

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs February 1, 2023

FILED

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Appellate Courts

CHRISTOPHER BOSTICK v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 13-02706 Jennifer Johnson Mitchell, Judge

No. W2022-00723-CCA-R3-PC

The Petitioner, Christopher Bostick, appeals the Shelby County Criminal Court's denial of his petition for post-conviction relief from his convictions for rape of a child and aggravated sexual battery. On appeal, the Petitioner argues that the post-conviction court erred by denying his claims that he received the ineffective assistance of trial counsel. We affirm the post-conviction court's judgment.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TIMOTHY L. EASTER, JJ., joined.

Rosalind Elizabeth Brown, Memphis, Tennessee, for the appellant, Christopher Bostick.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

A. Trial

A Shelby County Criminal Court jury found the Petitioner guilty of rape of a child and aggravated sexual battery. *State v. Christopher Bostick*, No. W2016-00573-CCA-R3-CD, 2017 WL 764591, at *1 (Tenn. Crim. App. Feb. 24, 2017). The pertinent facts from the underlying trial, as summarized by a panel of this court on appeal, are as follows:

The victim, B.T., was age seven at the time of the incidents, and the [Petitioner] met the victim and his family through a mentoring program.

The victim's mother testified that she and her husband had three children, B.T., a son, M.T., who was B.T.'s twin sister, and I.T., who was B.T. and M.T.'s younger sister, and that she and her husband were foster parents to the children before they adopted them. The victim's mother said that in the fall of 2010, B.T. and M.T. were age six and that she contacted the mentoring program to obtain mentors for the children. The victim's mother said that she and her husband were older parents and that she wanted their children to have additional role models. She said that the [Petitioner] was B.T.'s mentor, that the [Petitioner] and B.T. spent their time together at the family home for the first year because she was an over-protective mother, and that the [Petitioner] helped B.T. with homework and provided general childcare for B.T. She said she began to think of the [Petitioner] as another son, that she trusted the [Petitioner] with her children, and that the [Petitioner] sometimes stayed overnight at her home.

The victim's mother testified that in December 2012, she received a telephone call informing her of her aunt's death when the family and the [Petitioner] were at a movie theater. She said that the [Petitioner] stayed overnight at her home, that the [Petitioner], B.T., and the victim's cousin slept in B.T.'s bedroom, and that the bedroom had bunk beds and a third mattress. The victim's mother said she had never seen the [Petitioner] mistreat her children.

The victim's mother testified that in late 2012, she began noticing a change in B.T.'s behavior and that B.T. began getting in trouble. She recalled B.T.'s asking if he could have a new mentor and said she asked B.T. why he wanted a new mentor, although B.T. did not respond. She recalled times when the [Petitioner] was alone with B.T. and other times when the [Petitioner] was alone with B.T. and M.T. The victim's mother said that on October 15, 2012, she was at Walmart when she noticed a bleeding scratch on B.T.'s chin. She said that she asked B.T. about the scratch and that B.T. said the [Petitioner] caused the scratch and reported the [Petitioner] was "always touching [him] in a sexual manner." The victim's mother and her husband did not believe the accusation, but M.T. told the victim's mother that B.T. was being truthful.

The victim's mother testified that initially she did not want to hear any details from B.T., that she called the [Petitioner], that the [Petitioner] denied any wrongdoing, that after the conversation, she took B.T. to the hospital for an examination, and that hospital staff contacted the police. She said that after the examination, B.T. and M.T. participated in forensic interviews at the Child Advocacy Center. She denied talking to B.T. and M.T. about what occurred with the [Petitioner] and said B.T. did not want to talk to his mother about it.

On cross-examination, the victim's mother testified that she met the [Petitioner] in September 2010, and that the [Petitioner] had been B.T.'s mentor for about two-and-one-half years when B.T. disclosed inappropriate touching. She agreed it was about one-and-one-half years before she allowed the [Petitioner] and B.T. to be alone. She agreed the [Petitioner] took B.T. to a professional basketball game and to the [Petitioner's] grandparents' church. She thought she first allowed the [Petitioner] to stay overnight at her home in 2012. She said that the scratch on B.T.'s chin looked similar to a fingernail scratch and that it looked as though B.T. had "picked at a scab" when she saw it bleeding.

The victim's mother testified that B.T. ultimately reported an incident occurred when his sisters were at majorette practice and that majorette practice was on Mondays, Wednesdays, and Fridays during the summer of 2012. The victim's mother noted, though, that M.T. joined B.T.'s karate class about three weeks after majorette practice began. The victim's mother said that B.T. reported more than one incident but did not tell her the total number of incidents. She agreed M.T. and I.T. did not accuse the [Petitioner] of any wrongdoing.

B.T. testified that he met the [Petitioner] through the mentoring program and that initially, he and the [Petitioner] had fun. He said that something changed and that the [Petitioner] began touching him where he did not want to be touched. He said that the first incident occurred in his bedroom but that he could not recall what occurred during the incident because of the passage of time between the incident and his testimony. He agreed he was age six at the time of the incident and that he was age eleven at the time of the trial.

B.T. testified that a second incident occurred at his home, that the [Petitioner] inserted the [Petitioner's] penis in B.T.'s "behind," and that "it

hurt[].” B.T. said similar incidents occurred “a lot,” but he could not recall the number of incidents. He said that at other times, the [Petitioner] “tried to force [B.T.] to put it in [the Petitioner’s] mouth.” B.T. said that at other times, the Petitioner forced B.T. to touch the [Petitioner’s] penis. B.T. said that during some incidents, the [Petitioner’s] penis went “inside” his mouth and his “bottom.” He denied that the [Petitioner] touched him with the [Petitioner’s] hand and that B.T. touched the [Petitioner] with B.T.’s hand. He said that the [Petitioner] always told him not to tell his parents.

B.T. testified that he did not recall the last incident but that he recalled an incident during which M.T. walked in the room when the [Petitioner] had the [Petitioner’s] mouth on B.T.’s penis. B.T. recalled that his pants were down but that the [Petitioner] still wore his clothes. B.T. said that he did not speak to M.T. when she entered the room, that she left the room, that they spoke later, and that he told her not to say anything unless someone asked. He said he was embarrassed and did not want people to know what occurred. He recalled seeing “spit” come from the [Petitioner’s] penis when the [Petitioner] put the [Petitioner’s] penis in B.T.’s mouth.

B.T. testified that he told his mother what had occurred when he and his family were at Walmart and when his mother asked about a scratch on his chin. He said that the [Petitioner] scratched him when the [Petitioner] forced B.T. to put B.T.’s mouth on the [Petitioner’s] penis.

On cross-examination, B.T. testified that the [Petitioner] spent a large amount of time with him and his family and that the [Petitioner] never spanked him. He said the [Petitioner] “popped” him on the ear if he attempted to move away from the [Petitioner] when the [Petitioner] touched him. B.T. agreed that his ear was never injured and that he never told his parents about it. He agreed that his bedroom had three beds and that he and the [Petitioner] slept in different beds when the [Petitioner] stayed overnight. B.T. agreed he did not explain to his mother why he did not want the [Petitioner] to be his mentor anymore until he disclosed the touching at Walmart.

B.T. testified that he told the forensic interviewer that the scratch on his chin occurred from the [Petitioner’s] leading B.T. to the bedroom. He agreed he told the interviewer that the [Petitioner’s] inserting his penis in B.T.’s buttocks occurred numerous times and that the incidents occurred only during “the summer.” He estimated more than ten incidents and denied

previously stating less than ten incidents occurred. He said that some incidents occurred in his bedroom and others in the living room and that he did not recall previously stating the incidents only occurred in his bedroom.

B.T. testified that the first incident occurred in his bedroom, although he could not recall any details from the incident, that M.T. was inside the house with their cousin, and that he did not recall previously stating that he “screamed out” during the incident. Relative to the incident during which M.T. entered the room, B.T. said that the door was closed but unlocked and denied that the [Petitioner] was in the kitchen. B.T. said that when M.T. entered the room, the [Petitioner] acted as though he was tickling B.T. He agreed he told M.T. about the touching before telling his mother but denied telling his cousin.

On redirect examination, B.T. testified that he was scared of the [Petitioner] and of the things the [Petitioner] did to him. B.T. said that after the [Petitioner] inserted the [Petitioner’s] penis into B.T.’s buttocks, he had difficulty using the bathroom for a while. He said it was difficult to remember details from the incidents because of the passage of time.

M.T. testified that she was age ten and was in the fifth grade at the time of the trial. She said that she had a mentor through the mentoring program and that the [Petitioner] was B.T.’s mentor. She said that the [Petitioner] cared for her and B.T. at times when their mother was not home. She recalled one day in which she and B.T. were home with the [Petitioner] when their parents and younger sister were gone. M.T. said that she was doing her homework in the kitchen, that she wanted to show the [Petitioner] her homework, that she walked to the living room, and that she saw the [Petitioner] sitting on the couch and B.T. standing in front of the [Petitioner], and that B.T.’s pants and underwear were pulled down. M.T. said that the [Petitioner] told her to return to the kitchen and that she complied. She said that she talked to B.T. about the incident later and that B.T. said he would tell their mother. M.T. said she and B.T. decided to tell their mother about the [Petitioner] when they went to Walmart the next day. M.T. recalled that B.T. had a scratch under his eye at this time.

On cross-examination, M.T. testified relative to the incident she witnessed in the living room that the [Petitioner’s] pants were not pulled down and that the [Petitioner] was fully dressed. She denied telling the defense investigator that B.T. ran into the living room from his bedroom

while she was doing her homework and that the [Petitioner] came from the same bedroom carrying a belt. She said that B.T. ran from the living room toward the bedroom with a belt and that B.T. was scratched while he was running.

On redirect examination, M.T. clarified that the [Petitioner] grabbed B.T. and took B.T. to B.T.'s bedroom. She said that was the same time she walked into the living room. She said that when the [Petitioner] took B.T. to the bedroom, B.T. had on his pants and that the [Petitioner] was holding the [Petitioner's] belt. She said that she attempted to open the bedroom door and that she heard what she thought were "whipping" sounds. She said the bedroom door was locked.

Judy Pinson, a nurse practitioner and an expert in sexual assault forensic examinations, testified that B.T. underwent a physical examination on October 14, 2012. She said B.T. reported that the [Petitioner] had placed the [Petitioner's] penis inside B.T.'s mouth and anus and had forced B.T. to place B.T.'s penis inside the [Petitioner's] mouth. Ms. Pinson stated that the physical examination did not show injuries to the genital or anal areas but that B.T. had a scratch on his chin. Ms. Pinson said B.T. reported obtaining the scratch when the [Petitioner] pulled him into his bedroom.

Ms. Pinson testified that sexual assaults against children seldom resulted in injuries, that many times the length of time between an incident and a child's reporting the incident prevented evidence of an injury, and that some types of sexual contact left no injuries. She said that the anus stretched, which decreased the likelihood penetration would cause injury. She stated that based upon the information in the report, an incident occurred three days before the examination and that it was possible any injury had healed because the anus healed quickly. She could not determine whether an injury had occurred. She said that because three days had passed, a rape kit was not performed. She said that B.T. had showered and brushed his teeth during that time and presumably had used the bathroom.

On cross-examination, Ms. Pinson testified that the lack of an injury to B.T.'s anus was neither inconsistent with some form of sexual contact nor inconsistent with no sexual contact. She agreed that any lacerations or healing lacerations on the anus would have been noted in the report and that lacerations could result from a foreign object, hard or normal stool, or constipation. She said B.T. tested negative for sexually transmitted diseases.

She said no evidence was collected in this case. She agreed B.T. reported oral and anal sex but noted he had no physical injuries to his mouth or anus. She said that after speaking with B.T., the physical examination, and the laboratory testing, no physical evidence “back[ed] up” an allegation of sexual assault but that the findings were expected. Ms. Pinson stated that if a child had suffered anal penetration, the child might experience constipation but that someone might suffer from constipation without having been sexually assaulted.

Teresa Onry, a forensic interviewer at the Child Advocacy Center, testified that she conducted B.T.’s forensic interview on October 16, 2012. She said that during the interview, B.T. made a disclosure of sexual contact and that at the point in the interview when B.T. began to disclose the sexual contact, B.T. began to fidget and became more soft spoken than he had been at the beginning of the interview. She said it was common for children B.T.’s age not to recall the details of an incident.

On cross-examination, Ms. Onry testified that she and B.T. were the only people in the room during the interview, although other personnel were permitted to observe from an adjacent room or by teleconference. She agreed law enforcement and Department of Children’s Services case workers were allowed to request particular questions but that these people did not enter the room. She agreed that B.T.’s term for penis was “peter whacker” and that B.T. reported the [Petitioner’s] placing the [Petitioner’s] penis inside B.T.’s buttocks. She agreed that she asked him about the first incident and that B.T. could not recall the positions of his and the [Petitioner’s] bodies. She said B.T. stated that the first incident occurred when his sister was at majorette practice. She agreed that B.T. only reported the [Petitioner’s] inserting the [Petitioner’s] penis inside B.T.’s buttocks and that B.T. did not mention his or the [Petitioner’s] mouths.

Ms. Onry testified that B.T. also reported an incident during which M.T. entered the room and saw B.T.’s pants pulled down. Ms. Onry agreed that B.T. did not say the incident occurred in the living room or the kitchen and that B.T. said the incident occurred in B.T.’s bedroom. She said B.T. reported that the [Petitioner] was in the kitchen when M.T. saw B.T. with his pants down.

Ms. Onry testified that she conducted M.T.’s forensic interview on October 18, 2012. She agreed that M.T. also reported seeing B.T. with his

pants down and that M.T. reported being in the kitchen when this occurred. Ms. Onry said M.T. stated that she left the kitchen, that she walked to the living room, that she saw B.T.'s pants down, and that the [Petitioner] was fully dressed. Ms. Onry agreed M.T. never reported seeing sexual contact. On redirect examination, Ms. Onry testified that B.T. appeared embarrassed and made less eye contact when he discussed the nature of the touching.

The video recording of B.T.'s forensic interview was played for the jury. In the recording, B.T. stated that he was age seven. He said that his mother did not want him to talk about "Chris" anymore because of what happened. B.T. said Chris was his mentor from the mentoring program. Although B.T. initially stated that Chris lived with him, he clarified that Chris stayed overnight periodically. B.T. said that when his family was at Walmart, his mother asked about a scratch on his chin and that the scratch occurred because Chris "pulled [him] into the room" by his chin. B.T. said that Chris always pulled him inside B.T.'s bedroom during these incidents and that the adults were away from home when this happened.

B.T. recalled one incident in which he and Chris were inside B.T.'s bedroom. He said that M.T. entered the bedroom and that B.T.'s clothes were off because Chris "was getting on me." B.T. said that Chris "tried to" place Chris's "peter wacker" inside B.T.'s "butt." B.T. identified peter wacker as his term for penis. B.T. said that during the first incident, his mother was not home. He said that he and Chris were watching "Everybody Hates Chris" on television in the living room, that Chris told him to go to his bedroom for "something," that Chris came into the room, and that Chris, without saying anything[,] pulled down B.T.'s clothes. B.T. asked Chris what he was doing, but Chris did not respond. B.T. said that Chris's penis entered his anus but that he could not recall the positions of their bodies. B.T. said he was about six years old when the first incident occurred. B.T. said that Chris's pants were pulled down and that Chris wore a Mickey Mouse shirt and short pants. B.T. did not recall what clothes he wore that day. He did not feel or see anything come from Chris's penis. B.T. said that afterward, Chris stated that he would not be B.T.'s mentor anymore if B.T. told his mother what had occurred. B.T. said that afterward, he went to bed. B.T. said that the incident occurred in the afternoon while his sisters were at majorette practice. He could not recall the weather that day or the month in which the incident occurred.

B.T. stated that other similar incidents in which Chris placed his penis inside B.T.'s bottom occurred and that all the incidents occurred in B.T.'s bedroom. B.T. said that Chris did not place his penis anywhere else on B.T.'s body. Relative to the incident during which M.T. entered the bedroom, B.T. said that his clothes were off because Chris pulled them down, that Chris left the room and entered the kitchen, and that while Chris was in the kitchen, M.T. entered the bedroom. B.T. said that M.T. stated she understood what B.T. "had been telling" her. B.T. said that he told M.T. about the things Chris had been doing to him a few days before B.T. told his mother about the incidents when the family was at Walmart and that M.T. wanted him to tell their mother. B.T. said that Chris did not see M.T. inside B.T.'s bedroom but that when Chris returned, Chris placed his penis inside B.T.'s bottom.

B.T. stated that when Chris grabbed him by his chin and pulled him into B.T.'s bedroom, Chris began putting his penis inside B.T.'s bottom. B.T. said that Chris also pushed B.T.'s head down and made B.T. place his mouth on Chris's penis. B.T. said that he attempted to resist, that he saw "spit" come from Chris's penis, and that the spit smelled like garbage. He said Chris went to the bathroom afterward. B.T. said that sometimes the [Petitioner] attempted to make B.T. lick the spit but that B.T. did not lick it. He did not recall his and Chris's body positions. B.T. stated that during one incident, Chris said he would not "do it anymore" but that Chris continued doing it. B.T. did not notice anything unusual about Chris's penis.

Vincent Ores testified for the defense that he represented the [Petitioner] at the preliminary hearing and that B.T. was the only witness at the hearing. Mr. Ores recalled that B.T. testified on cross-examination that the [Petitioner] had placed the [Petitioner's] penis inside B.T.'s anus less than ten times and that B.T. "screamed out" when the [Petitioner] touched him. Mr. Ores also recalled that B.T. reported other people were inside the home when B.T. screamed. Mr. Ores recalled B.T. reported that the [Petitioner's] penis did not enter B.T.'s mouth and that B.T.'s penis did not enter the [Petitioner's] mouth.

On cross-examination, Mr. Ores testified that B.T. was age eight at the time of the hearing and that B.T. was calm and did not appear to be scared. Mr. Ores agreed that B.T. stated on direct examination that the [Petitioner] pulled down B.T.'s clothes, that the [Petitioner] placed the [Petitioner's] penis inside B.T.'s buttocks, and that B.T. said he felt pain. Mr. Ores agreed B.T. stated that the [Petitioner] placed the [Petitioner's] penis inside B.T.'s

mouth, that M.T. entered the room, that B.T.'s clothes were pulled down and the [Petitioner] was fully dressed, and that the [Petitioner] attempted to make it look as though the [Petitioner] were tickling B.T. Mr. Ores agreed that B.T. testified that the [Petitioner] thumped B.T. on the ear as a form of discipline.

The audio recording of the preliminary hearing was played for the jury. In the recording, B.T. testified that he was age eight and that he had known the [Petitioner] for a long time. He could not recall whether the [Petitioner] was his mentor but recalled the [Petitioner] frequented B.T.'s home and stayed overnight a few times. B.T. said that the [Petitioner] touched him more than once in an inappropriate manner. B.T. said the [Petitioner] touched B.T.'s "private part" with the [Petitioner's] hands and mouth. B.T. said that the [Petitioner] pulled down B.T.'s pants when the [Petitioner] touched B.T.'s private part with his hands and mouth. B.T. said that B.T.'s private part entered the [Petitioner's] mouth. B.T. said that the [Petitioner] placed the [Petitioner's] private part inside B.T.'s bottom and that it hurt. B.T. said that the [Petitioner] attempted to place the [Petitioner's] private part inside B.T.'s mouth but that the [Petitioner's] private part did not enter B.T.'s mouth. B.T. said that at some point, the [Petitioner] told B.T. that the [Petitioner] would not do it again but that the [Petitioner] continued doing it. B.T. said the incidents always occurred at B.T.'s home.

B.T. testified that during one incident, M.T. entered the room when B.T.'s pants were pulled down but that the [Petitioner's] pants were not pulled down. B.T. said that the [Petitioner] acted as though the [Petitioner] was tickling B.T., that the [Petitioner] told M.T. to leave the room, and that M.T. left. B.T. said that after M.T. left, the [Petitioner] closed the door but that B.T. did not recall what occurred after the door was closed.

On cross-examination, B.T. testified that he liked the [Petitioner] before the touching began and that they spent time together frequently. B.T. said that he and the [Petitioner] slept in different beds inside B.T.'s bedroom. B.T. said that he did not know when the touching began but that the touching occurred on "a lot of days." B.T. said the incidents occurred inside B.T.'s bedroom but could not recall if adults were home. B.T. did not recall telling anyone about the touching. He identified his private part as a "wiener."

B.T. testified that he told the [Petitioner] to stop touching him and that he could not recall the [Petitioner's] response. B.T. denied telling his sisters

about the touching. He said that the [Petitioner] did not place the [Petitioner's] private part inside B.T.'s mouth. B.T. did not know why he did not tell anyone about the touching. He denied the [Petitioner] spanked him but said the [Petitioner] "thumped" his ear. B.T. denied being naked in front of the [Petitioner]. B.T. said that the [Petitioner] placed the [Petitioner's] penis inside B.T.'s bottom less than ten times. B.T. did not know whether he underwent a medical examination. B.T. said that he screamed during one incident, that other people were home, and that nobody came to investigate the scream.

Marsha Davis testified that she investigated this case for the defense and that she interviewed the victim's mother. Ms. Davis stated that the victim's mother said she called the [Petitioner] after the family returned home from Walmart and asked the [Petitioner] if he had touched B.T. Ms. Davis said the victim's mother reported that the [Petitioner] denied any inappropriate touching.

Ms. Davis testified that she interviewed B.T. during her investigation and that B.T. denied the [Petitioner] placed the [Petitioner's] penis inside B.T.'s mouth. Ms. Davis said B.T. admitted telling M.T. and a cousin about the [Petitioner's] touching B.T.

On cross-examination, Ms. Davis agreed B.T. reported that the [Petitioner] had hurt B.T.'s buttocks with the [Petitioner's] penis, that the [Petitioner] had placed his mouth on B.T.'s penis when they were alone inside a bedroom, and that these incidents occurred frequently when B.T.'s mother took B.T.'s sisters to majorette practice.

....

The [Petitioner] testified that he met B.T. and his family through the mentoring program in September 2010. The [Petitioner] said he took B.T. to a professional sporting event, taught B.T. "dance moves," assisted B.T. with homework, played games with B.T., and took B.T. to Chuck E. Cheese. The [Petitioner] said that he also spent time with B.T.'s sisters and that he treated all of the children the same. The [Petitioner] recalled that the week after he met B.T., the victim's mother called requesting the [Petitioner] take B.T. to Chuck E. Cheese and that he and B.T. went to Chuck E. Cheese without B.T.'s parents.

The [Petitioner] testified that he became close to B.T.'s family and that he stayed overnight at the family home multiple times. The [Petitioner] said that B.T.'s bedroom contained three beds, that he slept in one bed, that B.T. slept in another bed, and that they never slept in the same bed. He said that when he was at the family home, the victim's parents, aunt, uncle, and cousins were usually also there. The [Petitioner] said that he spanked B.T. once with the victim's mother's permission. The [Petitioner] said that just as the victim's mother was getting ready to strike B.T. with a belt, B.T. requested the [Petitioner] to spank him instead of the victim's mother. The [Petitioner] said that the victim's mother gave him the belt and that he struck B.T.

The [Petitioner] testified that he had never touched B.T. in a sexual manner and denied that he touched B.T.'s penis with the [Petitioner's] hands or mouth. The [Petitioner] denied having B.T. touch the [Petitioner's] penis and having B.T. place his mouth on the [Petitioner's] penis. The [Petitioner] denied touching B.T.'s anus with the [Petitioner's] penis or inserting the [Petitioner's] penis inside B.T.'s anus. The [Petitioner] also denied having sexual contact with B.T.'s sisters and cousins.

The [Petitioner] testified that he did not sexually assault B.T. on October 12, 2012. The [Petitioner] recalled that the children were home from school because of fall break, that on October 9 or 10, he received a telephone call from the victim's mother asking him to care for the children on October 11, and that he stayed overnight at the family home on October 10 and cared for the children on October 11. The [Petitioner] said that the victim's mother left for work around 8:00 a.m., that he woke B.T., who had urinated in the bed overnight, that he sent B.T. to the bathroom to take a bath, that B.T.'s cousins woke and began watching television in the living room, and that B.T.'s sisters were playing in their bedroom. The [Petitioner] said that he watched television with B.T.'s cousins while B.T. took a bath, that B.T. ran out of the bathroom naked with a nose bleed, that the [Petitioner] tilted B.T.'s head back to stop the bleeding and cleaned B.T.'s face, and that B.T. returned to his bath. The [Petitioner] said that after B.T.'s bath, B.T. began working on homework, that the victim's mother returned home around 3:00 p.m., and that the [Petitioner's] grandmother picked up the [Petitioner] around 3:30 p.m. The [Petitioner] said that he next spoke to the victim's mother on October 14, when she called accusing him of touching B.T. inappropriately. The [Petitioner] said that he denied the accusations and that the victim's

mother threatened to hurt him if the accusations were true. He said he was initially shocked at the accusations but later felt frustrated and angry.

On cross-examination, the [Petitioner] testified that he became close to the family and that he had a good relationship with B.T. as a mentor. He agreed he cared for the children when the victim's mother needed assistance and when she took B.T.'s sisters to majorette practice. He agreed he had attempted to contact the victim's mother since the allegations were made.

Upon this evidence, the [Petitioner] was convicted of rape of a child and aggravated sexual battery.

Id. at *1-8.

The Petitioner received an effective sentence of thirty-four years at 100-percent service. *Id.* at *1. On direct appeal from his convictions, a panel of this court affirmed his convictions. *Id.* The Petitioner filed a timely petition for post-conviction relief and subsequent amended petitions alleging that trial counsel was ineffective in several ways, including, among other things, (1) trial counsel's failure to object to the trial court's order and method of considering lesser included offenses, which resulted in a double jeopardy violation; (2) trial counsel's failure to hire a forensic expert; (3) trial counsel's failure to compel the State's election of offenses before filing a motion to dismiss during trial; and (4) trial counsel's failure to obtain a bill of particulars.

B. Post-Conviction Hearing¹

At the post-conviction hearing, the Petitioner testified that from September 11, 2010, to October 11, 2012, the victim was his mentee through the Big Brothers Big Sisters program. The Petitioner said that, during the time of the incidents, the Petitioner was ages eighteen to twenty-one and the victim was between ages five and seven.

The Petitioner testified that trial counsel was ineffective by failing to object to a double jeopardy allegation regarding his convictions for rape of a child and aggravated sexual battery. The Petitioner said that prior to July 1, 2016, aggravated sexual battery was a lesser included offense of rape of a child and that, because his convictions occurred before July 1, 2016, his convictions for rape of a child and aggravated sexual battery amounted to a double jeopardy violation. The Petitioner said that the indictment alleged that the incidents occurred between August 1, 2010, and October 16, 2012. The Petitioner said that

¹ We will limit our summary of the post-conviction hearing to testimony relevant to the issues the Petitioner raised on appeal.

during the trial, the trial court mistakenly said that aggravated sexual battery was not a lesser included offense of rape of a child. The Petitioner said that trial counsel requested the trial court to include aggravated sexual battery as a lesser included offense of rape of a child, that the trial court ruled that it was not a lesser included offense of rape of a child, and that trial counsel “just left it at that.” The Petitioner said that after the trial court denied trial counsel’s request, trial counsel did not raise another objection, which meant the Petitioner could not raise the issue on appeal.

The Petitioner testified that he had a twenty-five-year sentence for his rape of a child conviction and a nine-year sentence for aggravated sexual battery. He said that one of the charges should have been dropped and that his total sentence should have been twenty-five years.

The Petitioner testified that trial counsel was ineffective by failing to hire a forensic expert. He said that trial counsel explained that the reason for not retaining an expert was that the trial court would only allow one expert to testify at the trial. The Petitioner explained that he wanted his own expert because he wanted an expert who would attest to the Petitioner’s “side of the story, seeing as though there was no [forensic] evidence.” The Petitioner said that he explained this to trial counsel but that trial counsel still refused to hire an expert. The Petitioner acknowledged that he was not sure what the hired expert would have testified to at the trial. The Petitioner said that during his trial, the State’s forensic expert testified that she did not collect a rape kit from the victim because it had been more than three days since the incident. The Petitioner said that another expert might have had a different opinion regarding whether a rape kit should have been collected in this case. On cross-examination, the Petitioner acknowledged that trial counsel questioned the forensic expert about her failure to collect a rape kit from the victim. The Petitioner acknowledged that he understood that if trial counsel had hired a different forensic expert, that expert would not have been able to collect a rape kit from the victim because too much time had passed since the abuse.

The Petitioner testified that he discussed with trial counsel whether to request a bill of particulars from the State. The Petitioner said that the indictment stated that the alleged incidents occurred during a two-year period and that he filed a pro se motion requesting a bill of particulars. The Petitioner said that trial counsel informed the trial court that a bill of particulars was not necessary because everything he needed was in the discovery materials and that the trial court denied the motion. The Petitioner said that during the trial, trial counsel filed a motion requesting the State to make an election of offenses because of a change in the statute related to sentencing for rape of a child that might affect the Petitioner. The Petitioner said that trial counsel did not properly prepare for the trial and was unaware of the change in the statute until shortly before the trial. The Petitioner said

that trial counsel did “not care” and then “tried to make up for it” at trial by requesting a bill of particulars. The Petitioner explained that he wanted specific dates related to the allegations in the indictment so that he could have presented an alibi defense. The Petitioner agreed that he was indicted for two offenses and that the State did not change the indictment during the trial.

Trial counsel testified that he represented the Petitioner at the trial. He said that he represented defendants in approximately fifteen to twenty trials before the Petitioner’s trial, and the majority of the charges were Class A or B felonies. Trial counsel explained that he had previously represented defendants who had been charged with rape of a child.

Trial counsel testified that he recalled the Petitioner had raised an issue related to lesser included offenses. Counsel said that he filed a motion related to lesser included offenses, that a hearing was held, and that the trial court allowed only certain offenses to be included as lesser included offenses but excluded others. Trial counsel stated that he asked the trial court to consider aggravated sexual battery as a lesser included offense of rape of a child, but the trial court excluded it in the jury instructions.

Trial counsel testified that his defense strategy was “lies change, the truth stays the same.” Trial counsel explained that the Petitioner denied any wrongdoing and that the trial strategy was to highlight inconsistencies between the victim’s testimony and the other juvenile witness’s testimony. Trial counsel said that he was able to use inconsistencies and contradictions from forensic interviews and the trial testimony to impeach the victim and the juvenile witness. Trial counsel said that he was also able to successfully cross-examine other witnesses and establish the Petitioner’s good character and that the trial court gave a jury instruction related to the Petitioner’s good character.

Trial counsel testified that he did not recall the Petitioner’s providing him information about an alibi defense. He explained the allegations in the indictment occurred over a two-year period. Trial counsel said that part of his strategy included the victim’s having no physical evidence indicating sexual trauma and the victim’s not disclosing the incidents for two years. Trial counsel wanted to use the broader, two-year date range to emphasize that if the Petitioner had been repeatedly raping the victim over a two-year period as the victim alleged, someone would have seen something, the victim would have told someone, or the victim would have suffered some type of injury. Trial counsel said that his investigation of the case never suggested an alibi for the specific time that the second child witnessed the Petitioner and the victim with the victim’s pants pulled down.

Trial counsel testified that he received discovery from the State before the trial and that he made a strategic decision not to request a bill of particulars before the trial. He said

that he knew what was statutorily required regarding the timing of a bill of particulars. Trial counsel explained that he used the two-year period in the indictment to the Petitioner's advantage. He said that he wanted to use the time period to show that no injury was reported. Additionally, there was a law change related to sentencing for rape of a child and depending on the alleged time-period, the Petitioner would have been subject to a longer sentence. Trial counsel said that he succeeded in limiting the Petitioner's sentence to twenty-five years by not asking for a bill of particulars before the close of the State's proof. He said that the State conceded that the maximum sentence the Petitioner could receive for rape of a child was twenty-five years because the State had not proven that the offense occurred after the statutory amendment increased the sentence to a range of twenty-five to forty years.

Trial counsel testified that he cross-examined Ms. Pinson, the State's forensic expert who testified at the Petitioner's trial. Trial counsel believed that he thoroughly cross-examined Ms. Pinson, including having her admit that the victim's lack of injury could indicate that no assault occurred. Ms. Pinson said that lack of injury could be proof that something did or did not happen. Trial counsel stated that he cross-examined Ms. Pinson about her relationship with the district attorney's office, the Memphis Police Department, the Shelby County Sheriff's Department, and the Child Protective Investigation Team. Trial counsel said that he had worked as a prosecutor for two years, spending the majority of the time in the Special Victim's Unit where he worked with child sexual assault victims. Trial counsel said he had a unique perspective because he knew the "exact role she played" and her potential bias toward the State. Trial counsel did not believe it was necessary to hire an additional forensic expert because he could effectively cross-examine Ms. Pinson based on his experience as a prosecutor. He explained that he also believed any forensic expert would offer the same testimony as Ms. Pinson because the victim had no visible physical trauma.

Trial counsel testified that he discussed the charges with the Petitioner before the trial. Trial counsel explained to the Petitioner that the Petitioner had been charged in a two-count indictment and that he could be convicted of both counts separately. Trial counsel explained to the Petitioner that each count was related to a separate incident and said that he was unsure why the Petitioner was raising a double jeopardy issue. Trial counsel emphasized to the Petitioner that if the Petitioner were convicted of both counts, his sentence for each could run consecutively.

In a written order, the post-conviction court denied the Petitioner relief. Pertaining to the Petitioner's claim regarding the exclusion of aggravated sexual battery as a lesser included offense and the method of consideration of lesser included offenses, the post-conviction court found that trial counsel's filing a motion requesting aggravated sexual

battery as a lesser included offense of rape of a child served as trial counsel's objection to the trial court's exclusion of the lesser included offense. The post-conviction court found that trial counsel's failure to object to the trial court's method of consideration of the lesser included offenses was not prejudicial to the Petitioner. The post-conviction court reasoned that the State was required to make an election of offenses, which notified the jury as to which of the Petitioner's alleged acts were for the jury's consideration. The court also found that the Petitioner's argument that he was subjected to double jeopardy because the trial court did not include aggravated sexual battery as a lesser included offense of rape of a child in the jury instructions was without merit because, as trial counsel correctly testified, the Petitioner's charges for rape of a child and aggravated sexual battery related to separate incidents.

The post-conviction court denied relief on the Petitioner's claim related to trial counsel's failure to retain a forensic expert. The post-conviction court considered trial counsel's testimony that no DNA evidence was available for an expert to evaluate and that trial counsel cross-examined the State's forensic expert, who admitted that the victim's lack of injury could indicate that no crime occurred. The post-conviction court also considered trial counsel's testimony that he cross-examined the State's forensic expert regarding her relationship with the district attorney's office and the child protective investigation team and that, because of trial counsel's past experience as a prosecutor, trial counsel had knowledge that most defense attorneys did not have. The post-conviction court also considered trial counsel's testimony that it was his trial strategy to gather helpful information through cross-examining the State's forensic expert as opposed to retaining a forensic expert for the defense. The post-conviction court found that trial counsel's testimony was credible, that trial counsel made a strategic decision not to hire a forensic expert, and that trial counsel's previous employment at the district attorney's office allowed him to effectively cross-examine the State's forensic expert. The post-conviction court ruled that the Petitioner had failed to show that trial counsel was deficient by failing to retain a forensic expert and denied relief regarding this issue.

Regarding the Petitioner's claim that trial counsel failed to request that the State make an election of offenses before the end of the State's proof at the trial, the post-conviction court found that the Petitioner failed to establish that trial counsel's performance was deficient because trial counsel filed a motion to compel the election of offenses at the end of the State's proof. The post-conviction court found that the trial court required the State to make an election of offenses before submitting the case to the jury for deliberation, which was all that was required by law. Thus, the Petitioner failed to show trial counsel's deficiency, and the post-conviction court denied relief regarding this issue.

The post-conviction court considered the Petitioner's claim that he received the ineffective assistance of counsel by trial counsel's failure to obtain a bill of particulars. The post-conviction court considered trial counsel's testimony that he reviewed the discovery presented by the State and that trial counsel concluded a bill of particulars was not necessary. The post-conviction court also considered trial counsel's testimony that he used the expanded time period in the indictment to the Petitioner's advantage. Trial counsel explained that his trial strategy included demonstrating that the victim reported no injuries and that no one observed anything unusual over the two-year period alleged in the indictment. Trial counsel also explained that there was a law change related to the sentence length for rape of a child, which increased the maximum sentence from twenty-five years to forty years. Trial counsel testified that because the State did not allege a specific date for the incidents, the State conceded that the maximum sentence the Petitioner could receive was twenty-five years. Trial counsel said that if the State had proven the incidents occurred later within the two-year time period, the Petitioner could have faced a twenty-five to forty-year sentence for his rape of a child conviction. The post-conviction court credited trial counsel's testimony and found that trial counsel made a tactical decision by not requesting a bill of particulars to ensure that the Petitioner's sentence was limited to twenty-five years. The post-conviction court found that trial counsel's performance was not deficient and denied relief regarding this issue.

The Petitioner filed a timely appeal.

II. ANALYSIS

Post-conviction relief is available when a "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. The burden in a post-conviction proceeding is on the petitioner to prove allegations of fact by clear and convincing evidence. *Id.* § 40-30-110(1); *see Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). "Questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved" by the post-conviction court. *Fields v. State*, 40 S.W.3d 450, 456 (Tenn. 2001). On appeal, we are bound by the post-conviction court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Id.* Because they relate to mixed questions of law and fact, we review the post-conviction court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. *Id.* at 457.

Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *see Cuyler v. Sullivan*, 446

U.S. 335, 344 (1980); *Dellinger*, 279 S.W.3d at 293. When a claim of ineffective assistance of counsel is made under the Sixth Amendment to the United States Constitution, the burden is on the petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). “Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.” *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). The *Strickland* standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

Deficient performance requires a showing that “counsel’s representation fell below an objective standard of reasonableness,” despite the fact that reviewing courts “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 688-89. When a court reviews a lawyer’s performance, it “must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s conduct, and to evaluate the conduct from the perspective of counsel at that time.” *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 689). We will not deem counsel to have been ineffective merely because a different strategy or procedure might have produced a more favorable result. *Rhoden v. State*, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). We recognize, however, that “deference to tactical choices only applies if the choices are informed ones based upon adequate preparation.” *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992) (citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)).

As to the prejudice prong, the petitioner must establish “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “That is, the petitioner must establish that his counsel’s deficient performance was of such a degree that it deprived him of a fair trial and called into question the reliability of the outcome.” *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008) (citing *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999)).

A. Lesser Included Offenses

The Petitioner argues that he received the ineffective assistance of counsel by trial counsel’s failure to object to the trial court’s ruling that aggravated sexual battery was not a lesser included offense of rape of a child and by failing to object to the trial court’s method of consideration of lesser included offenses, which “raised a double jeopardy issue.” The

State responds that the Petitioner failed to establish that trial counsel was deficient because trial counsel requested aggravated sexual battery as a lesser included offense of rape of a child. The State argues that the Petitioner failed to establish that he was prejudiced by trial counsel's failing to object to the trial court's consideration of lesser included offenses because the Petitioner did not explain how a different method of consideration would have benefitted him at the trial.

Appellate review is generally limited to issues that have been properly preserved and presented for appeal in a manner prescribed by Tennessee Rule of Appellate Procedure 27. *State v. Bristol*, 654 S.W.3d 917, 923-25 (Tenn. 2022). Accordingly, an appellate court "may decline to consider issues that a party failed to raise properly." *Id.* (quoting *State v. Harbison*, 539 S.W.3d 149, 165 (Tenn. 2018)). Tennessee Rule of Appellate Procedure 27(a)(7)(A) mandates that the appellant's brief includes an argument setting forth the appellant's contentions, a statement of why these contentions require relief, citations to legal authorities, and references to the record. "Issues which are not supported by argument, citation to authorities, or appropriate references to the record" frustrates appellate review and "will be treated as waived in this court." Tenn. Ct. Crim. App. R. 10(b).

First, we note that the Petitioner has waived any issue regarding double jeopardy because he failed to make an argument or cite to any authority related to double jeopardy in his brief. Second, while the Petitioner frames his issue as relating to the "order and method of consideration of lesser offenses," he offers no argument or citation to authority on this point. Instead, his argument focuses on trial counsel's performance in light of the trial court's exclusion of aggravated sexual battery as a lesser included offense of rape of a child. Therefore, the double jeopardy and "method of consideration" issues are waived, and we turn to the Petitioner's claim related to the exclusion of aggravated sexual battery as a lesser included offense of rape of a child.

The post-conviction court correctly ruled that the Petitioner failed to establish that trial counsel's performance regarding the exclusion of aggravated sexual battery as a lesser included offense was deficient. Trial counsel testified that he moved the trial court to include aggravated sexual battery as a lesser included offense of rape of a child, and the Petitioner concedes that trial counsel did so. The post-conviction court credited trial counsel's testimony and found that trial counsel was not deficient because he filed a motion requesting aggravated sexual battery as a lesser included offense of rape of a child and no further action was required after the motion was denied. *See State v. McGhee*, 746 S.W.2d 460, 464 (Tenn. 1988) (stating that counsel is not required to make technical, argumentative, or repetitious objections to issues which have already been ruled upon); *Goines v. State*, 572 S.W.2d 644, 649 (Tenn. 1978) (concluding that lodging an objection

after the trial court had overruled the petitioner's motion "would have been idle ceremony and a useless gesture"); *see also* Tenn. R. Crim. P. 51 (b) (providing that to preserve an error on appeal "it is sufficient that a party – at the time of the ruling or order of the court is made or sought – informs the court of . . . the action that the party desires the court to take"). The Petitioner argues that trial counsel did "nothing to further dispute" the court's ruling regarding jury instructions, but the Petitioner failed to explain how any further action would have affected the outcome of his trial or prevented him from challenging the issue on appeal. Thus, the Petitioner has failed to show how he was prejudiced by trial counsel's failure to object after his original motion was denied. Accordingly, the Petitioner is not entitled to relief regarding this issue.

B. Forensic Expert

The Petitioner argues that he received the ineffective assistance of trial counsel by trial counsel's failure to retain a forensic expert because trial counsel had "used experts in numerous previous cases" and trial counsel "admitted that he never sought a forensic expert" to help with the Petitioner's defense. The State responds that the Petitioner failed to establish that he received the ineffective assistance of counsel regarding this issue because the Petitioner did not present an expert at the post-conviction hearing. The State also argues that the post-conviction court did not err by finding that trial counsel made a strategic decision not to call a forensic expert.

Here, the post-conviction court credited trial counsel's testimony that trial counsel did not believe it was necessary to hire a forensic expert and found that trial counsel's decision not to call an expert was strategic. Trial counsel testified that he believed another forensic expert would have offered similar testimony to the State's expert because the victim did not have a physical injury. Trial counsel testified that based on his previous experience working at the district attorney's office, he had the knowledge to effectively cross-examine the State's forensic expert regarding any potential bias. During cross-examination, trial counsel was able to have the State's forensic expert admit that the victim's lack of physical injury could indicate that nothing happened to the victim. Trial counsel's decision to not retain a defense expert was a strategic one made after adequate preparation. We will not second-guess it on post-conviction review. *See Hellard*, 629 S.W.2d at 9.

Moreover, the Petitioner failed to present a forensic expert at the post-conviction hearing. *See Black v. State*, 794 S.W.2d 752, 57 (Tenn. Crim. App. 1990) (holding that an appellate court cannot "speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness's testimony might have been if introduced by defense counsel"). The Petitioner likewise failed to establish prejudice

because he failed to explain how calling a second forensic expert would have affected the outcome of the trial. Accordingly, the Petitioner is not entitled to relief regarding this issue.

C. Election of Offenses

The Petitioner argues that he received the ineffective assistance of counsel by trial counsel's failure to request the State make an election of offenses before the State put on proof at the trial. The Petitioner argues that trial counsel's motion regarding the election of offenses was "effectively too late and prejudiced the outcome of the Petitioner's case" because the Petitioner was unable to present an effective defense. The State responds that the post-conviction court did not err by ruling that trial counsel was not ineffective by failing to file a motion to compel the election of offenses until the close of the State's proof.

Trial counsel filed a motion to compel the State's election of offenses at the close of the State's proof at trial. In the direct appeal opinion related to the Petitioner's convictions, a panel of this court noted that:

[T]he election requirement has been applied almost exclusively in the sex crimes context, and specifically, when the defendant is alleged to have committed a series of sexual acts over a lengthy period of time against young children who are unable to identify the exact date on which any one act was perpetrated.

State v. Johnson, 53 S.W.3d 628, 631 (Tenn. 2001) (citing *State v. Brown*, 992 S.W.2d 389 (Tenn. 1999)). "[T]he State may introduce evidence of sex crimes allegedly committed against the victim during the time frame charged in the indictment, but, at the close of the proof, the State must elect the facts upon which it is relying for conviction." *Id.* (citation omitted).

Bostick, 2017 WL 764591, at *9-10. The post-conviction court did not err by finding that trial counsel was not deficient by waiting until the State's close of proof to file a motion to compel the State's election of offenses. See *Johnson*, 53 S.W.3d at 631. Moreover, the Petitioner has failed to show how he was prejudiced. The Petitioner argues that he might have presented an alibi defense had trial counsel filed a motion to compel the State's election of offenses earlier. However, trial counsel testified that he did not recall the Petitioner's providing an alibi during their preparation for the trial, and his investigation did not reveal any evidence of an alibi. Nor did the Petitioner present proof of an alibi at the post-conviction hearing for the offenses ultimately elected by the State at trial. Accordingly, the Petitioner is not entitled to relief regarding this issue.

D. Bill of Particulars

The Petitioner argues that he received the ineffective assistance of counsel by trial counsel's failure to request a bill of particulars. The Petitioner argues that this hindered his ability to aid in his defense and that trial counsel's requesting an election of offenses at the close of the State's proof at trial was "much less effective" than requesting a bill of particulars before the trial. The State responds that the post-conviction court correctly found that trial counsel was not deficient and made a strategic decision not to request a bill of particulars.

The post-conviction court credited trial counsel's testimony that he made a strategic decision not to request a bill of particulars. At the post-conviction hearing, trial counsel testified that he reviewed the discovery presented by the State and concluded a bill of particulars was not necessary. Trial counsel utilized the expanded time period in the indictment to the Petitioner's advantage by showing that over the two-year period alleged in the indictment, the victim reported no injuries and no one observed anything unusual during this time period. Trial counsel also explained that there was an amendment to the law related to the sentence length for rape of a child, which increased the maximum sentence from twenty-five years to forty years, that occurred during the time period alleged in the indictment. Trial counsel testified that because the State did not allege a specific date for the rape of a child charge in the incident, the State conceded that the maximum sentence the Petitioner could receive if convicted was twenty-five years. Trial counsel said that if the State had proven the incidents occurred later within the two-year time period, the Petitioner could have faced a twenty-five to forty-year sentence for his rape of a child conviction. *See* Tenn. Code Ann. § 39-13-522(b)(2)(A) (amended by 2011 Tenn. Pub. Acts, ch. 306, effective January 1, 2012). The post-conviction court did not err by finding that trial counsel made a strategic decision not to request a bill of particulars, and the Petitioner has failed to show that counsel's performance was deficient. Moreover, the Petitioner has failed to show how he was prejudiced by trial counsel's failure to request a bill of particulars. The Petitioner has not explained what additional information might have been included in the bill of particulars or how this would have specifically influenced his defense and affected the outcome of the trial. Accordingly, the Petitioner is not entitled to relief regarding this issue.

III. CONCLUSION

Based upon the foregoing and the record as a whole, we affirm the judgment of the post-conviction court.

KYLE A. HIXSON, JUDGE