IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
February 14, 2023 Session

JOSE LEMANUEL HALL, JR. v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2011-B-1736 Angelita Blackshear Dalton, Judge

No. M2021-01555-CCA-R3-PC

Following his conviction for first degree murder, the Petitioner, Jose Lemanuel Hall, filed a petition for post-conviction relief alleging that he was denied the effective assistance of counsel. The post-conviction court denied the petition after an evidentiary hearing. On appeal, the Petitioner argues that trial counsel failed to meet with him adequately and failed to object to the State's opening statement. He also argues that the requirement to show actual prejudice in post-conviction proceedings is overly burdensome and conflicts with constitutional protections. We respectfully affirm the judgment of the post-conviction court.

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

TOM GREENHOLTZ, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and J. ROSS DYER, JJ., joined.

Kyle D. Parks, Nashville, Tennessee, for the appellant, Jose Lemanuel Hall Jr.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and Janice Norman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

A. TRIAL PROCEEDINGS

Following a jury trial, the Petitioner, Jose Lemanuel Hall, was found guilty of the first degree murder of Kendrya Davis, and he was sentenced to life imprisonment. *State v.*

Hall, No. M2015-00018-CCA-R3-CD, 2016 WL 1222755, at *1 (Tenn. Crim. App. Mar. 29, 2016). On the Petitioner's direct appeal, this Court summarized the proof introduced at his trial in our analysis of the sufficiency of the evidence for conviction:

> Giving the State the strongest legitimate view of the evidence, the evidence shows that the victim was [the Petitioner's] ex-girlfriend and that he was under the impression that she was pregnant with his child. On March 28, 2011, the victim called [the Petitioner] numerous times throughout the day while she was at school. During the afternoon, the victim and [the Petitioner's] girlfriend got into argument at the downtown bus station, during which [the Petitioner] hit the victim.
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> Later that evening, after exchanging numerous text messages, [the Petitioner] and the victim met at the bus station and took the number 22 bus to the corner of Delta and Garfield near the crime scene. [The Petitioner] then led the victim to an abandoned house on Cass Street where [the Petitioner's] girlfriend was waiting. Inside the house, the victim was strangled, stabbed four times, and shot four times with a .22 caliber handgun.
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> Later that night, [the Petitioner] returned to his grandmother's home and asked her how to remove blood from his clothing. The next day, Vincent Lindsey saw [the Petitioner] in possession of a small caliber revolver that appeared to be a .22 caliber, the caliber of the murder weapon.
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> At the Rivergate Mall, [the Petitioner] confessed to Mr. Lindsey that he killed the victim in an abandoned house in the northern part of Nashville by shooting and stabbing her to death. Not long after the victim was reported missing, [the Petitioner's] father found five .22 caliber shell casings and three live rounds in [the Petitioner's] backpack.
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> After surrendering himself to police and while in custody, [the Petitioner] made numerous phone calls and sent several letters to fellow gang members, including his girlfriend, during which he showed a striking consciousness of guilt. He instructed his girlfriend to destroy some of his clothing. He told her to watch the crime scene carefully while it was investigated by law enforcement officials and appeared to have knowledge of details of the crime before they would have been made known to the public.
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> [The Petitioner] displayed animosity toward witnesses in this case, specifically his father and Mr. Lindsey, and had multiple conversations and correspondence with his gang about ensuring that Mr. Lindsey would not testify in court or cooperate with investigators. He also instructed his

girlfriend not to cooperate with investigators and repeatedly informed her not to talk about the victim over the phone or in her letters to [the Petitioner].

During several phone calls, [the Petitioner] and his girlfriend coordinated their story about their connection to the crime scene in anticipation of additional questioning from investigators. Additionally, [the Petitioner] confessed in extensive detail to killing the victim to two different fellow inmates while in jail.

Id. at *12 (paragraph spacing added). This Court affirmed the conviction on direct appeal, and the supreme court denied the Petitioner's petition for review on August 17, 2016. *See Hall*, 2016 WL 1222755, at *1.

B. POST-CONVICTION PROCEEDINGS

On October 26, 2016, the Petitioner filed a timely petition for post-conviction relief. After the post-conviction court appointed counsel to represent the Petitioner, the Petitioner filed an amended petition alleging that his trial counsel failed to provide effective assistance of counsel in two ways: (1) by failing to adequately meet with Petitioner to discuss trial strategy or possible witnesses; and (2) by failing to object to the State's opening statement.[1]

1. Trial Counsel's Testimony

The post-conviction court held a hearing on September 7, 2021, and the Petitioner called trial counsel to testify. Trial counsel testified that he had been a licensed attorney since 1975 and that the practice had been exclusively criminal defense work for the last twenty-five or thirty years. He confirmed that he had participated in "40 or 50" jury trials.

Trial counsel testified that he represented the Petitioner in two separate murder trials over the course of four or five years. With respect to this case, which was the second of the two, trial counsel was assisted by a second attorney.

[1] The original post-conviction petition identified additional issues as grounds for relief. However, the Petitioner did not present evidence on these issues or otherwise argue them before the post-conviction court. The Petitioner also does not raise these additional issues in this appeal. As such, our opinion here focuses only on the issues raised for decision in this Court. *See State v. Bristol*, 654 S.W.3d 917, 923 (Tenn. 2022) ("[A]n appellate court's authority 'generally will extend only to those issues presented for review.'" (quoting Tenn. R. App. P. 13(b))).

a. Meetings and Trial Strategy

Concerning his meetings with the Petitioner, trial counsel testified that he remembered speaking with the Petitioner about his case on discussion dates in court and at the jail. Trial counsel admitted that he could not recall how many jail visits occurred or when they occurred, but he said that his practice was also to have his investigator meet with his clients at the jail as well. The investigator also could deliver messages from trial counsel as to the status of the case.

Trial counsel testified that he reviewed all of the discovery materials in the case and met with the district attorney's office. He also stated that he reviewed all of the statements made by the Petitioner that the State planned to introduce at trial.

Trial counsel did not recall specifically discussing trial strategy with the Petitioner. Counsel testified that the Petitioner did not have an alibi defense and that the strategy was likely "a make them prove it type strategy[.]" He explained that this strategy was "to look for any weak spots" in the elements that the State had to prove.

Trial counsel confirmed that part of the trial strategy included challenging the credibility of the State's witnesses, especially an inmate who informed the district attorney's office about confidential information he saw from the Petitioner's discovery packet. Trial counsel testified that, while he was not aware of a basis to keep the inmate from testifying, he was focused on showing that the inmate hoped to receive a reduction in his sentence through his testimony. Trial counsel remembered speaking with the Petitioner about this particular witness.

Trial counsel also testified that part of the trial strategy was designed to focus on the lack of physical evidence connecting the Petitioner to the crime. For example, trial counsel recalled that the State did not have a weapon or have DNA or fingerprint evidence. As he explained, "[b]ecause juries nowadays, I think, they watch so many of those TV shows of CSI and all of that, sometimes you can make some hay with hammering on what [the State does not] have."

Finally, trial counsel testified that part of the trial strategy was trying to explain the Petitioner's statement in which he seemed to be bragging about the murder. Additionally, counsel confirmed that he tried to show that the Defendant was not confessing to a crime, but trying "to be cool" in front of his friends in the "gang environment."

b. Opening Statements

Concerning the State's opening statement, trial counsel also testified that he did not recall the statement specifically. However, he said that opening statements were an opportunity for parties to "tell the jury what you expect to be able to prove." As such, with respect to the State attributing various statements to the Petitioner in its opening statement, he assumed that "if the State expected to be able to prove that it could be included." Trial counsel added that he had "never gotten very far objecting to opening statements," as the judge would "point[] out that what we say is not evidence."

In addition, trial counsel offered another reason that he generally does not object to what is said in opening statements:

> [T]he reason that I have never objected much on opening statements, I will take notes, on what [the State says], because you better believe if there is one thing that you promised them and you don't deliver it[,] I'm going to remind them on closing argument, well, they told you this, but did you hear that, no . . . .
>
> I think it's good strategy just to see, wait and see if they were able to produce what they promised and also why in my opening statement[,] I very seldom ever promised anything to the jury because the State would reciprocate and do the same thing.

With the conclusion of trial counsel's testimony, the Petitioner did not testify or offer further evidence supporting the claims advanced in his post-conviction petition.

2. Denial of Post-Conviction Relief and Appeal

Following the hearing, the post-conviction court took the matter under advisement, and on November 18, 2021, the post-conviction court issued a written order denying relief. As relevant to the issues raised in this appeal, the post-conviction court first addressed the Petitioner's claim that trial counsel was ineffective by failing to adequately meet with him to prepare for trial or establish a defense. Specifically crediting trial counsel's testimony, and considering the lack of other evidence from the Petitioner, the court found trial counsel and his investigator met with the Petitioner and "developed a trial strategy and defense based on evidence known to [them]." The post-conviction court concluded that the record did not contain clear and convincing evidence that trial counsel "performed deficiently in his representation of the Petitioner on this issue." It also found that the Petitioner failed to

show that additional investigation would have resulted in evidence that would impeach the State's witnesses at trial.

Concerning the Petitioner's claim that trial counsel should have objected to the State's opening statement, the post-conviction court again credited trial counsel's testimony. The court found that trial counsel did not object "because he believed he had no legal basis to make such objection" and that "it would not have been productive to do so[.]" The post-conviction court concluded that trial counsel did not perform deficiently in his representation on this issue, and it denied relief.

On December 20, 2021, the Petitioner filed a timely notice of appeal. In this Court, the Petitioner argues that trial counsel rendered ineffective assistance by failing to meet with him adequately and by failing to object to the State's opening statement. He also argues that "the current standard whereby a Mr. Hall must show prejudice is overly burdensome and conflicts with constitutional protections."

For its part, the State argues that the post-conviction court properly determined that the petitioner failed to demonstrate that trial counsel was ineffective either in meeting with the Petitioner or in failing to object to opening statements. It also argues that this Court "is not at liberty" to revisit the requirement that a post-conviction petitioner show actual prejudice to establish a Sixth Amendment violation. We agree with the State and affirm the judgment of the post-conviction court.

STANDARD OF APPELLATE REVIEW

Our supreme court has recognized that "the first question for a reviewing court on any issue is 'what is the appropriate standard of review?'" *State v. Enix*, 653 S.W.3d 692, 698 (Tenn. 2022). As our supreme court has made clear,

> Appellate review of an ineffective assistance of counsel claim is a mixed question of law and fact that this Court reviews de novo. Witness credibility, the weight and value of witness testimony, and the resolution of other factual issues brought about by the evidence are entitled to a presumption of correctness, which is overcome only when the preponderance of the evidence is otherwise. On the other hand, we accord no presumption of correctness to the post-conviction court's conclusions of law, which are subject to purely de novo review.

Phillips v. State, 647 S.W.3d 389, 400 (Tenn. 2022) (citations omitted).

ANALYSIS

The Tennessee Post-Conviction Procedure Act provides an avenue for relief "when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. A post-conviction petitioner has the burden of proving his or her allegations of fact with clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). For evidence to be clear and convincing, "it must eliminate any 'serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" *Arroyo v. State*, 434 S.W.3d 555, 559 (Tenn. 2014) (quoting *State v. Sexton*, 368 S.W.3d 371, 404 (Tenn. 2012)).

Article I, section 9 of the Tennessee Constitution establishes that every criminal defendant has "the right to be heard by himself and his counsel." Similarly, the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, guarantees that all criminal defendants "shall enjoy the right . . . to have the [a]ssistance of [c]ounsel." "These constitutional provisions guarantee not simply the assistance of counsel, but rather the reasonably effective assistance of counsel." *Nesbit v. State*, 452 S.W.3d 779, 786 (Tenn. 2014). Accordingly, a petitioner's claim that he or she has been deprived "of effective assistance of counsel is a constitutional claim cognizable under the Post-Conviction Procedure Act." *Moore v. State*, 485 S.W.3d 411, 418 (Tenn. 2016); *see also Howard v. State*, 604 S.W.3d 53, 57 (Tenn. 2020).

"To prevail on a claim of ineffective assistance of counsel, a petitioner must establish both that counsel's performance was deficient and that counsel's deficiency prejudiced the defense." *Moore*, 485 S.W.3d at 418-19 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). A petitioner may establish that counsel's performance was deficient by showing that "'counsel's representation fell below an objective standard of reasonableness.'" *Garcia v. State*, 425 S.W.3d 248, 256 (Tenn. 2013) (quoting *Strickland*, 466 U.S. at 688). As our supreme court has also recognized, this Court must look to "'all the circumstances' to determine whether counsel's performance was reasonable and then objectively measure this performance against "the professional norms prevailing at the time of the representation." *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015) (quoting *Strickland*, 466 U.S. at 688).

"If the advice given or services rendered by counsel are 'within the range of competence demanded of attorneys in criminal cases,' counsel's performance is not deficient." *Phillips*, 647 S.W.3d at 407 (quoting *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). Notably, because this inquiry is highly dependent on the facts of the individual case, "[c]onduct that is unreasonable under the facts of one case may be perfectly reasonable under the facts of another." *State v. Burns*, 6 S.W.3d 453, 462 (Tenn. 1999).

In addition, a petitioner must establish that he or she has been prejudiced by counsel's deficient performance such that counsel's performance "'render[ed] the result of the trial unreliable or the proceeding fundamentally unfair.'" *Kendrick*, 454 S.W.3d at 458 (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). In other words, the petitioner "must establish 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Davidson v. State*, 453 S.W.3d 386, 393-94 (Tenn. 2014) (quoting *Strickland*, 466 U.S. at 694). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Howard*, 604 S.W.3d at 58 (quoting *Strickland*, 466 U.S. at 694).

Because a post-conviction petitioner bears the burden of establishing *both* deficient performance and resulting prejudice, "a court need not address both concepts if the petitioner fails to demonstrate either one of them." *Garcia*, 425 S.W.3d at 257. Indeed, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice[,] . . . that course should be followed." *Strickland*, 466 U.S. at 697; *see also Phillips*, 647 S.W.3d at 401 ("The petitioner must prove sufficient facts to support both the deficiency and prejudice prongs of the *Strickland* inquiry—or, stated another way, the post-conviction court need only determine the petitioner's proof is insufficient to support one of the two prongs to deny the claim.").

Importantly, when considering a claim of ineffective assistance of counsel, this Court begins with "the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all strategic and tactical significant decisions," *Davidson*, 453 S.W.3d at 393, and "[t]he petitioner bears the burden of overcoming this presumption," *Kendrick*, 454 S.W.3d at 458. This Court will "not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of a sound, but unsuccessful, tactical decision made during the course of the proceedings." *Berry v. State*, 366 S.W.3d 160, 172 (Tenn. Crim. App. 2011) (citation omitted). Of course, "the fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation." *Goad*, 938 S.W.2d at 369. However, this Court will give deference to the tactical decisions of counsel only if counsel's choices were made after adequate preparation of the case. *Moore*, 485 S.W.3d at 419.

A. REQUIREMENT TO SHOW PREJUDICE

Taking the Petitioner's issues out of order, we first address the Petitioner's argument that this Court should not require a post-conviction petitioner to prove prejudice to obtain post-conviction relief. More specifically, he argues that, by placing the burden of establishing prejudice on a petitioner, the law "reverses the usual presumption that a defendant is innocent until proven guilty," and it "effectively shifts the burden of proving

harmless error from the state to the defendant." He also asserts that it is virtually impossible for a petitioner to prove that the jury would have reached a different result had the petitioner received the effective assistance of counsel.

Initially, we conclude that this argument is waived because it was not raised before the post-conviction court. "Generally, issues raised for the first time on appeal are waived." *State v. Allen*, 593 S.W.3d 145, 154 (Tenn. 2020) (citation and internal quotation marks omitted). This may be particularly the case where, as here, an appellant does not respond to the State's waiver argument. *See Davidson v. State*, No. E2019-00541-CCA-R3-PD, 2021 WL 3672797, at *59 (Tenn. Crim. App. Aug. 19, 2021).

Nevertheless, even considering the merits of the argument, the United States Supreme Court has established the requirement that a post-conviction petitioner show prejudice to establish a Sixth Amendment violation. *See Strickland v. Washington*, 466 U.S. 668 (1984). Our own supreme court has likewise recognized that the *Strickland* prejudice requirement is appropriate for analysis under Article I, section 9 of the Tennessee Constitution. *See State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989) ("Appellees suggest that the prejudice prong of *Strickland* may not apply to claims of ineffective assistance of counsel under Art I, section 9 of the Tennessee Constitution. We do not interpret the Tennessee constitutional provision as being different from the federal in this respect.").

These principles are important because our supreme court is "the supreme judicial tribunal of the state," and "all other courts are constitutionally inferior tribunals" subject to its actions. *See Barger v. Brock*, 535 S.W.2d 337, 340 (Tenn. 1976); *State v. Harton*, 108 S.W.3d 253, 260 (Tenn. Crim. App. 2002) ("[A]s a state intermediate appellate court, we are not at liberty to overrule the United States Supreme Court, or the Tennessee Supreme Court." (citations omitted)). Indeed, even if we thought that the Petitioner's view arguably represents a better public policy choice—and we do not—we must nevertheless follow binding precedent from a higher court consistent with our oath. *See State v. Brown*, 373 S.W.3d 565, 574 (Tenn. Crim. App. 2011) (recognizing that we "cannot rule contrary to precedent established by [the supreme court] court even if we feel that a ruling should be revisited").

For these reasons, we respectfully decline the invitation to reconsider the prejudice prong of *Strickland*, as we have done in at least one other case involving the Petitioner. *See Hall v. State*, No. M2021-01556-CCA-R3-PC, 2023 WL 2318523 (Tenn. Crim. App. Mar. 2, 2023) (citing *Harton*, 108 S.W.3d at 260). With this issue resolved, the Petitioner alleges that he was denied the effective assistance of counsel in two areas. We address each of these issues in turn.

B. FAILURE TO MEET WITH PETITIONER

The Petitioner first argues that he was denied the effective assistance of counsel when trial counsel failed to meet with him sufficiently to establish a defense. He asserts that, although trial counsel testified that he and the investigator met with the Petitioner, trial counsel could not recall the number of times these meetings occurred. From this premise, the Petitioner concludes that he "was not allowed to participate in his own defense." For two reasons, we respectfully disagree.

First, the record does not establish that trial counsel acted deficiently in meeting with the Petitioner. The Petitioner's argument primarily focuses on the lack of meetings with trial counsel, though little evidence exists as to the precise frequency of the meetings—the Petitioner did not testify or offer other evidence on his point apart from trial counsel's testimony. However, a singular focus on the raw number of meetings between counsel and client largely misses the point. *E.g.*, *Jones v. State*, No. W2020-00372-CCA-R3-PC, 2021 WL 2255504, at *8 (Tenn. Crim. App. June 2, 2021) (rejecting claim that one meeting established ineffective assistance); *Garrity v. State*, No. M2016-01463-CCA-R3-PC, 2018 WL 1633542, at *10 (Tenn. Crim. App. Apr. 4, 2018) (rejecting claim that one meeting established ineffective assistance). After all, "courts must recognize that counsel does not enjoy the benefit of unlimited time and resources. Every counsel is faced with a zero-sum calculation on time, resources, and defenses to pursue at trial." *Chandler v. United States*, 218 F.3d 1305, 1314 n.14 (11th Cir. 2000) (en banc); *Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454, at *62 (Tenn. Crim. App. July 1, 2009) (same).

Instead, an analysis of trial counsel's performance in consulting with a client is directed to how trial counsel was able to impart and receive important information—such as, among other things, the facts of the case, the application of the law, significant case developments, and the petitioner's objectives—so that counsel and the petitioner could make informed decisions about the case. *See McWilliams v. State*, No. E2017-00275-CCA-R3-PC, 2017 WL 5046354, at *4 (Tenn. Crim. App. Nov. 2, 2017) (analyzing claim of failure to visit through an "objective standard of reasonableness as measured by [the duty of communication in] Tennessee Rule of Professional Conduct 1.4"); *see also Webster v. State*, No. M2014-02019-CCA-R3-PC, 2015 WL 9412755, at *6 (Tenn. Crim. App. Dec. 22, 2015) ("We agree that, irrespective of the specific number of meetings between trial counsel and the Petitioner, the substance of the meetings included a thorough discussion of the Petitioner's case. Therefore, the Petitioner has not proven that trial counsel was ineffective in this respect."); *Martin v. State*, No. M2006-01371-CCA-R3PC, 2007 WL 1628869, at *4 (Tenn. Crim. App. June 6, 2007) (as against a claim that trial counsel only met with petitioner once before trial, affirming denial of post-conviction relief when the record "established that trial counsel met with the petitioner prior to trial to fully discuss

the case, including the elements of the offenses, the State's proof, their theory of defense, and whether the petitioner should testify at trial").

In this case, the credited testimony of trial counsel established that he and his investigator met with the Petitioner to speak about the case during court status conferences and separately at the jail. Trial counsel also used the investigator to communicate information to the Petitioner regarding the status of the case. Although trial counsel could not recall specific conversations about trial strategy, he did remember speaking with the Petitioner about the inmate who wished to testify for the State. He also testified at length about the trial strategy he developed based on his investigation and the evidence in the case. Based upon this evidence, the post-conviction court found that the proof did not show that trial counsel "inadequately conferred with [the Petitioner] in preparation for trial." We agree and conclude that the record does not preponderate against the trial court's finding.

Second, the record does not establish that the Petitioner was prejudiced in any way by the lack of additional meetings with trial counsel. For example, the Petitioner has not shown that additional meetings would have affected the trial strategy developed by trial counsel, *see Bishop v. State*, No. W2017-00709-CCA-R3-PC, 2018 WL 2228195, at *6 (Tenn. Crim. App. May 15, 2018); would have resulted in trial counsel being better prepared for trial, *see Williams v. State*, No. M2007-02070-CCA-R3-PC, 2008 WL 5272556, at *5 (Tenn. Crim. App. Dec. 19, 2008); or would have benefited him in any way, *see Dickerson v. State*, No. W2011-00676-CCA-R3-PC, 2012 WL 5907496, at *5 (Tenn. Crim. App. Nov. 27, 2012).

It is fair to say, respectfully, that the Petitioner "has not attempted to establish any way in which better communication with his trial counsel or better involvement of Petitioner in trial preparation could have altered the outcome of the case." *Tate v. State*, No. W2019-01380-CCA-R3-PC, 2020 WL 1972586, at *4 (Tenn. Crim. App. Apr. 24, 2020), *perm. app. denied* (Tenn. Sept. 21, 2020). Accordingly, we conclude that the record does not preponderate against the post-conviction court's finding that any claimed deficiency by trial counsel did not prejudice the Petitioner.

C. FAILURE TO OBJECT DURING STATE'S OPENING STATEMENTS

The Petitioner also contends that trial counsel was ineffective by failing to object during opening arguments when the State "actively testified on behalf of witnesses rather than summarizing the proof that the State intended to present." The State responds that the Petitioner "misunderstands the fundamental nature of opening and closing arguments," explaining that opening statements by counsel are not evidence. The State also notes that the post-conviction court accredited trial counsel's testimony that he thought he did not have a legal basis on which to object to the State's opening statement and that he usually

avoided objecting during opening statement in order "to call attention to any discrepancies between the statement and the proof."

Parties are entitled to make opening statements "setting forth their respective contentions[and their] views of the facts and theories of the lawsuit." Tenn. Code Ann. § 20-9-301. Opening statements "are intended merely to inform the trial judge and jury, in a general way, of the nature of the case and to outline, generally, the facts each party intends to prove." *State v. Sexton*, 368 S.W.3d 371, 414-15 (Tenn. 2012), *as corrected* (Oct. 10, 2012) (citation and internal quotation marks omitted). Decisions to object to opposing counsel's opening statement are "often primarily tactical decisions." *Jordan v. State*, No. W2015-00698-CCA-R3-PD, 2016 WL 6078573, at *65 (Tenn. Crim. App. Oct. 14, 2016) (citation and internal quotation marks omitted).

In this case, the post-conviction court accredited trial counsel's testimony that he believed there was no legal basis to object to the opening statement. Additionally, trial counsel testified that he had little prior success in objecting to opening statements because the comments of counsel are not evidence. He also noted that he typically does not object to opening statements, choosing instead to attack the State's credibility in closing arguments if the State failed to produce the promised evidence. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994) (stating that a "petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings").

The post-conviction court found that "[b]y concluding that he did not have a legal basis to object to the State's opening statement and that it would not have been productive to do so, this Court does not believe that [trial counsel] performed deficiently in his representation of the Petitioner on this issue." We agree and conclude that the record does not preponderate against the post-conviction court's finding that trial counsel was not deficient by failing to object to the State's opening statement.

CONCLUSION

In summary, we hold that the post-conviction court properly found that the Petitioner was not denied the effective assistance of counsel during his trial. Accordingly, because the Petitioner's conviction or sentence is not void or voidable because of a violation of a constitutional right, we respectfully affirm the denial of post-conviction relief in all respects.

TOM GREENHOLTZ, JUDGE