

BROWN, Judge

William Wise appeals the post-conviction court's denial of his pro se petition for post-conviction relief. Wise raises eight issues which we revise and restate as:

- I. Whether the evidence was sufficient to support Wise's conviction;
- II. Whether Wise was denied effective assistance of trial counsel; and
- III. Whether newly discovered evidence requires a new trial.¹

We affirm.

The relevant facts as discussed in Wise's direct appeal follow.

William and Michelle Wise were married in July of 1992, two months after learning that Michelle was pregnant with Wise's child. Michelle delivered a baby boy, Matthew, on January 15, 1993. The three resided in a home with a central alarm system connected to smoke detectors and a burglar alarm. Matthew's nursery was on the second floor and the Wises' bedroom was on the ground level. A baby monitor was located under Matthew's bed and the Wises were able to hear Matthew crying through a portable receiver.

At about 2:00 a.m. on March 6, 1993, the Wises awoke to the sound of Matthew crying. Wise went upstairs to feed the baby and remained upstairs on the sofa afterward. Sometime between 4:30 and 5:00 a.m., Michelle went upstairs where she found Wise asleep on the sofa. She spoke to him for about ten minutes and then started downstairs. Although Michelle did not see or smell any smoke, the alarm went off as she approached the stairway. The alarm had gone off previously when there was no fire. Wise went down the stairway to check the main control panel and Michelle followed. After checking another control panel located in the downstairs foyer, the Wises observed smoke coming from the upper level of the home. Wise then returned upstairs to get a cordless phone but did

¹ Wise raises eight issues in his statement of the issues. Although Wise is proceeding pro se, such litigants are held to the same standard as trained counsel and are required to follow procedural rules. Evans v. State, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), trans. denied. Wise fails to put forth a cogent argument regarding a number of his issues. Consequently, these issues are waived. See, e.g., Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was "supported neither by cogent argument nor citation to authority"); Shane v. State, 716 N.E.2d 391, 398 n.3 (Ind. 1999) (holding that the defendant waived argument on appeal by failing to develop a cogent argument).

not go down the hallway to Matthew's room. Instead, he brought the phone downstairs, attempted to call 911, but told Michelle that the phone was not working. Wise asked Michelle to go to a neighbor's house to call 911, and stated that he would get Matthew. Michelle called 911 from a neighbor's home at 5:09 a.m., and Wise called 911 from another neighbor's house at 5:10 a.m. Michelle did not tell the 911 operator that Matthew was in the house, but Wise did state that "[t]he baby" was upstairs.

In his statement to police, Wise reported that before calling 911 he had made it to the hallway outside of Matthew's bedroom but was forced to turn back because he was having problems breathing. However, Indianapolis police officer Keith Williams arrived within ninety seconds of the dispatch and found Wise standing in the doorway. Wise, who had previously received fire training and was employed at the time as a fire/EMS dispatcher, was clad in firefighter's clothing (helmet, jacket, and boots) and told Williams that he was with the Indianapolis Fire Department. Williams believed that Wise had not been in the house because he was not coughing and did not have any soot on his face. Although Wise told Williams that there was a baby in the house, he did not mention that the child was his or indicate that he had attempted a rescue. At Williams' suggestion, the two men entered the house. They went up the stairs and turned left towards Matthew's room. Williams, who was not wearing fire gear, was overwhelmed by smoke and backed out of the house. Firefighters arrived as Williams was exiting, and Wise collided with one firefighter near the top of the stairs. The firefighters went to Matthew's room and extinguished the fire with a two to three second blast of a firehose at 5:16 a.m. The contents of the room were completely burned so that nothing stood more than six inches above the floor. After searching through the rubble by hand, a firefighter discovered Matthew's body.

Matthew's entire body, except for a portion of the groin area, was severely charred. Major portions of his arms and legs had been burned away, and the remaining underlying soft tissues were exposed. The pathologist opined that such injuries could not have been caused by a non-accelerated fire of fifteen to twenty minutes in duration. David Lepper, an Indianapolis Fire Department investigator, examined the remains of Matthew's room and concluded that the fire was intentionally set. James Finnerman, an electrical engineer, ruled out several accidental causes and also concluded that the fire had been intentionally set.

Nearly a year after the fire, Wise was charged with murder, felony murder, and arson as a Class A felony. After a two week trial a jury convicted him of all counts.

Wise v. State, 719 N.E.2d 1192, 1194-1195 (Ind. 1999). Wise filed a direct appeal challenging admission of certain evidence at the trial, a jury instruction, prosecutor conduct, the sufficiency of the evidence, and his sentence. Id. at 1194. The Indiana Supreme Court affirmed the conviction for murder, reduced his conviction for arson as a class A felony to a class B felony, and amended his sentence. Id. at 1201.

Wise filed a pro se petition for post-conviction relief on January 22, 2004, and an amended petition for post-conviction relief on July 11, 2007. Wise alleged that he received ineffective assistance of counsel and that newly discovered evidence required a new trial. In the State's answer to Wise's petition for post-conviction relief, the State argued that some of Wise's claims were barred by the doctrine of res judicata.

A chronological case summary entry dated August 8, 2007, indicates that Wise was referred to the State Public Defender. The State Public Defender withdrew her appearance on August 28, 2007. At the hearing on Wise's amended petition for post-conviction relief, Wise called no witnesses other than himself and offered only one exhibit, a letter from the United States Consumer Product Safety Commission acknowledging receipt of his Freedom of Information Act request for records relating to Fisher Price Baby Monitors.

On September 4, 2008, the court denied Wise's petition and issued findings of fact and conclusions thereon. The trial court's order stated, in part, "The petitioner called no

witnesses and offered only one exhibit, a letter from the US Consumer Product Safety Commission.” Appellee’s Appendix at 34.

Before discussing Wise’s allegations of error, we note the general standard under which we review a post-conviction court’s denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.” Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

I.

The first issue is whether the evidence is sufficient to support Wise’s conviction. In the State’s answer to Wise’s petition for post-conviction relief, the State argued that

Wise's claims were barred by the doctrine of res judicata. The doctrine of res judicata bars a later suit when an earlier suit resulted in a final judgment on the merits, was based on proper jurisdiction, and involved the same cause of action and the same parties as the later suit. Reed v. State, 856 N.E.2d 1189, 1194 (Ind. 2006). As a general rule, when a reviewing court decides an issue on direct appeal, the doctrine of res judicata applies, thereby precluding its review in post-conviction proceedings. Id. The doctrine of res judicata prevents the repetitious litigation of that which is essentially the same dispute. Id.

The Indiana Supreme Court addressed Wise's challenge to the sufficiency of the evidence on direct appeal and concluded that there was sufficient evidence to support the jury's conclusion that the fire was not accidental, and that Wise was at least an accomplice if not a principal. See Wise, 719 N.E.2d at 1200. Thus, Wise's argument that the evidence is insufficient is barred by the doctrine of res judicata. The post-conviction court's denial of Wise's petition on this issue is not clearly erroneous. See, e.g., State v. McManus, 868 N.E.2d 778, 790 (Ind. 2007) (holding that the petitioner's competency argument was barred by res judicata), reh'g denied, cert. denied, 128 S. Ct. 1739 (2008).

II.

The next issue is whether Wise was denied effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced

by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh’g denied), reh’g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel’s performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Perez v. State, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. French, 778 N.E.2d at 824. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Because Wise did not submit any testimony of his trial counsel or the transcript from his trial, Wise failed to produce any evidence to support his allegations of ineffective assistance of trial counsel. Consequently, we cannot say that the post-conviction court erred by denying Wise’s petition for post-conviction relief on this basis.²

² The State mentions that “[i]t is possible that what [Wise] is arguing is a claim that he was denied the right to the assistance of counsel for his post-conviction proceeding.” Appellee’s Brief at 10. To the extent that Wise suggests that he was also denied effective assistance of counsel at the post-conviction proceeding, we note that Ind. Post-Conviction Rule 1(9)(a) provides:

Upon receiving a copy of the petition, including an affidavit of indigency, from the clerk of the court, the Public Defender may represent any petitioner committed to the Indiana Department of Correction in all proceedings under this Rule, including appeal, if the Public Defender determines the proceedings are meritorious and in the interests of justice. The Public Defender may refuse representation in any case where the conviction or sentence being challenged has no present penal consequences. *Petitioner retains the*

See, e.g., Taylor v. State, 882 N.E.2d 777, 782 (Ind. Ct. App. 2008) (holding that petitioner failed to prove that he received ineffective assistance of trial counsel when he did not submit the transcript of the trial to the post-conviction court); Bahm v. State, 789 N.E.2d 50, 58-59 (Ind. Ct. App. 2003) (holding that petitioner failed to produce any evidence to support his allegations of ineffective assistance from trial and appellate counsel because he did not produce any witnesses at the post-conviction hearing or submit his direct appeal record of proceedings), clarified on reh'g, 794 N.E.2d 444, trans. denied; see also Tapia v. State, 753 N.E.2d 581, 587 n.10 (Ind. 2001) (noting that “[i]t is practically impossible to gauge the performance of trial counsel without the trial record . . .”).

III.

right to employ his own counsel or to proceed pro se, but the court is not required to appoint counsel for a petitioner other than the Public Defender.

(Emphasis added).

Here, the trial court referred Wise to the State Public Defender and a public defender was appointed. The public defender subsequently withdrew her appearance. Given that the right to counsel in a post-conviction proceeding is not guaranteed by either the Sixth Amendment of the United States Constitution or Article 1, § 13 of the Indiana Constitution and that Wise was represented by a public defender until her withdrawal, we cannot say that the trial court erred. See Daniels v. State, 741 N.E.2d 1177, 1190 (Ind. 2001) (holding that, from a broad perspective, the right to counsel in a post-conviction proceeding is guaranteed neither by the Sixth Amendment of the United States Constitution nor Article 1, § 13 of the Constitution of Indiana), reh'g denied; Ford v. State, 570 N.E.2d 84, 87 n.1 (Ind. Ct. App. 1991) (holding that Ind. Post-Conviction Rule 1 “denies inmate petitioners the right to continued representation by the [State Public Defender] on convictions with present penal consequences if after review and investigation, the [State Public Defender] finds the proceeding is not meritorious and in the interests of justice”), trans. denied; Von Hagel v. State, 568 N.E.2d 549, 551 (Ind. Ct. App. 1990) (holding that petitioner had no right to counsel under the constitution, statutes or post-conviction relief rules and that the post-conviction court had no power to appoint counsel other than the State public defender), trans. denied.

The next issue is whether newly discovered evidence requires a new trial. The Indiana Supreme Court has enunciated nine criteria for admission of newly discovered evidence:

[N]ew evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

Taylor v. State, 840 N.E.2d 324, 329-330 (Ind. 2006) (quoting Carter v. State, 738 N.E.2d 665, 671 (Ind. 2000)). We analyze these nine factors with care, as the basis for newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized. Id. at 330. “The burden of showing that all nine requirements are met rests with the petitioner for post-conviction relief.” Id.

The State argues that “[i]n the absence of the trial transcript, it is impossible to gauge whether the alleged newly discovered evidence is not cumulative, is not merely impeaching, and whether it would probably produce a different result on a retrial.” Appellee’s Brief at 11. We agree. As previously mentioned, Wise did not admit the trial transcript. Further, Wise did not submit the alleged newly discovered evidence at the post-conviction hearing. Wise called no witnesses other than himself and offered only one exhibit, a letter from the United States Consumer Product Safety Commission acknowledging receipt of his Freedom of Information Act request for records relating to Fisher Price Baby Monitors. Because Wise did not admit the trial transcript or the newly

discovered evidence, we cannot say that Wise demonstrated the nine criteria necessary to mandate a new trial due to newly discovered evidence. Consequently, we conclude that the trial court did not err by denying Wise's petition for post-conviction relief. See Douglas v. State, 800 N.E.2d 599, 606 (Ind. Ct. App. 2003) (addressing the petitioner's argument that the State withheld exculpatory evidence from him prior to his original trial and holding that "as [the petitioner] did not provide the direct appeal record, the post-conviction court could not determine whether the result of the proceeding would have been different if [the petitioner] had been provided this information before trial"), reh'g denied, trans. denied.

For the foregoing reasons, we affirm the post-conviction court's denial of Wise's petition for post-conviction relief.

Affirmed.

BAKER, C.J., and CRONE, J., concur.