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Clerk of the  
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs February 14, 2023

**ANGELA BUCHANAN v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Rutherford County  
No. 83181 James A. Turner, Judge**

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**No. M2022-00190-CCA-R3-PC**

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The Petitioner, Angela Buchanan, appeals from the Rutherford County Circuit Court's denial of her petition for post-conviction relief, wherein she challenged her convictions for criminally negligent homicide and aggravated child neglect. On appeal, the Petitioner argues: (1) she received ineffective assistance of trial counsel; (2) her convictions were based on inadmissible Rule 404(b) evidence; (3) she received ineffective assistance of appellate counsel; and (4) the trial court, in violation of Tennessee law and article I, section 9 of the Tennessee Constitution, failed to inform her that she could make a statement of allocution at sentencing.<sup>1</sup> We affirm the judgment of the post-conviction court.

**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 J. ROSS DYER and TOM GREENHOLTZ, JJ., joined.

Taylor D. Payne, Murfreesboro, Tennessee, for the Petitioner-Appellant, Angela Buchanan.

Jonathan Skrmetti, Attorney General and Reporter; Brooke A. Huppenthal, Assistant Attorney General; Jennings H. Jones, District Attorney General; and Hugh Ammerman, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

On March 20, 2014, the four-month-old victim, M.C., who was being cared for by the Petitioner, died of asphyxia likely due to accidental suffocation. State v. Angela Buchanan, No. M2018-00190-CCA-R3-CD, 2018 WL 6012538, at \*1-2 (Tenn. Crim. App. Nov. 15, 2018), perm. app. denied (Tenn. Mar. 27, 2019). On December 3, 2014, the

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<sup>1</sup> We have reordered the Petitioner's issues for clarity.

Petitioner was indicted for felony murder, aggravated child abuse, and aggravated child neglect. However, on August 1, 2016, the State obtained a superseding indictment, charging the Petitioner with felony murder in Count 1 and aggravated child neglect in Count 2.

At the conclusion of trial, the jury convicted the Petitioner of the lesser included offense of criminally negligent homicide in Count 1 and the charged offense of aggravated child neglect in Count 2. Id. at \*5. Following a sentencing hearing, the trial court imposed an effective sentence of twenty-two years with a release eligibility of thirty percent. Id. The Petitioner filed a timely motion for new trial and/or motion for judgment of acquittal, which the trial court denied. Id. On appeal, this court affirmed her convictions. Id. at \*9.

Thereafter, the Petitioner timely filed a petition for post-conviction relief, alleging, in part, that she had received ineffective assistance of counsel. Following the appointment of new counsel, the Petitioner filed an amended post-conviction petition, alleging, in pertinent part, that she had received ineffective assistance from both trial counsel and appellate counsel; that her convictions were based on inadmissible proof regarding payments made to her by the Cherry Tree Food Program; and that the trial court failed to inform her that she could provide a statement of allocution at sentencing, which violated Tennessee law and article I, section 9 of the Tennessee Constitution.

At the post-conviction hearing, Petitioner's trial counsel testified that he was initially retained in 2014 after the Petitioner was charged in the first indictment and that he represented the Petitioner at trial. He stated that although the Petitioner initially had a trial date set in 2016, the State obtained the superseding indictment, and the trial was continued to 2017. During his representation, trial counsel obtained the victim's autopsy, had an ex parte hearing with the trial court, hired an investigator, secured money for a toxicologist, and located and talked to several witnesses in the Petitioner's case.

Trial counsel stated that the day voir dire was to begin in the Petitioner's case, the victim's father, whom he had subpoenaed to testify for the defense, was late for trial. When he asked the State about the presence of the victim's father, the prosecutor asserted, in the presence of the prospective jurors, that they were waiting on "the dead baby's father." The prosecutor later informed the trial court of his comment, and trial counsel requested a mistrial. When asked whether he presented any evidence that the prospective jurors actually heard the prosecutor's comment, trial counsel replied that he only relied on State v. Onidas, 635 S.W.2d 516 (Tenn. 1982), to argue that a bias was created by the prosecutor's comment. He asserted that the attorney in the Onidas case did not "look and see who heard [the comment] or if they got on the jury" and that the court in that case ultimately held that any comments that created jury bias were "an attack on the process, our whole system." Trial counsel explained that he had made the same argument based on

Onidas in an unrelated case two years earlier, and the trial court had reversed the defendant's conviction. Despite his previous assertions, the Petitioner acknowledged that there was nothing inaccurate about the prosecutor calling the victim's father the "dead baby's father" during voir dire because those facts were established during the Petitioner's trial.

Trial counsel also asserted that prior to the State's reading of the indictment, the trial court erroneously included the aggravated child abuse charge from the first indictment in its preliminary instructions, which were placed on the screen in front of the prospective jurors, and the defense did not catch the error. He stated that the trial court gave its preliminary instructions again after the jury was sworn, and the trial court again included the aggravated child abuse charge; however, this time, the defense recognized the error. Trial counsel asserted that because the trial court had given an erroneous instruction to the jury, the defense was not required to make a contemporaneous objection and could raise the issue in its motion for new trial. He noted that when the State read the correct indictment to the jury, the trial court, in a bench conference, recognized its previous error, and the prosecutor stated that he would enter a nolle prosequi for the aggravated child abuse charge. Thereafter, trial counsel made a motion for a mistrial based on the trial court's erroneous instruction that included an aggravated child abuse charge. Although trial counsel believed the trial court would grant his motion for a mistrial, the court did not, holding that the State's reading of the correct indictment cured its instructional error. Trial counsel acknowledged that the correct charges went back with the jury during deliberations at the end of trial. He also confirmed that when the Tennessee Court of Criminal Appeals considered this issue on direct appeal, the court held that the trial court's error in instructing on the aggravated child abuse offense at the beginning of trial was harmless.

Trial counsel asserted that although the trial court admitted there was an inconsistent verdict in the Petitioner's case, the court nevertheless accepted the verdict. He explained that the verdict was inconsistent because the jury, having found the Petitioner not guilty in Count 1 of felony murder in the perpetration of aggravated child neglect, then found the Petitioner guilty of aggravated child neglect in Count 2. He believed this inconsistent verdict occurred because the jury had seen the erroneous aggravated child abuse charge on the screen at the beginning of trial and had used that charge to find the Petitioner guilty of aggravated child neglect.

Trial counsel stated that he moved for a judgment of acquittal at the sentencing hearing based on the Petitioner's innocence and the inconsistent verdict. He did not offer any proof on the Petitioner's behalf at sentencing because he did not believe it was needed. He noted that the Petitioner did not have any felony convictions and had a consistent work history. Trial counsel said he did not want to present testimony from the Petitioner's husband or mother at sentencing because he did not want the State to admit the damaging

photographs of the condition of the Petitioner's home and did not want the State to ask questions about the Petitioner's previous drug use or the Petitioner's use of Valium without a prescription. He also said that, in general, he did not believe that presenting character proof at sentencing was helpful. Although trial counsel did not believe the Petitioner had anything to offer in mitigation at sentencing, he did ask the trial court to specifically consider the Petitioner's lack of a criminal record when imposing the sentence in this case.

Trial counsel acknowledged that neither he nor the trial court advised the Petitioner that she could make a statement of allocution. He explained that he did not like to present "that type of character proof in a sentencing hearing" and claimed that he had "never seen an allocution come off well," particularly where a defendant was arguing his or her innocence. He asserted that the Petitioner had always been adamant about her innocence and that a statement of allocution by the Petitioner would have been at odds with his motion for judgment of acquittal based on the inconsistent verdict.

Raymond Daugherty, Ashley Martin, Stephanie Minton, Tansil Howell, Bo Buchanan, and Keena Mason testified that if someone had asked them, they would have testified regarding the Petitioner's character and/or the quality of the Petitioner's childcare. However, all of these witnesses acknowledged that they were not present when the incident involving the victim occurred.

The Petitioner testified that she hired trial counsel in 2014 and met with him often at the beginning of the representation. She said that there were problems with trial counsel not explaining things and not helping her understand her case. The Petitioner stated that although she provided trial counsel with a list of witnesses who could testify on her behalf, trial counsel said the State would use the testimony of these witnesses against her. She also asserted that the defense investigator never spoke with any of her witnesses because trial counsel said these witnesses were irrelevant. The Petitioner acknowledged that none of these witnesses was present in her home when the incident involving the victim occurred.

The Petitioner stated that trial counsel told her she could not have any witnesses testify on her behalf at sentencing. When the Petitioner mentioned having witnesses submit letters to the trial court prior to her sentencing hearing, trial counsel replied that the trial court would not even look at them. As a result, none of her witnesses submitted letters to the trial court before her sentencing hearing. In addition, the Petitioner said she was never made aware that she could make a statement of allocution at the sentencing hearing. She claimed she had no idea what was going to happen at her sentencing hearing, and every time she asked trial counsel about it, he would tell her not to worry. She asserted that trial counsel never gave her any information about what evidence or arguments he would make on her behalf at sentencing.

The Petitioner said that after she was convicted, trial counsel visited her in jail and talked to her about the inconsistent verdicts. She said trial counsel believed the trial court would throw out her convictions or grant her a new trial in light of the inconsistent verdicts.

The Petitioner maintained that the only reason trial counsel realized that the wrong charges were being read to the jury at the beginning of trial was because she brought it to his attention. When she informed him that she was not being tried for aggravated child abuse, trial counsel told her not to worry about it. She said that when the aggravated child abuse charge was mentioned to the jury the third time, the Petitioner told trial counsel she was going to stand up and object, and trial counsel finally objected on her behalf.

During closing arguments at the post-conviction hearing, post-conviction counsel mentioned for the first time that trial counsel never requested a Rule 404(b) hearing to prevent the Cherry Tree Food Program evidence from being admitted. In addition, post-conviction counsel asserted for the first time that appellate counsel was ineffective in failing to raise the issue that the Petitioner was never apprised of her right to allocute.

Following this hearing, the post-conviction court entered an order denying the petition for post-conviction relief. In it, the post-conviction court made the following findings of fact and conclusions of law:

The Petitioner alleges that trial counsel failed to offer proof of the prejudicial effect on the jury of the prosecutor's reference to the "dead baby's father." The Tennessee Court of Criminal Appeals [(CCA)] addressed the prosecutor's comment on direct appeal. This Court agrees that the comment of the prosecutor was insensitive, at best. The CCA opined that the prejudice alleged by [the Petitioner] on direct appeal was nothing more than speculation. This Court likewise has not heard proof from any of the jury members that show this statement affected their verdict. As such, the Petitioner has failed to meet her burden in showing the prejudice this caused.

. . . The Petitioner alleges that trial counsel's failure to object as the trial court read the wrong indictment, that included a count of aggravated child abuse, prejudiced her in some way. Although allowing the Court to read the wrong charges to the jury is concerning, this Court finds that trial counsel eventually addressed this matter with the trial court, seeking a mistrial. The CCA addressed this issue in its opinion[,] finding the error harmless. This Court also finds the error harmless. As such, the Petitioner has failed to meet her burden as to this allegation.

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. . . The Petitioner alleges that trial counsel failed to request a jury [-]out hearing related to the introduction of proof related to payments made by the Cherry Tree Food Program. This Court finds that the Petitioner has failed to establish, by clear and convincing evidence, that this alleged failure prejudiced her.

. . . The Petitioner alleges that trial counsel failed to offer mitigating proof at sentencing. This Court finds that the Petitioner has failed to establish, by clear and convincing evidence, that this alleged failure prejudiced her. Candidly, the Petitioner failed to prove that any mitigating proof actually existed. Further, a trial court has discretion in sentencing a criminal defendant within a range of punishment. State v. Caudle, 388 S.W.3d 273, 278, 279 (Tenn. 2012). Therefore, even if the Petitioner was able to introduce mitigating proof, the Petitioner failed to prove that the trial court's discretion would have been affected. Thus, the Petitioner has failed to meet its burden as to this allegation.

. . . The Petitioner alleges that the trial court failed to apprise her of her right to [allocute] on the record. She further alleges that appellate counsel failed to raise this issue on direct appeal. The Petitioner cites State v. Keathly, 145 S.W.3d 123 (Tenn. Crim. App. 2003)[,] as authority supporting the notion that a trial court has an affirmative duty to apprise a defendant of the right to [allocute] during a sentencing hearing. Keathly is factually distinguishable to the case at bar. In Keathly, the trial court did not allow an allocution after the defendant sought to [allocute]. That is not the case here.

This Court does not find that a trial court has an affirmative duty to advise a defendant of the right to [allocute]. Further, even if such duty existed, the Petitioner has failed to prove that the absence of her allocution would have affected the trial court's sentencing. Moreover, [trial counsel] testified that there was a strategic basis for [the Petitioner]'s lack of allocution. The Court finds [trial counsel]'s testimony regarding that strategic basis to be credible. As such, the Petitioner has failed to meet [her] burden as to this allegation.

Following entry of this order, the Petitioner timely filed a notice of appeal.

### ANALYSIS

**I. Ineffective Assistance of Trial Counsel.** The Petitioner argues that trial counsel provided ineffective assistance in failing to appropriately respond after the prosecutor commented about the “dead baby’s father” in the presence of the prospective jurors. She also contends that trial counsel was ineffective in failing to object and seek a curative instruction after the trial court erroneously instructed the jury that the Petitioner was charged with aggravated child abuse child at the beginning of trial, in failing to request a jury-out hearing pursuant to Rule 404(b) following the prosecutor’s introduction of the Cherry Tree Food Program evidence, and in failing to offer mitigating evidence at her sentencing hearing. The State asserts that the record supports the post-conviction court’s denial of relief. We agree with the State.

Post-conviction relief is only warranted when a petitioner establishes that his or her conviction or sentence is void or voidable because of an abridgment of a constitutional right. Tenn. Code Ann. § 40-30-103. A post-conviction petitioner has the burden of proving the factual allegations by clear and convincing evidence. Id. § 40-30-110(f); see Tenn. Sup. Ct. R. 28, § 8(D)(1); Nesbit v. State, 452 S.W.3d 779, 786 (Tenn. 2014). Evidence is considered clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from it. Lane v. State, 316 S.W.3d 555, 562 (Tenn. 2010); Grindstaff v. State, 297 S.W.3d 208, 216 (Tenn. 2009); Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

This court reviews “a post-conviction court’s conclusions of law, decisions involving mixed questions of law and fact, and its application of law to its factual findings de novo without a presumption of correctness.” Whitehead v. State, 402 S.W.3d 615, 621 (Tenn. 2013) (citing Felts v. State, 354 S.W.3d 266, 276 (Tenn. 2011); Calvert v. State, 342 S.W.3d 477, 485 (Tenn. 2011)). Ineffective assistance of counsel claims are treated as mixed questions of law and fact. Grindstaff, 297 S.W.3d at 216. A post-conviction court’s findings of fact are conclusive on appeal unless the evidence in the record preponderates against them. Calvert, 342 S.W.3d at 485 (citing Grindstaff, 297 S.W.3d at 216; State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999)). “Accordingly, we generally defer to a post-conviction court’s findings with respect to witness credibility, the weight and value of witness testimony, and the resolution of factual issues presented by the evidence.” Mobley v. State, 397 S.W.3d 70, 80 (Tenn. 2013) (citing Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999)). However, we review a post-conviction court’s application of the law to its factual findings de novo without a presumption of correctness. Id.

The right to effective assistance of counsel is protected by both the United States Constitution and the Tennessee Constitution. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. 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) this deficiency prejudiced the defense. Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Strickland v. Washington,

466 U.S. 668, 687 (1984). A petitioner successfully demonstrates deficient performance when the petitioner establishes that his attorney's conduct fell "below an objective standard of reasonableness under prevailing professional norms." Goad, 938 S.W.2d at 369 (citing Strickland, 466 U.S. at 688; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). 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). "Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." Id.

In assessing an attorney's performance, we "must be highly deferential and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462 (citing Strickland, 466 U.S. at 689). In addition, we must avoid the "distorting effects of hindsight" and must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 689-90. "No 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." Id. at 688-89. However, "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).

**A. Prosecutor's Comments.** First, the Petitioner contends that trial counsel was ineffective in failing to appropriately respond after the prosecutor made his "dead baby's father" comment in the presence of the venire. Specifically, she claims that although her trial counsel vigorously argued for a mistrial following the prosecutor's comment, trial counsel "failed to present any proof of the prejudicial effect" of this comment and "failed to request a curative instruction." The Petitioner asserts that had trial counsel sought and presented proof of the prejudicial effect of the comment, "the trial court may have granted a mistrial." She also claims that "if trial counsel had sought a curative instruction" in response to the prosecutor's comment, "the issue would have been preserved for appeal."

During a jury-out hearing prior to the beginning of jury selection, trial counsel moved for a mistrial after he claimed the prosecutor announced in the presence of the prospective jurors that he wanted to wait on the "[d]ead baby's father" to arrive before starting jury selection. The prosecutor insisted that he told trial counsel that they might need to delay jury selection so that the State could sequester the "father of the dead baby" somewhere in the courthouse. Trial counsel asserted that the prosecutor's statement was heard by everyone in the front row, and co-counsel for the Petitioner offered that the



prosecutor's statement was "real[ly] loud." The trial court denied the motion for a mistrial, stating, "I think it's clear we are talking about a murder trial. So I don't know that that's going to be prejudicial." Trial counsel did not renew his request for a mistrial in his motion for judgment of acquittal at the close of the State's proof or at the close of all the proof at trial.

At the hearing on the Petitioner's motion for judgment of acquittal and/or motion for new trial, trial counsel argued that pursuant to State v. Onidas, 635 S.W.2d 516 (Tenn. 1982), the defense was entitled to relief based on the prosecutor's statements regarding "the dead baby's father." Trial counsel argued that the Onidas court held that it was "perversion of the voir dire" for the attorney to create a bias. Id. at 517. At the conclusion of this hearing, the trial court asserted that it had already ruled on this matter and denied the motion for judgment of acquittal and motion for new trial.

On direct appeal, the Petitioner argued that the trial court erred in failing to declare a mistrial after the prosecutor made the aforementioned comment about the victim's father that was overheard by the prospective jurors. Angela Buchanan, 2018 WL 6012538, at \*5. After applying the factors in Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), to determine whether improper prosecutorial conduct affected the verdict to the prejudice of the Petitioner, this court noted that the jury had yet to be chosen at the time this comment was made and that the Petitioner had failed to show that any of the potential jurors who sat on her jury heard the prosecutor's comment or were affected by it. Angela Buchanan, 2018 WL 6012538, at \*5. The court observed that while the prosecutor's comment was "certainly insensitive, there was no proof of malicious intent and no question that the proof in the case involved the death of an infant." Id. It also recognized that the Petitioner never requested a curative instruction following this comment. Id. Accordingly, this court held that the trial court had not abused its discretion in denying the motion for a mistrial. Id.

At the post-conviction hearing, trial counsel testified that he requested a mistrial based on the prosecutor's comment; however, he admitted that he did not present any evidence that the prospective jurors heard this comment, opting instead to rely on Onidas in arguing that a mistrial was required because of the bias created by the prosecutor's comment. See Onidas, 635 S.W.2d at 517-18 (reversing the defendant's robbery conviction and remanding for a new trial after concluding that the prosecutor attempted to create bias and prejudice in minds of the prospective jurors when he stated, over the defense's objection, during voir dire that the judge of city court and the grand jury had already determined that there was probable cause to believe that the crime charged had been committed and that defendant had committed it). On cross-examination, trial counsel acknowledged that there was nothing inaccurate about the prosecutor calling the victim's father the "dead baby's father" prior to jury selection because those were facts that were established at trial. The post-conviction court denied relief, finding that it agreed with the

Tennessee Court of Criminal Appeals that the prosecutor's comment "was insensitive, at best" and that the prejudice alleged by the Petitioner on direct appeal was "nothing more than speculation." See Angela Buchanan, 2018 WL 6012538, at \*5. Moreover, the post-conviction court concluded that because the Petitioner failed to present proof from any of the jurors showing that the prosecutor's statement affected their verdict, the Petitioner failed to meet her burden of establishing that trial counsel's performance was prejudicial. We fully agree with this conclusion. The Petitioner has not shown a reasonable probability that but for trial counsel's alleged deficiencies on this issue, the result of the proceeding would have been different. Accordingly, the Petitioner is not entitled to relief on this issue.

**B. Erroneous Charge.** Second, the Petitioner argues that trial counsel was ineffective in failing to contemporaneously object and seek a curative instruction after the trial court erroneously included the charge for aggravated child abuse in its preliminary instructions. She claims that trial counsel waived this issue by not objecting." She asserts that "[t]rial counsel failed to seek a mistrial after the first and second instances [where] the trial court incorrectly referenced the aggravated child abuse charge in the preliminary instructions, and . . . sought relief only after the jury was sworn when the trial court again referenced the incorrect charges." The Petitioner asserts that "there was a manifest necessity that a mistrial be granted following the reading of the incorrect indictment" and that when "trial counsel failed to object," this failure "prejudiced the Petitioner."

At the beginning of voir dire, the trial court made the following statement in front of the venire: "You have been summoned as prospective jurors in a criminal case involving the charges of first-degree murder, aggravated child abuse, and aggravated child neglect[.]" Following this statement, the defense did not object to the erroneous inclusion of the aggravated child abuse charge. After the jury was impaneled and sworn, the trial court, during its preliminary instructions, then stated, "The Defendant is charged with aggravated child abuse, aggravated child neglect, and first-degree murder in the perpetration of such crimes." Once again, the defense did not object to the inclusion of the erroneous aggravated child abuse charge.

Thereafter, the prosecutor read the indictment, correctly stating that the Defendant was charged with felony murder in the perpetration of aggravated child neglect in Count 1 and aggravated child neglect in Count 2. At a bench conference, after the Petitioner entered her not guilty pleas to the aforementioned charges, the trial court asked about "Count 3," and the prosecutor stated that the court might have been "operating under the old indictment." The prosecutor explained that in the superseding indictment, he "took out agg[ravated] child abuse and upped the lower lesser of child neglect to aggravated child neglect" and kept the felony murder charge. The trial court stated that it just had the "old" indictment, and the prosecutor asserted that it could enter a nolle prosequi on the aggravated child abuse charge immediately. Trial counsel said he was unsure whether the

defense needed “to do something with the instructions [because] they ha[d] already been up [on the screen for the jury to view]” and asserted that they would “think about that at lunch.”

After the jury exited the courtroom but before the lunch break, trial counsel asked for a mistrial because the trial court had erroneously instructed the jury as to the old indictment, and there was no way to correct the error. The trial court denied the motion for a mistrial, stating, “I don’t think that I have defined any of those [offenses] at this point.” During a jury-out hearing after the lunch break, the Petitioner’s co-counsel renewed the motion for a mistrial after referencing Code sections 39-15-402(a) and 39-15-401(b) and arguing that because the trial court read from the original indictment and referred to the Petitioner being charged with aggravated child abuse, the defense had grounds for a mistrial. The trial court then made the following ruling:

Well, I think the indictment that was read to the jurors corrected that. So I don’t think there is an issue there. Once the indictment was read, we had the correct charge in front of the jury. And, so, that’s not going to be a ground[] for mistrial, I don’t believe.

At the hearing on the motion for judgment of acquittal and/or motion for new trial, trial counsel argued that the trial court’s preliminary instructions to the jury, which erroneously included the aggravated child abuse charge, resulted in an inconsistent verdict because the jury returned a verdict of not guilty on the felony murder count but returned a verdict of guilty on the aggravated child neglect count. At the conclusion of this hearing, the trial court noted that the jury did not start taking notes on the case until after the preliminary instructions. It then stated that it had already ruled on this matter and denied the motion for judgment of acquittal and motion for new trial.

On direct appeal, the Petitioner argued that the trial court erred in failing to declare a mistrial after the court erroneously instructed the jury about the charge of aggravated child abuse. Id. This court noted that “the indictment read by the State to the jury encompassed the correct charges.” Id. at \*6. It also recognized that the Petitioner had made no complaint about the instructions provided to the jury at the end of trial, which accurately reflected the charges in the superseding indictment. Id. Consequently, the court concluded that any error in the trial court’s preliminary instructions was harmless and that the Petitioner had failed to show a manifest necessity for a mistrial. Id.

Here, the Petitioner failed to establish how trial counsel’s alleged deficiencies prejudiced her. The Petitioner never explained how an earlier objection or a request for a curative instruction would have created a reasonable probability of a different result at trial. At the post-conviction hearing, the Petitioner presented no proof from any of the jurors that

the trial court's brief mention of the aggravated child abuse charge in its preliminary instructions confused or prejudiced them. Although trial counsel claimed that the Petitioner received an inconsistent verdict because the jury saw the erroneous aggravated child abuse charge on the screen at the beginning of trial and used that charge to find the Petitioner guilty of aggravated child neglect, the Petitioner also offered no proof at the post-conviction hearing to substantiate that claim. In considering this issue, we are guided by this court's opinion on direct appeal that any error in the trial court's preliminary instructions was harmless. See State v. Thacker, 164 S.W.3d 208, 230 (Tenn. 2005) ("Generally, in determining whether instructions are erroneous, this Court must review the charge in its entirety and read it as a whole."); State v. Hodges, 944 S.W.2d 346, 352 (Tenn. 1997) ("A charge should be considered prejudicially erroneous if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law."). We reiterate that the State read the correct indictment to the jury at the beginning of trial and that the trial court instructed the jury on the correct charges just before the jury deliberated. Because the Petitioner has failed to establish how trial counsel's performance prejudiced her, she is not entitled to relief.

**C. Cherry Tree Food Program Evidence.** Third, the Petitioner maintains that trial counsel was ineffective in failing to request a jury-out hearing pursuant to Rule 404(b) following the State's introduction of the Cherry Tree Food Program evidence, which indicated that the Petitioner had forged the victim's mother's signature on documents in order to receive federal funds for daycare food. See Tenn. R. Evid. 404(b) (providing that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait" but "may . . . be admissible for other purposes[,]") including for issues such as identity, intent, or rebuttal of accident or mistake) (outlining the four conditions that must be satisfied before admission of such evidence). The Petitioner claims that this evidence had no probative value and was offered only to prejudice the jury against her.

At trial, the prosecutor asked the victim's mother what she knew about "Cherry Tree[.]" and when she replied that she "didn't know a . . . whole lot[.]" Petitioner's trial counsel immediately objected." At the bench conference, trial counsel asserted that the victim's mother did not know "anything about this," and the prosecutor disagreed. Trial counsel then argued that the Cherry Tree evidence was "not relevant" because it concerned "how you are paid through the system to take care of kids." The prosecutor said he always wondered how the Petitioner paid for her substantial Suboxone prescriptions without charging for the children she kept and discovered that the Petitioner was "getting money from the [f]ederal [g]overnment through an organization called Cherry Tree." The prosecutor stated that the victim's mother would be able to testify that "[the Petitioner] repeatedly asked her to sign her name to Cherry Tree Food Program documents so she could acquire funds from the [g]overnment [to obtain] food for the children who attended

her unlicensed daycare.” The prosecutor believed this information was “interesting[] because [the victim], at least, had always been brought [to the Petitioner’s home] with his own food that [the Petitioner] never had to supply.”

When the trial court asserted that this was hearsay evidence, Petitioner’s trial counsel agreed. The court then told the prosecutor that he could ask the victim’s mother what the Petitioner told her about the Cherry Tree documents, and Petitioner’s trial counsel agreed that line of questioning “would be fine” but asserted that it would not be appropriate for the victim’s mother to “go into hearsay [about what she learned during] her investigation [into the Cherry Tree Food Program].” The trial court agreed that hearsay evidence about what the victim’s mother discovered during her investigation would be inadmissible.

When cross-examination resumed, the victim’s mother stated that she had conducted her own investigation into the Cherry Tree Food Program because she believed the Petitioner had forged her signature on Cherry Tree paperwork and then “paid someone \$50 to drive [this] paperwork to Clarksville, Tennessee and turn it in so that [the Petitioner] could receive a check.” The victim’s mother said that the Petitioner indicated to her that both of the victim’s mother’s children were listed on this Cherry Tree paperwork, and she confirmed that she had never signed this paperwork.

The Petitioner did not establish that trial counsel’s failure to request a Rule 404(b) hearing on the Cherry Tree Food Program evidence was deficient. At the post-conviction hearing, the Petitioner never presented any evidence regarding trial counsel’s ineffectiveness on this issue and only argued during closing statements that trial counsel should have objected to the Cherry Tree evidence pursuant to Rule 404(b). This court has held that in order to establish deficient performance on the part of trial counsel for failing to object to “bad act” evidence, a petitioner should conduct a Rule 404(b) hearing at the post-conviction hearing. Shakir Adams v. State, No. W2010-00217-CCA-R3-PC, 2011 WL 744736, at \*12 (Tenn. Crim. App. Mar. 1, 2011) (holding that because the Petitioner did not conduct a Rule 404(b) hearing at the post-conviction hearing, the Petitioner failed to “clearly and convincingly establish deficient performance on the part of trial counsel”). Because the Petitioner did not conduct a Rule 404(b) hearing during the post-conviction hearing or present any evidence on this issue, we conclude that she has failed to establish that trial counsel’s performance was deficient.

The Petitioner also failed to establish that trial counsel’s alleged deficiencies regarding the Cherry Tree Food Program evidence were prejudicial. At the post-conviction hearing, the Petitioner never explained how a Rule 404(b) jury-out hearing would have resulted in a different ruling from the trial court or would have affected the outcome of the proceedings. In denying relief, the post-conviction court concluded that the Petitioner had

failed to establish, by clear and convincing evidence, that this alleged failure prejudiced her. The record, which shows that the Petitioner presented no proof on this issue, fully supports the post-conviction court's conclusion. Because the Petitioner did not establish that trial counsel was ineffective in failing to request a Rule 404(b) hearing regarding the Cherry Tree Food Program evidence, she is not entitled to relief.

**D. Mitigating Evidence at Sentencing Hearing.** Fourth, the Petitioner asserts that trial counsel was ineffective in failing to offer sufficient mitigating proof at sentencing. While she acknowledges that trial counsel made a motion for judgment of acquittal at the sentencing hearing and asked the trial court to impose the minimum available sentence, the Petitioner argues that trial counsel never filed "a sentencing memorandum or any other document that would have assisted the trial court in rendering its sentence[,]" that trial counsel presented only "very limited" arguments at sentencing, and that trial counsel failed to offer any witnesses, including the witnesses who testified on the Petitioner's behalf at the post-conviction hearing, to mitigate her sentence.

At the sentencing hearing, the State admitted the presentencing investigation report, which included several victim impact statements, but offered no other proof. Trial counsel argued that the Petitioner had received an inconsistent verdict in this case because the jury found her not guilty in Count 1 of felony murder in the perpetration of aggravated child neglect but found her guilty in Count 2 of aggravated child neglect. Trial counsel claimed that the inconsistent verdict was caused by the trial court announcing to the jury at the beginning of trial that the Petitioner was charged with aggravated child abuse, which prejudiced the jury against the Petitioner. Consequently, trial counsel made a motion for a judgment of acquittal on the aggravated child neglect count and then asked the trial court to sentence the Petitioner to one year at thirty percent on the negligent homicide count and then give the Petitioner "time-served" on that count. Trial counsel offered no additional evidence or argument at sentencing, other than to assert that the Petitioner had "no record to speak of, except some misdemeanors" and to request that the Petitioner receive the minimum sentence for her convictions. At the conclusion of the hearing, the trial court asserted that once the State read the correct indictment, this "cured" the issue regarding the erroneous aggravated child abuse charge. The trial court also recognized that it was "not unusual" to have an inconsistent verdict in Tennessee and that inconsistent verdicts were "not a basis" for a judgment of acquittal. As a result, the trial court denied the motion for judgment of acquittal. Before imposing the sentence in this case, the trial court noted that both parties had presented "very limited" arguments regarding the Petitioner's sentence.

At the post-conviction hearing, trial counsel testified that although he did not believe the Petitioner had anything to offer in mitigation at sentencing, he did ask the trial court to specifically consider the Petitioner's lack of a criminal record when imposing the sentence in this case. He said he did not want to present testimony from the Petitioner's husband or

mother at sentencing because he did not want the State to admit the damaging photographs of the condition of the Petitioner's home or to ask questions about the Petitioner's previous drug use or the Petitioner's use of Valium without a prescription again. He also said that, in general, he did not believe that presenting character proof at sentencing was helpful. Trial counsel acknowledged that neither he nor the trial court advised the Petitioner of her right to make a statement of allocution. However, he stated that he did not like to present "that type of character proof in a sentencing hearing" and claimed that he had "never seen an allocution come off well," particularly when a defendant argues his or her innocence. He said the Petitioner had always been adamant about her innocence and that a statement of allocution by the Petitioner would have been at odds with his motion for judgment of acquittal at the sentencing hearing.

In support of her claim that trial counsel performed deficiently at sentencing, the Petitioner asserts that trial counsel presented "very limited" arguments at the sentencing hearing and failed to file a sentencing memorandum or present any witnesses at sentencing. However, the sentencing hearing transcript shows that trial counsel argued her lack of a criminal record and asked for the Petitioner to receive the minimum sentence for both her convictions. Trial counsel also argued the motion for judgment of acquittal at the sentencing hearing. The Petitioner has failed to show that trial counsel's conduct at the sentencing hearing fell "below an objective standard of reasonableness under prevailing professional norms." Goad, 938 S.W.2d at 369. Accordingly, we conclude that the Petitioner failed to show that trial counsel performed deficiently.

We also conclude that the Petitioner failed to establish that trial counsel's alleged deficiencies were prejudicial. In denying relief, the post-conviction court found that the Petitioner failed to show that any mitigating proof actually existed, likely because all of the Petitioner's witnesses who testified at the post-conviction hearing were character witnesses who did not witness the incident involving the victim's death. The court also held that even if the Petitioner had been able to introduce mitigating proof at sentencing, the trial court's sentencing decision would not have been affected. The post-conviction court noted that trial counsel testified there was a strategic basis for the Petitioner's lack of allocution in this case, and it found trial counsel's testimony on this point to be credible. Consequently, the post-conviction court concluded that the Petitioner had failed to establish, by clear and convincing evidence, that trial counsel's performance at sentencing prejudiced her. The record fully supports the post-conviction court's conclusion. Because the Petitioner has failed to establish that trial counsel's performance at sentencing was ineffective, the denial of post-conviction relief was proper.

**II. Rule 404(b).** The Petitioner also makes a stand-alone argument that the post-conviction court should have granted her relief based on the erroneous admission of the Cherry Tree Food Program evidence. The Petitioner asserts that because "the probative

value” of this evidence “was outweighed by the prejudicial [nature] of the testimony” and because “the trial court failed to follow the requirements of Rule 404(b), a substantial right belonging to her was violated by the admission of this evidence.” The State responds that the post-conviction court properly denied relief because the Petitioner waived this claim by failing to make a contemporaneous Rule 404(b) objection. We agree that the Petitioner is not entitled to relief on this claim.

Although the Petitioner argues that she should have received post-conviction relief based on the erroneous admission of the Cherry Tree Food Program evidence, the Petitioner waived this claim by failing to raise it at trial or on direct appeal. See Tenn. Code Ann. § 40-30-106(g) (stating that an issue is considered waived, and no longer grounds for post-conviction 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); id. § 40-30-110(f) (“There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived.”); see also Tenn. Sup. Ct. R. 28, § 2(D) (“A ground for relief is waived if [the] petitioner or petitioner’s counsel failed to present [it] for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.”). Moreover, this court is precluded from reviewing this issue for plain error. Grindstaff, 297 S.W.3d at 219 (“[T]he plain error rule, which would otherwise permit an appellate court to address the issue sua sponte, may not be applied in post-conviction proceedings to grounds that would otherwise be deemed either waived or previously determined.”); State v. West, 19 S.W.3d 753, 756-57 (Tenn. 2000) (concluding that plain error review cannot be applied in post-conviction cases where the grounds for relief have been waived or previously determined). Accordingly, we conclude that the post-conviction court properly denied relief on this claim.

**III. Ineffective Assistance of Appellate Counsel.** The Petitioner also argues that appellate counsel was ineffective in failing to raise on direct appeal that she was not apprised of her right of allocution at sentencing. See Carpenter v. State, 126 S.W.3d 879, 886 (Tenn. 2014) (concluding that the two-prong test in Strickland applies when determining whether appellate counsel is constitutionally effective). The State counters that the post-conviction court properly denied relief because the issue is without merit and the Petitioner failed to offer proof of appellate counsel’s deficient performance. We conclude that because the Petitioner has failed to show that appellate counsel was ineffective, the post-conviction court properly denied relief.

At the post-conviction hearing, the Petitioner never called appellate counsel to testify and never provided any proof showing that appellate counsel should have raised the allocution issue on appeal. In fact, the only mention of this issue during the post-conviction



hearing was during closing statements, when post-conviction counsel asserted that appellate counsel was ineffective in not raising the allocution issue on appeal. We note that the post-conviction court specifically found that trial counsel's testimony, concerning his strategic basis for not having the Petitioner's allocute, was credible, and this finding also cuts against the likelihood that this was a viable issue for appellate counsel to pursue. See id. at 887 (reiterating that "[a]ppellate counsel are not constitutionally required to raise every conceivable issue on appeal" and that "if an issue has no merit or is weak, then appellate counsel's performance will not be deficient if counsel fails to raise it"). For all these reasons, the Petitioner has failed to show that appellate counsel was deficient in failing to raise the allocution issue.

We also conclude that the Petitioner failed to establish that any alleged deficiency on the part of appellate counsel prejudiced her. The post-conviction court noted that the Petitioner cited State v. Keathly, 145 S.W.3d 123 (Tenn. Crim. App. 2003), for the proposition that a trial court has an affirmative duty to apprise a defendant of the right to allocute at sentencing. However, the post-conviction court held that Keathly was factually distinguishable from the Petitioner's case because in Keathly the trial court did not allow an allocution after the defendant sought to allocute whereas in the instant case the Petitioner never asked to make an allocution. See id. at 126-30 (reversing a defendant's sentence where the trial court did not allow the defendant to read a statement of allocution without being placed under oath and subject to cross-examination). The post-conviction court then concluded that a trial court does not have an affirmative duty to advise a defendant of the right to allocute and that, even if such a duty existed, the Petitioner had failed to prove that the absence of her allocution affected the trial court's sentencing. See Carpenter, 126 S.W.3d at 887 ("[U]nless the omitted issue has some merit, the petitioner suffers no prejudice from appellate counsel's failure to raise the issue on appeal.").

Our own research shows that the trial court does not have an affirmative duty to inquire whether the defendant wishes to provide a statement of allocution. See State v. Stephenson, 878 S.W.2d 530, 551-52 (Tenn. 1994), abrogated on other grounds by State v. Saylor, 117 S.W.3d 239 (Tenn. 2003) (noting that there is no constitutional right to allocution); Tenn. Code Ann. § 40-35-210(b)(7) (emphasis added) (providing that the trial court is only required to consider "[a]ny statement the defendant wishes to make on the defendant's own behalf about sentencing") (emphasis added); Marques Johnson v. State, No. M2014-01419-CCA-R3-PC, 2015 WL 832328, at \*4 (Tenn. Crim. App. Feb. 26, 2015) (stating that "[a]lthough a trial court's refusal to allow allocution is reversible error, trial courts are not required to inquire whether the defendant wishes to make any such statement."); State v. Robert Eugene Crawford, Jr., No. E2012-00001-CCA-R3-CD, 2013 WL 4459009, at \*27 (Tenn. Crim. App. Aug. 19, 2013) (denying relief because the defendant was given the opportunity to make a statement of allocution and failed to do so). Because the Petitioner failed to establish that appellate counsel's performance was

ineffective regarding this issue, we conclude that the post-conviction court properly denied relief.

**IV. Right of Allocution.** Lastly, the Petitioner makes a stand-alone claim that the post-conviction court erred in denying relief on the basis that the trial court failed to apprise her of her right of allocution at sentencing in violation of Tennessee law and article I, section 9 of the Tennessee Constitution. The State counters that the Petitioner waived this claim by failing to raise it previously. We agree with the State.

Although the Petitioner claims that her constitutional rights were violated when the trial court failed to inform her that she could provide a statement of allocution, the Petitioner waived this claim by failing to raise it at the sentencing hearing or on direct appeal. See Tenn. Code Ann. §§ 40-30-106(g), -110(f); see also Tenn. Sup. Ct. R. 28, § 2(D). In addition, this court is precluded from reviewing this issue for plain error. See Grindstaff, 297 S.W.3d at 219; West, 19 S.W.3d at 756-57. Accordingly, we conclude that the post-conviction court properly denied relief on this claim.

### **CONCLUSION**

The judgment of the post-conviction court is affirmed.

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CAMILLE R. MCMULLEN, JUDGE