IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs at Knoxville January 28, 2014

WILLIAM F. CHUMLEY v. STATE OF TENNESSEE

Appeal from the Circuit Court for Tipton County
No. 6772 Joseph H. Walker, Judge

No. W2013-00580-CCA-R3-PC - Filed March 10, 2014

William F. Chumley ("the Petitioner") was convicted of rape of a child and sentenced to twenty-five years' incarceration. On direct appeal, this Court affirmed the Petitioner's conviction. See State v. William Franklin Chumley, No. W2011-01832-CCA-R3-CD, 2012 WL 3134033, at *9 (Tenn. Crim. App. Aug. 1, 2012). The Petitioner subsequently filed for post-conviction relief, which the post-conviction court denied following an evidentiary hearing. The Petitioner now appeals, arguing that he received ineffective assistance of counsel at trial. Upon our thorough review of the record and the applicable law, we affirm the post-conviction court's decision denying relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JEFFREY S. BIVINS, J., delivered the opinion of the Court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Lyle A. Jones, Covington, Tennessee, for the appellant, William F. Chumley.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Senior Counsel; Mike Dunavant, District Attorney General; and Jason Poyner, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

To assist in the resolution of this proceeding, we repeat here the summary of the facts set forth in this Court's opinion resolving the Petitioner's direct appeal:

The [Petitioner], William Franklin "Frank" Chumley, was indicted on November 1, 2010 for rape of a child in violation of Tennessee Code Annotated section 39-13-522, after the nine-year-old victim, who had been staying with her relatives next door to the [Petitioner], told her family she had been sexually assaulted.

At trial, Ben Forbess, a deputy with the Tipton County Sheriff's Office, testified that he was dispatched to the home of the victim's grandmother to take a report concerning the sexual assault of a child. While there, he observed the victim, who appeared frightened and would not leave her mother's side. The victim confirmed that someone had touched her inappropriately. Deputy Forbess did not observe any injuries to the victim but testified he did not look for injuries.

The victim's mother testified regarding the circumstances leading up to the rape. She testified that, at the time, she was separated from the victim's father, but that the victim spent time with both parents; when the victim stayed with her father, the victim's mother would check on her daily. The victim's father lived next door to the victim's grandparents, and the victim's grandparents lived next door to the [Petitioner]. The victim spent time at the [Petitioner]'s house, attracted by the [Petitioner]'s swimming pool. The victim had also been permitted to spend the night at the [Petitioner]'s house. On the Friday prior to June 27, 2010, the victim's mother had seen her and noticed nothing out of the ordinary.

On June 27, 2010, the victim's grandmother called the victim's mother at approximately 7:00 p.m. The victim's mother drove to the victim's grandmother's house, and after speaking with the victim, she called law enforcement and gave a report. The victim was scared and crying. The victim's mother took the victim home; at home, the victim told her mother more about the assault, and as a result, the victim's mother and father decided to take her to seek medical care in Memphis at approximately 3:00 a.m. The victim's mother testified that the victim had a bruise on her neck "that it looked like she had been grabbed . . . around her throat area." The victim further had scratches on her arms and legs and complained of severe stomach pain and back pain. The bruises developed after the victim's mother took the victim home. The victim's mother testified that the victim has nightmares and anger and began having trouble in school after the rape.

The victim testified that the [Petitioner] raped her. The victim had frequent contact with the [Petitioner] because, while staying with her father,

the victim would frequently play and swim with the [Petitioner]'s wife's son. The victim's cousin and the [Petitioner]'s son were also present on June 27, 2010. After spending the night at the [Petitioner]'s house, as she had been doing "off and on," the victim had gone swimming in the morning with the [Petitioner]'s permission. The [Petitioner]'s wife, Samantha Chumley, left to go to Wal-Mart twenty or thirty minutes prior to the rape. The victim testified that Samantha Chumley's son was in the pool, but later testified he had gone to Wal-mart with Samantha Chumley. The victim testified that she and her cousin had been jumping on a trailer and the [Petitioner] yelled at them. They came inside the house and she sat on the couch by the [Petitioner]'s son for five minutes. The [Petitioner] was in the kitchen and tried to get her to come over to show her something, but she did not come. She then suggested to her cousin that they go back outside. She testified that as they were leaving the house, the [Petitioner] indicated to her cousin that he should go outside and then pulled her into the bathroom. He touched her between her legs, pulled her pants down, and raped her. The victim testified she was crying and attempted to call for help from the [Petitioner]'s son. She testified that sound from one end of the house could be heard in the other end and she did not know why the [Petitioner]'s son did not hear or respond to her.

She pushed the [Petitioner] away and ran outside to tell her cousin. She asked her cousin to tell the [Petitioner] that they were going to their grandmother's house and to tell their grandmother about the assault. On cross-examination, she further elaborated that although her cousin then tried to tell their grandmother, her grandmother was in a bad mood and kept ordering the children to go back to the [Petitioner]'s house to get their clothes. The victim told her grandmother she did not want to go, but her grandmother insisted, and she and her cousin returned to the [Petitioner]'s house, where the [Petitioner] and his wife gave them hot dogs for dinner; she did not say anything to the [Petitioner]'s wife. She testified that she was trying to leave, did not go over there to swim, and only stayed for about ten minutes. When they returned, her cousin told her grandmother about the assault. Her grandmother then called her mother. The victim then related the interview with police, the fact that she later told her mother everything, and her visit to Memphis, which she explained was "[s]o they could check me and see if anything was wrong with me." The victim testified she had bruises and scratches and that the [Petitioner] had put the bruises and scratches on her. She testified that the [Petitioner] didn't say anything except, finally, "Okay, I'll stop."

Amanda Taylor, a sexual assault nurse examiner for the city of Memphis, testified as an expert witness regarding her examination of the victim the morning following the rape. During Nurse Taylor's testimony, the prosecution introduced the report she prepared simultaneously with the examination. In a jury-out hearing, the defense raised a hearsay objection to the entirety of that portion of the report transcribing the narrative the victim gave Nurse Taylor. The defense raised a separate objection to references in the report to other criminal acts against the victim which were not charged in the indictment. The court redacted the report to remove the references to prior bad acts, but allowed the bulk of the narrative in as an exception to the prohibition against hearsay under Tennessee Rules of Evidence 803(4).

Nurse Taylor testified that she prepared the report in the ordinary course of business, and that her examination included an interview with the victim's parents, an interview with the victim alone, and an internal and external examination. Nurse Taylor read into the record the redacted description the victim gave of the assault:

> He dragged me into the bathroom and covered my mouth. He started touching and kissing on me. He pulled my pants down and then pulled his middle part out (clarified as penis) and put it in my middle part (clarified as vagina). He put it in this far (child held up fingers to show distance – distance measured with ruler and fingers photographed showing distance). I was able to kick the door open and started to run. He grabbed me by the neck and held me up and then he threw me against the wall. I got up and [tried] to run again and he picked me up by my neck again. He was choking me and I couldn't breath[e] so I kicked him and he dropped me, I fell on the floor, then he punched me in the face and kicked me in my stomach and my back. Then he picked me up by my neck again and threw me on the bed and pulled my pants and underwear down and put his middle part in again (clarified middle part as penis). He put his middle part in this far (child holds up fingers. Length measured to be 4 inches – photo taken of child[']s description of length with a ruler). I kicked him off and he smacked my face and held up his keys and asked me if I saw this and that these were the keys to his gun cabine[ ]t and that he would kill me if I told anyone. He held up some duck tape and threatened to use it on me. I was able to kick him again and was able to run, he almost caught me but he didn't, as I was running he was telling me to tell my

parents that the water on my face was from sweat rather than the tears that I was crying. I went to my grandma's house and told her.

Nurse Taylor testified that the evidence from her physical examination of the victim was consistent with the victim's narrative. She found bruising on the front of the victim's neck, on her right knuckle, and on her left ankle, and marks on her right shin, shoulder blade and right hip, as well as a healed scar on her right knee. With the exception of the scar, the injuries had been inflicted within the past seventy-two hours. She also found a laceration or blunt force injury in the area right outside the hymen; Nurse Taylor testified this was an indication of penetration. She testified that there was no tear in the hymen, but that the hymen can remain intact through penetration and even childbirth. She noted it was "highly unlikely" that the laceration was anything other than a sexual injury and "highly unlikely" that it was self-inflicted. Nurse Taylor collected swabs during the exam, and testified that there is "always some seepage of ejaculate. . . . So . . . there is always the possibility." The swabs tested negative for semen or alpha-amylase, which is a component of saliva.

Samantha Chumley, the [Petitioner]'s wife confirmed that the victim had been staying at her house off and on for a few weeks. She testified that sound would travel across the house if it was "loud enough" and confirmed that the TV was on that day; she did not remember if the washer or dryer were going. Ms. Chumley testified that she and her son went to Wal-Mart for thirty to forty-five minutes; she believed that the victim and her cousin were still there when she arrived home. She testified that the victim and her cousin went to their grandmother's house to eat dinner and came back, wanting to go swimming. She testified that they had not gone swimming that day, and testified that when the victim returned, Ms. Chumley could see the straps of a bathing suit under her clothes, and that she saw no marks or bruises on the victim. She testified the children did not stay long when they were told they couldn't go swimming.

On cross-examination, Ms. Chumley was questioned regarding an allegation that she and the [Petitioner] had tried to get the [Petitioner]'s teenaged son to assume responsibility for the rape. Regarding whether she participated in a telephone conversation with the [Petitioner] and his son about the [Petitioner]'s son taking the charge, Ms. Chumley testified: "I don't recall, but I mean, I'm not saying I didn't say it at the time." Ms. Chumley denied

that she had kept the [Petitioner]'s son from calling his mother to retrieve him for three days, and stated that he could have called her and had wanted to stay.

The [Petitioner] testified on his own behalf at trial. He confirmed that sound traveled in the house and testified that the house was small enough that someone in the living room could see into any of the bedrooms. According to the [Petitioner], they had planned to swim that afternoon, but he told the children that they couldn't swim because the family had errands. He testified that the victim and her cousin at first wanted to go to Wal-Mart, but changed their minds. The [Petitioner]'s son was watching either a Harry Potter movie or Avatar in the living room. The [Petitioner] testified that when his wife left the house, he got up to use the bathroom, and at that time, his wife, the victim, the victim's cousin, and the victim's grandmother were outside. When he emerged from the bathroom, he saw the victim and her cousin playing on the trailer, and he tapped the window, shook his head, and pointed at the victim. He testified that the victim's cousin did not come in again at that time, but the victim came in the house through the bathroom and bedroom to the living room, sat on the couch, and then came back in the bedroom, nearly bumping into the [Petitioner], who was returning from the bathroom. He testified that the victim told him she wanted to go see her grandmother. The [Petitioner] testified the bedroom door was open. He testified the television was on but that he was not doing laundry; he did not recall telling a detective that he was folding clothes on the bed. The victim and her cousin then went to the victim's grandmother's house. The [Petitioner] testified his wife was gone thirty-five to forty-five minutes, and when she returned, she took some purchases to the victim's grandmother. The children then came over to eat, but the victim's grandmother called and told them that the victim's other grandmother was there to pick her up. The [Petitioner] testified he did not touch or hurt the victim or have sexual contact with her. According to the [Petitioner], he was watching the movie with his son for the bulk of the time his wife was gone. He testified that the victim and her cousin were angry at him for not allowing them to swim and reprimanding them for playing on the trailer.

The [Petitioner] testified that he had told his son that if he committed the crime, he would need to take the charge. He denied telling his son that they had a plan for the [Petitioner] to avoid jail or telling his son that if he took the charge, he would not get any time because he was a juvenile. He denied refusing to let his son call his mother or leave for three days.

Shelly Chumley and Dustin Chumley, the [Petitioner]'s niece and nephew, testified that they had been in almost daily contact with the [Petitioner] growing up and maintained very frequent contact as adults. Both testified to his good character and honesty.

The [Petitioner]'s son, who was seventeen at the time of trial, testified that he had stayed with the [Petitioner] for approximately three weeks in June 2010. On June 27th, he was watching Harry Potter and the Goblet of Fire, a favorite movie that he had seen several times. He testified that the [Petitioner], the victim, and her cousin were watching the movie with him when Samantha Chumley left for Wal-Mart. He testified that the [Petitioner] and the victim were in a different room during part of the time that Ms. Chumley was gone; he was able to pinpoint their absence in relation to the movie by testifying that they were gone from the first task to the middle of the third task. He testified that he got up to see what they were doing in the middle of the second task because they had not reappeared. According to the [Petitioner]'s son, "Whenever I walked into the laundry room, I saw him bent over with his hands on his knees, looked like he was talking to her. . . . And then I walked back into the living room and sat down." The [Petitioner]'s son testified that the victim then returned and sat by her cousin in a chair. He did not notice anything about her, but was not looking at her. He did not see the victim or her cousin leave.

The [Petitioner]'s son also testified that his father and Samantha Chumley tried to persuade him to take the blame for the rape of the victim. He testified his father and stepmother would not let him leave or call his mother, and that eventually his mother came to get him without having been called. According to the [Petitioner]'s son, he agreed to help them when they told him they had a plan to keep the [Petitioner] out of jail, but changed his mind when they told him that the plan was that he would take the blame. This plan was revealed to him in face-to-face communications with Samantha Chumley and telephone conversations with the [Petitioner] and Samantha Chumley. They attempted to persuade him by telling him he would only be punished by a few days in juvenile hall because of his age. The telephone conversations, which had taken place while the [Petitioner] was in jail, were played for the jury. In the recordings, the [Petitioner] repeatedly tells his son that if he did something to the victim, he should confess. The [Petitioner] informs his son that otherwise the [Petitioner] will go to jail for twenty-five years. In one recording, Ms. Chumley repeats that the [Petitioner]'s son "ain't going to do nothing." The [Petitioner]'s son acknowledged that the [Petitioner] did not tell him to take the blame in the recordings, but testified that when Samantha

> Chumley states that the [Petitioner]'s son "ain't going to do nothing," she meant that he had declined to participate in their plan.

State v. William Franklin Chumley, No. W2011-01832-CCA-R3-CD, 2012 WL 3134033, at *1-5 (Tenn. Crim. App. Aug. 1, 2012) (footnote omitted).

The Petitioner subsequently filed a petition for post-conviction relief, alleging multiple instances of ineffective assistance of counsel at trial ("trial counsel"). At the post-conviction hearing, trial counsel testified that the defense's theory of the case was "[t]hat the child was angry at [the Petitioner] due to an altercation they had earlier in the day and also that [the Petitioner] wasn't allowing her to go swimming, and that she created just a fictitious story to retaliate." She explained that another attorney ("co-counsel") worked with her on this case and that co-counsel was the one who investigated the home and neighbors to corroborate the defense's theory.

Regarding jury selection, trial counsel stated that the Petitioner decided some of the peremptory strikes to exercise and that she and co-counsel chose the others. Trial counsel recalled cross-examining Nurse Amanda Taylor from the Memphis Sexual Assault Resource Center about DNA because DNA was not present in this case. Trial counsel agreed that, according to the victim's account of the events, the presence of DNA would be expected, except for the fact that "there was a lag time" between the incident and the victim's getting checked by Nurse Taylor. According to trial counsel, the victim's mother did not take the victim to the doctor until late afternoon of the day after the rape. Trial counsel did not hire a DNA expert because no DNA was found. She agreed that an expert might have explained more effectively to the jury why no DNA was found in this case.

Trial counsel recalled that the victim had the following injuries: "bruising on her neck, . . . several bruises on her back, maybe slight bruising on her arm, and a vaginal laceration." She agreed that, in her questioning of Nurse Taylor, Nurse Taylor acknowledged that the vaginal laceration could have resulted from something other than penetration. Moreover, Nurse Taylor had agreed that the injury was "not necessarily a sexual injury" but nevertheless was "suspect for sexual abuse." Trial counsel confirmed, however, that she did not hire an expert to explain to her the Adams Classifications Scales – the standards by which Nurse Taylor classified the victim's injuries. Furthermore, trial counsel was not aware that an injury like the victim's was "indeterminate for sexual abuse." Trial counsel agreed that it would have been helpful for a defense expert to impeach Nurse Taylor's testimony.

Trial counsel stated,

> Me or [co-counsel] or both of us attempted to meet with everyone who was present that day, everyone who spoke with the child, all the family members

> involved, and we investigated the crime scene where this allegedly occurred. We attempted to contact the current residents, but was – we were successful in reaching them. We were unsuccessful in ever gaining access or entry to that house.
>
> We did consult with an expert regarding just generally about sexual abuse in this case, not necessarily in preparation for being called to trial, but just to give an explanation, I guess a file review of the medical records and explain them further.

Trial counsel stated that she attempted to interview the victim but that the victim's mother would not allow it.

On cross-examination, trial counsel stated that she did not recall the Petitioner's asking her to excuse a juror that was not excused. She confirmed that the Petitioner provided a substantial list of potential character witnesses but that she only was able to get in contact with approximately half of them. Trial counsel did, however, call two of those character witnesses to testify.

Co-counsel testified that, in preparation for trial, he met with the Petitioner's son and several others in his family. He tried to get permission to investigate the home where the event occurred but never was able to do so. Instead, the Petitioner explained the layout of the house, and co-counsel created a diagram according to the Petitioner's explanation. The Petitioner also testified at trial regarding the fact that the incident could not have occurred without the two other people in the house hearing it happen.

Co-counsel stated that Dr. Lisa Piercey was hired as a defense expert but was not helpful because "she was not willing to say that the injury was not caused by penetration." When asked whether an expert would have been helpful to impeach Nurse Taylor "if [she] was passing on false information," co-counsel stated that "what Dr. Piercey told us basically supported the Rape Crisis Center nurse's testimony, or her statement."

When asked if it would have been helpful to hire a DNA expert in this case, co-counsel responded, "Well, there was no DNA." Co-counsel testified that the Petitioner had more input than trial counsel or co-counsel with respect to exercising peremptory challenges.

The Petitioner testified that trial counsel and co-counsel (collectively "counsel") met with him approximately once a month to once every two months for the fourteen months leading up to his trial. Approximately one week prior to trial, trial counsel gave the Petitioner a list of potential jurors to review. The Petitioner stated, however, that he knew people "by faces but not by names." When he entered the courtroom on the first morning of

the trial, he saw a man named Daniel Winters. The Petitioner told trial counsel that Winters "had to come off or [the Petitioner] was going to prison." He explained that either Winters or Winters' twin brother "swore to get [the Petitioner] because [the Petitioner] refused to sell him alcohol one night." However, Winters stayed on the jury. The Petitioner also stated that he wanted two females struck from the jury because the Petitioner and these two women "used to call each other boyfriend-girlfriend" as children. The Petitioner agreed, however, that, at the point he attempted to strike one of the women, he no longer had any peremptory strikes left. On cross-examination, the Petitioner acknowledged that other jurors were struck from the jury at his request, but he could not recall how many requests he made.

The State recalled co-counsel to testify. Co-counsel stated that he did not remember the Petitioner's mentioning Winters as a juror that needed to be excluded. Co-counsel testified, "It was [the Petitioner's] case. . . . [H]e had first priority on picking who was excluded." The first time that co-counsel recalled the Petitioner's having any complaints about an individual sitting on the jury was sometime after the trial was over.

At the conclusion of the hearing, the post-conviction court took the matter under advisement and issued a written order denying relief on February 4, 2013. The Petitioner timely appealed, asserting that counsel was deficient in failing to call an expert to testify at trial, failing to "exercise peremptory challenges in accordance with Petitioner[']s wishes," and failing to properly investigate the Petitioner's case.

Analysis

Relief pursuant to a post-conviction proceeding is available only when the petitioner demonstrates that his or her "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103 (2006). To prevail on a post-conviction claim of a constitutional violation, the petitioner must prove his or her allegations of fact by "clear and convincing evidence." Tenn. Code Ann. § 40-30-110(f) (2006); see also Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). This Court will not overturn a post-conviction court's findings of fact unless the preponderance of the evidence is otherwise. Pylant v. State, 263 S.W.3d 854, 867 (Tenn. 2008); Sexton v. State, 151 S.W.3d 525, 531 (Tenn. Crim. App. 2004). We will defer to the post-conviction court's findings with respect to the witnesses' credibility, the weight and value of their testimony, and the resolution of factual issues presented by the evidence. Momon, 18 S.W.3d at 156. With respect to issues raising mixed questions of law and fact, however, including claims of ineffective assistance of counsel, our review is de novo with no presumption of correctness. See Pylant, 263 S.W.3d at 867-68; Sexton, 151 S.W.3d at 531.

The Petitioner argues that he was denied effective assistance of counsel at trial. The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel at trial.[1] Both the United States Supreme Court and the Tennessee Supreme Court have recognized that this right is to "reasonably effective" assistance, which is assistance that falls "within the range of competence demanded of attorneys in criminal cases." Strickland v. Washington, 466 U.S. 668, 687 (1984); see also Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). The deprivation of effective assistance of counsel at trial presents a claim cognizable under Tennessee's Post-Conviction Procedure Act. See Tenn. Code Ann. § 40-30-103; Pylant, 263 S.W.3d at 868.

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must establish two prongs: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. See Strickland, 466 U.S. at 687; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996). The petitioner's failure to establish either prong is fatal to his or her claim of ineffective assistance of counsel. Goad, 938 S.W.2d at 370. Accordingly, if we determine that either prong is not satisfied, we need not consider the other prong. Id.

To establish the first prong of deficient performance, the petitioner must demonstrate that his lawyer's "acts or omissions were so serious as to fall below an objective standard of 'reasonableness under prevailing professional norms.'" Vaughn v. State, 202 S.W.3d 106, 116 (Tenn. 2006) (quoting Strickland, 466 U.S. at 688). Our supreme court has explained that:

> [T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations.

Baxter, 523 S.W.2d at 934-35 (quoting Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974)). When a court reviews a lawyer's performance, it "must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from the perspective of counsel at that time." Howell

[1] The Sixth Amendment right to counsel is applicable to the States through the Fourteenth Amendment to the United States Constitution. See Gideon v. Wainwright, 372 U.S. 335, 342 (1963); State v. Howell, 868 S.W.2d 238, 251 (Tenn. 1993).

v. State, 185 S.W.3d 319, 326 (Tenn. 2006) (citing Strickland, 466 U.S. at 689). Additionally, a reviewing court "must be highly deferential and 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" State v. Honeycutt, 54 S.W.3d 762, 767 (Tenn. 2001) (quoting Strickland, 466 U.S. at 689). We will not deem counsel to have been ineffective merely because a different strategy or procedure might have produced a more favorable result. Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). We recognize, however, that "deference to tactical choices only applies if the choices are informed ones based upon adequate preparation." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992) (citing Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982)).

As to the prejudice prong, the petitioner must establish a "reasonable probability that but for counsel's errors the result of the proceeding would have been different." Vaughn, 202 S.W.3d at 116 (citing Strickland, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "That is, the petitioner must establish that his counsel's deficient performance was of such a degree that it deprived him of a fair trial and called into question the reliability of the outcome." Pylant, 263 S.W.3d at 869 (citing State v. Burns, 6 S.W.3d 453, 463 (Tenn. 1999)). "A reasonable probability of being found guilty of a lesser charge . . . satisfies the second prong of Strickland." Id.

Failure to Call Expert at Trial

The Petitioner first asserts that counsel was ineffective in failing to call either a DNA or sexual assault expert to testify at trial. The Petitioner contends that a DNA expert could have explained the significance of a lack of DNA found in this case and that a sexual assault expert could have impeached Nurse Taylor's testimony, which allegedly relied on the Adams Classification Scales.

The post-conviction court stated in its order denying relief,

> [Co-counsel] testified that the stipulation as to the lab report was sufficient in his opinion. The report stated the same as what an expert would state. In his opinion it would be of no benefit to have an expert testify about the absence of DNA. He consulted with Dr. Piercey who explained how a nine year old's body would excrete DNA, and he did not feel that an expert would have been beneficial.
>
> The state's nurse testified at trial that the victim had bruising consistent with the complaint given by the victim. The nine year old victim had a

> laceration or blunt force injury in the area right outside the hymen, which is an indication of penetration.

Accordingly, the post-conviction court determined that the "Petitioner has failed to show how the testimony of a DNA expert would have been beneficial, or that counsel was deficient in failing to hire an expert."

The record does not preponderate against the post-conviction court's findings. Co-counsel stated at the post-conviction hearing that calling a DNA expert to testify at trial would have been pointless, given that no DNA was found from the examination of the victim. Regarding a sexual assault expert, co-counsel testified that the defense hired Dr. Piercey as an expert but that she was not helpful because "she was not willing to say that the injury was not caused by penetration." Accordingly, we will defer to counsel's decision not to call Dr. Piercey as an expert witness at trial. See Honeycutt, 54 S.W.3d at 767.

The Petitioner asserts that calling an expert to testify would have impeached Nurse Taylor's testimony regarding the Adams Classification Scales. However, the Petitioner has not established that Nurse Taylor's testimony was in fact impeachable, either through the testimony of an expert at the post-conviction hearing or through admission of the treatise on which Nurse Taylor relied – the Adams Classification Scales.

Therefore, the Petitioner has failed to establish deficient performance in this regard. Thus, we need not address the prejudice prong. See Goad, 938 S.W.2d at 370. Accordingly, the Petitioner is entitled to no relief on this issue.

Failure to Exercise Petitioner's Requested Peremptory Challenges

The Petitioner also argues that counsel "failed to exercise the peremptory challenge as directed by the Petitioner." As support, the Petitioner relies on his testimony at the post-conviction hearing that he specifically requested that co-counsel strike Daniel Winters from the jury panel "or [he] was going to prison."

The post-conviction court accredited co-counsel's testimony at the hearing over the Petitioner's that the Petitioner did not make such a request. According to co-counsel, the first time he recalled the Petitioner's having any complaints about an individual sitting on the jury was sometime after the trial was over. We defer to the post-conviction court's factual finding about witness credibility. See Momon, 18 S.W.3d at 156. Moreover, the Petitioner acknowledged that other jurors were struck from the jury at his request and that, at some point, he had no more peremptory challenges left to exercise. Thus, the Petitioner has failed to establish deficient performance on the part of counsel. Therefore, we need not address the

prejudice prong. See Goad, 938 S.W.2d at 370. Accordingly, the Petitioner is entitled to no relief on this issue.

Failure to Investigate

Lastly, the Petitioner contends that counsel was ineffective in the investigation of his case. Specifically, the Petitioner argues that trial counsel and co-counsel should have familiarized themselves with the Adams Classification Scales prior to trial.

In its order denying relief, the post-conviction court found that counsel, in preparation for trial, "consulted with an expert, Dr. Piercey, about the medical records and reports and the findings." The post-conviction court determined that the Petitioner failed to establish deficient performance or prejudice in this regard.

Looking first to the prejudice prong, we note once again that the Petitioner has failed to establish the content, and the resulting significance, of the Adams Classification Scales because the Petitioner did not provide the treatise at the post-conviction hearing. Therefore, the Petitioner has failed to establish a reasonable probability that, but for counsel's failure to study this treatise, "the result of the proceeding would have been different." Vaughn, 202 S.W.3d at 116 (citing Strickland, 466 U.S. at 694). Thus, the Petitioner has not established prejudice, and we need not address the deficiency prong. See Goad, 938 S.W.2d at 370. Accordingly, the Petitioner is entitled to no relief on this issue.

CONCLUSION

For the foregoing reasons, we conclude that the Petitioner is not entitled to post-conviction relief. Therefore, we affirm the judgment of the post-conviction court.

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JEFFREY S. BIVINS, JUDGE