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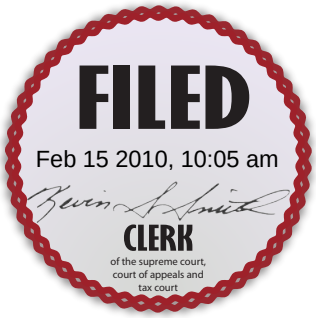

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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER F. NELSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A04-0906-PC-350
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0612-FA-77

February 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Christopher F. Nelson, *pro se*, appeals the post-conviction court's denial of his pro se petition for post-conviction relief. Nelson raises seven issues, which we revise and consolidate as:

I. Whether the post-conviction court abused its discretion by denying Nelson's request for certain discovery;

II. Whether Nelson was denied due process in that he alleges that the trial transcript had been amended;

III. Whether the post-conviction court abused its discretion in denying Nelson's motion to subpoena Taritas;

IV. Whether the post-conviction court erred in determining that a witness's testimony was barred by *res judicata*;

V. Whether Nelson was denied effective assistance of trial counsel and appellate counsel; and

VI. Whether Nelson waived his freestanding claim of error that the trial court committed fundamental error by giving an instruction on accomplice liability theory because it highlighted a witness's testimony.

We affirm.

The relevant facts as discussed in Nelson's direct appeal follow:

> On the evening of December 18, 2006, James Martz was in his residence on Spring Street in Fort Wayne. His friend Justin Taritas was visiting him. Shortly before 6:00 p.m., Martz received a telephone call from Tyrell Morris. The call was made on Nelson's phone; Martz knew Nelson and recognized his number. Morris asked if Martz was at home. Martz indicated that he was not home and continued eating his dinner. Within minutes, Morris "opened the door like he lived there and walked in," looking surprised when he saw Martz. (Tr. 141). Morris called to Nelson to come inside, and he did. Martz had not invited the men to enter his residence.

> Morris walked directly to Martz and "grabbed" Martz's cell phone "out of [his] hand." (Tr. 146). Morris then "kicked" Martz on the side of his head several times, pulled down his pants, rifled his pockets, and took the $40 inside. (Tr. 142). While Morris was beating Martz, Nelson positioned himself by standing in front of and facing Taritas, who was seated on the couch. Nelson and Morris departed – taking with them not only Martz's cell phone and his $40.00 but also Taritas' cell phone, which had been on top of the television.
>
> The police were called, and officers responded. While the officers were at Martz's house, his brother Eugene Martz arrived. Eugene called Martz's cell phone on his cell phone and talked with "whoever took [Martz's] phone" using the speaker-phone feature, whereby the police officers could hear the conversation. (Tr. 108). A demand for $50.00 was made for the return of Martz's phone. In coordination with the police, Eugene arranged for a meeting place to make the exchange.
>
> At the arranged meeting place, Nelson and Morris arrived in a car driven by Nelson. Another person in the car got out and approached Eugene and asked for the money in exchange for the cell phone, and police proceeded to arrest both Nelson and Morris. After Nelson was handcuffed, he attempted to flee but was quickly captured. The cell phones belonging to Martz and Taritas were found under the driver's side front seat of the car that Nelson had been driving.

Nelson v. State, No. 02A03-0705-CR-247, slip op. at 2-3 (Ind. Ct. App. January 23, 2008).

The State charged Nelson with burglary as a class A felony, robbery as a class B felony, and resisting law enforcement as a class A misdemeanor. Id. at 3. The State also charged Morris and moved to consolidate Morris's trial with Nelson's. Petitioner's Exhibit B at 3. Nelson's trial counsel stated that he had no objection and that he had talked to Morris's trial counsel and they "had a meeting of the minds." Id.

At the jury trial, Martz testified as reflected above. Nelson, slip op. at 3. Taritas also testified. Id. Officers Lichtsinn and Dubose testified that they were able to hear the conversation with Eugene on the cell phone, and that the $50 was to be paid not only for the return of Martz's cell phone but also for protection against such a robbery occurring in the future. Id. at 3-4. Detective Dubose also testified that after Nelson and Morris were apprehended at the meeting site, Martz had identified the two as the men "who went into his house" earlier and "kicked him and took his cell phone and his money." Id. at 4 (citing Trial Transcript at 218-219). Detective Dubose further testified that Martz reported to him that "both" Nelson and Morris had kicked him "four or five times." Id. (citing Trial Transcript at 223). Late on April 11th, the State rested. Id. The defense also rested. Id.

The trial court held a conference on jury instructions and denied the State's request for an instruction on accomplice liability, holding that Nelson had been charged as a principal. Id. The trial court later specified the lack of "evidence in the record to support the giving of an aiding instruction." Id. (citing Trial Transcript at 271).

On the morning of April 12th, the State asked permission to reopen its case, advising that a listed witness had not appeared the day before but was now present. Id. The trial court permitted the State to do so, overruling Nelson's objection and noting that Indiana law provided the trial court with authority in that regard. Id. The trial court also stated that the defense could present rebuttal, if it chose. Id.

Rachel Goodmann[1] then testified that she had been in the vehicle driven by Nelson to the meeting site where Morris and Nelson were apprehended. Id. She testified that both Morris and Nelson had talked on the cell phone during the conversation that arranged for the payment of money at the meeting. Id. After Goodmann's testimony, the trial court found that "there [wa]s evidence . . . to support giving the aiding instruction," inasmuch as Goodmann "clearly said they," meaning that "[t]hey were on the phone." Id. at 4-5 (citing Transcript at 292, 293). The trial court ruled that it would instruct the jury on accomplice liability. Id. at 5.

Morris then took the stand. Id. He testified that during pretrial incarceration, he had witnessed Nelson make two or three telephone calls to his brother asking the brother to take action to threaten and intimidate Martz and Taritas about their testimony at trial. Id. The jury found Nelson not guilty of the offense of burglary, but found him guilty of robbery and resisting law enforcement. Id. The trial court sentenced Nelson to fifteen years in the Indiana Department of Correction for robbery and one year for resisting law enforcement. The trial court ordered that the sentences be served consecutively.

On appeal, Nelson raised the following three issues: (1) whether the trial court committed reversible error when it allowed the State to reopen its case after it had rested; (2) whether the trial court erred when it instructed the jury on accomplice liability; and (3) whether sufficient evidence supports the conviction. Id. at 2. This court affirmed. Id.

[1] Nelson spells Rachel's last name as "Goodman," but the trial transcript reveals that her name is spelled "Goodmann." Trial Transcript at 281.

On August 1, 2008, Nelson filed a petition for post-conviction relief and argued that he received ineffective assistance of trial counsel because trial counsel: (1) failed to investigate and inform him that that the State "had intentionally enhanced both, Counts I and Count II via the same element of bodily injury;" (2) failed to correspond with Nelson and conduct an adequate investigation; (3) failed to ask for judgment based on the evidence; (4) failed to object to the admission of Goodmann's testimony; (5) failed to "separate co-defendant['s] trial per defendant's request;" and (6) failed to inform the trial court that a violation of the court's separation of witnesses order had occurred. Appellee's Appendix at 2-3. Nelson also argued that the accomplice liability instruction highlighted a single witness's testimony and "broadened the scope of the indictment by permitting a conviction for an uncharged offense." Id. at 4. Nelson argued that the trial court "erroneously permitted prosecution to re-open and submitted [sic] testimonial evidence of alleged, separate, uncharged misconduct, thereby Constructively Amending the indictment, which in turn mislead [sic] defendant in maintenance of his defense and resulted in extreme prejudice by allowing jury to disregard overwhelming evidence of innocence and to convict based solely on uncharged misconduct." Id. at 4. Nelson argued that the "Double Jeopardy Actual Evidence Test prohibits convictions for separate crimes enhanced by the same element of bodily injury" and that "[t]he prosecutor acted with malice in the charging indictment by way of enhancing counts 1 and 2 of the indictment using the same element of bodily injury, subjecting defendant to a higher statutory sentencing range." Id. Nelson argued that "prosecution elected to only

prosecute African American defendants and elected to drop charges on Caucasian defendant." Id. at 5. Lastly, Nelson argued that appellate counsel failed to file a reply brief "per defendant's request, when it was clear the state in its appellee[']s brief intentionally misstated the facts of this case and made inferences from issues not in the record." Id.

On October 20, 2008, Nelson filed a Request for Issuance of Subpoenas.[2] The post-conviction court granted Nelson's request in part but denied Nelson's request to subpoena Taritas because the "hearing on Petitioner's Petition for Post-Conviction Relief is not and shall not be a retrial of the above captioned cause." Appellant's Appendix at 42. After a hearing, the post-conviction court denied Nelson's petition for post-conviction relief in a seventeen page order.

Before discussing Nelson's allegations of error, we note that although Nelson 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. We also 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

[2] The record does not contain a copy of Nelson's Request for Issuance of Subpoenas.

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 post-conviction court abused its discretion by denying Nelson's request for discovery. Nelson appears to argue that the post-conviction court abused its discretion by denying his attempts to obtain specific discovery documents that were not made available to him or his trial counsel at the time of the original trial. Nelson also argues that the trial court's denial of his request violated due process. Nelson argues that he requested: (A) Goodmann's witness statement; (B) the deposition of Jedidiah Brickley; and (C) the police reports of the arresting officers.

Initially, we note that Nelson does not cite to the record to support his argument that he requested these items in connection with his petition for post-conviction relief or

that the post-conviction court denied his request.[3] Even assuming that Nelson requested these items and the post-conviction court denied his request, we cannot say that the post-conviction court abused its discretion.

"Trial and post-conviction courts are given wide discretion in discovery matters and 'in determining what constitutes substantial compliance with discovery orders, and we will affirm their determinations as to violations and sanctions absent clear error and resulting prejudice.'" State v. McManus, 868 N.E.2d 778, 790 (Ind. 2007) (quoting Dye v. State, 717 N.E.2d 5, 10-11 (Ind. 1999), reh'g denied, cert. denied, 531 U.S. 957, 121 S. Ct. 379 (2000)), reh'g denied, cert. denied, 128 S. Ct. 1739 (2008).

"Due process requires the State to disclose to the defendant favorable evidence which is material to either his guilt or punishment." Stephenson v. State, 742 N.E.2d 463, 491 (Ind. 2001) (citing Kyles v. Whitley, 514 U.S. 419, 432, 115 S. Ct. 1555, 1565 (1995), and Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-1197 (1963)), cert. denied, 534 U.S. 1105, 122 S. Ct. 905 (2002). The suppression of evidence by the State that is favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Shanabarger v. State, 798 N.E.2d 210, 217 (Ind. Ct. App. 2003), trans. denied. "To establish a Brady violation, the defendant must satisfy the following factors: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory

[3] On May 30, 2008, Nelson filed a Verified Petition to Compel for Copy of Discovery in the trial court and requested the deposition of "Brickley" and police reports for his habeas corpus petition. Appellant's Appendix at 54. In September 2008, Nelson filed a letter asking for his "Discovery."

or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." Id. at 217-218. "Additionally, a Brady violation arises if the defendant, using reasonable diligence, could not have obtained the information." Id. at 218. Exculpatory evidence has been defined as that which clears or tends to clear a defendant from alleged guilt. Id. "Evidence will be considered material under Brady only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. "Put another way, the defendant must show that the evidence at issue reasonably could be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id.

A. Goodmann's Witness Statement

Nelson points to the cross examination of Goodmann in which Goodmann testified that she recalled being interviewed by a detective and that she recalled telling the detective that she was riding with Nelson and Morris but that she did not know "what was going on." Trial Transcript at 285. Goodmann testified that Nelson talked on the cell phone at some point. Nelson argues that Goodmann's "testimony in the record at best established uncertainty as to whether or not Nelson used or possessed this phone at any time, [and] as such [Goodmann's] initial statement to police and witness statement to prosecution was material, exculpatory and vital to effective cross examination." Appellant's Brief at 2. Nelson does not demonstrate that the evidence at issue was

favorable to the accused, that the evidence must have been suppressed by the State, or that prejudice must have ensued.

B. Deposition of Jedidiah Brickley

Nelson argues that "[t]he Deposition statement given by Jedidiah Brickley was material as he was an essential witness[;] he was the driver of the car and was inside the car when the phone call by Morris took place." Appellant's Brief at 2. Nelson has failed to demonstrate that the evidence at issue was favorable to him and that the evidence must have been suppressed by the State or that prejudice must have ensued.

C. Police Reports

Nelson argues that "the requested police reports were material evidence for purposes of [*B*]*rady* because Fort Wayne police officers give [sic] contradictory testimony at trial as to the location of the cell phone found inside of the vehicle." Appellant's Brief at 2. Nelson argues that "Officer Lichtsinn (who was the first officer on the scene, and responsible for inventorying the vehicle) stated correctly the cell phone was found 'on the hump' in between the driver and passenger seats," while "Det. Dubose incorrectly stated the phone was found directly beneath the driver's side." Appellant's Brief at 2 (internal citations omitted). Nelson concludes that "[t]he requested discovery evidence was relevant to correct the record as to where exactly the phone was found." Id.

The record reveals that Officer Lichtsinn testified that a cell phone was found "underneath the front seat in the middle, between the driver and the passenger." Trial Transcript at 192. Detective Dubose testified that the cell phone was "up under the seat,

right on top of the hump" near the driver's seat. Id. at 217. Again, Nelson has failed to develop the argument that the evidence at issue was favorable to him and that the evidence must have been suppressed by the State or that prejudice must have ensued. Accordingly, we cannot say that the post-conviction court abused its discretion by denying Nelson's request for discovery.

II.

The next issue is whether Nelson was denied due process in that he alleges that the trial transcript had been amended. Nelson points to a Notice of Completion of Transcript filed on August 3, 2007, and an Amended Notice of Completion of Transcript filed on August 8, 2007. Nelson argues that "[t]hese Notices are five (5) days apart both certified and signed by the Clerk of Court Theresa Brown," and that "[t]hese documents definitively show there was an alteration made to the Appellant's Transcript after the original Notice of Completion was entered to which the Clerk issued and [sic] Amended Notice." Appellant's Brief at 5. Nelson also argues that he "was instantly prejudiced by the incorrect trial transcript as relevant portions of the transcript were intentionally omitted . . . ." Id.

We cannot say that two notices of completion of a trial transcript constituted evidence that the transcript was altered and Nelson was prejudiced. To the extent that Nelson suggests that relevant portions were omitted, Nelson fails to put forth a cogent argument or cite to the record. Consequently, this issue is 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); Smith v. State, 822 N.E.2d 193, 202-203 (Ind. Ct. App. 2005) ("Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record."), trans. denied.

III.

The next issue is whether the post-conviction court abused its discretion in denying Nelson's motion to subpoena Taritas. Ind. Post-Conviction Rule 1(9)(b) provides:

> If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the witness' testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the proposed witness' testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena.

The post-conviction court has discretion to determine whether to grant or deny the petitioner's request for a subpoena. Allen v. State, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003), trans. denied. We review the trial court's decision regarding the decision to issue a subpoena for an abuse of discretion. Stevenson v. State, 656 N.E.2d 476, 478 (Ind. 1995). An abuse of discretion has occurred if the court's decision is against the logic and effect of the facts and circumstances before the court. Allen, 791 N.E.2d at 756.

Nelson appears to point to the following statement made by this court in Nelson's direct appeal: "Nelson's positioning of himself during the attack supports the reasonable inference that he was aiding in the attack by preventing any assistance to Martz by Taritas." Slip op. at 9. Nelson argues that this statement was "clearly in conflict with Taritas's deposition statement" and the trial testimony of Martz and Taritas. Appellant's Brief at 7. In Taritas's deposition, he testified that Nelson tried to "stop this whole thing." Appellant's Appendix at 35. At trial, Taritas testified that Nelson told Morris to "leave [Martz] alone, let's go." Trial Transcript at 122. We fail to see how Taritas's testimony at the post-conviction hearing would be relevant and probative when Taritas already testified to the substance that Nelson appears to claim he would have testified to at the post-conviction hearing. To the extent that Nelson suggests that the post-conviction court abused its discretion in denying Nelson's motion to subpoena Taritas, Nelson fails to put forth a cogent argument. Consequently, this issue is waived. See, e.g., Cooper, 854 N.E.2d at 834 n.1 (holding that the defendant's contention was waived because it was "supported neither by cogent argument nor citation to authority"); Shane, 716 N.E.2d at 398 n.3 (holding that the defendant waived argument on appeal by failing to develop a cogent argument).

IV.

The next issue as stated by Nelson is "[w]hether the Post Conviction Court erred in its determination that Rachael [Goodmann's] testimony was barred by res judicata[.]" Appellant's Brief at 9. Nelson does not explain what issue is barred by *res judicata* and

fails to put forth a cogent argument. Consequently, this issue is waived. See, e.g., Cooper, 854 N.E.2d at 834 n.1; Shane, 716 N.E.2d at 398 n.3.

To the extent that Nelson argues that the trial court committed reversible error when it allowed the State to reopen its case after it had rested or whether the trial court erred when it instructed the jury on accomplice liability, this court has already addressed these issues. See Nelson, slip op. at 2. Thus, Nelson's arguments are barred by the doctrine of *res judicata*. The post-conviction court's denial of Nelson's petition on these issues 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).

V.

The next issue is whether Nelson was denied effective assistance of trial counsel and appellate counsel. We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. Williams v. State, 724 N.E.2d 1070, 1078 (Ind. 2000), reh'g denied, cert. denied, 531 U.S. 1128, 121 S. Ct. 886 (2001). 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.

A. Trial Counsel

Nelson argues that he received ineffective assistance of trial counsel on a number of grounds.

1. Double Jeopardy

Nelson appears to argue that his trial counsel was ineffective for failing to object to the charging information or failing to file a motion to dismiss one of the charges of burglary resulting in bodily injury and the charge of robbery resulting in bodily injury because the charges constituted double jeopardy. Specifically, Nelson argues that "he was placed in Jeopardy once the jury was sworn because counsel never challenged the indictment as charged." Appellant's Brief at 12.

To establish that his trial counsel was ineffective, Nelson must show that an objection to the charging information or a motion to dismiss one of the counts would have been granted. See Sauerheber v. State, 698 N.E.2d 796, 807 (Ind. 1998). We

cannot say that the charging information placed Nelson in double jeopardy. See Davenport v. State, 734 N.E.2d 622, 624 (Ind. Ct. App. 2000) ("It is well settled that a defendant may be charged and tried with a greater and lesser included offense simultaneously, as double jeopardy considerations are not violated by the charges themselves."), trans. denied; see also Green v. State, 856 N.E.2d 703, 704 (Ind. 2006) ("To be sure, a defendant's constitutional rights are violated when a court enters judgment twice for the same offense, but not when a defendant is simply found guilty of a particular count."); Winn v. State, 722 N.E.2d 345, 348 (Ind. Ct. App. 1999) ("[I]t is not the multiple charges which violate double jeopardy because the defendant is subject to only one judicial proceeding."). We conclude that Nelson failed to demonstrate that a motion to dismiss would have been granted. Thus, the failure of Nelson's trial counsel to move to dismiss one of the charges does not amount to ineffective assistance of counsel.

2. Failure to Depose Goodmann

Nelson appears to argue that his trial counsel was ineffective for failing to depose Goodmann. The mere fact that trial counsel did not depose witnesses does not in and of itself demonstrate ineffective assistance of counsel. Herrera v. State, 679 N.E.2d 1322, 1326 (Ind. 1997). Nelson's trial counsel cross examined Goodmann at the trial. Nelson fails to point to any specific instance where his counsel's cross examination might have been more effective had Goodmann been deposed. We conclude that Nelson has not demonstrated that he was prejudiced. Accordingly, his claim of ineffective assistance on this basis fails.

3. Failure to Move for Judgment Based on the Evidence

Nelson appears to argue that his trial counsel was ineffective for failing to ask for judgment based on the evidence with regard to the charges of burglary and robbery. Again, to establish that his trial counsel was ineffective, Nelson must show that the motion would have been granted. See Sauerheber, 698 N.E.2d at 807. A motion for judgment on the evidence should be granted only if there is a total lack of evidence as to the guilt of the accused or where there is no conflict in the evidence and it is susceptible only to an inference in favor of the accused. Wilcox v. State, 664 N.E.2d 379, 382 (Ind. Ct. App. 1996); Ind. Trial Rule 50. A motion for judgment on the evidence will not be granted if the State presented a *prima facie* case. Wilcox, 664 N.E.2d at 382.

In Nelson's direct appeal, Nelson argued that "before [Goodmann]'s testimony, there was nothing in the record to support" an instruction based on the "theory that Nelson had aided or assisted Morris in the commission of a robbery." Nelson, slip op. at 7. This court held that the evidence given before Goodmann testified supported the giving of an accessory liability instruction. Specifically, we held:

> The evidence shows that Martz received a call from a man using "[Nelson]'s phone," and that the caller inquired whether Martz was home. Within minutes of Martz's responsive statement that he was not home, Morris entered Martz's residence and looked surprised to see him there. Nelson entered behind Morris, although neither man was invited inside. Morris began kicking Martz and took his cell phone, while Nelson positioned himself in front of the other occupant of Martz's living room – Taritas. Nelson and Morris departed together, taking Martz's money and the cell phones of Martz and Taritas. Shortly thereafter, Martz's brother engaged a man on Martz's cell phone in a conversation about obtaining the return of that phone. The speaker advised that a payment of $50 was

> necessary for return of the phone and "protection," and this conversation was overheard by police officers. Arrangements coordinated with the police were made to pay the money demanded at a specific meeting site. Nelson drove himself and Morris to the meeting site. After an occupant of the vehicle got out to collect the payment, Nelson and Morris were arrested. Both stolen cell phones were found under the driver's seat of the vehicle Nelson had been driving.
>
> The foregoing evidence, given before Goodmann's testimony was heard, was sufficient to support the giving of an accessory liability instruction.

Id. at 8-9.

Based upon the evidence given before Goodmann's testimony as illustrated in Nelson's direct appeal, we cannot say that there was a total lack of evidence as to the guilt of the accused or that there was no conflict in the evidence. We conclude that Nelson failed to demonstrate that a motion for judgment on the evidence regarding the robbery charge would have been granted.[4] Thus, the failure of Nelson's trial counsel to move for a judgment on the evidence does not amount to ineffective assistance of counsel.

4. Failure to Object to Goodmann's Testimony

Nelson argues that his trial counsel was ineffective for failing to object to Goodmann's testimony on the basis of "relevance," "other crimes," or hearsay. Appellant's Brief at 16. Again, to establish that his trial counsel was ineffective, Nelson

[4] To the extent that Nelson argues that his trial counsel was ineffective for failing to ask for judgment based on the evidence with regard to the charge of burglary, we note that the jury found Nelson not guilty of the burglary charge. Thus, Nelson has failed to demonstrate that he was prejudiced.

must show that an objection would have been granted. See Sauerheber, 698 N.E.2d at 807.

a. Relevance

Nelson appears to argue that Goodmann's testimony was not relevant because she testified that she did not know "what was going on." Appellant's Brief at 17. The State argues that Nelson takes Goodmann's statements out of context and that Goodmann's statement "that she did not know what was going on clearly referred to the fact that she was not part of the scheme involving [Nelson] and Morris to rob the victims and then extort money from them." Appellee's Brief at 21. We agree. Goodmann testified that she heard Nelson and Morris talk on the cell phone and that the conversation involved exchanging the cell phone for money. We conclude that Nelson failed to demonstrate that an objection on the basis that Goodmann's testimony was not relevant would have been granted. See Vitek v. State, 750 N.E.2d 346, 353 (Ind. 2001) (holding that a jury could infer from the defendant's actions after the crime that he knowingly or intentionally aided a person in committing murder), reh'g denied. Thus, the failure of Nelson's trial counsel to object on this basis does not amount to ineffective assistance of counsel.

b. Other Crimes

Nelson argues that he was not "charged in any way with the usage of the cell phone" and that "the jury was allowed to hear testimony that [Nelson] is of bad character, may have participated in an uncharged offense, and has a propensity to commit crimes . . . ." Appellant's Brief at 17. The State argues that Nelson's claim "fails because the

attempt to extort money from the victims for the cell phones was intertwined with the robbery." Appellee's Brief at 22. We agree.

Ind. Evidence Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

This rule does not bar evidence of uncharged criminal acts that are intrinsic to the charged offense. Lee v. State, 689 N.E.2d 435, 438 (Ind. 1997), reh'g denied. We conclude that Nelson failed to demonstrate that an objection on the basis that Goodmann's testimony was barred by Ind. Evidence Rule 404(b) would have been granted. Thus, the failure of Nelson's trial counsel to object to Goodmann's testimony on this basis does not amount to ineffective assistance of counsel.

c. Hearsay

To the extent that Nelson argues that Goodmann's testimony constituted hearsay, Nelson fails to point to any specific portions of Goodmann's testimony or develop this argument. Consequently, this issue is waived. See, e.g., Cooper, 854 N.E.2d at 834 n.1; Shane, 716 N.E.2d at 398 n.3; Smith, 822 N.E.2d at 202-203.

5. Consolidation of Cases

Nelson argues that his counsel failed to consult with him about the decision to consolidate Nelson's case with Morris's case.[5] Nelson does not cite to the record for this proposition. Further, our review of the record reveals that Nelson's trial counsel talked to Nelson before the trial,[6] and that trial counsel testified that he was "prepared for the trial." Post-Conviction Transcript at 10. We cannot say that the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court.

Nelson also appears to argue that his trial counsel was ineffective for consenting to the consolidation of Nelson's trial with Morris's trial. Without citation to the record, Nelson argues that because his trial counsel failed to object to the consolidation "the jury heard falsified prejudicial statements made by co-defendant Morris." Appellant's Brief at 19. Nelson also argues that "[h]ad counsel separated the trial as requested by defendant the jury would have never been allowed to hear testimony from either Morris or [Goodmann] and the outcome of the trial clearly would have been different." Id. at 20.

"Defendants have no absolute right to a separate trial or severance, but they may ask the trial judge to exercise her discretion to grant such a motion." Rouster v. State,

[5] The State argues that Nelson's allegation fails because it was not included in Nelson's petition for post-conviction relief. In Nelson's petition for post-conviction relief, Nelson argued that "Counsel violated Rules of Professional Conduct by failing to correspond with defendant, and conduct adequate investigation. Counsel made no attempt to speak to defendant until a day before the start of the trial, counsel never filed or received discovery (also failed to file motion in limine which would have excluded evidence of uncharged misconduct), [and] as a result ignored whether any pre-trial motions had to be filed." Appellee's Appendix at 2. Because Nelson appeared to raise this argument in his petition, we will address the merits.

[6] Nelson does not cite any evidence of the content of his conversation with counsel.

705 N.E.2d 999, 1004 (Ind. 1999), reh'g denied. An abuse of discretion occurs when a court denies a defendant's properly filed motion for separate trials and the parties' defenses are mutually antagonistic to such a degree that acceptance of one party's defense precludes the acquittal of the other. Id. A defendant is not, however, entitled to a separate trial merely because a co-defendant implicates that defendant. Id.

Initially, we note that Nelson fails to cite to the record to support his arguments regarding Morris's testimony. Moreover, we conclude that there is no reasonable probability that the results of the trial would have been different if a separation had occurred. The same evidence would have been admitted against Nelson even if he had been granted a separate trial. Such evidence includes: Martz's testimony that Nelson was standing in front of Taritas while Morris was hitting and kicking him; Goodmann's testimony that she had been in the vehicle driven by Nelson to the meeting site where Morris and Nelson were apprehended and that both Morris and Nelson had talked on the cell phone during the conversation that arranged for the payment of money at the meeting; and Detective Dubose's testimony that after Nelson and Morris were apprehended at the meeting site, Martz had identified the two as the men "who went into his house" earlier and "kicked him and took his cell phone and his money." Nelson, slip op. at 4 (citing Trial Transcript at 218-219). Detective Dubose further testified that Martz reported to him that "both" Nelson and Morris had kicked him "four or five times," and the cell phones belonging to Martz and Taritas were found under the driver's side front

seat of the car that Nelson had been driving.[7] Id. (citing Trial Transcript at 223). Considering the amount of corroborating evidence indicating Nelson's role in the crime, Nelson was not prejudiced by his counsel's failure to move for separate trials. Thus, the failure of Nelson's trial counsel to object to Goodmann's testimony on this basis does not amount to ineffective assistance of counsel. See Rouster, 705 N.E.2d at 1005 (holding that the petitioner was not prejudiced by his counsel's failure to move for separate trials).

6. Violation of Witness Separation Order

Nelson argues that his trial counsel was ineffective for failing to object to a violation of the trial court's witness separation order. Nelson's entire argument states: "Counsel failed to bring to Court[']s attention that a violation of the Court[']s separation of witnesses order had been violated, by way of Detective Dubose who was a witnesses [sic] the previous day talking to [Goodmann] (who had yet to testify) for more than ½ hour before the start of trial." Appellant's Brief at 20. Nelson does not develop this argument, cite to authority, or cite to the record. Consequently, this issue is waived. See, e.g., Cooper, 854 N.E.2d at 834 n.1; Shane, 716 N.E.2d at 398 n.3; Smith, 822 N.E.2d at 202-203.

B. Appellate Counsel

Nelson argues that his appellate counsel was ineffective for failing to file a reply brief per Nelson's request. Without citation to the record, Nelson argues that the State's

[7] While Nelson appears to suggest that Goodmann would not have testified at his trial had he had a separate trial, Nelson does not develop this argument. Consequently, the issue is waived. See, e.g., Cooper, 854 N.E.2d at 834 n.1; Shane, 716 N.E.2d at 398 n.3.

brief in his direct appeal "misstated the facts of this case and made inferences from issues not in the record." Appellant's Brief at 21.

The record reveals that Nelson had the opportunity to present his appellate counsel as a witness at the post-conviction hearing but did not do so. When counsel is not called as a witness to testify in support of a petitioner's arguments, the post-conviction court may infer that counsel would not have corroborated the petitioner's allegations. See Dickson v. State, 533 N.E.2d 586, 588 (Ind. 1989); Culvahouse v. State, 819 N.E.2d 857, 863 (Ind. Ct. App. 2004), trans. denied. Further, Nelson failed to submit the State's brief from his direct appeal to the post-conviction court. Given that Nelson has the burden of demonstrating ineffectiveness of counsel, Nelson failed to meet his burden by presenting no evidence to the post-conviction court concerning his appellate representation. See, e.g., Culvahouse, 819 N.E.2d at 863 (addressing petitioner's argument regarding appellate counsel's failure to raise the issue of whether his sentence was manifestly unreasonable and holding that petitioner failed to meet his burden by presenting no evidence concerning his appellate representation), trans. denied.

VI.

The next issue is whether Nelson waived his freestanding claim of error that the trial court committed fundamental error by giving an instruction on accomplice liability theory because it highlighted Goodmann's testimony. Nelson may not raise this freestanding claim of error in a post-conviction proceeding. Rather, in "post-conviction proceedings, complaints that something went awry at trial are generally cognizable only

when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). Here, Nelson has not demonstrated that his argument was unavailable at the time of trial or direct appeal. Consequently, we will not address the argument as a freestanding claim. See, e.g., Conner v. State, 829 N.E.2d 21, 26 (Ind. 2005) (holding that the petitioner's post-conviction claim "of trial court bias was not raised at trial or in [the petitioner's] earlier appeals, and [was] therefore procedurally defaulted"); Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) (holding that it is wrong to review the petitioner's fundamental error claim in a post-conviction proceeding).

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

Affirmed.

MATHIAS, J., and BARNES, J., concur.