gift that she had left for him "on the side of the dresser by the table." *Id.* at 157–61, 164.

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[2] Kemper also points to a phone call he placed to Abdullah at 12:28 a.m.—fourteen minutes after the missing text message—that he asserts proves he "wasn't inside [Abdullah's] car." Appellant's Br. at 14. There is no location information for this phone call, and so, it does nothing to prove where Kemper was at the time. DA Ex. Vol. at 115. Further, the call was presented to the jury. DA Tr. Vol. II, p. 312.

[21] Kemper maintains that these messages reveal Abdullah's "motive" for the robbery and also "prove in fact" that Abdullah was inside his girlfriend's house during the same timeframe Abdullah testified that he and Kemper were either in Lawrenceburg or traveling to and from the city. Appellant's Br. at 20–26. Kemper in turn asserts that the messages establish Abdullah "committed perjury in the highest degree," and that had they "been presented to the jury it would have resulted in a different result." *Id.* at 23–24. These arguments are unavailing, and Kemper has failed to establish that trial counsels' investigation and decisions related to the text messages were objectively unreasonable.

[22] At Kemper's post-conviction hearing, his lead trial attorney confirmed that he and his co-counsel "had reviewed" the records in Exhibit 32 and concluded that "[a] lot of it wasn't relevant to [Kemper's] trial and a lot of it was prejudicial towards [him]." Tr. pp. 44, 51. When questioned about the messages between Abdullah and his girlfriend, counsel told Kemper, "I don't know that . . . those text messages[] prove what you think they [prove]." *Id.* at 50. To counsel's assertion, the post-conviction court observed that the messages "show a contentious relationship between [Abdullah and his girlfriend], however, they show no location information." Appellant's App. p. 20. The court therefore found that the text messages do not "conclusively establish that Abdullah was not with Kemper," reasoning,

> It seems illogical for Abdullah to text his girlfriend that he was out going to a casino with someone when in the same group of messages there are significant arguments about money. It would

> also seem illogical to expect him to tell her he was out committing a robbery with someone.

Id. And we agree. After thoroughly reviewing the record, we find it much more likely that Abdullah was not being truthful about his location with his girlfriend. Just before Abdullah allegedly found the gift inside his girlfriend's house, he texted her that he was "bout to make something happen." *Id.* at 164. Further, there is no identifying information about the gift from which to infer that Abdullah retrieved anything—he simply states, "Wow!! U know what to do," and responds, "Hell yea," when she asked if he liked the gift. *Id.* at 164–65.

[23] In sum, despite Kemper's contrary assertions, the cell-phone evidence does not reveal that either Detective Beetz or Abdullah committed perjury. At best, the missing text message and the messages between Abdullah and his girlfriend could have been used to impeach. At worst, presenting that evidence to the jury could have hurt the defense. Kemper has failed to establish that trial counsels' strategy as to these exhibits was unsound, and much less that counsels' actions constituted deficient performance or resulted in prejudice. Kemper has thus not demonstrated that the post-conviction erred in denying relief on these claims.

B. Kemper has not established that trial counsel performed deficiently for failing to object to testimony about his change of clothing.

[24] Kemper next contends trial counsel was ineffective for failing to object to testimony that he asserts "**indirectly implicate[d]**" him in a different robbery and thereby violated the trial court's limine order. Appellant's Br. at 29. In

rejecting this claim, the post-conviction court did "not find any deficient representation." Appellant's App. p. 21. We agree. Kemper has not shown a violation of the court's limine order, and therefore has not demonstrated that an objection by trial counsel would have been sustained.

[25] Prior to Kemper's trial, the court entered a limine order "prohibiting the State from admission of evidence of other crimes." DA Appellant's App. Vol. II, p. 237. The order specifically referred to two other robberies allegedly involving Kemper and Abdullah. The first occurred on June 14, four days before the Lawrenceburg robbery; the second occurred about one-and-one-half hours before the Lawrenceburg robbery. *Id.* At trial, the State asked Abdullah whether Kemper was "still dressed normal" when he picked Abdullah up and began driving towards Lawrenceburg sometime "after 3:00 [a.m.]" DA Tr. Vol. I, pp. 194–95. Abdullah responded, "No, he's got different clothes on, dark colored clothes on . . . . [d]ark shirt, dark pants, dark everything." *Id.* at 195. Kemper argues that the purpose of these comments was to "**blatantly** point the finger at Kemper for the" other robbery that occurred that night. Appellant's Br. at 31. Accordingly, he asserts that Abdullah's testimony violated the limine order and that counsel was ineffective for not objecting. Kemper is incorrect for three reasons.

[26] First, there is no evidence that the jury knew anything about the robbery that occurred about ninety minutes before the Lawrenceburg robbery. Second, even if the jury was aware of the robbery, there is no evidence that the jury knew any circumstances surrounding the offense, such as the number of perpetrators

involved or the clothing worn by any alleged perpetrator. And third, the fact that Abdullah informed the jury that Kemper changed into "dark" clothing sometime after he borrowed Abdullah's car does not lead to a reasonable inference that Kemper committed a criminal offense. Kemper's lead trial counsel "did not interpret" the testimony "as being a violation of the motion in limine." Tr. p. 52. We agree and echo the post-conviction court's observation that Abdullah's "testimony does not imply anything that could reasonably be tied to an uncharged bad act." Appellant's App. p. 21.

[27] In short, Kemper has not demonstrated that an objection to Abdullah's testimony about Kemper's change of clothing would have been sustained, and he has therefore not shown that counsel performed deficiently in not objecting. Kemper has not established that the post-conviction clearly erred in denying relief on this claim.

C. Kemper has not established that trial counsel performed deficiently for failing to object to alleged vouching testimony.

[28] Finally, Kemper argues trial counsel was ineffective for not objecting to several instances of what he claims was improper vouching by the prosecutor. Kemper specifically takes issue with testimony about Abdullah's plea agreement and the admission of that agreement, as well as five comments by the prosecutor during closing arguments. Appellant's Br. at 33–39. Kemper is correct in pointing out that "a prosecutor may not personally vouch for a witness." *Ryan v. State*, 9 N.E.3d 663, 671 (Ind. 2014). But a prosecutor can (1) comment on a witness's credibility if the assertions are based on reasons arising from the evidence

presented, *Cooper v. State*, 854 N.E.2d 831, 836 (Ind. 2006), or (2) properly raise any reasonable conclusions based on his own analysis of the evidence, *Neville v. State*, 976 N.E.2d 1252, 1260 (Ind. Ct. App. 2012), *trans. denied*. Because the evidence and statements Kemper challenges arguably fall within these categories, he has not established that trial counsel was ineffective for failing to object.

[29] As to Kemper's concern over Abdullah's plea agreement, Abdullah pleaded guilty to conspiracy to commit robbery and had been released from prison by the time of Kemper's trial. During Abdullah's direct examination, the following exchange took place:

> State: And, do you have a condition of probation that's in that Plea Agreement that says that you're required to testify truthfully in any proceedings against Mr. Kemper?
>
> Abdullah: Yes, I do.
>
> State: Okay. Do you understand if you don't tell the truth that you could be subject to having your probation violated.
>
> Abdullah: Absolutely.

DA Tr. Vol. I, p. 180. In line with this testimony, the plea agreement, which was subsequently admitted into evidence, required Abdullah to "testify truthfully at any and all proceedings" concerning Kemper. DA Ex. Vol. at 98.

Kemper argues that trial counsel should have objected because the testimony and plea agreement "vouched for [Abdullah's] truthfulness." Appellant's Br. at 38. We disagree.

[30] Neither the plea agreement nor the prosecutor's questioning of Abdullah about the agreement's requirement that he testify truthfully amount to improper vouching. As Kemper's lead trial counsel explained during the post-conviction hearing, such a requirement is standard issue in many plea agreements, and the questions posed by the prosecutor were "standard type of questions" related to that agreement. Tr. pp. 53–54. The prosecutor did not opine or elicit testimony that Abdullah was testifying truthfully; he simply used the plea agreement's standard requirement to highlight for the jury the consequences Abdullah faced if he was lying. We also note that the existence of Abdullah's plea agreement confirmed to the jury that he was involved in the Lawrenceburg robbery. As the State points out, "Excluding evidence that Abdullah committed the crimes for which [Kemper] was being tried might have been prejudicial." Appellee's Br. at 20. For these reasons, we find no basis for concluding that counsels' failure to object to Abdullah's plea agreement or his testimony about that agreement falls below an objective standard of reasonableness.[3]

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[3] Kemper contends that the use of Abdullah's plea agreement "to vouch for his testimony . . . spilled over into the direct appeal prejudicing [Kemper] again," arguing that this court "made clear" the jury used the plea agreement to convict Kemper. Appellant's Br. at 35–37 (referencing *Kemper*, 35 N.E.3d at 310–12). He is incorrect. The panel, in finding insufficient evidence to support Kemper's conspiracy conviction, rejected the State's argument that the "the jury could infer that the two had agreed to commit the robbery from the fact that Abdullah pleaded guilty." *Kemper*, 35 N.E.3d at 311. What the court "made clear" was that the existence of "Abdullah's guilty plea, and his acknowledgement of that plea" was insufficient to allow the jury to

[31] Kemper also takes issue with the following five comments made by the prosecutor during closing arguments:

> "There's plenty of individuals out there [Abdullah] could try to lay blame on, but he chose Kemper. Why? Because he chose the truth."
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> "I will submit to you [that losing friends for telling on others is] plenty good motivation for [Abdullah] to tell the truth, not just giving up someone for the sake of giving someone up."
>
> "[Abdullah] got a deal to implicate Kemper. That is so wrong. He doesn't get any deal unless he testifies to the truth . . . ."
>
> "[Abdullah] told you the truth . . . . He had to on the stand. Again, you judge for yourself, did [] Abdullah tell you the truth? I think he did."
>
> "I didn't know if [] Morgan was going to tell you [Kemper] is the guy or not, cause I don't know, and I know one thing, he's telling you the truth to the best of his memory and recollection."

DA Tr. Vol. III, pp. 595–96, 623–24, 627. The prosecutor made the first two comments in his initial argument, which lasted forty minutes and spans approximately twenty-one transcribed pages. *Id.* at 586–607. He made the latter

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reasonably infer that Kemper and Abdullah agreed to rob the Lawrenceburg gas station—a required element of Kemper's conspiracy charge. *Id.*

three after Kemper's counsel's closing argument, in a rebuttal that spans approximately twelve transcribed pages. *Id.* at 621–33.

[32] These statements, which Kemper has taken out of context, do not constitute improper vouching. While we acknowledge that the prosecutor's use of the first-person perspective may have been too liberal, each comment either precedes or follows the prosecutor's explanation of the statement as it relates to the evidence presented at trial. *See id.* at 595–96, 623–24, 627–28. And the latter three statements in particular were made in direct response to Kemper's counsel's closing argument, where he repeatedly attacked Morgan's and Abdullah's credibility, at one point stating that Abdullah "is a liar." *Id.* at 613–20. Simply put, the prosecutor spoke to the credibility of Abdullah and Morgan based on reasons arising from the evidence, and thus Kemper has not established improper vouching. The post-conviction court made a similar observation in concluding that counsel was not deficient for failing to object to these statements. Appellant's App. p. 21. Kemper has failed to show that the evidence unmistakably leads to an opposite conclusion.

[33] But even if we found counsel performed deficiently by falling to object to the prosecutor's statements, Kemper has not demonstrated a reasonable probability that any objection would have changed the result of his trial. As noted above, the statements were cherry picked from the prosecutor's closing arguments, which encompasses nearly thirty-three transcribed pages. And the jury was properly instructed that those arguments were not evidence and that the jurors themselves were the exclusive arbiters of witness credibility. *See* DA Appellant's

App. Vol. II, pp. 41, 45, 90, 92, 119, 123, 139. The prosecutor even twice reminded the jury during his closing arguments that his statements were not evidence. DA Tr. Vol. III, pp. 621, 626. The post-conviction court concluded that there was "no prejudice to Kemper based on these limited statements in closing." Appellant's App. p. 21. And Kemper has failed to show that conclusion is clearly erroneous.

[34] In sum, Kemper has failed to demonstrate that any of trial counsels' alleged errors satisfy the two-part *Strickland* test. Kemper has therefore not established that the post-conviction court clearly erred in concluding that he was not denied effective assistance of trial counsel. We now turn to Kemper's other claim for post-conviction relief.

II. The court did not err in concluding that Kemper failed to establish he received ineffective assistance of appellate counsel.

[35] Kemper also maintains the post-conviction court erred when it concluded that he was not denied effective assistance of appellate counsel. There are three basic categories of alleged appellate ineffectiveness: (1) denying access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *See, e.g., Harris*, 861 N.E.2d at 1187. Kemper's claim implicates the latter two categories, as he contends that appellate counsel was ineffective for failing to "proper[ly] argue insufficiency of the evidence for all [of his] convictions." Appellant's Br. at 41. In rejecting this claim, the post-conviction court found neither "deficient appellate representation" nor "any prejudice from that representation."

Appellant's App. p. 16. Kemper has not demonstrated that either conclusion is clearly erroneous.

[36] In Kemper's direct appeal, his appellate counsel challenged the sufficiency of the evidence supporting each of his convictions. *See* DA Appellant's Br. at 8–9, 23–30. And one of those challenges proved successful; a panel of this court found the evidence insufficient to support Kemper's conspiracy conviction. *Kemper*, 35 N.E.3d at 309–12. But at the outset of that discussion, the panel found that appellate counsel had waived the claims of insufficient evidence supporting Kemper's other convictions for "failure to adequately present the issues and support [the] arguments with cogent reasoning." *Id.* at 310 n.4 (citing Ind. App. R. 46(A)(8)(a)). Because the panel found the arguments waived, Kemper contends appellate counsel was ineffective. We disagree

[37] At Kemper's post-conviction hearing, appellate counsel remarked that she "respectfully disagree[d]" with this court's decision to find the other sufficiency arguments waived. Tr. p. 31. And, having reviewed counsel's briefs, we agree that appellate counsel adequately challenged the sufficiency of the evidence surrounding each conviction. *See* DA Appellant's Br. at 17–24, 26–30; DA Reply Br. at 9–11. Nevertheless, even assuming appellate counsel did waive the other sufficiency arguments, Kemper has not shown that counsel's performance was deficient.

[38] Appellate counsel's representation, viewed in its entirety, establishes that her performance was not objectively unreasonable. *See Bieghler v. State*, 690 N.E.2d

188, 195 (Ind. 1997) (recognizing that even when an issue is deemed waived, appellate counsel's "representation in its entirety is [] still the touchstone of determining whether counsel's performance fell below an objective standard of reasonableness"). Counsel raised four claims on appeal, and considered the sufficiency arguments the weakest of the four. Tr. pp. 11–12. She recalled discussing with Kemper that those arguments were unlikely to "get [him] a reversal, because . . . the Court's not going to re-weigh that evidence." *Id.* Due to the circumstances in Kemper's case, presenting a successful sufficiency claim was going to be particularly difficult: two eyewitnesses identified Kemper; and the State presented evidence indicating that his four alibi witnesses lied. Yet, appellate counsel made a reasonable, strategic decision to challenge the sufficiency of the evidence anyway "because sometimes, even though you're not going to win on a sufficiency issue," raising it can "bolster" the other, stronger issues. *Id.* at 12; *see also id.* at 17 –18, 21. And that is precisely what she did in Kemper's appeal.

[39] Other circumstances, aside from counsel's presentation of the sufficiency arguments, reveal that her performance was not deficient. In reviewing Kemper's trial transcripts, appellate counsel was concerned that there were "a lot of inaudibles." *Id.* at 10. So, she spent "thirty or forty hours" listening to the recordings of Kemper's trial to ensure the transcripts "were in good condition." *Id.* Then, while drafting the initial brief, appellate counsel and Kemper "had a lot of communications where [they] were vetting issues," which included Kemper writing "several very lengthy letters, at [counsel's] request, about what

went wrong with [his] case." *Id.* at 17. She also sent Kemper several drafts of the brief to make sure "we didn't miss any of the facts before we actually filed it." *Id.* at 20. Kemper remembered each occurrence. *Id.* at 10–11, 17, 20.

[40] For all of these reasons, we find no basis for finding appellate counsel's performance deficient in any respect. But even if we did, Kemper has not shown prejudice, as he has failed to demonstrate a reasonable probability that the outcome of his appeal would have changed had counsel presented the sufficiency claims differently. Kemper has therefore not demonstrated that the post-conviction court clearly erred in concluding he was not denied effective assistance of appellate counsel.

Conclusion

[41] The post-conviction court concluded that Kemper failed to prove that he received ineffective assistance of trial or appellate counsel. Kemper has not established that the evidence unmistakably and unerringly leads to opposite conclusions. We thus affirm the court's denial of Kemper's petition for post-conviction relief.

Riley, J., and Crone, J., concur.