

STATEMENT OF THE CASE

Timothy E. Strowmatt, pro se, appeals the denial of his petition for post-conviction relief.

We affirm.

ISSUE

Whether the post-conviction court erred when it concluded that Strowmatt had failed to establish his entitlement to post-conviction relief.

FACTS

On April 12, 2004, the State charged Strowmatt with having committed two counts of attempted criminal confinement of a child less than fourteen years of age, a class C felony. Specifically, it charged that on April 5, 2004, he had attempted to commit the criminal confinement of nine-year old B.L. “by grabbing or attempting to pull [her] into his vehicle”; and of seven-year old A.V. “by offering [her] . . . money to get into his vehicle”; and that each such act was “conduct constitut[ing] a substantial step toward the commission of the crime of Criminal Confinement, that is intentionally confining a person, not the child of the Defendant and under the age of fourteen (14) years, without the consent of said person.” (App. 7, 8). The State also charged that Strowmatt was an habitual offender.

On December 6 – 9, 2004, Strowmatt was tried to the bench. In our memorandum opinion on his direct appeal, we found that the following facts were presented at trial:

On April 5, 2004, Strowmatt approached two little girls, ten-year-old K.D. and nine-year-old B.L., near Faith Baptist Church. He asked for their assistance in finding his daughter and offered them five dollars. They agreed to help him. He then pulled behind the church and motioned for the

girls to walk over to him. When they neared the car, they noticed that he was wearing only his underwear and a white tank top. Strowmatt grabbed B.L.'s arm and tried to pull her into the car. She and K.D. resisted and ran in the opposite direction. At this point, Jackie and Linda Derrickson drove into the parking lot and noticed the car and the girls. The girls ran over to the Derricksons' car and called the police.

Later that same day, Strowmatt approached another little girl, seven-year old A.V., who was playing in her backyard. He asked her whether she had seen his daughter and offered her one dollar to get in his car and help him find her. A.V. noticed that he had duct tape and rope underneath his front seat and said no. She then ran into the house, crying and upset, and had her mother call the police.

On April 8, 2004, all three girls picked Strowmatt's picture out of separate photographic arrays. B.L.'s sister, A.L., witnessed the incident involving B.L. and K.D. and also identified Strowmatt from a photo array. The Derricksons confirmed that Strowmatt's car was the same size and color as the one they saw in the church parking lot.

Strowmatt v. State, No. 71A03-0501-CR-22, at *2-3 (Ind. Ct. App. September 7, 2005).

On December 9, 2004, the trial court found Strowmatt guilty of both attempted criminal confinement offenses. On December 13, 2004, it found that Strowmatt was an habitual offender. Strowmatt appealed, arguing that the evidence was insufficient to sustain his conviction because the witnesses' testimony was vacillating, contradictory, and uncertain; none of the witnesses could positively identify Strowmatt at trial; and in the photographic array from which the witnesses had identified him, only his photograph depicted him in front of a bright blue background. On September 9, 2005, we affirmed the trial court's judgment.

On February 8, 2006, Strowmatt filed his pro se petition for post-conviction relief ("PCR"). He claimed that he was (1) denied effective assistance of trial counsel; (2) denied effective assistance of appellate counsel; (3) denied a fair trial when the trial court misled him; (4) sentenced unreasonably and excessively; (5) improperly found to be an

habitual offender; (6) denied a fair trial by a biased trial judge; (7) denied an appropriate pre-trial bond; (8) denied a fair trial, due process, and equal protection when the trial court admitted evidence precluded by local court rules; and (9) denied a fair trial when the trial court denied him the opportunity to present a defense. On November 16, 2006, he filed a motion to amend his petition for PCR, withdrawing the foregoing third, sixth and seventh claims. His motion also sought to add the claim that he was “improperly charged by the State under Ind. Code § 35-42-3-3(1), a statute that is unconstitutionally vague and provides arbitrary and discriminatory enforcement and prosecution”; and was “improperly charged under Ind. Code § 35-42-3-3(1)” while being “prosecuted under 35-42-3-3(2).” (App. 384).¹

On October 20, 2008, the post-conviction court held a hearing on Strowmatt’s petition. When asked to present his evidence, Strowmatt called only a single witness – his stepfather, Carey Rowe. Rowe testified that in late April or early May of 2004, he had given a signed statement to Strowmatt’s trial counsel in which he reported having received two messages from Strowmatt in the early evening hours of April 4, 2004.

After Rowe testified, the post-conviction court asked Strowmatt whether he had any additional testimony, “sworn evidence.” (Tr. 17). Strowmatt responded that his “only other evidence” was his brief and its appendix. *Id.* The post-conviction court explained that a brief was “argument” but an appendix was “exhibits.” *Id.* Strowmatt responded that his appendix consisted of parts of “the court’s records.” (Tr. 18). The

¹ According to the CCS, the State filed a response to both Strowmatt’s initial petition for PCR and his amended petition, but neither is included in Strowmatt’s Appendix.

State objected to the admission of Strowmatt’s proffered appendix to his brief; the post-conviction court accepted from Strowmatt three of four volumes from the trial record (tr. 40-41); but the post-conviction court did not rule admissible Strowmatt’s proffered appendix.² The post-conviction court advised Strowmatt that it would accept supplemental “legal argument in writing,” with citations to “other cases,” subsequent to the hearing. (Tr. 39).

On November 21, 2008, Strowmatt filed his brief, his “Appendix to Petitioner’s brief on Post-Conviction Relief,” and a “Supplemental to Brief on Post-Conviction Relief.” (App. 65, 55). His brief argued that he was convicted under an “unconstitutionally vague” statute, as held in *Brown v. State*, 868 N.E.2d 464 (Ind. 2007), and that he was denied the effective assistance of trial and appellate counsel. (App. 31).

On September 11, 2009, the post-conviction court issued its order denying Strowmatt’s petition.³

² The transcript of the October 30, 2008 hearing reflects Strowmatt’s multiple references to his brief and its appendix, suggesting that he had it with him at the hearing. The CCS does not reflect their filing on that date; and the brief and “Appendix to Petitioner’s Brief on Post-Conviction Relief” are file-marked November 21, 2008. (Tr. 26, 65). The post-conviction court’s order, however, states that Strowmatt’s “written brief, and the Appendix with it” were “filed on the date of his hearing.” (App. 21). Accordingly, we assume that the brief and appendix considered by the post-conviction court are those contained in Strowmatt’s Appendix (even though they are file-marked November 21, 2008).

³ The post-conviction court found that Strowmatt’s argument “that the statute under which he was charged, I.C. 35-42-3-3 was unconstitutionally vague,” as found in *Brown v. State*, 868 N.E.2d 464 (Ind. 2007), was inapposite – inasmuch as Strowmatt was convicted of the offenses of attempted intentional confinement of a person against the person’s will. (App. 19). It further found that Strowmatt, who “called no witnesses, except with respect to a possible alibi, nor testified himself,” had “failed in his burden of proof” to establish by a preponderance of the evidence the ineffective assistance of his trial counsel or of his appellate counsel. (App. 21). With respect to the other issues in Strowmatt’s original and amended petitions for PCR, the post-conviction court “decided against” him, based on his “failure to present evidence thereon.” App. 18, n.2.

DECISION

In a post-conviction relief proceeding, the petitioner bears the burden of establishing the grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* Therefore, in order to prevail on his appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44.

Post-conviction procedures do not afford a petitioner with a “super-appeal.” *Williams v. State*, 808 N.E.2d 652, 659 (Ind. 2004). Rather, their scope is limited to the grounds enumerated in Post-Conviction Rule 1. *Id.* If an issue was known and available on direct appeal but not raised, it is procedurally defaulted as a basis for relief in subsequent proceedings. *Id.* Claims not raised on appeal, “free-standing claims of error,” are not available in a post-conviction proceeding. *Id.* Such claims may be properly presented in a post-conviction proceeding, however, as a claim of ineffective assistance of counsel. *Id.* The standard of review for a claim of ineffective assistance of counsel is two-pronged, and requires that Strowmatt show that

(1) counsel’s performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.

Pruitt v. State, 903 N.E.2d 899, 905-06 (Ind. 2009) (internal citations omitted).

Strowmatt first argues that “the holdings of *Brown v. State*, 868 N.E.2d 464 (Ind. 2007),” require that relief be granted to him. As the State properly notes, this is a free-standing claim of error; hence, it is not available as a post-conviction claim. Further, if considered as an ineffective assistance of counsel claim, it must fail. In *Brown*, our Supreme Court held that the statutory language which made the knowing or intentional removal of another person “by fraud” or “enticement” a criminal offense was “void for vagueness.” *Id.* at 469. Accordingly, it excised those words, “leaving [the statute] intact as to its proscription against a person who knowing or intentionally ‘removes another person by force or threat of force’ from one place to another.” *Id.* Strowmatt was charged with, and convicted of, having committed the attempted intentional criminal confinement of a child by attempting the physical confinement of the child without the child’s consent, *i.e.* not under the “remov[al]” provision.⁴ Because Strowmatt was neither charged with nor convicted of the “by fraud” and “enticement” provision of the statute, there is no reasonable probability that a different outcome would have obtained had counsel asserted the *Brown* argument.

Strowmatt argues that the criminal confinement statutes require that a person “be confined without their [sic] consent” and that the defendant “not merely attempt to do so,” but here “actual physical confinement did not occur.” Strowmatt’s Br. at 5. Again,

⁴ The statute defines the criminal confinement offense as follows:

- (a) A person who knowingly or intentionally;
 - (1) confines another person without the other person’s consent; or
 - (2) removes another person, by fraud, enticement, force, or threat of force, from one (1) place to another;
- commits confinement.

this is a free-standing claim of error. Moreover, because Strowmatt was convicted of attempted confinement, there is no reasonable probability that a different outcome would have obtained had his argument been made by counsel.

Strowmatt next argues that there was no evidence of his intent to confine the victims “without their consent.” *Id.* at 7. This claim is a challenge to the sufficiency of the evidence, and we do not judge the weight of the evidence. *See Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). This is also another free-standing claim, and necessarily fails for the same reasons as the two previous arguments.

Strowmatt argues that trial counsel was ineffective for failing to file an alibi defense; failing to file a motion to suppress – based on the composition of the photo array; and failing to object to the State’s reopening its case after denial of the defense motion for judgment on the evidence. Strowmatt’s trial counsel was not called to testify at the post-conviction hearing; nor were affidavits from counsel presented. The standard for reviewing an ineffective assistance claim includes the “strong presumption . . . that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable judgment.” *Pruitt*, 903 N.E.2d at 906. After referring to that presumption, as noted by the post-conviction court, our Supreme Court has held that “where, . . . , the petitioner does not call trial counsel as a witness[,] the post-conviction court is justified in inferring that trial counsel would not have corroborated the allegations of ineffective counsel.” *Owens v. State*, 464 N.E.2d 1277, 1279 (Ind. 1984); *see also Dickson v. State*, 533 N.E.2d 586, 589 (Ind. 1989); *Downs v. State*, 827 N.E.2d 646, 654 (Ind. Ct. App. 2005), *trans. denied*. Therefore, we find that Strowmatt has not shown that the evidence

as a whole leads unerringly and unmistakably to the conclusion opposite: that he was denied the effective assistance of trial counsel. *See Henley*, 881 N.E.2d at 643-44.

As to his appellate counsel, Strowmatt argues the failure to raise the issues he now presents: his “unreasonable and excessive sentence”; his “inappropriate” pretrial bond; and the sufficiency of the evidence to sustain his habitual offender adjudication. Strowmatt’s Br. at 18. However, we find no evidence presented in this regard. As in the above discussion of his allegations regarding trial counsel representation, Strowmatt did not call his appellate attorney to testify or present an affidavit in that regard. Given that Strowmatt has the burden of demonstrating ineffectiveness of counsel, he “failed to meet his burden by presenting no evidence to the post-conviction court concerning his appellate representation.” *Culvahouse v. State*, 819 N.E.2d 857, 863 (Ind. Ct. App. 2004), *trans. denied*. Further, his arguments fail to persuade us that in any single argument, or all combined arguments, as to appellate representation, there is a reasonable probability that a different outcome would have obtained had the argument(s) been made by appellate counsel. *See Pruitt*, 903 N.E.2d 905-06.

Finally, Strowmatt argues that the trial court erred when it did not expressly rule on each claim raised in his original and amended post-conviction petitions. As best we grasp his argument, he believes that because he presented legal arguments in his briefs and asked the post-conviction court to review the transcript of his trial, there was sufficient evidence for full consideration and review of each of his legal arguments. The hearing transcript does not indicate that the trial transcript was admitted into evidence, and less than the full transcript was given by Strowmatt to the post-conviction court at the

hearing. Further, Strowmatt's Appendix to this court does not contain a complete trial transcript, only selected pages -- without any certification. Moreover, his reference to the post-conviction court's statement at the hearing that it would "read" the briefs and material submitted by Strowmatt does not transform his submissions into evidence. (Tr. 26, 42, 63). "Evidence is matter that makes clear the truth of fact," 29 Am. Jur. 2d *Evidence* § 1 (2008), *i.e.* the means of establishing a fact. *Id.* at § 2.

Strowmatt notes that he had raised the following additional claims: trial counsel's failure to file a motion to dismiss, or to object to hearsay testimony; appellate counsel's failure to argue that his sentence was unreasonable and excessive, or that his pretrial bond was inappropriate, or that the evidence did not support the habitual offender adjudication. These all are matter of alleged ineffective assistance of counsel. As already indicated, Strowmatt presented no testimony or affidavits in this regard. The Appendix submitted by Strowmatt to this court and the material labeled "appendix"⁵ that was submitted with his brief to the post-conviction court do not lead us unerringly and unmistakably to a conclusion opposite the post-conviction court's conclusion -- that Strowmatt failed to present evidence on these claims. Accordingly, he failed to satisfy his burden of establishing the grounds for relief.

Affirmed.

⁵ This "appendix" contains various 2004 police reports concerning the instant offenses; pretrial correspondence between Strowmatt and his trial counsel; Strowmatt's undated affidavit about his pretrial communication with his trial counsel; a report of the State's witness list; correspondence from Strowmatt's appellate counsel to him before preparing the appeal; a 2003 eyeglass prescription for Strowmatt; the direct appeal brief and the Court of Appeals opinion; a 1993 charging information for battery; and police reports from 1993; the 1995 dismissal of the battery charge against Strowmatt; and an affidavit from Strowmatt stating that the contents of his appendix were "true and correct." (App. 151).

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