

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 7, 2023 Session

FILED
04/06/2023
Clerk of the
Appellate Courts

MICHAEL BROOKS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 12-02650 Chris Craft, Judge

No. W2022-00572-CCA-R3-PC

The Petitioner, Michael Brooks, appeals from the Shelby County Criminal Court’s denial of his petition for post-conviction relief from his convictions for especially aggravated kidnapping, facilitation of aggravated robbery, assault, and aggravated burglary, for which he is serving an effective eighteen-year sentence. On appeal, the Petitioner contends that the post-conviction court (1) erred in denying relief on his ineffective assistance claims and (2) deprived him of due process in various respects. 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 H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and CAMILLE R. MCMULLEN, JJ., joined.

Terrell L. Tooten (at post-conviction hearing), Cordova, Tennessee, for the Appellant, Michael Brooks.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Sam Winnig, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner’s convictions relate to a home invasion. On November 23, 2011, the Petitioner knocked on the front door of the home of Patricia Jones, Warren Galloway,

their four-year-old daughter, J.G.,¹ and Ms. Jones's adult nephew, Michael Riley. Ms. Jones knew the Petitioner and invited him into the home. Ms. Jones and Mr. Galloway sold snack food items to people in their neighborhood. The Petitioner said he wanted to purchase some items, and Mr. Galloway went to the back of the house to get bags for the purchase. While Mr. Galloway was away, the Petitioner opened the door to allow three armed men into the home. They announced that they were committing a robbery, ordered Ms. Jones to lie on the floor, scuffled with Mr. Galloway, hit him on the head with a gun, and threatened to shoot Ms. Jones. The intruders forced Mr. Galloway to lie on the kitchen floor with Ms. Jones and took the couple's money, jewelry, watches and cell phones. The Petitioner went to J.G.'s bedroom, placed a gun to her head, and forced her into a closet, causing her to urinate on herself. The Petitioner and the men left the house, and Ms. Jones went next door to call the police. Ms. Jones and Mr. Galloway identified the Petitioner in a photograph lineup. J.G. told the police that the Petitioner committed the offenses and later identified the Petitioner at trial, noting that she knew the Petitioner and had seen him previously in her neighborhood and in her home. *State v. Michael Brooks*, No. W2014-01391-CCA-R3-CD, 2015 WL 5278362, at *1-2 (Tenn. Crim. App. Sept. 9, 2015).

At trial, Memphis Police Sergeant John Simpson testified that the Petitioner made several statements to him regarding the robbery. Initially, the Petitioner denied participating in the robbery and indicated he was not at the home when the robbery occurred. After being reminded that he was wearing an ankle monitoring bracelet, the Petitioner said that he was related to Ms. Jones and Mr. Galloway, that he went to their home for ten minutes, and that he left before the robbery. The Petitioner changed his statement after being shown the victims' statements and told Sergeant Simpson that he was at his grandmother's house when the codefendants arrived and planned the robbery, that he told them not to do it, and that the codefendants left and committed the robbery. Sergeant Simpson said that, later, he confronted the Petitioner with the codefendants' statements, after which the Petitioner admitted he was present during the planning and commission of the robbery and received proceeds from the robbery. A jury convicted the Petitioner. He appealed his convictions, and this court denied relief. *Id.*

On June 16, 2016, the Petitioner filed a pro se petition for post-conviction relief alleging the ineffective assistance of trial and appellate counsel. The post-conviction court appointed post-conviction counsel, who filed an amended petition alleging, in relevant part, that (1) trial counsel failed to request a jury instruction that required corroboration of the Petitioner's extrajudicial statements, (2) counsel failed to move to suppress J.G.'s in-court identification of the Petitioner, (3) counsel failed to raise as mitigating evidence that the Petitioner was "very gentle and kind" to J.G. and told her

¹ J.G. is identified by her initials as she was a minor at the time of the crimes.

that she would not be harmed, and (4) the Petitioner did not receive a fair trial because the jury was not instructed that the Petitioner's extrajudicial statements required corroboration for a conviction.

At the post-conviction hearing, an audio recording of the preliminary hearing was received as an exhibit and reflected the following: Ms. Jones was called to testify and to identify the Petitioner. Prior to her testimony, J.G. was excused from the courtroom. Ms. Jones identified the Petitioner as the person who let the armed men into her home. She also testified that he was well-known to her. After concluding her testimony, Ms. Jones was seen talking to family members and pointing toward the Petitioner. To determine whether she shared her testimony, Ms. Jones was recalled to the stand. Ms. Jones said she did not share her testimony but said she asked family members where to find J.G. Ms. Jones said that J.G. asked her, "Where is Black Baby?" "Black Baby" was the name by which the Petitioner was known in the community. Ms. Jones said she told J.G. that he was in the front of the courtroom and pointed to where he and his codefendants were seated.

Trial counsel testified at the post-conviction hearing that he had represented the Petitioner's family members previously, that he had practiced law since 1981, and that he had handled over 200 jury trials, including felony cases. He stated that his defense strategy was to challenge the minor child's identification of the Petitioner. He believed that Ms. Jones while in the courtroom for the preliminary hearing pointed out the Petitioner to J.G., thereby assisting J.G. to identify the Petitioner at the trial. Counsel recalled discussing his concerns during the preliminary hearing with the trial judge, Ms. Jones, and the prosecutor. Counsel said he chose not to file a motion to suppress J.G.'s identification of the Petitioner because he "felt like [the issue] had been resolved" at the preliminary hearing. Counsel stated the Petitioner was "known" by the victims.

Trial counsel testified that he did not request an independent jury instruction stating that a defendant cannot be convicted based on his confession alone but accepted the jury instructions provided by the trial court.

Trial counsel testified the evidence established that the Petitioner took J.G., "who was known to [the Petitioner,]" to a back bedroom where the Petitioner held a gun to her head and forced her into a closet, causing her to urinate on herself. Counsel stated it "distressed" him to have the jury hear that evidence. Counsel said he did not emphasize to the jury that the Petitioner was not physically rough with the child because the facts were "difficult enough to hear," and counsel did not think the child was voluntarily released.

On cross-examination, trial counsel testified that "substantial additional evidence" corroborated the Petitioner's inculpatory statement to law enforcement, including Ms.

Jones's and Mr. Galloway's identification of the Petitioner. Counsel said that the Petitioner's statement that he was present for the robbery "more clearly matched up with the facts that [counsel] knew to be true." The Petitioner did not testify at the post-conviction hearing.

The post-conviction court concluded that: (1) trial counsel did not provide deficient performance by failing to propose a jury instruction regarding corroborating evidence because determining the sufficiency of evidence necessary to corroborate the Petitioner's statements was a question of law for the trial court, and the Petitioner's statements "were sufficiently corroborated by the testimony of the victims"; (2) counsel did not provide deficient performance by failing to file a motion to suppress J.G.'s identification of the Petitioner at the trial because the audio recording from the preliminary hearing indicated that J.G. was not coached to identify the Petitioner, and, therefore, any motion to suppress J.G.'s identification of the Petitioner would not have been successful; and (3) counsel did not provide deficient performance by failing to argue as a mitigating factor that the Petitioner was "very gentle and kind" to J.G. when the Petitioner held a gun to her head and placed her in a closet. This appeal followed.

The Petitioner contends that the post-conviction court erred by denying relief as to his ineffective assistance of counsel claims, that he was denied a fair trial in violation of due process, and that J.G.'s testimony should have been excluded pursuant to Tennessee Rule of Evidence 602. The State counters that the post-conviction court did not err when it determined that trial counsel did not provide ineffective assistance of counsel and that the due process and the Rule 602 claims are waived. We agree with the State.

Post-conviction relief is available "when the 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." T.C.A. § 40-30-103 (2018). A petitioner has the burden of proving his factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f) (2018). A post-conviction court's findings of fact are binding on appeal, and this court must defer to them "unless the evidence in the record preponderates against those findings." *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *see Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's application of law to its factual findings is subject to a de novo standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

I. Ineffective Assistance of Counsel Claims

To establish a post-conviction claim of the ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner has the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*,

506 U.S. 364, 368-72 (1993). The Tennessee Supreme Court has applied the *Strickland* standard to an accused's right to counsel under article I, section 9 of the Tennessee Constitution. See *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner must satisfy both prongs of the *Strickland* test in order to prevail in an ineffective assistance of counsel claim. *Henley*, 960 S.W.2d at 580. “[F]ailure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.” *Goard v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). To establish the performance prong, a petitioner must show that “the advice given, or the services rendered . . . are [not] within the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); see *Strickland*, 466 U.S. at 690. The post-conviction court must determine if these acts or omissions, viewed in light of all of the circumstances, fell “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. A petitioner “is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision.” *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); see *Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008). This deference, however, 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). To establish the prejudice prong, a 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.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

1. Jury Instruction

The Petitioner contends that trial counsel was ineffective by failing to request a jury instruction that required the jury to find corroborating evidence before convicting the Petitioner based on his extrajudicial inculpatory statements.

Our supreme court in *State v. Bishop*, 431 S.W.3d 22 (Tenn. 2014), adopted the modified trustworthiness standard for establishing corroboration of a defendant’s extrajudicial statements.² In *Bishop*, the court stated that “a defendant’s extrajudicial confession is sufficient to support a conviction only if the State introduces ‘independent proof of facts and circumstances which strengthen or bolster the confession and tend to generate a belief in its trustworthiness, plus independent proof of loss or injury.’” *Id.* at 58 (quoting *State v. Lucas*, 152 A.2d 50, 60 (N.J. 1959)). If the charged offense involves

² Prior to the modified trustworthiness standard, Tennessee followed the *corpus delicti* rule which required the State to present only “slight” evidence, independent of a defendant’s confession, that an injury occurred and that the injury resulted from some person’s criminal acts. *Bishop*, 431 U.S. at 47, 58 (citations omitted).

a tangible injury, the State is required to provide “substantial independent evidence tending to show that the defendant’s statement is trustworthy, plus independent prima facie evidence that the injury actually occurred.” *Id.* at 59.

A trial court’s determination of whether a defendant’s extrajudicial admission or confession is sufficiently corroborated is a mixed question of law and fact, and the standard of review on appeal is *de novo*. *Id.* Our supreme court has also made clear that “[t]he corroboration requirement is a low threshold.” Once the State meets that evidentiary threshold, the jury may consider the credibility of the statement along with any other supporting or conflicting evidence. *Id.* at 61. *Bishop* tasks the trial court with making the threshold evidentiary determination regarding corroboration; it is not a question for the jury.

In *State v. Billy Hill*, the defendant contended that the trial court erred by refusing to provide a corroboration jury instruction with regard to his extrajudicial statements. No. E2015-00811-CCA-R3-CD, 2017 WL 532481, at *30 (Tenn. Crim. App. Feb. 9, 2017) *perm. app. denied* (Tenn. June 7, 2017). This court held “no jury instruction was required because whether the statements were adequately corroborated is a question of law for the trial court, not the jury, to determine.” *Id.* This court also noted that “[a]lthough the defense challenged the credibility of the witnesses, credibility was a determination for the jury and did not impact the trustworthiness of the statements because the assertions contained in the statements were corroborated by substantial independent evidence.” *Id.* Further, “the admissions against interest pattern jury instruction provided by the trial court addressed the juror’s duty to determine whether the [d]efendant made the statements, and if so, to determine the truth of the facts.” *Id.*; see T.P.I.—Crim. 42.11 Admission Against Interest (19th ed. 2015). *But see Delshun Jones v. State*, No. W2020-00994-CCA-R3-PC, 2021 WL 2886336 (Tenn. Crim. App. July 9, 2021) (relying on federal case law, the court held a trial court should instruct the jury on corroboration) *perm. app. denied* (Tenn. Oct. 15, 2021).

In the present case, the post-conviction court found that (1) the testimony from the victims and their identification of the Petitioner was credible and provided sufficient independent evidence to corroborate the Petitioner’s inculpatory statements, (2) no jury instruction was required because sufficient corroborating evidence existed, and (3) as a result, trial counsel was not deficient in failing to request a jury instruction regarding corroboration and there was no proof of prejudice to the Petitioner. Because the post-conviction court determined that the State had substantially corroborated the Petitioner’s extrajudicial statements, the court found it was unnecessary for the trial court to pose that question to the jury. We agree with the post-conviction court’s conclusion that no corroboration jury instruction was necessary and that counsel was not deficient for failing to request one.

Additionally, the jury instruction provided by the trial court addressed the juror's duty to consider the credibility of the Petitioner's statements:

The Court instruct[s] the jury that if an oral or written statement given by the defendant has been proven in this case you may take it into consideration with all of the other facts and circumstances proven in the case. In considering the statement, it's for you, the jury, to say what weight you will give the statement. You may believe any part of the statement or disbelieve any part of it and you may believe the whole statement or disbelieve it in its entirety.

See T.P.I.—Crim. 42.11(a) Prior Statement of the Defendant (18th ed. 2014).

The record reflects that the trial court instructed the jury to consider the Petitioner's statements in light of all the evidence, to weigh the statements, and to determine the veracity of those statements. The jury could believe the statements or disbelieve them in their entirety. To show prejudice for his ineffective assistance of counsel claim, the Petitioner must demonstrate there is a reasonable probability that, but for the failure to request a corroboration jury instruction, the result of the trial would have been different. *See Strickland*, 466 U.S. at 694. The post-conviction court found the Petitioner failed to offer any evidence of prejudice.

The record supports the post-conviction court's determination that trial counsel's performance was not deficient and that the Petitioner was not prejudiced by counsel's failure to propose a corroboration jury instruction. The Petitioner is not entitled to relief on this basis.

2. Motion to Suppress

The Petitioner contends that trial counsel was ineffective for failing to move to suppress J.G.'s in-court identification of the Petitioner. The post-conviction court found that counsel was not deficient because no evidence from the preliminary hearing showed that J.G.'s in-court identification of the Petitioner was coached and that the Petitioner failed to show prejudice because a motion to suppress J.G.'s testimony would not have been successful.

At trial, J.G. identified the Petitioner, was subject to cross-examination, and the jury, by its verdict, credited her testimony. The post-conviction court also reviewed the preliminary hearing recording and found that J.G.'s identification testimony was not coached. The record supports the court's determination that the Petitioner failed to establish his claim that trial counsel provided ineffective assistance of counsel by failing

to file a suppression motion. Accordingly, the Petitioner is not entitled to relief on this basis.

3. Mitigating Evidence

The Petitioner contends that trial counsel was ineffective for failing to raise as mitigating evidence that the Petitioner was “very gentle and kind” to the four-year-old victim. The record reflects that the Petitioner held a gun to a four-year-old girl’s head and forced her into a closet, where she urinated on herself. Counsel testified that he did not want to emphasize what happened to the minor child because the facts were “distressing.” The post-conviction court determined that “the [P]etitioner’s attorney did an excellent job in presenting the [P]etitioner in as good a light as possible” and that arguing the Petitioner had been “very gentle and kind” under the circumstances would have been “preposterous.” The record supports the court’s finding that counsel made a strategic decision not to highlight the trauma experienced by the victim and that counsel’s performance was not deficient. *See Adkins*, 911 S.W.2d at 347.

The Petitioner further contends that he told the minor child that “they were not killers” and “were not going to hurt her” and that these statements constituted mitigating evidence. The record does not reflect that the Petitioner, or anyone else, made the statements. The Petitioner bears the burden of proving his factual allegations by clear and convincing evidence. T.C.A. § 40-30-110(f). He has failed to do so and is not entitled to relief on this basis.

II Due Process and Rule 602 Claims

The Petitioner argues for the first time in this appeal (1) that he did not receive a fair trial because the trial court failed to instruct the jury about the need for corroborating evidence, (2) that he did not receive a fair trial because the court allowed J.G. to testify without determining whether her testimony was coached, and (3) that his trial counsel was ineffective for failing to move to exclude J.G.’s identification testimony under Tennessee Rule of Evidence 602. The State contends that the Petitioner waived these claims by failing to raise them in the appeal from the conviction proceedings. We agree with the State.

“A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented[.]” T.C.A. § 40-30-106(g) (2018); Tenn. Sup. Ct. R. 28, § 2(D) (“A ground for relief is waived if petitioner or petitioner’s counsel failed to present the ground for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.”); *see* Tenn. R. App. P. 36(a) (“Nothing in this rule shall be construed as

requiring relief to be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”); *see also State v. Howard*, 504 S.W.3d 260, 277 (Tenn. 2016) (“[A] defendant may not advocate a different or novel position on appeal.”); *State v. Maddin*, 192 S.W.3d 558, 561 (Tenn. Crim. App. 2005) (“When an issue is raised for the first time on appeal, it is typically waived.”). Because the Petitioner did not raise these issues in the appeal of the convictions, post-conviction consideration is waived. The Petitioner is not entitled to relief on this basis.

In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

ROBERT H. MONTGOMERY, JR., JUDGE