IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER SESSION, 1999

FILED

March 31, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

JEROME MARTIN WRAY,	)	**C.C.A. NO. 01C01-9807-CR-00298**
	)	M1999-01200-CCA-R3-CD
Appellant,	)	
	)	**DAVIDSON COUNTY**
V.	)	
	)	
	)	**HON. WALTER C. KURTZ, JUDGE**
STATE OF TENNESSEE,	)	
	)	
Appellee.	)	**(POST-CONVICTION)**

FOR THE APPELLANT:

DAVID L. RAYBIN
Hollins, Wagster & Yarbrough, P.C.
424 Church Street, Suite 2210
Nashville, TN 37219

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General & Reporter

ELIZABETH T. RYAN
Assistant Attorney General
2nd Floor, Cordell Hull Building
425 Fifth Avenue North
Nashville, TN 37243

VICTOR S. JOHNSON, III
District Attorney General

DIANE LANCE
Assistant District Attorney General
Washington Square, Suite 500
222 2nd Avenue North
Nashville, TN 37201-1649

OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

Petitioner Jerome Martin Wray appeals as of right from the dismissal of his post-conviction petition by the Davidson County Criminal Court. Petitioner raised numerous issues in his petition for post-conviction relief. After an evidentiary hearing the post-conviction court denied the petition in a written order. On appeal, Petitioner now alleges that the post-conviction court erred in its determination of eight issues. Specifically, Petitioner argues:

(1) Petitioner's trial counsel was ineffective because trial counsel failed to properly research the law, discover our Supreme Court's grant of permission to appeal in State v. John Rickman, C.C.A. No. 03-C01-9211-CR-00393, 1993 WL 171706, Bradley County (Tenn. Crim. App., Knoxville, May 18, 1993), and utilize the grant of appeal in Petitioner's motion for new trial as a basis for excluding evidence of uncharged sexual misconduct;

(2) Petitioner's counsel on direct appeal was ineffective for the same reason in issue (1) at the time appellate counsel filed an amended motion for a new trial;

(3) Petitioner's counsel on direct appeal was ineffective because appellate counsel failed to properly research the law after our Supreme Court's opinion in State v. Rickman, 876 S.W.2d 824 (Tenn. 1994), failed to discover the Rickman opinion, and did not use Rickman as grounds for a claim on direct appeal;

(4) Petitioner's trial counsel was ineffective because counsel did not request a limiting instruction to address evidence of uncharged sexual misconduct;

(5) Petitioner's counsel on direct appeal was ineffective because appellate counsel did not raise a claim based on the absence of a limiting instruction addressing the evidence of uncharged sexual misconduct;

(6) Petitioner's trial counsel was ineffective because counsel did not call material witnesses to testify for Petitioner.

(7) the admission of evidence of uncharged sexual misconduct at trial violated Petitioner's due process rights;

(8) there was a due process violation when the trial court failed to give a limiting instruction to the jury regarding the evidence of uncharged sexual misconduct.

Initially, we hold that issues (7) and (8) are waived because Petitioner did not raise these issues on direct appeal. As to the remaining issues, we hold that Petitioner's trial counsel was effective. We also hold that counsel on direct appeal was effective in issues (2) and (5). Although we hold that Petitioner's counsel on appeal was ineffective in issue (3), we also hold that under the standard set forth in Strickland v. Washington Petitioner cannot show prejudice. Therefore we affirm the judgment of the post-conviction court.

I. Factual Background and Procedural History

On October 23, 1992, a twenty-one count indictment charged Petitioner with sex crimes perpetrated against his son, JW, and stepdaughter, KC. (It is the policy of this Court not to identify minor victims of child abuse. The victims will be referred to by their initials.) The charges related to crimes against KC were later severed. Petitioner therefore went to trial on three counts of aggravated rape, and six counts of aggravated sexual battery. After the State's proof the trial judge granted a judgment of acquittal as to the aggravated rape charges, but not as to the lesser included charge of aggravated sexual battery in each count of aggravated rape. The jury returned a verdict of guilty on all nine aggravated sexual battery counts, and the trial court sentenced Petitioner to an effective term of 90 years.

Petitioner's trial was August 2, 1993, through August 5, 1993. Petitioner was represented at trial by John Rodgers, Sr., and on appeal by Sam Wallace, Sr. Mr. Rodgers filed the initial motion for a new trial, which was then amended by Mr. Wallace. The motion for new trial was heard on November 18, 1993. Mr. Wallace

filed an appeal with this Court, and filed the record on April 14, 1994. Mr. Wallace filed Petitioner's appellate brief in this Court on June 15, 1994.

At the time of Petitioner's trial and appeal a direct appeal was also being pursued in State v. John Rickman, C.C.A. No. 03-C01-9211-CR-00393, 1993 WL 171706, Bradley County (Tenn. Crim. App., Knoxville, May 18, 1993) (hereinafter Rickman I). This Court's decision was handed down in May of 1993, and our Supreme Court granted permission to appeal in Rickman I on August 2, 1993–the same day that Petitioner's trial commenced. See id. at *1. Our Supreme Court rendered its decision on April 14, 1994, and reversed this Court. See State v. Rickman, 876 S.W.2d 824, 825 (Tenn. 1994) (hereinafter Rickman II).

John Rickman was convicted of statutory rape and incest for sexual acts with his stepdaughter. Id. at 826. At trial the victim testified to numerous sexual contacts with Rickman other than those for which Rickman was charged and convicted. Id. The trial court allowed such testimony for purposes of corroboration. Id. Our Supreme Court observed that there is no "sex crimes" exception to the evidentiary rule that evidence of other bad acts is inadmissible to prove action in conformity therewith. Id. at 829. The court reversed Rickman's convictions and remanded the case for a new trial. Id. at 830.

The proof presented at Petitioner's trial was very similar to that presented in Rickman because the primary evidence that the State presented of Petitioner's misconduct was the testimony of the victim–there was no physical evidence. Although the indictment charging Petitioner was not date-specific, a bill of particulars

narrowed the charge to incidents that occurred in 1990 or 1991 in Petitioner's home in Nashville.

The victim's testimony at Petitioner's trial was concise and unembellished. The victim's testimony was corroborated by testimony from the victim's mother and a licensed nurse practitioner who performed a physical examination of the victim. The victim's mother testified how the victim informed her of the abuse. The nurse practitioner testified as to the content of statements made by the victim regarding the abuse.

JW testified that during his visits to Petitioner's home in Nashville, after Petitioner was released from prison, Petitioner repeatedly touched the victim's genitals and anus. When asked to estimate the frequency of the abuse, JW guessed approximately 35 touchings per seven day period. The victim testified first that the Petitioner would put his hand around JW's penis, and touch his anus when Petitioner would come say goodnight to him. Next, JW testified that Petitioner touched the victim's penis and "butt" when JW would take a bath. JW also testified that Petitioner made the victim touch Petitioner's "private"– sometimes through, and sometimes under Petitioner's clothing–when they were in the bathroom, and when they were in the living room together. JW testified that Petitioner would touch the victim's penis when they were in the living room together. Finally, JW testified that the Petitioner would make him touch Petitioner's penis when JW would go into Petitioner's bedroom to say goodnight to Petitioner.

Like Rickman, the State presented evidence regarding sexual misconduct for which Petitioner was not charged. This evidence showed that Petitioner touched the

victim sexually when the victim visited Petitioner at Petitioner's home in White Bluff, Tennessee, in the year following the charged offenses. The State also presented evidence that was within the charge of the indictment but outside the bill of particulars. This evidence showed that the Petitioner touched the victim sexually when the victim came to visit Petitioner in prison some time between 1983 and March of 1990. Evidence of the White Bluff and prison conduct was alluded to in the testimony of other witnesses, and referred to by the State both in the State's opening and closing argument. Petitioner's counsel objected to this evidence in a pre-trial motion, but the trial judge ruled that the evidence was admissible.

Petitioner's counsel attempted to defend Petitioner by challenging the credibility of the victim and the victim's mother. This attempt included testimony from Petitioner, Petitioner's brother Richard Wray, Petitioner's nephew, Richard Lee Wray, Jr., and Petitioner's then-girlfriend Jennifer Hicks (who is now Petitioner's wife, and answers to Jennifer Wray). Petitioner attempted to show motive on the part of the victim's mother to frame Petitioner. Petitioner also challenged the victim's account of events through testimony which contradicted the victim's account of his visit with his father and which showed that the house in which the offenses occurred was extremely small–too small for such things to occur without attracting the notice of the other occupants of the house.

The grant of permission to appeal in Rickman I was not noticed by Petitioner's attorneys at trial or on appeal. There was no request for a limiting instruction regarding the evidence of uncharged sexual misconduct, nor was there a reference to Rickman I in the motion for a new trial. Petitioner's counsel on appeal also failed to discover our Supreme Court's decision in Rickman II. Thus Petitioner's appellate

brief, filed two months after our Supreme Court's decision, did not contain any arguments addressing Rickman II or the evidence of uncharged sexual misconduct.

After Petitioner's conviction he pursued a direct appeal, which was not successful. See State v. Jerome Martin Wray, C.C.A. No. 01C01-9404-CR-00139, 1995 WL 111687, Davidson County (Tenn. Crim. App., Nashville, Mar. 15, 1995) perm. to appeal denied (Tenn. 1995). He filed this petition for post-conviction relief on July 9, 1996. After an evidentiary hearing the post-conviction court denied the petition in a written order.

II. Post-conviction Proceeding

At Petitioner's post-conviction hearing on May 28, 1998, Petitioner presented the testimony of twelve witnesses, including that of Petitioner.

Mary M. Schaffner, Thomas F. Bloom, and Gregory D. Smith, all attorneys, testified about the standards of representation for attorneys in criminal cases in the state of Tennessee. Each one of these witnesses concluded that a reasonable attorney would have been aware of our Supreme Court's grant of permission to appeal in Rickman I, and would have used the grant as a basis for a claim in Petitioner's motion for new trial. Each expert also opined that a reasonable attorney would have been aware of our Supreme Court's decision in Rickman II after the decision was rendered, and would have included a Rickman II-based claim in Petitioner's direct appeal.

John Rodgers, Sr., Petitioner's attorney at trial, testified at length regarding his representation of Petitioner. Rodgers testified that his central trial strategy, given that the only evidence of wrongdoing was the testimony of the child victim, was discrediting the testimony of the victim and the victim's mother. He testified that he relied extensively on Petitioner's wife (then Petitioner's girlfriend), Jennifer Wray, for assistance in his pre-trial investigation, and also for communication with Petitioner, who was incarcerated in Morgan County. Mr. Rodgers testified that he came up with a list of witnesses for trial after consulting with Jennifer Wray–and that Petitioner did not directly give Rodgers any information regarding witnesses. Rodgers acknowledged that he did not call all the persons on his pre-trial witness list to testify at trial.

Mr. Rodgers explained his decision to call fewer witnesses as one of strategy. In the original indictment Petitioner was charged with offenses against two victims–Petitioner's son, JW, and stepdaughter, KC. Rodgers succeeded in severing the offenses–and confining the instant trial to those offenses committed against JW. Rodgers also prevailed in a pretrial motion in limine, which prevented the prosecution from referring to the offenses against KC. However, Rodgers was afraid that his witnesses at trial would slip and refer to the offenses against KC, thereby prejudicing Petitioner. Rodgers felt that the witnesses he did call were strong witnesses, and that the risk that the other witnesses presented was high as compared to their potential to assist Petitioner's case. He felt that their testimony would not add anything to that which was already presented.

Rodgers also testified that he had no recollection of requesting a limiting instruction regarding the evidence of uncharged sexual misconduct. Rodgers stated

that he had no knowledge of the grant of permission to appeal in Rickman I at any time during his representation of Petitioner.

Sam Wallace, Sr., Petitioner's attorney on direct appeal, testified that he was retained by petitioner in October of 1993 following Petitioner's trial. Mr. Wallace explained that he filed an amended motion for a new trial, which was heard and overruled. He did not have access to a transcript of the trial proceedings when he filed the amended motion, but he did have the transcript when the motion was heard. Wallace stated that when the motion was heard he knew there was an evidentiary issue at trial regarding evidence of uncharged sexual misconduct. Wallace then perfected an appeal to this Court. He testified that he was not aware of the grant of permission to appeal in Rickman I when he filed and argued the motion for a new trial. Wallace also testified that when he filed the appellate brief in Petitioner's case he was not aware of our Supreme Court's decision in Rickman II, and thus he did not bring a Rickman II-based challenge to the evidence of uncharged sexual misconduct that was introduced at Petitioner's trial. Mr. Wallace testified that had he been aware of the decision, he would have raised the Rickman issue on direct appeal.

Jennifer Wray testified that she assisted John Rodgers, Sr., in preparing Petitioner's defense for his trial. She informed Mr. Rodgers about available witnesses Brian Carder, Kelly Myer, Monica Charlton, and Carla Hedgecoth, but these persons were not called to testify at trial. She prepared a sketch of the house where the alleged offenses occurred, but Mr. Rodgers did not use the sketch at trial. Ms. Wray also testified that she met with Mr. Rodgers only one time prior to trial, and that to the best of her knowledge, Rodgers only met with Petitioner one time prior to trial. Finally, she testified that she had no contact with Mr. Rodgers from the time of

trial until the sentencing hearing. On cross examination she conceded that she did legal research for Rodgers prior to trial, and assisted Rodgers by interviewing potential witnesses.

Brian Keith Carder testified that he lived across the street from Petitioner in the summer of 1990, and that his family socialized with Petitioner's family, including JW, the victim. Mr. Carder testified that he never saw Petitioner mistreat JW. Mr. Carder also stated that he told Jennifer Wray he was available to testify at Petitioner's original trial.

Carla Hedgecoth testified that she is Petitioner's niece, and that she lived in the house in front of Petitioner's during the summer of 1990. She testified that she was familiar with signs of child abuse, and that she saw none during the time that the victim stayed with Petitioner. She stated that she was available to testify at Petitioner's original trial, but that she was not contacted by anyone.

Monica Maureen Charlton testified that she is Petitioner's sister-in-law, and that she lived in Petitioner's home for approximately eight months in 1990, including the time when the victim came to visit. She testified that she did not have a job and was home during the day and the night. Ms. Charlton testified that the victim slept in the living room on the couch, but that she slept in her bedroom. She testified that she did not see the Petitioner behave inappropriately towards the victim.

Kelly Lynn Myers testified that she is Petitioner's niece. She lived in Petitioner's home for a week in 1990 when the victim was visiting. At that time she was 11 years old. She testified that during that week she slept on the floor of the

living room while the victim slept on the couch in the living room, and she did not see Petitioner behave inappropriately towards the victim. She stated that she was available to testify at Petitioner's original trial.

Petitioner testified on his own behalf. He stated that the victim did not visit Petitioner in prison in 1990–the victim's last visit to the prison was during the summer of 1989.

III. Analysis

In order to obtain post-conviction relief a petitioner must allege that his conviction or sentence is void or voidable because of an abridgement of a constitutional right. T.C.A. § 40-30-203. If granted an evidentiary hearing, the petitioner has the burden of proving the allegations by clear and convincing evidence. T.C.A. § 40-30-210(f). The trial judge's findings of fact in a post-conviction proceeding are afforded the weight of a jury verdict. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim App. 1990). Consequently, this Court is bound by the trial judge's findings of fact unless we conclude that the evidence preponderates against the judgment entered by the post-conviction court. Caruthers v. State, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991).

Our examination of the post-conviction court's decision is constrained by three fundamental rules of appellate review. First, this Court cannot reweigh or reevaluate the evidence. Nor may this Court substitute its inferences for those drawn by the trial judge. Black, 794 S.W.2d at 755. Second, any questions regarding the credibility of the witnesses, the weight and value to be given to their testimony, and

the factual issues raised by the evidence are to be resolved by the trial judge. Id. Third, Petitioner bears the burden of proof, and must show why the evidence in the record preponderates against the judgment entered by the post-conviction court. Id.

The above standards are modified when the claim for relief is ineffective assistance of counsel. In State v. Burns our Supreme Court held that a claim of ineffective assistance of counsel raised on direct appeal is a mixed question of law and fact, and thus is subject to a de novo review. 6 S.W.3d 453, 461 (Tenn. 1999). In so holding, our Supreme Court made clear that a defendant alleging ineffective assistance of counsel on direct appeal must prove his claim by clear and convincing evidence–the same standard of proof required of a petitioner bringing the same claim in a post-conviction petition. See id. at 461 n.5. We interpret Burns as requiring the application of the same legal criteria to all claims of ineffective assistance of counsel, regardless of whether a claim is raised on direct appeal or in a post-conviction petition. Thus the claims of ineffective assistance of counsel before us are reviewed de novo.

Here, Petitioner has raised eight issues on this appeal. In issue number (7) Petitioner alleges that his due process rights were violated when evidence of uncharged sexual misconduct was admitted at his trial. In issue (8) Petitioner alleges a due process violation when the trial court failed to give a limiting instruction to the jury regarding the evidence of uncharged sexual misconduct. These issues are waived because Petitioner failed to include them on direct appeal. Tenn. Code Ann. § 40-30-206(g) (1997). The remainder of Petitioner's issues are all variations on the theme of ineffective assistance of counsel, and we address each in turn.

Petitioner alleges that both his trial and appellate counsel were ineffective, violating his right to counsel under the Sixth Amendment of the United States Constitution, and Article I, § 9 of the Constitution of Tennessee. In determining whether counsel provided effective assistance this Court must decide whether counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To prevail on a claim that his counsel was ineffective a petitioner bears the burden of proving two elements: First, that his counsel made errors so serious that he was not functioning as counsel as guaranteed by the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 687 (1984); Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993). This element is proved by showing that counsel's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. Second, the petitioner must prove that he was prejudiced by his counsel's unprofessional errors, such that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694; Butler v. State, 789 S.W.2d 898, 900 (Tenn. 1990).

When reviewing a defense attorney's actions, this Court may not use "20-20" hindsight to second-guess counsel's decisions regarding trial strategy and tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel's alleged errors should be judged at the time they were made in light of all the facts and circumstances. Strickland, 466 U.S. at 690; Cooper 849 S.W.2d at 746.

Petitioner alleges six instances of ineffective assistance. In sub-part A we will address together those claims that involve trial and appellate counsel's awareness of Rickman I and Rickman II. Sub-part B will address the claims of ineffective

assistance of counsel regarding the lack of a limiting instruction at trial regarding the admission of evidence of sexual misconduct. Sub-part C will address Petitioner's allegation that trial counsel was ineffective because he failed to call material witnesses on Petitioner's behalf.

A. Ineffective assistance of counsel: failure to raise arguments at trial and on direct appeal based on Rickman I and Rickman II.

Petitioner alleges that his trial and appellate attorneys were ineffective because they failed to take notice of the grant of permission to appeal in Rickman I, 1993 WL 171706, and our Supreme Court's subsequent ruling in Rickman II, 876 S.W.2d 824. Petitioner argues that the evidence of non-charged sexual misconduct introduced at Petitioner's trial was admitted in violation of Rickman II, and that had Rickman II been applied at trial or on appeal the necessary result would have been a reversal of Petitioner's conviction. Accordingly, we now turn to the first prong of Strickland, and ask if trial and appellate counsel's failure to bring a Rickman-based challenge was objectively unreasonable.

(i) Objectively reasonable representation

In determining if trial and appellate counsel acted reasonably, and within the standard of competency expected of attorneys in criminal cases, it is necessary to briefly discuss the Rickman II holding and why it is applicable to Petitioner's case.

(a) Rickman II and the admission of evidence of uncharged sexual misconduct

Rickman II addressed the scope of Tennessee Rule of Evidence 404, which prohibits the introduction of character evidence, or evidence of a character trait, "for

the purpose of proving action in conformity with the character or trait on a particular occasion." Tenn.R.Evid. 404(a). The rule's prohibition extends to using evidence of other crimes, wrongs, or acts for the same purpose. Tenn.R.Evid. 404(b). In other words, evidence of other criminal activity cannot be introduced simply to prove that the defendant committed the crime for which he is charged. This general rule "is based on the recognition that such evidence easily results in a jury improperly convicting a defendant for his or her bad character or apparent propensity or disposition to commit a crime regardless of strength of the evidence concerning the offense on trial." Rickman II, 876 S.W.2d at 828 (citing Anderson v. State, 56 S.W.2d 731 (Tenn. 1933)). Evidence of other crimes may be admitted, however, if it is relevant to some matter at issue in the case at trial, and if the probative value of the evidence is not outweighed by the prejudicial effect upon the defendant. Tenn.R.Evid. 404(b); State v. Bunch, 605 S.W.2d 227, 229 (Tenn. 1980). Thus evidence of other crimes may be admitted to prove (1) identity, including motive or common scheme or plan, (2) intent, and (3) to rebut a claim of mistake or accident–if such is raised as a defense. State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996) (citing Tenn.R.Evid. 404, Advisory Comm'n Comments; State v. Parton, 694 S.W.2d 299, 302 (Tenn. 1985)).

In Rickman II our Supreme Court rejected an interpretation of Rule 404 that created an exception to the rule for "sex crimes." 876 S.W.2d at 827-29. Instead, the court reaffirmed its prior holdings that evidence of sexual misconduct is subject to the same evidentiary rules as non-sexual misconduct. See id. at 829. In so holding, however, the court clarified that evidence of sexual misconduct may be admissible because it is relevant when (1) the indictment is not time-specific, and (2) the evidence relates to sex crimes that allegedly occurred within the time frame

charged by the indictment. Id. This special rule is balanced by the requirement that the State elect, at the conclusion of the State's proof, as to the particular incident for which a conviction is sought. Id. Thus the "introduction of other incidents of sexual crimes occurring within the indicted period requires an election of offenses; otherwise the introduction of other sexual crimes outside the indicted period, or in a 'date specific' indictment requires compliance with Rule 404(b) procedures." State v. Hoyt, 928 S.W.2d 935, 947 (Tenn. Crim. App. 1995). For evidence to be admissible under Rule 404(b) there must be (1) a hearing outside the presence of the jury to address admissibility; (2) a determination by the trial court that the evidence is relevant to a material issue other than conduct conforming with the character trait; and (3) a determination by the trial court that the probative value of the evidence outweighs the danger of unfair prejudice to the defendant. Tenn.R.Evid. 404(b). Moreover, the trial court must find that the defendant committed the other incidents by clear and convincing evidence. McCary, 922 S.W.2d at 514 (citing Tenn.R.Evid. 404, Advisory Comm'n Comments).

Here, Rickman II clearly applies to the evidence of sexual misconduct that was presented at Petitioner's trial. Rickman was convicted of statutory rape and incest for having sex with his stepdaughter on one particular occasion. 876 S.W.2d at 826. The evidence at issue in Rickman II was the testimony of the defendant's stepdaughter regarding other instances of sexual contact between her and Rickman–conduct that was not within the charge of the indictment. Id.

The above scenario is similar to that which was presented at Petitioner's trial. The language of the indictment that charged Petitioner was not date-specific, and described the time and place of the offenses as follows: "on a day in 1990 or 1991,

in Davidson County, Tennessee." However, the State's response to Petitioner's motion for a bill of particulars gave further information regarding the crimes charged: all were alleged to have occurred in the Petitioner's house or residence "after [Petitioner] had been released from the penitentiary."

The trial court allowed the prosecution to present evidence regarding sexual conduct by Petitioner, towards the victim, at three times and locations that were separate and distinct from one another. First, the prosecution presented evidence that Petitioner molested the victim when the victim came to visit Petitioner in prison in Tennessee. The time-frame of these crimes was not specified by the victim–and could have been at any period during Petitioner's incarceration from 1983 until March of 1990. Second, the prosecution presented evidence that Petitioner molested the victim at the residence on Illinois Avenue, in Nashville, Davidson County, during the summer of 1990, when the victim came to visit Petitioner during the victim's summer vacation. Third, the prosecution presented evidence that the Petitioner molested the victim in White Bluff, Dickson County, Tennessee, in 1991, which was also a visit during the victim's summer vacation.

Only one of these instances–the conduct on Illinois Avenue in Nashville–was squarely within the charge of the indictment. First, the conduct in White Bluff was not because Petitioner was not tried for criminal conduct occurring outside of Davidson County. Second, it appears that the State's proof did not show that the prison misconduct occurred within Davidson County. Third, it is also possible that under Rickman II the bill of particulars narrowed the charge of the indictment to exclude conduct during the prison visitations. See Rickman II, 876 S.W.2d at 828 (citing State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993)).

We are of the opinion that Rickman II would presently govern the admissibility of the evidence of sexual misconduct that was presented at Petitioner's trial. Petitioner was charged with committing sex offenses at his home in Nashville. The evidence presented, however, included completely unrelated evidence of other sexual misconduct during the prison visits and White Bluff visitation. Because it is clear that Rickman II provides controlling law that could have been used to address the admissibility of evidence of uncharged sexual misconduct introduced at Petitioner's trial, we now ask whether it was objectively unreasonable for trial and appellate counsel to have failed to bring a Rickman II-based challenge to the evidence.

(b) Objectively reasonable representation: trial counsel

Although Rickman II controls the evidentiary issue presented at Petitioner's trial, we are of the opinion that trial counsel's failure to raise Rickman II was not objectively unreasonable. This Court's decision in Rickman I was released on May 18, 1993. See 1993 WL 171706, at *1. Our decision held that the challenged evidence of uncharged sexual misconduct was admissible. Id. at *7. This was the law at the time that Petitioner's trial began on August 2, 1993. Petitioner's trial counsel did file a pretrial motion which set forth Petitioner's objection to the introduction of evidence of uncharged sexual misconduct. When the trial judge denied this motion he relied on prior decisions by this Court that deemed such evidence admissible. Petitioner's trial counsel conceded to the trial court that he knew of no case law which would support the exclusion of the evidence.

Petitioner argues that his trial counsel was ineffective because counsel failed to discover that our Supreme Court granted permission to appeal in Rickman I on

August 2, 1993–the same day that Petitioner's trial started. Petitioner argues that a reasonable attorney would have noted the grant of permission to appeal, and used it in the motion for a new trial as a basis to attack the admission of the evidence of uncharged sexual misconduct. Petitioner buttressed this argument at the post-conviction hearing with the testimony of three attorneys, all of whom were qualified by the court as experts in appellate practice in Tennessee. Each attorney testified that a reasonable attorney would have been aware of the grant of permission to appeal, and used it in the new trial motion. Petitioner's reliance on this evidence is based on his presumption that the grant of permission to appeal in Rickman I necessarily meant that the Court of Criminal Appeals was going to be reversed. As put forth by Thomas F. Bloom, one of Petitioner's experts: "I do not know what it is like in other states, but I do know that in Tennessee . . . the Tennessee Supreme Court generally does not take a case unless they are going to reverse it."

The post-conviction court disagreed with Petitioner, stating that the court "does not believe that such clairvoyance is within the standard of competency." We agree with the post-conviction court. Trial counsel's failure to argue the procedural posture of Rickman I does not constitute ineffective assistance of counsel. The grant of permission to appeal by our Supreme Court does indeed tell a reasonable attorney that a decision by the Supreme Court of Tennessee will be rendered in the case for which an appeal is granted. But such a grant does not tell a reasonable attorney which way the decision will fall. Indeed, a review of the criminal cases decided by the Supreme Court in 1999 available on the Westlaw database shows that of the 48 decisions issued by the court, over 50% of those decisions affirmed the Court of Criminal Appeals. In our opinion a reasonable attorney is versed and aware of the law as it stands–we decline to expand the definition of a reasonable

attorney to require that attorneys research and argue what the law might possibly become.

(c) Objectively reasonable representation: counsel on direct appeal

_____Petitioner also alleges that appellate counsel, Sam Wallace, Sr., was ineffective for failing to notice the grant of permission to appeal in Rickman I, and our Supreme Court's decision in Rickman II. This argument is twofold. First, Petitioner argues that appellate counsel was ineffective because counsel failed to properly research the law, discover our Supreme Court's grant of permission to appeal in Rickman I, and utilize the grant in Rickman I in the amended motion for new trial as a basis for excluding evidence of uncharged sexual misconduct. Second, Petitioner argues that Wallace was ineffective because he failed to properly research the law after Rickman II had been decided, did not discover the Rickman II opinion, and thus did not use Rickman II as grounds for a claim on direct appeal.

Petitioner's claim is framed in this manner because Wallace represented petitioner both before and after our Supreme Court's decision in Rickman II. Petitioner's trial concluded on August 5, 1993–three days after permission to appeal was granted in Rickman I. Wallace was made attorney of record on October 21, 1993. He filed an amended motion for a new trial and judgment of acquittal which was heard on November 18, 1993. Our Supreme Court rendered its decision in Rickman II on April 11, 1994. See 876 S.W.2d 824. Wallace filed the record in Petitioner's case in this Court on April 14, 1994, and filed Petitioner's appellate brief in this Court on June 15, 1994.

For the reasons set forth above in part IIA(i)(b), we hold that Mr. Wallace's representation was not objectively unreasonable when he failed to note the grant of permission to appeal, use it in the motion for a new trial, and bring a challenge to the evidence of uncharged sexual misconduct. We hold, however, that Wallace's representation was objectively unreasonable when he failed to research the law and become aware of the Supreme Court's disposition in Rickman II after the decision had been rendered and disseminated to the public. As a result, Wallace's failure to bring a Rickman II-based claim leads us to the conclusion that Wallace's representation of Petitioner fell below the standard expected of attorneys in criminal cases.

Mr. Wallace testified at the post-conviction hearing that he had no knowledge of the Rickman case at any time during Petitioner's direct appeal. He testified that he had read the transcript of Petitioner's trial in order to prepare Petitioner's appeal, and that he was aware that evidence of uncharged sexual misconduct had been admitted at Petitioner's trial. Wallace also testified that if he had known of the Rickman II decision, he would have brought a Rickman II-based challenge to the evidence of uncharged sexual misconduct.

The post-conviction court held that Wallace's actions after the Rickman II decision had been released were reasonable because Rickman II represented a sea-change in the law regarding the evidentiary use of uncharged sexual misconduct. Although we recognize that sudden changes in well-established law can catch a reasonable attorney off-guard, we respectfully disagree with the post-conviction court's conclusion on this issue. One reason that an attorney must conduct thorough research is because the law is constantly changing. Although

some areas of law change more drastically than others, we believe that a reasonable attorney is one who is aware that the law is not static, and who conducts timely research–each time that his services are required–in order to ensure that he is familiar with the law. Wallace submitted his appellate brief to this Court two months after Rickman II was decided. At minimum, a reasonable attorney in a like position would have researched the law pertinent to all issues raised at trial and in the motion for a new trial before completing the brief. In so doing, a reasonable attorney would have discovered Rickman II. Although Petitioner's objection to the evidence of uncharged sexual misconduct was not preserved in the motion for a new trial, a reasonable attorney would have challenged the evidence at issue before this Court under the doctrine of plain error. See Tenn.R.Crim.P. 52(b). Wallace's representation of Petitioner after the Rickman II decision was objectively unreasonable.

(ii) Prejudice

Even though appellate counsel's representation of Petitioner was unreasonable, and fell below the standard expected of attorneys in criminal cases, we may not set aside Petitioner's conviction unless Petitioner can show prejudice resulting from his attorney's unprofessional error. In other words, there must be a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694; Butler, 789 S.W.2d at 900. Petitioner can only show prejudice here if there is a reasonable probability that (1) this court would have applied our Supreme Court's decision in Rickman II retroactively to Petitioner's direct appeal, (2) the evidence of uncharged sexual misconduct was wrongfully admitted under Rickman II, and (3) the admission of the evidence was reversible error.

(a) Retroactive Application of Rickman

Even though Petitioner's motion for a new trial did not preserve trial counsel's initial objection to the evidence of uncharged sexual misconduct, this Court could have reached the issue on Petitioner's direct appeal under the doctrine of plain error. See Tenn.R.Crim.P. 52(b). However, our Supreme Court's decision in Rickman II does not state what type of retroactive effect the court intended the decision to have. See 876 S.W.2d 824 (Tenn. 1994). Although there is a general rule mandating full retroactive application of new state constitutional rules that enhance the integrity and reliability of the fact-finding process at trial, see State v. Meadows, 849 S.W.2d 748, 754 (Tenn. 1993), we have previously held that Rickman II does not announce a new constitutional rule. See James Robert Blevins v. State, C.C.A. No. 03C01-9611-CR-00396, 1997 WL 280052, at *2, Washington County (Tenn. Crim. App., Knoxville, May 28, 1997), perm. to appeal denied (Tenn. 1997). There is no comparable rule for new rules of criminal law that do not stem from constitutional mandates. Accordingly, in order to determine whether this Court would have applied Rickman II retroactively on Petitioner's direct appeal, we look to other cases in which Rickman II has been retroactively applied.

In State v. Frank Daniel Peters this Court applied Rickman II retroactively on direct appeal and reversed Peters' conviction of aggravated sexual battery. C.C.A. No. 03C01-9312-CR-00405, 1994 WL 678541, Hamblen County (Tenn. Crim. App., Knoxville, Dec. 6, 1994), no Rule 11 application filed. Peters was convicted on July 19, 1993–ten months before Rickman II–of perpetrating the battery upon his step-daughter. At trial, the victim testified that the defendant touched her sexually on numerous occasions in the year prior to the crime for which the defendant was

charged. Peters, 1994 WL 678541, at *1. This Court applied Rickman II, noting that "the evidence of the prior acts between the victim and the defendant was a significant part of the victim's testimony." Id. at *2. This Court reversed Peter's conviction after concluding that under Rule of Evidence 404(b) the prejudicial effect of the evidence outweighed the probative value. Id. at *3.

In State v. Dutton the Tennessee Supreme Court applied Rickman II retroactively on direct appeal and reversed Dutton's conviction on three counts of aggravated rape. 896 S.W.2d 114, 115 (Tenn. 1995). Dutton was convicted on August 25, 1992, one year and nine months before the Rickman II decision. At trial, the victim's cousin testified that he had seen the defendant perform sexual acts on the victim on occasions other than those charged in the indictment. 896 S.W.2d at 115. The victim also testified that the defendant had performed sexual acts on the victim approximately twenty times since the victim was seven-years-old. Id. at 116. Our Supreme Court determined that Rickman II controlled the issue, and applied a harmless error analysis. Id. 116. The Court determined that the evidence was not harmless because the trial took on the form of a credibility contest: the "victim's testimony was the primary evidence against the defendant. The defendant took the stand and denied the charges against him. Essentially the jury had to decide who to believe . . . ." Id. at 117. The court concluded that under these circumstances the evidence more probably than not affected the judgment, and reversed the defendant's convictions. Id.

In State v. Otis Breeden this Court applied Rickman II retroactively on direct appeal and reversed Otis Breeden's conviction on two counts of aggravated sexual battery and two counts of exhibiting harmful materials to minors. C.C.A. No. 03C0L-

93L0-CR-00335, 1995 WL 390952, Sevier county (Tenn. Crim. App., Knoxville, July 15, 1995) no Rule 11 application filed. Breeden was convicted on April 6, 1993–thirteen months before Rickman II–of two counts of sexual battery and two counts of exhibiting harmful materials to minors. Breeden, 1995 WL 390952, at *1. At trial, one of Breeden's victims testified that Breeden touched her private parts with his hands more than twenty times. Id. The other victim testified that Breeden had touched her genitals and breasts more than twenty times and that Breeden had tried to get her to perform fellatio upon him. Id. This Court initially affirmed Breeden's conviction, holding that the evidence of uncharged sexual misconduct was admissible to show a state of intimacy between the victims and the defendant. See State v. Otis Breeden, C.C.A. No. 03C01-9310-CR-00335, 1994 WL 361555, at *2, Sevier County (Tenn. Crim. App., Knoxville, July 13, 1994), perm. to appeal granted (Tenn. 1995). Our Supreme Court remanded the case to this Court for reconsideration in light of Rickman II. State v. Otis Breeden, No. 03-C-01-9310-CR-00335, 1995 WL 355588, Sevier County (Tenn., Knoxville, June 12,1995). On remand this Court held the evidence on uncharged sexual misconduct should not have been admitted, and reversed Breeden's convictions. State v. Otis Breeden, 1995 WL 390952, at *1.

In State v. Woodcock this Court applied Rickman II retroactively, and reversed Barry Woodcock's conviction on two counts of rape and three counts of incest. 922 S.W.2d 904 (Tenn. Crim. App. 1995). Woodcock was convicted on October 15, 1993–seven months before the Rickman II decision. Woodcock was charged with five crimes, which occurred on four separate days. 922 S.W.2d at 907. During the State's proof-in-chief the victim provided explicit testimony regarding uncharged sexual conduct between the victim and the defendant. Id. at 909-910. The State

also introduced other evidence of sexual misconduct and referred to the uncharged conduct repeatedly in closing arguments. Id. at 910. Although the defendant objected to the introduction of evidence of uncharged conduct (in a pre-trial motion), the trial court overruled the motion, and relied in part on this Court's decision in Rickman I. 922 S.W.2d at 908-909. On appeal, this Court held that Woodcock's convictions must be reversed under Rickman II because the evidence of uncharged conduct was "highly prejudicial," and could not be harmless error. Id. at 912.

Finally, in State v. McCary our Supreme Court applied Rickman II retroactively on direct appeal and reversed Donald McCary's convictions on thirteen sex offenses. 922 S.W.2d 511 (Tenn. 1996). McCary was convicted on April 1, 1992, two years and one month before the Rickman II decision. McCary was a minister at a church, and he was indicted for sexual acts perpetrated on four minors. 922 S.W.2d at 513. At trial the State presented the testimony of a fifth party with whom McCary had sexual contact, and this witness testified at length regarding five years of sexual activities with the defendant. Id. at 513. Our Supreme Court held that this evidence did not fall under any of the Rule 404 exceptions, and thus was inadmissible propensity evidence. Id. at 514. The court held that the evidence was "profoundly prejudicial," and concluded that its admission could not be harmless error. Id. at 515.

After reviewing the above cases we conclude that there is a reasonable probability that this Court would have applied Rickman II retroactively to Petitioner's direct appeal had the issue been raised.

(b) Application of Rickman to Petitioner's Case on Direct Appeal

Assuming that this Court would have applied Rickman retroactively on Petitioner's direct appeal, we must first decide if the evidence of uncharged sexual misconduct was admitted in violation of Rickman. If the evidence was improperly admitted, we must then decide if the admission was reversible error. After very careful consideration we hold that the evidence regarding misconduct in White Bluff was improperly admitted. We also hold that the evidence regarding sexual misconduct at the prison may have been improperly admitted. Nonetheless, we hold that the admission of the above evidence was harmless error. As a result, Petitioner cannot show that he was prejudiced by his counsel's failure to raise the issue.

Under Rickman II the "introduction of other incidents of sexual crimes occurring within the indicted period requires an election of offenses; otherwise the introduction of other sexual crimes outside the indicted period, or in a 'date specific' indictment requires compliance with Rule 404(b) procedures." Hoyt, 928 S.W.2d at 947. As previously discussed, the language of the indictment here was not date-specific, and described the time and place of the offenses as follows: "on a day in 1990 or 1991, in Davidson County, Tennessee." However, the State's response to Petitioner's motion for a bill of particulars gave further information regarding the crimes charged: all were alleged to have occurred in the Petitioner's house or residence "after [Petitioner] had been released from the penitentiary."

The language of the indictment and the bill of particulars make it clear that Petitioner was not indicted for sexual misconduct during visits to Petitioner's residence in White Bluff. Thus the Rickman II exception does not apply, and under Rickman II this evidence should have been subject to Rule 404(b) procedures. See Hoyt, 928 S.W.2d at 947. It is unclear if the evidence about the prison visitations is

within the charge of the indictment for purposes of the Rickman exception. In Rickman II our Supreme Court discussed its prior holding in State v. Shelton, and concluded that the evidence of sexual misconduct admitted against Shelton was properly admitted because it was within the time frame of the indictment as narrowed by the bill of particulars. See 876 S.W.2d at 828 (citing 851 S.W.2d 134, 157 (Tenn. 1993)). Our Supreme Court did not suggest what the conclusion would be had the evidence been within the charge of the indictment, but outside that of the bill of particulars. See id. We also note that at Petitioner's trial the State neglected to present any proof showing that the misconduct during the prison visits occurred within Davidson County, thus bringing the conduct within the scope of the indictment. Because it is unclear what the correct result is here, we will proceed based on the assumption that the evidence of sexual misconduct at the prison was outside the charge of the indictment. Thus this evidence should also have been subject to Rule 404(b) procedures. See Hoyt, 928 S.W.2d at 947.

Given that Rickman II had yet to be decided at the time of trial, the trial judge did not apply Rule 404(b) to either the prison misconduct or the misconduct in White Bluff. However, even if Rule 404(b) had been applied the evidence would not have been admissible. None of the Rule 404(b) exceptions apply here–the evidence here does not speak to identity, motive, a common scheme or plan, or intent. Further, there was no claim of mistake or accident raised as a defense. Nor can we say that the probative value of this evidence outweighs the prejudicial effect upon Petitioner. See Tenn.R.Evid. 404(b). The evidence regarding the sexual misconduct at the prison and at White Bluff has no probative value whatsoever as regards to the offenses that occurred in Nashville.

This does not conclude our inquiry, for even if the trial judge did err, this Court would not have set aside Petitioner's conviction unless there was a substantial probability that the error affected the outcome of Petitioner's trial. Dutton, 896 S.W.2d at 117 (citing Tenn.R.App.P. 36(b)). We do not believe this to be the case, and conclude that the error was harmless. We base our holding on the facts presented at trial. The evidence regarding the charged offenses was substantial and detailed. The evidence regarding Petitioner's sexual misconduct during the prison and White Bluff visits was limited and nondescript. As a result, the error that resulted from the admission of the evidence was harmless.

As set forth in Part I of this opinion, the State's direct evidence regarding Petitioner's conduct during the victim's visit to Petitioner's home in Nashville consisted primarily of the victim's testimony. This was supported by testimony of the victim's mother, Beverly McCarthy, who testified how the victim informed her of the abuse. Testimony was also given by Sue Ross, a licensed nurse practitioner who examined the victim for signs of sexual abuse. Ross testified regarding the victim's description of the abuse given to Ross at the time of the examination. Although Petitioner objected to this evidence as hearsay, the trial court asked counsel why the evidence did not constitute statements given for purposes of medical diagnosis and treatment (apparently referring to the hearsay exception codified at Tenn.R.Evid. 803(4)), and Petitioner withdrew the objection. The State did not introduce any physical evidence.

The victim's testimony regarding the charged conduct was clear and concise. The victim testified first that the Petitioner would put his hand around the victim's penis, and touch the victim's anus when Petitioner would come say goodnight to the

victim. Next, the victim testified that Petitioner touched the victim's penis and "butt" when the victim would take a bath. The victim also testified that Petitioner made the victim touch Petitioner's "private"–sometimes through, and sometimes under Petitioner's clothing–when they were in the bathroom, and when they were in the living room together. The victim testified that Petitioner would touch the victim's penis when they were in the living room together. Finally, the victim testified that Petitioner would make the victim touch Petitioner's penis when the victim would go into Petitioner's bedroom to say goodnight to Petitioner.

This evidence is the context in which the improperly admitted evidence, and any references thereto, must be placed. The first reference that we find to the evidence of uncharged sexual misconduct is in the State's opening statement, when the State referred to Petitioner's conduct in White Bluff:

> In May of '91 , going backwards, Mr. Wray moved to White Bluff. And the child continued to visit him and has visited him, in fact, in White Bluff . . . . Mr. Wray continued to abuse his son not only here in Nashville, but in White Bluff until the mother found out about it in April of 1992.

The State then presented proof regarding the uncharged sexual misconduct in five separate instances. First, in the State's direct examination of the victim, the State initially referred to the prison visitations:

> Q: And why did you stop seeing your dad?
> A: Because he abused me.
> Q: And how did he do that? Did he do something to you that you didn't like?
> A: Yes.
> Q: Did he touch your body?
> A: Yes.
> Q: Can you tell me what part of your body he touched?
> A: My butt and my penis.
> Q: Now, let me ask you a little bit about where you were when that would happen. Okay? Did it happen to you at the penitentiary?
> A: Yes.

Second, after the State had the victim testify to the abuse that occurred in Nashville, the State asked the victim if the abuse occurred in White Bluff:

> Q: After that did you see him in a place called White Bluff?
> A: Yes.
> Q: Do you know what White Bluff is?
> A: No. A (sic) think I know what house you're talking about. It ain't the one next to the store, is it? The one out by the woods?
> Q: That's what I'm asking you. The next time you went to see him where did he live?
> A: Out by the woods.
> Q: So you don't know what the name of the place is, the town, where the house by the woods is?
> A: No.
> Q: When you went to see him at the house by the woods did the same things happen to you there?
> A: Yes.

The State also addressed the uncharged White Bluff misconduct on redirect. On cross examination Petitioner attempted to impeach the victim by introducing a prior statement of the victim's in which the victim stated that the offenses occurred in White Bluff, and not in Nashville. On redirect, the State sought to rehabilitate the victim's identification of the location of the offenses:

> Q: Well, all I really want to know is the things you told me about, told the jury about, that your dad did to you that you didn't like, did he do that to you at every house that you visited him?
> A: Yes.
> Q: So when you tell the lady, "Yes, he did bad things to me in White Bluff," is that true?
> A: Yes.

Fourth, the State indirectly revisited the uncharged White Bluff conduct during the cross examination of Jennifer Wray (then Jennifer Hicks), who was living with Petitioner during 1990 and 1991:

> Q: Ms. Hicks, where do you live now?
> A: White Bluff.
> Q: At this same place in White Bluff that you lived in May of '91?

A: No.
Q: Is it true that when you left Illinois Avenue you moved to an apartment in White Bluff?
A: It was a cabin, yes.
Q: A cabin?
A: Uh-huh (affirmative).
Q: Was it near the woods?
A: It was–it had some trees and some high grass off to the side and a railroad track behind it. It wasn't near the woods.
Q: Okay, but there was a wooded area and there was a railroad track there?
A: Right.
. . . .
Q: At the time that Justin came to visit you in 1991–
A: Uh-huh (affirmative).
Q: –in August–
A: Right.
Q: –which did you live in?
A: The cabin.

Finally, the State directly addressed the prison visit conduct during Mrs. Wray's cross examination:

Q: Let's see. You're saying that when you took the child to meet his father [at the prison] it was not possible for him to be alone with his father?
A: Right.
Q: Now obviously from the dates we can see that Kendra was born at a time when [Petitioner] was incarcerated and at a time a year or so after you met him while he was still incarcerated. So you were able to be alone with [Petitioner] at the pen; right?
A: Correct.
Q: You didn't have any problem being alone with him?
A: Yes.
Q: You did have a problem–
A: Well–
Q: –but you could manage it.
A: You can manage it.

Finally, in closing, the State referred to the uncharged sexual misconduct of Petitioner during the victim's visits to Petitioner in prison:

> We know he started doing this to [the victim] when he went to the penitentiary. We have no evidence that he ever did this to the child before that. In the penitentiary we must accept the fact that the

> penitentiary is probably what you heard here about what it's like. It's probably not what you thought it was like at all.
>
> This is a place where you have wall-to-wall carpeting, you have curtains, you have TV, you had a VCR, you had a refrigerator. It's not exactly how you might have typically imagined it would be like in the penitentiary. And of course there can be no argument that [Petitioner] did not have private access to the child while at the penitentiary.
>
> Obviously his girlfriend, Jennifer Hicks, conceived her first child with [Petitioner] at the penitentiary. It's obvious that you can arrange or be aware of ways to have privacy while you're at the pen. And that's the same as it goes for the house. You don't do this in front of other people. You don't do it in front of other people. It's a secret. Don't tell anyone or you'll get in trouble.

There were no other references in the State's closing to uncharged sexual misconduct.

As is evident from the above, with one exception, the State's evidence regarding the non-charged conduct during prison visitations and during the victim's visit to White Bluff was general in detail. When this is compared with the substantial and detailed evidence that the victim gave regarding the charged conduct, we conclude that any unfair prejudice that accrued to Petitioner during the presentation of the evidence was harmless. Moreover, although the references to the uncharged sexual misconduct in the State's opening and closing compounded the prejudicial effect of the evidence, we note that the portion of the State's argument that references the uncharged conduct is brief. When each prejudicial reference is placed in the context of the entire opening and closing arguments the prejudicial references are, standing alone, insignificant. The State emphasized the circumstances surrounding the charged offenses and the victim's testimony, and made only a passing reference to the uncharged conduct in both the opening and the closing.

We note that the evidence here is less prejudicial than the evidence presented in the cases that Petitioner cites as controlling authority that would require reversal of Petitioner's conviction. These prior cases all involve strong and direct evidence of uncharged sexual misconduct. In State v. Woodcock the victim's testimony regarding the uncharged sexual misconduct included graphic and explicit descriptions of sexual activity. 922 S.W.2d at 909-910. In State v. Breeden, a 10 year old victim testified that, in addition to the charged conduct, the defendant attempted to get the victim to perform fellatio, and touched her "front part" more than twenty times. 1995 WL 390952, at *1. The other victim testified that the defendant touched her genitals more than twenty times. Id. In State v. McCary a third-party witness testified to having sexual contact with the defendant for a period of five years, when the witness was age 15 to age 20, including kissing, fondling, and masturbation. 922 S.W.2d at 513. In State v. Dutton a witness testified that he watched the defendant perform sexual acts on the victim at times outside the charge of the indictment. 896 S.W.2d at 115. Finally, in State v. Peters, the victim testified that in the year preceding the charged incident the defendant would touch the victim's genitals before she would be allowed to go out with friends, and the defendant touched her breasts and tried to kiss her. 1994 WL 678541, at *1.

We do not think the improperly admitted evidence here rises to the level of that described above. Although the victim's testimony was not corroborated by physical evidence, the victim's mother and nurse Ross both confirmed that the victim informed them of Petitioner's misconduct. The evidence is not overwhelming, but the victim's testimony provided sufficient evidence of Petitioner's crimes.

B. Ineffective Assistance of Counsel: failure to request a limiting instruction for evidence of uncharged sexual misconduct.

Petitioner alleges that his trial counsel John Rodgers, Sr., was ineffective because he did not request a limiting instruction for the evidence of uncharged sexual misconduct. Petitioner also alleges that his appellate counsel, Sam Wallace, Sr., was ineffective because appellate counsel failed to raise a claim based on the absence of a limiting instruction. The basis for Petitioner's argument is case law which pre-dates our Supreme Court's opinion in Rickman II. Under this precedent, evidence of uncharged sexual misconduct was admissible, but only for limited purposes, such as corroboration, or to show a state of intimacy. See, e.g., State v. Lockhart, 731 S.W.2d 548, 551 (Tenn. Crim. App. 1986); State v. Williams, 768 S.W.2d 714, 716 (Tenn. Crim. App. 1988).

We need not consider if trial counsel's and appellate counsel's respective inaction on this issue was objectively unreasonable. As we discussed in part IIA of this opinion, the admission of the evidence of uncharged sexual misconduct was not prejudicial error. Thus Petitioner cannot show prejudice even if trial counsel's failure to request such an instruction was unreasonable. Likewise, Petitioner cannot show prejudice even if appellate counsel's failure to raise the issue on direct appeal was unreasonable. Petitioner is not entitled to relief on this issue.

C. Ineffective Assistance of Counsel: failure to call material witnesses.

Petitioner's final claim alleges that his trial counsel, John Rodgers, Sr., was ineffective because he failed to call material witnesses on Petitioner's behalf.

Petitioner argues that Mr. Rodgers had a duty to call all available witnesses on Petitioner's behalf because the only direct proof in the case was the testimony of the victim. Petitioner argues that counsel's failure to call several witnesses, all of whom were available to testify, reflects counsel's inadequate preparation for trial, and was not based on a rational strategic decision. We disagree.

Mr. Rodgers testified at the post-conviction hearing about his decision to not call all the witnesses listed in his witness list. In the original indictment Petitioner was charged with offenses against two victims–Petitioner's son, JW, and stepdaughter, KC. Counsel succeeded in severing the offenses–and confining the instant trial to those offenses committed against JW. Counsel also prevailed in a pre-trial motion in limine, which prevented the prosecution from referring to the offenses against KC during trial. However, counsel was afraid that his witnesses at trial would slip and refer to the offenses against KC, thereby prejudicing Petitioner. Mr. Rodgers felt that the risk posed by the other witnesses presented was high as compared to their potential to assist Petitioner's case: "And with every question and with every witness I stood in fear of going down the drain. At that time the witnesses that were left were in my opinion not strong enough to take a chance, so I didn't call them."

Nothing in Petitioner's post-conviction proof rebuts Mr. Rodger's assessment. The witnesses presented at the post-conviction hearing–Brian Carder, Carla Hedgecoth, Monica Charlton, and Kelly Lynn Myers–did not have personal knowledge of any facts surrounding Petitioner's crimes. They all testified to the fact that they lived in or near Petitioner's home at the time in question and that they never saw Petitioner behave inappropriately towards the victim.

We conclude that Mr. Rodgers decision to not call any further witnesses was a reasonable exercise of his professional judgment. The post-conviction court found that the testimony of the additional witnesses would have been cumulative, and the evidence does not preponderate against this finding. Absent clear and convincing evidence that the witnesses not called possessed material and highly probative information regarding Petitioner's case, we will not second-guess counsel's trial strategy. Moreover, even if Mr. Rodgers' failure to call witnesses was objectively unreasonable, Petitioner cannot show prejudice. We cannot say that there is a reasonable probability that the evidence offered at the post-conviction hearing by the non-called witnesses would have altered the outcome of Petitioner's trial.

IV. Conclusion

For the above reasons we affirm the post-conviction court's dismissal of the Petition.

_____
THOMAS T. WOODALL, Judge

CONCUR:

_____
JOE G. RILEY, JR., Judge

_____
JAMES CURWOOD WITT, JR., Judge