IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 12, 2023

**DONALD H. RUNIONS v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Lewis County**
**No. 2021-CR-56 James G. Martin, III, Judge**

---

**No. M2022-01347-CCA-R3-PC**

---

The Petitioner, Donald H. Runions, appeals the Lewis County Circuit Court's denial of his petition for post-conviction relief from his multiple convictions for violation of the Child Protection Act, rape of a child, and aggravated sexual battery. On appeal, the Petitioner contends that the post-conviction court erred by denying relief on his claims alleging that he received the ineffective assistance of trial counsel. The Petitioner argues that trial counsel was ineffective by (1) failing to lodge an objection or move for a continuance due to the Petitioner's absence from certain pretrial evidentiary hearings; (2) failing to present a sound trial strategy based upon adequate preparation; and (3) failing to allow the Petitioner to testify on his own behalf at trial. After review, we affirm the judgment of the post-conviction court.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and MATTHEW J. WILSON, JJ., joined.

Seth C. Chapman, Spring Hill, Tennessee, for the appellant, Donald H. Runions.

Jonathan Skrmetti, Attorney General and Reporter; Edwin Alan Groves, Jr., Assistant Attorney General; Kim R. Helper, District Attorney General; and Jennifer M. Mason, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### I. FACTUAL AND PROCEDURAL HISTORY

On February 1, 2018, a Lewis County jury found the Petitioner guilty of two counts of violation of the Child Protection Act, four counts of rape of a child, and two counts of

aggravated sexual battery. *See* Tenn. Code Ann. §§ 39-13-504, -518, -522. Following a sentencing hearing, the trial court sentenced the Petitioner to an effective term of fifty years in the Department of Correction. The Petitioner appealed to this court, challenging the sufficiency of the evidence, the constitutionality of the Child Protection Act, and the admissibility of testimony about changes in the victims' behavior following the abuse. *See generally State v. Runions*, No. M2019-00940-CCA-R3-CD, 2020 WL 7238537 (Tenn. Crim. App. Dec. 19, 2020), *perm. app. denied* (Tenn. Apr. 7, 2021). This court affirmed the Petitioner's convictions. *Id.* at *1, *14.

A. Trial Proceedings

At trial, which took place from January 29 to February 1, 2018, the State adduced the following evidence. In 2015, the Petitioner married the victims' grandmother, who had three adult children from a previous relationship. *Runions*, 2020 WL 7238537, at *1. The female victims were cousins: The Petitioner's wife's daughter was the mother of the three-year-old victim, and one of the Petitioner's wife's sons was the father of the five-year-old victim. *Id*. During the summer of 2015 through October 2015, the Petitioner's wife babysat the younger victim, and the older victim occasionally visited with her parents. *Id.* at *1-2. On these occasions, the Petitioner sometimes spent time alone with the grandchildren. *Id.*

During this timeframe, the victims began to demonstrate behavioral changes and signs of trauma, including anger, aggression, and withdrawal. *Runions*, 2020 WL 7238537, at *3-4, *6. The younger victim's mother observed the younger victim touch her dolls on their private parts, with their clothes off, on at least three occasions. *Id.* at *3. On one occasion, when the younger victim's mother told her not to do that, the victim said, "paw-paw done it so she can, too." "Paw paw" was the grandchildren's name for the Petitioner. *Id.* at *1, 3, 5. That same year, the older victim's mother caught the older victim touching her own vagina, and there were later incidents when the older victim was caught touching her siblings' private parts. *Id.* at *6.

On cross examination, the younger victim's mother admitted that she was raised by her father and did not have much of a relationship with her mother, the Petitioner's wife, prior to 2013. *Runions*, 2020 WL 7238537, at *4. The younger victim's mother acknowledged that she and the older victim's mother were friends at one point, but the friendship ended when the older victim's mother and the younger victim's mother's brother separated. *Id.* The older victim's mother said that her family did not spend much time with the younger victim's family, aside from holidays. *Id.* at *6.

Subsequently, the victims were both interviewed, and they described the manner in which the Petitioner had abused them, though the more detailed account came from the older victim. *Runions*, 2020 WL 7238537, at *4-5, *7. The older victim was able to distinguish between real and made up, and she was able to identify body parts that should be private. *Id.* at *7. Both victims testified at trial that they told the forensic examiner the truth during their respective interviews. *Id.* at *5, 7.

The nurse practitioner, who conducted the medical examinations of the victims, found no physical signs of trauma to either victim. *Runions*, 2020 WL 7238537, at *8. The nurse practitioner explained that there was almost no chance of observing lasting injury to the genital area in children less than twelve years old, but she explained that her findings in no way ruled out the possibility that either child was the victim of sexual abuse. *Id.*

During the medical examination of the older victim, the older victim again confirmed that the Petitioner had touched her vagina. *Runions*, 2020 WL 7238537, at *8. However, during the examination, the older victim briefly recanted and said that the Petitioner "didn't do it." *Id.* When the older victim was asked to explain her original accusation, the older victim put her head in her hands and let out a frustrated sound and said, in a higher octave, that the Petitioner did, in fact, abuse her. *Id.* The social worker, who was present during the medical examination, explained that before she had this conversation with the older victim, she had told the older victim that the older victim was going to have a medical examination afterwards and that someone would be looking at her private parts. *Id.* The social worker, as well as an investigator with the Lewis County Sheriff's Department, indicated that the older victim's brief statement of denial and subsequent assertion of frustration was a recognizable response to the exhausting examination process for a young victim. *Id.* at *9. The investigator recalled that, although not common, he had previous cases where a child victim would "say something happened and then say it hasn't happened[.]" *Id.*

The Petitioner called his cousin to testify in his defense. *Runions*, 2020 WL 7238537, at *9. His cousin testified that he visited the Petitioner's residence at least three or four times a week during the summer and fall of 2015 and that he saw the older victim there with her family "[m]aybe four times" during that timeframe. *Id.* The Petitioner's cousin said that he never saw the Petitioner go outside the residence with one of the children and that there was never a time when both the Petitioner and one of the girls were out of his field of vision at the same time. *Id.*

## B. Post-Conviction Proceedings

The Petitioner filed a timely pro se petition for post-conviction relief. The post-conviction court appointed counsel, and an amended petition was filed alleging that the Petitioner received the ineffective assistance of counsel at trial. Specifically, the Petitioner alleged that trial counsel was ineffective for (1) failing to object or move for a continuance when the Petitioner was not present at certain evidentiary hearings; (2) failing to employ a sound trial strategy due to inadequate preparation; and (3) failing to permit the Petitioner to testify on his own behalf at trial. A post-conviction hearing was held on August 24, 2022.

The Petitioner confirmed that he was originally arrested on July 7, 2016, on charges from Perry County, that those charges were still pending, and that he would have remained incarcerated regardless of the outcome of this case. Trial counsel was appointed in both the Perry County case and this case to represent the Petitioner. Regarding this Lewis County case, trial counsel represented the Petitioner until the conclusion of trial, after which he withdrew. Thereafter, a new lawyer was appointed to represent the Petitioner through sentencing and the motion for new trial proceedings.

The Petitioner testified that trial counsel came to visit him in jail "maybe three times" to discuss this case. The Petitioner said that he initially had a good relationship with trial counsel until, about three weeks after trial counsel's appointment, the Petitioner accused trial counsel of being a "n----- lover" when trial counsel "started bringing a bunch of black people in" to do the Petitioner's evaluations. According to the Petitioner, after he made that statement to trial counsel, trial counsel no longer came to visit him in jail. The Petitioner said that he never saw any discovery materials and that they never discussed the evidence that would be used against him at trial.

The Petitioner stated that he had provided the names of many favorable witnesses to trial counsel but that ultimately only one witness testified on his behalf at trial, his cousin. The Petitioner testified that on the first day of trial, he asked trial counsel where his witnesses were, and trial counsel told him that they "didn't want to testify for a child molester." According to the Petitioner, the fact that none of his other witnesses were subpoenaed to trial indicated to him that trial counsel had a vendetta against him and would not fight for him due to the nature of the charges. The Petitioner acknowledged trial counsel filed a significant number of pretrial motions; however, he insisted that trial counsel should have objected more at trial and "let [in] all kinds of hearsay" and that trial counsel's opening statement and closing argument were lackluster at best. The Petitioner

claimed that he tried to fire trial counsel on the last of day of trial but that the trial judge did not allow him to do so.

The Petitioner asserted that trial counsel told the Petitioner that he did not need to be present at some of the pretrial proceedings, and the Petitioner believed that there were several pretrial hearings at which he was absent. According to the Petitioner, trial counsel explained that the Petitioner did not need to be present, saying, "I've got people off that done [sic] this crime. . . . [S]o I've got this won, don't worry about it." The Petitioner indicated that he had been transported to Lewis County several times for proceedings, but on one occasion, he got locked in the library at the jailhouse and never made it to court. The Petitioner recalled trial counsel's speaking with him about the Petitioner's absence at one hearing. The Petitioner testified that trial counsel informed the Petitioner that he was not transported due to a disciplinary infraction and that trial counsel said he had "handled everything." The Petitioner asserted that he wanted to be present at every hearing and that he informed trial counsel of such. According to the Petitioner, he had his mother call trial counsel every few days to ask about the status of the case.

The Petitioner stated that trial counsel advised him not to testify in his own defense at trial because it would not be in his best interest. According to the Petitioner, trial counsel said that the Petitioner's testifying would jeopardize the defense, that trial counsel "had the case won," and that trial counsel was "going to get [the Petitioner] the least sentence" possible if he did not testify. The Petitioner averred that he wanted to testify at trial; however, he felt pressured by trial counsel not to do so, and he believed trial counsel was going to obtain a favorable result. The Petitioner confirmed that a *Momon*[1] hearing was conducted in the trial court, but the Petitioner explained that he relied upon trial counsel's advice in responding appropriately to questioning.

On cross-examination, the Petitioner acknowledged that in addition to meetings in the jail, trial counsel also spoke with him at court proceedings. The Petitioner affirmed that trial counsel cross-examined the witnesses at trial, but according to the Petitioner, trial counsel did not ask any questions of consequence pertaining to the Petitioner's guilt.

The Petitioner testified that he was potentially absent for multiple hearings. The Petitioner indicated that he was absent at several hearings where his wife, his step-daughter, and the younger victim testified, though he did not know what those hearings were about, and at another hearing pertaining to admission of "the videos." He acknowledged that he

[1] In *Momon v. State*, 18 S.W.3d 152, 162 (Tenn. 1999), our supreme court adopted a prophylactic procedure designed to ensure that a defendant's waiver of the fundamental right to testify is voluntary, knowing, and intelligent.

was present for a hearing where the older victim and her mother testified. In addition, the Petitioner confirmed he was present for his arraignment, jury selection, trial, verdict, and sentencing.

Regarding his decision not to testify, the Petitioner conceded that the trial court informed him that it was his decision, and his alone, on whether to testify at trial and that he swore that it was his decision not to testify. The Petitioner reiterated that he agreed with trial counsel's advice not to testify because trial counsel told him that he had the "case won." The Petitioner said that, if he had to do it over again, he would not rely on trial counsel's advice and would testify. The Petitioner claimed that trial counsel told him on the first day of trial that he was guilty and that he did not believe his claim of innocence. The Petitioner agreed that he followed trial counsel's advice not to testify despite his alleged dissatisfaction with trial counsel's performance.

On redirect examination, the Petitioner said that he did not recall being present for a hearing related to the "comfort dog" that was present at trial. When the Petitioner saw the dog at trial and asked trial counsel about it, trial counsel explained that it was "so the child will stay calm."

Trial counsel testified that he had been practicing since 2008 and that his practice focused significantly on criminal law, as well as family law. He confirmed that in 2016, he was appointed to represent the Petitioner on the Lewis County charges in this case and that the Petitioner was already incarcerated at that time on separate charges in Perry County. At the time trial counsel withdrew from representing the Petitioner in both cases following the conclusion of trial, the Perry County charges were still pending.

Trial counsel testified that he met with the Petitioner at the Petitioner's arraignment on this case and that once he received discovery materials, he went to visit the Petitioner in the Perry County Jail and reviewed those materials with him. According to trial counsel, he had a printed copy of the documents to show the Petitioner, and he took a CD player that allowed the Petitioner to view relevant recordings, including the forensic interviews of the victims. Trial counsel recalled that in addition to meeting with the Petitioner at multiple courtroom proceedings, he met with the Petitioner in person at the jail "[a]t least three, maybe four," times. Trial counsel said that the Petitioner maintained his innocence and was not interested in accepting a plea offer. Trial counsel could not remember ever filing as many motions as he had filed in this case, and he detailed the various motions that he had filed. He submitted a motion to declare the case extended and complex because he had worked 289 hours on the case.

Trial counsel affirmed that he never made any comments to the Petitioner that he had the case "won," that he had obtained not guilty verdicts in cases involving similar crimes, or that he had everything in the Petitioner's case handled. Trial counsel opined that he would never say anything like that to a client due to the uncertainty of jury trials.

Trial counsel stated that the investigator he hired in the Petitioner's case was African-American and that he discussed this with the Petitioner to make sure there was not going to be any conflict. Trial counsel denied that the Petitioner ever called him a "n----- lover" and emphasized that he would have withdrawn immediately if he had.

Relative to the Petitioner's presence at various pretrial hearings, trial counsel said that he never told the Petitioner there was no need for him to attend those proceedings. Trial counsel remembered a date where there was a transportation issue in the jail, either with the Petitioner specifically or his "pod," and the Petitioner was unable to be transported to the courthouse; at that time, the Petitioner had been incarcerated for about twenty months and the trial date was approaching. Prior to the hearing, trial counsel spoke with the Petitioner and gave the Petitioner the option of moving forward without being present or his seeking a continuance. According to trial counsel, he told the Petitioner that his testimony was not required at the hearing, and the Petitioner instructed him to proceed with the hearing because he did not want the case continued.

The State then reviewed with trial counsel various pretrial proceedings from October 4, 2017, and January 3, January 18, and January 25, 2018; they discussed whether the record indicated if the Petitioner was present at these times. Trial counsel confirmed that the record reflected that the Petitioner was present at the October 4, 2017 and January 25, 2018 hearings. At the October 4, 2017 hearing, the trial court heard the Petitioner's motion to sever and dismiss. The trial court's order denying this motion was entered into the record and reflected that the Petitioner was present. In addition, the October 4, 2017 and January 25, 2018 proceedings dealt with the State's motions to play the victims' forensic interviews at trial. At these hearings, the forensic examiner and the respective victims testified. Both hearings resulted in the trial court's granting the State's request and entering a protective order restricting further dissemination of the recordings. The orders granting these motions and the corresponding protective orders all indicate that the Petitioner was present for these proceedings. Transport orders for both of these dates were also entered into the record. Finally, at the January 25 hearing, the trial court appeared to thank the transport staff from Perry County for bringing the Petitioner to Williamson County[2] for the hearing.

[2] The transcript from the January 25 hearing and the testimony at the post-conviction hearing indicate that this proceeding took place in Williamson County.

Regarding the January 3, 2018 proceeding, the record showed that the State's "motion to allow a facility dog to be present during the testimony of the minor children and to accompany the child while inside the courthouse" and several of the Petitioner's motions in limine were discussed at the time. The transcript from the hearing did not mention that the Petitioner was present. When trial counsel spoke at the hearing, he indicated that the Petitioner was "in custody" and that the parties had agreed to all of the motions but two, which would need to be set for a hearing. No testimony was given that day. Thereafter, two separate orders were entered granting the State's motion for the use of a facility dog and eleven of the Petitioner's motions in limine; neither of these orders indicated that the Petitioner was present for the January 3 hearing. When trial counsel was asked about the Petitioner's absence, trial counsel described the proceeding as a "pretrial conference" and said that defendants were not typically present for these. Nonetheless, there was a transportation order in the court file for January 3, 2018, and the "Lewis County Workhouse Daily Activities Logs" for January 3 reflected that the Petitioner was transported to Lewis County that day, that trial counsel met with the Petitioner in the Lewis County Jail, and that the Petitioner was later transferred "w. in from court" and "secured to max."

On January 18, 2018, the trial court heard the State's motion to amend counts 1 and 2 of the indictment and the Petitioner's motion in limine to exclude as hearsay "any reference to statements made by [the younger victim] and heard by her father, mother, or other family members concerning the alleged criminal conduct or statements of the [Petitioner]." Ultimately, trial counsel was successful in arguing for exclusion of the statements. Thereafter, the trial court entered separate orders granting both motions, neither of which reflected that the Petitioner was present for the January 18 hearing. The trial court's order on the motion in limine indicated that the younger victim's sister and the younger victim's parents testified at the January 18 hearing. Trial counsel confirmed that in the record, there was a transport order for the Petitioner on January 17, 2018, and he explained that either it was a clerical mistake or the hearing was "bump[ed]" a day. The "Lewis County Workhouse Daily Activities Log" from January 18, 2018, showed that the Petitioner was in fact transported to Lewis County on that day and "placed in holding," but they did not reflect that the Petitioner was ever transferred to the courthouse before his transfer back to Perry County. Trial counsel could not recall if the Petitioner was present in court that day.

After reviewing the various proceedings with trial counsel, trial counsel opined that the proceeding where the Petitioner was not present due to the transportation issue and the Petitioner told trial counsel to proceed anyway was likely the January 18, 2018 hearing,

despite trial counsel's original belief that it was the January 25 hearing. Trial counsel stated that he would not have proceeded with the hearing had the Petitioner told him to wait.

Regarding his advice to the Petitioner on testifying at trial, trial counsel said that they discussed this several times and that after reviewing the evidence with the Petitioner following the conclusion of the State's proof, he "strongly" recommended that the Petitioner not testify. Trial counsel acknowledged that he might have admonished the Petitioner that to do so would "jeopardize" the case. But, trial counsel testified that he "made sure to inform" the Petitioner that it was ultimately the Petitioner's decision whether to testify. Trial counsel denied ever telling the Petitioner that he had the case "won" and that the Petitioner need not testify. Trial counsel did not recall the Petitioner's having any hesitation about his choice to forego testifying, and he did not believe he ever forced the Petitioner in any way not to testify.

Trial counsel denied ever telling the Petitioner that he thought the Petitioner was guilty, and trial counsel rejected any suggestion that he did not fight for the Petitioner. Trial counsel detailed how he attempted to develop an alternate theory of the case—that the allegations were false due to some "bad blood" between the parties and that the victims were potentially "coached"—through cross-examination of the witnesses and attempting to discredit the forensic interviews. Trial counsel agreed that the Petitioner provided him with a list of potential witnesses that included "multiple people that [the Petitioner] worked with." Trial counsel said that he had the investigator reach out to several of the potential witnesses, who mostly refused to talk to her, and that one who did talk to her at length clearly would not have been beneficial based on his attitude towards the Petitioner. Trial counsel indicated that he had spoken with the Petitioner's boss, who was not going to add anything beneficial "character-wise," that the Petitioner's boss did not want to testify, and that the Petitioner's boss did not keep good records to establish the Petitioner's whereabouts during any specific offense date. Trial counsel also obtained and reviewed the Petitioner's phone records, but those did not provide any useful information in the Petitioner's defense.

On cross-examination, trial counsel acknowledged that the Petitioner had disclosed an affiliation with the Ku Klux Klan. Trial counsel explained that this was why he obtained assurances from the Petitioner that he was comfortable working with an African-American investigator before hiring one. Trial counsel said that he was able to compartmentalize this type of thing as part of doing his job within the criminal milieu.

Trial counsel testified that during their trial preparations, the Petitioner indicated that he wanted to testify, particularly if neither victim was going to be able to affirmatively

state at trial that the abuse took place. But, after the evidence at trial where the older victim was able to affirmatively state that the Petitioner had molested them, trial counsel was unsure if the Petitioner would change his mind. Trial counsel did not know whether the Petitioner would ultimately follow his advice not to testify.

Trial counsel denied that the Petitioner ever tried to fire him. According to trial counsel, he did review the discovery materials with the Petitioner, despite the Petitioner's protestations to the contrary. Trial counsel recalled requesting five subpoenas from the trial court clerk and that he ultimately issued only one subpoena for the Petitioner's cousin. Trial counsel also mentioned that he obtained the Petitioner's phone records close to the start of trial. Trial counsel said he knew the State's experts were going to testify long before trial, even though the State potentially did not file its notice until five days before trial.

Trial counsel confirmed that within three weeks of trial, on January 11, 2018, he was still requesting additional funds for the investigator so that they could continue trying to talk with reluctant witnesses. The trial court entered an order that same day granting trial counsel's request. Trial counsel then identified five reports from the defense investigator dated January 4, 8, 12, and 28, 2018. Trial counsel said that the January 28 report discussed the Petitioner's phone records, and though this was right before trial, he did not ask for a continuance; he explained that the phone records were not "useful."

At the conclusion of the hearing, the post-conviction court made an oral ruling from the bench denying the Petitioner's petition, finding that the Petitioner received the effective assistance of trial counsel. Relative to the Petitioner's issue regarding his absence at pretrial hearings, the post-conviction court found that the Petitioner was only absent from the evidentiary hearing on January 18, 2018, noting that the primary issue at that hearing was the admission of hearsay testimony from the younger victim's sister. The court determined that this was not the type of proceeding that required the Petitioner's presence under Tennessee Rule of Criminal Procedure 43.[3] Regardless, the court found that the Petitioner had waived any right—whether by Rule or constitutional in nature—to be present at the hearing when he instructed trial counsel to proceed without him not wishing to delay the trial. The court accredited trial counsel's testimony in this regard that he discussed the issue with the Petitioner and that the Petitioner told him to proceed to avoid further delay. Moreover, the court concluded that the Petitioner had failed to establish

[3] Tennessee Rule of Criminal Procedure 43(a) requires, absent proper excuse, a defendant's presence at "arraignment," "every stage of the trial, including the impaneling of the jury and the return of the verdict," and "the imposition of sentence." The rule further provides that "[a] defendant need not be present . . . [a]t a conference or argument on a question of law." Tenn. R. Crim. P. 43(d).

prejudice because trial counsel successfully argued at the hearing for exclusion of the testimony at trial. The court also noted trial counsel's testimony that the Petitioner was shown the recordings of the forensic interviews, so the Petitioner knew what the evidence would be at trial.

Addressing the Petitioner's issue of adequate trial preparation and sound trial strategy, the post-conviction court observed that the Petitioner had failed to identify what trial counsel should have done that he did not do or how such actions would have made a difference in the outcome of the Petitioner's case. The court found that trial counsel investigated the case and represented the Petitioner thoroughly, including filing numerous motions, hiring an investigator, contacting potential witnesses, and acquiring phone records. The court further noted that trial counsel met with the Petitioner at least three or four times for private meetings outside of the occasions they met in court and accredited trial counsel's testimony that he reviewed the discovery materials with the Petitioner. In addition, the court mentioned that trial counsel had filed a motion to declare the case extended and complex because he had worked 289 hours on the case. To summarize, the court remarked that trial counsel "not only met but exceeded the reasonable expectation of a competent attorney."

Relative to the Petitioner's issue regarding his decision not to testify at trial, the post-conviction court found that the Petitioner made an independent decision based on the advice of counsel. The court accredited trial counsel's testimony that he strongly advised the Petitioner not to testify at trial and that, in following this recommendation, the Petitioner's will was not overborne. The court mentioned that Petitioner's responses during the *Momon* hearing and remarked that the Petitioner's concern here was, instead, one of hindsight.

On August 30, 2022, the post-conviction court signed a written order to this effect. This timely appeal followed.

## II. ANALYSIS

Post-conviction relief is available when a "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *see Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009). When a claim of ineffective assistance of counsel is made under the Sixth Amendment to the United States

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

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

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

The burden in a post-conviction proceeding is on the petitioner to prove allegations of fact by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); *see Dellinger*, 279 S.W.3d at 293-94. "Questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved" by the post-conviction court. *Fields v. State*, 40 S.W.3d 450, 456 (Tenn. 2001). On appeal, we are bound by the post-conviction court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Id.* Because they

relate to mixed questions of law and fact, we review the post-conviction court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. *Id.* at 457.

A. Petitioner's Presence at Pretrial Hearings

On appeal, the Petitioner submits that trial counsel was ineffective in protecting the Petitioner's right to be present at certain pretrial hearings in violation of Tennessee Rule of Criminal Procedure 43, as well as his constitutional right to confront the witnesses against him. According to the Petitioner, trial counsel failed to object or move for a continuance when the Petitioner was not present at these proceedings, and trial counsel did not have the legal authority to proceed in the Petitioner's absence. Specifically, the Petitioner asserts that the record supports the conclusion that he was "definitively" not present for the proceedings on January 3 and 18, 2018, and "possibly" not present for the proceedings on January 25, 2018. The Petitioner claims that he was prejudiced by trial counsel's actions because this was his "best chance to witness the evidence that would be used at trial" and consult with trial counsel to formulate a defense. The State responds that trial counsel reasonably followed the Petitioner's request not to seek a continuance for the evidentiary hearing that took place on January 18 and that the Petitioner failed to establish prejudice from his absence at the successful hearing.

The Petitioner again takes issue on appeal with trial counsel's ineffectiveness in securing his presence on three dates—January 3, 18, and 25, 2018. However, at the hearing, post-conviction counsel, after hearing the proof, argued only, "I think from the proof that it's undisputed that at a[n] [e]videntiary [h]earing where witnesses testified, [the Petitioner] was not present. I think ultimately what the proof showed was that it was January 18th, that he was not present." Counsel, therefore, implicitly conceded that the proof established that the Petitioner was either present, or the proceedings did not require the Petitioner's presence, for the dates of October 4, 2017, and January 3 and 25, 2018. Accordingly, the Petitioner has waived appellate review of any issue regarding his presence at any hearing besides the January 18 proceeding. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief 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."). Moreover, trial counsel, after reviewing the record, agreed that the Petitioner was absent only for the January 18, 2018 hearing, and the post-conviction court found that the Petitioner was absent solely for that proceeding as well. The record supports that conclusion. Accordingly, our review will be limited only to trial counsel's effectiveness regarding securing the Petitioner's presence at the January 18, 2018 hearing.

At the January 18 hearing, the trial court heard two motions—the State's motion to amend counts 1 and 2 of the indictment and the Petitioner's motion in limine to exclude as hearsay "any reference to statements made by [the younger victim] and heard by her father, mother, or other family members concerning the alleged criminal conduct or statements of the [Petitioner]." Relative to the second motion, the trial court heard testimony from the younger victim's mother, father, and sister that day. Ultimately, the trial court granted both motions.

First, we find it unnecessary to delve into a discussion on the subject of whether Tennessee Rule of Criminal Procedure 43 or the Petitioner's right of confrontation[4] were violated in this case. Regardless of their applicability, both rights can be waived. *See State v. Muse,* 967 S.W.2d 764, 766 (Tenn. 1998) (concluding that the defendant had a constitutional right, as well as a Rule 43(a) right, to be present at voir dire, but noting that "[t]hough a fundamental right, the right to be present can be waived by the defendant"); *State v. Bowden*, No. M2016-02525-CCA-R3-CD, 2018 WL 2149731, at *9 (Tenn. Crim. App. May 10, 2018) (rejecting the defendant's argument that his absence from the initial suppression hearing violated Rule 43 and his constitutional right to be present at trial when defense counsel waived the defendant's presence at the suppression hearing after speaking with the defendant and the defendant did not raise the issue until after trial).

At the post-conviction hearing, trial counsel testified that there was a transportation issue with the Petitioner for the January 18 hearing and that he spoke with the Petitioner that day regarding the Petitioner's options. Trial counsel said that the Petitioner told him to proceed with the hearing though the Petitioner could not attend. According to trial counsel, the Petitioner had been incarcerated for some twenty months at that point and did not want to delay the trial any further by seeking a continuance. The post-conviction court explicitly accredited trial counsel's testimony over the Petitioner's. Appellate courts do not reassess the post-conviction court's determination of the credibility of witnesses. *See Fields*, 40 S.W.3d at 456.

Moreover, the record supports the post-conviction court's determination that the Petitioner waived his presence. The Petitioner made no contention at any point during the trial proceedings that he did not provide trial counsel with the authority to waive his presence at the January 18 hearing. A hearing was held the following week on January 25, 2018, at which the Petitioner was present, and no objection was lodged. The trial took place a few short days later with no complaint from the Petitioner. In addition, trial counsel

[4] A criminal defendant also has the right under the federal and state constitutions to be present at all critical stages of the proceeding. *State v. Carruthers*, 35 S.W.3d 516, 517 (Tenn. 2000).

withdrew following the trial, and the issue was not raised thereafter when the Petitioner was represented by successor counsel. It was not until after the Petitioner's direct appeal proceedings ended that he took issue with his supposed absence at certain pretrial hearings. The Petitioner has failed to establish that trial counsel was deficient in this regard.

Finally, the post-conviction court determined that the Petitioner had failed to establish prejudice because trial counsel successfully argued at the hearing for exclusion of the testimony at trial. During its oral ruling from the bench, the court also noted trial counsel's testimony that the Petitioner was shown the recordings of the forensic interviews, so the Petitioner knew what the evidence would be at trial. We agree that the Petitioner has failed to establish prejudice.

Trial counsel was successful at the January 18 hearing in having the younger victim's statements excluded as inadmissible hearsay. The Petitioner claims that he was prejudiced by trial counsel's actions because the hearing was his "best chance to witness the evidence that would be used at trial" and to consult with trial counsel to formulate a defense. However, he has failed to explain how the testimony of these witnesses at the January 18 hearing was different from information that was available to him elsewhere or how his knowledge of their testimony from this hearing would have impacted his defense. *See Bowden*, 2018 WL 2149731, at *9 (noting that the defendant "did not make any allegations that the result of the suppression hearing would have been different had he been present" and that he "failed to explain what testimony he would have given or how such testimony would have impacted his case"). The Petitioner's bare assertion of harm is insufficient. *See Marks v. State*, No. M2019-02249-CCA-R3-PC, 2020 WL 7329431, at *5-6 (Tenn. Crim. App. Dec. 14, 2020) (holding that the petitioner's presence was not required at the hearing on the motion to amend the indictment and, moreover, that the petitioner had failed to establish prejudice from his absence because the amendment "may have benefitted him in that it charged him with an offense that carried a shorter sentence"). As such, this claim of ineffective assistance fails.

B. Inadequate Preparation and Sound Trial Strategy

Next, the Petitioner argues that trial counsel was ineffective by failing to present a sound trial strategy based upon adequate preparation. The Petitioner states that "counsel should confer with his client without delay and as often as necessary to elicit matters of defense, . . . and counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed." Specifically, the Petitioner notes that (1) trial counsel did not receive many of the investigative reports until less than three weeks before trial, with the last being received the day before trial; (2) trial counsel was

still receiving relevant discovery from the State less than three weeks before trial, and the State failed to give notice of the intent to use two expert witnesses until five days before trial; and (3) though trial counsel requested five subpoenas, he only utilized one and called one witness at trial. The Petitioner observes that trial counsel failed to move for a continuance despite such inadequate preparation. The State responds that trial counsel thoroughly prepared for trial and zealously represented the Petitioner.

Although trial counsel does not have an absolute duty to investigate particular facts or a certain line of defense, counsel does have a duty to make a reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary. *Strickland*, 466 U.S. at 691. Counsel is not required to interview every conceivable witness. *See Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995). Furthermore,

> no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel. Rather, courts must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct, and judicial scrutiny of counsel's performance must be highly deferential.

*Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (internal citations and quotations omitted).

A reasonable investigation does not require counsel to "leave no stone unturned." *Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454, at *49 (Tenn. Crim. App. July 1, 2009). Rather, "[r]easonableness should be guided by the circumstances of the case, including information provided by the Petitioner, conversations with the Petitioner, and consideration of readily available resources." *Id*. The United States Supreme Court has said, "[I]nquiry into counsel's conversations with the Petitioner may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." *Strickland*, 466 U.S. at 691.

Trial counsel testified that he met with the Petitioner three or four times in the jail, in addition to the multiple times they spoke during court proceedings. Trial counsel said that he reviewed the discovery materials with the Petitioner, even taking a device with him that allowed the Petitioner to watch the forensic interviews. Trial counsel denied that the Petitioner ever made any racial slurs toward him and asserted that he would have withdrawn if the Petitioner had engaged in such behavior. Trial counsel also discounted the Petitioner's assertion that he failed to represent the Petitioner zealously because he believed the Petitioner was guilty of child molestation. Contrary to the Petitioner's

assertion that trial counsel did not fight for him, trial counsel testified that he filed a motion to have the case declared extended and complex because he had worked some 289 hours on the case. Trial counsel filed multiple pretrial motions, and trial counsel testified that he could not ever recall filing so many motions in one case. Trial counsel hired an investigator. Trial counsel also testified that either he or his investigator spoke with the witnesses in this case and that most were unwilling to testify on the Petitioner's behalf or would not have provided favorable information. Though the State did not file notice of its intent to use the two expert witnesses until five days before trial, trial counsel said that he had long been aware that the State intended to call them. Trial counsel said that the phone records likewise did not provide any useful information.

Moreover, though investigation was still taking place in the weeks leading up to trial, the Petitioner made a bare allegation that trial counsel was not prepared because of this late information, but he did not provide any guidance as to how trial counsel was not adequately prepared for trial based upon the information in these documents. In addition, trial counsel detailed how he attempted to develop an alternate theory of the case—that the allegations were false due to some "bad blood" between the parties and that the victims were potentially "coached"—through cross-examination of the witnesses and attempting to discredit the forensic interviews. At the post-conviction hearing, the Petitioner did not propose any alternative trial strategy or offer any specifics regarding how trial counsel could have been better prepared to present this defense.

The post-conviction court accredited trial counsel's testimony. Again, appellate courts do not reassess the post-conviction court's determination of the credibility of witnesses. *See Fields*, 40 S.W.3d at 456. Under the circumstances, trial counsel developed a reasonable, albeit unsuccessful trial strategy, based upon adequate preparation, and this court will not second-guess counsel's decision. The Petitioner has failed to prove that trial counsel's performance was deficient.

Furthermore, as the post-conviction court aptly observed, the Petitioner failed to identify what trial counsel should have done that would have made a difference in the outcome of the Petitioner's case, other than simply applying hindsight to the unsuccessful defense strategy. It is the Petitioner's burden to prove his factual allegations by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-110(f). Accordingly, he has likewise failed to establish prejudice. The post-conviction court did not err in determining that the Petitioner received the effective assistance of counsel in this regard.

C. Failure to Allow Petitioner to Testify at Trial

Finally, the Petitioner contends that trial counsel was ineffective by failing to allow the Petitioner to testify on his own behalf at trial. The Petitioner cites trial counsel's testimony that he strongly discouraged the Petitioner from testifying because it would jeopardize the case; trial counsel's admission that the Petitioner originally expressed a desire to testify, but trial counsel could not explain the Petitioner's change in position; and his own testimony that he would have testified at trial but for trial counsel's condemnation. According to the Petitioner, "[w]hile [t]rial [c]ounsel did not physically coerce [the] Petitioner to remain silent, it is clear that [t]rial [c]ounsel's statements to [the] Petitioner created a level of duress that influenced [the] Petitioner." In conclusion, the Petitioner submits that he was prejudiced because the "the most important prospective witness, [the] Petitioner himself, was not given the opportunity to present himself to the jury." The State responds that trial counsel reasonably advised the Petitioner not to testify and that the Petitioner's will was not overborne when he agreed with trial counsel's advice. Moreover, the State argues that the Petitioner failed to establish prejudice because he failed to demonstrate a reasonable probability that the outcome of the proceedings would have been different had he testified.

This court has previously considered five factors that tend to indicate whether trial counsel's advice that a defendant not testify constitutes ineffective assistance:

> (1) only the victim and the defendant were present when the offense was committed;
>
> (2) only the defendant could present a "full version of [his] theory of the facts";
>
> (3) the defendant's testimony could not be impeached by prior criminal convictions;
>
> (4) the defendant could give an account of the relationship with the victim; and
>
> (5) the attorney had let in objectionable, prejudicial testimony with the intention of clarifying it with the testimony of the defendant.

*Bates v. State*, 973 S.W.2d 615, 636 (Tenn. Crim. App. 1997) (citing *State v. Zimmerman*, 823 S.W.2d 220, 227 (Tenn. Crim. App. 1991)). To overcome the strong presumption that trial counsel's performance fell within the wide range of reasonable professional assistance, "the petitioner must show that the alleged deficiency was unsound trial strategy." *Id.* (citing *Strickland*, 466 U.S. at 689; *Hartman v. State*, 896 S.W.2d 94, 104 (Tenn. 1995)).

Both trial counsel and the Petitioner agreed that the trial court conducted a *Momon* colloquy in this case and that the Petitioner responded appropriately to questioning, thereby, waiving his right to testify on the record. The Petitioner conceded that the trial court informed him that it was his decision, and his alone, on whether to testify at trial and that he swore that it was his decision not to testify. However, the Petitioner claimed that he only did so because he was following trial counsel's advice. Nonetheless, the Petitioner also acknowledged that he followed trial counsel's advice not to testify because he believed trial counsel was going to obtain a favorable result.

Trial counsel testified that he "made sure to inform" the Petitioner that it was ultimately the Petitioner's decision whether to testify, and he did not believe he coerced the Petitioner into waiving his right to testify. Trial counsel did not dispute that, following the close of the State's proof at trial, he did, in fact, "strongly" advise the Petitioner not to testify, potentially saying that for the Petitioner to do so would "jeopardize" the case. But, trial counsel denied that he told the Petitioner that he had the case "won," that he had obtained not guilty verdicts in cases involving similar crimes, or that he had everything in the Petitioner's case "handled." Trial counsel's testimony indicated that though the Petitioner had initially considered testifying on his own behalf, he decided not to do so when the older victim was able to affirmatively state at trial that the abuse took place.

The post-conviction court accredited trial counsel's testimony and correctly observed that the Petitioner's reservations were simply a matter hindsight. Here, both the Petitioner's three- and five-years-old step-grandchildren detailed allegations of abuse at the hands of the Petitioner. Moreover, the Petitioner did not ask trial counsel about why he gave the Petitioner such advice, and it is the Petitioner's burden to prove his factual allegations by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-110(f); *Dellinger*, 279 S.W.3d at 293-94. The record does not reflect that trial counsel pressured or coerced the Petitioner in any way. *See Burgess v. State*, No. M2020-00028-CCA-R3-PC, 2021 WL 928475, at *22 (Tenn. Crim. App. Mar. 11, 2021) (rejecting the petitioner's assertion that trial counsel coerced the petitioner into waiving his right to testify when the petitioner simply took trial counsel's advice at the time); *Kent v. State*, No. M2017-01532-CCA-R3-PC, 2018 WL 2189706, at *14 (Tenn. Crim. App. May 14, 2018) (concluding, in a case of aggravated child neglect or endangerment and child abuse, "that the [p]etitioner made her own decision not to testify and that trial counsel's recommendation was based on reasonable trial strategy," which would not be second-guessed "with the benefit of hindsight"). The Petitioner has failed to establish that trial counsel was deficient in this regard.

Moreover, the Petitioner did not testify at the post-conviction hearing regarding what his testimony at trial might have added in his defense other than his apparent desire to fight for himself. We may not speculate what the Petitioner's testimony in this regard would have been. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Again, it is the Petitioner's responsibility to establish his factual allegations by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-110(f); *Dellinger*, 279 S.W.3d at 293-94. Accordingly, the Petitioner has likewise failed to show prejudice. *See Claxton v. State*, No. W2021-01240-CCA-R3-PC, 2022 WL 2721331, at *4 (Tenn. Crim. App. July 14, 2022), *no perm. app. filed* (determining that the petitioner had failed to establish prejudice by following trial counsel's advice not to testify at trial by failing to present his "side of the story" at the post-conviction hearing). The Petitioner is not entitled to relief on this basis because he has failed to show that trial counsel's advice was unsound trial strategy.

## III. CONCLUSION

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

_____
KYLE A. HIXSON, JUDGE