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

WILLIE NATHAN JONES v. STATE OF TENNESSEE

Appeal from the Criminal Court for Putnam County
No. 2015-CR-1073 Gary McKenzie, Judge

No. M2023-00060-CCA-R3-PC

Petitioner, Willie Nathan Jones, appeals from the Putnam County Criminal Court's denying his petition for post-conviction relief, which petition challenged his convictions of second degree murder and attempted second degree murder. Petitioner argues trial counsel provided ineffective assistance by failing to contemporaneously object to the prosecutor's closing argument and failing to object to the prosecutor's use of the term "victim" when referring to a State's witness. We affirm the judgment of the post-conviction court.

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

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

John B. Nisbet III, Livingston, Tennessee (on appeal); Blake Mullins, Sparta, Tennessee (at post-conviction hearing), for the appellant, Willie Nathan Jones.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Bryant Dunaway, District Attorney General; and Beth Willis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual and Procedural History

A. Trial

In February 2016, a Putnam County Grand Jury indicted Petitioner for the first degree premeditated murder and the first degree felony murder of Rodney Richards and

for the attempted first degree murder of Stacy Maynard. A summary of the facts from trial, as taken from the direct appeal in this case, are as follows.

On October 6, 2015, Stacy Maynard picked up her boyfriend, Rodney Richards, from work because his truck had a flat tire. *State v. Jones*, No. M2019-01273-CCA-R3-CD, 2020 WL 4979504, at *4 (Tenn. Crim. App. Aug. 25, 2020). As they were leaving, Mr. Richards spoke with Petitioner on the phone to help change the flat tire. *Id*. Petitioner later came over to Mr. Richards's residence to change his tire and eventually left between 1:00 and 2:00 a.m. Ms. Maynard and Mr. Richards then went to bed. *Id.*

Later that night, Ms. Maynard heard a vehicle moving on the gravel driveway and told Mr. Richards that someone was outside. *Id.* Mr. Richards went to the door and saw that it was Petitioner. *Id.* He returned to the bedroom to tell Ms. Maynard who it was before quickly returning to the door. *Id.* Ms. Maynard went to the kitchen to grab some water, and on the way she jokingly asked Petitioner, "'What in the hell are you doing back?'" *Id.* When Ms. Maynard got to the kitchen, she heard a "'loud noise.'" *Id*. When she turned back to see what happened, she saw a gun in Petitioner's hand and then heard Mr. Richards say, "'Why, Jonesy, why?'" as "'some blood [was] coming down from behind his ear.'" *Id.*

Ms. Maynard panicked and tried to hide behind the refrigerator door, but Petitioner got in front of her, aimed his gun, and then shot her in the face. *Id*. at 5. Ms. Maynard managed to struggle with Petitioner for the gun, but he shot her again, this time, in the knee. *Id*. Still struggling for the gun, Ms. Maynard remembered that Mr. Richards kept his keys inside his truck so she ran towards the truck and got inside. *Id.* Before she could lock the doors, Petitioner entered the truck through the passenger-side door. *Id.* Ms. Maynard still managed to start the truck, but she had to drive it into her own car to get away. *Id.* Petitioner started beating Ms. Maynard with the gun and knocked out some of her teeth. *Id.* When Petitioner forced the truck into park and attempted to grab the keys from the ignition, he left the gun in his lap, and Ms. Maynard grabbed it. *Id.* She began to hit Petitioner with the gun before pointing it at him and pulling the trigger. *Id.* But the gun did not fire. *Id.*

Ms. Maynard ran from the truck, but her knee gave out, and Petitioner caught up with her. *Id.* Petitioner grabbed her by the hair and started stabbing her in the back with a weapon. *Id.* After he stabbed her, he used the weapon across her neck "'in a sawing motion,'" and "actually stuck it in [her] mouth . . . like almost trying to pierce [her] cheek.'" *Id*. Ms. Maynard "'play[ed] dead' by slowing her breathing and lying still on the ground," and eventually Petitioner went back inside Mr. Richards's residence. *Id.* Ms. Maynard then drove Petitioner's car to the nearest neighbor where the neighbor called 9-1-1. *Id.*

The jury convicted Petitioner for the lesser included offenses of second degree murder and attempted second degree murder. The trial court sentenced Petitioner, as a

Range I, standard offender, to twenty-five years for second degree murder, and twelve years for attempted second degree murder to be served consecutively, for an effective sentence of thirty-seven years' incarceration. We affirmed Petitioner's convictions and sentence on appeal. *Id.* at 26.

Petitioner filed a timely pro se petition for post-conviction relief. In his petition, he raised three claims alleging Counsel was ineffective for: (1) failing to object to the State's use of the term "victim" regarding Ms. Maynard; (2) failing to object to the State's vouching for the credibility of witnesses during closing argument; and (3) failing to request a continuance of the trial when Petitioner alleged a fourth person was present during the attacks on Mr. Richards and Ms. Maynard. The post-conviction court subsequently appointed post-conviction counsel to represent Petitioner. On October 19, 2022, the post-conviction court conducted a hearing on Petitioner's claims.

B. Post-Conviction Hearing

At the post-conviction hearing, trial counsel ("Counsel") was the only witness. Counsel testified that he had been a licensed attorney in Tennessee since 2013 and that seventy-five percent of his practice focused on criminal law. Counsel had conducted three first degree murder trials. Counsel was appointed by the trial court to represent Petitioner in January 2017 and represented Petitioner through his trial in April 2018. Counsel was also Petitioner's third appointed counsel on the case.

Counsel met with Petitioner's previous counsel and met with Petitioner several times in jail. He and Petitioner spoke "pretty regularly." Counsel learned that the trial court had approved a request for an investigator, so he used the services of the investigator to research aspects of the case. Counsel also hired an expert to review phone records to uncover location data of Petitioner's cell phone. Although the cell phone data "was not very fruitful," Counsel testified that the investigation was helpful to the case.

Counsel stated that there was a dispute over how Petitioner "got from the scene, on the mountain, to where he was ultimately walking through the woods, and then ultimately at his mother's house." Counsel testified that he went with the investigator at least once to try to find a route that could explain how Petitioner ended up where he did. Counsel noted that there was some proof at the preliminary hearing that Petitioner went a "particular direction out of the driveway when he left."

Counsel filed "numerous" motions in limine before trial. One of the motions, which is an issue in this appeal, concerned the use of the word "victim." Counsel testified that his reason for the motion was because without a conviction, there cannot be a victim, and any use of the word at trial is prejudicial against Petitioner. In other words, because Petitioner was innocent until proven guilty, there could not be a victim of a crime. The trial court granted Counsel's motion and ruled that all parties must avoid using that word.

Still, the trial court noted that as the trial proceeded, mistakes could happen, and the court anticipated having to use a curative instruction for the jury to consider any use of the word "victim" as "alleged victim."

Counsel testified that he could not remember whether he contemporaneously objected to the State's later use of the word "victim" throughout trial or in closing arguments. Counsel admitted that he also may have used the word at different points during trial. Counsel pointed out, though, that his use of the word was strategic to argue that the State decided Ms. Maynard was the victim merely because she was bleeding when police arrived at the scene.

After Petitioner was convicted, Counsel timely filed a motion for a new trial, and an amended motion for a new trial. In the motion, Counsel raised the issue of the use of the word "victim" and argued that despite the trial court's ruling on the word, the State continued to use it to describe Mr. Richards and Ms. Maynard and that curative instructions were not enough to avoid prejudice to Petitioner. Counsel testified that "using the word 'victim' was tantamount to the state vouching for the credibility of the proof." Counsel then stated:

> I do think I should have objected. Yeah, I think that I likely should have sought to approach. I don't necessarily think that my usage of the word was the same as theirs, but, yeah, I think I should have. I don't know what the [trial court] would have done. The [trial court] was fairly clear that sometimes that word gets used, and, like many things, curative instructions are issued.

As to the State's closing argument, Counsel admitted that there were some inappropriate arguments that he considered burden shifting and vouching. He testified that he did not object because "you don't want them to do that to you." When asked whether his failure to object prejudiced Petitioner, Counsel said "I'd have to say so, because [the State's] arguments were impassioning and inflaming things. . . . I can see some prejudice, yes."

Ultimately, Counsel testified:

> I did everything I could for [Petitioner]. I still think that the jury got it wrong. Um, probably, probably with the failure to contemporaneously object, I think that did create some prejudice. . . . The contemporaneous objections were a problem, but I feel pretty good about the strategy we went in with.

Still, Counsel believed that the trial was a success because the jury ultimately convicted Petitioner of lesser included offenses. Counsel pointed out that Petitioner "will have an opportunity to live a life outside of custody."

The post-conviction court addressed Petitioner's claims in its written order denying post-conviction relief. The post-conviction court ultimately found that Petitioner failed to prove ineffective assistance of counsel by failing to prove either deficient performance or prejudice. Petitioner's timely appeal follows.

II. Analysis

On appeal, Petitioner argues Counsel provided ineffective assistance by: (1) failing to contemporaneously object to the State's closing argument; and (2) failing to contemporaneously object to the State's use of the term "victim" when referring to a State's witness. The State argues that Counsel was not deficient and that Petitioner cannot show that if Counsel was deficient, the deficiency undermines confidence in the outcome.

A. Standard of Review

To obtain post-conviction relief, a petitioner must establish his or her "conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of the United States or Tennessee Constitution." Tenn. Code Ann. § 40-30-103. A petitioner bears the burden of proving the factual allegations contained in the petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); *see Dellinger v. State*, 279 S.W.3d 282, 296 (Tenn. 2009). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)).

Appellate courts do not reassess the post-conviction court's determination of the credibility of witnesses. *Dellinger*, 279 S.W.3d at 292 (citing *R.D.S. v. State*, 245 S.W.3d 356, 362 (Tenn. 2008)). Assessing the credibility of witnesses is a matter entrusted to the post-conviction judge as the trier of fact. *R.D.S.*, 245 S.W.3d at 362 (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). On appeal, a post-conviction court's factual findings will not be disturbed unless the evidence contained in the record preponderates against the findings. *Brooks v. State*, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988); *Clenny v. State*, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978). On the other hand, conclusions of law are given no presumption of correctness on appeal. *Dellinger*, 279 S.W.3d at 293; *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

We review "a post-conviction court's conclusion of law, decisions involving mixed questions of law and fact, and its application of law to its factual findings de novo without a presumption of correctness." *Whitehead v. State*, 402 S.W.3d 615, 621 (Tenn. 2013) (first citing *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011); and then citing *Calvert v. State*, 342 S.W.3d 477, 485 (Tenn. 2011)). Even so, the post-conviction court's underlying findings of fact may not be disturbed unless the evidence preponderates against them.

Dellinger, 279 S.W.3d at 294 (Tenn. 2009) (citing Tenn. R. App. P. 13(d); *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006)). As a result, the appellate court is "not free to re-weigh or reevaluate the evidence, nor [is it] free to substitute [its] own inferences for those drawn by the post-conviction court." *Whitehead*, 402 S.W.3d at 621 (citing *State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001)).

B. Ineffective Assistance of Counsel

Both the United States Constitution and the Constitution of the State of Tennessee guarantee criminal defendants the right to effective assistance of counsel. U.S. Const. amend VI; Tenn. Const. art. I, § 9. Under the Sixth Amendment to the United States Constitution, when a petitioner raises an ineffective assistance of counsel claim, the burden is on the petitioner to show both (1) counsel's performance was deficient and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-372 (1993). 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). To prevail on such a claim, a petitioner must prove both prongs of the *Strickland* test, and failure to prove either is "a sufficient basis to deny relief on the claim." *See Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). "[A] court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996).

An ineffective assistance of counsel claim presents a mixed question of law and fact. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). As a mixed question of law and fact, this court's review of a petitioner's ineffective assistance of counsel's claims is de novo with no presumption of correctness. *Felts*, 354 S.W.3d at 276 (citations omitted).

To prove that counsel's performance was deficient, a petitioner must establish that his attorney's conduct fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. As our supreme court held:

> "[T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence . . . . Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations."

Finch v. State, 226 S.W.3d 307, 315-16 (Tenn. 2007) (quoting *Baxter v. Rose*, 523 S.W.2d 930, 934-35 (Tenn. 1975)). A review of trial counsel's performance "requires that every

effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Appellate courts "may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation." *Alley v. State*, 958 S.W.2d 138, 149 (Tenn. Crim. App. 1997) (citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)). Further, we cannot criticize a sound, but unsuccessful, tactical decision made during the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994).

To prove prejudice, a petitioner must demonstrate "a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." *Id.* As such, a petitioner must establish that his or her attorney's deficient performance was of such magnitude that he was deprived of a fair trial and that the reliability of the outcome was called into question. *Finch*, 226 S.W.3d at 316 (citing *Burns*, 6 S.W.3d at 463).

1. Failure to Object to Prosecutor's Closing Argument

Petitioner argues that Counsel's failure to contemporaneously object to the State's closing argument was deficient performance, and that the failure to object prejudiced Petitioner. The State argues that Petitioner "cannot show that [Counsel] either performed deficiently by deciding against raising contemporaneous objections during the prosecutor's closing statements or that the absence of such objection prejudiced the defendant." We agree with the State.

As to deficient performance, Petitioner does not specify any portion of the State's closing argument to which Counsel should have objected. Rather, Petitioner argues that because Counsel failed to object to the State's closing argument—which this court concluded resulted in waiver and plain error review of the issue on direct appeal—this court must now conclude that Counsel's actions were deficient performance per se. We disagree. Petitioner's argument conflates the issue we must decide here with our previous application of the standard of review. The pertinent issue we must decide now is whether trial counsel was deficient by failing to object to the State's closing argument, and subsequently whether the failure would have produced a different outcome in the case.

In support of his argument, the only proof Petitioner offers to show Counsel's ineffectiveness are Counsel's own statements at the post-conviction hearing. At the hearing, Counsel expressed regret for failing to object to the State's closing argument, testifying, "Oh, yeah. Yes, I do think I should have objected." But Counsel's subjective assessment of his own performance is not the standard. The standard for ineffective assistance of counsel is not whether trial counsel subjectively believes that they were ineffective—it is an objective standard of reasonableness. *Strickland*, 466 U.S. at 690. In

his brief, Petitioner points to no area of the State's closing argument he claims is objectionable. It is Petitioner's burden to prove the factual allegations contained in the petition by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-110(f); *Dellinger*, 279 S.W.3d at 296. Further, Counsel explained why he did not object to the State's argument, stating "you don't want to interrupt their closing or summation because you don't want them to do that to you." This was a tactical decision by Counsel. As stated, a reviewing court cannot second-guess or criticize sound strategic or tactical decisions made by trial counsel that were ultimately unsuccessful. *Alley*, 958 S.W.2d at 149 (first citing *Hellard*, 629 S.W.2d at 9); and then citing *Adkins*, 911 S.W.2d at 347). We will not do so here. Petitioner has failed to meet his burden, and we conclude that Counsel's performance was not deficient.

Regarding prejudice, the State points out that, on direct appeal, we reviewed the State's closing argument, albeit under plain error review, and found nothing improper. *Jones*, 2020 WL 4979504, at *20-22. The State's assertion is true. *Id*. The post-conviction court recognized this when it found "[t]his very issue was addressed by the Court of Criminal Appeals" and "[t]his [c]ourt agrees with [our] analysis of this issue and finds that it has been previously determined." Petitioner correctly notes that an analysis under *Strickland* differs from an analysis for plain error, and requires findings of Counsel's deficient performance and resulting prejudice. Yet as Petitioner asks us to find impropriety in the same closing argument we addressed on direct appeal, he fails to point to any specific area of the closing argument he claims caused Petitioner prejudice.

When addressing prejudice, the only proof Petitioner offers to support his position is, again, Counsel's own testimony, and asserts it proves Counsel "was ineffective at [Petitioner's] trial by delivering a deficient performance that resulted in prejudice to [Petitioner]." At the post-conviction hearing, Counsel did state, "I can see some prejudice, yes." But again, Counsel's subjective assessment of prejudice is not the standard under *Strickland*—the standard is an objective one. Moreover, in his brief Petitioner makes no attempt to show how Counsel's "deficiency" caused prejudice to Petitioner such that it undermines confidence in the outcome of trial. We note that it is well established that "[c]losing arguments are not evidence." *State v. Gentry*, 538 S.W.3d 413, 430 (Tenn. 2017) (citing *State v. Shaw*, 37 S.W.3d 900, 904 (Tenn. 2001)). In any event, "[a] criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument." *State v. Banks*, 271 S.W.3d 90, 131 (Tenn. 2008) (citing *United States v. Young*, 470 U.S. 1, 11-13 (1985)). And while Petitioner correctly states that an analysis under *Strickland* differs from a plain error analysis, both analyses focus on prejudice. As we stated in Petitioner's direct appeal, "[p]lain error relief is 'limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial.'" *Jones*, 2020 WL 4979504, at *21 (quoting *State v. Adkisson*, 899 S.W.2d 626, 642 (Tenn. Crim. App. 1994)). In that same appeal, reviewing the State's closing argument in depth, we found that the State's comments were either not improper, "limited and made in passing," or "did not affect the jury's deliberations." *See Jones*, 2020 WL 4979504, at *20-22. We

concluded there was no unfair prejudicial impact on Petitioner. *Id*. Here, we conclude that any "deficiency" by Counsel on this issue did not prejudice Petitioner or undermine confidence in the outcome at trial. Petitioner is not entitled to relief on this issue.

2. Failure to Object to Prosecutor's use of the Term "Victim"

Petitioner also argues that Counsel was ineffective by failing to object to the State's use of the term "victim" throughout trial. He again only relies on Counsel's own statements at the post-conviction hearing to show that Counsel was ineffective by failing to object to the term during the trial. Counsel testified that "jurors are continually hearing the posture of the word 'victim,' and you have to overcome the presumption of innocence in that context." Counsel stated that "using the word 'victim' [is] tantamount to the [S]tate vouching for the credibility of the proof" and is also a "burden-shifting issue." Based on Counsel's testimony alone, Petitioner concludes Counsel "was ineffective at [Petitioner]'s trial by delivering a deficient performance that resulted in prejudice to [Petitioner]." As noted above, the standard for ineffective assistance of counsel is an objective standard of reasonableness. *Strickland*, 466 U.S. at 690. Counsel testified that the theory of his defense was "the only reason" that Ms. Maynard "was viewed by law enforcement to be the victim [was] because she was the person that was bleeding at the time of their arrival." Counsel admitted "that the use of that word 'victim' was in context of showing that the [S]tate had decided she was the victim."

When we look at Counsel's performance, it is clear he had a tactical reason for not objecting to use of the term victim—he strategically used the term too. Counsel admitted that he argued law enforcement had "'decided [Petitioner was] the suspect and [Ms. Maynard was] the victim.'" In our objective assessment of Counsel's performance, we cannot and will not second guess Counsel's strategy, and we conclude there was no deficiency in Counsel's performance on this issue.

Concerning prejudice, the post-conviction court in this case found:

> Petitioner has failed to show there is a reasonable probability the result of the trial would have been different due to this "deficient performance." . . . Petitioner asks this court to make a finding that a jury would cast away its solemn fact[-]finding responsibility merely because a term or moniker is used at trial. This request is a wide chasm that this [c]ourt is unwilling to leap. This finding would place so little confidence in the ability of an American Jury as to call into question any possible decision they could ever reach. It is unreasonable to assume that any trial could be conducted without a part to it mistakenly using terms such as "victim" and "defendant." To place this burden on any trial attorney would be analogous to requiring a "perfect" trial. A "perfect" trial is neither required by the State or U.S. Constitution, nor an outcome based in reality.

We agree with the post-conviction court that Petitioner has failed show prejudice. The jury was instructed by the trial court that any use of the term "victim" should be considered as "alleged victim" as it is the jury's decision to determine if there is a "victim" and who that "victim" would be. Additionally, we note that the proof in this case was overwhelming. The jury accredited Ms. Maynard's testimony that Petitioner shot Mr. Richards, then shot and stabbed her. The physical evidence pointed to Petitioner, with Petitioner having no significant injuries, while Ms. Maynard had broken teeth, two gunshot wounds, and stab wounds. Ms. Maynard's blood was found on Petitioner's shirt, in Petitioner's vehicle, and on the gun. Petitioner's DNA was found on a glove in the kitchen where Mr. Richards was shot. Therefore, Petitioner has not shown that, but for Counsel's "deficiency," there is a reasonable probability the result of his trial would have been different. *See Strickland*, 466 U.S. at 694. Petitioner is not entitled to relief on this issue.

III. Conclusion

For the reasons stated above, we affirm the judgments of the post-conviction court.

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MATTHEW J. WILSON, JUDGE