

FILED

05/08/2023

Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

November 8, 2022 Session

GREGG MERRILEES v. STATE OF TENNESSEE

Appeal from the Circuit Court for Rutherford County

No. 77445-C

James A. Turner, Judge

No. M2021-01324-CCA-R3-PC

In this post-conviction appeal, the Petitioner-Appellant, Gregg Merrilees, seeks relief from his original convictions of aggravated robbery and robbery in concert with two or more persons, for which he received an effective sentence of sixteen years' imprisonment. He subsequently filed a petition seeking post-conviction relief, which was denied by the post-conviction court. The Petitioner now appeals and raises a stand-alone challenge to the sufficiency of the evidence. In addition, the Petitioner argues four grounds in support of his ineffective assistance of counsel claim: (1) trial counsel's failure to challenge the sufficiency of the evidence based on the lack of accomplice corroboration in a motion for judgment of acquittal or on direct appeal; (2) trial counsel's failure to request a jury instruction on accomplice corroboration; (3) trial counsel's failure to object based on speculation to the hotel clerk-victim's accusation that the Petitioner was involved in the offenses based on the hotel clerk-victim's "gut"; and (4) trial counsel's failure to object to "the unconstitutional show-up" identification of the Petitioner by the hotel clerk-victim at trial. Upon our review, we affirm.

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

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which ROBERT H. MONTGOMERY, JR., J., joined. TOM GREENHOLTZ, J., concurring in part, and dissenting in part.

Drew Justice, Murfreesboro, Tennessee, for the Petitioner-Appellant, Gregg Merrilees.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Jennings H. Jones, District Attorney General; and Dana Minor and Matthew Westmoreland, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

The sufficiency of the evidence is central to several of the issues raised by the Petitioner; accordingly, it is necessary to engage in a full recitation of the evidence presented at the Petitioner's jury trial on August 13, 2018.

Dashaun Hickerson, an admitted drug addict who was in custody at the time of trial, testified that he moved to Tennessee in 2005, after Hurricane Katrina struck New Orleans, which earned him the nickname of N.O. He had been in different substance abuse programs to help with his drug problem and blamed his drug problem for why he was involved with the instant offenses. He knew the Petitioner, who Hickerson called "Peanut," and another individual named "Monk," but he did not know Monk's real name. Hickerson had only met Monk "maybe twice." Hickerson and the Petitioner were mutual friends and had the same drug addiction. Hickerson would contact the Petitioner on a weekly basis, and he considered their relationship to be "pretty close." On January 3, 2017, Hickerson met the Petitioner in Smyrna in the evening, after he got off work. Hickerson said he got in the Petitioner's car, and Katie, the Petitioner's ex-girlfriend, was also in the car.

They drove to the Home Depot, retrieved some items, and the Petitioner left him at the Home Depot. Hickerson waited at the Home Depot until it closed and then walked down the street to a gas station. Around 1:00 a.m., when Hickerson was about to leave the gas station, the Petitioner pulled into the gas station. Though angry, Hickerson got in the car with the Petitioner. Only the Petitioner, Hickerson, and Monk were in the car at this time. Hickerson did not know where they were going, but they eventually pulled into the parking lot of a hotel because the Petitioner had to use the restroom. Hickerson did not remember the name of the hotel, but he thought it may have been the Hilton. Hickerson testified that the Petitioner was inside the hotel for twenty minutes while he and Monk stayed in the car. While inside the car, Monk's girlfriend repeatedly called him because she was "dope sick," and Monk became agitated.

When the Petitioner returned to the car, he told them that only one person was in the hotel. Hickerson understood what the Petitioner and Monk were about to do. The Petitioner then told Hickerson that he was going to have to go inside the hotel with Monk. The Petitioner drove to the front of the hotel, gave Hickerson a roll of duct tape, and told him to use it if necessary. Hickerson put the duct tape in his pants and went into the hotel with Monk. Monk asked the cost of a room while Hickerson acted like he was on the phone. As the hotel clerk was looking at the computer, Monk approached him armed with a knife and demanded money. The hotel clerk appeared scared and gave Monk the money. Monk then brought the hotel clerk to "the back" behind the counter and asked where the hotel safe was located. Hickerson followed them. Once behind the counter, the hotel clerk told them that he could not open the safe. At this point, Hickerson told the clerk to sit down, calm down, and that no one was going to hurt him. Hickerson then put tape around the hotel clerk's hands, took the hotel clerk's phone, and left.

When Hickerson went outside the hotel, the Petitioner was in the front of the hotel getting the cash register. Monk was heading toward the front door. The Petitioner put the cash register in the trunk of his car. Hickerson explained that the cash register the Petitioner put in the trunk was from the front of the hotel and not the same cash register the hotel clerk used to give Monk money. All three men got in the car, with the Petitioner driving, Monk in the front passenger seat, and Hickerson in the back seat. They then went to Nashville, picked up Katie, and bought and used drugs. They went to a house, where they used the drugs, and the Petitioner eventually dropped Hickerson at his home in Antioch.

Hickerson agreed that he was later arrested for the instant offenses and provided a statement to Detective Jason Anderson. He agreed that the information provided in the statement was not entirely consistent with his trial testimony. Upon being shown photographs, Hickerson initially denied it was him in the photograph, and he also denied that he tied up the hotel clerk-victim. He was untruthful as to how he came to meet the Petitioner on the day of the offenses and the events following the offenses, stating that he went straight home. Hickerson nevertheless insisted he was truthful and consistent regarding the persons who committed the robbery with him, the Petitioner and Monk. Hickerson had also previously reviewed the surveillance videos of the instant offenses and confirmed they portrayed the events on the night of the offenses as he testified to at trial.

The surveillance videos were admitted as evidence and played for the jury at trial. The first video shows a view of the front desk and two individuals: one individual is seen walking past the front desk into the darker area of the hotel and another masked individual is seen later taking something from behind the desk. No faces are shown on the video. Hickerson had met with the State prior to his testimony, but he was not made any offers or promises of leniency. During their discussions, Hickerson was advised to tell the truth. Hickerson identified the Petitioner in court as the person who accompanied him on the night of the offenses.

On cross-examination, Hickerson agreed that he was a heroin addict at the time of the offenses, but he denied that it affected his ability to remember at that time. Hickerson explained that he was "sick" or had not had any drugs. He confirmed that the Petitioner went inside the hotel for twenty minutes, and that he waited about five minutes before he and Monk entered the hotel. Hickerson confirmed that the Petitioner was outside of the hotel when he and Monk went inside. Hickerson also confirmed that Monk held the knife to the hotel clerk-victim, that Hickerson tied him up, and that the Petitioner was not present at either time. Hickerson agreed that he originally did not tell the police that the Petitioner provided him with duct tape. Hickerson also agreed that while he did not have an agreement with the State, he hoped the State would take his testimony into consideration for a better offer.

Decari Cradle, the hotel clerk-victim in this case, testified that in January 2017, he was employed at the Hilton Garden Inn. At the time of the offenses, his duties were as a night auditor, and no one else worked in the same area of the hotel. As part of his job, he had access to surveillance videos and a monitor at his desk, and he identified several photographs of the same as evidence at trial. On January 2, 2017, the victim's shift began at 11:00 in the evening, but he arrived fifteen to thirty minutes late. He said the only other employees present were the front desk manager and the bartender. The victim explained these employees would typically leave after updating him on the happenings at the hotel. The victim said an individual came into the hotel that night asking to use the bathroom who "seemed a little bit strange. Not too strange. Just to give a red flag." The bartender told the bathroom-goer where the bathroom was located. The bathroom-goer wore "like a red or burgundy shirt, had a hat, kind of like a fedora on." Asked if he saw the person who asked to go to the bathroom that night in the courtroom, the victim identified the Petitioner.

The victim did not see the Petitioner "physically" leave the hotel, and the victim only assumed the Petitioner left based on a car that came there "kind of when he was there." When the car left, the victim believed the Petitioner had left as well. The other two employees left after they thought the Petitioner had left, which was fifteen or twenty minutes later. Sometime later, two other individuals entered the hotel lobby together. The victim described one of the men as an "older male" with "kind of a jagged look." The other man "looked like a mixed guy" and was "heavy set." While one of the men inquired about the rates, the other man was on the phone. As the victim explained the rates, the men robbed him.

The victim said one of the men was armed with a knife and told him to "give me the damn money, I want the money." The victim complied, asking the men not to touch him. The other man had a bulge in the front of his pants, and the victim thought it may have been a gun, which made him "just really scared." After taking between \$400 and \$600 from the register, the men then took the victim to the front office which is where the office of the general manager, sales accounts, and safe were located. They asked the victim for the safe combination, which the victim did not know. The victim described, from photographs admitted into evidence, where the men were positioned. The men then took the victim to another area in the hotel, sat him down, tied his hands, and took the phone cord from the front office. The victim confirmed that the "mixed" man told him to "just be compliant" and that they were not going to hurt him. When the men left, the victim was in shock and sat there for a minute to ensure the men were gone. He then went to another area in the hotel, cut himself free, and called his mother and the police to report the crime.

Once the police arrived, the victim noticed the cash register near the bar was gone and the monitor was broken. He identified photographs admitted as evidence of the drawer from which the perpetrators took the money during the robbery and the area where he was placed with his hands tied up. Following the offenses, the victim reviewed additional surveillance videos and observed the time was an hour ahead, meaning where it showed

1:27 it meant 12:27. The surveillance footage otherwise depicted the events as they unfolded on the night of the offenses. Based on the photographs, the victim confirmed the area surrounding the bar was “pretty dark.” He also confirmed that he did not see the Petitioner during the actual robbery.

Asked if he mentioned the Petitioner to the police following the robbery, the victim replied, “I did off the top. I mean, he was the lookout. He was the lookout. And I knew it. It was my gut telling me. I knew certainly.” The victim also confirmed it was possible for someone to walk in and go to the bathroom without being seen on the surveillance video; however, the victim could see the individual from where the victim sat. The victim said the value of his stolen cell phone was between \$500 and \$800.

On cross-examination, the victim agreed that the Petitioner did not enter the hotel with the other two men on the night of the offenses. The victim repeated that the Petitioner came into the hotel before the two other men and asked to use the bathroom. He confirmed that he told the police that a man came in to use the bathroom before the robbery. When the man asked to go to the bathroom, the victim responded as follows:

we all got a good look at him – well, me and [the bartender] more than likely. . .[S]he kind of pointed to him. But I kind of looked, too, to get a good picture of him, because, you know, why is an outsider coming in around this time to use the bathroom. You know, it kind of gave me a little suspicion.

He agreed that when the bathroom-goer came into the bar area it was around 12:30 at night, and the bar was closed. He agreed that, based on the surveillance video, while the cash register was being taken from the bar area, the victim was tied up in the back area of the hotel. While the victim agreed that he told the police on the night of the offenses that the bathroom-goer had a tattoo under one of his eyes, the victim insisted that he told the police the bathroom-goer had tattoos “all over his face. Some of them was a little distinctive at that time. But his hat, his fedora hat was covering up . . .” When pressed about the difference between a single tattoo under one eye and tattoos all over the bathroom-goer’s face, the victim insisted he told the police they were all over his face but said that he “was really in shock” at the time he gave the statement.

The victim agreed that he was shown a photo lineup on January 27, 2017, which included the Petitioner. The victim was unable to identify the Petitioner as the bathroom-goer at that time. The victim explained that the photograph of the Petitioner within the photo lineup did not contain any tattoos. On re-direct examination, the victim further explained that as the Petitioner sat in court, he had multiple facial tattoos, which was “completely different than the photo lineup.”

Henry Piarrot testified that he was the General Manager of the Hilton Garden Inn in Smyrna, Tennessee, at the time of the offenses. He received a call in the early morning

hours of January 3, 2017, regarding a robbery. Upon arrival, Piarrot observed several items missing including the cash register drawer in the restaurant. He said that unit, valued at \$250-\$300, was destroyed, and the cash box was gone. There was approximately \$500 missing from the other part of the hotel.

Detective Jason Anderson testified that he was employed in the Investigative Division of the Smyrna Police Department. He was on duty on the night of the offenses and responded to the Hilton Garden Inn. Upon arrival, he interviewed the victim, oversaw crime scene processing, and helped with photographs and collecting evidence. Detective Anderson specifically recovered a piece of duct tape, admitted as evidence, which was subsequently forwarded to the Tennessee Bureau of Investigation for testing, but it yielded no usable results.

Detective Anderson identified the Petitioner as a suspect in the instant investigation and developed a photo lineup containing the Petitioner's photograph. Detective Anderson agreed that the victim was unable to identify the Petitioner as the bathroom-goer from the photo lineup. The photo lineup was admitted into evidence. Detective Anderson said he experienced "difficulties" or "special circumstances" in developing this photo lineup. He explained the process of developing a photo lineup usually involved collecting a series of six photos, one of the suspect and five of other individuals who were similar in appearance, and then providing the lineup to a victim for possible identification. Detective Anderson wanted to make the lineup process in this case "as fair . . . as possible[.]" and "although it's getting more popular to have tattoos on [the] face, at that time [it] was even less popular." To be fair to the Petitioner, Detective Anderson included a driver's license photo of the Petitioner from 2013 with no tattoos on his face, along with other individuals similar in appearance. He agreed the victim was unable to identify the Petitioner from this photo lineup.

Detective Anderson also interviewed Hickerson, who had been previously developed as a suspect based on his image in the surveillance video and other interviews. At the time Detective Anderson interviewed Hickerson, he had already developed the Petitioner as a suspect. Prior to the interview with Hickerson, Detective Anderson did not tell Hickerson of the other potential suspects in the case. Detective Anderson explained that in his years of experience as a detective, he expected possible suspects to initially minimize their involvement in an offense. Detective Anderson also requested and received surveillance video footage from the hotel from the night of the offenses. Based on his recollection of the footage, there were no other people around the hotel at the time of the offenses. The surveillance video from the bar was also admitted into evidence.

On cross-examination, Detective Anderson identified the two men on "the main video" who entered the hotel on the night of the offenses armed with a knife as Hickerson and Robin Phillips, the other co-defendant. Detective Anderson also agreed that he reviewed over 100 different surveillance video clips of the hotel from the night of the

offenses and that the Petitioner was not shown in any of those clips as participating in the offenses. He clarified that the investigation revealed that the Petitioner entered the hotel approximately thirty minutes before the robbery occurred. He further agreed that there was a video of “a figure” walking from the bathroom area and out the door, but he could not confirm that it was the Petitioner. Detective Anderson also confirmed that he spoke with the victim for “quite a while” on the night of the offenses. He said the victim told him the bathroom-goer had “at least one tattoo” under his eye. However, he also agreed that his report “definitely [did] not say that [the bathroom goer]” had tattoos “all over his face.” The report noted that “it’s just one tattoo under one of the eyes,” and that it was “possibly a cross[.]”

At the close of the State’s proof, defense counsel moved for judgment of acquittal, which was denied by the trial court. In support, defense counsel briefly argued that the evidence was “insufficient” because “the only thing that places [the Petitioner] there . . . is the co-defendant’s testimony. He’s certainly got reason to lie and save himself.” Defense counsel additionally argued that although the victim identified the Petitioner in court at trial, the victim was unable to do so on the night of the offenses or in the photo lineup. Finally, defense counsel argued that while there was clearly video of the other two co-defendants, there was no video, DNA, or fingerprint evidence linking the Petitioner to the offenses. The Petitioner did not offer any evidence at trial. Based upon the above proof, the jury convicted the Petitioner of aggravated robbery and robbery in concert with two or more persons and acquitted the Petitioner of especially aggravated kidnapping. The Petitioner received an effective sentence of sixteen years’ imprisonment.

The Petitioner subsequently filed a motion for new trial, arguing that the trial court erred in ruling that should the Petitioner testify his prior conviction for aggravated robbery would be admissible to impeach the Petitioner; the trial court erred in allowing the State to amend the indictment approximately ten days prior to trial; the trial court erred in denying the Petitioner’s newly retained attorney’s motion to continue, the State mischaracterized evidence in closing argument; and based on the cumulative effect of errors, the Petitioner was entitled to a new trial. An amended motion for new trial was later filed to include that the trial court erred in giving preliminary jury instructions prior to the jury panel being sworn. On May 23, 2019, the trial court conducted a hearing on the motion for new trial, which was later denied by order on June 6, 2019.

The Petitioner appealed his convictions, which were affirmed by this court. State v. Gregg Merrilees, No. M2019-01194-CCA-R3-CD, 2020 WL 755054, at *5-6 (Tenn. Crim. App. Feb. 14, 2020), perm. app. denied (Tenn. June 3, 2020). The issues presented on direct appeal included whether the trial court erred by amending the indictment without also granting the Petitioner a continuance, by denying the Petitioner’s motion to continue so he could employ private counsel, by issuing preliminary jury instructions prior to the jury panel being sworn, and by determining that there was no cumulative error. The Petitioner then filed a pro se petition for post-conviction relief on September 17, 2020, and

on November 24, 2020, the Petitioner filed an amended petition for post-conviction relief. On October 21, 2020, post-conviction counsel was appointed to represent the Petitioner, and on May 20, 2021, post-conviction counsel filed an amended petition preserving the following issues: a stand-alone claim challenging the sufficiency of the evidence based on insufficient accomplice corroboration and ineffective assistance of trial counsel based on (1) failure to object “to the accusation based on the victim’s ‘gut’”; (2) failure “to object to or move for a new trial, or appeal the unconstitutional show-up”; (3) failure “to request a jury instruction about the corroboration of accomplices, or to move for a new trial, or appeal the deficient instructions on this issue”; and (4) failure “to move for acquittal, or appeal, the insufficiency of the evidence in light of the uncorroborated accomplice accusation.”¹ On August 11, 2021, the State filed an answer to the petition denying all claims. On September 15, 2021, the State filed an amended answer detailing their position.

The post-conviction evidentiary hearing was held on September 21, 2021, and trial counsel was the sole witness. Trial counsel testified that prior to trial he was aware that the victim was unable to identify the Petitioner. Trial counsel confirmed that the hotel clerk “had mentioned” that the man that had gone into the bathroom on the night of the offenses had a tattoo on his face. Trial counsel agreed that the Petitioner had “multiple” tattoos on his face. Trial counsel said he argued the discrepancy at trial during cross-examination and in closing arguments. Trial counsel testified that he raised the issue that the victim had been unable to identify the bathroom-goer prior to trial. Trial counsel did not have a “plan” for when the State asked the hotel clerk to identify the person he saw go into the bathroom on the night of the offenses at trial. Trial counsel was generally aware of the law concerning “show-up” identifications, but he did not associate it with in-court identifications. Trial counsel did not believe the in-court identification of the Petitioner was a legal basis for the Petitioner’s conviction to be overturned, and he did not include it as an issue in the motion for new trial. Trial counsel recalled the testimony from the victim concerning his “gut” feeling that the bathroom-goer was involved in the offenses. Trial counsel did not object to that testimony because, initially, there was no ground upon which to object, and “then by the time that was testified to, it had already come out.” Trial counsel explained that he did not object after the testimony for strategic reasons, or because he did not want to highlight the issue more than it already was with a curative instruction.

Trial counsel was aware that the accomplice was going to testify at the Petitioner’s trial, and he acknowledged that he did not have a specific plan regarding the need for the jury to be instructed on accomplice corroboration. Asked if he had a plan for why the issue was not included in the motion for new trial, trial counsel explained that he thought it was sufficiently corroborated based on the co-defendant’s testimony, the testimony of the victim, and the surveillance videos. Trial counsel agreed that he moved for a judgment of

¹ There were other issues in his petition for post-conviction relief which are not included in this appeal. Accordingly, we deem them to be waived. We have also re-ordered the Petitioner’s issues for clarity.

acquittal, as was his normal practice. He could not recall why he did not “press” the corroboration argument at that stage of the trial.

Trial counsel also served as appellate counsel for the Petitioner. Trial counsel did not raise sufficiency of the evidence on direct appeal because he did not believe it was a “winnable argument[.]” While trial counsel was certain he considered raising the issue of the lack of accomplice corroboration, he could not recall why he chose not to include it as an issue on appeal. The appellate brief, filed by trial counsel in the direct appeal, was exhibited to the hearing. Trial counsel acknowledged that he did not file a reply brief, and he did not request oral argument.

On cross-examination, trial counsel agreed that his theory of defense was to discredit the co-defendant or to show that the co-defendant had an interest in the outcome of the trial by gaining some leniency from the State. Trial counsel also noted that he focused on the “misidentification” by the victim. Trial counsel believed his strongest argument was to challenge the identification and not accomplice corroboration. Trial counsel asserted, even if everything the State had put forth at trial were true, he emphasized the fact that the Petitioner was not involved “in the actual tying up of the victim” at trial. Based on this strategy, trial counsel obtained an acquittal on the most serious charge of especially aggravated kidnapping. He also agreed that the Petitioner received a sentence less than what was offered in plea negotiations by the State.

By order on October 13, 2021, the trial court determined that the Petitioner failed to establish by clear and convincing evidence that he received ineffective assistance of counsel. The Petitioner filed a timely notice of appeal, and this case is now properly before this court for review.

ANALYSIS

I. Sufficiency of the Evidence. In this post-conviction action, the Petitioner raises a stand-alone claim challenging the legal sufficiency of the evidence based on the lack of accomplice corroboration at trial. The Petitioner argues the only non-accomplice testimony at trial was the victim’s “gut” instinct that the Petitioner was involved and the surveillance videos which do not identify the Petitioner. In response, the State asserts this issue is previously determined, waived, or both. State v. West, 19 S.W.3d 753, 754 (Tenn. 2000) (holding that “the language of the [Post-Conviction] Act controls the scope of issues on review and expressly prohibits post-conviction consideration of issues deemed ‘previously determined’ or ‘waived’”). Regardless, the State insists the claim has no merit because the evidence was sufficient.

First, the State argues this issue is previously determined because this court did not explicitly disclaim our duty under Tenn. R. App. P. 13(e)² to review the sufficiency of the evidence issue on direct appeal. See John Wayne Slate v. State, No. 03C01-9201-CR-00014, 1994 WL 149170, at *10-*11 (Tenn. Crim. App. Apr. 27, 1994) (finding that where this court had explicitly declined to consider sufficiency on direct appeal, it could be considered on post-conviction), perm. app. denied concurring in results only, (Tenn. 1994). Alternatively, the State argues this issue is waived. See Tenn. Code Ann. § 40-30-106(g) (“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[.]”). The Petitioner counters that unlike the petitioner in State v. West, in which the Tennessee Supreme Court had expressly found on automatic direct review that the aggravating factors were sufficient for a sentence of death, the Petitioner never appealed the sufficiency of the evidence, and this court never reviewed the issue. The Petitioner also insists that Rule 13 merely lists the standard of review for sufficiency of the evidence and does not require automatic review of all convictions for sufficiency of the evidence even when not raised. Finally, the Petitioner argues the State has waived its defense of waiver for failure to raise it at the post-conviction hearing because “waiver does not apply to claims that were unraised because of constitutional error.” See Tenn. Code Ann. § 40-30-106(g)(2). The Petitioner reasons, “[i]f trial counsel gave ineffective assistance, then constitutional error prevented this claim from being raised and waiver does not apply.”

As an initial matter, while the State’s citation to John Wayne Slate is not dispositive, we question the viability of that case. The ruling in John Wayne Slate was based upon Jackson v. Virginia, 443 U.S. 307 (1979), in which the Supreme Court rejected the “no evidence” doctrine of Thompson v. Louisville, 362 U.S. 199 (1960), applied by federal habeas courts in assessing a state prisoner’s challenge to the sufficiency of the evidence in favor of the constitutional rule of In re Winship, 397 U.S. 358 (1970). The high court held that *federal* habeas corpus relief is available “if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. at 324. In denying the Rule 11 permission to appeal in John Wayne Slate, the Tennessee Supreme Court concurred in results only, Ralph Dean Purkey v. Bowlen, No. 03C01-9808-CC-00268, 1999 WL 499746, at *2-3 (Tenn. Crim. App. July 16, 1999), and we have found no other case by this court to have cited or relied upon John Wayne Slate for the proposition that a sufficiency of the evidence claim may be raised for the first time on post-conviction review as a federal due process claim. See Irick v. Bell, No. 3:98-CV-666, 2001 WL 37115951, at *28 (E.D. Tenn. Mar. 30, 2001) (federal habeas action acknowledging that under Tennessee law a defendant appealing a criminal conviction in a post-conviction proceeding may not

² Rule 13(e) of the Tennessee Rules of Appellate Procedure provides: “Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt.”

question the sufficiency of the evidence used at trial and rejecting argument that failure of the Tennessee Post-Conviction Act to provide a remedy for all federal constitutional issues regarding the sufficiency of evidence constitutes the absence of available state corrective process because the test for procedural default is whether a petitioner has had a *reasonable opportunity* to have an issue heard and determined by the state courts, not whether the post-conviction statute provides a remedy for all constitutional issues regarding sufficiency of the evidence).

In any case, under the Post-Conviction Procedure Act, an issue is considered waived, and no longer grounds for relief, “if the petitioner personally or through an attorney fail[s] to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented[,]” with two limited exceptions not applicable here. Tenn. Code. Ann. § 40-30-106(g) (2018); Holland v. State, 610 S.W.3d 450, 457-58 (Tenn. 2020) (internal citations omitted). In addition, the Act provides “[a] ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.” Tenn. Code Ann. § 40-30-106 (h); see Cole v. State, 798 S.W.2d 261, 264 n.12 (Tenn. Crim. App. 1990) (“It has long been established that issues concerning the sufficiency of the evidence are not cognizable in post-conviction proceedings.”) (citing Gant v. State, 507 S.W.2d 133, 137 (Tenn. Crim. App. 1973); Ray v. State, 489 S.W.2d 849, 851 (Tenn. Crim. App. 1972); Parton v. State, 483 S.W.2d 753, 755 (Tenn. Crim. App. 1972); Brotherton v. State, 477 S.W.2d 522, 524 (Tenn. Crim. App. 1971)). The language of the Act controls the scope of issues on review and “expressly prohibits post-conviction consideration of issues deemed ‘previously determined’ or ‘waived.’” Holland, 610 S.W.3d at 457 (citing West, 19 S.W.3d at 754, 756)). These waiver restrictions are necessary to avoid “an open- and possibly never-ending approach to post-conviction review.” Id.

Accordingly, because the Petitioner had the opportunity to challenge the legal sufficiency of the evidence based on the lack of accomplice corroboration on direct appeal but failed to do so, he is procedurally barred from raising this claim on post-conviction review. House v. State, 911 S.W.2d 705, 714 (Tenn. 1995) (“Waiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney.”); Long v. State, 510 S.W.2d 83, 87 (Tenn. Crim. App. 1974) (“actions or non-action of retained counsel are imputed to the defendant and not to the State, and that no ‘State action,’ which is necessary to invoke the due process clause of the Fourteenth Amendment, is involved”); see Dennis Allen Rayfield v. State, No. M2020-00546-CCA-R3-PC, 2021 WL 4205714, at *6 (Tenn. Crim. App. Sept. 16, 2021) (the petitioner waived claims for post-conviction relief by failing to raise them on direct appeal) (citing House, 911 S.W.2d at 714), no perm. app. filed. This conclusion does not preclude us from addressing the Petitioner’s sufficiency of the evidence claims as they relate to the alleged deficiencies of trial counsel.

II. Ineffective Assistance of Counsel. The Petitioner argues that he was denied his Sixth Amendment right to counsel on the following four grounds: (1) trial counsel's failure to challenge the sufficiency of the evidence based on the lack of accomplice corroboration in a motion for judgment of acquittal or on direct appeal; (2) trial counsel's failure to request a jury instruction on accomplice corroboration; (3) trial counsel's failure to object based on speculation to the hotel clerk-victim's accusation that the Petitioner was involved in the offenses based on the hotel clerk-victim's "gut"; and (4) trial counsel's failure to object to "the unconstitutional show-up" identification of the Petitioner by the hotel clerk-victim at trial. We will address each issue in turn.

In evaluating these claims, we apply the following well-established legal framework. Post-conviction relief is only warranted when a petitioner establishes that his or her conviction is void or voidable because of an abridgement of a constitutional right. Tenn. Code Ann. § 40-30-103 (2006). The Tennessee Supreme Court has held:

A post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. When reviewing factual issues, the appellate court will not re-weigh or re-evaluate the evidence; moreover, factual questions involving the credibility of witnesses or the weight of their testimony are matters for the trial court to resolve. The appellate court's review of a legal issue, or of a mixed question of law or fact such as a claim of ineffective assistance of counsel, is de novo with no presumption of correctness.

Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006) (internal quotation and citations omitted).

"The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence." Id. (citing Tenn. Code Ann. § 40-30-110(f); Wiley v. State, 183 S.W.3d 317, 325 (Tenn. 2006)). Evidence is considered clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from it. 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)). Vaughn further repeated well-settled principles applicable to claims of ineffective assistance of counsel:

The right of a person accused of a crime to representation by counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. Both the United States Supreme Court and this Court have recognized that this right to representation encompasses the right to reasonably effective assistance, that is, within the range of competence demanded of attorneys in criminal cases.

Vaughn, 202 S.W.3d at 116 (internal quotations and citations omitted).

In order to prevail on an ineffective assistance of counsel claim, the petitioner must establish that (1) his lawyer's performance was deficient and (2) the deficient performance prejudiced the defense. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn.1975)). “[A] failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, 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, 370 (Tenn. 1996) (citing Strickland, 466 U.S. at 697).

A petitioner successfully demonstrates deficient performance when the clear and convincing evidence proves that his attorney's conduct fell below “an objective standard of reasonableness under prevailing professional norms.” Id. at 369 (citing Strickland, 466 U.S. at 688; Baxter, 523 S.W.2d at 936). Prejudice arising therefrom is demonstrated once the petitioner establishes “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 370 (quoting Strickland, 466 U.S. at 694).

We note that “[i]n evaluating an attorney's performance, a reviewing court must be highly deferential and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” State v. Burns, 6 S.W.3d 453, 462 (Tenn. 1999) (citing Strickland, 466 U.S. at 689). Moreover, “[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” Strickland, 466 U.S. at 688-89. However, we note that this “deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.” House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (quoting Goad, 938 S.W.2d at 369).

1. The Petitioner argues trial counsel was ineffective in failing to move for judgment of acquittal and present as an issue on direct appeal the insufficiency of evidence based on the lack of accomplice corroboration. In response, the State argues the post-conviction court properly determined that the Petitioner failed to demonstrate deficiency or prejudice. In addition, the State submits the post-conviction court properly rejected this claim because the evidence presented at trial was sufficient to support the Petitioner's convictions and that the accomplice's testimony was sufficiently corroborated based on the testimony of the hotel clerk-victim and the hotel surveillance video.

In review of this claim, we are mindful that when the trial court is presented with a motion for judgment of acquittal, the only concern is the legal sufficiency, as opposed to

the weight, of the evidence. State v. Blanton, 926 S.W.2d 953, 957 (Tenn. Crim. App. 1996); Tenn. R. Crim. P. 29 (“On defendant’s motion or its own initiative, the court shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, presentment, or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.”). When a motion for a judgment of acquittal is made at the close of all the evidence, the trial court must favor the opponent of the motion with the strongest legitimate view of the evidence, including all reasonable inferences, and discard any countervailing evidence. State v. Collier, 411 S.W.3d 886, 893-94 (Tenn. 2013) (internal citations and quotations omitted). “The standard by which the trial court determines a motion for a judgment of acquittal is, in essence, the same standard that applies on appeal in determining the sufficiency of the evidence after a conviction.” Id. That is, “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id. at 893-94 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Because the evidence during trial established that Hickson was an accomplice in the instant offenses, the State was required to introduce corroborative evidence of his testimony. Evidence is insufficient to sustain a conviction if it is solely based upon the uncorroborated testimony of one or more accomplices. State v. Little, 402 S.W.3d 202, 211 (Tenn. 2013) (citing Sherrill v. State, 321 S.W.2d 811, 814-15 (1959); Prince v. State, 529 S.W.2d 729, 732 (Tenn. Crim. App.1975)). ““Only slight circumstances are required to corroborate an accomplice’s testimony.”” State v. Fusco, 404 S.W.3d 504, 524 (Tenn. Crim. App. 2012) (quoting State v. Griffis, 964 S.W.2d 577, 589 (Tenn. Crim. App. 1997)). However, evidence that merely “casts a suspicion” on the defendant, shows that the defendant “had an opportunity to commit the crime in question[,]” or demonstrates that the defendant was “present at the situs of the crime” is insufficient to corroborate an accomplice’s testimony. Griffis, 964 S.W.2d at 589; see State v. Adkisson, 899 S.W.2d 626, 644 (Tenn. Crim. App. 1994); State v. Boxley, 76 S.W.3d 381, 387 (Tenn. Crim. App. 2001). Instead, the rule is

[t]here must be some fact testified to, entirely independent of the accomplice’s testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant’s identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged.

State v. Bough, 152 S.W.3d 453, 464 (Tenn. 2004). In other words, “the [corroborative] evidence must confirm in some manner that (a) a crime has been committed and (b) the accused committed the crime.” Adkisson, 899 S.W.2d at 644.

Following the close of proof at trial, the record shows that trial counsel moved for judgment of acquittal based generally on “insufficient” evidence. While his argument was not concisely framed as challenging the sufficiency of the evidence based on the lack of accomplice corroboration, trial counsel did argue “the only thing that places [the Petitioner] there . . . is the co-defendant’s testimony. He’s certainly got reason to lie and save himself.” Trial counsel said although the victim identified the Petitioner in court at trial, the victim was unable to do so on the night of the offenses or in the photo lineup. Finally, trial counsel argued that while there was clearly surveillance video of the other two co-defendants, there was no video, DNA, or fingerprint evidence linking the Petitioner to the offenses. At the post-conviction hearing, trial counsel said that he did not challenge the lack of accomplice corroboration in the motion for new trial because he thought it was sufficiently corroborated based on the co-defendant’s testimony, the testimony of the victim, and the surveillance videos. Trial counsel also did not challenge the sufficiency of the evidence based on a lack of accomplice corroboration on direct appeal because he did not believe it was a “winnable” issue. The post-conviction court determined that trial counsel made numerous attempts to challenge the accomplice’s credibility during cross-examination and in closing arguments and that the petitioner had failed to meet his burden.

Upon our review, we agree with the post-conviction court and conclude that trial counsel was deficient in failing to argue expressly the lack of accomplice corroboration in this case. Accomplice corroboration was at the core of this case, and trial counsel was duty bound to so argue at the motion for judgment of acquittal, the motion for new trial, and on direct appeal. We must now determine whether the Petitioner was prejudiced because of trial counsel’s failure to argue the lack of accomplice corroboration by a review of the evidence.

We begin our analysis by noting that there is no dispute that a robbery occurred in this case; accordingly, we will focus primarily on the evidence that gives rise to an inference of the Petitioner’s identity as one of the perpetrators. State v. Bough, 152 S.W.3d at 464. The record shows that the victim arrived at work around 11:30 p.m. on the night of the offenses, and as the night auditor for the hotel, the victim was alone in his area. Sometime later, a man wearing a “red or burgundy shirt” and a fedora-style hat, whom the victim later identified at trial as the Petitioner, entered the hotel and asked to use the bathroom shortly before the robbery occurred. The victim said that the man who went to the bathroom had a tattoo under his eye, and that the route to the bathroom enabled the man to clearly observe the restaurant area/bar register, which was dark and empty because it was closed for the night. At the time, the victim said the man who came into the hotel and asked to use the bathroom “seemed a little bit strange,” and he exhibited behavior that was a “red flag.” The victim “looked . . . to get a good picture of [the Petitioner], because, you

know, why is an outsider coming in around this time to use the bathroom[?] You know, it kind of gave [him] a little suspicion.”

The victim testified that it was difficult for surveillance video to show someone coming in and going to the bathroom because it would not be “clear and accurate.” However, the victim was able to get a good look at the bathroom-goer from where the victim was positioned in the hotel. The victim said the two other employees left the hotel, upon their belief that the bathroom-goer had left. The victim agreed that he did not “physically see” the bathroom-goer leave, and he too only “assumed” the man had left prior to the robbery. Surveillance video of the robbery showed that a third person, who was dressed differently than the two accomplices, took the cash register from the restaurant area/bar. Upon calling the police, the victim immediately reported that he believed the man who went to the restroom was the lookout for the other two accomplices involved in the robbery.

At trial, the victim explained to the jury that he did not identify the Petitioner as the bathroom-goer in the photo line-up shown less than a month after the robbery because the Petitioner’s photo in the photo line-up did not show the Petitioner with face tattoos. The victim said he told the police that the bathroom-goer “had tattoos all over his face” and that some of them were “a little distinctive at that time.” When the victim was pressed on cross-examination as to his police statement describing the bathroom-goer as having only one tattoo under his eye, the victim insisted he told the police the man had tattoos all over his face. The victim said, “[The Petitioner] was the lookout. He was the lookout. And I knew it. It was my gut telling me. I knew certainly.”

With respect to the photo line-up shown to the victim, Detective Anderson testified that he could not find other individuals with face tattoos to put with the Petitioner’s photo in the photo line-up because at the time of incident, face tattoos were not that common. In fairness to the Petitioner, he had to use the Petitioner’s driver’s license photo from 2013, which was before the Petitioner had gotten his face tattoos. Detective Anderson said he talked to the victim “[f]or quite a while” the night of the robbery, and the victim told him that the bathroom-goer had “at least” one tattoo. Finally, Detective Anderson agreed that his report stated that the victim said the bathroom-goer had one tattoo under one of his eyes that was “possibly a cross[.]”

Moreover, while the circumstances as to how Detective Anderson developed the Petitioner as a suspect in the robbery were unknown, Detective Anderson stated that he had already identified the Petitioner as a potential suspect in the robbery before he interviewed accomplice Hickerson. Asked if he told accomplice Hickerson that he suspected the Petitioner was involved in the robbery prior to accomplice Hickerson’s interview, Detective Anderson said, “I don’t believe that I did.” Detective Anderson said that surveillance video showed someone walking from the restroom and exiting through the front doors of hotel; however, he could not identify this person as the Petitioner. Detective

Anderson explained that he would be unable to identify anyone based on the route taken by the person in the surveillance video.

Taken in the light most favorable to the State, the above facts are sufficient for a reasonable juror to infer from the evidence the Petitioner's identity as the third individual involved in the robbery. At the time of the offenses, there was no one in the restaurant/bar area except the victim and the Petitioner. The victim identified the Petitioner as the bathroom-goer after the restaurant/bar had closed shortly before the robbery and explained that the only reason he did not identify the Petitioner from the photo line-up was because it did not include a photograph of the Petitioner with his facial tattoos. Detective Anderson, in an attempt not to be unduly suggestive, placed a photograph in the photo line-up showing the Petitioner before the Petitioner had tattoos. The victim identified the Petitioner as the late-night bathroom-goer at trial, and the jury accredited the testimony of the victim as was their prerogative. Moreover, the jury was also aware of the Petitioner's facial appearance at trial. Because "only slight circumstances are required to corroborate an accomplice's testimony," Fusco, 404 S.W.3d at 524, we conclude that there was sufficient evidence to corroborate the testimony of the accomplice upon which to infer the Petitioner's identity as one of the perpetrators in this case.

Accordingly, because the evidence was legally sufficient, the Petitioner has failed to establish that the outcome of his case would have been different had trial counsel moved for a judgment of acquittal based expressly on the lack of accomplice corroboration. For the same reasons, the Petitioner is not entitled to relief based on trial counsel's failure to include this issue in the motion for new trial and on direct appeal.

2. The Petitioner's next claim is entitled "[a]bsence of an accomplice corroboration instruction, and failure to object to Prosecutor's argument about accomplices being presumed truthful[.]" He argues that trial counsel was deficient in not requesting an accomplice corroboration jury instruction and in "letting the prosecutor tell the jury, unopposed and unobjected to, that an accomplice is presumed truthful."³ In short, the Petitioner argues he received ineffective assistance of counsel based on trial counsel's failure to request a jury instruction on accomplice corroboration. In response, the State contends the post-conviction court properly determined that trial counsel was deficient in not requesting the jury to be instructed on accomplice corroboration. However, because the accomplice's testimony was sufficiently corroborated, the State submits the Petitioner is unable to establish prejudice. Accordingly, the State contends the post-conviction court properly denied relief.

³ There are no further citations, authority, or argument pertaining to the Petitioner's assertion that the prosecutor told the jury that the accomplice was presumed to be truthful. Accordingly, our resolution of this issue will focus solely on the absence of the jury instruction on accomplice corroboration.

The trial court has the duty to give a comprehensive instruction of the law as applicable to the facts in each case. State v. Fayne, 451 S.W.3d 362, 373 (Tenn. 2014) (citing State v. Thompson, 519 S.W.2d 789, 792 (Tenn. 1975)). When the trial court fails to instruct the jury on the issue of accomplice testimony, it is the defendant's responsibility to request such an instruction, and the defendant's failure to do so results in a waiver of the issue on appeal:

[O]ur supreme court has held that an instruction on the rule requiring corroboration of an accomplice's testimony is not fundamental. Upon the trial court's failure to instruct the jury regarding accomplice testimony and the requirement of corroboration, it becomes the obligation of the defendant to make a special request for the instruction. In the absence of a special request, the trial court does not err by failing to instruct the jury about accomplice testimony even if the circumstances of the case warrant such an instruction.

State v. Anderson, 985 S.W.2d 9, 17-18 (Tenn. Crim. App. 1997) (internal citations omitted); see State v. Bough, 152 S.W.3d at 464-65.

The record supports the determination of the post-conviction court, concluding that the accomplice corroboration instruction should have been given to the jury in this case. However, based on the evidence corroborating the accomplice testimony as outlined above, the Petitioner has failed to establish that, had trial counsel requested a corroboration instruction, the outcome of the trial would have been different. Accordingly, the Petitioner is not entitled to relief.

3. The Petitioner argues trial counsel was ineffective in failing to object to the victim's testimony that the Petitioner was a "criminal participant . . . based solely on his gut." The Petitioner argues that trial counsel should have objected to this testimony based on speculation. Regardless of the admissibility of the testimony, the State counters that the decision of trial counsel not to object was strategic and not deficient because trial counsel testified that he did not want to emphasize the brief testimony to the jury with an objection and a curative instruction.

A witness's testimony "may not be based on mere speculation," but Rule 602 "does not require absolute certainty." State v. Land, 34 S.W.3d 516, 529 (Tenn. Crim. App. 2000). Rule 602 of the Tennessee Rules of Evidence provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The "[e]vidence to prove personal knowledge may, but need not, consist of the witness's own testimony." Tenn. R. Evid. 602. "The personal knowledge rule of Rule 602 provides that . . . a witness is not competent to testify about facts unless the witness personally perceived those facts by use of the

witness's five senses." Neil P. Cohen, et al., Tennessee Law of Evidence § 602.1 at 2 & 3.

The trial court must determine "whether a witness had a sufficient opportunity to perceive the subject matter about which he or she is testifying." Land, 34 S.W.3d at 529. A witness's personal knowledge "may be inferred from the statements themselves and the surrounding facts and circumstances." Kendrick v. State, 454 S.W.3d 450, 479 (Tenn. 2015). "[T]he party offering the testimony must introduce evidence sufficient to support a jury finding that the witness had personal knowledge of the matter." Id. Lay witness testimony "in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of the fact in issue." Tenn. R. Evid. 701. A witness may not testify about the identity of an offender if there was no showing that the witness had personal knowledge of the offender's identity. Land, 34 S.W.3d at 530.

At trial, the victim described the bathroom-goer who came into the hotel that night as "a little bit strange. Not too strange. Just to give a red flag." The bathroom-goer wore "like a red or burgundy shirt, had a hat, kind of like a fedora on." The victim also later testified when the man asked to go to the bathroom, "we all got a good look at him . . . , [b]ut I kind of looked, too, to get a good picture of him, because, you know, why is an outsider coming in around this time to use the bathroom[?] You know, it kind of gave me a little suspicion." The victim eventually identified the Petitioner at trial as the bathroom-goer from the night of the offenses. When the victim was asked if he mentioned the Petitioner to the police following the robbery, the victim replied, "I did off the top. I mean, he was the lookout. He was the lookout. And I knew it. It was my gut telling me. I knew certainly." The post-conviction court analyzed the claim under Rule 701 and determined that the testimony from the victim was admissible because it "amounts to how he felt about the situation, and a witness can certainly provide testimony about their feelings."

Here, it is significant that the State, as the questioner, did not illicit the testimony from the victim who volunteered his opinion that the Petitioner was "the lookout" for the robbery. Moreover, while we agree that the victim had no personal knowledge of the Petitioner's role as the lookout, taken in context, we conclude that the victim's comments were not impermissible speculation. Based on the late-night hour, the bathroom-goer's suspicious behavior, and the fact that the bathroom-goer entered the hotel shortly before the robbery occurred, it was logical for the victim to infer that the Petitioner was the lookout for the other two robbery perpetrators. Given these facts, the victim testified based on his rationally based perceptions. Alternatively, even if the statement was improper, the record shows trial counsel made a strategic decision not to object to this testimony in an effort not to highlight it for the jury. Accordingly, we conclude that the Petitioner has failed to establish that the outcome of his case would have been different based on this issue.

4. In the Petitioner's final claim, he cites Stoval v. Denno, 388 U.S. 293 (1967), arguing a due process violation of law based on trial counsel's failure to object to the victim's first time, in-court identification of the Petitioner as an "illegal show-up." The State responds that when a petitioner claims that trial counsel was ineffective in failing to seek the suppression of evidence, the petitioner must show that there was a reasonable probability that the proceedings would have concluded differently. Phillips v. State, 647 S.W.3d 389, 402 (Tenn. 2022). Because the Petitioner did not put forth any evidence to demonstrate that a motion to suppress would have been granted, the State submits the Petitioner's claim must fail. In his reply brief, the Petitioner asserts that it was unnecessary to put forth evidence in support of this issue at the post-conviction hearing urging this court to rely on the trial testimony of the victim.

Significantly, the Petitioner does not claim that trial counsel was ineffective in failing to move to suppress the victim's inability to identify the Petitioner from the pretrial identification procedures employed by law enforcement in this case. State v. Martin, 505 S.W.3d 492, 500 (Tenn. 2016) ("Under the Due Process Clause of the Fifth Amendment to the United States Constitution, a witness's pretrial identification of the defendant by photograph will be suppressed 'only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'") (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)); Neil v. Biggers, 409 U.S. 188, 198-99 (1972) (establishing two-part analysis which trial courts must apply to determine the validity of a pre-trial identification). Nor does the Petitioner attack any alleged impropriety regarding any pre-trial identification procedures as unduly suggestive. Rather, the Petitioner claims trial counsel was ineffective in failing to object to the victim's first time, in-court identification of the Petitioner because the victim had previously "exonerated" the Petitioner given his inability to identify him in the first photo line-up. Foster v. California, 394 U.S. 440 (1969) (three-man in-person line-up followed by five-man in-person line up ten days later in which the defendant was the only person who participated in both held to be denial of due process). The Petitioner then relies on a series of state and federal cases from other jurisdictions that have adopted certain procedures for courts to follow when deciding whether to admit first-time, in-court identifications. See e.g., United States v. Hill, 967 F. 2d 226, 232 (6th Cir. 1992) (holding that the Biggers analysis applies to in-court identifications based on the same due process concerns that the analysis applies to impermissibly suggestive pre-trial identifications); United States v. Morgan, 248 F. Supp.3d 208 (Dist. D.C. 2017) (citing Second, Fourth, Fifth, Sixth, and Seventh Circuits as adopting same approach); State v. Folkerts, 703 N.W.2d 761 (Iowa 2005); Com. v. Crayton, 470 Mass. 228 (2014) (adopting a per se exclusion to all in-court show-ups without good cause).

Like the post-conviction court's analysis, our research has not revealed a Tennessee case having squarely addressed the administration of first-time, in-court identifications. But see State v. Martin, 505 S.W.3d at 500-01 (noting that "[t]rial judges are not required 'to prescreen eyewitness evidence for reliability any time an identification is made under

suggestive circumstances” and that “the due process check for reliability . . . comes into play only after the defendant establishes improper police conduct”); State v. Reid, 91 S.W.3d 247, 273 (Tenn. 2002) (concluding that the due process rights of criminal defendants are adequately protected by existing rules and procedures and absent evidence of state involvement in witness identifications of the defendant, constitutional due process is not implicated and Biggers analysis not applicable). Moreover, the closest the United States Supreme Court has come to addressing this issue was in Perry v. New Hampshire, cited extensively in Martin, which held the safeguards generally available in criminal trials defeat due process objections to the admissibility of eyewitness identifications untainted by suggestive, police-arranged procedures. 565 U.S. 228, 232-33 (2012). Perry further acknowledged that “[m]ost eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do.” Id. at 244. However, “[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.” Id. at 245. In declining to “enlarge the domain of due process,” the Court emphasized that “the jury, not the judge, traditionally determines the reliability of evidence.” Id. Finally, the Court explained the Due Process Clause was employed to deter police misconduct, not supplant traditional trial safeguards.

The Petitioner relies on the approach of other jurisdictions, upon which he assumes the victim’s in-court identification was improper. In support, he argues there is “little authority . . . for broadly allowing trial judges to carry out the same suggestive show-ups that are prohibited for the police.” However, having set forth the above law, trial counsel cannot be said to have engaged in deficient performance for failing to employ an approach that simply does not exist in Tennessee law. Additionally, in our view, because the victim’s first time, in court identification did not involve any state action, a Biggers analysis to determine the likelihood of misidentification is unnecessary. See State v. Cannon, 642 S.W.3d 401, 448 (Tenn. Crim. App. 2021), perm. app. denied (Tenn. Jan. 14, 2022) (affirming denial of pretrial motion to suppress in-court identification based on absence of State action where witness failed to identify defendant from two police photo line-ups but later identified defendant from television explaining defendant’s appearance was different in the prior photos). The record shows the trial court applied the rules of evidence, trial counsel effectively cross-examined the victim, focusing upon the weaknesses in his identification, and the trial court properly instructed the jury as to witness credibility and testimony. Accordingly, the record supports the determination of the post-conviction court, concluding that the Petitioner has failed to establish deficient performance or prejudice as to this issue, and he is not entitled to relief.

CONCLUSION

Based on the aforementioned reasoning and authority, we affirm the judgment of the post-conviction court.

CAMILLE R. MCMULLEN, JUDGE