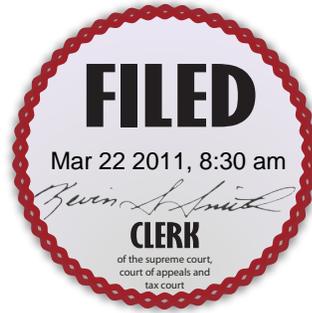


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

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Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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CLYDE PIGGIE, )  
 )  
 Appellant-Petitioner, )  
 )  
 vs. ) No. 20A03-1005-PC-264  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Respondent. )

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable David C. Bonfiglio, Judge  
Cause No. 20D06-0609-PC-9

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**March 22, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Clyde Piggie appeals the denial of his petition for post-conviction relief. He raises several issues for our consideration, which we consolidate<sup>1</sup> and restate as:

1. Whether the post-conviction court erred in denying Piggie's request to admit certain materials;
2. Whether Piggie's trial and appellate counsel were ineffective.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

Piggie was convicted of Class A felony dealing in cocaine.<sup>2</sup> We set out the facts of the crime in Piggie's direct appeal:

On October 30, 1992, Daniel Oliver, a confidential informant working with the Elkhart Drug Task Force, arranged to buy cocaine from Piggie. That afternoon, Oliver met with undercover police officer "Rod." Rod searched Oliver and then wired Oliver with a body microphone. The two proceeded in Rod's car to the corner of Oakland and Cleveland, where Oliver had arranged to buy cocaine. As the two were sitting in the car, Piggie drove up and parked in front of them. Rod gave Oliver \$425 and Oliver got in Piggie's car from the passenger side. Shortly thereafter, Piggie backed his car up so that it was even with Rod's car, and told Rod that the next time the cocaine would be more expensive. Piggie then returned his car its original position.

A red car, driven by Tamara Cassity, pulled onto the street and parked across from Piggie's car. Piggie went over to the car and had a discussion with Cassity. Piggie then returned to his car. Oliver got out of Piggie's car and entered Cassity's car on the passenger side. Piggie returned to Cassity's car and dropped a package containing a white substance on Cassity's lap. Cassity gave Oliver the package. Oliver then returned to Rod's car and handed Rod two plastic baggies containing a substance which was later identified as cocaine.

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<sup>1</sup> Piggie argues the post-conviction court abused its discretion when denying him access to pieces of evidence he claims are exculpatory. In a prior appeal during these post-conviction proceedings, and we determined Piggie had not demonstrated the post-conviction court improperly denied him exculpatory evidence. *Piggie v. State*, No. 20A03-0902-PC-41, slip op. at 4, (Ind. Ct. App., August 21, 2009). We decline to revisit that issue.

<sup>2</sup> Ind. Code § 35-48-4-1(b).

*Piggie v. State*, No. 20A05-9308-CR-284, slip op. at 2-3, (Ind. Ct. App. June 15, 1994). In

that direct appeal, Piggie asserted the trial court:

- 1) erred in denying his motion for a mistrial where the State improperly elicited testimony of criminal charges other than that for which he was on trial; and
- 2) erred in prohibiting Piggie's counsel from questioning a confidential informant as to the possible sentence the informant faced as the result of criminal charges pending against the informant.

*Id.* at 2. We affirmed the trial court's decisions.

Piggie then began pursuing post-conviction relief, and this is Piggie's third appeal of his first petition for post-conviction relief. The facts and decisions surrounding the first two appeals are as follows:

In January 2005, Piggie filed a petition for post-conviction relief under Indiana Post-Conviction Rule 1 alleging ineffective assistance of trial counsel. In April 2006, Piggie added an allegation of ineffective assistance of appellate counsel in an amended petition for post-conviction relief. The post-conviction court, without a hearing, denied Piggie's petition on January 22, 2007. On appeal, we reversed and remanded for an evidentiary hearing. *See Piggie v. State*, No. 20A05-0703-PC-142, slip op. (Ind. Ct. App. September 28, 2007).

On October 31, 2008, the post-conviction court held an evidentiary hearing on Piggie's petition. At the commencement of the hearing, Piggie's post-conviction attorney informed the court that it would only be considering Piggie's claim of ineffective assistance of trial counsel. His attorney called two witnesses during the hearing, Piggie's trial counsel, Mark Doty, and Piggie himself; however, she failed to introduce the trial transcript into evidence. Despite Piggie's amended petition alleging ineffective assistance of appellate counsel, his attorney neither argued ineffective assistance of appellate counsel nor did she call witnesses or present evidence on that claim. She did not file any proposed findings of fact and conclusions of law on Piggie's behalf.

After hearing the evidence and considering the State's proposed findings of facts and conclusions of law, the post-conviction court denied Piggie's petition.

*Piggie v. State*, No. 20A03-0902-PC-41, slip op. at 2-3, (Ind. Ct. App. August 21, 2009).

In that second appeal, Piggie claimed his post-conviction counsel was ineffective. We determined Piggie had sufficiently demonstrated counsel's ineffectiveness and reversed the denial of Piggie's petition for post-conviction relief. Piggie's post-conviction counsel did not introduce the trial record into evidence, she "did not present evidence or argue Piggie's claim of ineffective assistance of appellate counsel at the hearing, and she did not submit proposed findings of facts and conclusions of law despite a reminder from the court informing her to do so." *Id.* at 7. We remanded for a new post-conviction hearing.

On February 5, 2010, a new post-conviction hearing was held, and Piggie appeared *pro se* via video conference. The trial court admitted into evidence the trial record and the transcript from the October 31, 2008, post-conviction hearing. It denied admission of three items Piggie offered: an undated newspaper article, correspondence between Piggie and his appellate counsel, and letters from Tamara Cassity. Piggie asked the court to re-subpoena Tamara Cassity because he did not agree with the grant of her Motion to Quash, and his request was denied. Piggie presented little argument at the hearing, but filed extensive proposed findings of fact and conclusions of law. The trial court denied post-conviction relief, finding Piggie had not demonstrated trial or appellate counsel were ineffective.

## **DISCUSSION AND DECISION**

Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Davidson v. State*, 763 N.E.2d 441, 443 (Ind. 2002). As post-conviction proceedings are civil in nature, the

petitioner must prove his grounds for relief by a preponderance of the evidence. *Id.* A party appealing a negative post-conviction judgment must establish that the evidence is without conflict and, as a whole, unmistakably and unerringly points to a conclusion contrary to that reached by the post-conviction court. *Id.* Where, as here, the post-conviction court makes findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6), we do not defer to the court’s legal conclusions, but “the findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.” *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (citation omitted).

1. Admission of Evidence and Subpoena of Cassity

The Post-Conviction Rules provide in relevant part that “[t]he court may receive affidavits, depositions, oral testimony, or other evidence.” P-C.R. 1(5). The admission or exclusion of evidence is within the post-conviction court’s sound discretion. *Badelle v. State*, 754 N.E.2d 510, 521 (Ind. Ct. App. 2001). An abuse of discretion occurs when the court’s decision is against the logic and effect of the facts and circumstances before the court. *Allen v. State*, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003).

a. Newspaper article and letters

At his post-conviction hearing, Piggie attempted to admit an undated newspaper article to show his trial counsel knew the judge was biased against Piggie. The post-conviction court found, “[the newspaper article] is not admitted into evidence in that it does not contain any relevant information in regard to this matter. It is barely legible.”

(Appellant's App. at 5.) At the post conviction hearing, Piggie did not explain the date or source of the article. Thus, the court could not determine if Piggie's trial counsel had seen it and therefore could not find counsel's failure to request a change of judge was deficient performance.

Generally, documents are admissible only on a foundational showing that they are what they purport to be. *Doyle v. State*, 468 N.E.2d 528, 527 (Ind. Ct. App. 1984), *reh'gs denied*. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401. Without a proper foundation, Piggie did not demonstrate the relevance of the evidence to his cause and the trial court did not err in excluding it.

Piggie also attempted to present his correspondence with his appellate counsel, Mark Armstrong. Two of the letters were admitted in support of Piggie's claim Armstrong was ineffective, but four were not because "they constitutes (sic) hearsay, there is a lack of foundation and they are not relevant." (Appellant's App. at 6.)<sup>3</sup> As Piggie offered no testimony or argument at his post-conviction hearing regarding the relevance or authenticity of the excluded letters, we cannot hold the trial court abused its discretion. *See Tiller v. State*, 541 N.E.2d 885, 891-92 (Ind. 1989) (trial court did not abuse its discretion in refusing to admit evidence when defendant failed to make an offer to prove).

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<sup>3</sup> It appears the two letters were admitted based on an exception to the hearsay rule, as Armstrong was deceased at the time of Piggie's post-conviction hearing. *See* Evid. R. 804(a)(4).

Finally, Piggie attempted to admit, as one exhibit, twenty-one letters from Tamara Cassity and one letter from Dawn Hale. The post conviction court ruled “[t]he exhibit is not admitted in that it constitutes hearsay, there is a lack of foundation and it is not relevant.” (Appellant’s App. at 6.) Piggie testified that he presented the letters from Cassity because “she’s not able to testify by deposition or interrogatories or admissions, this is my only way to present evidence.” (Tr. at 15.) He asserted the letter from Hale proved his allegation that his trial counsel knew of possible jury misconduct.

Hearsay is an out of court statement offered to prove the truth of the matter asserted, Evid. R. 801(c), and is generally inadmissible unless it falls into an exception to or exclusion from the rule. Evid. R. 802. As Piggie does not assert an exception or exclusion that would have made admissible the letters from Cassity and Hale, he has waived our review of this issue. *See* Ind. App. Rule 46(A)(8)(a); *Matheney v. State*, 688 N.E.2d 883, 907 (Ind. 1997) (failure to make a cogent argument supported by citation to authority results in waiver of issue on appeal).

b. Subpoena of Cassity

P-C.R. 1(9)(b) states:

If the *pro se* petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petition shall specifically state by affidavit the reason the witness’ testimony is required and the substance of the witness’ expected testimony. If the court finds the witness’ testimony would be relevant and probative, the court shall order the subpoena be issued. If the court finds the proposed witness’ testimony is not relevant and probative, it shall enter a finding in the record and refuse to issue the subpoena.

We review for an abuse of discretion the post-conviction court’s decision whether to issue a

subpoena. *Stevenson v. State*, 656 N.E.2d 476, 478 (Ind. 1995). An abuse of discretion has occurred if the decision is against the logic and effect of the facts and circumstances before the court. *Allen v. State*, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003).

The post conviction court initially granted Piggie’s request to subpoena Cassity because Piggie alleged his trial counsel told Cassity “to commit perjury in the trial of the underlying criminal case.” (Appellant’s App. at 38.) The court later granted Cassity’s request to quash that subpoena, finding she was “not properly served pursuant to T.R. 45(E)”<sup>4</sup> and Piggie “has not cited any law of this state, the United States or the State of Michigan that allows service of a subpoena on a resident of another state.” (*Id.* at 39.)

Piggie now argues the post-conviction court should have allowed him to re-subpoena Cassity. At the hearing he asserted, “[Cassity’s] lawyer filed a Motion to Squash (sic) which I believe is in bad taste because Ms. Cassity is living in Indiana, Elkhart. She’s married and has two kids but they’re making it seem like she’s still staying with her mother in Union, Michigan[.]” (Tr. at 5.) Piggie did not did not provide an Indiana address for Cassity to the court prior to his hearing. Thus the denial of his request during the hearing to re-subpoena Cassity was not an abuse of discretion because Cassity had successfully filed a motion to quash the earlier subpoena, and the court was not required to send the subpoena to an address

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<sup>4</sup> T.R. 45(E) states in relevant part,

A subpoena may be served at any place within the state; and when permitted by the laws of the United States, this or another state or foreign country, the court upon proper application and cause may authorize the service of a subpoena outside the state in accordance with and as permitted by such law.

As the court noted, Piggie did not cite law allowing a Michigan resident to be subpoenaed into an Indiana court proceeding. Therefore, the court granted Cassity’s motion to quash.

Piggie had not provided. *Cf. Allegheny Mut. Ca. Co. v. State*, 474 N.E.2d 1051, 1054 (Ind. Ct. App. 1985) (court does not have duty to ascertain party's address not designated as required by Ind. Trial Rule 5(B)(2)).

2. Ineffective Assistance of Trial Counsel

Piggie argues his trial counsel was ineffective for failure to request a change of judge, failure to object to the Judge's comments during sentencing, failure to bring forth certain mitigating factors and witnesses during sentencing, failure to offer certain jury instructions, errors during *voir dire*, and conflict of interest. Claims of ineffective assistance of counsel are reviewed under the two-part test in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail, a claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based on prevailing professional norms, *Taylor v. State*, 882 N.E.2d 777, 781 (Ind. Ct. App. 2008), and that the deficient performance resulted in prejudice. *Id.* "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). We need not consider whether counsel's performance fell below the objective standard if that performance would have not changed the outcome. *Strickland*, 466 U.S. at 687. None of the errors Piggie asserts trial counsel made would have changed the outcome of his case.

a. Change of Judge and Procedural Errors

First, Piggie argues his trial counsel, Mark Doty, was ineffective for failing to request

a change of judge because the trial judge had made comments in an earlier hearing that indicated bias against Piggie. However, Piggie offers no evidence the judge was biased against him during the trial, or that, in light of the evidence supporting his conviction, the outcome of his case would have been different had a different judge tried the case.

Next, Piggie argues Doty should have objected to the judge's "personal philosophical or political message to aggravate sentence," (Br. of Appellant at 4), and should have presented possible mitigators during sentencing or testimony from Piggie's family regarding mitigating circumstances. At trial, the judge commented on Piggie's crime, but Piggie does not indicate which comments were objectionable or why. Nor has Piggie demonstrated the judge's comments during sentencing caused him to improperly sentence Piggie. Therefore, the issue is waived for failure to make a cogent argument. *See* Ind. App. Rule 46(A)(8)(a); *Matheney v. State*, 688 N.E.2d 883, 907 (Ind. 1997) (failure to make a cogent argument supported by citation to authority results in waiver of issue on appeal).

Further, there is no evidence that Doty failed to present mitigators during sentencing. Doty testified during an earlier post-conviction hearing, "I would assume I would have argued his age as a mitigator and any other factors that were present on the pre-sentence report which would tend to work by way of mitigation on his behalf. Specifically what I would have argued at sentencing, I don't recall." (Tr. of October 31, 2008 hearing at 18.) Finally, "[a] decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess." *Brown v. State*, 691 N.E.2d 438, 447 (Ind. 1998).

b. Jury Instructions

Piggie also asserts Doty was ineffective because he did not submit a jury instruction regarding the lesser-included offense of possession of cocaine. Possession of cocaine is an inherently included offense to dealing cocaine, *Sledge v. State*, 677 N.E.2d 82, 85 (Ind. Ct. App. 1997), but a tactical decision not to tender a lesser-included offense instruction does not amount to ineffective assistance of counsel, even where the lesser-included offense is inherently included in the greater offense. *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998). Thus, Piggie’s argument fails.

Next, Piggie argues counsel should have to submitted jury instructions regarding the requirement of intent in dealing in cocaine. His argument fails because Class A felony dealing in cocaine does not require an intentional act. The State must prove the person “knowingly or intentionally” commits the crime of dealing cocaine. Ind. Code § 35-48-4-1. Therefore, if the jury was instructed that Piggie must have “knowingly” dealt cocaine, the elements of the crime were properly before it.<sup>5</sup>

Finally, Piggie contends his trial counsel should have submitted jury instructions regarding the defense of entrapment. Ind. Code § 35-41-3-9 defines entrapment as follows:

- (a) It is a defense that:
  - (1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in that conduct; and
  - (2) the person is not predisposed to commit the offense.
- (b) Conduct merely affording a person the opportunity to commit the offense

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<sup>5</sup> The State points to the language of the charging information and jury instructions allegedly given at Piggie’s original trial, but the transcript of that trial is not part of the record. Piggie does not argue the jury instructions were deficient because they did not require the jury to find he acted “knowingly.”

does not constitute entrapment.

Piggie does not explain why the entrapment defense should have been raised during his trial, and thus he has not demonstrated counsel's ineffectiveness in failing to tender such an instruction.

c. Alleged Errors During *Voir Dire*

Piggie argues counsel should have objected to the seating of a juror who was allegedly Piggie's high school teacher and to Piggie's all-white jury. Piggie has presented no evidence counsel knew a juror was Piggie's former teacher, so we cannot find counsel ineffective for failing to object. The fact that Piggie, an African-American, was convicted by an all-white jury does not by itself mandate holding the right to trial by an impartial jury has been denied, *see Lambert v. State*, 448 N.E.2d 288, 290 (Ind. 1983), and Piggie has not demonstrated he was prejudiced by the racial make-up of his jury. *See Johnson v. State*, 272 Ind. 427, 431, 399 N.E.2d 360, 362 (1980) (defendant's argument of denial of fair trial due to racial composition of jury fails when the only argument provided on appeal is the defendant's "bare assertion" of prejudice). Thus, his arguments regarding the ineffectiveness of Doty's representation again fail.

d. Alleged Conflict of Interest

Piggie alleges Doty had a conflict of interest, as Doty represented a defendant for whom Tamara Cassity was a witness. Piggie has not explained how Doty's prior experience examining Cassity created a conflict of interest, and thus this allegation of error is waived for failure to make a cogent argument. *See Ind. App. Rule 46(A)(8)(a); Matheney*, 688 N.E.2d at

907 (failure to make a cogent argument supported by citation to authority results in waiver of issue on appeal). Nor has Piggie demonstrated prejudice from this alleged conflict of interest.

3. Ineffective Assistance of Appellate Counsel

We review claims of ineffective assistance of appellate counsel using the same standard applicable to claims of trial counsel ineffectiveness. *Fisher v. State*, 810 N.E.2d 674, 676-77 (Ind. 2004). The defendant must show that appellate counsel was deficient in his performance and that the deficiency resulted in prejudice. *Id.* at 677.

Ineffective appellate assistance claims generally fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Id.* We employ a two-part test to evaluate “waiver of issue” claims: (1) whether the unraised issues are significant and obvious from the face of the record, and (2) whether the unraised issues are “clearly stronger” than the issues raised. *Id.*

Because counsel is afforded considerable discretion in choosing strategy and tactics, we presume counsel’s assistance was adequate and all significant decisions were made in the exercise of reasonable professional judgment. *State v. Miller*, 771 N.E.2d 1284, 1288 (Ind. Ct. App. 2002). Deciding which issues to raise on appeal is one of the most important strategic decisions of appellate counsel. *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1998), *reh’g denied*.

Piggie claims his appellate counsel, Mark Armstrong, was ineffective because he should have raised ineffective assistance of trial counsel on direct appeal,<sup>6</sup> should have raised Piggie’s allegation that “the State investigating officers and prosecutor misconduct suborned it’s [sic] witness, Tamara Cassity, into committing perjury,” (Br. of Appellant at 10), should have presented error in the admission of testimony by Detective Marks, should have presented errors in *voir dire*, should have requested a rehearing or petition to transfer to the Indiana Supreme Court, and had a conflict of interest.

a. Failure to Raise Suborned Perjury Claim

Piggie argues Armstrong should have argued the State encouraged Tamara Cassity to perjure herself during her testimony in Piggie’s trial. He claims Cassity was brought “Taco Bell and cigarettes for providing false testimony.” (Br. of Appellant at 11.) Piggie presented no evidence to the post-conviction court to corroborate this claim. Nor did he suggest evidence from his trial supports this claim. We cannot find appellate counsel ineffective for failing to raise an issue when Piggie has not demonstrated counsel had knowledge of that issue. *See Timberlake v. State*, 753 N.E.2d 591, 606 (Ind. 2001) (“a defendant must show from the information available in the trial record or otherwise known to appellate counsel

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<sup>6</sup> As indicated above, we find trial counsel was not ineffective. Further, our Indiana Supreme Court has held the preferred method of presenting a claim of ineffective assistance of counsel is on post-conviction review. *McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999). Thus we could not hold appellate counsel provided deficient performance for failing to raise the issue on direct appeal.

that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy”) (citation omitted).

b. Failure to Present Errors in Admission of Detective Marks’ Testimony

Piggie alleges Armstrong should have raised the erroneous admission of Detective Bill Marks’ testimony. The record indicates the State called Detective Marks after indicating it would not do so. Trial counsel objected preserving the issue for appeal. Piggie has not demonstrated how the unraised issue of the alleged erroneous admission of Detective Marks’ testimony is “clearly stronger” than the issues Armstrong raised on appeal. Thus, Piggie’s argument fails. *See Fisher*, 810 N.E.2d at 677 (we must consider first whether the unraised issue is significant and obvious from the face of the record, and then determine if the unraised issue is “clearly stronger” than the raised issues).

c. Failure to Request Rehearing or Transfer

Piggie claims Armstrong should have sought rehearing or transfer after we affirmed his conviction. As Piggie has not pointed to any aspect the direct appeal opinion that was erroneous, we cannot find Armstrong ineffective for failing to file for rehearing or transfer.

d. Alleged Conflict of Interest

Piggie alleged Armstrong should not have been allowed to represent him at the appellate level because Armstrong had served as a judge *pro tempore* over a proceeding involving Cassity, who was a witness in Piggie’s case. Piggie presented testimony at his post-conviction hearing indicating Armstrong was the judge in Cassity’s bond reduction case, but he has not explained how this might have affected his appeal, and thus his argument is

waived.<sup>7</sup> See Ind. App. Rule 46(A)(8)(a) and *Matheney*, 688 N.E.2d at 907 (failure to make a cogent argument supported by citation to authority results in waiver of issue on appeal).

### CONCLUSION

The post-conviction court did not abuse its discretion when excluding certain items offered as evidence, when those items lacked proper foundation or were hearsay. The trial court's exclusion from evidence of certain court documents not related to Piggie's trial was addressed in an earlier post-conviction appeal, and we decline to revisit that issue. Piggie has not demonstrated ineffective assistance of trial or appellate counsel. We affirm the decision of the post-conviction court in all aspects.

Affirmed.

ROBB, C.J., and VAIDIK, J., concur.

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<sup>7</sup> Piggie also alleges Armstrong was ineffective for failing to assert *voir dire* errors. As Piggie has not demonstrated trial counsel was ineffective in his handling of *voir dire*, we need not decide if appellate counsel was ineffective for failing to raise those issues.