MEMORANDUM DECISION

APPELLANT PRO SE

Mark Johnson
New Castle Correctional Facility
New Castle, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Justin F. Roebel
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Mark Johnson,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

December 12, 2022

Court of Appeals Case No. 21A-PC-1159

Appeal from the Marion Superior Court

The Honorable Peggy Hart, Magistrate

Trial Court Cause No. 49D31-0008-PC-142825

Crone, Judge.

Case Summary

[1] Mark Johnson, pro se, appeals the denial of his petition for post-conviction relief (PCR). We affirm.

Facts and Procedural History

[2] The underlying facts as recited by this Court in Johnson's direct appeal are as follows:

> On July 28, 2000, Kym Johnson (Kym) lived in a two-story townhouse … with her son and daughter, ages three and eleven, respectively. Although [Johnson], her husband of five years, lived there "off and on," her name was the only one on the lease because she wanted to be able to "kick him out whenever she got ready." Kym also testified that she had previously given him a key to the home, but she did not know whether [Johnson] still had it on the day of the crime. Further, she stated that this was an "off" day and [Johnson] was not residing at the townhouse on July 28, 2000. She also testified that she had asked him to leave the home either the day of the incident at hand or the previous day and had called maintenance to change the locks.
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> At 9:00 a.m. that morning, Kym called 911. Officer Karen Baumgart (Baumgart), a detective in the burglary division of the Marion County Sheriff's Department, was dispatched to Kym's residence. Baumgart took Kym's statement on the day of the incident and testified that Kym had described the incident as follows. In the early hours of July 28, 2000, a noise woke Kym up. Kym then picked up the phone receiver only to learn that the line was dead. Next, Kym walked to her bedroom door where she observed [Johnson] standing with a knife. He thereafter forced her to have intercourse with him.
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> Baumgart further testified that there had been a temporary

> restraining order against [Johnson] which lapsed three days before the incident in question. Baumgart also testified that she took photographs of the residence, which were admitted as exhibits and evidenced the apparent forced entry of the door to the living room of the residence and a window.
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> [Johnson] was charged with rape, a class B felony; burglary, a class B felony; and confinement, a class B felony.

Johnson v. State, No. 49A02-0107-CR-501, slip op. at 2-3 (Ind. Ct. App. Mar. 20, 2002) (transcript citations omitted). Before trial, the court granted use immunity to Kym, who testified for the State.

[3] At trial, Johnson was represented by attorney Lindsay Schneider, who requested and received, over the State's objection, a jury instruction on class D felony residential entry as a lesser-included offense of burglary. The jury found Johnson guilty of residential entry and acquitted him of the remaining charges. The trial court imposed a three-year suspended sentence. On direct appeal, Johnson was represented by attorney Timothy O'Connor, who challenged the sufficiency of the evidence supporting Johnson's conviction. In 2002, another panel of this Court held that Johnson's conviction was supported by sufficient evidence and affirmed his conviction.

[4] In January 2014, Johnson filed a pro se PCR petition, which was subsequently amended, raising multiple claims of ineffective trial and appellate counsel. An evidentiary hearing was held in December 2017 and September 2018, during which Johnson called both Schneider and O'Connor as witnesses. In May 2021, the post-conviction court issued findings of fact and conclusions of law denying

Johnson's petition. Johnson filed a motion to correct error, which was also denied.

Discussion and Decision

[5] Johnson asserts that the post-conviction court erred in denying his PCR petition. "Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence." *Bautista v. State*, 163 N.E.3d 892, 896 (Ind. Ct. App. 2021) (quoting *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *cert. denied* (2020)). "A defendant who files a petition for post-conviction relief 'bears the burden of establishing grounds for relief by a preponderance of the evidence.'" *Id*. (quoting Ind. Post-Conviction Rule 1(5)). "Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment[.]" *Id*. "Thus, the defendant must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Id*. (quoting *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013)). "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*. (quoting *Wilkes*, 984 N.E.2d at 1240). "We review the post-conviction court's factual findings for clear error, but do not defer to its conclusions of law." *Wilkes*, 984 N.E.2d at 1240.

[6] "The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution." *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "A

defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, [466 U.S. 668 (1984)]." *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). "First, the defendant must show that counsel's performance was deficient." *Id*. *"* This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment." *Id*. (citations omitted). "There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption." *Peaver v. State*, 937 N.E.2d 896, 900 (Ind. Ct. App. 2010), *trans. denied* (2011).

[7] "Second, the defendant must show that the deficient performance prejudiced the defense." *Perez*, 748 N.E.2d at 854. "To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "Although the two parts of the *Strickland* test are separate [inquiries], a claim may be disposed of on either prong." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). "*Strickland* declared that the 'object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, … that course should be followed.'" *Id*. (quoting *Strickland*, 466 U.S. at 697).

[8] Johnson has brought this appeal pro se, "but this does not mean that we will treat his brief any differently than we would if he were represented by counsel." *Receveur v. Buss*, 919 N.E.2d 1235, 128 n.4 (Ind. Ct. App. 2010), *trans. denied*. "Indeed, it has long been the rule in Indiana that pro se litigants without legal training are held to the same standard as trained counsel and are required to follow procedural rules." *Id*. (italics omitted). "We will not become an 'advocate for a party, or address arguments that are inappropriate or too poorly developed or expressed to be understood.'" *Lowrance v. State*, 64 N.E.3d 935, 938 (Ind. Ct. App. 2016) (citation omitted), *trans. denied* (2017).

Section 1 – Johnson has failed to establish that his trial counsel was ineffective.

[9] In his amended petition, Johnson alleged that trial counsel Schneider rendered ineffective assistance by failing to do the following: (1) object on the basis that he was subjected to double jeopardy by being acquitted of burglary and convicted of residential entry; (2) request an instruction on class A misdemeanor criminal trespass as a lesser-included offense of burglary; (3) object or request a directed verdict on the basis that the State "failed to present evidence of a proper arrest warrant or search warrant"; (4) object or request a continuance on the basis that "Johnson was not given adequate notice of the charge of residential entry"; (5) move for a directed verdict on the battery count on the basis of insufficient evidence; and (6) "conduct a complete investigation"

and present evidence that his wife Kym "was offered immunity from prosecution for her testimony against" him. Appellee's App. Vol. 2 at 2, 3.[1]

[10] With respect to issue (1), we observe that "[t]o establish ineffective assistance for counsel's failure to object, a petitioner must show that the trial court would have sustained the objection had it been made and that the petitioner was prejudiced by the failure to object." *Taylor v. State*, 929 N.E.2d 912, 918 (Ind. Ct. App. 2010), *trans. denied*. "Stated another way, the petitioner must demonstrate that had the objection been made, the trial court would have had no choice but to sustain it." *Id*. The post-conviction court found that Johnson had "provided no legal authority that his conviction of residential entry as a lesser included offense violated double jeopardy, nor does the trial record support such an assertion. The trial court would not have sustained an objection on this basis. With no deficient performance or prejudice here, this claim fails." Appealed Order at 8. Johnson has failed to establish that these findings are clearly erroneous, as his argument rests on a fundamental misunderstanding of double jeopardy principles. *See Griffin v. State*, 717 N.E.2d 73, 78 (Ind. 1999) (noting that "a defendant may be tried in the same proceeding for multiple

[1] The State points out that Johnson raises several additional allegations for the first time in his appellate brief, including Schneider's "failing to pursue an all or nothing strategy on burglary, failing to provide evidence of his residency, and failing to challenge that an instruction overemphasized an evidentiary fact." Appellee's Br. at 17 n.4. Our supreme court has stated that "[i]ssues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal." *Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001). Accordingly, as does the State, we confine our analysis "to the issues raised in the PCR petition and decided by the PCR court." Appellee's Br. at 17 n.4. We have listed those issues in the order in which they were addressed by the post-conviction court.

offenses, including greater and lesser included offenses, because the jeopardy is simultaneous" and that "a defendant may be retried for a lesser offense, of which he was convicted at the first trial, after that conviction is reversed on appeal, *and this is true even though the first trial also resulted in a verdict of acquittal on a greater offense*") (emphasis added), *cert. denied* (2000). Johnson's argument also rests on his mistaken belief that defense counsel may not request an instruction on an uncharged lesser-included offense. *Compare* Appellant's Br. at 21 ("In order for the court to allow the trial attorney, Mr. Schneider to submit this instruction to the jury, the charge of residential entry must be included in the charging affidavit.") *with Larkin v. State*, 173 N.E.3d 662, 668 (Ind. 2021) ("During a criminal trial, either party can request a jury instruction on a lesser included offense.").[2] We revisit this misapprehension in addressing issue (4).

[11] As for issue (2), the post-conviction court found that Schneider's performance was not deficient and that Johnson "failed to show a reasonable probability of a more favorable outcome had a trespass instruction been requested[.]" Appealed Order at 9. Johnson's response to these findings consists largely of transcript excerpts devoid of meaningful legal context and a conclusory assertion that if Schneider had made a "motion to offer trespass the outcome would have been

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[2] At the PCR hearing, O'Connor acknowledged that "it's possible to be charged with one thing at the beginning by way of a […] charging information, and then at the end of the trial, either the State or the defendant may propose an instruction on a lesser-included offense." PCR Tr. Vol. 2 at 60. Johnson's PCR petition and his line of questioning at the hearing indicate that he mistakenly believed that the State had amended the charging information to add a residential entry allegation, when in fact Schneider had requested a jury instruction on that offense. Johnson now appears to have realized this mistake, but he may not raise new issues based on this realization at this stage of the proceeding. *Allen*, 749 N.E.2d at 1171.

different." Appellant's Br. at 50. Johnson's failure to support his contention with cogent reasoning and citations to relevant legal authority and the record waives this issue for review. *See Lee v. State*, 91 N.E.3d 978, 990-91 (Ind. Ct. App. 2017) (finding pro se appellant's argument waived due to his failure to provide cogent argument required by Ind. Appellate Rule 46(A)(8)(a)), *trans. denied* (2018).[3]

[12] Johnson addresses issues (3) and (5) in a one-page argument in which he cites no legal authority whatsoever. Therefore, this argument is waived. *Id*. Waiver notwithstanding, Johnson was acquitted of burglary and therefore cannot establish prejudice as to that count.[4]

[13] Issue (4) is premised on Johnson's mistaken belief that defense counsel may not request an instruction on an uncharged lesser-included offense. Regarding his specific assertion that he did not have sufficient notice of the residential entry offense, it is well settled that "[a] defendant has notice [that he can be convicted of an offense] if [the] offense is specifically charged or if it is an inherently or

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[3] In fact, Johnson's only quotation from a judicial opinion actually undermines his argument. *See* Appellant's Br. at 42-43 (quoting *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998) ("Further, this Court has previously held that a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense. *Page v. State,* 615 N.E.2d 894, 895 (Ind. 1993). In *Page,* we concluded: 'It is not sound policy for this Court to second-guess an attorney through the distortions of hindsight.' *Id.* at 896.")).

[4] The State points out that even if Schneider had requested a motion for directed verdict on the burglary count, the State could have requested an instruction on the lesser-included offense of residential entry. *See State v. O'Grady*, 876 N.E.2d 763, 768 (Ind. Ct. App. 2007) (holding that trial court erred in denying State's request to amend charging information to lesser-included offense of class B misdemeanor in response to defendant's motion for directed verdict on class A misdemeanor battery charge).

factually included offense of the charged offense." *Simmons v. State*, 793 N.E.2d 321, 325 (Ind. Ct. App. 2003). It is also well settled that residential entry is an inherently included offense of residential burglary, with the only difference being that a residential burglary conviction requires proof of intent to commit a felony in the dwelling. *See Patterson v. State*, 729 N.E.2d 1035, 1043 (Ind. Ct. App. 2000) (citing Ind. Code §§ 35-43-2-1 (burglary) and 35-43-2-1.5 (residential entry)). The post-conviction court found that "[t]he trial court would not have sustained an objection" based on lack of notice. Appealed Order at 11. Johnson has failed to convince us otherwise.

[14] Finally, as for issue (6), Johnson focuses almost exclusively on the credibility of Kym's trial testimony regarding the rape charge, of which he was acquitted.[5] He requests a "new trial at the least" on his residential entry conviction. Appellant's Br. at 59. But, as the post-conviction court correctly observed, Johnson "failed to offer a transcript of the use immunity hearing as post-conviction evidence" and "presented no other post-conviction testimony or evidence to show that any facts helpful to the defense would have been ascertained had trial counsel conducted his investigation differently, or any showing here of a reasonable probability of a more favorable outcome at trial."

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[5] Johnson misleadingly claims that Kym testified at trial that she "never said any[thing] about a rape." Appellant's Br. at 59. In fact, Kym testified that she did not "recall" telling Officer Baumgart that Johnson "made [her] have sex with him[.]" Trial Tr. Vol. 1 at 45. Johnson also claims that Kim "had a[n] arrest record for dishonesty, false informing[,]" Appellant's Br. at 59, but he presented no evidence of this at the PCR hearing. He further suggests that Schneider could have impeached Kym using "sworn statements from depositions[,]" Appellant's Br. at 59, but he did not offer the depositions into evidence.

Appealed Order at 13. Accordingly, we affirm the court's rulings on Johnson's claims of ineffective assistance of trial counsel.

Section 2 – Johnson has failed to establish that his appellate counsel was ineffective.

[15] Johnson alleged that appellate counsel O'Connor rendered ineffective assistance by failing to do the following: (1) raise the issue that his residential entry conviction violated double jeopardy principles; (2) raise the issue that trial counsel was ineffective in failing to request an instruction on criminal trespass; and (3) raise the issue that trial counsel was ineffective in failing to "conduct a complete investigation" and present evidence that Kym "was offered immunity from prosecution for her testimony against" him. Appellee's App. Vol. 2 at 3.[6]

[16] "The standard of review for a claim of ineffective assistance of appellate counsel is the same as that for trial counsel." *Massey v. State*, 955 N.E.2d 247, 257 (Ind. Ct. App. 2011). "The petitioner must show that counsel's performance was deficient in that counsel's representation fell below an objective standard of reasonableness and that but for appellate counsel's deficient performance, there is a reasonable probability that the result of the appeal would have been different." *Id*. at 257-58. "As with ineffective assistance of trial counsel claims,

[6] The State observes that the third issue was addressed by the post-conviction court "as an issue regarding trial counsel[,]" but that Johnson's "amended petition refers generally to 'counsel'" and "Johnson labels this as an appellate counsel issue[.]" Appellee's Br. at 26.

if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Id*. at 258.

[17] "There are three different grounds for claims of ineffective assistance of appellate counsel: (1) counsel's actions denied the defendant access to appeal; (2) counsel failed to raise issues on direct appeal resulting in waiver of those issues; and (3) counsel failed to present issues well." *Id*. "Ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal." *Id*. (quoting *Reed v. State*, 856 N.E.2d 1189, 1196 (Ind. 2006)). "This is so because the choice of what issues to raise on appeal is one of the most important strategic decisions appellate counsel makes." *Id*. "To establish deficient performance for failing to raise an issue, the petitioner must show that the unraised issue was significant and obvious on the face of the record and that it was clearly stronger than the issues raised." *Id*.

[18] We have already established that Johnson's double-jeopardy argument is based on a misunderstanding of the law, so we summarily affirm the post-conviction court's ruling on issue (1).

[19] As for issue (2), we note that although bringing a claim of ineffective assistance of trial counsel on direct appeal "is not prohibited, post-conviction proceedings are usually the preferred forum for adjudicating" such claims. *Rogers v. State*, 897 N.E.2d 955, 964 (Ind. Ct. App. 2008), *trans. denied* (2009). "This is so because presenting such claims often requires the development of new facts not present in the trial record." *Id*. at 964-65. Moreover, "an ineffective assistance

of trial counsel claim is foreclosed in post-conviction proceedings if it is raised on direct appeal." *Caruthers v. State*, 926 N.E.2d 1016, 1023 (Ind. 2010). Johnson's argument on this issue is a confusing hodgepodge of conclusory statements and irrelevant legalese. The gist of it appears to be that Johnson was prejudiced because he was convicted of felony residential entry instead of misdemeanor criminal trespass, which was the result of Schneider's failure to request an instruction on the latter offense, and that O'Connor was ineffective in failing to raise Schneider's ineffectiveness as an issue on direct appeal. The most glaring flaw in Johnson's argument is that he has failed to establish whether he had a contractual interest in Kym's townhouse, and thus he cannot establish any deficient performance on either Schneider's or O'Connor's part, let alone any resulting prejudice. *See* Ind. Code § 35-43-2-2 (2000) ("A person who: … (5) not having a contractual interest in the property, knowingly or intentionally enters the dwelling of another person without the person's consent … commits criminal trespass, a Class A misdemeanor."); *Spaulding v. State*, 533 N.E.2d 597, 602 (Ind. Ct. App. 1989) (noting appellant's acknowledgement that

"a tendered instruction must be a correct statement of the law and must be supported by the evidence"), *trans. denied*.[7]

[20] And as for issue (3), Johnson has failed to establish that Schneider was ineffective with respect to his investigation and Kym's immunity, so his claim that O'Connor was ineffective must likewise fail. In sum, we affirm the post-conviction court in all respects.

[21] Affirmed.

May, J., and Weissmann, J., concur.

[7] To the extent Johnson suggests that O'Connor should have raised the criminal-trespass instruction as a standalone issue, we agree with the post-conviction court's assessment that Johnson failed to establish that the issue "was significant and obvious from the record or clearly stronger than the issue raised[,]" given that "[t]he record of [trial] proceedings makes no mention of criminal trespass." Appealed Order at 16. In other words, the issue would have been considered waived. *See Cook v. State*, 119 N.E.3d 1092, 1097 n.3 (Ind. Ct. App. 2019) ("[A] party that raises an issue for the first time on appeal has waived that issue."), *trans. denied*. "Counsel will not be deemed ineffective for failing to present meritless claims." *Lowery v. State*, 640 N.E.2d 1031, 1049 (Ind. 1994).