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

BRANDEN BROOKINS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 16-05861 James M. Lammey, Jr., Judge

No. W2022-01214-CCA-R3-PC

Branden Brookins, Petitioner, appeals from the denial of his petition seeking post-petition relief from his 2019 convictions for first degree murder, conspiracy to commit first degree murder, two counts of criminal attempt first degree murder, employing a firearm with intent to commit a felony, and reckless endangerment with a deadly weapon. On appeal, Petitioner claims that he received ineffective assistance of counsel. After a thorough review of the record, we affirm the judgment of the post-conviction court.

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

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

Roberto Garcia, Jr., Memphis, Tennessee, for the appellant, Branden Brookins.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Vanecia Patterson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In its opinion on Petitioner's direct appeal, this court summarized the facts as follows:

> On April 10, 2015, seven-year-old Kristan Williams was shot and killed in a drive-by shooting while she was playing outside with her friends after school on Durby Circle in Memphis. After a police investigation, Defendants Clayton, Stokes, [and Petitioner] were indicted, along with Carl Johnson, for their involvement in the victim's death. An indictment was

returned by the Shelby County Grand Jury in September of 2015 charging Defendants with one count of first degree murder. In October of 2016, a superseding indictment was returned by the Shelby County Grand Jury charging Defendants with one count of first degree murder, one count of conspiracy to commit first degree murder, two counts of attempted first degree murder, two counts of employing a firearm during the commission of a dangerous felony, and one count of reckless endangerment. The indictment also charged Defendant Clayton with one count of felon in possession of a firearm.

Prior to trial, Defendant Clayton filed a motion to sever his case from that of [Petitioner]. The trial court held a hearing on the motion, during which counsel for Defendant Stokes joined the motion orally. The trial court denied the motion to sever.

At trial, Alexis Hawkins testified that her daughter was four years old at the time of the shooting. She and her daughter lived on Durby Circle. Her daughter was friends with the victim. On April 9, 2015, she heard a gunshot while her "kids [were] in the tub" and she was in the "back room [of the house] getting their clothes situated for school." The shot shattered one of the windows of her house and sounded like it was fired from a close distance. Shortly thereafter, she got a telephone call from the victim's mother, asking if everyone in the house was safe. After her boyfriend arrived at the house, they called the police to report the shot.

The next morning, Ms. Hawkins got up to go to work as usual. She and the victim's mother took turns driving the children to and from school—ordinarily the victim's mother took the children to school in the morning and Ms. Hawkins picked the children up from school in the afternoon. April 10th was no different. Ms. Hawkins picked the children up that afternoon at school before she took her boyfriend to work, stopped at a friend's house, and headed home. Ms. Hawkins's mother, Angela Bibbs, was parked on the street in her car when Ms. Hawkins arrived home from picking the children up at school. When they pulled up to the houses on Durby Circle, Ms. Hawkins parked her white "truck" in the driveway of her home. The victim "jumped out the car" because she wanted to drop her backpack off with her grandmother, who was at the victim's house. Ms. Hawkins "was taking [the kids] to the mall cause it felt good" outside. Ms. Hawkins stood on the curb next to her mother's car and talked to her mother through the window while she waited for the victim to take her school things to her grandmother. At that point, nothing seemed amiss. The kids were "running around the truck playing." All of the sudden, Ms. Bibbs started yelling, "get the kids, they

shooting." Ms. Hawkins looked up, saw a burgundy vehicle coming down the street, and "a young man hanging out the car" from the back seat behind the driver. Ms. Hawkins saw the man hanging halfway out of the window, leaning over the top of the car with a gun in his hand. The man was shooting over the top of the car while hanging on to the luggage rack as the car drove by. Ms. Hawkins heard about six shots as the car drove down the street. The car did not stop. Ms. Bibbs saw a hand sticking out of the passenger side window of the vehicle holding a gun. She heard two gunshots but was unable to identify anyone inside the vehicle.

Ms. Hawkins "hollered" the victim's name and told her to "get down," but by the time the victim looked at her, [Ms. Hawkins] knew "something was wrong." The victim had been shot in the head. Ms. Hawkins saw the victim try to get up from the driveway. Ms. Hawkins told the victim to stay still and yelled for the victim's grandmother.

Ms. Hawkins explained that she saw the shooter for approximately two seconds as the vehicle was driving away. She was taken to the police station and shown a photographic lineup on the night of the shooting. From that lineup, Ms. Hawkins identified one person as the shooter. Two days later, Ms. Hawkins identified a different man, Defendant Clayton, as the shooter. The individual chosen by Ms. Hawkins in the first lineup had similar facial characteristics to Defendant Clayton.

Carl Johnson testified for the State. He was indicted along with Defendants Clayton, Stokes, and [Petitioner] but was not on trial. Mr. Johnson admitted that he told authorities several versions of the activity of the Defendants prior to the victim's death but agreed to testify truthfully at the trial of his co[-]defendants in the hope that he would receive leniency. Mr. Johnson testified at trial that he was driving around in his mother's burgundy Chevrolet Trailblazer with Defendant Clayton on the day prior to the victim's death. He "took [Defendant Clayton] to go sell somebody [named 'White Boy'] some pills" on Durby Circle, next door to Ms. Hawkins's home. According to Mr. Johnson, when they arrived, "White Boy" came out along with "six more other dudes." The men stood near the car Mr. Johnson was driving and in which Defendant Clayton was a passenger. When they pulled up to the location, some of the men were standing on the passenger side of the car and "one dude was walking around the back of the car." When Defendant Clayton "sold 'White [B]oy' the pill, ['White Boy's' brother Rico] had tried to grab [Defendant Clayton's] gun or something and they were tussling and [Defendant Clayton] shot [Rico] in the chest." Mr. Johnson heard but did not see Defendant Clayton shoot Rico.

Defendant Clayton immediately told Mr. Johnson "to pull off real fast." As they were pulling away someone shot at the back of the truck that Mr. Johnson was driving.

"White Boy" called Defendant Clayton on the phone as Mr. Johnson and Defendant Clayton were driving away from Durby Circle. Mr. Johnson could hear the conversation and overhead "White Boy" ask Defendant Clayton why he shot his brother. Defendant Clayton claimed that Rico robbed him "in front of Carlos['s] house back in November, December, and he was like he was trying to pull the same move, [Rico] was trying to rob me again." So, Defendant Clayton shot him.

In the early morning hours of the next day, April 10th, Defendant Stokes's fifteen-year-old sister was killed in a drive-by shooting. In the afternoon of April 10th, Mr. Johnson was again riding around in the burgundy Trailblazer. He was by himself when Defendant Clayton called him and asked if he could "come take him to serve 'Big Nunu' and 'Pooh-Loo' some pills." "Big Nunu" was later identified as Theodis Turner. Mr. Johnson picked Defendant Clayton up and took him to a house "in a cove" near Robin Hood Lane "going towards East Memphis." Mr. Johnson claimed that he did not go inside or "to the back" of the house. While he and Defendant Clayton were at this location, Defendant Stokes arrived in a "silver, four-door Infiniti."

Defendant Stokes parked and got out of the car and asked to talk to Defendant Clayton. Defendant Clayton got out of the car that he was riding in with Mr. Johnson and into the car with Defendant Stokes. Defendant Clayton told Mr. Johnson to pick him up "from the Taco Bell over there off Pendleton." According to Mr. Johnson, the Infiniti containing Defendants Stokes and Clayton drove away. Mr. Johnson drove off and picked Defendant Clayton up at the Taco Bell a short time later. Mr. Johnson explained that he "pulled back up over there by 'Big Nunu' and 'Pooh-Loo['s]' house" after picking Defendant Clayton up at the Taco Bell. [Petitioner] arrived at the house three to five minutes later and jumped out of a black Tahoe.

Mr. Johnson recalled that outside the house, everyone was talking, "joking like take me to the hood to go sell somebody else some more bars." Defendants Stokes, [Petitioner], and Clayton got into Mr. Johnson's Trailblazer. Mr. Johnson recalled he was told to drive to Orange Mound and from there, Durby Circle. Mr. Johnson arrived on Durby Circle and drove twice past the house where Defendant Clayton had "shot Rico and them at."

The third time Mr. Johnson drove down the street, Defendant Stokes said he did not care who was outside the house. Defendant Stokes started talking about his little sister being killed and that he wanted a "body for a body." Mr. Johnson saw "some kids" and a few adults outside the house. Mr. Johnson testified that "[Petitioner] hung out the window [of the car as they drove by] and he shot one time and he tried to shoot again, [but] his gun jammed up." Immediately before he shot the gun, Mr. Johnson heard [Petitioner] say "something like, 'hey, little bitch.'" Mr. Johnson also saw Defendant Clayton hang out the window and shoot a gun "[a]bout 20, 15 seconds later," but Mr. Johnson did not think that Defendant Clayton's bullet hit anyone. Mr. Johnson drove away quickly, heading back toward "Big Nunu" and "Pooh-Loo's" house. Halfway there, he told [Petitioner] and Defendant Stokes to get out of his car. When they arrived back at the house, Defendant Clayton took off in the direction of Auriel Wiggins's house.

Mr. Johnson identified [Petitioner]'s gun as a black, .40 caliber Taurus. He identified Defendant Clayton's gun as a black, .40 caliber Glock 22. According to Mr. Johnson, Defendant Clayton was in the front passenger seat, Defendant Stokes was in the back seat on the driver's side of the car, and [Petitioner] was "sitting behind Jordan Clayton in the back seat." Mr. Johnson testified that a fifth man, Brandon Derr, was in the third-row seat. According to Mr. Johnson, Defendant Stokes was in charge that day, telling people what to do. The others listened to him because "he got a lot of people under him and he tell[s] them what to do and they do it." Mr. Johnson clarified that Defendant Stokes was a member of the Blood gang and had a lot of gang members under him. Mr. Johnson explained that he was a member of the Gangster Disciples gang.

Mr. Johnson admitted on cross-examination that he gave several statements to authorities that were replete with lies. He explained at trial that he lied when first questioned because he was "scared" but claimed that he was telling the truth in the second statement he gave to police and in his testimony at trial.

Ashinik Johnson, Mr. Johnson's mother, confirmed that she owned a 2003 Chevrolet Trailblazer in April of 2015. At the time, she was living at the Budget motel with Mr. Johnson. One day in April, she was at the motel room with Mr. Johnson, her daughter Marshanik Butler, her granddaughter, and her "friend dude." Mr. Johnson called Defendant Clayton on the phone. Mr. Johnson was lying on the bed during the telephone call, and Ms. Johnson was seated next to him such that she could hear the conversation. The two men talked about the gunshot hole in the back of her truck. Defendant

Clayton claimed that "he had got into it with somebody and they had a shoot out." Ms. Johnson also heard Mr. Johnson talking to Defendant Clayton about "a little girl being shot." Ms. Johnson claimed she heard Defendant Clayton admit that "he killed the little girl."

Eventually, Mr. Johnson along with Defendants Clayton, [Petitioner], and Stokes were developed as suspects in the death of the victim. [Petitioner] was interviewed by Detective Robert Wilkie of the Memphis Police Department. [Petitioner] admitted that he was in the vehicle seated behind the driver during the shooting. [Petitioner] recalled that there were two people with guns and that several shots were fired.

Several people that were present on Durby Circle at the time of the shooting testified at trial. Tenic Baker was sitting in the front yard of her parent's home, across the street from the location of the shooting. Ms. Baker saw a "truck" drive through the neighborhood at least twice before a window on the passenger side was lowered and shots were fired at a little girl. The truck sped off after the shots were fired. Ms. Baker was unable to identify anyone in the truck.

Mario Moore was also standing outside on the day of the shooting. He heard the shots, looked down the street, and saw the young girl on the ground. Mr. Moore recalled that the shots came from a truck driving down the street but that he did not see the shooter.

Annie Vaughn had lived on the corner of Durby Circle and Labelle Street for twenty-five years. She lived next door to the victim. On the day of the incident she saw "a burgundy truck keep riding slowly down the street back and forward." Ms. Vaughn later described the vehicle as an "SUV." She further explained that the SUV "[m]ade about two or three trips like that" up and down the street "slowly" at about "15, 20" miles per hour. Ms. Vaughn wondered what the people in the vehicle were doing as she had "never seen [that vehicle] on that street." About the third time down the street, she "saw a gentlemen raise up out of his window on the [front] passenger side of that car" and "point the pistol at the baby's head." The car stopped momentarily and the man with the gun looked around, pointed the gun at the victim, and started shooting. She heard two or three shots. Ms. Vaughn started screaming. Then, "[t]he car pulled off and stopped. When it passed by three houses from where the baby was laying, it stopped and the gentlemen raised up from the same front window, looked out, raised his body out so he could see the back and said I got her." Ms. Vaughn continued to scream and holler and ran down the street toward the victim. Ms. Vaughn

did not give a statement on the night of the shooting. However, ten days after the shooting, Ms. Vaughn identified Defendant Clayton as the shooter in a photographic lineup and gave a statement to police. Ms. Vaughn explained that she did not come forward because she "didn't want to get caught up in anything." She admitted on cross-examination that she testified at an earlier proceeding that she could not recall if the windows of the SUV were tinted and that she did not tell officers in her statement that the shooter said, "I got her."

Officer Brandon Westrich of the Memphis Police Department responded to the call of shots fired at 5:54 p.m. He and a partner, Officer Mujahed Abedellatif, were about a block away from the location of the shooting and arrived within minutes of the call. When Officer Westrich arrived, there "was a crowd of individuals, women and children" standing outside a house on Durby Circle. There was "a little girl lying face down in the middle of the drive[]way. She had blood around her head." Officer Westrich relieved a neighbor who was holding a towel to the victim's head. Officer Westrich continued to put pressure on the victim's wound until an ambulance arrived shortly thereafter and transported the victim to the hospital. Officer Abedellatif explained that all the people on the scene were "telling [them] who - - what kind of vehicle it was." He was able to put out a broadcast about "two, three minutes" after they arrived on the scene giving a description of the shooter's vehicle.

Defendants Clayton and [Petitioner] both gave statements to the police, which were redacted prior to trial to remove any references to the other Defendants. In Defendant Clayton's statement, he explained that he was on Durby Circle on April 9 in the burgundy SUV with Mr. Johnson. They went to the street to sell some "bars" to someone named "Red." At that point, Rico pulled a gun out on Defendant Clayton and tried to rob him again. Defendant Clayton explained that Rico had robbed him about five months prior to that date. There was a tussle over the gun, and Defendant Clayton shot Rico. Defendant Clayton and Mr. Johnson left the scene. The next day, Defendant Clayton was at "Nunu's" house to sell him some "bars." There was a discussion about Defendant Stokes's sister having been killed the night before. Defendant Clayton claimed that he left "Nunu's" house with Mr. Johnson and was dropped off at Kimball Cabana Apartments to stay with his girlfriend, where he remained for the evening. Defendant Clayton claimed that he did not know about the victim's death until April 11th. [Petitioner], on the other hand, admitted in his statement that he was in the car with Mr. Johnson when the victim was killed. Defendant Stokes did not give a formal statement but admitted that he was at Mr. Turner's house on the day of the

victim's murder when he talked to police about his own sister's death. He also stated that he "really didn't give a f*** about [the victim's] death because his own sister was dead."

Theodis Turner, also known as "Nunu," testified at trial that he had suffered a stroke and could not recall any of the events that took place on April 10th. Mr. Turner did not recall making a statement to police or testifying at the preliminary hearing. Mr. Turner listened to a portion of a recording from the preliminary hearing and recognized his own voice, but could not recall testifying at the hearing.

The preliminary hearing testimony was played for jury. During the preliminary hearing, Mr. Turner testified that Defendant Clayton and Mr. Johnson showed up at his house in a red Trailblazer. Defendant Stokes and [Petitioner] came to his house in an Infiniti. Mr. Turner testified that Defendant Stokes was upset about his sister's murder and was "huddled up in a crowd" talking to the other men about the murder. Mr. Turner testified that the men were also talking about Defendant Clayton getting robbed at Defendant Stokes's house prior to Defendant Stokes's sister's murder. Defendant Stokes said something had to be done about the murder of his sister. At first, Mr. Turner testified Defendant Stokes did not say what needed to be done but then acknowledged that he gave a statement to police in which he said Defendant Stokes wanted "a body" because his sister was killed. Mr. Turner did not see anyone with a gun but testified that the men all "toted" weapons on a regular basis. Mr. Turner testified that everyone left after that, but only [Petitioner] and Mr. Johnson came back to his house a short time later.

Mr. Turner was able to identify his signature on each of the pages of his statement to police and the photographic lineups where he identified the Defendants. Officer Fausto Frias then testified that Mr. Turner gave the following statement:

> [I w]as at [my] house and [Defendant Clayton] came over to sale [sic] me some bars. He was in [Mr. Johnson's] red truck and [Mr. Johnson] was driving. He came to the back porch and sold me the bars. [Defendant Stokes] pulled up in his grey Infiniti with [Petitioner]. [Defendant Stokes] got out of the car. I saw that [Petitioner] had a black gun. [Defendant Stokes] called [Defendant Clayton] to the side and told him to bring him a body for a body and he wanted it now. [Defendants Clayton, [Petitioner], and Stokes] pulled off in [Defendant

> Stokes's] car and [Mr. Johnson] pulled off behind them. I think 15 minutes went by and they pulled back but [Defendant Clayton] was not with them. They came to the back porch looking suspicious. I asked them what happened but no one said s**t. I began hearing sirens and they all left from my house.

In the statement, Mr. Turner claimed that he only saw Mr. Johnson, Defendant Clayton's brother "Little B," and [Petitioner] in the red Trailblazer. He did not see Defendant Stokes in the red Trailblazer. Mr. Turner explained that Defendant Stokes wanted a "body for a body":

> [b]ecause he fel[t] that [Defendant Clayton] was responsible for his sister getting kill[ed] . . . because [Defendant Clayton] shot somebody the night before and they thought that [Defendant Clayton] lived at Carlos['s] house, because the same guy [Defendant Clayton] shot robbed [Defendant Clayton] some months back at Carlos['s] house.

During the investigation, police found a .40 caliber bullet that penetrated an exterior wall of Ms. Hawkins's home and eventually came to rest in the bathtub. The bullet had the same class characteristics as one test-fired from the gun found in Defendant Clayton's possession during his arrest: a black .40 caliber Glock 22 imprinted with the words "Arkansas Highway Police." Cell phone technology placed Defendant Clayton in the area of Durby Circle at the time of the shooting. Likewise, data from a GPS monitoring device worn by Mr. Johnson placed him at Durby Circle at the time of the shooting.

None of the Defendants testified at trial. Defendant Clayton introduced testimony from a friend, Auriel Wiggins, who claimed that he was at her house the afternoon of April 10[th] and stayed there doing drugs and "chillin" until the next day. Ms. Wiggins never told police that Defendant Clayton was with her on the day of the shooting.

State v. Jordan Clayton, *Carlos Stokes, and Braden Brookins*, No. W2018-00386-CCA-R3-CD, 2019 WL 3453288, at *1-6 (Tenn. Crim. App. July 31, 2019), *perm. app. denied* (Tenn. Dec. 10, 2019).

Petition and Amended Petitions for Post-Conviction Relief

Petitioner filed a pro se petition for post-conviction relief claiming that the State violated his constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and that trial counsel was ineffective for: not challenging the selection of the jury, not sufficiently cross-examining a witness about inconsistencies in his statement to the police, not thoroughly investigating the case, not requesting the trial court to instruct on duress and coercion, failing to prepare Petitioner to testify, and not joining in the motion to sever Petitioner's case from his co-defendants. After counsel was appointed, two amended petitions were filed reasserting the grounds in the pro se petition and claiming that Petitioner received ineffective assistance of counsel by: (1) preventing the testimony by one of the State's witnesses about a recent confrontation between one of Petitioner's co-defendants and a rival gang member near the scene where the victim was killed; (2) bolstering the testimony of two witnesses by having the witnesses restate their testimony; (3) failing to object to certain hearsay evidence; and (4) committing cumulative error.

Post-Conviction Hearing

Petitioner testified that trial counsel only visited with him three times for about a half hour to one hour each. He said that, although counsel mailed him the discovery, counsel never went over it with him. He said that he knew that Mr. Stokes's teenage sister had been killed in a drive-by shooting but denied knowing who killed her. He said that no one was ever prosecuted for her murder. He said that Mr. Johnson's statements to the police were inconsistent and that trial counsel failed to adequately cross-examine Mr. Johnson about the inconsistencies.

On cross-examination, Petitioner admitted that he was seated behind the driver in the SUV but denied that he had a gun. He claimed trial counsel never explained criminal responsibility to him.

During questioning by the post-conviction court, Petitioner said that it was not his intention to kill someone when he got in the SUV. He said that he thought they were going to see Mr. Stokes's mother. He said that Mr. Clayton was the shooter.

Trial counsel testified that he had practiced almost exclusively as a criminal defense attorney for about twenty-two years. He stated that it was his "standard operating procedure" to request discovery and file pretrial motions. He said that he mailed the discovery he received from the State to Petitioner at the jail. Counsel did not recall how many times he met with Petitioner but said that he reviewed the discovery material with him. He said that he discussed the risks and benefits of testifying with Petitioner. He described the case as a "short but very violent ongoing dispute between rival gangs that

had led to at least one other juvenile being shot." He said that he explained to Petitioner that it was "a terrible case." The State did not offer a plea deal.

Trial counsel said Petitioner had given a statement to police placing himself in the back seat behind the driver. Counsel said, "[T]he best thing that [Petitioner] had going for him [was] the inconsistencies among the co-defendants' statements." He said there were also inconsistencies in Mr. Johnson's statement to police and his testimony at trial and that some of the witnesses at the scene of the shooting "gave inconsistent statements about which window of the SUV the shooter came out of." Counsel stated that he tried to highlight those inconsistencies in an attempt to show the jury that Petitioner was not the shooter. He said he did not "remember there being any real extensive investigation needed for this. After they all pretty much placed themselves on the scene or each other." He said that the State was "able to flip one of the co[-]defendants to testify at trial." He said the case was more about who was the shooter than about what happened.

Trial counsel was questioned about his decision to object to Demire Young's testimony. According to the State, Mr. Young was prepared to testify about a robbery and shooting by Mr. Clayton of someone named Rico that occurred "a day or so" before at a house located next door to the house where the victim in this case was murdered. When the State asked Mr. Young about the robbery and shooting, Mr. Young stated, "I need a lawyer." Counsel agreed that Mr. Young's testimony might have been "an opportunity to shift criminal responsibility" to one of Petitioner's co-defendants, but he explained that he had to decide quickly whether to object to Mr. Young's testimony. Counsel provided the following explanation for his decision to object:

> But there was a decision I was making to try to keep that testimony out. Or on the other hand, I was preparing the [c]ourt to know that once I got into my cross-examination, that I was going to continue to ask questions that related to a third-party['s] guilt. And so instead of waiting until I'm in front of a jury and getting shut down in front of the jury and looking bad, I may have been raising this in advance to get a ruling from the [c]ourt before the witness actually took the stand. But it's obvious from the transcript there was an ongoing discussion between me, [the assistant district attorney], and the [c]ourt[,] and that I was making some judgment call about where we were going with it. I don't remember what the issues were but at that point after I argued it, . . . the State said well fine, we're just not going to put him on then with the understanding that I was going to get to cross-examine him.

Trial counsel also was questioned about his cross-examination of Tenic Baker.[1] Trial counsel testified that, on cross-examination, he asked Ms. Baker if she clearly saw the vehicle and that Ms. Baker said that she did. Counsel stated that the police knew the vehicle used in the shooting and that Petitioner had given a statement to police confirming that he was in the back seat on the driver's side of the vehicle. Counsel denied that his questioning of Ms. Baker bolstered her credibility.

Concerning the testimony of Ms. Hawkins, post-conviction counsel asked trial counsel: "Do you recall any hearsay objections that would have kept some damaging testimony out?" After trial counsel answered "no," post-conviction counsel asked trial counsel to read from the trial transcript. The selected portion of the transcript was read silently by trial counsel and was neither transcribed by the court reporter nor made an exhibit. After counsel read the selected portion of the transcript, the following dialogue occurred:

> Q. Was there a hearsay objection in that portion of the testimony that would have prevented her from mentioning any shooting at Durby Circle?
>
> A. I would assume she already testified to a shooting on direct, right? So no, there's no objectionable hearsay here.
>
> Q. But witnesses cannot testify as to what was said outside of court; correct?
>
> A. No, not true. State of mind, other exceptions. Sometimes as an attorney you don't object to hearsay because it's already been testified to. This is—I'm assuming what you're talking about is the statement where she says: "And he came through the door and I was just telling him that it was gunshots and my window was shattered." I can't imagine that that came out the first time on my cross-examination. I'd have to think that's part of the State's direct and I wouldn't have objected to it. And, of course, had I objected to it, that all came from my question which was okay. And then she said that, so I wouldn't have—I didn't elicit that testimony and if I had objected to it, and if it had actually been objectionable, the jury would have still heard it because it's already been said, so the objection would have been pointless.

[1] The transcript of the post-conviction hearing and Petitioner's brief incorrectly refer to Tenic Baker as Lieutenant Baker.

Trial counsel denied that his examination of Annie Vaughn made her look more sympathetic to the jury. Trial counsel explained that he questioned Ms. Vaughn to get her to explain why she waited so long to go to the police and tell them what she saw. Ms. Vaughn said the reason for her delay was because she was afraid for her children.

On cross-examination, trial counsel testified that he had tried forty to fifty first degree murder trials, including cases where there were multiple defendants. He said that multiple defendant cases in Shelby County are usually gang related. He explained his strategy in such cases as follows:

> So right off the bat, multiple co[-]defendants, it's going to be a gang case in Shelby County. The problem with this is the State is always going to flip somebody. I'm always trying to flip my client for a better deal. One of the attorneys is going to win that battle. Most of the time your client is going to testify and get a better deal.

When asked by the post-conviction court what was "the most damning piece of evidence" against Petitioner, trial counsel explained that Petitioner admitted to being in the car and that there was "testimony that they had all gotten together beforehand and planned to go out kind of looking for a body." He said probably the worst thing for Petitioner was Mr. Johnson's testimony that, after Petitioner fired his pistol out of the window and over the top of the car, Petitioner said something like "I got that b***h."

Post-Conviction Court's Ruling

After argument of counsel, the post-conviction court orally announced its decision. The court noted that Petitioner had given a statement admitting that he was seated in the back seat behind the driver of the SUV. The court stated, "I don't see where [trial counsel] was ineffective at all, not at all. There was nothing specific that [Petitioner] pointed to that [trial counsel] did wrong[.]" The court found that, "in light of all the massive amount of evidence against all these co[-]defendants in this case, it just appears that there's no prejudice whatsoever to [Petitioner]. [Trial counsel] did the best he could under these circumstances." The court noted,

> that [with] someone testifying [that] they saw the back passenger behind the driver shooting over the top of the car, it would be very, very hard to say that was inconsistent. And then of course [Petitioner] admitting that he was the one seated back there, that's almost too much to overcome.

The court found that, as to "the second prong of the [*Strickland*] test, there's no way [Petitioner] was prejudiced in any way" and denied post-conviction relief. On August 31, 2022, the post-conviction court entered a written order.

Petitioner timely appealed.

Analysis

On appeal, Petitioner claims that trial counsel provided ineffective assistance "when he prevented Demire Young from testifying," when he "booste[d] the credibility" of Tenic Baker and Annie Vaughn, and when he failed to make a hearsay objection during the testimony of Alexis Hawkins.[2] The State argues that Petitioner failed to show that counsel's performance was deficient or that any alleged deficiency prejudiced the defense. We agree with the State.

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court's factual findings unless the evidence preponderates against such findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). Additionally, "questions concerning the credibility of the 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*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997)); *see Kendrick*, 454 S.W.3d at 457. The post-conviction court's conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. *Kendrick*, 454 S.W.3d at 457.

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997). Both factors must be proven for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d

[2] The claims of ineffective assistance of counsel raised in the pro se petition and the amended petitions that are not raised on appeal are abandoned, and we accordingly limit our review to the ineffective assistance of counsel claims raised on appeal. *See Ronnie Jackson, Jr. v. State*, No. W2008-02280-CCA-R3-PC, 2009 WL 3430151, at n.2 (Tenn. Crim. App. Oct. 26, 2009) ("While the Petitioner raised additional issues in his petition for post-conviction relief, he has abandoned those issues on appeal"), *perm. app. denied* (Tenn. Apr. 16, 2010).

879, 886 (Tenn. 2004)). Additionally, review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Henley*, 960 S.W.2d at 579. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley*, 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)); *see also Goad*, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688); *see Baxter*, 523 S.W.2d at 936.

In cases where a petitioner contends that trial counsel failed to present a witness in support of the petitioner's defense, the petitioner must present such witness at the post-conviction hearing. *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Neither a trial nor an appellate judge can speculate as to whether that witness's testimony would have been favorable to the defense. *Id.* Therefore, the petitioner must "produce a material witness who . . . would have testified favorably in support of his defense if called [at trial]. Otherwise, the petitioner fails to establish the prejudice requirement mandated by *Strickland v. Washington*." *Id.* at 758.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

Trial Counsel's Role in the State's Decision not to have Demire Young Testify

According to the transcript from the direct appeal, the State called Mr. Young as a witness. When the State asked Mr. Young about an incident that occurred on April 9, 2015, on Durby Circle, Mr. Young stated, "I need a lawyer." Outside the presence of the jury, the State argued that Mr. Young was not implicated in offenses in the case at trial. The State explained that Mr. Young was an eyewitness to Mr. Clayton's shooting someone named Rico. Trial counsel made a strategic decision to argue to the trial court that he planned to cross-examine Mr. Young about his role in the robbery and shooting. After trial

counsel made his argument, the State announced that it had decided not to call Mr. Young as a witness.

Petitioner argues that, if trial counsel had not intervened, Mr. Young would have testified, and counsel could have cross-examined Mr. Young in an effort to shift criminal responsibility for the shooting to one of Petitioner's co-defendants. Petitioner also claims that, if the jury had heard proof about the "previous shootings and robberies," there would have been "a reasonable probability that the outcome of the trial would have been different because the jurors could have reasonably concluded that [Petitioner] did not commit the shooting because he had no motive, stake, or intention of doing so."

For two reasons we determine that Petitioner is not entitled to relief on his issue. First, trial counsel made a strategic decision to announce that he intended to cross-examine Mr. Young. His explanation for doing so was reasonable. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound tactical decision. *Granderson*, 197 S.W.3d at 790.

Second, we determine that Petitioner's claim concerning Mr. Young is similar to a common post-conviction claim—that an attorney was deficient for failing to call a witness at trial. Because Petitioner did not call Mr. Young at the post-conviction hearing, we cannot determine what Mr. Young's testimony would have been or even if the testimony would have been helpful or harmful to Petitioner. Generally, "[w]hen a petitioner contends that trial counsel failed to . . . present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black*, 794 S.W.2d at 757. Without the testimony of Mr. Young at the post-conviction hearing or at trial, Petitioner has failed to show that counsel's role in the State's decision not to call Mr. Young as a witness amounted to deficient performance or prejudiced his defense.

Boosting the Credibility of Tenic Baker

Petitioner claims that trial counsel rendered ineffective assistance when he had "Tenic Baker recite her testimony that she could clearly see the SUV." Petitioner claims that having the jury hear repetitious testimony only "boosted" the testimony previously given by the witness and that, had her testimony not been "boosted," there would have been "a reasonable probability that the outcome of the trial would have been different." According to the recitation of the facts in this court's opinion:

> Tenic Baker was sitting in the front yard of her parent's home, across the street from the location of the shooting. Ms. Baker saw a "truck" drive through the neighborhood at least twice before a window on the passenger side was lowered and shots were fired at a little girl. The truck sped off after the shots were fired. Ms. Baker was unable to identify anyone in the truck.

Jordan Clayton, 2019 WL 3453288, at *4.

Based on the proof presented at trial, the identity of the vehicle was not in question, and Petitioner admitted in his statement to police that he was in the SUV. Petitioner has failed to show that counsel was deficient by asking Ms. Baker if she could clearly see the SUV. Even if counsel was deficient in questioning Ms. Baker, Petitioner has failed to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Goad*, 938 S.W.2d at 370.

Boosting the Credibility of Annie Vaughn

Petitioner claims that trial counsel "boosted" Ms. Vaughn's credibility during cross-examination. According to the trial transcript, Ms. Vaughn "did not give a statement on the night of the shooting. However, ten days after the shooting, Ms. Vaughn identified Defendant Clayton as the shooter in a photographic lineup and gave a statement to police." Ms. Vaughn explained that she did not come forward because she "didn't want to get caught up in anything." *Jordan Clayton*, 2019 WL 3453288, at *4. Petitioner claims that, during cross-examination, Ms. Vaughn explained in response to a question by trial counsel that she ultimately reported the incident to police because it involved a child victim and because she had children. Petitioner claims that Ms. Vaughn's response made her look more sympathetic to the jury and boosted her testimony. Petitioner argues that the "outcome of the trial would have been different had trial [counsel] not boosted the credibility of [Ms.] Vaughn."

Petitioner has failed to show that trial counsel's cross-examination was deficient or how Ms. Vaughn's testimony made her more sympathetic to the jury. Even if counsel was deficient in his cross-examination of Ms. Vaughn, Petitioner has failed to show that the deficiency prejudiced his defense. As the State points out in its brief: "Ms. Vaughn did not implicate [P]etitioner and her identification of the vehicle was not in question." Petitioner is not entitled to relief on this issue.

Failure to Object to Hearsay

Petitioner claims that trial counsel rendered ineffective assistance when he failed to object to Alexis Hawkins' "hearsay statement in which she mentioned that a shooting had occurred" on Durby Circle. Post-conviction counsel asked trial counsel: "Do you recall any hearsay objections that would have kept some damaging testimony out?" When trial counsel answered no, post-conviction counsel asked trial counsel to read a portion of the transcript. Post-conviction counsel did not have trial counsel read the portion of the transcript aloud so it would be transcribed. Post-conviction counsel did not enter a copy of the portion of the transcript as an exhibit and does not quote the testimony he claims

was hearsay in his brief. We glean from the transcript of the direct appeal in this case that Ms. Hawkins testified about someone's shooting into her house on Durby Circle a day or so before the victim in this case was killed. Ms. Hawkins said that, on April 9, 2015, "she heard a gunshot while her 'kids [were] in the tub' and she was in the 'back room [of the house] getting their clothes situated for school.' The shot shattered one of the windows of her house and sounded like it was fired from a close distance." *Jordan Clayton*, 2019 WL 3453288, at *1. We fail to see how Ms. Hawkins' testimony was hearsay or how an objection to hearsay would have been sustained. Petitioner has failed to show that counsel was ineffective by failing to raise a hearsay objection.

There was testimony presented at trial, including the testimony of Mr. Johnson, that Petitioner and the other three passengers in the SUV formulated a plan to kill someone, that Petitioner was in the back seat of the SUV behind the driver, that Petitioner leaned out of the rear passenger side window and was holding onto the luggage rack while shooting a pistol over the top of the vehicle, and that Petitioner stated after firing his pistol that he "got that b***h." Based on the overwhelming proof at trial, Petitioner has also failed to show that there is a "reasonable probability that the result of the proceeding would have been different" if trial counsel had raised a hearsay objection to Ms. Hawkins' testimony. *Goad*, 938 S.W.2d at 370. Petitioner is not entitled to relief on this issue.

Conclusion

The judgment of the post-conviction court denying post-conviction relief is affirmed.

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ROBERT L. HOLLOWAY, JR., JUDGE