

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs December 6, 2022

FILED

01/25/2023

Clerk of the  
Appellate Courts

**DARRYL ROBINSON v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Shelby County**  
**No. 14-00511      Glenn Ivy Wright, Judge**

---

**No. W2022-00048-CCA-R3-PC**

---

The Petitioner, Darryl Robinson, appeals the Shelby County Criminal Court's denial of his post-conviction petition, seeking relief from his convictions of aggravated robbery and convicted felon in possession of a handgun and his resulting effective sentence of sixteen years in confinement. On appeal, the Petitioner contends that he received the ineffective assistance of trial counsel. Upon review, we affirm the judgment of the post-conviction court.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and KYLE A. HIXSON, JJ., joined.

Robert Golder (on appeal and at post-conviction hearing) and Brett B. Stein (amended petition for post-conviction relief), Memphis, Tennessee, for the appellant, Darryl Robinson.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

In June 2016, a Shelby County jury convicted the Petitioner of aggravated robbery, a Class B felony, and convicted felon in possession of a handgun, a Class E felony.<sup>1</sup> At

---

<sup>1</sup> The Petitioner has requested that we take judicial notice of the records from *State v. Darryl Robinson*, No. W2016-01803-CCA-R3-CD, 2017 WL 5952925 (Tenn. Crim. App. Nov. 29, 2017), and *Darryl Robinson v. State*, No. W2020-00942-CCA-R3-PC, 2021 WL 3642399 (Tenn. Crim. App. Aug. 18,

trial, Thomas Wright testified that on May 14, 2013, the Petitioner and Demetrius Davison robbed him at gunpoint as he was walking to a friend's house. *State v. Darryl Robinson*, No. W2016-01803-CCA-R3-CD, 2017 WL 5952925 (Tenn. Crim. App. Nov. 29, 2017). The victim knew the Petitioner and Mr. Davison from the neighborhood. *Id.* at \*1. The victim telephoned the police immediately after the incident and provided the responding officer with the names of the perpetrators. *Id.* The police arrested Mr. Davison, who was seventeen or eighteen years old at the time of the crimes, about a week later, and Mr. Davison gave a statement. *Id.* at \*1, 2. Mr. Davison testified at trial that the Petitioner, who was thirty-six or thirty-seven years old, saw the victim; said he was going to rob the victim; brandished a .32-caliber handgun and pointed it at the victim; and took the victim's money, marijuana, and cellular telephone. *Id.* at \*1. Mr. Davison told the jury that he was afraid of the Petitioner, that he did not want to rob anyone, and that he did not receive any proceeds from the robbery. *Id.*

On direct appeal of the Petitioner's convictions, he claimed that the evidence was insufficient to support his conviction of aggravated robbery and that Mr. Davison's reference to the Petitioner's nickname, "Trigger Man," during Mr. Davison's testimony was prejudicially erroneous. *Id.* at \*2-3. The Petitioner also raised several issues with regard to his conviction of convicted felon in possession of a handgun. *See id.* at \*4-8.

This court affirmed the Petitioner's convictions. *Id.* at \*8. In its opinion, this court stated as follows regarding the Petitioner's claim that Mr. Davison's reference to "Trigger Man" was prejudicial:

The record shows that Mr. Davison's testimony spanned thirty pages of trial transcript. During his direct testimony, Mr. Davison used the [Petitioner's] actual name several times but twice used the [Petitioner's] nickname. The defense did not object to the two occurrences, and the State did not request a sidebar to admonish the witness; however, the State appeared to make a point of repeatedly using the [Petitioner's] full name throughout its questioning of Mr. Davison as a gentle reminder to not use the nickname. When Mr. Davison relayed in detail the sequence of events leading up to and including the robbery, he used the [Petitioner's] actual name. During cross-examination, Mr. Davison used the [Petitioner's] nickname two more times. The first time, Mr. Davison started with the nickname "Trigger," but then appeared to catch himself and used the [Petitioner's] actual name. The second reference occurred in the same way,

---

2021), *perm. appeal denied* (Tenn. Nov. 17, 2021). Given the procedural history of this case, we choose to take judicial notice of the records. *See State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009).

with Mr. Davison first using the nickname and then correcting himself and using the actual name.

We discern no plain error in this case because there was no breach of a clear and unequivocal rule of law, it is not clear that the [Petitioner] did not waive the issue for tactical reasons, and consideration of the issue is not necessary to do substantial justice. First, although, “[n]icknames should generally be avoided,” *State v. Zirkle*, 910 S.W.2d 874, 886 (Tenn. 1995), there is no outright prohibition against the use of nicknames. Second, it is possible that the [Petitioner] chose to withhold his objection to the few instances when his nickname was used because Mr. Davison quickly corrected himself and most often used the [Petitioner’s] real name, and objecting would have drawn attention to the response. Third, the use of the [Petitioner’s] nickname was limited and quickly corrected such that it did not saturate the trial to the extent that it had any effect on the jury’s verdict. The [Petitioner] is not entitled to plain error relief on this issue.

*Id.* at \*4.

The Petitioner filed a timely pro se petition for post-conviction relief, claiming that he received the ineffective assistance of counsel because trial counsel failed to locate and interview “key” witnesses who could have seen the robbery and could have testified at trial. The post-conviction court appointed counsel, and post-conviction counsel filed an amended petition in which the Petitioner listed two additional “grounds for relief”: that trial counsel was ineffective for failing to object to Mr. Davison’s prejudicial use of the Petitioner’s nickname and that trial counsel was ineffective for relying on the Petitioner’s prior “trivial convictions” of simple possession of marijuana and criminal trespass to dissuade the Petitioner from testifying at trial. Later in the petition, the Petitioner also alleged that the State’s repeated use of the phrase “pink elephant” during closing arguments constituted prosecutorial misconduct and violated his constitutional rights and that trial counsel was ineffective for failing to object to the misconduct. Regarding those latter claims, the Petitioner specifically asserted as follows:

Here, the [S]tate’s overarching theme in rebuttal argument was that of the “pink elephant.” The prosecutor characterized every piece of evidence referred to by defense counsel and every inference suggested by defense counsel as a “pink elephant.” These remarks did not comment on the proof, but rather on the character and skill of defense counsel, and by extension, the honesty and credibility of the non-testifying defendant. Although defense counsel failed to object, the trial court gave no curative instruction *sua sponte* to remedy the prejudice inherent in these comments. The “pink elephant”

was not a single spontaneous reference, but endured throughout the entire argument, showing that the conduct was flagrant and intentional. Petitioner is entitled to a new trial for the violation of his right to Due Process based on prosecutorial misconduct.

....

Defense counsel had at least a dozen opportunities to object to the misconduct, but lay silent for the entire argument. Trial counsel's inaction cannot be characterized as a matter of strategy in light of the severity of the conduct that should have been challenged. Furthermore, even if trial counsel did not want to interrupt the prosecutor's argument, he could have preserved the issue with an objection at the end of the argument by raising the issue in the motion for new trial.

The post-conviction court held an evidentiary hearing on January 16, 2020. During the hearing, the Petitioner testified that his nickname was "Trigger Man." He explained that he received the nickname in 1996 when he "got arrested for a gun charge and got out and a woman started calling [him] that and it stuck ever since." His friends and "[e]verybody" knew him by that name. The Petitioner saw his discovery materials before trial, and his nickname was mentioned in the materials. Trial counsel never asked the Petitioner about the nickname.

On cross-examination, the Petitioner testified that he did not remember if trial counsel filed a pretrial motion to exclude the nickname or if trial counsel raised the issue on direct appeal of the Petitioner's convictions. Trial counsel told the Petitioner "not to testify, it wouldn't look good, he didn't want [to] bring up [the Petitioner's] background." The Petitioner said that he had been to prison previously for aggravated robbery but denied that he had been to prison for aggravated assault. The State then asked him, "You don't recall that the basis for your convicted felon in possession of a handgun charge was three aggravated assaults?" The Petitioner responded, "Yes, ma'am." On cross-examination, the Petitioner testified that trial counsel represented him at the motion for new trial hearing and that he and trial counsel did not discuss the "Trigger Man" or "pink elephants" issues prior to the hearing.

Trial counsel testified for the State that he had been practicing criminal law since 1996 and that he currently performed part-time juvenile work for the public defender's office. In 2014, trial counsel worked full time for the public defender's office and began representing the Petitioner for his charges of aggravated robbery and convicted felon in possession of a handgun. The Petitioner went to trial for the charges in 2015.

Trial counsel testified that the defense's theory was that the victim was not telling the truth and that there were inconsistencies in his story. Mr. Davison, who was the Petitioner's cousin and codefendant, testified against the Petitioner. Before trial, trial counsel filed a motion in limine to prevent the jury from hearing the Petitioner's nickname, "Trigger Man." The trial court granted the motion, and the State instructed its witnesses not to use the nickname. However, Mr. Davison used the nickname during his testimony, and trial counsel objected. The nickname "came out another couple of times where they would try to correct it and say his name." Trial counsel said that "you really had to be listening to pick up on it" and that he did not keep objecting because the objections would have "just brought more attention to it." Trial counsel filed the Petitioner's motion for new trial and did not raise the issue in the motion. Trial counsel did not represent the Petitioner on direct appeal of his convictions.

Trial counsel acknowledged that during the State's rebuttal closing argument, the prosecutor used the phrase "Pink Elephant." Trial counsel said he did not object to the phrase, explaining,

I've heard it and I've used such analogies numerous times in my arguments to [juries] and it's never been objected to. I didn't think that that really hurt anything. Everybody these days when they do a closing argument they want to tell a story and make an analogy it's just pretty much common place when you do a lot of trial work.

The State asked him, "And you didn't find anything out of bounds about this particular argument?" Trial counsel answered, "I really didn't or I would have objected." Trial counsel said he was "relatively pleased" with the Petitioner's trial.

On cross-examination, trial counsel acknowledged that it was important for the jury not to hear the Petitioner's nickname. Trial counsel objected to the nickname one time, and the attorneys approached the bench. Trial counsel said that if he had objected every time "Trigger Man" was mentioned, his objections would have drawn attention to the nickname. Trial counsel said that he never asked the trial court to instruct the jury on the issue but that he "probably should have done that." Trial counsel said he also "[p]robably" should have raised the issue in the Petitioner's motion for new trial.

The State asked trial counsel if he had ever objected during a prosecutor's closing argument. Trial counsel said he had objected only one or two times when a prosecutor started talking about evidence that was not brought out at trial. Trial counsel said that he had never objected to a prosecutor's analogy during closing arguments and that he did not think the prosecutor's references to a "pink elephant" in this case "rose to any kind of prejudicial level." Trial counsel stated, "I've had people talk about the Wizard of Oz, all

kinds of things, and to me I didn't think the pink elephant -- I've used the elephant in a room saying let's talk now about the elephant in the room." Trial counsel said there "[p]robably" was a difference between the "pink elephant" analogy and the "[elephant] in the room" analogy. Trial counsel said that while the prosecutor's "pink elephant" analogy could have been considered an insult to the defense, such analogies were commonly used by prosecutors in closing arguments. Trial counsel said he would not object to such analogies because "I say their witnesses are not telling the truth," which also could be considered an insult.

On redirect-examination, trial counsel testified that he did not think the prosecutor's "pink elephant" analogy was an insult and that he did not think the analogy was prejudicial or a constitutional violation. Had he thought so, he would have objected. Trial counsel acknowledged that he did not keep objecting to "Trigger Man" because Mr. Davison "quickly corrected himself" and because objecting would have drawn attention to the nickname.

On July 10, 2020, the post-conviction court entered an order denying the petition. In the order, the post-conviction court identified three issues raised in the post-conviction petitions: (1) trial counsel's failure to object to Mr. Davison's use of "Trigger Man" during his testimony; (2) trial counsel's reliance on "mistaken information" when advising the Petitioner not to testify; and (3) violations of the Petitioner's constitutional rights based on prosecutorial misconduct during closing arguments. As to the first issue, the post-conviction court found that the Petitioner was not entitled to relief because his nickname "was not used in a derogatory manner" at trial but to identify the Petitioner; the nickname was relevant to establish the Petitioner's identity; the use of the nickname did not "saturate the jury . . . to the extent that the record affirmatively shows that it affected the jury's verdict"; and trial counsel's decision not to object every time the nickname was used was a strategic decision that did not prejudice the Petitioner. The post-conviction court did not address the remaining two issues, stating, "Several other issues were alleged in the original petition and the amended petition but no proof was presented on any of these issues. Therefore, they have been abandoned or waived."

On appeal, the Petitioner claimed that the post-conviction court failed to make sufficient findings for this court to conduct a proper appellate review. A panel of this court agreed with the Petitioner, stating that the "pink elephant" ineffective assistance of counsel claim "was squarely raised in the amended petition and both the Petitioner and trial counsel were asked about the 'pink elephant' issue at the hearing." *Darryl Robinson v. State*, No. W2020-00942-CCA-R3-PC, 2021 WL 3642399, at \*6 (Tenn. Crim. App. Aug. 18, 2021), *perm. app. denied* (Tenn. Nov. 17, 2021). In a footnote, though, this court stated that if it had been addressing only the stand-alone claim of prosecutorial misconduct, it would have agreed with the post-conviction court's waiver finding because the Petitioner failed to raise

the issue of prosecutorial misconduct on direct appeal of his convictions. *Id.* at \*6 n.4. Nevertheless, this court reversed the post-conviction court's denial of the petition and remanded the case for findings and conclusions of law regarding the "pink elephant" ineffective assistance of counsel claim. *Id.* at \*6.

On December 13, 2021, the post-conviction court entered a supplemental order denying the petition. In the order, the post-conviction court identified three issues of ineffective assistance of counsel raised by the Petitioner: (1) trial counsel's failure to object and preserve on appeal the use of the Petitioner's nickname, "Trigger Man"; (2) trial counsel's reliance on "mistaken information" when advising the Petitioner not to testify; and (3) trial counsel's failure to object to the State's use of the "pink elephant" analogy and prosecutorial misconduct during its closing argument.

Addressing the Petitioner's "Trigger Man" ineffective assistance of counsel claim, the post-conviction court reiterated its conclusions from its first order denying post-conviction relief. As to the Petitioner's claim that trial counsel was ineffective for relying on mistaken information to advise the Petitioner not to testify, the post-conviction court found that trial counsel advised the Petitioner not to testify and that the Petitioner chose not to testify. The court concluded that the Petitioner was not entitled to relief because he did not present "enough proof . . . to establish to the contrary." Regarding trial counsel's failure to object to the prosecutor's use of the "pink elephant" analogy during rebuttal closing argument, the post-conviction court recounted trial counsel's testimony that he did not think the analogy warranted objection; that he "didn't find anything out of bounds about that particular phrase or else he would have objected to its use"; and that he did not think the analogy was prejudicial or violated constitutional principles. The post-conviction court concluded that the "actions of Trial Counsel were not unreasonable given the particularities of the case and the manner in which the 'pink elephant' analogy was used. . . . It is clear from the record that Trial Counsel acted accordingly, and, in a manner, sufficient to show effective assistance of counsel." The post-conviction court stated that it would not second-guess trial counsel's reasonable tactical decisions. In its concluding paragraph, the post-conviction court also stated that the Petitioner did not show he was prejudiced by trial counsel's failure to object to the analogy or trial counsel's failure to preserve the issue in the motion for new trial.

Finally, the post-conviction court addressed the Petitioner's stand-alone claim that the State's use of the "pink elephants" analogy constituted prosecutorial misconduct. The post-conviction court stated that the Petitioner did not raise the issue in his pro se or amended petitions for post-conviction relief, that trial counsel never testified about the issue, and that "there was no proof put on, nor prejudice shown by the Petitioner." Thus, the post-conviction court again denied the petition for post-conviction relief.

## ANALYSIS

On appeal, the Petitioner contends that the post-conviction court's findings and conclusions of law regarding his "pink elephant" claims are still insufficient for this court to conduct adequate appellate review. He further contends that the post-conviction court should have granted relief for trial counsel's failure to object to the use of his nickname during the trial testimony and the use of the "pink elephant" analogy during the State's rebuttal closing argument. Finally, he maintains that the post-conviction court should have granted relief on his stand-alone claim of prosecutorial misconduct because the State's repeated use of the "pink elephant" analogy "ran afoul of the constitution." The State argues that the post-conviction court's order is adequate for our review and that the Petitioner is not entitled to relief. We agree with the State.

Post-conviction relief "shall be granted 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." Tenn. Code Ann. § 40-30-103. The petitioner bears the burden of proving factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. *See Wiley v. State*, 183 S.W.3d 317, 325 (Tenn. 2006). When reviewing factual issues, the appellate court will not reweigh the evidence and will instead defer to the post-conviction court's findings as to the credibility of witnesses or the weight of their testimony. *Id.* However, review of a post-conviction court's application of the law to the facts of the case is de novo, with no presumption of correctness. *See Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed de novo, with a presumption of correctness given only to the post-conviction court's findings of fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001); *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The *Strickland* standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth



Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, *see Strickland*, 466 U.S. at 690, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. *See Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982).

The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Courts need not approach the *Strickland* test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697; *see Goad*, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

### **I. "Trigger Man"**

The Petitioner claims that the post-conviction court should have granted relief because trial counsel failed to object to Mr. Davison's repeated use of "Trigger Man" during his testimony and failed to request a curative instruction. On direct appeal of the Petitioner's convictions, this court concluded that the Petitioner waived plenary review of the issue. *See Darryl Robinson*, 2017 WL 5952925, at \*3. However, this court conducted a detailed analysis of the issue under the plain error doctrine and concluded that the Petitioner was not entitled to relief because there was no breach of a clear and unequivocal rule of law, it was not clear that the Petitioner did not waive the issue for tactical reasons, and consideration of the issue was not necessary to do substantial justice. *Id.* at \*4. As noted by the State, the standard used to establish prejudice in post-conviction claims is "essentially the same" as the standard used to establish plain error. *Douglas Marshall*

*Mathis v. State*, No. M2006-02525-CCA-R3-PC, 2008 WL 1850800, at \*10 (Tenn. Crim. App. 2008). Therefore, “any claims of ineffective assistance of counsel in the post-conviction petition that were identical to Petitioner’s claims on direct appeal and determined by this Court not to rise to the level of plain error also [fail] to establish prejudice in the context of a post-conviction proceeding.” *Charles Owens v. State*, No. M2009-00558-CCA-R3-PC, 2010 WL 1462529, at \*6. (Tenn. Crim. App. Apr. 13, 2010). Given that the Petitioner failed to demonstrate plain error on direct appeal, he also has failed to demonstrate a reasonable probability that the outcome of the proceedings would have been different. In any event, trial counsel testified that he objected to the nickname one time but that he did not keep objecting because “you really had to be listening to pick up on it” and because he did not want to bring attention to the nickname. The post-conviction court found in its first petition denying relief that trial counsel’s decision not to object was a strategic decision. Like the post-conviction court, we will not second-guess trial counsel’s strategy. The Petitioner is not entitled to relief on this issue.

## II. “Pink Elephant”

We now turn to the Petitioner’s claims about the prosecutor’s use of the “pink elephant” analogy during the State’s rebuttal closing argument. First, the Petitioner contends that the post-conviction court again failed to address adequately his claim of ineffective assistance of counsel and stand-alone claim of prosecutorial misconduct. The post-conviction court found that the Petitioner waived his stand-alone claim of prosecutorial misconduct because he failed to raise it in his petitions and failed to present any proof of the issue at the evidentiary hearing. We disagree with the post-conviction court. The Petitioner clearly raised the issue in his amended petition and questioned trial counsel about the prosecutorial misconduct at the evidentiary hearing. Nevertheless, we agree with the previous panel that this issue has been waived. Pursuant to the Post-Conviction Procedure Act:

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 unless:

(1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or

(2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

Tenn. Code Ann. § 40-30-106(g). Neither of those exceptions applies in this case. Therefore, the Petitioner, by not raising this issue in the direct appeal of his convictions, has waived his stand-alone claim of prosecutorial misconduct.

As to the Petitioner's claim that trial counsel was ineffective for failing to object to the State's repeated use of the "pink elephant" analogy, our review of the trial transcript reflects that trial counsel gave a thorough closing argument in which he asserted that the victim's testimony about the robbery was inconsistent with his statements to the police and that Mr. Davison cooperated with the police "to save himself." In the State's rebuttal closing, the prosecutor began his argument with the following statements:

No pink elephants. [Trial counsel] just went over a long list of maybe why, could of, should of, would of's. Maybe why you have a reasonable doubt. But no pink elephant. What happened happened. And what happened was [the Petitioner] robbed Thomas Wright with a black 32 and took his property without his consent with intent to deprive him. He put him in fear. That's what happened. There are no pink elephants.

The prosecutor then addressed each argument trial counsel had raised in his closing argument. In doing so, the prosecutor referred to trial counsel's arguments as a "pink elephant," "pink elephants," or "pink bunnies" an additional fourteen times. Trial counsel did not object.

It is well-established that closing argument is an important tool for both parties during a trial; thus, counsel is generally given wide latitude during closing argument, and the trial court is granted wide discretion in controlling closing arguments. *See State v. Carruthers*, 35 S.W.3d 516, 577-78 (Tenn. 2000) (appendix). "Notwithstanding such, arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003). Furthermore, "[t]he prosecution is not permitted to reflect unfavorably upon defense counsel or the trial tactics employed during the course of the trial." *State v. Gann*, 251 S.W.3d 446, 460 (Tenn. Crim. App. 2007). To warrant a new trial, the argument must be so inflammatory or improper as to affect the verdict. *State v. McCary*, 119 S.W.3d 226, 253 (Tenn. Crim. App. 2003) (citing *Harrington v. State*, 385 S.W.2d 758 (1965)).

Here, trial counsel testified that he did not think the "pink elephant" analogy warranted an objection because he did not think it was an insult to the defense or prejudicial to the Petitioner. Trial counsel explained that prosecutors often used such analogies in their closing arguments and that he even used analogies to argue that the State's witnesses were not telling the truth. In our view, the prosecutor's "pink elephant" analogy in rebuttal

argument was in response to trial counsel's closing argument and addressed why trial counsel's assertions were not supported by the evidence, not to insult trial counsel or the defense. We note that during the prosecutor's rebuttal closing, he also told the jury that trial counsel "is a great attorney, he is." The post-conviction court inherently accredited trial counsel's testimony and found that his failure to object was not unreasonable "given . . . the manner in which the 'pink elephant' analogy was used." We cannot say that the evidence preponderates against the finding of the post-conviction court. Therefore, the Petitioner has failed to demonstrate that he received the ineffective assistance of counsel.

### **CONCLUSION**

Based on our review, we affirm the judgment of the post-conviction court.

---

JOHN W. CAMPBELL, SR., JUDGE