MEMORANDUM DECISION

APPELLANT *PRO SE*

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IN THE COURT OF APPEALS OF INDIANA

Jose Antonio Gutierrez,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

January 17, 2023

Court of Appeals Case No. 22A-PC-1513

Appeal from the Lake Superior Court

The Honorable Salvador Vasquez, Judge

Trial Court Cause No. 45G01-1711-PC-7

Bradford, Judge.

Case Summary

[1] On or about November 1, 2013, Jose Antonio Gutierrez was ejected from a bar in Hammond after trying to fight another patron. A short time after having been forced to leave the bar, he came back and fired thirteen shots from his semi-automatic handgun into the bar, killing one person and injuring another. Following trial, Gutierrez was found guilty of murder and Class C felony battery with a deadly weapon and was sentenced to an aggregate sixty-five-year term in the Department of Correction ("DOC"). On direct appeal, Gutierrez argued that the evidence was insufficient to sustain his murder conviction and that the trial court had abused its discretion in admitting certain evidence. We affirmed his convictions, and the Indiana Supreme Court denied transfer.

[2] Gutierrez subsequently filed a *pro-se* petition for post-conviction relief ("PCR"), in which he claimed that both his trial and appellate counsels had provided him with ineffective assistance, the trial court had committed various errors throughout the trial proceedings, and the prosecutor had committed various forms of misconduct. Following a two-day evidentiary hearing, the post-conviction court denied Gutierrez's PCR petition. On appeal, Gutierrez claims that the post-conviction court's order is deficient in numerous regards. Because we conclude otherwise, we affirm.

Facts and Procedural History

[3] Our memorandum decision in Gutierrez's direct appeal, which was handed down on October 21, 2016, instructs us to the underlying facts and procedural history leading to this post-conviction appeal:

> On or about November 1, 2013, Gutierrez and his friend, Mark Bartell ("Bartell") went to the Michigan Avenue Bar in Hammond, Indiana, where they drank several beers and used cocaine. Daniel Juarez ("Juarez") and Rey Sanchez–Guadarrama ("Guadarrama") were also present in the bar that night.
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> At some point that evening, Bartell called Juarez a derogatory name because Bartell offered Juarez cocaine and Juarez refused. Cesar Olivares ("Olivares"), a bar employee, observed tension between the two groups of men, and told Gutierrez that if he had a gun, he needed to take it outside. Gutierrez also agreed to be "patted down" before he would be allowed to reenter the bar.
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> Gutierrez and Bartell left the bar, and Gutierrez placed a handgun in the console by the driver's side door of his Hummer. Gutierrez and Bartell then reentered the bar after they were patted down.
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> Shortly thereafter, Gutierrez approached Juarez and removed his jacket, intending to fight with Juarez. Bartell and Carlos Ramos ("Ramos"), another bar employee, held onto Gutierrez to prevent him from fighting with Juarez. Ramos ordered Gutierrez to leave the bar immediately. As Gutierrez and Bartell were being escorted from the bar, Gutierrez demanded that Juarez be kicked out as well and claimed he would return if Juarez was allowed to remain inside. Ramos locked the door to the bar after Gutierrez and Bartell were removed.
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> Gutierrez and Bartell left the bar in Gutierrez's vehicle and parked it around the corner in an alley. Gutierrez asked Bartell

for his hooded sweatshirt and put the sweatshirt on. Gutierrez then left the vehicle with the gun that he had earlier placed in the console. Bartell saw Gutierrez walk back toward the bar.

Gutierrez attempted to open the door to the bar but found that it was locked. He then fired thirteen shots from his semi-automatic handgun into the outside wall of the bar underneath a row of windows. Juarez and Guadarrama had been sitting in the area near the windows that evening. Gudarrama, who was seated next to Juarez, was struck by a bullet in his foot. Tragically, Jose Herrera, who had been asleep at the table next to Juarez's, was shot in the head and was killed.

Gutierrez returned to his vehicle, and he and Bartell fled the scene. Gutierrez told Bartell that "the dude shouldn't have disrespected him." Tr. p. 480.

They proceeded to another bar in Hammond. The surveillance video taken at that bar showed Gutierrez acting like he was shooting a gun. Gutierrez also pulled the handgun from his pocket to show [an unidentified individual sitting in a parked car in the bar's parking lot.] They then returned to Bartell's residence where Gutierrez gave the hooded sweatshirt back to Bartell and gave him the gun after instructing Bartell to hide it.

On November 6, 2013, Gutierrez was charged with murder and Class C felony battery with a deadly weapon. A three-day jury trial commenced on March 16, 2015. The jury found Gutierrez guilty of both charges, and the trial court ordered him to serve an aggregate sixty-five-year sentence. Gutierrez failed to file a timely notice of appeal but was later granted permission to file this belated appeal.

Gutierrez v. State, 45A05-1512-CR-2372 *1–2 (Ind. Ct. App. Oct. 21, 2016) (footnote omitted, bracketed information reflecting the correction made on rehearing in a memorandum decision dated January 30, 2017), *trans. denied*.

[4] On direct appeal, Gutierrez argued that the State had presented insufficient evidence to sustain his conviction for murder. Gutierrez also argued that the trial court had abused its discretion by admitting (1) "a police officer's testimony that Gutierrez's gestures recorded on a surveillance tape after the shooting depicted Gutierrez demonstrating how he shot into the bar"; (2) Hammond Police Detective John Suarez's comments relating to "the recorded conversation between Gutierrez and his sister, which was also played for and translated for the jury, where the detective told the jury that Gutierrez was asking his sister to get rid of the shirt he wore the night of the offense"; and (3) bar employee Cesar Olivares's testimony that "another bar patron told Olivares that he thought Gutierrez had a gun." *Id.* at *3 (internal record quotation omitted). Concluding that the evidence was sufficient to sustain Gutierrez's conviction and that the trial court had not abused its discretion in admitting the challenged evidence, we affirmed. *Id.* at 4. The Indiana Supreme Court denied transfer.

[5] Gutierrez filed a *pro-se* PCR petition on November 17, 2017.[1] In this petition, Gutierrez alleged that both his trial and appellate counsels had provided him with ineffective assistance, the trial court had committed various errors throughout the trial proceedings, and the prosecutor had committed various forms of misconduct. On June 6, 2022, following a two-day evidentiary hearing, the post-conviction court denied Gutierrez's PCR petition.

Discussion and Decision

[6] "Post-conviction procedures do not afford the petitioner with a super-appeal." *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). "Instead, they create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules." *Id.* 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); *Collier v. State*, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999), *trans. denied*.

[7] Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, in order to prevail, a petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5);

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[1] Although a representative for the Indiana Public Defender appeared on Gutierrez's behalf in December of 2017, she withdrew her appearance approximately six months later. Since that time, Gutierrez has proceeded *pro-se*.

Stevens, 770 N.E.2d at 745. When appealing from the denial of a PCR petition, a petitioner must convince this court that the evidence, taken as a whole, "leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Stevens*, 770 N.E.2d at 745. "In other words, the defendant must convince this Court that there is *no* way within the law that the court below could have reached the decision it did." *Id.* (emphasis in original). "It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law." *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*. "The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses." *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

[8] In arguing that the post-conviction court erred in denying his PCR petition, Gutierrez contends that both his trial and appellate counsels provided him with ineffective assistance, the trial court made various errors throughout the trial proceedings, and the prosecutor committed various misconduct throughout the trial proceedings. As an initial matter, we note that both Gutierrez's contentions relating to the alleged trial court error and prosecutorial misconduct are waived for review because they were available, but not brought, on direct appeal. *See Williams v. State*, 808 N.E.2d 652, 659 (Ind. 2004) (citing *Timberlake v. State*, 753 N.E.2d 591, 597–98 (Ind. 2001)). We will therefore focus our review on Gutierrez's contentions relating to whether he received ineffective assistance from either his trial or appellate counsel.

[9] "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)). "'The 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).

[10] A successful claim for ineffective assistance of counsel must satisfy two components. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Under the first prong, the petitioner must establish that counsel's performance was deficient by demonstrating that counsel's representation "fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Id.* (internal quotation omitted). "We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or most effective way to represent a client," and therefore, under this prong, we will assume that counsel performed adequately and defer to counsel's strategic and tactical decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.*

[11] Under the second prong, the petitioner must show that the deficient performance resulted in prejudice. *Reed*, 866 N.E.2d at 769. A petitioner may show prejudice by demonstrating that there is "a reasonable probability (*i.e.* a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Id.* (emphasis added, internal quotation omitted). A petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *See Williams*, 706 N.E.2d at 154. Stated differently, "[a]lthough the two parts of the *Strickland* test are separate inquires, a claim may be disposed of on either prong." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (citing *Williams*, 706 N.E.2d at 154).

I. Trial Counsel

[12] Gutierrez alleges that his trial counsel provided him with numerous instances of ineffective assistance. Gutierrez's claims of ineffective assistance of trial counsel can be divided into six different categories: (1) failure to object to certain jury instructions and to request others, (2) failure to request a directed verdict, (3) failure to object to the admission of certain evidence, (4) failure to object to various instances of prosecutorial misconduct, (5) failure to subpoena certain witnesses, and (6) failure to adequately impeach a witness.

A. Jury Instructions

1. Failure to Object to Tendered Jury Instructions

[13] Gutierrez argues that his trial counsel provided him with ineffective assistance by failing to object to final jury instruction numbers ("Instruction No.") 5, 7, 9, 12, 13, and 25. Instruction No. 5 sets forth the statutory definition and elements of the crime of murder and includes language pertaining to the doctrine of transferred intent. Instruction No. 7 sets forth the statutory definition and elements of the lesser-included charge of reckless homicide. Instruction No. 9 sets forth the statutory definition and elements of the crime of Class C felony battery. Instruction No. 12 sets forth the statutory definition of the term "intentionally[,]" and Instruction No. 13 sets forth the statutory definition of the term "knowingly." Appellant's App. Vol. IV pp. 67, 68. Finally, Instruction No. 25 provides that "[v]oluntary intoxication is not a defense to a charge of murder. You may not take voluntary intoxication into consideration in determining whether the defendant acted knowingly, intentionally or recklessly as alleged in the information." Appellant's App. Vol. IV p. 69.

[14] Gutierrez does not allege that any of the challenged instructions contained improper statements of the law, and, upon review, we conclude that each of the challenged instructions contained correct statements of the law. Thus, it was not error for the trial court to give these instructions so long as each was supported by the evidence in the record. *See Hubbard v. State*, 742 N.E.2d 919, 921 (Ind. 2001) (providing that the trial court did not err in instructing the jury

when the challenged instruction was a correct statement of the law and was supported by evidence in the record). Our review further reveals that each of the challenged instructions was indeed supported by evidence in the record. As such, any objection would have been unsuccessful as the instructions were correctly given.[2] *See Potter v. State*, 684 N.E.2d 1127, 1132 (Ind. 1997) ("In order to establish that counsel's failure to object to a jury instruction was ineffective assistance of counsel, a defendant must first prove that a proper objection would have been sustained."). The post-conviction court, therefore, did not err in finding that Gutierrez was not entitled to relief on this ground because Gutierrez cannot establish either deficient performance or that he was prejudiced by trial counsel's failure to object to these instructions.

2. Failure to Request Instructions on Voluntary and Involuntary Manslaughter

[15] Gutierrez also argues that his trial counsel provided him with ineffective assistance by failing to request jury instructions on voluntary and involuntary

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[2] Gutierrez argues that giving these instructions constituted error

> because it was "impossible for a jury to correctly find him guilty beyond a reasonable doubt of both murder and battery based on one episode of conduct" because he could only act with a single "intent" and there was no evidence that he changed this "intent" "during the nanoseconds it took the bullets to leave the gun" and strike Guardarrama and Herrera.

Appellee's Br. p. 18 (quoting Appellant's Br. pp. 18, 21). The crux of Gutierrez's argument relating to these jury instructions is that he believes that it is unfair that he was convicted of both murder and Class C felony battery when he committed only one criminal act. This act, however, included firing thirteen shots from his semi-automatic handgun into the bar, killing one person and injuring another. It is not unfair that Gutierrez was charged with and convicted of criminal behavior which resulted in the death of one victim and injury to the other. To conclude otherwise would be unfair to Gutierrez's victims.

manslaughter. Gutierrez, however, did not include a claim that his counsel had provided him with ineffective assistance of counsel for failing to request a voluntary-manslaughter instruction in either his original or amended PCR petition. As such, he has waived this claim for appellate review. *See Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001) ("Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal.").

[16] As for an involuntary-manslaughter instruction, the record reveals that the decision not to request an involuntary-manslaughter instruction was a tactical decision made by trial counsel after consulting with Gutierrez. Specifically, at the post-conviction hearing, trial counsel testified as follows:

> We came to you and said we do think this is a particularly appropriate case for murder, but that involuntary manslaughter, given the evidence, not just the evidence from inside, the evidence from outside, for example, when we went to the scene and reviewed the pictures of where the shots were fired. You were adamant, Mr. Gutierrez, and perhaps you don't remember it, but you were adamant that you wanted us to pursue a complete exoneration, a not guilty verdict. You were focused on that. That's what your position was for us.

PCR Tr. Vol. II p. 22. Trial counsel's testimony revealed counsel's reason for making the tactical decision to not request an involuntary-manslaughter instruction. We will not second-guess trial counsel's strategic and tactical decisions regarding theories of defense. *See Curtis v. State*, 905 N.E.2d 410, 414 (Ind. Ct. App. 2009) (providing that strategies are assessed based on facts

known at the time and will not be second-guessed), *trans. denied*. Gutierrez failed to prove that trial counsel provided deficient performance and, as a result, the post-conviction court did not err in failing to grant Gutierrez relief on this ground.

B. Directed Verdict

[17] Gutierrez also claims that his trial counsel provided him with ineffective assistance by failing to request a directed verdict, based on his belief that the evidence presented at trial was insufficient to prove that he had committed murder. Again, we previously concluded in Gutierrez's direct appeal that the evidence was sufficient to sustain his murder conviction. As such, Gutierrez cannot prove that he was prejudiced by counsel's failure to request a directed verdict as there is not a reasonable probability that the outcome of the proceedings would have been different had counsel requested a directed verdict. *See Peak v. State*, 26 N.E.3d 1010, 1016 (Ind. Ct. App. 2015) ("Counsel's performance is not deficient for failing to present a claim that would have been meritless."); *see also Reed*, 866 N.E.2d at 769 (providing that a petitioner may show prejudice by demonstrating that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different). The post-conviction court did not err in failing to grant Gutierrez relief on this ground. *See Williams*, 706 N.E.2d at 154 (providing that a petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail).

C. Admission of Evidence

[18] Gutierrez argues that his trial counsel provided ineffective assistance by failing to object to the admission of certain pieces of evidence, including testimony relating to surveillance videos, testimony relating to recordings of telephone calls that Gutierrez made to his sister from the county jail, the recording of his interrogation by police, the recording of the initial 911 call made that reported the shooting, and testimony regarding his apprehension.

1. Testimony Regarding Surveillance Video and Jailhouse Telephone Calls

[19] Gutierrez asserts that his trial counsel provided him with ineffective assistance by failing to object to the admission of Hammond Police Detective David Carter's testimony regarding what could be seen in surveillance videos taken outside of the bars visited by Gutierrez on the night in question. Gutierrez also asserts that his trial counsel provided him with ineffective assistance by failing to object to the admission of Detective Suarez's testimony regarding the statements made by Gutierrez to his sister in jailhouse telephone calls, during which Gutierrez and his sister had discussed discarding a shirt.

[20] Gutierrez challenged the admission of both Detective Carter's and Detective Suarez's testimony on direct appeal. In concluding that the trial court did not abuse its discretion in admitting either detective's testimony, we found that

> Gutierrez's defense at trial was two-fold. First, he argued that Bartell was the shooter. In the alternative, Gutierrez claimed that the State failed to prove he had the intent to commit murder, and therefore, he could only be convicted of reckless homicide.

> The evidence that Gutierrez challenges on appeal was introduced to prove that Gutierrez, not Bartell, was the shooter. This evidence was merely cumulative of other evidence presented at trial, including the photographic and video evidence depicting Gutierrez and Bartell inside and outside the bar. Importantly, photographs and video evidence established that Gutierrez possessed the gun. Gutierrez also argued that Bartell was angry with Juarez and had reason to shoot him. However, the State proved that Gutierrez attempted to punch Juarez and was therefore forcibly escorted from the bar. Gutierrez demanded that Juarez should be kicked out of the bar as well and that he would come back if Juarez was not sent out. Tr. p. 143.
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> For these reasons, we conclude that even if the challenged evidence was admitted in error, it did not affect Gutierrez's substantial rights and his convictions are supported by substantial evidence of guilt.

Gutierrez, 45A05-1512-CR-2372 at *4. Given that we have previously concluded that the admission of the challenged testimony, even if erroneous, did not affect Gutierrez's substantial rights, Gutierrez cannot prove that he was prejudiced by the admission of the testimony.

2. Recording of Interrogation

[21] Gutierrez asserts that

> [t]rial counsel failed to properly object to and file a motion to suppress the admission of [a] recording tape of Gutierrez's interrogation in which he talked about committing other crimes pursuant to Ind. Evid. R. 404(b), which prohibits admission of such evidence. Although portions of the tape had been redacted, the jury was still able to view and hear Gutierrez admitting to the

> detective that he was [possibly] involved with non-related crimes involving drugs. Even though Gutierrez's conversation did not amount to an admission of possessing drugs it showed the jury he was acquainted with other people who did, which gave the jury the inference he was involved with drug dealers and therefore must be a bad person who needed some kind of punishment.

Appellant's Br. p. 39. Gutierrez also asserts that "had trial counsel been providing effective assistance and investigated the interrogation tape he would have heard Gutierrez telling the detective that he did not want to talk any longer." Appellant's Br. p. 40.

[22] The State points out that redacted versions of two different recorded statements by Gutierrez to law enforcement were admitted into the record. One was an advisement of his rights and the other was an interview, during which he was accompanied by counsel. Gutierrez does not specify during which recorded conversation the allegedly inadmissible statements were made. We are not obligated to search the record or construct arguments on Gutierrez's behalf. Further, "[w]e 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*. "Failure to put forth a cogent argument acts as a waiver of the issue on appeal." *Id.* Gutierrez has failed to adequately develop his argument relating to the admission of the interrogation videos or to establish that he was prejudiced by their admission.

3. 911 Call

[23] In the summary of his arguments, Gutierrez asserts that trial counsel provided ineffective assistance by failing to object to the admission of the 911 call which reported the shooting. Gutierrez, however, has failed to develop this argument in his appellate brief. As such, the argument is waived. *See Izaguirre v. State*, 194 N.E.3d 1224, 1226 (Ind. Ct. App. 2022) ("Where an appellant fails to support an argument with cogent reasoning and citations to authorities, an argument is waived.").

4. Testimony Relating to Apprehension

[24] Gutierrez asserts that trial counsel provided ineffective assistance by failing to object to testimony regarding the fact that he was apprehended in Illinois as well as the deputy prosecutor's suggestion that his apprehension in another state was evidence of guilt. Detective Carter and Hammond Police Captain Ezequiel Hinojosa testified that they had interviewed Gutierrez after he had been apprehended in Lansing, Illinois. Upon being apprehended, Gutierrez spontaneously asked, "How did you find me?" Trial Tr. p. 448. Captain Hinojosa explained that investigating officers had utilized cell-phone information to locate Gutierrez.

[25] Gutierrez does not explain why this testimony should have been excluded or on what basis he believes his trial counsel should have objected to either Detective Carter's or Captain Hinojosa's testimony. He has therefore failed to carry his burden of proving deficient performance and prejudice. *See Stevens*, 770 N.E.2d

at 745 (providing that a petitioner must establish his claims by a preponderance of the evidence). Gutierrez's argument seems to be based on his belief that the deputy prosecutor wrongfully alluded to the fact that had been attempting to evade arrest. During closing arguments, the deputy prosecutor alluded to the fact that Gutierrez had been apprehended in Illinois, stating "[t]hat is quintessential flight and that is also evidence of his own consciousness of guilt." Trial Tr. p. 702. It has long been the law in Indiana that "[f]light and related conduct may be considered by a jury in determining a defendant's guilt." *See Dill v. State*, 741 N.E.2d 1230, 1232 (Ind. 2001) (citing *Johnson v. State*, 258 Ind. 683, 686, 284 N.E.2d 517, 519 (Ind. 1972)); *see also Turner v. State*, 255 Ind. 427, 429, 265 N.E.2d 11, 12 (1970). Therefore, the post-conviction court did not err in denying Gutierrez's claim for relief on this ground.

D. Alleged Prosecutorial Misconduct

[26] Gutierrez argues that his trial counsel provided him ineffective assistance by "not objecting to all the time [sic] the [prosecutor] committed [m]isconduct at trial." Appellant's Br. p. 40. Gutierrez effectively argues that his trial counsel provided ineffective assistance by not objecting to the prosecutor's summative characterization of the evidence proving Gutierrez's guilt. Although the State's interpretation of the evidence may have differed from Gutierrez's interpretation, the characterization provided by the State was consistent with the evidence as it was presented. Gutierrez has failed to show that he was prejudiced by counsel's failure to object to the State's characterization or that counsel's performance in this regard was in any way deficient.

E. Failure to Subpoena Witnesses

[27] Gutierrez argues that his trial counsel provided ineffective assistance by failing to subpoena his sister to testify regarding the telephone calls that he made to her from jail. He asserts that due to counsel's alleged ineffective assistance, he was "denied the opportunity to cross-examine his sister about testimony surrounding their conversation." Appellant's Br. pp. 33–34. "In the context of an ineffective assistance of counsel claim, the decision of what witnesses to call is a matter of trial strategy and appellate courts do not second-guess that decision." *Reeves v. State*, 174 N.E.3d 1134, 1141 (Ind. Ct. App. 2021), *trans. denied*. Gutierrez, however, does not argue, much less establish, that his sister would have provided testimony that was any different in substance than the recordings of the telephone calls and the transcripts of such. Trial counsel made the tactical decision not to call Gutierrez's sister and we will not second-guess that decision. *See id*.

[28] Gutierrez also argues that his trial counsel provided ineffective assistance by failing to subpoena Fernando Rodriguez to testify at trial, alleging that Rodriguez was an "important witness" who was "inside the bar when the bullets came flying through the wall." Appellant's Br. p. 45. Gutierrez asserts that Rodriguez would have testified that "whoever was firing the gun the bullets came from, was not aiming at any one person because the bullets were flying in all directions." Appellant's Br. p. 45. Trial counsel testified during the PCR hearing that he had reviewed Rodriguez's statement before deciding to not call him as a witness. In addition, the evidence at trial supported the reasonable

inference that Gutierrez was not firing at random, but rather was firing in the direction of an intended target. As the decision of what witnesses to call is a matter of trial strategy, we will not second-guess counsel's decision not to call Rodriguez as a witness at trial. *See Reeves*, 174 N.E.3d at 1141.

[29] In addition, in the summary of his arguments, Gutierrez asserts that his counsel provided ineffective assistance by failing to subpoena the individual who made the initial 911 call to testify at trial. Gutierrez, however, has failed to develop this argument in his appellate brief. As such, the argument is waived. *See Izaguirre*, 194 N.E.3d at 1226 ("Where an appellant fails to support an argument with cogent reasoning and citations to authorities, an argument is waived.").

F. Inadequate Impeachment of Witnesses

[30] Finally, Gutierrez argues that trial counsel provided ineffective assistance by failing to investigate "Bartell's background for impeachable evidence." Appellant's Br. p. 44. Gutierrez bases his argument on the deputy prosecutor's statements during closing argument that Bartell was an "idiot" for having admitted that he had touched the trigger of Gutierrez's gun while hiding it and a "liar" because he had initially lied to police. Trial Tr. pp. 697, 698. However, as the State points out, the deputy prosecutor went on to emphasize aspects of Bartell's testimony that "are corroborated by other evidence [and] tell you that Mark Bartell did not fire that gun." Trial Tr. p. 698. Gutierrez has failed to point to any information about what an additional investigation into Bartell's background would have disclosed or how such information would have been beneficial to his defense. Gutierrez has failed to carry his burden of proving

both deficient performance and prejudice. *See Stevens*, 770 N.E.2d at 745 (providing that a petitioner must establish his claims by a preponderance of the evidence).

II. Appellate Counsel

[31] "The standard of review for appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in his or her performance and that the deficiency resulted in prejudice." *Garrett v. State*, 992 N.E.2d 710, 719 (Ind. 2013). "[I]neffective assistance of appellate counsel claims generally fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well." *Hollowell v. State*, 19 N.E.3d 263, 270 (Ind. 2014). Gutierrez's claims regarding appellate counsel appear to fall under the second and third categories.

[32] With respect to a claim relating to waiver of issues for appeal, "[i]neffectiveness is very rarely found in these cases because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Ritchie v. State*, 875 N.E.2d 706, 723–24 (Ind. 2007) (internal quotation omitted).

> Accordingly, our review is particularly deferential to counsel's strategic decision to exclude certain issues in favor of others. We first look to see whether the unraised issues were significant and obvious upon the face of the record. If so, then we compare these unraised obvious issues to those raised by appellate counsel, finding deficient performance only when ignored issues are clearly stronger than those presented. If deficient

> performance by counsel is found, then we turn to the prejudice prong to determine whether the issues appellate counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial.

Id. at 724 (internal citations omitted).

[33] With respect to claims alleging a failure to raise an issue well, "the petitioner faces a compound burden." *Seeley v. State*, 782 N.E.2d 1052, 1059 (Ind. Ct. App. 2003), *trans. denied*. Claims of inadequate presentation of certain issues, "are the most difficult for convicts to advance and reviewing tribunals to support." *Bieghler v. State*, 690 N.E.2d 188, 195 (Ind. 1997). "We believe this to be true for two reasons." *Id.*

> First, these claims essentially require the reviewing tribunal to review specific issues it has already adjudicated to determine whether the new record citations, case references, or arguments would have had any marginal effect on their previous decision. Thus, this kind of ineffectiveness claim, as compared to the others mentioned, most implicates concerns of finality, judicial economy, and repose while least affecting assurance of a valid conviction.
>
> Second, an Indiana appellate court is not limited in its review of issues to the facts and cases cited and arguments made by the appellant's counsel. We commonly review relevant portions of the record, perform separate legal research, and often decide cases based on legal arguments and reasoning not advanced by either party. While impressive appellate advocacy can influence the decisions appellate judges make and does make our task easier, a less than top notch performance does not necessarily prevent us from appreciating the full measure of an appellant's claim, or amount to a breakdown in the adversarial process that

> our system counts on to produce just results[.]… When the issues presented by an attorney are analyzed, researched, discussed, and decided by an appellate court, deference should be afforded both to the attorney's professional ability and the appellate judges' ability to recognize a meritorious argument.
>
> For these reasons, an ineffectiveness challenge resting on counsel's presentation of a claim must overcome the strongest presumption of adequate assistance. Judicial scrutiny of counsel's performance, already highly deferential, is properly at its highest. Relief is only appropriate when the appellate court is confident it would have ruled differently.

Id. at 195–96 (internal citations and quotations omitted).

[34] In arguing that his appellate counsel provided ineffective assistance, Gutierrez asserts that

> had appellate counsel done a better job presenting his direct appeal issue he would have had a better chance of prevailing. Moreover, the above issues are clearly stronger than the issue appellate counsel raised on direct appeal and had the above issue been raised on direct appeal, his convictions would have been overturned.

Appellant's Br. p. 49. Gutierrez's general statement regarding appellate counsel's allegedly deficient representation, however, fails to overcome the strong presumption of adequate assistance.

[35] Gutierrez does not explain what he means by "his direct appeal issue" and we are unable to ascertain to which of the four issues raised by appellate counsel on direct appeal he might be referring. Appellant's Br. p. 49. It is also unclear

from Gutierrez's argument to what issue he is referring when stating that counsel should have raised a different, allegedly stronger, issue on appeal. As the State points out, Gutierrez's appellate counsel raised numerous claims on appeal, and it is not clear from Gutierrez's statement which issues he deemed stronger than the issues that were raised on direct appeal. Gutierrez fails to provide clear arguments as to how he believes that his appellate counsel provided him ineffective assistance. He has therefore failed to provide cogent argument supporting his claim that appellate counsel rendered ineffective assistance. Gutierrez has therefore waived his contention that appellate counsel had provided him with ineffective assistance. *See Wingate v. State*, 900 N.E.2d 468, 475 (Ind. Ct. App. 2009) (providing that a failure to support an argument with cogent argument results in waiver).

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

May, J., and Pyle, J., concur.