

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs February 1, 2023

FILED

04/12/2023

Clerk of the  
Appellate Courts

**TRAVIS SMITH v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Shelby County**  
**No. 11-05223 Glenn Wright, Judge**

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**No. W2022-00912-CCA-R3-PC**

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The Petitioner, Travis Smith, appeals the Shelby County Criminal Court's denial of his petition for post-conviction relief from his conviction for rape of a child. On appeal, the Petitioner contends that the post-conviction court erred by denying relief on his claims alleging that he received the ineffective assistance of trial counsel. The Petitioner argues that trial counsel was ineffective by (1) failing to meet with and keep the Petitioner informed, (2) failing to object on Confrontation Clause grounds to exclusion of the victim's testimony about an indecent exposure incident that occurred at the courthouse during the Petitioner's trial and failing to preserve the issue for appeal, (3) failing to find and prepare witnesses, and (4) failing to properly cross-examine witnesses. The Petitioner additionally argues that he is entitled to relief under the cumulative error doctrine. After review, we affirm the judgment of the post-conviction court.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TIMOTHY L. EASTER, JJ., joined.

John Catmur, Memphis, Tennessee, for the appellant, Travis Smith.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Ryan Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. FACTUAL AND PROCEDURAL HISTORY**

On June 11, 2015, the Petitioner was convicted by a jury of rape of a child and was sentenced to twenty-five years' incarceration. *State v. Travis Smith*, No. W2015-02360-

CCA-R3-CD, 2017 WL 1959500, at \*1 (Tenn. Crim. App. May 11, 2017), *perm. app. denied* (Tenn. Sept. 22, 2017). On appeal, this court affirmed the Petitioner's convictions. *Id.*

#### A. Trial Proceedings

A jury trial commenced on June 8, 2015. *Smith*, 2017 WL 1959500, at \*1. The victim, Y.M.,<sup>1</sup> testified that she was between eight and nine years old when the Petitioner stayed with her family for several months in 2010. *Id.* at \*1. She testified that during this time, the Petitioner woke her in the middle of the night on three occasions and that on one of these occasions, he told her to go to the bathroom, locked the door, took off his clothing and hers, made her lay down, held up her leg, and penetrated her vagina with his penis. *Id.* at \*2. The victim testified that after an absence of some months, she saw the Petitioner at a family party and that he followed her into the bathroom, locked the door, and took pictures of her. *Id.* at \*2. The next day, the victim saw the Petitioner at another family party, and the Petitioner went back to the victim's house to spend the night. *Id.* at \*1. The victim testified that the Petitioner woke her in the middle of the night and told her to go to the living room. *Id.* at \*2. She testified that the Petitioner walked back and forth in front of her mother's room with his cell phone light pointed down trying to determine whether the victim's mother was awake. *Id.* The victim testified that her mother opened her bedroom door and that the Petitioner ran into the bathroom. The victim stated that upon her mother's questioning as to why she was awake and in the living room, she disclosed that the Petitioner had previously raped her. *Id.*

On cross-examination, the victim testified that she had known the Petitioner her entire life and that he had not previously been violent with her or her siblings. *Id.* at \*3. The victim acknowledged that she could not remember whether the sexual assaults occurred in the spring, summer, or fall of 2010, whether she was still in third grade or had started fourth grade, or whether she was still eight years old or had turned nine years old. *Id.*

The victim's mother testified that on the night the victim disclosed the sexual assaults, she heard noises in the house. *Smith*, 2017 WL 1959500, at \*4. She testified that she had decided to wake her children to ask them to use the bathroom because they struggled with wetting the bed. *Id.* She testified that when she opened the door, she saw a "flash run by" like someone had run from across the hallway into the bathroom. *Id.* She stated that she heard the bathroom door shut and lock. *Id.* She said that she questioned the victim as to why she was awake and in the living room and that during this questioning,

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<sup>1</sup> It is this court's policy to refer to minor victims by their initials.

the victim disclosed the sexual assault. *Id.* The victim's mother testified that the Petitioner denied sexually assaulting the victim when confronted and that she took everyone in the house, including the Petitioner, to the hospital. *Id.* On cross-examination, she stated the Petitioner had babysat for her and that she had never had a problem with him. *Id.*

The victim's brother testified that, while at the hospital, the Petitioner stated he was going to get cigarettes and "speed walked" out as though trying to leave undetected. *Smith*, 2017 WL 1959500, at \*5. He testified that the Petitioner had babysat him and his siblings and that the Petitioner had never hurt or threatened them. *Id.*

The Petitioner testified that approximately five adults lived at the victim's home in 2010: the victim's mother, the victim's father, the victim's uncle, the victim's grandmother, and the Petitioner's brother. *Smith*, 2017 WL 1959500, at \*6. The Petitioner testified that he had babysat the victim and her siblings and that he had never threatened them in any way. *Id.* at \*7. He denied running past the victim's mother that night and instead testified that he had only gotten up to use the bathroom. *Id.* The Petitioner theorized that the victim got out of bed and then "had to lie her way out of it" by accusing him of sexual assault. *Id.* He stated that if he had committed an assault, the victim "should have screamed." *Id.* The Petitioner further denied taking pictures of the victim at the party. *Id.* He stated that the police took his cell phone when he was arrested and that he never saw it again. *Id.* The Petitioner testified that everyone who testified against him was lying. *Id.*

Dexter Smith, the Petitioner's brother, testified that he had six daughters ages two to twenty-four and that the Petitioner had spent time around all of them except the youngest. *Smith*, 2017 WL 1959500, at \*7. He stated that he trusted the Petitioner with his children. *Id.* He denied ever having spoken to the victim's mother regarding a letter that the Petitioner had allegedly written in which the Petitioner stated that he did "something really bad" and felt "bad about it." *Id.* He testified that he knew nothing about such a letter. *Id.* He testified that he stayed with the victim's family in 2010 and that he, the victim's grandmother, and the victim's uncle "sometimes" slept in the living room while the Petitioner slept in the victim's brother's room. *Id.* at \*8. He acknowledged that sometimes the Petitioner slept in the living room and was sometimes the only person outside the immediate family to spend the night at the house. *Id.*

Prior to the victim's testimony, the court was informed that the victim reported a man's exposing his genitals to her outside the courtroom. *Id.* at \*3. Trial counsel requested to voir dire the victim regarding the event for the purpose of creating a record. *Id.* The trial court denied the request on the basis of relevance. *Id.* Trial counsel stated that he wanted to question the victim because the incident went to her credibility. *Id.* Later that day, the trial court permitted the attorneys to summarize the event for the record. *Id.* The

State responded that an attorney had said that he and the victim were in a “glassed-in” room and that the victim “started saying something to him to try to get his attention and she immediately went and backed up against a wall so that she was out of view.” *Id.* The victim told the attorney that a man was exposing himself to her. *Id.* The prosecutor stated that the attorney saw an African-American man with dreadlocks, that the attorney went to confront the man, and that the man ran away. *Id.* The man was not apprehended. *Id.* Trial counsel added that the attorney said that he did not see the man “fiddling with his clothes.” *Id.* In the motion for a new trial, the Petitioner raised as error the fact that he was precluded from cross-examining the victim regarding the incident. *Id.* at \*8.

## B. Post-Conviction Proceedings

The Petitioner filed a timely pro se petition for post-conviction relief. The post-conviction court initially appointed counsel, who filed an amended petition, but who subsequently withdrew from representation. The post-conviction court appointed the Petitioner’s present post-conviction counsel, and post-conviction counsel filed two additional amended petitions for post-conviction relief alleging that the Petitioner received ineffective assistance of counsel at trial. Relative to this appeal, the Petitioner argued that trial counsel was ineffective for (1) failing to meet with the Petitioner at critical stages of trial and trial preparation; (2) failing to object and include in the motion for new trial a Confrontation Clause violation concerning the victim testifying about the indecent exposure incident, thereby waiving the issue on appeal; and (3) failing to adequately investigate the Petitioner’s case and failing to properly cross-examine witnesses. A post-conviction hearing was held on March 17, 2022.

Trial counsel testified that he had practiced law for forty-two years. He stated that he had tried dozens of trials, including trials with charges similar to rape of a child. Trial counsel stated that he was currently suspended from the practice of law, but that the suspension occurred years after representing the Petitioner. He testified that he met with the Petitioner “several times,” that the two talked approximately “a dozen times,” and that he and the Petitioner “covered every aspect of the case.”

Trial counsel testified that he provided the Petitioner with a copy of the discovery. He said that the Petitioner stated there were no witnesses for trial counsel to interview. Trial counsel testified he and the Petitioner discussed trial strategy. He stated that he and the Petitioner discussed that this was going to be a “difficult case.”

Trial counsel testified that during the trial, the victim claimed that a strange man “exposed” himself to her outside the courtroom. Trial counsel testified that he moved for a mistrial claiming this would prejudice the jury. He stated that the trial court denied his

motion. He stated that he argued this issue on appeal but felt it was not a strong argument because it occurred outside the presence of the jury. Trial counsel testified he was able to question the victim about the incident but not the attorney who witnessed the incident.

Trial counsel stated that the Petitioner informed him of an incident concerning a cell phone and photographs on the cell phone. Trial counsel testified that the State insisted it did not have this cell phone in evidence and that trial counsel's co-counsel did not find a record of the cell phone in the evidence room. Trial counsel stated that he was unsure how this cell phone would have helped the Petitioner.

On cross-examination, trial counsel testified that he cross-examined the victim concerning the time frame during which the rape occurred. He stated that even with specific reference points, such as the end of school, the victim's birthday, and summer holidays, the victim was unable to further specify when the rape occurred.

Trial counsel testified that on appeal, this court affirmed the trial court's decision that the indecent exposure incident during trial was not relevant to whether the victim was raped five years before by the Petitioner. Trial counsel stated that he did not consider this to be an important issue on appeal, although he would have liked to use this incident to impeach the victim's credibility.

The Petitioner testified that he met with trial counsel only "once or twice" while in jail and that his only other meetings with trial counsel occurred when the Petitioner was entering the courtroom for case proceedings. The Petitioner stated that these exchanges were not long enough to sufficiently discuss case proceedings or trial strategy. The Petitioner then testified that trial counsel did not come to visit him in jail the week of the trial and that the only time he recalled meeting with trial counsel was on May 22, 2013. He stated that trial counsel's failure to adequately communicate with the Petitioner led to trial counsel failing to research relevant topics vital to the Petitioner's case. The Petitioner further stated that trial counsel's failure to communicate caused the Petitioner to be unprepared for the trial. He stated that because trial counsel failed to meet with him and discuss the case, the Petitioner was "blind" at the trial and was not adequately prepared to testify.

The Petitioner testified that trial counsel did not personally provide him with the discovery material but that trial counsel mailed this material to him in jail. He stated that he and trial counsel reviewed the discovery material together once during a visit that lasted only ten or fifteen minutes. He said that he and trial counsel did not discuss the trial or case strategy during that visit.

The Petitioner testified that he informed trial counsel of several potential witnesses, including Mr. Smith and the Petitioner's eight nieces. The Petitioner stated that trial counsel failed to meet with Mr. Smith, prepare Mr. Smith for testifying at trial, or meet with any of the other witnesses the Petitioner provided. The Petitioner acknowledged that trial counsel contacted and spoke with Mr. Smith once. The Petitioner stated that he wrote trial counsel inquiring about the witnesses but that trial counsel never responded to these letters.

The Petitioner testified that trial counsel did not properly investigate the indecent exposure incident. He stated that it was a "critical moment" and that trial counsel did not discuss it with him or search for video footage that could have proven the victim lied about the incident. He stated that he understood that the trial judge found it irrelevant, but he felt it was relevant because it concerned a sex crime and the Petitioner was on trial for a sex crime.

The Petitioner stated that trial counsel was not adequately prepared for trial and that trial counsel did not ask the "right questions" at trial. He stated that trial counsel acted like he did not want to question the victim. The Petitioner stated that trial counsel did not review the victim's forensic interview with him and that he did not know it would be played at trial.

The Petitioner testified that trial counsel did not thoroughly cross-examine the witnesses at trial. He stated that the night of his arrest, the victim's brother had the Petitioner's phone and that both the victim's mother and brother informed the Petitioner that they gave his cell phone to the detectives. The Petitioner stated that the victim's brother testified at trial and that trial counsel did not "deeply" question him about the Petitioner's cell phone.

On cross-examination, the Petitioner acknowledged that Mr. Smith testified at the trial. He said that the State questioned Mr. Smith about a letter that the Petitioner had allegedly written stating that the Petitioner felt guilty for doing something bad. The Petitioner stated neither he nor Mr. Smith knew anything about this letter and that trial counsel should have objected to the questioning of a letter that was not introduced at trial.

The Petitioner testified that the victim's mother's testimony was inconsistent because she stated that on the night of the incident, she exited her room and saw "a flash," "a lightning," or "somebody running." He stated that trial counsel did not properly cross-examine the victim's mother regarding what exactly she saw that night or regarding her testimony that the Petitioner came from the bathroom while the victim was in the living room.

The Petitioner stated that trial counsel failed to adequately cross-examine the victim's brother about the location of the Petitioner's cell phone on two occasions. The Petitioner stated that he was accused of taking photographs of the victim in a bathroom during a family party but that the victim's brother had the Petitioner's cell phone during this party. The Petitioner stated that trial counsel failed to question the victim's brother regarding how the Petitioner took these photographs if the Petitioner did not have the cell phone in his possession. The Petitioner testified that the victim's brother also had the Petitioner's cell phone on the night the Petitioner was arrested and that trial counsel did not adequately question the victim's brother about the cell phone's location that night. The Petitioner further stated that he was not asked about the cell phone during his testimony. He acknowledged that he was not convicted of any crime related to his cell phone.

The post-conviction court questioned the Petitioner when the State concluded its cross-examination. The Petitioner said that trial counsel only spoke with Mr. Smith once by phone and did not contact the other potential witnesses. The Petitioner testified that Mr. Smith was a "key factor" in the Petitioner's case because Mr. Smith was living at the victim's house at the time of the alleged rape. The Petitioner said that Mr. Smith was supposed to testify that "[they] all stayed in that house," that there was "no way" the Petitioner raped the victim, and that no letter existed stating that the Petitioner felt guilty for doing something bad. He stated that the other "eight" or "nine" witnesses were his nieces and nephews and that they would testify that the Petitioner had never sexually assaulted them. The Petitioner stated that the indecent exposure incident at the courthouse should have been introduced and the victim cross-examined about it in front of the jury so that the jury could see that the victim was lying.

On June 10, 2022, the post-conviction court filed a written order denying the Petitioner relief. Initially, the court observed that trial counsel was an experienced criminal defense attorney, having practiced law for over forty years. Generally, the court determined that the Petitioner had "failed to meet his burden of proof as to his allegation of ineffective assistance of counsel," and that even if the Petitioner "were to prove deficient performance by counsel, Petitioner was not prejudiced in light of all the proof presented at trial or on appeal."

Relative to the Petitioner's specific allegation that trial counsel was ineffective by failing to adequately meet and communicate with the Petitioner, the court found that there was no evidence that trial counsel did not meet with the Petitioner or that trial counsel failed to adequately communicate with the Petitioner. It noted that in the Petitioner's own testimony, the Petitioner stated that trial counsel not only met with him on his court dates, but that trial counsel also reviewed the discovery material with the Petitioner at the jail.

The post-conviction court credited trial counsel's testimony that he met with the Petitioner enough times to cover all the information necessary for trial. Citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982), the post-conviction court concluded that trial counsel's decisions regarding pretrial preparation and communication with the Petitioner were strategic ones that should not be second-guessed on post-conviction review. It further found that the Petitioner presented "no evidence that [trial counsel's] choice of how often the two of them should meet regarding the case was uninformed because of inadequate preparation, especially in light of the fact that [trial counsel] ha[d] been in practice for over forty years."

The post-conviction court also found that trial counsel was not ineffective for failing to preserve a Confrontation Clause issue for appellate review. It found that the Petitioner was not "denied his right to face his accuser under the Confrontation Clause" when trial counsel was precluded from cross-examining the victim about the indecent exposure incident. It noted that the trial court and this court found the indecent exposure incident irrelevant to the Petitioner's charged offense. The post-conviction court, therefore, found that because the Petitioner's right to cross-examine was not infringed, trial counsel was not ineffective for failing to object on Confrontation Clause grounds and preserve this issue for appellate review. The post-conviction court further noted that trial counsel was able to cross-examine the victim concerning the charge for which the Petitioner was on trial.

This timely appeal followed.

## II. ANALYSIS

On appeal, the Petitioner contends that the post-conviction court erred by denying his claims of ineffective assistance of counsel. Specifically, the Petitioner contends that trial counsel was ineffective by (1) failing to meet with and keep the Petitioner informed, (2) failing to object on Confrontation grounds to exclusion of the victim's testimony about the exposure incident and failing to preserve the issue for appeal, (3) failing to find and prepare witnesses, and (4) failing to properly cross-examine witnesses. The State argues that the post-conviction court did not err by denying the Petitioner relief. We agree with the State.

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

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

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

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

The burden in a post-conviction proceeding is on the petitioner to prove allegations of fact by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(1); see *Dellinger*, 279 S.W.3d at 293-94. "Questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved" by the post-conviction court. *Fields v. State*, 40 S.W.3d 450, 456 (Tenn. 2001). On appeal, we are bound by the post-conviction court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Id.* Because they relate to mixed questions of law and fact, we review the post-conviction court's

conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. *Id.* at 457.

#### A. Failure to Adequately Meet and Communicate

The Petitioner argues that the post-conviction court erred by finding he received effective assistance of trial counsel because trial counsel failed to meet and communicate with him about case strategy. Moreover, the Petitioner submits that the lack of input by the Petitioner into the defense of his case prejudiced the outcome. The State responds that the post-conviction court did not err by denying the Petitioner relief because the Petitioner did not present evidence establishing that trial counsel failed to adequately meet and communicate with the Petitioner or that trial counsel's decision in this regard was unformed and based on inadequate preparation.

Trial counsel testified that he met with the Petitioner "several times" and that they spoke approximately "a dozen" times regarding case proceedings. He stated that he and the Petitioner reviewed the discovery material together and "covered every aspect of the case." The Petitioner acknowledged that he and trial counsel discussed the discovery material, met "once or twice" at the jail, and met at the courthouse prior to case proceedings. The post-conviction court accredited trial counsel's testimony. Specifically, the court found that trial counsel met with the Petitioner enough times to cover all the necessary information for trial, specifically noting trial counsel's experience of over forty years. We conclude that nothing in the record preponderates against the post-conviction court's findings. *Fields*, 40 S.W.3d at 456. The post-conviction court concluded that trial counsel's decision on how often to meet and communicate with the Petitioner was informed and based on adequate preparation and that it would not second guess trial counsel's tactical and strategic decisions in this regard. The post-conviction court did not err in determining that the Petitioner failed to prove deficient performance or prejudice on this claim.

#### B. Failure to Preserve Issue for Appeal

The Petitioner argues that the post-conviction court erred by finding he received effective assistance of trial counsel because trial counsel failed to preserve a Confrontation Clause issue for appeal. Specifically, the Petitioner alleges that trial counsel failed to object to the trial court's prohibiting trial counsel from cross-examining the victim about the indecent exposure incident and that trial counsel failed to include this issue in the motion for new trial. The State responds that the court did not err by concluding that the Petitioner received effective assistance of counsel because the indecent exposure incident was irrelevant to the Petitioner's trial.

The Sixth Amendment of the United State Constitution and article I, section 9 of the Tennessee Constitution afford a criminal defendant the right to confront of witnesses against him. U.S. Const. amend. VI; Tenn. Const. art. 1, § 9. However, a defendant’s constitutional right to cross-examine witnesses remains subject to general rules of relevance and concerns such as presentation of cumulative or marginally relevant information. *See* Tenn. R. Evid. 402, 403; *State v. Reid*, 882 S.W.2d 423, 430 (Tenn. 1994). Ultimately, “the Confrontation Clause only guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985); *see State v. Rimmer*, 623 S.W.3d 235, 290 (Tenn. 2021). Further, there is no ineffective assistance of counsel where trial counsel fails to preserve a fruitless argument. *Williams v. State*, 599 S.W.2d 276, 280 (Tenn. Crim. App. 1980); *see Pylant*, 263 S.W.3d at 869.

In the instant case, the indecent exposure incident was ruled irrelevant to the trial, and trial counsel was precluded from cross-examining the victim regarding the incident. Trial counsel did not object to the ruling on Confrontation Clause grounds but instead moved for a mistrial, which the trial court denied. Though the Confrontation Clause issue was waived on direct appeal, this court agreed with the trial court that the incident was irrelevant because it did nothing to make it more or less probable that the Petitioner raped the victim five years prior. *Smith*, 2017 WL 1959500, at \*11. This court further stated that the incident did not reflect on the victim’s credibility because nothing in the record suggested that the victim was untruthful regarding the incident. *Id.*

The post-conviction court found that an objection on Confrontation Clause grounds would have been futile because the incident was irrelevant. It found that trial counsel was not deficient for failing to make a futile objection and that the Petitioner’s trial and appeal were not prejudiced by the exclusion of irrelevant evidence. We agree. *See Williams*, 599 S.W.2d at 280; *Pylant*, 263 S.W.3d 854 at 869. Therefore, the post-conviction court did not err in determining that the Petitioner failed to establish his ineffectiveness claim in this regard.

### C. Failure to Find and Prepare Witnesses

The Petitioner argues next that trial counsel was ineffective for failing to find and prepare “key witnesses” for trial. Specifically, the Petitioner cites to his testimony at the hearing that multiple witnesses, as many as eight or nine, were potentially available, as well as observing that trial counsel did not speak with the Petitioner’s brother prior to trial. The State argues the post-conviction court did not err by denying the Petitioner relief because the Petitioner failed to present witnesses at the post-conviction hearing.

To succeed on a claim of ineffective assistance of counsel for failure to discover, interview, or present witnesses, the petitioner should present these witnesses at the post-conviction hearing. *Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. 1990). A petitioner is not entitled to relief unless the material witness is introduced and proffers favorable testimony in support of the petitioner's defense. *Id.* at 758. Generally, this is the only way to establish that trial counsel's failure resulted in the denial of critical evidence, prejudicing the petitioner. *Id.* at 757. "[N]either a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness's testimony might have been if introduced by [trial] counsel." *Id.*

The Petitioner does not identify in his appellate brief the identity of the "multiple witnesses," other than noting that there were potentially as many as eight or nine, that trial counsel should have called in his defense or how their testimony would have aided his defense. Nor does his appellate brief give any indication of how Mr. Smith would have provided more favorable testimony had he been better prepared to testify by trial counsel. *See Sneed v. Bd. of Prof'l Responsibility of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2016) ("It is not the role of the courts, trial or appellate, to research or construct a litigant's case or argument for him or her[.]" Nevertheless, at the hearing, the Petitioner testified that he had eight or nine nieces and nephews willing to testify on his behalf at trial that they were never molested in his care. He further testified that if Mr. Smith had been better prepared to testify at trial, his testimony would have included that he was living at the victim's house at that time of the alleged rape, that there was "no way" the Petitioner raped the victim, and that no letter existed stating that the Petitioner felt guilty for doing something bad. The Petitioner, however, failed to present any of these witnesses at the post-conviction hearing to demonstrate that they would have, in fact, testified to this effect at trial. He, therefore, failed to establish prejudice and is not entitled to relief on this claim. *Black*, 794 S.W.2d at 752, 757-58.

#### D. Failure to Properly Cross-Examine Witnesses

The Petitioner argues that trial counsel was ineffective for failing to properly cross-examine "key witnesses" at trial. The Petitioner's argument for this claim is limited to a singular allegation that trial counsel did not properly cross-examine "key" witnesses "thoroughly." The State argues that Petitioner's claim is meritless because he failed to indicate how the cross-examination of any witness was deficient and that a general complaint fails to establish prejudice.

Appellate review is generally limited to issues that have been properly preserved and presented for appeal in a manner prescribed by Tennessee Rule of Appellate Procedure 27. *State v. Bristol*, 654 S.W.3d 917, 923-25 (Tenn. 2022). Accordingly, an appellate court “may decline to consider issues that a party failed to raise properly.” *Id.* (quoting *State v. Harbison*, 539 S.W.3d 149, 165 (Tenn. 2018)); *see also Sneed*, 301 S.W.3d at 615. Tennessee Rule of Appellate Procedure 27(a)(7)(A) mandates that the appellant’s brief includes an argument setting forth the appellant’s contentions, a statement of why these contentions require relief, citations to legal authorities, and references to the record. “Issues which are not supported by argument, citation to authorities, or appropriate references to the record” frustrates appellate review and “will be treated as waived in this court.” Tenn. R. Ct. Crim. App. 10(b).

Here, the Petitioner does not provide legal authority or supporting argument for his contention under this claim. He merely alleges a generalized complaint about trial counsel’s cross-examination strategy. He fails to state which witnesses were the “key” witnesses related to this claim, how their cross-examination was deficient, or how a more thorough cross-examination would have elicited a response beneficial to the Petitioner’s defense. Further, he fails to cite any authority that would demonstrate that he is entitled to relief. The Petitioner has failed to properly raise this issue for appeal. Therefore, we consider the issue waived. Tenn. Ct. Crim. App. R. 10(b).

#### E. Cumulative Error

The Petitioner briefly argues that he is entitled to relief due to the cumulative effect of the errors of trial counsel. Because we have found no error in the record, the Petitioner is not entitled to relief under the cumulative error doctrine. *State v. Hester*, 324 S.W.3d 1, 76-77 (Tenn. 2010) (holding that the cumulative error doctrine only applies when multiple errors exist in the trial proceedings).

### III. CONCLUSION

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

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KYLE A. HIXSON, JUDGE