MEMORANDUM DECISION

APPELLANT, PRO SE

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ATTORNEYS FOR APPELLEE

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IN THE COURT OF APPEALS OF INDIANA

John W. Thomas,
Appellant-Petitioner

v.

State of Indiana,
Appellee-Respondent.

September 18, 2023

Court of Appeals Case No. 21A-PC-122

Appeal from the Vigo Superior Court

The Honorable Michael Rader, Judge

Trial Court Cause No. 84D05-1808-PC-5962

Memorandum Decision by Judge Pyle

Chief Judge Altice and Judge Riley concur.

Pyle, Judge.

Statement of the Case

[1] John W. Thomas ("Thomas"), pro se, appeals the post-conviction court's denial of his petition for post-conviction relief. Thomas argues that the post-conviction court erred by denying his claims of ineffective assistance of trial and appellate counsel and that he received ineffective assistance of post-conviction counsel. Concluding that Thomas has failed to meet his burden of showing that the post-conviction court erred and has failed to show that he was deprived of a procedurally fair post-conviction proceeding, we affirm the post-conviction court's judgment.

[2] We affirm.

Issue

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

Facts[1]

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

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[1] We note that, contrary to Indiana Appellate Rule 50, Thomas has not included a copy of the chronological case summary from his post-conviction proceeding. In order to obtain procedural information from Thomas' post-conviction proceeding, we take judicial notice of his underlying post-conviction cause. *See* Ind. Evidence Rule 201.

[O]n the evening of January 17, 2015, Damita Jaffe ("Jaffe") and her boyfriend Craig Robinson ("Robinson") were getting into Jaffe's vehicle when Thomas, whom Jaffe and Robinson knew, and his wife ("Annette") pulled up and parked. Thomas got out of his vehicle and approached Robinson, who also got out of his car, and the two exchanged words. Thomas's demeanor was aggressive, and Robinson smelled alcohol on Thomas's breath. Thomas asked, "[Y]ou think I'm playin'?" and then popped the trunk of his car to show Robinson that he had a shotgun in there. *Tr.* at 57. Jaffe's adult son, Bobby Vinson ("Vinson"), walked up to the scene, Thomas's attention turned to Vinson, and they argued. Thomas retrieved the shotgun and pointed it at Vinson for two to three minutes. Thomas put the gun back in the trunk, but thereafter, Thomas swung at Vinson, and the two fought. Jaffe attempted to defuse the situation, grabbing Thomas's arm. She smelled alcohol on his breath. Eventually, Thomas and Annette drove away.

A short time later, while Jaffe, Robinson, and Vinson were still outside, they heard gunshots. Thomas was fifty to seventy feet away, walking toward Jaffe's house while shooting a shotgun. Jaffe was hit in the face and fell to the ground, near her vehicle. Jaffe heard more shots as she was on the ground. Robinson and Bobby ran and were not harmed. Jaffe's daughter, Anna Vinson ("Anna"), lived at Jaffe's house along with her two daughters, and at some point she had stepped out on the front porch and was grazed by pellets from Thomas's shotgun. Jaffe was lying injured on the ground near a car, and when she heard Thomas's footsteps running away, she drove to a nearby police station.

Police later found Thomas and Annette at their home. They searched the car and found two empty vodka bottles. Police observed no injuries to Thomas when he was arrested later that night. The State initially charged Thomas with four counts of Level 1 felony attempted murder and one count of Level 5 felony robbery, but it later amended the charging information by removing a "knowing" mens rea from Counts 1 through 4 and

removing the robbery charge. A four-day jury trial was held in December 2015.

Annette, who at the time of trial was facing criminal charges of robbery and criminal recklessness related to the January 17, 2015 incident and had been granted use immunity, testified that, on the night in question, Vinson had pointed a pistol at Thomas and had hit Thomas in the face with it. Annette said that Vinson hit her, as well. She and Thomas got back in their car, and that, as they drove away from the scene, she heard two "loud noises" that she believed were gunshots. *Tr.* at 310, 312. She believed that "they was following us shootin' at us[.]" *Id.* at 312. She said that Thomas's face was bloody from being hit by Vinson, describing it as "all messed up" and that he "had blood everywhere." *Id.* at 310. They stopped to wipe his face, and Thomas got out and popped the trunk and left. She did not see where he went, but heard two "big booms," and when she looked out, she saw Thomas running back to the car. *Id.* at 317-18. Thomas got in the driver's seat and said, "[T]he f*ck is shootin' at us[.]" *Id.* at 323. Thomas and Annette sped away while "tryin' to ditch them," but eventually the car's "back tire blew," the vehicle left the roadway, and, after a short ride with a person who offered assistance, they walked home. *Id.* at 325. Annette testified that Thomas was intoxicated that night. *Id.* at 330.

The trial court instructed the jury regarding the elements of attempted murder, as well as the following lesser-included offenses: Level 3 felony attempted aggravated battery; Level 5 felony attempted battery with a deadly weapon; Level 5 felony attempted battery resulting in serious bodily injury; and Level 6 felony criminal recklessness. *Appellant's App.* at 145-165. The trial court instructed the jury on the mens rea requirements for acting intentionally, knowingly, and recklessly. *Id.* at 168-170, 173. As Thomas was pursuing a claim of self-defense, the trial court instructed the jury on the elements of a self-defense claim. *Id.* at 166.

> The trial court also read Final Instruction No. 28 regarding voluntary intoxication. It stated:
>
> > Voluntary intoxication is not a defense to a charge of Attempted Murder. You may not take voluntary intoxication into consideration in determining whether the Defendant acted with the intent to kill as alleged in the Information.
> >
> > Voluntary intoxication is not a defense to the lesser-included offenses of Attempted Aggravated Battery, a Level 3 Felony; Attempted Battery With a Deadly Weapon, a Level 5 Felony; Attempted Battery Causing Serious Bodily Injury, a Level 5 Felony; and Criminal Recklessness, a Level 6 Felony. You may not take voluntary intoxication into consideration in determining whether the Defendant acted recklessly, knowingly, or intentionally as alleged in the lesser included offenses of those included in the Information.
>
> *Id.* at 167.
>
> The jury found Thomas guilty of: (1) Level 1 felony attempted murder with respect to Vinson; (2) Level 3 felony attempted aggravated battery with respect to Jaffe; (3) Level 5 felony attempted battery with a deadly weapon with respect to Anna; and (4) Level 6 felony criminal recklessness with respect to Robinson. *Id.* at 185-205. The trial court imposed an aggregate term of thirty-five years executed.

Thomas v. State, 61 N.E.3d 1198, 1199-1201 (Ind. Ct. App. 2016) (footnote omitted), *trans. denied*.

[4] Thomas filed a direct appeal and was represented by attorney Cara Schaefer Wieneke ("Appellate Counsel Wieneke"). On appeal, Thomas argued that the

trial court had committed fundamental error when it instructed the jury that voluntary intoxication was not a defense to attempted murder. Our Court held that the trial court's challenged instruction was a correct statement of the law and that Thomas had failed to show fundamental error. *Id.* at 1205.

[5] Subsequently, in August 2018, Thomas filed a pro se petition for post-conviction relief. Thereafter, the State Public Defender's office entered an appearance on behalf of Thomas but then filed a motion to withdraw pursuant to Indiana Post-Conviction Rule 1(9)(c). Thereafter, in March 2019, Thomas hired private counsel, Gregory Spencer ("Post-Conviction Counsel Spencer"), to represent him in the post-conviction proceeding. Thomas subsequently filed an amended petition for post-conviction relief in October 2019.

[6] In his amended petition, Thomas raised claims of ineffective assistance of trial and appellate counsel and a freestanding claim. Specifically, Thomas argued that his trial counsel had rendered ineffective assistance by failing to: (1) move to dismiss the attempted murder count relating to Vinson when Vinson did not appear for a deposition and did not testify at trial; (2) establish through testimony of trial witnesses that Vinson had been the initial aggressor; (3) advise Thomas of his right to claim spousal privilege when his wife testified at trial; (4) object to the evidence obtained from Thomas' and Annette's vehicle; (5) tender a jury instruction on self-defense; and (6) effectively counsel Thomas regarding his right to testify in his own defense. Thomas also argued that the cumulative effect of trial counsel's errors had denied him a fair trial. Additionally, Thomas argued that his appellate counsel had rendered ineffective assistance by failing

to: (1) raise an appellate issue of fundamental error based on the trial court "forc[ing]" Thomas to "continue to trial with [Trial Counsel] Organ[;]" (2) raise a due process issue based on Thomas' inability to cross-examine Vinson, who was not a witness at trial; and (3) raise an appellate challenge to the sufficiency of the evidence on his attempted murder conviction. (App. 18). Lastly, in Thomas' freestanding claim, he argued that the trial court had committed error by instructing the jury that voluntary intoxication was not a defense to attempted murder.

[7] The post-conviction court held a hearing in January 2020. During the post-conviction hearing, Thomas introduced the following exhibits from his underlying cause and direct appeal: the amended charging information; the probable cause affidavit; the trial transcript; a transcript from Thomas' January 2015 statement to police; Thomas' appellate brief; and our Court's opinion in Thomas' direct appeal. Thomas' post-conviction counsel also presented testimony from Trial Counsel Organ and Thomas.

[8] Thomas' post-conviction counsel questioned Trial Counsel Organ about Thomas' claims of ineffective assistance of counsel. Trial Counsel Organ testified that he had not filed a motion to dismiss the charge relating to Vinson because it was not subject to dismissal based on Vinson not testifying at trial. Trial Counsel Organ also testified that his strategy was to establish Thomas' defense of self-defense through Annette's testimony and that she had been "extremely important" in establishing that defense because she had provided testimony that Vinson had been the initial aggressor. (Tr. 10). Trial Counsel

Organ also testified that he had submitted two self-defense instructions to the trial court. Additionally, Trial Counsel Organ testified that Thomas did not have a claim of spousal privilege because the privilege belonged to Annette and that spousal privilege was not at issue because Annette's relevant testimony had not been confidential and had been made in the presence of others. Trial Counsel Organ also testified that he did not object to the evidence found in Thomas' and Annette's car because they had abandoned their car after they had crashed it and because Annette had consented to the search of the car by the police. Moreover, Trial Counsel Organ testified that he and Thomas had discussed whether Thomas should testify and that they had reached a mutual decision that Thomas should not testify.

[9] Trial Counsel Organ also addressed some of Thomas' claims of ineffective assistance of appellate counsel. For example, Trial Counsel Organ testified that he had met with Thomas and had discussed the trial strategy a couple of days before the trial and that "things were good" at that point. (Tr. 26). However, on the morning of the trial, Thomas, who Trial Counsel Organ described as "very passionate about his case[,]" became "upset" and told the trial court that he wanted Trial Counsel Organ removed. (Tr. 26). Trial Counsel Organ explained that the trial court had "some discussion" with Thomas and that they then "went ahead" with the trial. (Tr. 26). Trial Counsel Organ testified that, after the trial had begun, Thomas became "comforted" about Annette's testimony and "his defense [that] was being put forward." (Tr. 26).

Additionally, Trial Counsel Organ testified that at the end of the trial, Thomas had specifically thanked Trial Counsel Organ for representing him.

[10] In December 2020, the post-conviction court issued an order denying post-conviction relief to Thomas. The post-conviction court concluded that Thomas had failed to prove his claims of ineffective assistance of trial and appellate counsel.

[11] Thomas now appeals.

Decision

[12] Thomas appeals pro se and argues that the post-conviction court erred by denying him post-conviction relief. He argues that he received ineffective assistance of trial, appellate, and post-conviction counsel.

[13] At the outset, we note that Thomas 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*.

[14] "[P]ost-conviction proceedings do not grant a petitioner a 'super-appeal' but are limited to those issues available under the Indiana Post-Conviction Rules." *Shepherd v. State*, 924 N.E.2d 1274, 1280 (Ind. Ct. App. 2010), *trans. denied*. "In post-conviction proceedings, the petitioner bears the burden of establishing his claims by a preponderance of the evidence." *Isom v. State*, 170 N.E.3d 623, 632 (Ind. 2021), *reh'g denied*. "Where, as here, the petitioner is appealing 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." *Id.* (cleaned up).

[15] We first review Thomas' arguments regarding his claims of ineffective assistance of trial counsel. Specifically, Thomas argues that the post-conviction court erred by denying his claims that trial counsel had rendered ineffective assistance of counsel by failing to: (1) object to evidence found in Thomas and Annette's car; (2) tender a self-defense instruction; (3) file a motion to dismiss the attempted murder charge against Vinson; and (4) effectively counsel Thomas regarding his right to testify in his own defense.[2]

[2] Thomas also attempts to raise claims that he did not include in his post-conviction petition. Specifically, he asserts that his trial counsel rendered ineffective assistance by failing to: (1) compel Vinson to testify as a defense witness; and (2) object to Annette's testimony based on spousal privilege. However, Thomas has waived these claims because he did not raise them in his post-conviction petition. *See Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001) ("Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal."), *reh'g denied*, *cert. denied*. *See also* Ind. Post-Conviction Rule 1(8) ("All grounds for relief available to a petitioner under this rule must be raised in his original petition.").

[16] 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).

[17] 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*. 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). "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.*

[18] Here, Thomas' ineffective assistance of trial counsel arguments in his appellate brief are overall lacking in cogency. Accordingly, Thomas has waived review of these arguments. *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, Thomas 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. Additionally, Thomas' trial counsel testified that he tendered two self-defense instructions despite Thomas' claim that counsel had failed to tender such an instruction. Moreover, Thomas 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 Thomas 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.[3]

[19] Next, we turn to Thomas' arguments regarding ineffective assistance of appellate counsel. Thomas appears to argue that his appellate counsel rendered ineffective assistance by failing to raise appellate issues to challenge the sufficiency of his attempted murder conviction and to challenge whether his rights had been violated when the trial court had him proceed to trial with Trial Counsel Organ.

[20] 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.

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[3] Thomas also argues that trial counsel's deficient performance resulted in cumulative error that prejudiced him. Because we have concluded that there was no error, we also conclude that there was no cumulative error.

[21] 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)). Thomas' 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*).

[22] "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*).

[23] Like his ineffective assistance of trial counsel arguments, Thomas has also failed to provide cogent argument regarding his claims of ineffective assistance of appellate counsel. Accordingly, Thomas has waived review of these arguments. *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, Thomas has failed to demonstrate that the unraised appellate issues were significant and obvious from the face of the record and that they were clearly stronger than the raised appellate issue. *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). Moreover, Thomas 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 id.* (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 Thomas 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.

[24] Lastly, we turn to Thomas' assertion that he received ineffective assistance of post-conviction counsel.[4] 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) (quoting *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.

[25] Thomas has failed to provide cogent argument regarding his claim of ineffective assistance of post-conviction counsel. Accordingly, Thomas has waived review of this argument. *See* Ind. App. Rule 46(A)(8)(a). *See also Griffith*, 59 N.E.3d at

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[4] Although Thomas did not raise a claim of ineffective assistance of post-conviction counsel in his post-conviction petition, we will address his argument in this appeal. *See Bahm v. State*, 789 N.E.2d 50, 60 n.10 (Ind. Ct. App. 2003) (explaining that, despite the petitioner's lack of an ineffective assistance of post-conviction counsel claim in his post-conviction petition, the petitioner had not waived the claim and that this Court would review the ineffective assistance of post-conviction counsel claim in his post-conviction appeal), *clarified on reh'g*, *trans. denied*.

958 n.5 (noting that the defendant had waived his arguments by failing to provide cogent argument). Waiver notwithstanding, Thomas has failed to show that his post-conviction counsel's representation during the post-conviction proceeding deprived him of a procedurally fair post-conviction proceeding. Here, Post-Conviction Counsel Spencer appeared and represented Thomas during the post-conviction hearing, which resulted in a judgment of the post-conviction court that is now on appeal. Post-Conviction Counsel Spencer presented witnesses and evidence on Thomas' claims of ineffective assistance of counsel. Post-Conviction Counsel Spencer also argued in support of Thomas' claims and filed proposed findings and conclusions in the post-conviction proceeding. Because Thomas failed to show that he was deprived of a procedurally fair post-conviction proceeding, we affirm the post-conviction court's denial of post-conviction relief to Thomas. *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).

[26] Affirmed.

Altice, C.J., and Riley, J., concur.