The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Assistant Attorney General with the Office of the Tennessee Attorney General and Reporter

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

2015, TN BPR Number 034492

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee, BPR Number 034492, October 2015, currently active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Office of the Tennessee Attorney General and Reporter, Nashville and Memphis, Tennessee (March 2016 – Present): In March 2016, I began working as an Assistant Attorney General with the Criminal Appeals Division. My work in that role involved filing the State of Tennessee's briefs in the Court of Criminal Appeals and responding to motions for habeas corpus filed in various state trial courts. In May 2017, I transferred to the Memphis Division to expand my practice. In the Memphis Division, I am able to practice both civil and criminal law in a variety of courts, including the United States Court of Appeals for the Sixth Circuit, the Tennessee Court of Appeals, and state and federal trial courts.

The Kennedy Law Firm, PLLC, Clarksville, Tennessee (August 2015-December 2015): I worked as a law clerk at Kennedy Law Firm from August to October 2015 while awaiting my Tennessee Bar Exam results. After I became licensed in October 2015, I represented indigent criminal defendants in General Sessions Court in Montgomery and Houston counties. I also counseled clients on personal injury and landlord-tenant issues.

Other: Between December 2015 and March 2016, I worked part-time completing various title work for loans and purchases for Farmers & Merchants Bank in Mississippi while studying for the Mississippi Bar Examination. In April 2016, I passed the Mississippi Bar Examination and became eligible to practice law in Mississippi. Due to my position as an Assistant Attorney General for the State of Tennessee, I have not completed the remaining requirements to practice law in Mississippi.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

As an Assistant Attorney General with the Memphis Division, I litigate cases in both civil and criminal law. Currently, I estimate that about 90% of my caseload involves civil matters. Those matters include constitutional and statutory challenges to state laws, suits against state officials such as district attorneys general, and civil challenges to overturn convictions or sentences. The remaining 10% of my practice includes filing briefs on behalf of the State of Tennessee in the Court of Criminal Appeals.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

Throughout my legal career, I have practiced in various state and federal trial and appellate courts. When I first became licensed, the bulk of my practice involved receiving criminal appointments to represent indigent clients in General Sessions Court. When I started my position as Assistant Attorney General, I spent over a year filing briefs in the Court of Criminal Appeals, responding to inmate requests for habeas corpus relief in Tennessee criminal and circuit

courts, and filing responsive documents to an appellant's request for permission to appeal before the Tennessee Supreme Court. After transferring to the Memphis Division, and in addition to my work in the Court of Criminal Appeals, I took on cases involving various civil matters in both state and federal trial courts and the Tennessee Claims Commission. Although I worked with a supervising attorney on these matters, I was entrusted with drafting a motion, response, or pleading to advance the case, and I was also with conducting the depositions of important witnesses and experts. In addition to my experience in drafting substantive motions and conducting discovery in trial courts, I also drafted briefs filed in the United States Court of Appeals for the Sixth Circuit and in the Tennessee Court of Appeals.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Not applicable.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not applicable.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

Not applicable.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Not applicable.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of Mississippi, **Oxford, Mississippi,** June – July 2006. In high school, I attended the University of Mississippi's Summer College program that allowed high school students to obtain college credits. No degree was offered in this program.

University of Tennessee, **Knoxville, Tennessee,** August 2007 – December 2011. Graduated with a degree in Biological Sciences.

University of Memphis, Cecil C. Humphreys School of Law, **Memphis, Tennessee,** August 2012 – May 2015. Graduated *Cum Laude* with a Juris Doctorate. Articles Editor for The University of Memphis Law Review.

PERSONAL INFORMATION

15. State your age and date of birth.

I am currently 33 years old. My date of birth is [redacted] 1988.

16. How long have you lived continuously in the State of Tennessee?

I have lived in the State of Tennessee continuously for 33 years.

17. How long have you lived continuously in the county where you are now living?

I have lived in Shelby County, Tennessee, continuously for the last four years.

18. State the county in which you are registered to vote.

Shelby County, Tennessee

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state

whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

In 2008, I completed a pre-trial diversion program for an underage consumption charge in Knox County. The charge has since been expunged.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

Not applicable.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

Not applicable.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

Not applicable

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

Not applicable.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This

question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Please see response to Question 20.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Member, Christ Church United Methodist – April 2021 to present

Committee Member, Campaign for Equal Justice, Memphis Bar Association – 2019-2020

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

Lambda Chi Alpha, Fraternity – During my undergraduate career, I was a member of the Lambda Chi Alpha fraternity. The fraternity limited membership to males only.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Bar Association, approximately 2016-2017

Memphis Bar Association, approximately 2018-2020

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Not Applicable.

30. List the citations of any legal articles or books you have published.

Not Applicable.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Not Applicable.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not Applicable.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

Not Applicable.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Attached please find two appellate briefs that I filed in the Court of Criminal Appeals. The briefs contain only minimal edits by a supervising attorney within the Office of the Tennessee Attorney General and Reporter. The edits did not substantively alter the briefs' contents.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I am seeking a judgeship on the Tennessee Court of Criminal Appeals to expand my commitment to serve the citizens of the State of Tennessee. I enjoy reading, analyzing, and writing about legal issues, and my desire to continue to grow and develop these skills will serve well me on the appellate bench. My appointment to this judgeship would also allow me to implement my diverse experience in other legal areas to enlarge the Court's repertoire to resolve issues in matters relating to the State of Tennessee's criminal justice process.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I have helped raise funds as a committee member for the Memphis Bar Association's Campaign for Equal Justice.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I seek appointment to fulfill the judicial vacancy on the Tennessee Court of Criminal Appeals, Western Grand Division. The Court hears trial court appeals in felony and misdemeanor cases, post-conviction petitions, and other post-judgment motions relating to a conviction or sentence. The Court consists of 12 judges of varying legal backgrounds who meet monthly in panels of three in Jackson, Nashville, Knoxville, or other places as necessary, such as Belmont University. My selection would bring a learned approach to the matters appealed and issues raised to the Court. Additionally, I would draw upon my diverse legal experience to resolve unique and novel issues as they arise before the Court.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I am currently a member of Christ Church United Methodist in Memphis Tennessee, and I volunteer for various opportunities within the Church to help strengthen my community. I would continue to be involved in such opportunities as the Rules of Judicial Conduct permit and as time allows.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

Each day, I strive to develop my skills to become a better professional in the practice of law. In addition to my enjoyment of reading, analyzing, and writing about the law, I seek ways to continue to hone those abilities. I continue to craft those skills by reading books about legal writing, reviewing briefs by other attorneys, and by studying court opinions. My current practice allows me to apply my legal research and writing abilities to a broad range of both civil and criminal matters, including cases that involve filing briefs in the Court of Criminal Appeals. Further, in all of my previous professional work experiences, I have aimed to foster a positive working environment with both attorneys and staff members.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Upon admission to practice law in Tennessee, I took an oath to uphold the rule the law. Throughout my time in both the private practice of law and as an attorney for the State of Tennessee, I have remained steadfast in my commitment to that oath. Any personal disagreement I may have with the outcome of a matter is of no consequence to me so long as the outcome is supported by the rule of law. For example, in criminal matters, a trial court has broad discretion by statute to impose a particular sentence, including deciding whether to grant probation and determining the length of a sentence. Criminal defendants will often challenge their sentences before the Court of Criminal Appeals. In responding to such arguments on behalf of the State, I have argued that the statute supported the trial court's decision, even when I believed that the facts warranted a different sentence than the one imposed.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. **Jim Newsom**, Senior Counsel, Office of the Tennessee Attorney General and Reporter, Memphis, TN, [redacted]

B. **Zachary Hinkle**, Associate Solicitor General, Office of the Tennessee Attorney General and Reporter, Nashville, TN, [redacted]

C. **Andrew Coulam**, Senior Assistant Attorney General, Office of the Tennessee Attorney General and Reporter, Nashville, TN [redacted]

D. **Michael Sadker**, Area Manager, Amazon, Murfreesboro, TN, [redacted]

E. **Benjamin Gibson**, Supply Chain Executive, Kordsa, Chattanooga, TN, [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals, Western Division of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: October 11, 2021.

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Robert W. Wilson

Type or Print Name

Signature

October 11, 2021

Date

034492

BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUSTICE BALL,	)	
	)	
Appellant,	)	
	)	**SHELBY COUNTY**
v.	)	**NO. W2019-02239-CCA-R3-PC**
	)	
STATE OF TENNESSEE,	)	
	)	
Appellee.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE SHELBY COUNTY CRIMINAL COURT

BRIEF OF THE STATE OF TENNESSEE

HERBERT H. SLATERY III
Attorney General and Reporter

ROBERT W. WILSON
Assistant Attorney General
Office of the Attorney General
And Reporter
40 South Main Street, Suite 1014
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B.P.R. No. 34492

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the post-conviction court properly concluded that Petitioner received effective assistance of counsel where trial counsel made an informed, strategic decision in advising Petitioner not to testify at trial and by not impeaching evidence that was favorable to Petitioner's defense. (Pet'r's Issues I and II.)

STATEMENT OF THE CASE

The Shelby County Grand Jury indicted Petitioner, Justice Ball, on one count of especially aggravated kidnapping, one count of aggravated robbery, one count of carjacking, one count of employing a firearm during the commission of a dangerous felony, and evading arrest. *State v. Ball*, No. W2016-01358-CCA-R3-CD, 2017 WL 2482996, at *1 (Tenn. Crim. App. June 7, 2017), *perm. app. denied* (Tenn. Oct. 5, 2017). After trial, a jury found Petitioner guilty on all five counts, and the trial court imposed an effective fifteen-year sentence. *Id.* at *1-2.

On October 18, 2017, Petitioner filed a timely petition for post-conviction relief. (I, 19-25.) After the post-conviction court appointed Petitioner with counsel, (I, 26-27), Petitioner filed two amended requests for relief on August 27, 2018, (I, 29-30), and February 18, 2019, (I, 31-32).[1]

The Honorable Glenn Wright, Shelby County Criminal Court Judge, held a hearing on Petitioner's request for post-conviction relief on June 27, 2019. (I, 35.) On November 26, 2019, the post-conviction court entered a written order denying Petitioner's request. (I, 36-48.) In the order, the post-conviction court determined that Petitioner knew that he had a right to testify at trial, knew that he could refuse to testify, consulted with trial counsel prior to making his decision, discussed the advantages and disadvantages of testifying, and waived his right to testify. (I, 40-46.) The court further concluded that Petitioner was not coerced by his trial counsel into waiving his right to

[1]Neither of the amended petitions were "verified under oath." Tenn. Code Ann. § 40-30-104(e).

testify at trial, and that trial counsel made an informed, strategic decision in not challenging inconsistencies between the victim's testimony and Petitioner's version of the facts because the victim's testimony was more favorable to Petitioner's defense. (I, 38-48.) Petitioner timely filed his notice of appeal from the post-conviction court's order on December 19, 2019. (I, 54-55.)

STATEMENT OF THE FACTS

Trial

In the early morning hours on July 8, 2014, the victim was driving home from work when his vehicle stalled. *Ball*, 2017 WL 2482996, at *1. As the car restarted, two men approached the victim, one man hit the victim with his weapon, and both men demanded money. *Id.* Although the victim gave the men his wallet and cell phone, the men got into the backseat of the victim's vehicle, continued to hit him, and ordered him to drive to an ATM. *Id.*

During the drive, the perpetrators instructed the victim to make a stop near a Wal-Mart. *Id.* Once there, the perpetrators began "shouting at two of their friends across the road." *Id.* The friends, later identified as Petitioner and his co-defendant, got into the vehicle; Petitioner got into the front seat, the co-defendant in the backseat. *Id.* According to the victim, the co-defendant demanded the weapon from another perpetrator and continued hitting the victim while Petitioner "did not say anything or hit him." *Id.*

After picking up Petitioner, the other perpetrators told the victim to drive to another ATM at a gas station. *Id.* Once there, the victim explained that he could not withdraw cash, and one of the original perpetrators responded by hitting him on his head, "causing him to fall out of the car." *Id.* Then "the victim ran away and called police from a nearby gas station." *Id.*

Less than ten minutes after the victim contacted the police, officers located the victim's car. *Id.* Once officers turned on the lights of their patrol car, the perpetrators jumped out of the vehicle and ran in

opposite directions. *Id.* at *1-2. At trial, one officer testified that he saw Petitioner jump out of the backseat of the car. *Id.* at *2. A crime scene investigator lifted fingerprints from the victim's cell phone, and, at trial, an expert in latent prints "testified that [Petitioner's] left palm print was found on the victim's cell phone." *Id.* Officers arrested Petitioner that night, and the victim identified him as one of the perpetrators. *Id.* at *2-3.

At trial, the State offered Petitioner's statement into evidence. *Id.* at *2.[2] In the statement, Petitioner told officers that he saw the perpetrators in the victim's vehicle and he "flagged them down." (II, Ex. 2, at 2-3.) According to Petitioner, he knew "nothing about the stolen car," admitted that he "knew about [the other perpetrators] trying to get the [victim's] money and taking him to the ATM," and that he "turn[ed] off the victim's cell phone" when the other perpetrators told him to "turn it off because they can track it." (II, Ex. 2, at 1-3); *Ball*, 2017 WL 2482996, at *2. Petitioner further explained that he sat in the backseat of the vehicle, did not hit the victim, and that another perpetrator pulled the victim out of the vehicle before "push[ing] [him] away" from the vehicle. (II, Ex. 2, at 1-3); *Ball*, 2017 WL 2482996, at *2.

Post-Conviction Hearing

Petitioner testified at his post-conviction hearing. (III, 10.) He recalled informing the court twice at trial that he wanted to testify. (III, 11.) But according to Petitioner, he did not testify because Gregory

[2] Petitioner's statement was also made as an exhibit during his post-conviction hearing. (II, Ex. 2, at 1-4; III, 104.)

Allen, his trial counsel, asked the court for a five-minute recess and "persuaded" him not to testify; Petitioner claimed that Mr. Allen told him that he would "argue all of the inconsistencies that [Petitioner] wanted him to argue." (III, 11-12.) Petitioner stated that he informed Mr. Allen that he wanted several inconsistencies brought to the jury's attention, such as his and the victim's seating arrangement in the vehicle, how many persons were in the vehicle, and that the victim gave an incorrect description of Petitioner's clothing. (III, 12.) In addition to those inconsistencies, Petitioner wanted Mr. Allen to inform the jury that Petitioner was not truthful about the perpetrators' identities in his statement. (III, 13-14.) According to Petitioner, the remainder of his statement was truthful. (III, 14.)

Petitioner maintained that his co-defendant was not involved in the crime and that he did not see his co-defendant prior to trial. (III, 14-15.) Petitioner further claimed that he gave the names of the other perpetrators to both Mr. Allen and his investigator. (III, 15.)

At the post-conviction hearing, Petitioner gave his version of the facts he wanted raised at trial. According to Petitioner, he was walking from his brother's apartment when he saw the victim's vehicle; Petitioner flagged down the vehicle because he recognized a "masked face sticking out" of the vehicle and he "needed a ride home." (III, 19-20.) Petitioner got into the vehicle and saw four other perpetrators and the victim. (III, 19.) The victim was trapped in the middle of others in the backseat, another perpetrator was driving, and Petitioner got into the back-passenger seat. (III, 23-24.) Petitioner claimed that he did not know the victim, how the perpetrators met the victim, or that a robbery

was ongoing. (III, 19-20.) The perpetrators drove to an ATM and, once there, the victim stated that he could not retrieve money out of the ATM. (III, 20.) One of the perpetrators got out of the vehicle, pulled the victim out of the car and "beat him up." Once the perpetrator got back into the car, Petitioner and the other perpetrators drove away from the area. (III, 20-21.) After leaving the area, Petitioner picked up the victim's phone that was inside of the vehicle. (III, 23.) When Petitioner started to use the cell phone, another perpetrator told him to cut off the phone so that they could avoid being tracked. (III, 63.) Petitioner claimed that he only cut the screen off. (III, 63.)

Within three minutes, officers began chasing after the vehicle. (III, 21.) According to Petitioner, he told the other perpetrators to "pull over" and "take the ticket;" one of the perpetrators told Petitioner that they would not stop because the vehicle was stolen. (III, 21.) When the driver did not stop, Petitioner started "hitting him in the back of the head." After the car slowed, Petitioner got out of the vehicle and ran from the officers. (III, 21-22, 25.) According to Petitioner, he did not know that the other perpetrators were robbing the victim until after a perpetrator pulled the victim out of the car and when they began running from officers. (III, 29.) Petitioner first ran into the woods before coming back out and walking towards a police car. (III, 25-26.) When Petitioner attempted to tell an officer that he was one of the people who ran from the car, an officer told him to "keep on walking," and as Petitioner began walking away, officers arrested him. (III, 26.)

After his arrest, Petitioner gave officers a statement. (III, 26.) Petitioner, however, did not tell the officers "all [of] the people that were

involved" because he "thought [they] were friends." (III, 26-27.) Although he first claimed that the victim failed to properly identify him, Petitioner later conceded that the victim identified him and that his finger and palm prints were found on the victim's phone. (III, 29-30, 41-43.) Petitioner did not recall telling officers that he turned off the victim's phone to avoid being tracked, nor did he inform officers that he attempted to stop the other perpetrators. (III, 35-36, 45.)

At the post-conviction hearing, Petitioner asserted that Mr. Allen would not allow him to testify as to the inconsistencies between his version of events and the State's witnesses' testimonies. (III, 25.) He further claimed that Mr. Allen left out "[j]ust about every[]" inconsistency that he wanted raised at trial during closing argument. (III, 30-31.) Petitioner wanted Mr. Allen to impeach the victim's testimony by asserting that a perpetrator drug the victim out of the vehicle, that Petitioner was in the backseat of the car rather than the front seat, and that Petitioner was not truthful in his statement. (III, 32-33, 46.) Petitioner recalled that the victim testified that a perpetrator in the backseat hit him as he was driving, and Petitioner denied that he hit him. (III, 33-34.)

Petitioner acknowledged that Mr. Allen's trial strategy was to rely on the victim's favorable testimony. (III, 62-63.) Mr. Allen wanted to establish that Petitioner was not criminally responsible because, once Petitioner got into the vehicle, he "didn't say anything, . . . didn't have a gun, didn't hit the victim[,] and . . . didn't know what was going on." (III, 34-35.) Petitioner recalled that he and Mr. Allen discussed the possibility of testifying "depend[ing] on how the proof came in at trial."

(III, 36-37.) At trial, Petitioner stated that Mr. Allen was surprised when he told the court that he wanted to testify, and that he and Mr. Allen went into another room to discuss Petitioner testifying and the victim's testimony. (III, 37-38.) Petitioner stated that Mr. Allen believed that the victim's testimony had not been harmful and that, based on the proof, he could argue that Petitioner "didn't know when [he] got in that car what was going on." (III, 37-38.) Mr. Allen told Petitioner that he would "get some tough questions about [his] statement" if he testified and that he did not believe Petitioner testifying was the right strategy. (III, 38.) Based on Mr. Allen's advice, Petitioner returned to the courtroom and informed the court that he decided not to testify. (III, 38-40, 57-58.) According to Petitioner, he decided not to testify after Mr. Allen told him that he would argue the inconsistencies during closing argument that Petitioner wanted raised. (III, 56.)

Mr. Allen, who represented Petitioner both at trial and on direct appeal, also testified at the post-conviction hearing. (III, 64-65.) While discussing Petitioner's appeal and the Tennessee Court of Criminal Appeals' decision, Mr. Allen recalled that the decision stated that a jury could return inconsistent verdicts as to Petitioner and his co-defendant. (III, 74-75.) Mr. Allen testified that the proof at trial established that Petitioner had given a statement implicating himself in the crimes, his fingerprints were found on an item within the vehicle, and that an officer had identified him as running from the victim's vehicle. (III, 75.) Mr. Allen explained that those were "three distinguishing facts that only applied to" Petitioner. (III, 75.)

Regarding his trial strategy, Mr. Allen stated that he did not want to "go after" the victim by impeaching him "because his testimony was, in my opinion, . . . very favorable to" Petitioner. (III, 76.) Mr. Allen wanted to establish that Petitioner was not criminally responsible for the other perpetrators' conduct because Petitioner's "mere presence alone [wa]s not enough." (III, 77-78, 106.) At trial, Mr. Allen was placed in the "unique position" where the version of events "given by the victim was more favorable to [Petitioner] than the version that [Petitioner] had given to police." (III, 77.) He recalled the victim testifying that the other perpetrators flagged down Petitioner while in the victim's car, Petitioner got into the front seat of the vehicle and did not speak, carry a weapon, or strike the victim; according to Mr. Allen, the proof at trial demonstrated that Petitioner "didn't direct anybody" or "further the plan" to commit crimes against the victim. (III, 77-78.) Mr. Allen did not believe that impeaching the victim's testimony would be beneficial "because everything that [the victim] said that [Mr. Allen] felt was damaging[] was pointed towards" the co-defendant. (III, 76, 106.) That is, Mr. Allen did not want to harm the victim's "beneficial testimony" regarding Petitioner's role, or lack thereof, in the criminal activity. (III, 115.)

Although Mr. Allen knew that Petitioner's statement would be introduced into evidence, Mr. Allen believed that trying to rectify the inconsistencies Petitioner wanted corrected "was simply impeaching testimony that was favorable to" Petitioner. (III, 76-77.) Through the victim's testimony, Mr. Allen attempted to "distanc[e] [Petitioner] from all those facts" about the other perpetrators' conduct. (III, 78.) Mr.

Allen stated that he and the prosecutors were "shocked" when the jury found Petitioner guilty and not the co-defendant.[3] (III, 84-85.) Mr. Allen did not believe that there was a correlation between Petitioner not testifying and being found guilty and the co-defendant testifying and receiving a hung jury. (III, 135.) Based on the verdict, Mr. Allen believed that the jury rejected the version of events contained in Petitioner's statement as well as some parts of the victim's testimony. (III, 106-07.)

Mr. Allen testified that he "would have lost a lot of credibility with the jury" if he challenged Petitioner's identity directly. (III, 80.) Mr. Allen could not challenge Petitioner admitting in his statement that he was in the vehicle, Petitioner's palm prints found on the victim's phone, or the officer's identification of Petitioner. (III, 80, 115.) But Mr. Allen did file a motion to suppress the victim's "show-up" identification of Petitioner; after the trial court denied the motion, Mr. Allen focused on minimizing Petitioner's level of responsibility for the other perpetrators' conduct. (III, 83-84.) Mr. Allen also recalled requesting a mistrial after an officer testified that he knew Petitioner previously because of the concern that "the jury would infer that [the knowledge] was from [a] prior arrest[] or misconduct[] rather than . . . community policing." (III, 82.)

Mr. Allen also testified about his meetings with Petitioner about testifying and the evidence against him. Before trial, Mr. Allen and Petitioner discussed the proof that would be presented, potential

[3] Petitioner's co-defendant pleaded guilty after the trial. (III, 94.)

questions for witnesses, the motion to suppress, and the possibility of Petitioner testifying. (III, 87-88.) Mr. Allen stated that he attempted to prepare Petitioner to testify and discussed his police statement. (III, 129-30.) Mr. Allen also had several meetings with Petitioner about Petitioner's version of the facts because he was not "consistent in what he was telling" him. (III, 103-04.) At different meetings, Petitioner would change his version of the facts from those contained in his statement and from their prior discussions. (III, 105-06.)

At trial, Mr. Allen recalled informing Petitioner about "the pros and cons of testifying" and that he believed Petitioner's alleged inconsistencies were not material. (III, 88.) Since there was no dispute that Petitioner was in the vehicle, Mr. Allen explained to Petitioner that it would be immaterial for the jury to hear conflicting testimony that Petitioner was in the backseat where "all of the violence [wa]s happening." (III, 88-89, 124.) He also told Petitioner that, by testifying, he would open the door to the inconsistencies contained within his statement and testimony, and that he could "lose credibility" with the jury. (III, 89, 123-24.) At the time of trial, Petitioner also had a pending indictment for aggravated robbery, and by testifying, Petitioner could have also opened that door on cross-examination. (III, 89.) Although Mr. Allen advised Petitioner not to testify because the victim's testimony was favorable, Mr. Allen stated that it was Petitioner's "decision and his decision alone" regarding whether to testify, and that he had "never made that decision for a criminal defendant." (III, 88-90.) Mr. Allen did not tell Petitioner whether he could or could not testify. (III, 90-91.) Mr. Allen believed that Petitioner took his advice not to

testify into consideration, weighed his options, and made the decision not to testify. (III, 132.)

Mr. Allen denied promising Petitioner that he "would argue anything[] specific" during closing argument. (III, 90, 108, 110-11.) Mr. Allen recalled telling Petitioner that he "had the ability to argue inconsistencies during closing," and he testified that, during closing, he argued "the most important things . . . to do [Petitioner] justice." (III, 108-09.) He did not believe that "[i]mpeaching a victim who ha[d] given favorable testimony" was the best strategy, and that it would not be in Petitioner's "best interest to testify." (III, 90-91.) Mr. Allen recalled informing Petitioner that neither the judge nor jury would find Petitioner credible if he attempted to deny his statement. (III, 92.) According to Mr. Allen, he and Petitioner had a great working relationship throughout his representation. (III, 91.)

Mr. Allen also testified that Petitioner's version of events may have been harmful to his defense. Mr. Allen explained that, regarding Petitioner's request to inform the jury that he told police the wrong identities for the other perpetrators, Petitioner "[e]ssentially . . . wanted [Mr. Allen] to put on that he lied to the police." (III, 124-25.) Further, Mr. Allen thought that Petitioner would lose credibility with the jury if he testified that six people were in the victim's vehicle at one point because the vehicle was a "smaller SUV." (III, 125.) Mr. Allen also believed that, had Petitioner testified that he flagged down the victim's vehicle, the jury "c[ould] assume that there was a plan to car-jack th[e] vehicle or to rob [the victim]." (III, 125-26.) Had Petitioner testified at trial consistently with his post-conviction testimony, the State would

have had "an opportunity to argue" and emphasize "the damaging portions of his statement." (III, 126.)

ARGUMENT

The Post-Conviction Court Properly Concluded that Petitioner Did Not Receive Ineffective Assistance of Counsel.

This Court should affirm the post-conviction court's conclusion that Petitioner received effective assistance of counsel. On appeal, Petitioner claims that Mr. Allen provided ineffective assistance by "coercing" him into not testifying and by failing to argue inconsistencies between Petitioner's version of events and the State's witnesses' testimonies. (Pet'r's Br. at 15, 17-19, 21.) More specifically, Petitioner wanted Mr. Allen to elicit evidence that "he was not truthful to the police originally," he flagged down an unknown vehicle containing the other perpetrators, he got into the backseat of the vehicle, and that he was about to use the victim's cell phone before another perpetrator told him to turn off the phone because it could be tracked. (Pet'r's Br. at 7, 13, 16-17, 19; III, 63.)

Petitioner's claims fail to demonstrate that Mr. Allen rendered ineffective assistance. Petitioner voluntarily waived his right to testify at trial without promise or coercion. Mr. Allen made the strategic decision to rely on the victim's favorable testimony in support of Petitioner's defense. And even if Petitioner testified at trial, or if Mr. Allen raised Petitioner's inconsistencies during closing argument, there is no reasonable probability that the jury would have reached a different conclusion. Since Petitioner failed to establish that he received ineffective assistance of counsel by clear and convincing evidence, this Court should affirm the post-conviction court's judgment.

A. Legal standards for post-conviction relief.

In Tennessee, a petitioner may obtain post-conviction relief where the "conviction or sentence is void or voidable" due to the violation of a constitutional right. Tenn. Code Ann. § 40-30-103. The petitioner must prove that he is entitled to such relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). "'Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" *Arroyo v. State*, 434 S.W.3d 555, 559 (Tenn. 2014) (quoting *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009)).

A petitioner's claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed de novo on appeal. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). A post-conviction court's factual conclusions receive a presumption of correctness unless the evidence preponderates against those findings; a post-conviction court's legal conclusions do not receive a presumption of correctness. *Id.* An appellate court will defer to the post-conviction court's determinations regarding the credibility of witnesses, the weight and value of their testimony, and any factual issues raised by the evidence. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999). These findings of fact carry the "weight of a jury verdict" and will not be disturbed unless the evidence preponderates against them. *Berry v. State*, 366 S.W.3d 160, 169 (Tenn. Crim. App. 2011).

Both the United States Constitution and the Tennessee Constitution guarantee a criminal defendant the right to receive effective assistance of counsel in criminal proceedings. *Strickland v.*

Washington, 466 U.S. 668, 686 (1984); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. To succeed on a claim for ineffective assistance of counsel, a petitioner must prove (1) that his counsel's performance was deficient, and (2) that the deficiency prejudiced his defense. *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011) (citing *Strickland*, 466 U.S. at 687). A court need not address the prongs in any particular order and may deny relief if a petitioner cannot prove either prong. *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996).

To prove deficiency, a petitioner must show that his counsel's performance fell "below an objective standard of reasonableness under prevailing professional norms." *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997). This standard does not entitle a defendant to perfect representation, but only constitutionally-adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In reviewing counsel's performance, a court "must be highly deferential and should indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *State v. Burns*, 6 S.W.3d 453, 462 (Tenn. 1999). Courts will not second-guess trial strategies—regardless of the outcome—so long as such "choices are informed ones based upon adequate preparation." *Goad*, 938 S.W.2d at 369.

If deficiency is proven, a petitioner must also show that the deficiency prejudiced his defense. "The question at this juncture is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" *Kendrick v. State*, 454 S.W.3d 450, 458 (Tenn. 2015) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). This prong requires the petitioner to establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A "reasonable probability" means a probability sufficient to undermine confidence in the trial's outcome. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2009).

B. Petitioner failed to show that he received ineffective assistance of counsel.

The post-conviction court properly concluded that Petitioner failed to establish that Mr. Allen provided ineffective assistance. Based on the evidence presented at trial, Mr. Allen properly advised Petitioner not to testify. At the post-conviction hearing, Petitioner admitted that he informed the trial court that it was his decision not to testify. (III, 38, 57-58, 90-91.) Mr. Allen stated that he and Petitioner discussed "the pros and cons of testifying," informed Petitioner that it was Petitioner's decision regarding whether to testify, and that he advised Petitioner that it was not in his best interest to testify at trial. (III, 88-91.) As part of their conversation, Mr. Allen explained to Petitioner that, by testifying, he would open the door to any inconsistencies contained in his statement and testimony and "lose credibility" with the jury. (III, 89, 123-24.) During his meetings before trial with Mr. Allen,

Petitioner gave conflicting versions of events in each meeting, and those versions ran contrary to the facts within Petitioner's statement. (III, 103-06.) Mr. Allen believed that Petitioner took his advice into consideration, weighed his options, and made the decision not to testify. (III, 132.) And Mr. Allen denied promising Petitioner that he "would argue anything[] specific" during closing argument. Mr. Allen testified that, during closing, he argued "the most important things . . . to do [Petitioner] justice." (III, 90, 108-11.) By finding that Petitioner knowingly waived his right to testify at trial and by denying Petitioner's request for relief, the post-conviction court implicitly accredited Mr. Allen's testimony over Petitioner's. (I, 36-48); *see Kirk v. State*, No. M2015-01203-CCA-R3-PC, 2016 WL 3909811, at *1 (Tenn. Crim. App. July 13, 2016) ("In its written order denying post-conviction relief, the post-conviction court implicitly accredited trial counsel's testimony.") (no perm. app. filed).

Mr. Allen made an informed, strategic decision in advising Petitioner not to testify and by not impeaching the victim's testimony. Based on the evidence, Mr. Allen determined that Petitioner's best defense to the State's criminal responsibility theory was to establish that Petitioner's "mere presence alone [wa]s not enough" to find him guilty. (III, 77-78, 106.) At trial, Mr. Allen was placed in the "unique position" where the victim's testimony "was more favorable to [Petitioner] than the version that" Petitioner gave in his statement. (III, 76-77.) The victim testified that the other perpetrators flagged down Petitioner, Petitioner got into the front seat of the vehicle and did not speak, carry a weapon, or strike the victim, the perpetrators in the

backseat struck the victim, and that the other perpetrators hit the victim out of the vehicle. (III, 77-78); *Ball*, 2017 WL 2482996, at *1. Petitioner, however, wanted to impeach the victim's testimony by testifying, or by having Mr. Allen argue, that he flagged down the victim's vehicle, he and the victim were sitting in the backseat, another perpetrator drug the victim out of the vehicle, and that Petitioner was not truthful in his statement. (III, 19-21, 23-24, 26-27, 32-33, 46.) Mr. Allen believed that impeaching the victim, who had given favorable testimony in Petitioner's defense, was not in Petitioner's best interest. (III, 90-91.) Had Petitioner testified at trial, the jury would have learned that Petitioner "lied to the police," "c[ould] assume that there was a plan to car-jack th[e] vehicle or to rob [the victim]" since Petitioner flagged down the victim's vehicle, and that the State would have "an opportunity to argue" and emphasize "the damaging portions of [Petitioner's] statement." (III, 124-26.) Based on the proof presented at trial, Mr. Allen made an informed, strategic decision to rely on the victim's favorable testimony and by advising against Petitioner testifying. *See Goad*, 938 S.W.2d at 369.

Petitioner's arguments to the contrary are meritless. He first attempts to overcome his waiver of his right to testify by claiming that Mr. Allen "coerced" him into his decision by "promising to address all the inconsistencies [in closing argument] that Petitioner wanted to address in his testimony." (Pet'r's Br. at 18.) But the record fails to support Petitioner's assertion by clear and convincing evidence. Mr. Allen testified that he and Petitioner discussed the "pros and cons of testifying" and that Petitioner made the decision to not testify. (III, 88,

90-91, 132.) And Mr. Allen denied making any promise to Petitioner that he would make certain arguments during closing. (III, 90, 108-11.) By denying Petitioner's request for relief, the post-conviction court accredited Mr. Allen's testimony. (I, 36-48); *see Kirk*, 2016 WL 3909811, at *1.

Petitioner also claims that, under the factors listed in *Bates v. State*, 973 S.W.2d 615 (Tenn. Crim. App. 1997), Mr. Allen was ineffective for not calling Petitioner to testify at trial. (Pet'r's Br. at 15-22.) Yet *Bates* fails to support Petitioner's argument. In *Bates*, the post-conviction petitioner claimed that his trial counsel rendered ineffective assistance by advising him not to testify when the petitioner "expressly indicated . . . that he wanted and needed to testify." 973 S.W.2d at 636. The *Bates* court listed several factors that "tend to indicate whether the failure of a defense attorney to call the defendant constitutes ineffective assistance," such as: (1) only the victim and defendant were present when the offense was committed; (2) only the defendant could present a full version of his theory of the facts; (3) the defendant's testimony could not be impeached by prior convictions; (4) the defendant could give an account of the relationship with the victim; and (5) the attorney "had let in objectionable, prejudicial testimony with the intention of clarifying it with the testimony of the defendant." *Id.*

But the court did not rely on any of those factors in concluding that defense counsel provided effective assistance. Instead, the court determined that the "trial court correctly found that the petitioner was advised of his right to testify[,] . . . made a well-counseled decision to waive that right," and that defense counsel's advice "was based on a

sound trial strategy . . . considering the petitioner's demeanor, his lack of control, and his history of violent behavior." *Id.* at 636-37. This Court has also concluded that "although some of the *Bates* factors . . . [may be] applicable" in a case, a court will not review a "trial counsel's recommendation" not to testify if that recommendation "was based on reasonable trial strategy" and the "Petitioner made h[is] own decision not to testify." *Kent v. State*, No. M2017-01532-CCA-R3-PC, 2018 WL 2189706, at *14 (Tenn. Crim. App. May 14, 2018) (no perm. app. filed).

Here, Mr. Allen provided Petitioner with well-counseled advice about the pros and cons of testifying. *See id.*; *Bates*, 973 S.W.2d at 636-37. Because the victim provided "beneficial testimony" in Petitioner's defense, Mr. Allen believed that it was not in Petitioner's best interest to attempt to impeach the victim's testimony. (III, 76-77, 89-90, 106, 115.) Petitioner took Mr. Allen's advice into consideration, weighed his options, and made the decision himself as to whether he wanted to testify. (III, 88-90, 132.)

The *Bates* factors also do not favor Petitioner. First, Petitioner and the victim were not the only persons "present when the offense[s] w[ere] committed." *Bates*, 973 S.W.2d at 636. Petitioner's statement and testimony revealed that there were three to four other perpetrators involved in the robbery. (II, Ex. 2, at 1-2; III, 13-14, 19); *Ball*, 2017 WL 2482996, at *1-2. Second, Petitioner fails to identify any "objectionable, prejudicial testimony" that Mr. Allen allowed into evidence "with the intention of clarifying it with the testimony of" Petitioner. *Bates*, 973 S.W.2d at 636. Rather, the victim's testimony demonstrated that Petitioner got into the vehicle, "didn't say anything, . . . didn't have a

gun, didn't hit the victim[,] and . . . didn't know what was going on." (III, 34-35.) Since Mr. Allen's recommendation to Petitioner was based on a reasonable trial strategy of relying on the victim's testimony, and Petitioner made an informed decision not to testify, this Court should find that Mr. Allen provided competent representation to Petitioner. *See Kent*, 2018 WL 2189706, at *14; *Bates*, 973 S.W.2d at 636-37.

Although this Court is not required to further analyze Petitioner's ineffective assistance of counsel claim after finding that he failed to establish any deficiency in Mr. Allen's representation, *see Goad*, 938 S.W.2d at 370, Petitioner also fails to demonstrate any prejudice. Despite Petitioner's contention that he was "greatly prejudiced" by Mr. Allen's decision not to impeach the victim's testimony, (Pet'r's Br. at 21-22), Petitioner provides no evidence, much less clear and convincing evidence, that the jury would have reached a different conclusion had Mr. Allen impeached the victim. *See* Tenn. Code Ann. § 40-30-110(f); *Strickland*, 466 U.S. at 694. At the post-conviction hearing, Petitioner claimed that he wanted to testify that he flagged down the victim's vehicle, he was unaware of a crime being committed when he entered the vehicle, he and the victim were in the backseat of the vehicle, and that a perpetrator pulled the victim out of the vehicle. (III, 19-20, 24-25, 33.) But all of these inconsistencies were contained within Petitioner's statement that was introduced into evidence at trial. (II, Ex. 2, at 1-4); *Ball*, 2017 WL 2482996, at *2. And Petitioner wanted to testify that he was untruthful in his statement. (III, 13-14.) Petitioner has offered no explanation as to why him offering duplicative evidence about the inconsistencies or that his admission that he lied to officers a

would have changed the jury's verdict. *See Strickland*, 466 U.S. at 694. Petitioner failed to prove by clear and convincing evidence that Mr. Allen provided either deficient or prejudicial representation. This Court should affirm the post-conviction court's judgment.

CONCLUSION

For the reasons stated, the judgment of the post-conviction court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Tenn. Sup. Ct. R. 46, Rule 3.02, the total number of words in this brief, exclusive of the Title/Cover page, Table of Contents, Table of Authorities, and this Certificate of Compliance, is 5,711. This word count is based upon the word processing system used to prepare this brief.

/s/ Robert W. Wilson
ROBERT W. WILSON
Assistant Attorney General

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	**RUTHERFORD COUNTY**
v.	)	**NO. M2019-00274-CCA-R3-CD**
	)	
TANDY TOMLIN,	)	
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE RUTHERFORD COUNTY CIRCUIT COURT

BRIEF OF THE STATE OF TENNESSEE

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II.

Whether the trial court properly enhanced Defendant's sentence where he had a history of criminal convictions and committed rape of a child for his own pleasure or excitement.

III.

Whether Defendant waived his challenge to his right to a fair trial by failing to timely object to entering into the courtroom through a side door while escorted by a law enforcement officer, and he otherwise failed to establish any prejudice from his entrance.

STATEMENT OF THE CASE

On August 9, 2017, the Rutherford County Grand Jury charged Defendant, Tandy Tomlin, with nine counts of rape of a child (Counts 1-9), one count of aggravated sexual battery (Count 10), one count of solicitation to commit rape of a child (Count 11), and one count of solicitation to commit aggravated sexual battery (Count 12), occurring between September 1, 2012, and January 31, 2013. (I, 3-14.) The Honorable Royce Taylor, Rutherford County Circuit Court Judge, presided over Defendant's jury trial from June 7-8, 2019. (II, 1; III, 1.) After presenting its evidence, the State requested that the trial court modify Count 9 to charge aggravated sexual battery rather than rape of a child; the trial court granted the request. (III, 95.) As charged, the jury found Defendant guilty of each count. (I, 31-52.)

The trial court held Defendant's sentencing hearing on August 3, 2018. (IV, 1.) The State entered Defendant's presentence report as an exhibit to the hearing, and the parties presented no additional proof. (IV, 3, 5; Aug. 3, 2018, Ex. 1.)[1] At the request of the State, trial court merged Counts 4 and 5. (IV, 5, 14.) Before imposing Defendant's sentence, the trial court considered the "evidence presented at trial and the presentence report, . . . the [p]rinciples of [s]entencing, arguments . . . by the attorneys, the nature and characteristics of the criminal conduct involved," and the applicable enhancement and mitigation

[1] The exhibits entered during Defendant's trial on June 7, 2018, and at the sentencing hearing on August 3, 2018, are not separately marked as volumes. The State will refer to the exhibits by the date they were entered and the exhibit number.

factors. (IV, 7-8, 14.) In enhancing Defendant's sentence, the trial court found that Defendant had a history of criminal convictions or behavior in addition to those used to calculate his appropriate range, and that he committed both rape of a child and the solicitation of the same to gratify his desire for pleasure or excitement; the trial court determined that no mitigating factors applied. (IV, 7-8, 14.) In reviewing the presentence report, the trial court determined that Defendant was previously convicted of attempted aggravated sexual battery, violating the driver's license law, driving with a suspended, canceled, or revoked license, and for unlawful drug paraphernalia uses and activities. (Aug. 3, 2018, Ex. 1, at 5.) For each rape of a child conviction, the trial court sentenced Defendant to thirty years; ten years each for two counts of aggravated sexual battery; a ten-year sentence for his solicitation of rape of a child; and a five-year sentence for solicitation of aggravated sexual battery. (IV, 16.) The trial court also ran Defendant's sentences consecutively for an effective 245-year sentence. (IV, 16.) The trial court entered Defendant's judgments on August 3, 2018. (I, 57-64.)[2]

Defendant filed a timely motion for new trial on August 27, 2018. (I, 65-66.) In the motion, Defendant raised—for the first time—that he "was denied his right to Due Process, a Fair Trial, and the presumption of innocence when he was led into the courtroom through a secured door, under escort by a uniformed deputy within view of the jury." (I, 65.) The trial court, however, concluded that Defendant's entrance did

[2] Only Defendant's judgment forms from his rape of a child convictions are included in the record. (I, 57-64.)

not prejudice the jury because there was "nothing that would indicate to the jury that [Defendant] was in custody during the trial." (I, 68.) As explained by the trial court, the "secure door" "is a plain white door in the courtroom that leads to the inmate holding area." (I, 67 & n.1.) The trial court found that the courtroom door gave no "indicat[ion] that there [were] cells" behind the door, and that the jury "would not have any indication to know that" the holding area was behind the door. (I, 67; V, 9.) Regarding the officer escort, the trial court concluded that there were "deputies all over the courtroom and all over the hallways and in the entrance with regard to security of the building," and that the jury had no evidence to conclude that Defendant was in custody during the trial. (V, 9-10.) Further, Defendant was not in handcuffs or restrained at any time in view of the jurors, and he wore plain clothes throughout his trial. (I, 68.) By written order on January 29, 2019, the trial court denied Defendant's motion for a new trial. (I, 67-69.) Defendant filed a timely notice of appeal on February 12, 2019. (I, 70-71.)

STATEMENT OF THE FACTS

Trial

Between 2012 and 2013, K.M. lived with her father T.M., her stepmother L.A., her four brothers, and Defendant, T.M.'s cousin, in a multi-bedroom trailer in Murfreesboro, Tennessee.[3] (II, 49, 51-52; III, 12.) At that time, K.M. was twelve years old and Defendant was at least in his thirties. (I, 57; II, 51; III, 14.) Although Defendant "was nice to everybody" in the home, a tension existed between him and K.M. (II, 57, 96.) L.A. became suspicious of Defendant when she saw K.M. sitting across his legs on the couch in a straddle while K.M. tried to determine Defendant's phone's passcode; L.A. pulled K.M. aside and informed her that it was "not appropriate for a young lady to be sitting on [Defendant] like that." (II, 95; III, 79-80.) L.A. also "always made sure that one of [K.M.'s] brothers rode with" K.M. when Defendant offered to drive her somewhere. (II, 66.)

One day, K.M. and Defendant were on the couch watching television while the other family members were away. (II, 69-71.) Defendant began "touching [K.M.]" and he told her that she "w[ould] be rewarded for this later." (II, 70.) Defendant climbed on top of K.M. and put his hands inside of her vagina. (II, 70-71.) Later, he inserted "his penis inside of [her]." (II, 69.) When one of K.M.'s brothers returned home and knocked on the locked door, Defendant told the brother to

[3] In accordance with this Court's policy, the State will refer to the minor victim, as well as her family members, by their initials. *See State v. Greenwood*, No. M2013-01924-CCA-R3-CD, 2014 WL 6609308, at *1 n.1 (Tenn. Crim. App. Nov. 21, 2014), *perm. app. denied* (Tenn. Apr. 10, 2015).

"hold on" and he "kept on trying to" "do[] what he was doing" until K.M. told him to stop. (II, 71-72.)

In September 2012, L.A. was taken into custody after her conviction for conspiracy to commit aggravated robbery. (III, 75-76.) Since T.M. owned his own business and spent the majority of the time away from the home, L.A.'s mother M.B. came to live in the home to help with the family. (II, 57, 59; III, 8-9.) When T.M. was away from the home, Defendant was in charge of K.M. (II, 59-60; III, 12.) Since K.M. knew L.A. was going into custody, she did not want to tell somebody that Defendant touched her inappropriately because T.M. would "probably . . . go crazy about it" and she did not want both of her parents to be in jail. (II, 111.)

Defendant's other inappropriate touching of K.M. occurred while L.A. was in custody. (II, 73.) One night, K.M., her brothers, and Defendant were playing hide and seek outside in the dark. (II, 68.) K.M. hid in the bushes while Defendant "was supposed to be it." (II, 68.) Defendant then found K.M., slipped his hand into her yoga pants, and touched her vagina with his fingers. (II, 68-69.) His fingers made skin to skin contact and he "moved it around" her private area. (II, 68-69.)

On another evening, Defendant drove K.M. in his red, four-door sedan with cloth interior to Barfield Park near dark. (II, 65, 79-80, 121.) Defendant parked the car and, while K.M. was in the passenger's seat, "reached his hands into" her jeans. (II, 79, 81.) He moved his fingers around her vagina and inserted them into her. (II, 81.) At trial,

K.M. testified that the park would close after dark, and that Defendant touched her in the park when it was near dark. (II, 116, 121.)

Defendant also twice drove K.M. to a dead end on Lawrence Street, an area that was a short drive from the home. (II, 81-82.) At the dead end, Defendant told K.M. that they were going to do something and that he would "reward [K.M.] for it later." (II, 124.) Defendant and K.M. would stay at the dead end for about 30-35 minutes while it was dark outside. (II, 82, 86.) Once there, Defendant would park the car, order K.M. to get into the backseat, and insert his penis inside of her vagina. (II, 82.) On one occasion, Defendant asked K.M. to "jack him off" and she refused. (II, 100.)

Defendant drove K.M. to another dead end on Suzanne Street three times. (II, 87-90.) The first time, Defendant he touched her with his fingers and inserted his penis inside of her vagina. (II, 87.) Another time, Defendant only inserted his penis into K.M. (II, 87.) The third time, Defendant touched K.M. with his fingers and requested her to place her mouth onto his penis; K.M. refused the request. (II, 87-88.)

When K.M. had a friend over to her home to help with homework, Defendant would drive the friend home with K.M. before stopping at one of the dead ends. (II, 122.) K.M. first discovered that Defendant wanted to inappropriately touch her when he parked the car and told her that they "were going to do something." (II, 123.) When Defendant and K.M. would return home, Defendant would tell T.M. that they dropped off the friend and talked to the friend's parents "for a little bit." (II, 122.)

K.M. also saw semen come out of Defendant's penis. (II, 94.) Defendant would ejaculate onto either the seats of his car or onto her pajama pants. (II, 94.) Defendant would not wear a condom or other protection, and he would lick his hand and touch his penis before he inserted it inside of K.M.'s vagina. (II, 94-95.)

One day in the home, M.B. walked into a bedroom where K.M. and Defendant were "play fighting." (II, 96; III, 14.) While Defendant had K.M. "bent over on the bed," he leaned over her back and "into her with his hands" "[c]upped right over [her] breasts." (II, 96; III, 14-15.) M.B. ordered Defendant to remove his hands from K.M.'s breasts, and they both "jumped up" and "stepped aside from each other." (III, 15.)

Defendant would "reward" K.M. for allowing him to inappropriately touch her. Defendant bought K.M. a cell phone, a hoodie, clothes, a bicycle, a pair of skates, a "silky, black, sexy" costume, cigarettes, and alcohol. (II, 61-62; III, 20-21.) Despite dreading Defendant touching her, K.M. wanted the gifts because she did not have any other chance to get them. (II, 112-13.) For the most part, Defendant would not buy K.M.'s brothers any gifts. (II, 63; III, 21.) Defendant would also allow K.M. to drive his car in the Barfield Park parking lot while refusing to allow anyone else to drive it. (III, 80.) Despite T.M.'s rule for the children not to have friends over while he was away, Defendant would allow K.M. to bring her friends to the home. (II, 67; III, 19.)

But if K.M. refused to allow Defendant to touch her, Defendant would withdraw his gifts and would "tell [her] that he was going to tell [her] dad" that she had friends at the home. (II, 67, 93.) At various

times, Defendant would take away the cell phone he gave K.M. (II, 61-62, 66.) Defendant also destroyed the hoodie he gave K.M. after he found out that she obtained the number of a boy from school. (II, 66-67.) On another day, Defendant saw K.M. texting a boy from school and ordered her to give him the phone. (II, 93-94.) K.M. refused, ran out of the door, and, while Defendant chased her, threw her phone down onto the concrete and "busted it." (II, 93-94.)

M.B. became concerned over Defendant and K.M.'s relationship. (III, 13.) She "knew the relationship was not right," and that it was "different" than a grown male relative towards a female child. (III, 14.) Defendant and K.M. would be alone in the car "quite a bit," and he would ask her if she wanted a ride to the store while not allowing M.B. or the other children to ride with them. (III, 16.) M.B. also testified that Defendant and K.M. took "quite a long time to take all of [K.M.'s friends] home and get back." (III, 17.)

One night, M.B. confronted Defendant about his interactions with K.M. Defendant told M.B. that "he had an inappropriate relationship with someone" and that he "knew it was wrong." (III, 22-23.) When M.B. asked Defendant if his relationship was with K.M., Defendant denied the allegation because K.M. was "dirty" and "stunk." (III, 22-24.)

L.A. was released from custody in January 2013. Defendant later told L.A. that "he was in love with a younger girl and she was perfect," and that "she was too young and he couldn't ever say her name." (III, 80.) When L.A. asked if it was with K.M., Defendant "paused and hesitated for a minute" before denying any such relationship. (III, 80.)

Defendant last touched K.M. inappropriately about one to three weeks before L.A. returned to the home. (II, 91; III, 76.) Although Defendant again attempted to touch K.M. inappropriately, she told him no and that she no longer cared if he took away the gifts he gave her. (II, 91, 100.) Defendant became angry and told K.M. that she would "regret" her decision. (II, 100-01.) When L.A. noticed that K.M. was "acting different," she pulled K.M. into the bathroom and asked her if she had had intercourse. (II, 101; III, 82-83.) K.M. revealed that Defendant touched her inappropriately on multiple occasions. (II, 101; III, 82-83.) L.A. believed K.M. because she described Defendant licking his hand and touching his penis. (III, 83.) Thereafter, L.A. and K.M. informed T.M. of Defendant's conduct. (II, 101-02; III, 83-85.) The next morning, T.M. confronted Defendant and, although he denied touching K.M., Defendant began crying. (II, 103; III, 85.) T.M. informed Defendant that he was no longer welcome in the home and that they would pack his things for him. (II, 103-04; III, 85.) While gathering Defendant's items, K.M. discovered her panties, shorts, hairbrushes, and other items that she had been missing in his drawers. (II, 104; III, 86.)

Later, K.M. was required to talk to investigators about Defendant's conduct. She provided the Child Protective Services investigator with information about the sexual abuse she received and a description of Defendant. (III, 56.) She also provided consistent information to both the Child Protective Services investigator and the Child Advocacy Center's investigator regarding Defendant's sexual abuse. (III, 45, 58-61.)

At the close of proof, the State made an election of offenses. (III, 89-90.) Count 1 was charged in reference to Defendant's digital penetration of K.M. while on the couch in the home; Count 2 for Defendant's penile penetration of K.M. on the couch in the home; Count 3 for Defendant's digital genital penetration of K.M. while parked at Barfield Park near dark; Count 4 for Defendant's penile genital penetration of K.M. while parked at the dead end of Lawrence Street; Count 5 for Defendant's second penile genital penetration of K.M. while parked at the dead end of Lawrence Street; Count 6 for Defendant's penile genital penetration of K.M. while parked at the dead end of Suzanne Street; Count 7 for Defendant's digital genital penetration of K.M. while parked at the dead end of Suzanne Street; Count 8 for Defendant's second penile genital penetration of K.M. while parked at the dead end of Suzanne Street; Count 9 for Defendant's grabbing K.M.'s breasts with his hands while in the home; Count 10 for Defendant's touching of K.M.'s genitalia with his fingers during hide and seek; Count 11 for Defendant asking K.M. to put her mouth on his penis; and Count 12 for Defendant asking K.M. to touch his penis with her hand. (III, 90-92.) Defendant elected not to testify or present proof. (III, 94-95, 99.)

Motion for New Trial Hearing

Defendant testified at his motion for new trial hearing. According to Defendant, on the morning of trial, he was escorted into the courtroom by a uniformed officer through a secured door in front of the jury. Defendant also stated that he wore plain clothes throughout his trial. (V, 3-5.)

ARGUMENT

I. The Evidence is Sufficient to Sustain Defendant's Convictions.

The State presented sufficient evidence at trial to allow a rational juror to find Defendant guilty of rape of a child, aggravated sexual battery, and solicitation of a minor involving the rape of a child and aggravated sexual battery. K.M. testified that Defendant committed digital and penile penetration of her on multiple occasions at her home, Barfield Park, and two dead end streets. Further, Defendant made sexual contact with K.M.'s breasts while in the home and with her vagina while playing hide and seek. Finally, the jury heard evidence that Defendant requested K.M. to place her mouth on his penis and to "jack him off;" had K.M. complied with Defendant's requests, Defendant would have committed rape of a child and aggravated sexual battery. The evidence is more than sufficient for a rational juror to find Defendant guilty of the charged offenses.

When a defendant challenges the legal sufficiency of the evidence, the relevant inquiry is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Musacchio v. United States*, 136 S. Ct. 709, 715 (2016) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *State v. Franklin*, 308 S.W.3d 799, 825 (Tenn. 2010). "When considering a sufficiency of the evidence question on appeal, the State must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom." *State v. Vasques*,

221 S.W.3d 514, 521 (Tenn. 2007) (citing *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978)). "Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict." *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009).

"The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact." *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008) (citing *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). "A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003) (quoting *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)). The standard of review for sufficiency of the evidence "'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *Hanson*, 279 S.W.3d at 275). As factfinder, the jury is tasked with the role of determining both the weight and inferences to be drawn from circumstantial evidence. *Id.* (citing *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006)). A court may not reweigh or reevaluate the evidence. *State v. Carruthers*, 35 S.W.3d 516, 557 (Tenn. 2000).

In Tennessee, rape of a child "is the unlawful sexual penetration of a victim by the defendant . . . if the victim is more than three (3) years of age but less than thirteen (13) years of age." Tenn. Code Ann. §

39-13-522(a). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required." Tenn. Code Ann. § 39-13-501(7). "'Victim' means the person alleged to have been subjected to criminal sexual conduct . . . ." Tenn. Code Ann. § 39-13-501(8).

Aggravated sexual battery is the "unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by . . . [t]he victim [being] less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-504(a)(4). "Sexual contact" is defined as "the intentional touching of the victim's[or] the defendant's . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's[or] the defendant's . . . intimate parts, if the intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." Tenn. Code Ann. § 39-13-501(6). "'Intimate parts' includes semen, vaginal fluid, the primary genital area, groin, inner thigh, buttock or breast of a human being." Tenn. Code Ann. § 39-13-501(2).

A person commits solicitation of a person under 18 years of age if: (1) the "person [is] eighteen (18) years of age or older;" (2) "by means of oral, written or electronic communication, electronic mail or internet services, directly or through another;" (3) "intentionally command[s], request[s], hire[s], persuade[s], invite[s] or attempt[s] to induce;" (4) "a person whom the person making the solicitation knows, or should know, is less than eighteen (18) years of age;" (5) "to engage in conduct that, if

completed, would constitute a violation by the soliciting adult of" rape of a child or aggravated sexual battery. Tenn. Code Ann. § 39-13-528(a)(1), (4). "It is no defense that the solicitation was unsuccessful[or] that the conduct solicited was not engaged in . . . ." Tenn. Code Ann. § 39-13-528(b).

Here, the jury had more than sufficient evidence to find Defendant guilty of each charged offense. First, in Counts 1-8, the jury found Defendant guilty of rape of a child. K.M. was 12 years old when Defendant raped her on multiple occasions. (II, 51); *see* Tenn. Code Ann. § 39-13-522(a) (stating that a defendant commits rape of a child if the victim is more than three years of age but less than thirteen years of age). For Counts 1-2, Defendant had "sexual intercourse . . . [and made another] intrusion . . . into" K.M.'s vagina with both his hands and his penis while the two were alone in the home. (II, 69-71; III, 90); Tenn. Code Ann. §§ 39-13-501(7), -522(a). Regarding Count 3, Defendant made another intrusion into K.M.'s vagina with his fingers while they were parked in his car in Barfield Park when it was almost dark. (II, 79-81; III, 90.) For merged Counts 4-5, K.M. described Defendant having sexual intercourse with her in his parked car at a dead end on Lawrence Street after dark. (II, 81-82; III, 90.) Finally, for Counts 6-8, K.M. testified that Defendant raped her multiple times at a dead end on Suzanne Street. (II, 87-90; III, 91.) For Counts 6 and 7, Defendant sexually penetrated K.M. with his penis and fingers. (II, 87; III, 91.) For Count 8, Defendant sexually penetrated K.M. with his penis. (II, 87; III, 91.) K.M. testified that she saw semen come out of

Defendant's penis, and that he would lick his hand and touch his penis before inserting it inside of her. (II, 94-95.)

Second, a rational juror could also conclude that Defendant twice committed aggravated sexual battery by making sexual contact with K.M. For Count 9, while in the home, Defendant made sexual contact with the clothing covering the immediate area of K.M.'s intimate parts by "ben[ding K.M.] over on the bed" and "[c]upp[ing his hands] right over [her] breasts." (II, 96; III, 14-15, 91); Tenn. Code Ann. §§ 39-13-501(2), (6), -504(a)(4). The jury could reasonably construe Defendant's contact as "being for the purpose of sexual arousal or gratification" because of their location in the bedroom and Defendant's positioning over K.M. Tenn. Code Ann. §§ 39-13-501(6), -522(a), -528(a)(1); *see State v. Meeks*, 876 S.W.2d 121, 130-31 (Tenn. Crim. App. 1993) (finding that "jurors may use their common knowledge and experience in making reasonable inferences from evidence" to determine if sexual contact could reasonably be construed as for sexual arousal or gratification where a defendant grabbed the victim's breast during a robbery). Further, the jury could find that Defendant's sexual touching of K.M. was for sexual arousal or gratification by Defendant's statement to M.B. that he "had an inappropriate relationship with someone," and his other conversation with L.A. about how "he was in love with a younger girl" that "was too young." (III, 23-24, 80); *see State v. Smith*, 42 S.W.3d 101, 106 (Tenn. Crim. App. 2000) (concluding that a jury could "reasonably construe[] from th[e] evidence that . . . sexual contact [with a minor] was for the purpose of sexual arousal or gratification" where the defendant "expressly admitted that he had sexual fantasies

about children"). For Count 10, Defendant slipped his hand into K.M.'s pants, touched her vagina with his fingers, and "moved [his hand] around" her genital area. (II, 68-69; III, 91-92.) K.M. was 12 years old each time Defendant made sexual contact with her. (II, 51); *see* Tenn. Code Ann. § 39-13-504(a)(4).

Finally, the evidence is sufficient to find Defendant guilty of solicitation of a minor. At the time of each solicitation, K.M. was younger than 18 years old and Defendant was at least 18. (I, 57; II, 51; III, 14.) For the actions listed in Count 11, Defendant orally requested K.M. to put her mouth onto his penis. (II, 87-90; III, 92.) Although K.M. refused Defendant's request, had the conduct been completed, Defendant's actions would have constituted rape of a child by forcing K.M., a child under 13 years old, to perform fellatio. Tenn. Code Ann. § 39-13-501(7), -522(a) -528(a)(1). And for Count 12, Defendant orally requested K.M. to put her hand on his penis to "jack him off." (II, 100; III, 92.) K.M. refused, and had she complied, Defendant would have committed aggravated sexual battery by making K.M. "intentional[ly] touch [his] . . . intimate parts." (II, 100); Tenn. Code Ann. §§ 39-13-501(2), (6), -504(a), -528(a)(4). In sum, the evidence is more than sufficient to sustain Defendant's convictions for rape of a child, aggravated sexual battery, and solicitation of a minor.

Defendant's contentions to the contrary are meritless. Citing *State v. Letner*, 512 S.W.2d 643 (Tenn. Crim. App. 1974), Defendant claims that the State's case was "plagued with [voluminous] contradictions and inconsistencies" because: (1) K.M. asserted that she was raped at Barfield Park after dark; (2) Defendant purportedly

committed the sexual abuse while the household was occupied and "no one noticed anything amiss;" and (3) someone in the household would have noticed K.M.'s personal belongings in Defendant's drawers. (Def.'s Br. at 3-4.)

None of Defendant's claims entitle him to relief. First, K.M.'s testimony about Defendant's rape at Barfield Park is not contradictory or inconsistent. K.M. testified that Defendant raped her there when it was near dark outside and that the park only closed after dark. (II, 65, 79-81, 116, 121.)

Second, both L.A. and M.B. expressed concern with Defendant's interactions with K.M. L.A. became suspicious of Defendant when she saw him allow K.M. to straddle him on the couch, and L.A. would not allow K.M. to ride in the car alone with Defendant. (II, 66, 95; III, 79-80.) And M.B. believed that Defendant's interactions with K.M. were inappropriate, Defendant and K.M. would be alone "quite a bit," and that Defendant took "a long time to take all of [K.M.'s friends] home and get back." (III, 14, 16-17.) Defendant would explain the length of the car trips by telling T.M. that they talked with the friends' parents for an extended period. (II, 122.)

Finally, Defendant's third contention has no bearing on whether the State presented sufficient proof that he sexually penetrated, made sexual contact with, and solicited the same from K.M. And even accepting Defendant's characterization that Defendant's drawers were "clear bins" and "made of clear plastic," (Def.'s Br. at 4), the jury could reasonably infer that Defendant hid K.M.'s items underneath or within his own belongings that K.M. and her family packed. (II, 103-04; III,

85-86); *see Dorantes*, 331 S.W.3d at 379. Defendant fails to show that there were any inconsistencies in K.M.'s testimony, much less any inconsistencies "to create a reasonable doubt as to . . . [D]efendant's guilt." *State v. Elkins*, 102 S.W.3d 578, 583 (Tenn. 2003). The evidence is sufficient to sustain each of Defendant's convictions.

II. The Trial Court Properly Enhanced Defendant's Sentence for an Effective 245-Year Sentence.

Defendant next challenges the trial court's enhancement of his sentence.[4] More specifically, Defendant claims that the trial court committed reversible error in finding that his offenses "involved a victim and was committed to gratify [his] desire for pleasure or excitement," Tenn. Code Ann. § 40-45-114(7), because the element is already essential to his aggravated sexual battery convictions, the record is "void as to how the court established that [he] committed these offenses to gratify his desire for pleasure or excitement," and that the trial court "made no indication[]" as to whether the factor applied to all of his convictions. (Def.'s Br. 4-5.)

The trial court properly enhanced Defendant's sentence. In determining that enhancement was appropriate, the trial court found that Defendant had a prior criminal history of convictions in addition to those necessary to establish his sentencing range, and that his convictions for rape of a child, and the solicitation of the same, were committed to gratify his desire for pleasure or excitement. The presentence report detailed Defendant's prior convictions, including a prior conviction for aggravated sexual battery, and the evidence at trial established that Defendant committed the rapes of K.M. for pleasure or excitement. This Court should affirm the trial court's sentence.

On appeal, a defendant may challenge "the length, range and manner of service of the sentence imposed by the sentencing court."

[4] Defendant makes no challenge to the trial court's imposition of consecutive sentences. (*See* Def.'s Br. 4-5.)

Tenn. Code Ann. § 40-35-401(a). Under Tennessee's sentencing act, trial courts are given "broad discretionary authority" to impose their sentences. *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). An appellate court will review the trial court's sentencing decision under an abuse of discretion standard, granting a presumption of reasonableness to a within-range sentence that reflects a proper application of the purposes and principles of sentencing. *Id.* at 707-08. A trial court only abuses its discretion when it applies an incorrect legal standard or reaches a conclusion that is illogical or unreasonable that causes an injustice to the defendant. *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007). If the trial court's sentencing determination is reasonable, an appellate court may not disturb the sentence, even if it had preferred a different result. *See State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008). The defendant has the burden of proving that the trial court abused its discretion in imposing its sentence. *See* Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts. ("[T]he burden of showing that the sentence is improper is upon the appealing party.").

A trial court is to consider the evidence received at both the trial and sentencing hearing, the presentence report, the principles of sentencing and arguments as to sentencing alternatives, the nature and characteristics of the criminal conduct involved, evidence regarding mitigating and enhancement factors, statistical information provided by the administrative office of the courts regarding sentencing practices for similar offenses, any statement the defendant wishes to make on his own behalf about sentencing, and the result of the validated risk and needs assessment conducted by the department and contained in the

presentence report. Tenn. Code Ann. § 40-35-210(b). A trial court must place on the record, either orally or in writing, the reasons for imposing its sentence. Tenn. Code Ann. § 40-35-210(e). However, a trial court's "[m]ere inadequacy in the articulation of the reasons for imposing a particular sentence" will not negate the presumption of reasonableness. *Bise*, 380 S.W.3d at 705-706. Although a trial court "'should set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority,' there is no requirement that such reasoning be particularly lengthy or detailed." *Id.* at 706 (quoting *Rita v. United States*, 551 U.S. 338, 356-57 (2007)). So long as a sentence is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles of sentencing, a defendant's sentence will be upheld. *Id.* at 709-10. Only if a trial court "fail[s] altogether to place on the record any reason for a particular sentence" should an appellate court conduct a de novo review or remand the case for a new sentencing hearing. *Id.* at 705 & n.41.

In Tennessee, rape of a child is a Class A felony. Tenn. Code Ann. § 39-13-522(b)(1). A person convicted of rape of a child "shall be punished [at a minimum] as a Range II offender." Tenn. Code Ann. § 39-13-522(b)(2)(A). A trial court may impose a sentence between 25 and 40 years on a Range II, Class A felony offender. Tenn. Code Ann. § 40-35-112(b)(1). Aggravated sexual battery is a Class B felony. Tenn. Code Ann. § 39-13-504(b). A Range I, Class B offender may be sentenced between eight and twelve years. Tenn. Code Ann. § 40-35-112(a)(2). Solicitation of a minor "constitute[s] an offense one . . .

classification lower than the most serious crime solicited." Tenn. Code Ann. § 39-13-528(c). A trial court is authorized to impose on a Range I, Class C felony offender a sentence between three and six years. Tenn. Code Ann. § 40-35-112(a)(3).

Statutory enhancement factors are advisory only. *See* Tenn. Code Ann. § 40-35-114; *Bise*, 380 S.W.3d at 701. Further, a trial court's "misapplication of an enhancement . . . factor does not invalidate the sentence imposed unless the trial court wholly depart[s]" from Tennessee's sentencing act. *Bise*, 380 S.W.3d at 706. An appellate court is "bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles" of sentencing. *Carter*, 254 S.W.3d at 346.

Here, the trial court properly imposed an effective 245-year sentence on Defendant. First, the Court should apply a presumption of reasonableness to the sentence. As required by Tenn. Code Ann. § 40-35-210(b), the trial court considered the evidence presented at trial, Defendant's presentence report and included risk and needs assessment, the principles of sentencing, arguments of counsel, applicable enhancement and mitigating factors, and the nature and characteristics of Defendant's conduct. (IV, 14.) And the trial court imposed a thirty-year sentence for each rape of a child conviction, ten-year sentences for each aggravated sexual battery and solicitation of a minor to commit the rape of a child conviction, and a five-year sentence for the solicitation of a minor to commit aggravated sexual conviction, all sentences which were within Defendant's imposed range. (IV, 16); Tenn. Code Ann. § 40-35-112(a)(2)-(3), (b)(1). Since the trial court

imposed a within-range sentence and properly considered the purposes and principles of sentencing, Defendant's effective 245-year sentence is presumptively reasonable. *See Bise*, 380 S.W.3d at 707-08.

Second, the trial court acted within its discretion to enhance Defendant's sentence. The trial court properly applied Tenn. Code Ann. § 40-35-114(7) because Defendant's rape convictions involved K.M. and were "committed to gratify [his] desire for pleasure or excitement." This factor requires the trial court's "determination of the defendant's *motive* for committing the offense." *State v. Arnett*, 49 S.W.3d 250, 261 (Tenn. 2001). The factor "may be applied with evidence including, but not limited to, sexually explicit remarks and overt sexual displays made by the defendant . . ., or remarks or behavior demonstrating the defendant's enjoyment of the sheer violence of the rape." *Id.* at 262. At the sentencing hearing, the State argued that the enhancement factor applied to Defendant's rape of a child and solicitation of a minor to commit rape of a child convictions only, and the trial court accepted the State's submission. (IV, 7-8, 14.) At trial, the State submitted evidence that Defendant told K.M. that she "w[ould] be rewarded" for allowing him to rape her, and Defendant gave K.M. a cell phone, a hoodie, a pair of skates, a bicycle, clothes, a "silky, black, sexy" costume, cigarettes, alcohol, and allowed her to drive his car. (II, 61-64, 70, 80, 124; III, 20-21.) K.M. also reported that Defendant would lick his hand and touch his penis before penetrating her with it. (II, 94-95; III, 83.) This Court has previously approved of a trial court's use of Tenn. Code Ann. § 40-35-114(7) where the victim described a "transactional . . . relationship" that would reward a victim for allowing the defendant to sexually abuse

them, and where a defendant used his own saliva as lubrication for his penis before penetrating the minor victim. *State v. Kimble*, No. M2017-02472-CCA-R3-CD, 2018 WL 5840836, at *3, 6 (Tenn. Crim. App. Nov. 7, 2018), *perm. app. denied* (Tenn. Feb. 21, 2019); *State v. Reid*, No. 01C01-9511-CC-00390, 1997 WL 311916, at *6 (Tenn. Crim. App. June 6, 1997), *perm. app. denied* (Tenn. Oct. 11, 1999). The evidence supports the trial court's application of this factor.

The trial court also properly determined that Defendant had a "previous history of criminal convictions or criminal behavior[] in addition to those necessary to establish [his] appropriate range." (IV, 7, 14); Tenn. Code Ann. § 40-35-114(1). Defendant's presentence report detailed that he was previously convicted of attempted aggravated sexual battery, multiple violations of the driver's license law, driving with a suspended, canceled, or revoked license, and for unlawful drug paraphernalia uses or activities. (Aug. 3, 2018, Ex. 1, at 5.) The trial court acted within its discretion in enhancing Defendant's sentence.

III. Defendant Waived His Challenge to Any Alleged Impropriety of His Entrance into Court; In the Alternative, His Challenge Is Meritless.

In his final challenge on appeal, Defendant contends that his "guard [escort] through an armored door" into the courtroom violated his right to a fair trial. (Def.'s Br. 5-7.) Although he concedes that he failed to timely raise the issue, Defendant, likening his case to those involving a defendant in shackles or prison attire during trial, argues that he is still entitled to relief because the escort imposed "an unacceptable risk of impermissible factors." (Def.'s Br. 6-7.) Defendant is mistaken. He waived his challenge to any impropriety of his trial entrance by failing to timely raise issue. And this Court has previously rejected Defendant's challenge where, as here, the defendant failed to establish any prejudice from the guarded escort.

A defendant waives an issue on appeal if he was "responsible for an error" or "fail[s] to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). If the defendant fails to raise any objection during his trial regarding his presentment to the jury, the defendant waives the issue on appeal. *See State v. Payne*, No. W2005-00679-CCA-R3-CD, 2006 WL 1506518, at *8 (Tenn. Crim. App. June 1, 2006) (finding that a defendant "failed to object to the [detention response team's] presence at trial and that the failure to make a contemporaneous objection waives the issue"), *perm. app. denied* (Tenn. Sept. 25, 2006); *State v. Odum*, No. 01C01-9406-CC-00234, 1995 WL 599010, at *2 (Tenn. Crim. App. Oct. 12, 1995) (stating that "[t]he right to be tried in civilian

clothing can be waived . . . when the defendant fails to make known to the court . . . his desire to exercise this right and fails to otherwise timely object."), *perm. app. denied* (Tenn. Mar. 25, 1996). Here, Defendant failed to raise any objection to his escort into the courtroom during trial. (V, 7.) Instead, Defendant first raised the issue in his motion for a new trial. (I, 65.) His failure to timely object waives the issue for appellate review. *See* Tenn. R. App. P. 36(a); *Payne*, 2006 WL 1506518, at *8; *Odum*, 1995 WL 599010, at *2.

Even if Defendant timely raised the issue, or this Court exercises its discretion to review the issue for plain error, *see State v. Minor*, 546 S.W.3d 59, 65 (Tenn. 2018), he fails to demonstrate any prejudice from the escort. To be sure, a criminal defendant has the constitutional right to be tried by an impartial jury. *State v. Davidson*, 509 S.W.3d 156, 193 (Tenn. 2016). This right includes the accused's "'right to the physical indicia of innocence.'" *Willocks v. State*, 546 S.W.2d 819, 820 (Tenn. Crim. App. 1976) (quoting *Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir. 1973)). And courts in Tennessee have found that the use of shackles or compelled-prison garb during trial, without evidence of a particularized need for the prejudicial attire, violates that right. *State v. Hall*, 461 S.W.3d 469, 497-98 (Tenn. 2015); *State v. Taylor*, 240 S.W.3d 789, 796 (Tenn. 2007).

But the "conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial" is dissimilar to the "inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986); *see also Taylor*, 240

S.W.3d at 396. "While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable." *Holbrook*, 475 U.S. at 569. And this Court has previously rejected a defendant's challenge to his entering "the courtroom from the holding cell by two sheriff's deputies while the prospective jurors were in the courtroom" as a violation of the right to a fair trial where the defendant failed to demonstrate any prejudice. *State v. Harris*, No. E2000-00718-CCA-R3-CD, 2001 WL 9927, at *3-4 (Tenn. Crim. App. Jan. 4, 2001) (no perm. app. filed); *see also State v. Beauregard*, No. W1999-01496-CCA-R3-CD, 2000 WL 705978, at *8-9 (Tenn. Crim. App. May 26, 2000), *perm. app. denied* (Tenn. Mar. 5, 2001).

Here, Defendant failed to present any evidence that he was prejudiced by his police escort into the courtroom. Defendant was not restrained by handcuffs or shackles at any time in front of the jurors, and he was allowed to wear plain clothes throughout trial. (I, 68; V, 3-5.) Defendant also entered the courtroom through a "plain white door . . . that leads to the inmate holding area," and nothing on the door would indicate to the jurors that the holding area was behind the door. (I, 67 & n.1; V, 9.) Further, the trial court noted that there were "deputies all over the courtroom and all over the hallways and in the entrance" for security purposes. (V, 9-10.) In all, the trial court determined that the jurors had no reason to suspect that Defendant was in custody during his trial. (I, 68.) Defendant presented no evidence to the contrary. *See Harris*, 2001 WL 9927, at *3-4; *Beauregard*, 2000 WL 705978, at *8-9.

Defendant waived any challenge to the alleged impropriety of his escort into court, and the challenge is otherwise meritless. This Court should affirm the trial court's judgments.

CONCLUSION

For the reasons stated, the judgments of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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