

## MEMORANDUM DECISION

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



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## IN THE COURT OF APPEALS OF INDIANA

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Donald Weaver,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

February 15, 2022

Court of Appeals Case No.  
21A-PC-852

Appeal from the Grant Superior  
Court

The Honorable Jeffrey D. Todd,  
Judge

Trial Court Cause No.  
27D01-1804-PC-6

**Bailey, Judge.**

# Case Summary

- [1] Donald Weaver (“Weaver”) appeals, pro se, the post-conviction court’s order denying his petition for post-conviction relief (“PCR”).
- [2] We affirm.

## Issues

- [3] Weaver purports to raise eight issues which we consolidate and restate as:
- I. Whether Weaver is foreclosed from asserting ineffective assistance of trial counsel in this PCR action, as he asserted that claim in his direct appeal;
  - II. Whether the PCR court erred in denying Weaver’s claims of ineffective assistance of appellate counsel; and
  - III. Whether the trial court erred by failing to enter findings on all PCR issues raised.

## Facts and Procedural History

- [4] The facts as found by this Court in Weaver’s direct appeal are as follows.

On October 4, 2005, Weaver and his girlfriend, Stacey Fritch, were together in Weaver’s green Ford Explorer and were running some errands and visiting friends. During the evening, Weaver told Fritch that he was upset with Jerome Robertson because Robertson had given Weaver \$300 in counterfeit money when Weaver sold crack cocaine to Robertson. After Weaver and Fritch arrived at Fritch’s apartment, Weaver received a call on his cell phone. Weaver said, “that was him.” Transcript at 120.

The pair left Fritch's apartment with Fritch driving Weaver's Explorer. They stopped at Weaver's parents' apartment, where Weaver went inside and came back to the Explorer with a gun wrapped in a red bandana. As Fritch was driving, they saw a man on a bicycle, and Weaver told her "that was him or there he is." *Id.* at 129. Fritch stopped the Explorer, and Weaver yelled for Robertson and motioned for him to come over to the vehicle. Robertson approached Weaver, and Weaver started a conversation with Robertson about the counterfeit money. Weaver then fired his gun at Robertson, hitting Robertson in the chest and arm. Robertson rode away on his bicycle, and Weaver continued to shoot at Robertson five more times. Weaver then told Fritch to drive away.

Robertson obtained assistance from a nearby convenience store and was transported to the hospital. Officers located Weaver's Explorer and attempted to stop it, but Weaver told Fritch to keep driving. When the officers ultimately stopped the vehicle, Weaver tossed the gun underneath Fritch's seat. Weaver then told Fritch that he loved her and "don't tell on me." *Id.* at 143.

Five shell casings were found at the scene of the shooting and were determined to have been fired from the gun found in Weaver's Explorer. Additionally, the bullet removed from Robertson was found to have been fired from the same gun.

*Weaver v. State*, No. 27A02-0610-CR-942, 2007 WL 2459171, at \*1 (Ind. Ct. App. Aug. 31, 2007).

[5] On October 7, 2005, the State charged Weaver with attempted murder, a Class A felony,<sup>1</sup> and subsequently amended the charge to add unlawful possession of a firearm by a serious violent felon, a Class B felony.<sup>2</sup> The State also alleged that Weaver had a status of a habitual offender.<sup>3</sup> Following a jury trial, Weaver was found guilty as charged, and the trial court sentenced him to an aggregate sentence of eighty years. Weaver appealed, raising claims of insufficient evidence and ineffective assistance of trial counsel. *Id.* On August 31, 2007, the Indiana Court of Appeals affirmed his convictions. *Id.*

[6] On April 23, 2018, Weaver filed a petition for post-conviction relief in which he again claimed his trial counsel was ineffective for reasons that included grounds not previously raised in his direct appeal. Weaver also alleged ineffective assistance of appellate counsel and raised several claims of “fundamental error.” Appellee’s App. at 3-4. On May 10, 2019, the post-conviction court entered written findings of fact and conclusions thereon denying post-conviction relief. This pro se appeal ensued.

## Discussion and Decision

[7] Weaver appeals the denial of his petition for PCR.

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<sup>1</sup> Ind. Code § 35-42-1-1(1) (2005); I.C. § 35-41-5-1(1).

<sup>2</sup> I.C. § 35-47-4-5(c).

<sup>3</sup> I.C. § 35-50-2-8.

The defendant bears the burden of establishing his claims by a preponderance of the evidence. [Ind. Post-Conviction Rule] 1(5). When, as here, the defendant appeals from a negative judgment denying post-conviction relief, he “must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court’s decision.” *Ben-Yisrayl v. State*, 738 N.E.2d 23053, 258 (Ind. 2000). When a defendant fails to meet this “rigorous standard of review,” we will affirm the post-conviction court’s denial of relief. *DeWitt v. State*, 755 N.E.2d 167, 169–70 (Ind. 2001).

*Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019).

- [8] We review a post-conviction matter de novo when the post-conviction court fails to enter specific findings of fact regarding an issue raised by the petitioner, but the facts underlying the claim are not in dispute, the issues are sufficiently clear, and both parties address the merits in their briefs. *Ellis v. State*, 67 N.E.3d 643, 646 (Ind. 2017). We also review questions of law de novo. *E.g.*, *Grundy v. State*, 38 N.E.3d 675, 684 (Ind. Ct. App. 2015), *trans. denied*.
- [9] Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. P.-C.R. 1(1)(b); *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013).

The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal. *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012). “Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are *res judicata*.” *Id.*

*Gibson*, 133 N.E.3d at 681. A post-conviction petitioner may overcome a procedural bar to a claim, on the ground of fundamental error, only by asserting either: (1) deprivation of the Sixth Amendment right to effective assistance of counsel, or (2) an issue demonstrably unavailable to the petitioner at the time of trial and direct appeal. *White v. State*, 971 N.E.2d 203, 207 (Ind. Ct. App. 2012), *trans. denied*.

## Ineffective Assistance of Trial Counsel

[10] The post-conviction court correctly concluded that Weaver’s ineffective assistance of trial counsel claims are foreclosed from review in this PCR action. It is well-settled that, if ineffective assistance of trial counsel is raised on direct appeal, “the appellate resolution of the issue acts as *res judicata* and precludes its relitigation in subsequent post-conviction relief proceedings.” *Jewel v. State*, 887 N.E.2d 939, 941 (Ind. 2008); *see also Heyward v. State*, 769 N.E.2d 215, 220 (Ind. Ct. App. 2002) (“[E]ssentially, the defendant must decide the forum for adjudication of the issue of ineffectiveness of trial counsel—direct appeal or collateral review—and specific contentions supporting the claim may not be divided between the two proceedings.” (quotations omitted) (citing *Wood v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998))). This is true even when the PCR petitioner raises new grounds for the ineffective assistance of trial counsel claims; the post-conviction court’s consideration of those new grounds would still constitute review of a previously determined issue and is therefore barred by *res judicata*. *E.g.*, *Sawyer v. State*, 679 N.E.2d 1328, 1329 (Ind. 1997); *Saunders v. State*, 794 N.E.2d 523, 527 (Ind. Ct. App. 2003). Under such

circumstances, the PCR petitioner may only raise the issue of trial counsel's effectiveness in the context of a claim of ineffective assistance of appellate counsel for failing to raise in the direct appeal the trial counsel's alleged ineffectiveness. *See Thomas v. State*, 797 N.E.2d 752, 754 (Ind. 2003).

- [11] The post-conviction court did not err in finding Weaver's ineffective assistance of trial counsel claims barred as res judicata.

## Ineffective Assistance of Appellate Counsel

- [12] Weaver also maintains that he received ineffective assistance of appellate counsel in violation of the Sixth Amendment to the federal constitution. The standard of review for a claim of ineffective assistance of appellate counsel is the same as a claim for ineffective assistance of trial counsel. *Allen v. State*, 749 N.E.2d 1158, 1166 (Ind. 2001). We begin with a strong presumption that counsel rendered adequate legal assistance. *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002). "To prevail on an ineffective assistance of counsel claim, [the petitioner] must show both deficient performance and resulting prejudice." *Allen*, 749 N.E.2d at 1166. Moreover, "if we can dispose of a claim of ineffective assistance of counsel by analyzing the prejudice prong alone, we will do so." *Burnell v. State*, 110 N.E.3d 1167, 1171 (Ind. Ct. App. 2018) (citing *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002)).

[13] Weaver alleges that his appellate counsel was ineffective for failing to raise the alleged ineffectiveness of trial counsel as to particular issues.<sup>4</sup> Ineffectiveness is rarely found when the issue is alleged failure to raise a claim on direct appeal. *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997). “Appellate counsel is not required to raise every possible claim but must winnow out weaker arguments and focus on the most promising issues for review.” *Azania v. State*, 738 N.E.2d 248, 251 (Ind. 2000) (citing *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). And to demonstrate prejudice, a PCR petitioner must show a reasonable possibility that the result of the appeal would have been different, i.e., that it would have resulted in the reversal of his conviction or sentence, had the issue been raised. *See Bieghler*, 690 N.E.2d at 194.

[14] On appeal, Weaver asserts that his appellate counsel was ineffective for failing to raise trial counsel’s alleged ineffectiveness in failing to: (1) submit instructions regarding mens rea and the lesser-included offense of battery; (2) object to the prosecutor’s comments during voir dire; and (3) object to the admission of documents regarding his habitual offender status. We address each of these claims below.

[15] In addition, Weaver raises the issue of his trial counsel’s alleged failure to adequately investigate his case not as error of his appellate counsel, but as an independent claim. He also raises the following issues as freestanding

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<sup>4</sup> Appellate counsel did raise on direct appeal trial counsel’s alleged ineffectiveness on several grounds that are not at issue in this PCR action. *Weaver*, 2007 WL 2459171, at \*3-5.



“fundamental error” claims: (1) failure of trial counsel to raise the issue of alleged prosecutorial misconduct, and (2) failure of trial counsel to object to the court’s alleged failure to disclose to the jury a plea deal Robertson received. As we noted above, the claims of trial counsel ineffectiveness are res judicata and may only be reviewed in this PCR action as claims of ineffective assistance of appellate counsel. In addition, a freestanding claim of fundamental error is not available in a PCR proceeding; rather, “complaints that something went awry at trial are generally cognizable only when they show a deprivation” of the Sixth Amendment right to effective counsel or where the issue was “demonstrably unavailable at the time of the trial or direct appeal.” *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002).

[16] Because the issue of trial counsel’s alleged failure to investigate is res judicata, we address it here only as a claim of ineffectiveness of appellate counsel. In addition, because Weaver has not shown that the issues of alleged prosecutorial misconduct and failure to disclose a plea deal were unavailable at the time of trial and appeal in this case, we also review these issues as claims of ineffective assistance of appellate counsel.

[17] As we discuss in more detail below, Weaver has waived most of his ineffective assistance of appellate counsel claims by failing to comply with the briefing requirements of Indiana Appellate Rule 46(A)(8). And his claim of ineffective assistance of appellate counsel relating to trial counsel’s alleged failure to offer correct instructions to the jury or object to the failure to disclose an alleged plea deal also fail.

## Waiver for Failure to Comply with Appellate Rule 46(A)

[18] Weaver has waived many of his claims due to his failure to comply with the requirements of Indiana Appellate Rule 46(A). Although Weaver brings this PCR appeal pro se,

[i]t is well settled that pro se litigants are held to the same legal standards as licensed attorneys. *Twin Lakes Reg'l Sewer Dist. v. Teumer*, 992 N.E.2d 744, 747 (Ind. Ct. App. 2013). This means that pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so. *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004).

*Lowrance v. State*, 64 N.E.3d 935, 938 (Ind. Ct. App. 2016), *trans. denied*.

[19] Indiana Appellate Rule 46(A)(8)(a) requires that each contention in an appellant's brief be "supported by cogent reasoning" and "by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal." When an appellant provides no cogent argument for a contention, that contention is waived. *See, e.g., Burnell v. State*, 110 N.E.3d 1167, 1171 (Ind. Ct. App. 2018) (noting the presentation of the appellant's contentions must contain a clear showing of how the issues and contentions relate to the particular facts of the case under review, and we will not review undeveloped arguments). When an appellant fails to provide citations to the record in support of his contentions, those contentions are also waived as this Court "will not search the record to discover errors not properly presented or speculate as to what comment the [appellant] is referring or why he considers it harmful.'" *Jenkins v.*

*State*, 809 N.E.2d 361, 372 (Ind. Ct. App. 2004) (quoting *McPherson v. State*, 178 Ind. App. 539, 383 N.E.2d 403, 406 (1978)), *trans. denied*. Similarly, when an appellant provides no citation to legal authority supporting his contentions, those contentions are waived. *E.g.*, *Shields v. Town of Perrysville*, 136 N.E.3d 309, 312 n.2 (Ind. Ct. App. 2019). Thus, under our Appellate Rules, “[i]t is not sufficient for the argument section that an appellant simply recites facts and makes conclusory statements without analysis or authoritative support.” *Kishpaugh v. Odegard*, 17 N.E.3d 363, 373 n.3 (Ind. Ct. App. 2014); *see also Lane Alan Schrader Tr. v. Gilbert*, 974 N.E.2d 516, 521 (Ind. Ct. App. 2012) (noting Rule 46(A)(8) “prevents the court from becoming an advocate when it is forced to search the entire record for evidence in support of [a party’s] broad statements”).

[20] Here, we first note that Weaver has failed to provide any Statement of Facts section at all, as required by Indiana Appellate Rule 46(A)(6).<sup>5</sup> In addition, by failing to comply with the requirements of Indiana Appellate Rule 46(A)(8), Weaver has waived his claims regarding: voir dire, documents related to his habitual offender status, failure of trial counsel to investigate, and prosecutorial misconduct.

### *Voir Dire*

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<sup>5</sup> While a PCR petitioner is not required to recite facts relating to the criminal conviction, he must present facts relevant to the PCR proceeding. Ind. Appellate Rule 46(A)(6)(d).

[21] The section of Weaver’s brief regarding voir dire consists of incomplete and/or incoherent sentences, bald allegations with no coherent analysis, and insufficient or non-existent references to the record. For example, Weaver asserts that his trial counsel should have objected to the prosecutor’s alleged misconduct during voir dire, and in the next three pages he simply lists page numbers from an unidentified source, followed by brief—often one or two word—statements.<sup>6</sup> We have consistently held that an argument is waived on appeal when it does not contain cogent analysis and citations to relevant parts of the record sufficient to allow for appellate review. *See, e.g., Hinkle v. State*, 97 N.E.3d 654, 668 (Ind. Ct. App. 2018) (holding appellant’s failure to make cogent argument and cite to parts of the record that might support his assertion resulted in waiver of the issue), *trans. denied; Ashworth v. Ehr Gott*, 934 N.E.2d 152, 167 (Ind. Ct. App. 2010) (holding argument was waived where we could not decipher the basis for it); *Jenkins*, 809 N.E.2d at 372 (noting we will not search the record to find support for appellant’s contentions). Weaver has waived his claim regarding voir dire.

*Habitual Offender Documentation*

[22] The section of Weaver’s brief titled “Habitual Offender” is similarly deficient. It alleges that trial counsel was ineffective for failure to object to “documents

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<sup>6</sup> For example, “Page 6 Parson raised next door,” “Page 24: the “‘Storm’ shifting burden,” Page 27: conditioning.” Appellant’s Br. at 9. Weaver does not identify in either his opening brief or his reply brief to what document the page numbers refer. Moreover, we note that the record does not contain a transcript of the voir dire proceedings.

used by the Prosecutor” in support of the habitual offender allegation but provides no citation to the record. Appellant’s Br. at 12. Thus, it is impossible for us to determine to what documents Weaver refers or where those documents are in the record, if indeed they are in the record at all. This section also makes bald assertions of claims unrelated to habitual offender documents, such as insufficiency of evidence, failure to give an unspecified instruction, and failure to object to alleged prosecutor “vouching,” all without citation to the record, any coherent analysis, or any explanation of how the cited legal authority is applicable to Weaver’s case. *Id.* at 15. The claim regarding habitual offender status is waived.

*Failure to Investigate*

[23] Weaver’s claim regarding trial counsel’s alleged failure to adequately investigate his case suffers from the same deficiencies. The first two single-spaced pages of this section of Weaver’s brief list alleged duties of trial counsel without a single citation to any legal authority. Weaver then provides legal authority for the general duty to investigate, followed by a list of his trial counsel’s alleged deficiencies without any citation to the record. Weaver does not, for example, cite to the transcript of the PCR hearing where he could have asked his trial counsel whether he did, in fact, fail to take the investigative steps

Weaver alleges.<sup>7</sup> Instead, Weaver again simply makes unsupported, bald assertions of ineffective assistance of trial counsel. His claims regarding the failure to investigate are waived. App. R. 46(A)(8).

*Prosecutorial Misconduct*

[24] In a section of his brief subtitled “Ineffective Trial Attorney,” Weaver makes various allegations about his trial counsel, such as his alleged failure to object to the admission of habitual offender documentation, with citation to an unspecified source. Appellant’s Br. at 25. For the next four and one half pages, Weaver again simply lists page numbers from an unidentified source,<sup>8</sup> followed by brief, often incomplete statements that appear to relate to his trial counsel’s alleged deficiencies and the prosecutor’s alleged misconduct for statements made at unspecified times and/or proceedings. *Id.* at 26-31; *see also* Appellant’s Reply Br. at 9-11 (alleging prosecutorial misconduct). In addition to failing to cite to the record in any understandable format, Weaver again fails to provide legal authority and coherent analysis explaining how the cited statements

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<sup>7</sup> Weaver points to a portion of the trial transcript allegedly showing a detective’s failure to adequately investigate his case; however, he does not explain how that is relevant to his ineffective assistance of trial counsel claim that allegedly should have been raised by his appellate counsel. Weaver also includes in this portion of his brief claims unrelated to an alleged failure to investigate, such as claims of trial counsel’s failure to object to certain evidence.

<sup>8</sup> After one and a half pages of citations to page numbers of an unidentified source, Weaver begins to cite to “TR,” and he makes the same citations in his reply brief. However, the “TR” citations do not match up to the eighty-seven-page transcript of the PCR hearing. While it appears that Weaver’s citations to “TR” may refer to the two-volume transcript of his criminal trial, he has not made that clear.

establish ineffective assistance of trial counsel and/or prosecutorial misconduct. Therefore, these claims are waived. *See* App. R. 46(A)(8).

### *Conclusion*

- [25] Weaver has waived most of his claims in this PCR appeal by failing to abide by the appellate rules which apply to all appellants, whether represented by counsel or proceeding pro se. And “[w]e will not review undeveloped arguments, for ‘a court which must search the record and make up its own arguments because a party has presented them in perfunctory form runs the risk of being an advocate rather than an adjudicator.’” *Burnell*, 110 N.E.3d at 1171 (quoting *Keller v. State*, 549 N.E.2d 372, 373 (Ind. 1990)).

### **Instructions**

- [26] Weaver also maintains that his appellate counsel was ineffective for failing to raise in the direct appeal the alleged ineffectiveness of Weaver’s trial counsel in failing to tender correct jury instructions regarding the mens rea for the crime and regarding the lesser included offense of battery.
- [27] Regarding the mens rea claim, it is well-established that jury instructions on attempted murder must include a statement that the mens rea for the crime is “specific intent to kill.” *Ramsey v. State*, 723 N.E.2d 869, 871 (Ind. 2000) (citing *Spradlin v. State*, 569 N.E.2d 948, 950 (Ind. 1991)). Preliminary Jury Instruction Number 1 and Final Jury Instruction 1 recited the charging information in Weaver’s case, stating in relevant part: “Donald E. Weaver, Jr., did knowingly or intentionally attempt to commit the crime of murder.” Prior Case App. at 72,

93. However, Preliminary Jury Instruction Number 2 and Final Jury Instruction Number 2 stated:

The crime of Attempted Murder, a Class A felony, is defined by law as follows:

A person attempts to commit murder when, *acting with the specific intent to kill another person*, he engages in conduct that constitutes a substantial step toward killing that person.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. *acting with the specific intent to kill Jerome Robertson*
3. did shoot Jerome Robertson with a handgun
4. which was conduct constituting a substantial step toward the commission of the intended crime of killing Jerome Robertson.

*If the State failed to prove each of these elements* beyond a reasonable doubt, you must find the Defendant not guilty of Attempted Murder a Class A felony, as charged in Count I.

*Id.* at 73, 94 (emphases added). Thus, the jury instructions as a whole “succeeded in informing the jury that [specific] intent to kill is an element of the crime of attempted murder.” *Dawson v. State*, 810 N.E.2d 1165, 1175 (Ind. Ct.



App. 2004), *trans. denied*. Weaver’s appellate counsel did not provide ineffective assistance by failing to raise trial counsel’s failure to object to the instructions.

[28] Weaver also asserts that his appellate counsel was ineffective for failing to assert that trial counsel was ineffective for failing to offer an instruction regarding the lesser-included offense of battery. “Defense counsel enjoys considerable discretion in developing legal strategies for a client, and this discretion demands deferential judicial review.” *Bradbury v. State*, 174 N.E.3d 608, 613 (Ind. 2021) (quotations and citation omitted). And a reasonable 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. *Id.* Thus, our Supreme Court has held trial counsel was not ineffective for failing to tender a lesser-included offense instruction where his trial strategy was the “all or nothing” assertion that the defendant simply did not do the criminal act. *Id.*; *see also Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998) (“The all or nothing strategy employed by counsel was appropriate and reasonable based on the facts in this case.”).

[29] Here, trial counsel employed the “all or nothing” strategy; that is, he argued that there was insufficient evidence that Weaver shot Robertson at all. Prior Case Tr. Vol. II at 123. And offering an instruction on a lesser-included offense such as battery would have been inconsistent with that “all or nothing” defense strategy. The defense strategy was reasonable, and “[i]t is not sound policy for this Court to second-guess an attorney through the distortions of hindsight.”

*Autrey*, 700 N.E.2d at 1141. Weaver’s counsel was not ineffective for failing to offer an instruction on a lesser-included offense, such as battery.

[30] Finally, we note that even if Weaver had shown error in failing to offer an instruction on a lesser-included offense, he failed to establish that he was prejudiced by that error as there was other overwhelming evidence of his guilt. *See Allen*, 749 N.E.2d at 1166 (“To prevail on an ineffective assistance of counsel claim, [the petitioner] must show both deficient performance and resulting prejudice.”). That evidence included the testimony of two eye-witnesses—Weaver’s girlfriend who drove the vehicle, and the victim Robertson, both of whom testified that it was Weaver who shot Robertson; evidence that Weaver was apprehended by police in the vehicle with the gun that ballistics showed had been used to shoot Robertson; and evidence that Weaver had written a letter to his girlfriend asking her to change her version of the events of the shooting. Given the overwhelming evidence of Weaver’s guilt of attempted murder, he has failed to show that he was prejudiced by the failure to offer an instruction on a lesser-included offense.

### **Plea Agreement**

[31] Finally, Weaver maintains that his appellate counsel was ineffective for failing to argue that his trial counsel was ineffective when he failed to object to the

alleged fact that Robertson had a “plea deal” that was not disclosed to the jury.<sup>9</sup> However, as the post-conviction court noted in its decision, there was no actual “plea deal.” Rather, because Robertson had refused to testify against Weaver in Weaver’s first trial, Robertson was held in contempt and incarcerated. The jury was unable to reach a verdict in Weaver’s first trial. Before Weaver’s second trial, Robertson wrote to the court from jail, stating that he was willing to testify in Weaver’s second trial. The trial court then wrote to Robertson’s counsel, explaining that, if Robertson testified at the second trial, he would purge himself of contempt. The trial court sent a copy of its letter to both the prosecutor and Weaver’s counsel. At the second trial, Weaver’s counsel cross-examined Robertson regarding whether Robertson would be released from jail after he testified, to which Robertson replied that he was told the only way he could be released from jail for his contempt was to testify at Weaver’s second trial. Thus, there was no “plea deal” to which Weaver’s counsel could object, and the jury was made aware that Robertson would only be released from jail for contempt if he testified at Weaver’s trial. Weaver has failed to show ineffective assistance of counsel for failure to bring Robertson’s contempt situation to the attention of the jury.

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<sup>9</sup> It is difficult to discern Weaver’s precise claim regarding an alleged “plea deal.” At various points he characterizes the claim as one of judicial bias and prosecutorial misconduct for allowing Robertson to enter into the alleged plea deal. But Weaver provides no cogent argument or analysis of that claim and has, therefore, waived it. App. R. 46(A)(8).

As previously noted, Weaver also presents his claim regarding the plea deal as “fundamental error.” CITE However, as such a claim is not available to him in this PCR action, we analyze the claim as an ineffective assistance of appellate counsel claim. CITE

## Conclusion

[32] Most of Weaver's claims regarding ineffective assistance of appellate counsel are waived for Weaver's failure to comply with the requirements of Indiana Appellate Rule 46(A)(8). And Weaver has failed to show that his appellate counsel was ineffective for failing to raise on direct appeal the alleged ineffectiveness of Weaver's trial counsel for (1) failing to proffer jury instructions regarding mens rea and the lesser-included offense of battery, and (2) failing to object to the failure to disclose to the jury an alleged plea deal obtained by Robertson.

## Post-Conviction Court's Findings

[33] Finally, Weaver contends that the post-conviction court committed reversible error by failing to "address all the issues that Weaver raised" in his PCR petition. Appellant's Br. at 33. However, Weaver does not state, in either his opening brief or his reply brief, what issues he raised that were not addressed. Therefore, Weaver has waived this claim. App. R. 46(A)(8). In any case, a post-conviction court's failure to enter specific findings of fact and conclusions thereon in a PCR claim is not reversible error, as we review such an unaddressed claim de novo. *Ellis*, 67 N.E.3d at 646.

## Conclusion

[34] The claims of ineffective assistance of trial counsel that Weaver raises in this PCR action are foreclosed as res judicata. Most of Weaver's claims of

ineffective assistance of appellate counsel are waived for failure to comply with the briefing requirements of Indiana Appellate Rule 46(A)(8). And we hold that Weaver's appellate counsel was not ineffective for failing to raise trial counsel's failure to challenge the jury instructions or the alleged non-disclosure of a plea deal. Finally, Weaver waived any contention that the post-conviction court committed reversible error by failing to address all of Weaver's PCR claims.

[35] Affirmed.

Mathias, J. and Altice, J., concur.