

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs February 15, 2017

**JOHN C. CRIM v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Wilson County**  
**No. 08-CR-567 Brody N. Kane, Judge**

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**No. M2016-00772-CCA-R3-PC**

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A jury convicted Petitioner, John C. Crim, of eight counts of rape of a child and six counts of aggravated sexual battery. Petitioner sought post-conviction relief, and his petition was denied after a hearing. On appeal, Petitioner asserts that his trial counsel were deficient in omitting an argument pertaining to the suppression of his confession; in failing to obtain the testimony of a witness; in failing to object to jury instructions regarding the mens rea required for aggravated sexual battery; and in failing to object to jury instructions regarding unanimous acquittal. After a thorough review of the record, we conclude that Petitioner has not established any grounds for relief, and we affirm the judgment of the post-conviction court.

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

THOMAS T. WOODALL, P.J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and TIMOTHY L. EASTER, JJ., joined.

Eric L. Phillips, Lebanon, Tennessee, for the appellant, John C. Crim.

Herbert H. Slatery III, Attorney General and Reporter; M. Todd Ridley, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Thomas Swink, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

***Trial***

Petitioner was indicted for numerous sexual crimes that he committed against his daughter between 2004 and 2007, during the times he exercised his right of visitation in the summer months. The proof at trial included the victim's testimony regarding the crimes and Petitioner's interview with law enforcement, during which he acknowledged

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having repeated sexual contact with the child from the time she was seven years old. *See State v. John C. Crim*, No. 2010-01281-CCA-R3-CD, 2012 WL 76891, at \*5 (Tenn. Crim. App. Jan 10, 2012), *perm. app. denied* (Tenn. Apr. 12, 2012).

Prior to trial, Petitioner's two attorneys sought to have the recorded interview suppressed. We note here that the audio recording of the interview was not included in the record on direct appeal or in the post-conviction record. *See id.* at \*7 ("Initially, we note that in ruling on the motion to suppress, the trial court heavily relied on Crim's tape recorded interview, which is not contained in the record on appeal."). The parties, prior to the post-conviction hearing, stipulated to the authenticity of certain trial transcripts, including the "Requested Excerpt from Court Proceedings" regarding the suppression hearing and a transcript recording the court's ruling on the issue. These transcripts were not included in the post-conviction record but are part of the direct appeal. We note that the transcript of the hearing is labeled an "excerpt" and that the transcript contains only the testimony of law enforcement. However, the hearing also included the testimony of Petitioner, and the court made a specific finding that Petitioner's testimony was not credible, in particular finding that he testified he was intimidated but that the audio recording demonstrated that he was at ease and laughing. A transcript of an excerpt from Petitioner's testimony was attached to Petitioner's pro se post-conviction petition but was not listed in an agreed order regarding the authenticity of certain transcripts and was not part of the record on direct appeal. It is unclear if other witnesses testified at the suppression hearing.

In the written motion to suppress, trial counsel argued that Petitioner was "retained . . . for an unreasonable period of time while the detective made subtle threats, made promises, and exerted improper influence." The motion also detailed the alleged promises and cited *Bram v. United States*, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187 (1897), for the proposition that a confession cannot be extracted by threats or promises. At the commencement of the hearing, the prosecutor stated, "just for clarification . . . I want to make sure we're here just on the narrow issue of whether Mr. Crim was in custody during this interview." The trial court replied that it believed that "it is that one single issue to determine whether or not he was" because the parties had stipulated that warnings regarding self-incrimination were not given prior to the interview. The defense did not respond.

At the suppression hearing, Detective Brian Harbaugh testified that he was contacted by authorities in Pennsylvania regarding the victim, that he contacted Petitioner, and that the two arranged a mutually convenient time for Petitioner to come to the police station for an interview. Detective Harbaugh explained to Petitioner the reason he wanted to speak to him at the time they arranged the interview. Detective Harbaugh testified to the circumstances of the interview bearing on the question of custody,

including that Petitioner was told he was free to leave and that his route of egress was open.

During the hearing, trial counsel questioned Detective Harbaugh regarding statements he had made to Petitioner calculated to elicit a confession. Detective Harbaugh acknowledged that he repeatedly assured Petitioner that “what was said in that room would stay in that room.” He also told Petitioner that he would “help” him and that he and his family could then “go back to whatever they do.” Detective Harbaugh explained that incarceration would help Petitioner refrain from future crime and that “we obviously have different understandings of what help is, and I’m aware of that. I know obviously if I told him that my form of help is for him to be incarcerated, that wouldn’t necessarily agree with him, so I don’t get into details about it.” He also acknowledged saying that he “just wanted to work things out in that room” and again explained that he meant he would incapacitate Petitioner through incarceration. He acknowledged bluffing and that he told Petitioner that a laboratory was examining DNA from the victim’s clothing to imply that law enforcement knew more than they did. He denied promising Petitioner anything. Detective Harbaugh’s testimony at trial was consistent with his testimony at the suppression hearing. He acknowledged assuring Petitioner that his statement would “stay in that room” and stated he may have told him that “the consequences for an honest person would be counseling and he and his group would get back to whatever it is they do.” He acknowledged he was not completely honest with Petitioner.

The trial court found that Petitioner was not in custody. The trial court noted that the tone of the interview remained “conversational, not confrontational,” that Petitioner was laughing throughout the interview, and that Petitioner gave long responses which volunteered information beyond that requested by law enforcement. The trial court further found that while Detective Harbaugh stated that police were testing the victim’s clothing when they were not, Detective Harbaugh also noted to Petitioner that “[s]ometimes this stuff just doesn’t pan out.” The trial court found that Detective Harbaugh’s representation that Petitioner’s statement would “stay here” was not made in the context of not sharing the information with prosecutors but “strictly in the context of not sharing it with the other members of Mr. Crim’s family. . . . It was regarding his family and for no other reason.” This ruling was based on the audio recording and the context of the statement. The motion to suppress was denied, and the audio recording was admitted at trial.

At trial, the jury was instructed that the State was required to prove each element of each offense beyond a reasonable doubt. The jury was also instructed:

If you unanimously find the Defendant guilty of the indicted offense beyond a reasonable doubt you ***do not consider*** any lesser included offense to that count of the indictment. If you unanimously have reasonable doubt as[] to the Defendant's guilt to the more serious indicted offense, then and only then, will you consider the Defendant's guilt or innocence of the lesser included offenses. (Emphasis added).

The instruction regarding unanimous reasonable doubt was repeated for each offense.

Regarding the aggravated sexual battery charges, the jury was instructed that the State must prove:

- (1) The Defendant had unlawful sexual contact with the alleged victim in which the Defendant intentionally touched the alleged victim's intimate parts, or the clothing covering the immediate area of the alleged victim's intimate parts; and
- (2) That the alleged victim was less than thirteen (13) years of age; and
- (3) That the Defendant acted either intentionally, knowingly or recklessly.

No objections were lodged to either of these instructions.

Petitioner was found guilty of eight counts of rape of a child and six counts of aggravated sexual battery, and he was sentenced to serve 212 years in prison. *State v. John C. Crim*, 2012 WL 76891, at \*1. On direct appeal, this court affirmed Petitioner's convictions and the trial court's ruling on the motion to suppress. This court noted:

Regarding Crim's claims that Detective Harbaugh was not forthcoming, the trial court found that Detective Harbaugh told Crim about the evidence that they did not have and that Crim knew there was no DNA or semen. The trial court further found that, based on the context of the conversation, when Detective Harbaugh stated "what we talk about here stays here," he was referring to not sharing the information with Crim's family. The trial court noted that the tape ended after one hour and twenty-one minutes, which "was not particularly long."

The court distinguished Crim's case from [*State v.*] *Dailey*[, 273 S.W.3d 94, 104 (Tenn. 2009)] and found that the [*State v.*] *Anderson*[, 937 S.W.2d 851 (Tenn. 1996)] factors suggested that it was not a custodial interview. Thus, the trial court denied Crim's motion to suppress. Upon

our review, the evidence does not preponderate against the findings of the trial court. Accordingly, we conclude that the trial court did not err in ruling that Crim's statements were admissible at trial.

*Id.* at \*8. However, this court concluded that Petitioner was entitled to a new sentencing hearing because Petitioner had not waived the right to be sentenced under the Sentencing Act in effect prior to 2005. *Id.* at \*12. On remand, Petitioner was resentenced to an aggregate sentence of 208 years in prison. *John C. Crim v. State*, No. M2014-00948-CCA-R3-PC, 2015 WL 1726556, at \*1 (Tenn. Crim. App. Apr. 13, 2015), *no perm. app. filed*.

### ***Post-Conviction***

Petitioner filed a timely post-conviction petition asserting various grounds of relief, and the post-conviction court dismissed the petition without the appointment of counsel, finding that the bulk of the claims had been previously determined, that the petition failed to state a factual basis for two of the remaining claims, and that the allegations of ineffective assistance of counsel, if taken as true, would still not entitle Petitioner to relief. *Id.* at \*1-2. On appeal of the dismissal, this court remanded for a hearing and the appointment of counsel, concluding that Petitioner alleged both deficient performance by counsel and prejudice stemming from the allegedly deficient performance. *Id.* at \*4. This court, however, dismissed the remaining grounds, which the post-conviction court determined had been previously adjudicated as part of the direct appeal. *Id.* at \*5. In particular, this court held that "Petitioner's claims with regards to the allegedly unlawful arrest, coerced confession, and illegally obtained evidence were previously determined by the trial court at the motion to suppress hearing and affirmed by this Court on direct appeal." *Id.*; *but see id.* at \*5 (Woodall, J., concurring in part and dissenting in part) (noting that because the petition raised a colorable ground for relief, the entire petition should be reconsidered by the post-conviction court).

On remand, Petitioner filed an amended petition for post-conviction relief, asserting that he received the ineffective assistance of counsel. Among Petitioner's claims were the assertion that trial counsel failed to challenge the admissibility of his statement on the basis that it was induced by law enforcement's promises; that trial counsel failed to obtain the testimony of an employee of Child and Youth Services in Pennsylvania; that trial counsel failed to object to an improper jury instruction regarding mens rea; and that trial counsel failed to object to jury instructions regarding unanimous acquittal.

At the post-conviction hearing, both of Petitioner's attorneys testified regarding their representation. Trial counsel testified that she had filed the motion to suppress and

that she argued both the issue of custody and whether the confession was obtained through threats and promises. She testified that while the transcript may not reflect questions regarding the voluntariness of the statement, the transcript was merely an excerpt. Trial counsel acknowledged that the order did not address any issue regarding promises made to Petitioner in exchange for his statement. On cross-examination, she clarified that she did cover the topic of voluntariness at the suppression hearing. She acknowledged that she did not object to the jury instructions regarding unanimous reasonable doubt or regarding the mens rea for aggravated sexual battery. Trial counsel testified that the victim had initially given a statement to a counselor in Pennsylvania. When trial counsel obtained the records from the authorities in Pennsylvania, she requested a continuance and reviewed all of the discovery. She testified that there was one statement made to the counselor which was helpful to the defense, and trial counsel was able to cross-examine the victim regarding the statement. In trial counsel's opinion, it was not necessary to have the testimony of the counselor.

Co-counsel testified that he had worked to obtain the removal of the language regarding unanimous reasonable doubt from local jury instructions and that he thought the instruction was incorrect and prejudicial. He testified that he believed the instruction regarding the mens rea for aggravated sexual battery was also in error.

Detective Robert Stafford, who had been present at Petitioner's interview with Detective Harbaugh, testified that he had no recollection of the interview and was merely an observer in training at the time of the interview.

The post-conviction court denied relief. The post-conviction court found that trial counsel raised the voluntariness of the confession through cross-examination at the suppression hearing. The court concluded that the "exhaustive[ness]" of trial counsel's challenge was a matter of strategy. The post-conviction court found that trial counsel's testimony was credible and that she chose not to call the counselor because it was not necessary. Regarding the mens rea instruction, the post-conviction court found that Petitioner had not demonstrated prejudice. The court likewise declined to find prejudice regarding any unanimity instruction, noting that Petitioner was convicted of the charged offenses and that the jury did not reach any lesser included offenses.

### *Analysis*

On appeal, Petitioner argues that the motion to suppress would have succeeded had trial counsel argued that the confession was involuntary due to promises given by law enforcement. Petitioner also argues that trial counsel were ineffective in failing to call the counselor from Pennsylvania, who could have discredited the victim's testimony. Petitioner claims his trial counsel were deficient in failing to object to the jury instruction

regarding aggravated sexual battery because the statute requires intentional touching but the jury instructions included knowledge or recklessness as sufficient mens rea. Finally, he also faults trial counsel's failure to object to the unanimous acquittal instructions.

### **I. Ineffective Assistance of Counsel**

A Petitioner shall be granted relief in a post-conviction proceeding, "when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. The burden is on the Petitioner to prove the factual allegations supporting relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); *see Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). On review, the post-conviction court's findings of fact are reviewed under a *de novo* standard with a presumption of correctness, unless the evidence preponderates against them. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d)); *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). Conclusions of law, however, are reviewed under a purely *de novo* standard, with no presumption of correctness. *Id.* In a petition alleging ineffective assistance of counsel, this court will apply a purely *de novo* review with no presumption of correctness. *Id.*

To prevail on a claim of ineffective assistance of counsel, Petitioner must show that the performance of his trial counsel was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). In order to show deficient performance, Petitioner must show that the trial counsel's conduct fell below an "objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). In reviewing counsel's performance, the distortions of hindsight must be avoided, and this court will not second-guess counsel's decisions regarding trial strategies and tactics. *Hellard v. State*, 629 19 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. *Id.* at 690, 104 S. Ct. at 2066.

To show that the conduct of the trial counsel prejudiced the defense, Petitioner must establish "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." *Goad*, 938 S.W.2d at 370 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068).

“[A] failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.” *Id.*

### **A. Motion to Suppress**

Petitioner asserts that, at the suppression hearing, trial counsel limited the basis for suppression to the issue of whether Petitioner was in custody and did not argue that Detective Harbaugh’s promises coerced his confession and made it inadmissible at trial. The State responds that the record is insufficient for review, that the post-conviction court found that trial counsel adequately raised the issue, and that Petitioner cannot demonstrate prejudice.

Whether Petitioner’s confession was induced by false promises from law enforcement is an issue of voluntariness. *See State v. Smith*, 933 S.W.2d 450, 455 (Tenn. 1996). In order to succeed on this claim of ineffective assistance of counsel, Petitioner must establish by clear and convincing evidence that the voluntariness of the confession was not raised by trial counsel.

Trial counsel’s written motion to suppress, while not a model of clarity in separating the issue of custodial interrogation from that of voluntariness, cited case law for the proposition that a confession could not be the result of direct or implied promises, and the motion detailed factual allegations that Petitioner’s confession was the result of promises that he would not be prosecuted if he confessed. The trial court, in denying the motion, addressed the issue of coercion through promises and found that Detective Harbaugh’s statements that a confession would “stay[] here” were not promises not to prosecute but were made “strictly in the context of not sharing it with the other members of Mr. Crim’s family.... It was regarding his family and for no other reason.” The motion for a new trial filed by trial counsel raised as an issue that “said statement of the defendant was obtained by effectively overriding the defendant’s free will and choice through coercion and deceit.” On appeal, this court cited the trial court’s finding that Detective Harbaugh’s statements were not promises regarding prosecution and generally concluded that the evidence did not preponderate against the trial court’s findings. *John C. Crim*, 2012 WL 76891, at \*8.

On appeal of the initial dismissal of the post-conviction petition, this court concluded that “Petitioner’s claims with regards to the allegedly unlawful arrest, coerced confession, and illegally obtained evidence were previously determined by the trial court at the motion to suppress hearing and affirmed by this Court on direct appeal.” *John C.*

*Crim v. State*, 2015 WL 1726556, at \*5. This determination was not appealed, and Petitioner proceeded to present evidence at the post-conviction hearing.

At the post-conviction hearing, trial counsel asserted that the issue of voluntariness was heard, noting that the excerpt did not include the entirety of the hearing. The post-conviction court found that Detective Harbaugh was cross-examined regarding voluntariness and that “[w]hether counsel exhaustively broached the subject of coercion during the suppression motion hearing is a matter of trial strategy.” Accordingly, the post-conviction court found both that Petitioner did not prove by clear and convincing evidence that the issue was omitted by trial counsel and that trial counsel’s treatment of the issue was not deficient. We note that Petitioner has the burden of providing a record adequate to support review of the issues raised. Tenn. R. App. P. 24(b); *State v. Bledsoe*, 226 S.W.3d 349, 357 (Tenn. 2007). We conclude that the record does not preponderate against the post-conviction court’s finding that the issue was raised and trial counsel did not provide deficient representation. Moreover, the trial court’s numerous findings regarding the tone of the interview – that it was “cordial” and “conversation, not confrontational” – do not support a claim of prejudice, as Petitioner could not have succeeded in suppressing the statement without demonstrating that law enforcement had overborne his will in inducing the confession. *Smith*, 933 S.W.2d at 455-56 (“Promises of leniency by state officers do not render subsequent confessions involuntary *per se*” but only when the behavior of law enforcement functions to overbear the accused’s will to resist).

### **B. Failure to Call Witness**

Petitioner asserts that trial counsel were deficient in failing to call the counselor from Pennsylvania who initially interviewed the victim regarding the abuse. The post-conviction court credited the testimony of one trial counsel that the witness was not necessary to the defense.

When a petitioner seeks post-conviction relief by asserting that trial counsel failed to present a witness, that witness should be presented at the post-conviction hearing. *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008). Because the post-conviction court cannot speculate as to the testimony of the missing witness, testimony from the witness may be necessary to demonstrate that critical evidence was omitted from trial. *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).

Here, Petitioner did not present the testimony of the counselor at the post-conviction hearing. Trial counsel testified that the victim had made one statement recorded by the Pennsylvania authorities which was relevant to the defense, but the record does not contain any testimony or other evidence regarding what the counselor’s

testimony would have been. Accordingly, Petitioner has not established either deficiency or prejudice.

### C. Mens Rea in Jury Instructions

Petitioner next asserts that the jury instructions allowed the jury to convict him of the aggravated sexual battery charges based on a mens rea of recklessness or knowledge, despite a statutory requirement that the touching be intentional.

As charged here, aggravated sexual battery is “unlawful sexual contact with a victim by the defendant” when the victim is under thirteen years old. Tenn. Code Ann. § 39-13-504(a). Sexual contact, in turn,

includes the intentional touching of the victim’s, the defendant’s, or any other person’s intimate parts, or the intentional touching of the clothing covering the immediate area of the victim’s, the defendant’s, or any other person’s intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.

Tenn. Code Ann. § 39-13-501(6). The statute requires that “[t]he *actus reus* – ‘touching’ someone’s ‘intimate parts’ or the clothing immediately covering the intimate parts – must be done intentionally.” *State v. Clark*, 452 S.W.3d 268, 298 (Tenn. 2014). Accordingly, while the element regarding the age of the victim is governed by the generic mens rea statute in Tennessee Code Annotated section 39-11-301(c), the element regarding unlawful sexual content requires intent. *Id.*

Here, the jury was instructed that the State must prove:

- (1) The Defendant had unlawful sexual contact with the alleged victim in which the Defendant intentionally touched the alleged victim’s intimate parts, or the clothing covering the immediate area of the alleged victim’s intimate parts; and
- (2) That the alleged victim was less than thirteen (13) years of age; and
- (3) That the Defendant acted either intentionally, knowingly or recklessly.

The jury instructions in *Clark* were essentially identical to those given in Petitioner’s case in that they required the jury to find that the defendant’s touching was intentional but listed as a third element that the defendant acted “either intentionally, knowingly, or recklessly.” *Clark*, 452 S.W.3d at 298. The court in *Clark* noted that

“[d]espite the ambiguity, a jury which read these instructions carefully would likely determine that the ‘sexual contact’ element had to be done ‘intentionally’” because of the proximity of the requirement of intent and the element of touching. *Id.* The court, however, specifically declined to determine whether the instructions were in error, concluding that any error would have been harmless “[b]ecause neither the State nor Mr. Clark presented evidence that his behavior might have been done recklessly or knowingly (but not intentionally).” *Id.* at 299.

We conclude that Petitioner cannot demonstrate prejudice under *Clark*. In Petitioner’s case, as in *Clark*, the evidence established only an intentional touching, and there was no evidence that Petitioner’s numerous sexual crimes against his daughter were committed knowingly or recklessly but not intentionally. There is no reasonable probability that a jury instruction which clarified the mens rea elements of the crime would have resulted in acquittal on any of the offenses. Accordingly, Petitioner cannot demonstrate prejudice and is not entitled to relief.

#### **D. Unanimity on Acquittal**

Petitioner relies on the testimony of co-counsel that the jury instructions requiring unanimous acquittal prior to the consideration of lesser included offenses was in error. The post-conviction court concluded that because Petitioner was convicted of the charged offense on each count, he could not establish prejudice.

The jury was instructed:

If you unanimously find the Defendant guilty of the indicted offense beyond a reasonable doubt you ***do not consider*** any lesser included offense to that count of the indictment. If you unanimously have reasonable doubt as[] to the Defendant’s guilt to the more serious indicted offense, then and only then, will you consider the Defendant’s guilt or innocence of the lesser included offenses. (Emphasis added)

A similar instruction was given for each count, noting that the jury must “unanimously have a reasonable doubt as to the Defendant’s guilt” regarding the charged offense before it could acquit him and consider a lesser-included offense. The pattern jury instructions instruct the jury: “If you unanimously find the defendant not guilty of [the charged] offense, or have a reasonable doubt of the defendant’s guilt of that offense, you shall then proceed to consider whether or not the defendant is guilty of the next lesser included offense in order from greatest to least.” 7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 41.01. The instructions specifically note that the members of the jury “shall not proceed to consider any lesser-included offense until you have first made a unanimous

determination that the defendant is not guilty of the immediately-preceding greater offense or you unanimously have a reasonable doubt of the defendant's guilt of that offense." *Id.*

These instructions are also in accord with the holding of the Tennessee Supreme Court in *State v. Davis*, 266 S.W.3d 896, 904 (Tenn. 2008). In *Davis*, the Court observed, "A jury cannot convict a defendant unless and until it reaches a unanimous verdict of guilt. *By the same token, a jury cannot acquit a defendant unless and until it reaches a unanimous verdict of not[ ]guilty.*" *Id.* (emphasis added); *see also State v. Mann*, 959 S.W.2d 503, 521 (Tenn. 1997) ("This court has repeatedly upheld 'acquittal-first' instructions."). Petitioner cites to *James C. Osborne IV v. State* for the proposition that the instructions were in error, but the instructions in *James C. Osborne IV* required the jury to find the defendant not guilty *beyond a reasonable doubt*, unlike the instructions here, which merely required a unanimous finding of reasonable doubt. No. M2010-00065-CCA-R3-PC, 2011 WL 3612205, at \*1, 3 (Tenn. Crim. App. Aug. 16, 2011). Accordingly, *James C. Osborne IV* does not support the contention that the instructions here were in error.

Petitioner has accordingly not demonstrated error in the instructions or deficiency on the part of trial counsel in failing to object to the instructions. He is not entitled to relief.

#### CONCLUSION

Based on the foregoing reasoning, we affirm the judgment of the post-conviction court.

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THOMAS T. WOODALL, PRESIDING JUDGE