

# MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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Homer T. Richards,  
*Appellant-Petitioner,*

v.

State of Indiana,  
*Appellee-Respondent.*

December 22, 2022

Court of Appeals Case No.  
21A-PC-1270

Appeal from the Allen Superior  
Court

The Honorable David Zent, Judge

Trial Court Cause No.  
02D05-1705-PC-53

**Pyle, Judge.**

## Statement of the Case

[1] Homer T. Richards (“Richards”), pro se, appeals the post-conviction court’s denial of his petition for post-conviction relief. Richards argues that the post-conviction court erred by denying him post-conviction relief on his claims of ineffective assistance of trial, appellate, and post-conviction counsel. Concluding that there was no error, we affirm the post-conviction court’s judgment.

[2] We affirm.

### Issue

Whether the post-conviction court erred by denying post-conviction relief to Richards.

### Facts

[3] The relevant facts of Richards’ underlying offenses, as set forth by this Court in Richards’ direct appeal, are as follows:

On August 18, 2015, Richards and his girlfriend of several years, April Miller (Miller), ended their relationship. At the time, Miller worked as a manager at Cap n’ Cork, a liquor store, located on Lewis Street in Fort Wayne, Allen County, Indiana. Approximately one week after her break-up with Richards, Miller began dating a long-time customer from Cap n’ Cork—Peter Major (Major). Richards, however, continued to contact Miller on a regular basis, even showing up at her house at night uninvited. After obtaining permission from her district manager, Miller informed Richards that he was no longer permitted inside Cap n’ Cork.

For several weeks, Richards adhered to this ban, although he regularly waited outside the store in an attempt to talk to Miller on her way to and from work. On September 21, 2015, Miller arrived at Cap n' Cork between 8:30 and 8:45 a.m. in order to open the store at 9:00 a.m. Once again, Richards was waiting for her outside the store, but Miller proceeded directly inside. Later that morning, Miller left the store to empty the garbage.

Richards approached her and attempted to discuss a reconciliation. Miller explained that she had no interest in resuming their relationship, but Richards argued with her. Eventually, Miller “didn’t want to listen to it anymore so [she] shut the door and went inside.” (Tr. p. 148). Thereafter, Richards repeatedly attempted to call Miller on her cellphone, but Miller refused to answer. Despite his ban from the liquor store, Richards went inside and began yelling at Miller for not answering her phone. As Miller tried to carry on with her tasks, the two argued about Miller’s refusal to reconcile and Richards’ insistence that she quit her job because “he has been around there longer.” (Tr. p. 151).

At approximately 12:30 p.m., Richards was still at Cap n' Cork, arguing with Miller. At this time, Miller’s new boyfriend, Major, arrived at Cap n' Cork, along with his brother, John Tinker (Tinker). Major asked Richards, “[W]hy do you keep fucking with her, why don’t you just leave her the fuck alone[?]” (Tr. p. 155). This inevitably led to an argument between Richards and Major, and upon realizing that Major was dating Miller, Richards invited Major to “go outside.” (Tr. p. 193). Instead of exiting the store, Major punched Richards multiple times, knocking Richards to the ground. Tinker intervened and pulled Major away from Richards. Major ordered Richards to leave the store, and despite the fact that Tinker was holding onto him, Major managed to knock Richards to the ground once more. As Richards stood, he stated that he would leave and walked out the door. However, a few minutes later, Major saw through the window that Richards was walking back toward Cap n' Cork—this time with a firearm in his hand. Before Major could lock the

door, Richards pulled it open and was “[w]aving the gun around.” (Tr. p. 158). He then aimed the gun at Major and fired twice; Major dropped to the ground.

Miller rushed to Major’s side while calling 911, as Tinker tackled Richards and snatched the gun away from him. Outside the liquor store, a customer, Domonic Holliday (Holliday), heard the gunfire and immediately ran inside. Unaware of who fired the shots, Holliday jumped on Tinker’s back as Tinker wrestled with Richards. Assuming that Holliday was Richards’ cohort, Tinker turned and hit Holliday in the head with the gun. Tinker chased Holliday out of the store and even pulled the trigger to shoot at him as he fled, but there was no ammunition left in the gun. As Tinker turned back toward the liquor store, Richards was running away. Tinker dropped the gun on the floor and checked on Major, who was struggling to breathe. Tinker then ran to his vehicle and drove off in an attempt to locate Richards, but the police apprehended Tinker and took him into custody for questioning.

Major was transported by ambulance to Lutheran Hospital. He survived the shooting and was hospitalized for nearly two months. Major sustained a collapsed lung, and one of the bullets “traversed and injured his spinal . . . column as well as his spinal cord.” (Tr. p. 286). As a result, Major is now paralyzed from the chest down and requires ongoing therapy.

During the investigation at Cap n’ Cork, police officers retrieved the handgun—a 9mm Luger, as well as two shell casings and a tactical stainless steel knife. In addition, Miller informed the officers that Cap n’ Cork was equipped with surveillance cameras and that a copy of the footage could be obtained from the main Cap n’ Cork branch located on Coldwater Road in Fort Wayne.

On September 25, 2015, the State filed an Information, charging Richards with Count I, attempted murder, I.C. §§ 35-41-5-1(a); -42-1-1; and Count II, aggravated battery, a Level 3 felony, I.C. § 35-42-2-1.5. The State also filed an Information for Application

for Additional Fixed Term of Imprisonment (as Part II of Count II) based on Richards' use of a firearm in the commission of his aggravated battery offense, I.C. § 35-50-2-11. At his initial hearing on September 29, 2015, Richards indicated that he would be hiring private counsel, but no attorney ever entered an appearance. On October 9, 2015, Richards, acting *pro se*, filed a motion to suppress and a motion to dismiss. On October 14, 2015, while Richards' *pro se* motions remained pending, the trial court appointed a public defender to represent him, and on October 21, 2015, John C. Bohdan (Attorney Bohdan) filed his appearance as defense counsel.

On November 30, 2015, Richards filed with the trial court a copy of a letter he had written to Attorney Bohdan. In his letter, Richards requested that Attorney Bohdan "please notify the court A.S.A.P. for a hearing for me to request representing myself." (Appellant's App. p. 37). On December 3, 2015, Richards filed with the court a copy of another letter making the same request. On December 16, 2015, the trial court held a status hearing to discuss Richards' requests to proceed *pro se*. At the hearing, Richards initially indicated that he would be withdrawing his request to proceed *pro se*, but he subsequently informed the trial court that he wanted to represent himself because he has

two (2) *pro se* motions in front of the [c]ourt that has [sic] good merits, and I asked [Attorney Bohdan] to move it [sic] into context. [Attorney Bohdan] said that he does not want to—once again, he does not want to pursue the matter the way that I was trying to lead him in as far as to get that information to the [c]ourt and alert the [c]ourt that we have a problem here today. [The State is] basing [its] case on false information, and [Attorney Bohdan] does not seem to want to pursue it.

(Status Hrg. Tr. p. 4) (Italics added). Based on Richards' intent to proceed *pro se*, the trial court advised him of his rights and of the pitfalls of self-representation. The trial court also informed Richards of its policy against appointing standby counsel. The

trial court questioned Richards about his capabilities, and Richards indicated that he has his GED; he has done legal work in his prior cases; and he has some experience studying to be a paralegal. Richards also stated that he can read and write well; he is a good speaker; and he could quickly become familiar with the rules and procedures for his trial. Moreover, Richards verified that his decision to represent himself was not influenced by promises of special treatment or threats of harm. Richards articulated that he understood the disadvantages of self-representation but that he wished to proceed *pro se*. However, after the trial court commenced a discussion about scheduling a suppression hearing, Richards privately consulted with Attorney Bohdan. As a result, both Attorney Bohdan and the trial court directed Richards that he needed to make a final decision about his representation. Richards determined that he was “going with [Attorney] Bohdan” and officially withdrew his request to proceed *pro se*. (Status Hrg. Tr. p. 15). The trial court subsequently returned Richards’ *pro se* motions to suppress and to dismiss, stating that it does not accept *pro se* motions from represented defendants.

On February 16-17, 2016, the trial court conducted a bifurcated jury trial. During the trial, to bolster the testimony of Miller, Major, and Tinker, the State offered the surveillance footage of the shooting as Exhibit 1. Richards objected to the admission of the video-recording based on his belief that it had been edited and was “not a true and accurate copy.” (Tr. p. 163). The trial court admitted Exhibit 1 over Richards’ objection. During his case-in-chief, Richards testified as to his version of events. He stated that after he was repeatedly punched by Major, he initially left the liquor store, but he was worried about Miller’s safety because he believed that Major and Tinker were planning on robbing Cap n’ Cork. Thus, he withdrew the firearm from his pocket and returned to the liquor store merely with the intent to ensure Miller’s safety. Richards testified that Major charged at him with a knife, so he fired a warning shot in the opposite direction. Richards claimed that “the gun went off” a second time when

Tinker tackled him, but he never intentionally fired a shot at Major. (Tr. p. 389).

*Richards v. State*, 02A03-1604-CR-824 at \*1-3 (Ind. Ct. App. Oct. 25, 2016), *trans. denied*.

[4] The trial court instructed the jury on the elements of the attempted murder and aggravated battery charges. In regard to the attempted murder instruction, the trial court instructed the jury that the State was required to prove beyond a reasonable doubt that Richards acted with the “specific intent to kill” Majors. (Direct Appeal App. Vol. 2 at 88). Additionally, the trial court instructed that the “[i]ntent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily injury.” (Direct Appeal App. Vol. 2 at 92). The trial court also gave a self-defense instruction.

[5] Before the jury went to deliberate, the trial court informed the jury about some procedural aspects for deliberations. The trial court informed the jury that all admitted exhibits, except the gun and the knife, would be sent back to the jury room as part of the jury’s deliberations. The trial court told the jury that if it wanted to see those two exhibits, then the court could arrange for the jury to see them in the courtroom. Additionally, the trial court addressed the jury’s inquiry to the bailiff about whether the jurors would be able to view the surveillance video during deliberations. The trial court informed the jury that it should first begin its deliberations before determining if it wanted to view the video. The trial court advised the jury that if it wanted to see the video, then the court would play the video for the jury one time in the courtroom.

[6] Once the jury went to deliberate, the parties informed the trial court that they did not need to return to the courtroom if the jury decided that it wanted to review the surveillance video. The trial court informed the parties that it would nevertheless inform the parties if the jury made such a request.

[7] During deliberations and upon the jury's request, the trial court allowed the jury to go to the courtroom to view the gun and knife that had been excluded from the jury room and to view the surveillance video. The bailiff played the video one time for the jury and, upon instructions by the trial court, the bailiff paused the video at certain times when requested by the jury.

. . . [T]he jury returned a guilty verdict on both Counts. Thereafter, the jury made a separate determination that Richards used a firearm in the commission of the aggravated battery offense, thus warranting an additional fixed penalty.

On March 15, 2016, the trial court held a sentencing hearing. The trial court merged the aggravated battery charge into the attempted murder charge and entered a judgment of conviction for attempted murder, a Level 1 felony. The trial court imposed the advisory sentence of thirty years, fully executed in the Indiana Department of Correction. In addition, during the sentencing hearing, Major accepted responsibility for his role in the altercation with Richards; thus, he requested that Richards pay for only one-half of his medical expenses. The trial court agreed and ordered Richards to pay \$23,500 in restitution.

*Richards*, 02A03-1604-CR-824 at \*3-4.



[8] Richards filed a direct appeal and was represented by attorney P. Stephen Miller (“Appellate Counsel Miller”).<sup>1</sup> On appeal, Richards argued that the trial court had: (1) coerced him into forfeiting his right to self-representation; and (2) abused its discretion by admitting the surveillance video into evidence, arguing that the evidence violated the best evidence rule and had not been properly authenticated under the silent witness theory. On Richards’ first issue, this Court held that the trial court had “properly advised Richards of the disadvantages of self-representation” and had not coerced Richards into forfeiting his right to self-representation. *Richards*, 02A03-1604-CR-824 at \*9. When reviewing Richards’ admission of evidence challenge, this Court first noted that Richards had not objected to the admission of the surveillance video based on the grounds raised on appeal. Nevertheless, we reviewed Richards’ challenge to the admission of the surveillance video as related to his trial objection that the video had been edited and was not an accurate portrayal of the events that the video had purported to depict. We ultimately rejected Richards’ evidentiary challenge and held that the trial court had acted within its discretion when it admitted the surveillance video into evidence. Accordingly, we affirmed Richards’ conviction.

[9] Subsequently, in May 2017, Richards filed a pro se petition for post-conviction relief. For a period of time, Richards was represented by attorneys with the

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<sup>1</sup> The post-conviction court’s order indicates that Appellate Counsel Miller was deceased at the time of the post-conviction proceeding.

Office of the Indiana Public Defender, including attorney John Pinnow (“Post-Conviction Counsel Pinnow”). In January 2019, Post-Conviction Counsel Pinnow withdrew his appearance pursuant to Indiana Post-Conviction Rule 1(9). Thereafter, pursuant to a request by the State, the trial court ordered the parties, pursuant to Post-Conviction Rule 1(9)(b), to submit the post-conviction case via affidavit.

[10] Richards later filed an amended pro se petition in February 2020. In his amended petition, Richards raised forty-one post-conviction claims of ineffective assistance of counsel. Specifically, he raised twenty claims of ineffective assistance of trial counsel, twenty claims of ineffective assistance of appellate counsel, and one claim of ineffective assistance of post-conviction counsel.

[11] The majority of Richards’ ineffective assistance of trial counsel claims were based on allegations that his trial counsel had failed to object to various testimony, evidence, instructions, or alleged misconduct by the prosecutors. Richards’ remaining trial counsel claims were based on allegations that Richards’ trial counsel had failed to act in some way, including the failure to conduct a proper pretrial investigation, file a motion to suppress, call or impeach witnesses, or request jury instructions. For each of Richards’ ineffective assistance of trial counsel claims, he raised a corresponding ineffective assistance of appellate counsel claim, in which he argued that appellate counsel had rendered ineffective assistance by failing to raise the various alleged errors on appeal or by failing to raise an appellate claim of

ineffective assistance of trial counsel.<sup>2</sup> Additionally, Richards argued that Post-Conviction Attorney Pinnow had rendered ineffective assistance of post-conviction counsel under the *Baum* standard<sup>3</sup> by withdrawing his appearance.

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<sup>2</sup> Specifically, Richards alleged the following corresponding claims of ineffective assistance of trial and appellate counsel: (1) trial counsel failed to object to prosecutorial misconduct, and appellate counsel failed to raise an ineffective assistance of trial counsel issue on appeal; (2) trial counsel failed to object to prosecutorial misconduct based on the State allegedly using inconsistent theories of prosecution (which was based on Richards' allegation that some witnesses had inconsistent deposition and trial testimony), and appellate counsel failed to raise that same issue on appeal; (3) trial counsel failed to object to prosecutorial misconduct based on the State not calling certain witnesses to testify (including, the detective who had signed the probable cause affidavit), and appellate counsel failed to raise that same issue on appeal; (4) trial counsel failed to object to prosecutorial misconduct based on the State's alleged use of hearsay (which was based on Richards' allegation that the probable cause affidavit—that had not been offered or admitted into evidence—was hearsay, and appellate counsel failed to raise that same issue on appeal; (5) trial counsel failed to object to prosecutorial misconduct based on the State allegedly using false statements during opening and closing statements, and appellate counsel failed to raise that same issue on appeal; (6) trial counsel failed to object to prosecutorial misconduct based on the State allowing witnesses to use alleged perjured testimony, and appellate counsel failed to raise that same issue on appeal; (7) trial counsel failed to object to the admission of the surveillance video into evidence based on an argument that it had been tampered with, and appellate counsel failed to raise that same issue on appeal; (8) trial counsel failed to object to prosecutorial misconduct based on the ex parte presentation of the video to the jury during deliberations, and appellate counsel failed to raise that same issue on appeal; (9) trial counsel failed to object to an alleged conflict of interest between Richards and the prosecutor's office, and appellate counsel failed to raise that same issue on appeal; (10) trial counsel failed to use impeachment evidence, and appellate counsel failed to raise an ineffective assistance of trial counsel issue on appeal; (11) trial counsel failed to conduct a proper pre-trial investigation or use discovery, and appellate counsel failed to raise an ineffective assistance of trial counsel issue on appeal; (12) trial counsel failed to object to prosecutorial misconduct based on an alleged improper jury instruction on inferred intent, and appellate counsel failed to raise that same issue on appeal; (13) trial counsel failed to request jury instructions for aggravated battery as a lesser-included offense to attempted murder, the absence of sudden heat as an element of attempted murder, and self-defense of another person, and appellate counsel failed to raise an ineffective assistance of trial counsel issue on appeal; (14) trial counsel failed to object to prosecutorial misconduct based on an allegation that a State's witness (Miller) had been coerced to testify, and appellate counsel failed to raise an ineffective assistance of trial counsel issue on appeal; (15) trial counsel failed to object to prosecutorial misconduct based on the trial court merging Count 2 into Count 1, and appellate counsel failed to raise an ineffective assistance of trial counsel issue on appeal; (16) trial counsel failed to file a motion to suppress based on double jeopardy, and appellate counsel failed to raise an ineffective assistance of trial counsel issue on appeal; (17) trial counsel failed to file Richards' pro se motion to dismiss and motion to suppress, and appellate counsel failed to raise an ineffective assistance of trial counsel issue on appeal; (18) trial counsel failed to object to evidence as directed by Richards, and appellate counsel failed to raise an ineffective assistance of trial counsel issue on appeal; (19) trial counsel failed to raise an issue on specific intent, and appellate counsel failed to raise an ineffective assistance of trial counsel issue on appeal; (20) trial counsel failed to object to prosecutorial misconduct based on an alleged improper foundation for the admission of the probable cause affidavit into evidence (that had not been offered as evidence), and appellate counsel failed to raise an ineffective assistance of trial counsel issue on appeal.

[12] Richards submitted his post-conviction affidavit, in which he simply restated the ineffective assistance of counsel claims that he had raised in his amended post-conviction petition. Richards also submitted interrogatory answers from Trial Counsel Bohdan and Post-Conviction Counsel Pinnow. In Post-Conviction Counsel Pinnow's answers, he stated, among other things, that the jury at Richards' trial had been properly instructed on the specific intent to kill element. Additionally, Richards designated evidence of the transcripts from his jury trial and the direct appeal record from this Court, and pre-trial depositions of Miller, Major, and Tinker that had been conducted by Trial Counsel Bohdan in January 2016.

[13] Thereafter, the post-conviction court issued an order denying Richards' petition for post-conviction relief on his claims of ineffective assistance of trial, appellate, and post-conviction counsel. The post-conviction court concluded that Richards had either waived his ineffective assistance of trial and appellate counsel claims by failing to make a cogent argument or by failing to meet his burden of showing deficient performance or prejudice. In part, the post-conviction court rejected Richards' ineffective assistance of counsel claim regarding the intent to kill instruction because it concluded that the trial court had correctly instructed the jury on the elements of attempted murder, including the specific intent to kill element, the State had presented compelling evidence of the intent to kill, and Richards had failed to meet his burden of

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<sup>3</sup> *Baum v. State*, 533 N.E.2d 1200 (Ind. 1989).

showing prejudice on the claim. The post-conviction court also determined that Richards' claim regarding the surveillance video was barred by res judicata because he had previously raised a challenge to the video on direct appeal. Additionally, the post-conviction court denied relief on Richards' ineffective assistance of post-conviction counsel claim, concluding that the *Baum* standard did not apply to Richards' case. Specifically, the post-conviction court concluded that Post-Conviction Counsel Pinnow's withdrawal of his appearance did not result in a judgment of the court but had merely left Richards the choice to proceed pro se to pursue post-conviction relief.

[14] Richards now appeals.

## Decision

[15] Richards argues that the post-conviction court erred by denying him post-conviction relief. At the outset, we note that Richards has chosen to proceed pro se. It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. Thus, 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. *Id.* "We 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*.

[16] Our standard of review in post-conviction proceedings is well settled.

We observe that post-conviction proceedings do not grant a petitioner a “super-appeal” but are limited to those issues available under the Indiana Post-Conviction Rules. Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who appeals the denial of PCR faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. The appellate court must accept the post-conviction court’s findings of fact and may reverse only if the findings are clearly erroneous. If a PCR petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court.

*Shepherd v. State*, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010) (internal case citations omitted), *trans. denied*. “We review the post-conviction court’s factual findings under a ‘clearly erroneous’ standard but do not defer to the post-conviction court’s legal conclusions.” *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007), *reh’g denied, cert. denied*. Additionally, “[w]e will not reweigh the evidence or judge the credibility of the witnesses; we examine only the probative evidence and reasonable inferences that support the decision of the post-conviction court.” *Id.*

[17] On appeal, Richards raises the same twenty claims of trial counsel ineffectiveness, twenty corresponding claims of appellate counsel ineffectiveness, and one claim of post-conviction counsel ineffectiveness that he had raised in his amended post-conviction petition. We turn first to Richards’ argument regarding ineffective assistance of trial counsel.

[18] A claim of ineffective assistance of trial counsel requires a petitioner to show that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Davidson v. State*, 763 N.E.2d 441, 444 (Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *reh'g denied*), *reh'g denied*, *cert. denied*. "A reasonable probability arises when there is a 'probability sufficient to undermine confidence in the outcome.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). "Failure to satisfy either of the two prongs will cause the claim to fail." *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). "Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *Id.* Therefore, if we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008).

[19] Richards' ineffective assistance of trial counsel claims can be condensed into two categories: (1) failure to object; and (2) failure to act in some manner. The majority of Richards' ineffective assistance of trial counsel claims were based on allegations that his trial counsel had failed to object to various testimony, evidence, instructions, or alleged misconduct by the prosecutors, while his remaining trial counsel claims were based on allegations that his trial counsel

had failed to conduct a proper pretrial investigation, file a motion to suppress, impeach witnesses, and request jury instructions.

[20] To demonstrate ineffective assistance of trial counsel for failure to object or failure to file a motion, a petitioner must prove that an objection would have been sustained or the motion would have been granted if made, and he must also show that he was prejudiced by counsel's failure to make an objection or to file the motion. *Kubsch v. State*, 934 N.E.2d 1138, 1150 (Ind. 2010), *reh'g denied*; *Talley v. State*, 51 N.E.3d 300, 303 (Ind. Ct. App. 2016), *trans. denied*. “[E]stablishing failure to investigate as a ground for ineffective assistance of counsel requires going beyond the trial record to show what an investigation, if undertaken, would have produced.” *McKnight v. State*, 1 N.E.3d 193, 201 (Ind. Ct. App. 2013). “This is necessary because success on the prejudice prong of an ineffectiveness claim requires a showing of a reasonable probability of affecting the result.” *Id.* (quoting *Woods v. State*, 701 N.E.2d 1208, 1214 (Ind. 1998), *reh'g denied*, *cert. denied*). Additionally, trial strategy, including the decision regarding whether to request a jury instruction, is not subject to attack through an ineffective assistance of counsel claim, “unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness.” *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998). Moreover, our supreme court has held that “the method of impeaching witnesses is a tactical decision and a matter of trial strategy that does not amount to ineffective assistance.” *Kubsch*, 934 N.E.2d at 1150. “Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord



those decisions deference.” *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *reh’g denied, cert. denied*.

[21] Here, Richards’ ineffective assistance of trial counsel arguments in his appellate brief are disjointed, rife with incomplete sentences, and overall lacking in cogency. Accordingly, Richards has waived review of these arguments, and we will not address them. *See* Ind. App. Rule 46(A)(8)(a). *See also* *Griffith v. State*, 59 N.E.3d 947, 958 n.5 (Ind. 2016) (noting that the defendant had waived his arguments by failing to provide cogent argument). Waiver notwithstanding, Richards has failed to demonstrate that the various objections that he alleges should have been made would have been sustained or that the alleged motions that he alleges should have been filed would have been granted or that trial counsel otherwise rendered deficient performance. Moreover, Richards has failed to allege or show that there was a reasonable probability that, but for counsel’s alleged unprofessional errors, the result of the proceeding would have been different. Because Richards has failed to demonstrate that trial counsel rendered ineffective assistance, we affirm the post-conviction court’s denial of post-conviction relief on these claims.

[22] Next, we turn to Richards’ post-conviction claims regarding ineffective assistance of appellate counsel. Richards argues that his appellate counsel rendered ineffective assistance by failing to: (1) raise various alleged errors on direct appeal; and (2) raise various ineffective assistance of trial counsel claims on direct appeal.

[23] We apply the same standard of review to a claim of ineffective assistance of appellate counsel as we do to an ineffective assistance of trial counsel claim. *Garrett v. State*, 992 N.E.2d 710, 724 (Ind. 2013). Thus, a petitioner alleging a claim of ineffective assistance of appellate counsel is required to show that: (1) counsel’s performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel’s performance prejudiced the defendant such that “‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Davidson*, 763 N.E.2d at 444 (quoting *Strickland*, 466 U.S. at 687). “Failure to satisfy either of the two prongs will cause the claim to fail.” *French*, 778 N.E.2d at 824.

[24] Ineffective assistance of appellate counsel claims “‘generally fall into three basic categories: (1) denial of access to an appeal[;] (2) waiver of issues[;] and (3) failure to present issues well.’” *Garrett*, 992 N.E.2d at 724 (quoting *Reed v. State*, 856 N.E.2d 1189, 1195 (Ind. 2006)). Richards’ ineffective assistance of appellate counsel claims are based upon category (2), waiver of issues. To evaluate the performance prong in a waiver-of-issues appellate counsel claim, our Court applies the following test: “(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 raised issues.” *Garrett*, 992 N.E.2d at 724 (quoting *Timberlake*, 753 N.E.2d at 605-06). The prejudice prong for the waiver-of-issues category of an ineffective assistance of appellate counsel claim requires an examination of whether the issues that appellate counsel

failed to raise ““would have been clearly more likely to result in reversal or an order for a new trial.”” *Garrett*, 992 N.E.2d at 724 (quoting *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997), *reh’g denied*, *cert. denied*).

[25] “Ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on . . . appeal” because “the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel.” *Reed*, 856 N.E.2d at 1196. “Accordingly, when assessing these types of ineffectiveness claims, reviewing courts should be particularly deferential to counsel’s strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable.” *Conner v. State*, 711 N.E.2d 1238, 1252 (Ind. 1999) (quoting *Bieghler*, 690 N.E.2d at 194), *reh’g denied*, *cert. denied*. To show that appellate counsel was ineffective for failing to raise an issue on appeal, a petitioner ““must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential.”” *Garrett*, 992 N.E.2d at 724 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260-61 (Ind. 2000), *reh’g denied*, *cert. denied*).

[26] Like his ineffective assistance of trial counsel arguments, Richards has also failed to provide cogent argument regarding his claims of ineffective assistance of appellate counsel. Accordingly, Richards has waived review of these arguments, and we will not address them. *See* Ind. App. Rule 46(A)(8)(a). *See also Griffith*, 59 N.E.3d at 958 n.5 (noting that the defendant had waived his arguments by failing to provide cogent argument). Waiver notwithstanding, Richards has failed to demonstrate that his assertions of the unraised appellate

issues were significant and obvious from the face of the record and that they were clearly stronger than the raised appellate issues. *See Garrett*, 992 N.E.2d at 724 (explaining that to demonstrate the performance prong in a waiver-of-issues appellate counsel claim, a petitioner must show that unraised issues are significant and obvious from the face of the record and that the unraised issues are clearly stronger than the raised issues). Indeed, Richards has failed to show that his appellate counsel rendered deficient performance by not raising an ineffective assistance of trial counsel issue on appeal. Our supreme court has explained that a post-conviction proceeding, not direct appeal, is generally “‘the preferred forum’ “ for adjudicating claims of ineffective assistance of [trial] counsel because the presentation of such claims often requires the development of new facts not present in the trial record” and that a defendant who raises an ineffective assistance of trial counsel claim on direct appeal will be foreclosed from raising such an issue in a post-conviction proceeding. *McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999) (quoting *Woods*, 701 N.E.2d at 1219).

Moreover, Richards has failed to show that the appellate issues that he contends should have been raised would have been clearly more likely to result in reversal or an order for a new trial. *See Garrett*, 992 N.E.2d at 724 (explaining that the prejudice prong for the waiver-of-issues category of an ineffective assistance of appellate counsel claim requires a petitioner to demonstrate that the issues that appellate counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial). Because Richards has failed to demonstrate that appellate counsel rendered ineffective assistance, we

affirm the post-conviction court's denial of post-conviction relief on these claims.

[27] Lastly, we turn to Richards' assertion that Post-Conviction Counsel Pinnow rendered ineffective assistance of post-conviction counsel by withdrawing his appearance. There is no federal or state constitutional right to the assistance of counsel in post-conviction proceedings. *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989). As a result, the performance of post-conviction counsel is reviewed under a "highly deferential standard." *Daniels v. State*, 741 N.E.2d 1177, 1190 (Ind. 2001), *reh'g denied*. "[I]nstead of using the 'rigorous standard set forth in *Strickland*,' courts instead judge post-conviction counsel by a 'lesser standard' based on due-course-of-law principles." *Hill v. State*, 960 N.E.2d 141, 145 (Ind. 2012) (citing *Baum*, 533 N.E.2d at 1201), *reh'g denied*. The applicable standard is whether "counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court." *Baum*, 533 N.E.2d at 1201.

[28] Here, the post-conviction court denied relief on Richards' ineffective assistance of post-conviction counsel claim, concluding that the *Baum* standard did not apply to Richards' case. Specifically, the post-conviction court concluded that Post-Conviction Counsel Pinnow's withdrawal of his appearance did not result in a judgment of the court but had merely left Richards the choice to proceed pro se to pursue post-conviction relief.

[29] On appeal, Richards has failed to demonstrate that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court. Most notably, Richards has failed to provide cogent argument regarding his claim of ineffective assistance of post-conviction counsel. Accordingly, Richards has waived review of this argument, and we will not address it. *See* Ind. App. Rule 46(A)(8)(a). *See also Griffith*, 59 N.E.3d at 958 n.5 (noting that the defendant had waived his arguments by failing to provide cogent argument). Waiver notwithstanding, the post-conviction rules allow for a post-conviction counsel to withdraw an appearance in post-conviction proceeding. *See* Ind. Post-Conviction Rule 1(9)(c) (providing that “[i]n the event that [post-conviction] counsel determines the proceeding is not meritorious or in the interests of justice, before or after an evidentiary hearing is held, counsel shall file with the court counsel's withdrawal of appearance . . . .”). Moreover, even if Richards could show that the *Baum* standard applied to his claim, Richards has failed to show post-conviction counsel’s withdrawal resulted in a judgment of the court or deprived him of a procedurally fair post-conviction proceeding. *See Matheney v. State*, 834 N.E.2d 658, 663 (Ind. 2005) (explaining that a post-conviction petitioner had “fail[ed] to state a cognizable claim” under *Baum* where he failed to show that post-conviction counsel’s decision to choose claims had deprived the petitioner of a procedurally fair post-conviction proceeding). Because Richards has failed to demonstrate that post-conviction counsel rendered ineffective assistance, we affirm the post-conviction court’s denial of post-conviction relief on this claim.

[30] Affirmed.

May, J., and Brown, J., concur.