IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 23, 2018 Session

GEVON C. PATTON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hamblen County
No. 15-CR-485 John F. Dugger, Jr., Judge

No. E2017-00886-CCA-R3-PC

The Petitioner, Gevon C. Patton, appeals the Hamblen County Criminal Court's denial of his petition for post-conviction relief from his 2013 convictions for criminally negligent homicide and especially aggravated kidnapping and his effective twenty-five-year sentence. The Petitioner contends that he received the ineffective assistance of counsel and requests that his case be transferred to another trial court judge upon remand for a new trial. We affirm the judgment of the post-conviction court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Brennan M. Wingerter (on appeal), Knoxville, Tennessee, and Nick Davenport (at hearing), Morristown, Tennessee, for the appellant, Gevon C. Patton.

Herbert H. Slatery III, Attorney General and Reporter; Benjamin A. Ball, Senior Counsel; Dan E. Armstrong, District Attorney General; and Kim Morrison, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case arises from the Petitioner's involvement in the 2008 kidnapping and subsequent death of Willie Morgan. The Petitioner appealed his convictions, and this court affirmed the convictions and summarized the facts of the case as follows:

> At trial, the State's theory was that appellant was a part of a group of individuals who kidnapped the victim and held him for ransom. The group targeted the victim due to his relationship with Donnie Johnson, who the group believed was responsible for robbing one of its members. The group bound

the victim to a chair, and the bindings caused the victim to asphyxiate, leading to his death.

The State's first witness at trial was Hamblen County Sheriff's Department Detective David Stapleton. Detective Stapleton testified that he received information on January 19, 2008, that the victim might have been kidnapped. His investigation led him first to Sonny Mills's residence and then to Roy Hollifield's residence. The victim was not found at either location, but Detective Stapleton learned that appellant, appellant's brother Anthony Patton, and Darryl Nance had been to Mr. Hollifield's residence earlier. Mr. Hollifield reported that they were looking for his brother, Donnie Johnson. Detective Stapleton testified that during the investigation, Nancy McCann Reed called 9-1-1 and told the operator that she had received a telephone call from one of the kidnappers. Detective Stapleton said that the investigators returned to Mr. Mills's residence, where they learned that the kidnappers might be in Bryce Whaley's red Jeep Cherokee. They were unable to locate Mr. Whaley initially but later discovered him at Mr. Mills's residence. Mr. Whaley was taken into custody. While investigators were questioning Mr. Whaley, Mr. Whaley received at least one telephone call from a Chattanooga number. Subsequently, the sheriff's department contacted the Chattanooga Police Department and asked them to be on the lookout for vehicles with Hamblen County license plates at local motels. Eventually, the Chattanooga Police Department located Darryl Nance, Jessica Lane, Betty Fuson, and Whitney Webb, all of whom were taken into custody. From interviews with these individuals, Detective Stapleton learned of the involvement of appellant and appellant's brother in the victim's kidnapping. Detective Stapleton testified that Mr. Whaley led the investigators to the victim's body. The victim had been hidden in a pile of brush, and his left hand had been severed. The investigators received information that the kidnappers had restrained the victim at Ms. Fuson's trailer.

Nancy McCann Reed testified that the victim was "like a dad" to her. She stated that she received a telephone call from Jessica Nicole Lawson informing her "that the black boys that [her] nephew Donnie Johnson robbed had either shot [the victim] or kidnapped him." Ms. Reed relayed this information to the 9-1-1 operator, and the State played the recording of her 9-1-1 call to the jury.

Roy Hollifield testified that Donnie Johnson was his brother. They considered the victim to be their grandfather, although they were not actually related. Mr. Hollifield recalled receiving a visit from Darryl Nance and one of

the Patton brothers (he could not recall whether Anthony or appellant came with Mr. Nance) on the day prior to the victim's kidnapping. Mr. Nance informed him that he was looking for Mr. Johnson. Mr. Hollifield did not know where Mr. Johnson was, but he tried to call him. Mr. Nance told Mr. Hollifield to let Mr. Johnson know that he was looking for him. The following day, the day of the victim's kidnapping, Mr. Nance and both Patton brothers visited Mr. Hollifield. This time, Mr. Nance displayed a pistol and told Mr. Hollifield that he was going to kill Mr. Johnson when he found him. Mr. Hollifield recalled that the men arrived in a red Jeep. On cross-examination, Mr. Hollifield testified that appellant was either fifteen or sixteen years old in January 2008.

Daniel Kuykendall testified that he had been in a relationship with Jessica Lane in January 2008. He recalled seeing Ms. Lane with Mr. Nance, Mr. Whaley, and two black men in a red Jeep Cherokee on January 19, 2008. He testified that they came to his trailer in Ball's Trailer Park and that Ms. Lane borrowed his cellular telephone. Ms. Lane gave the telephone to Mr. Nance, and Mr. Kuykendall retrieved it from him. Mr. Kuykendall testified that before she left, Ms. Lane "said she had to take care of some business."

Erica Lawson testified that she saw Ms. Lane and Mr. Nance with both Patton brothers at Sonny Mills's residence on one evening in January 2008. She could not recall the exact date, but she said it was between 9:30 and 10:00 p.m. She remembered that they were eating a meal from Hardee's.

Whitney Webb testified that she and Betty Fuson spent much of January 19, 2008, shopping. Ms. Webb was driving them in her white Mustang. When they returned to Ms. Fuson's trailer, Ms. Fuson was unable to open the door, so they drove away. When they left, they saw Darryl Nance and Jessica Lane by a red Jeep. Mr. Nance told them that they had run out of gas and asked Ms. Webb to get gas for them. He also told her that he would give her money for the gas if they would all go to Ms. Fuson's trailer. In the trailer, Ms. Webb testified that she observed the victim tied to a chair in the living room. She said that appellant was not in the living room but that she saw him later in Ms. Fuson's bedroom. Ms. Webb testified that when she tried to leave, Mr. Nance refused to let her go. However, Mr. Nance changed his mind when appellant volunteered to go with her and Ms. Fuson to ensure that the women returned. Ms. Webb, Ms. Fuson, and appellant went to the Food City in White Pine. They bought a container and filled it with gas. They drove back to the red Jeep and left the gas inside it. Appellant then accompanied the women to Morristown and Knoxville. Ms. Webb testified that appellant told

her Mr. Nance and Anthony Patton kidnapped the victim while he and Ms. Lane waited in the vehicle. On cross-examination, Ms. Webb said that the victim was alive when they left the trailer.

Betty Fuson testified that in January 2008, she did not have a key to her trailer but that Darryl Nance and his brother had keys. She said that her trailer was on the border between Jefferson County and Hamblen County. Ms. Fuson recalled that she and Ms. Webb had been shopping on January 19, 2008, before they went to her trailer to get clothes for a trip to Knoxville. When they arrived at her trailer, both doors were locked. They decided to go to Knoxville anyway, but they stopped when they saw Mr. Nance and Ms. Lane with a red Jeep near her trailer. Mr. Nance told her that he "had Donnie's papaw tied up at [her] house." She did not believe him at first, but when she entered her trailer, she saw the victim tied to a chair in her living room. Ms. Fuson said that she also saw the Patton brothers in the trailer. She testified that appellant followed her to her bedroom and told her that he was going to go with her when she left. Ms. Fuson stated that Mr. Nance would not let them leave until she called his brother. Mr. Nance's brother convinced him to let Ms. Webb and Ms. Fuson leave to get gas and to let appellant go with them. They left, bought gas, returned to the red Jeep, and left the gas in the Jeep. Ms. Fuson called Mr. Nance to let him know that they had bought the gas and that they were not returning to the trailer. Appellant accompanied her and Ms. Webb to Knoxville. Ms. Fuson said that appellant told her that he and Ms. Lane had waited in the car while Mr. Nance and Anthony Patton went inside the victim's residence. He also told her that he had heard a gun[]shot while they were inside.

Ms. Fuson testified that Mr. Nance called her when she was in Knoxville, asking for a ride out of town. She and Ms. Webb went to White Pine to pick up Mr. Nance and Ms. Lane and then returned to Knoxville. When Mr. Nance saw appellant in Knoxville, he was angry that appellant had not brought the women back to the trailer. Appellant stayed in Knoxville while Ms. Webb, Ms. Fuson, Ms. Lane, and Mr. Nance drove to Chattanooga. On cross-examination, Ms. Fuson testified that the victim was alive when they left her trailer.

The State called Anthony Patton as a witness; however, he refused to answer any questions substantively, other than declaring appellant's innocence. The trial court ruled that he was unavailable as a witness and allowed the State to read into evidence a statement given by Anthony Patton to investigators on February 22, 2008. Anthony Patton explained to investigators

the events leading to the victim's kidnapping. He said that he was with Darryl Nance and Jessica Lane at Sonny Mills's residence, and Mr. Nance repeatedly stated that "he was going to F up Donnie." Anthony Patton left the Mills residence with Bryce Whaley, Mr. Nance, and Ms. Lane in Mr. Whaley's Jeep. He said that they went to Roy Hollifield's and that everyone went inside. Mr. Nance insisted that Mr. Hollifield call his brother, but Mr. Johnson would not answer his telephone. The group left and went to Ball's Trailer Park and then returned to Mr. Mills's residence. Ms. Lane commented that Mr. Johnson was close to the victim. As the group drove around town looking for Mr. Johnson, Ms. Lane suggested that they go to the victim's house, and she drove them there. They all went inside the victim's house when he opened the door. Mr. Nance repeatedly asked the victim for Mr. Johnson's location. Mr. Nance fired his gun at one point. Anthony Patton stated that he and Mr. Nance picked up the victim by his arms and carried him to the vehicle. They took the victim to Betty Fuson's trailer, where someone tied him to a chair. Anthony Patton said that Mr. Nance and Ms. Lane kept asking the victim for Mr. Johnson's location, and Mr. Nance hit the victim in the head with his pistol. At some point, Ms. Lane used Anthony Patton's telephone to leave someone a message informing that person that the group was holding the victim. Ms. Lane suggested that the group return to the victim's house, so they left Ms. Fuson's trailer in the Jeep but very shortly ran out of gas. Anthony Patton said that he was walking back to the trailer when he saw a white Mustang stop by the Jeep. Anthony Patton stated that Mr. Nance told him Ms. Fuson was going to get gas for them. Ms. Fuson and Ms. Webb entered the trailer and went to the bedroom to pack clothes. Anthony Patton said that he saw Mr. Nance hit the victim with his pistol again but harder than the first time. Ms. Fuson and Ms. Webb left to buy gas, and Anthony Patton later received a text message indicating that they had left the gas in the Jeep. Eventually, Anthony Patton left with Mr. Nance and Ms. Lane. They ordered food from Hardee's and went to Mr. Mills's residence.

In addition to the eyewitness testimony, the State presented forensic evidence tending to show that the victim had been in Ms. Fuson's trailer and Mr. Whaley's Jeep. The victim's severed hand was found inside Mr. Whaley's Jeep, along with two knives. The victim's blood was located in various areas in the Jeep and on one of the knives. The victim's DNA was also found on suspenders collected from Ms. Fuson's bathroom. A forensic examiner from the Federal Bureau of Investigation ("FBI") compared hair from the chair in Ms. Fuson's living room to a known sample of the victim's hair and concluded that the two had the same microscopic characteristics. Another FBI forensic examiner compared mitochondrial DNA from the two

hair samples and concluded that they matched at every position, meaning that the examiner could not exclude the victim as the source of the hair found on the chair.

Medical Examiner Dr. Darinka Mileusnic-Polchan testified as an expert in forensic pathology. She stated that the cause of the victim's death was restraint asphyxiation, caused by the bandana that had been wrapped around his jaw and neck. She explained that the restraint pushed the victim's tongue up and prevented him from breathing efficiently. Dr. Mileusnic-Polchan opined that the extent and distribution of hemorrhaging in the victim's muscles were "consistent with strangulation or pressure more than just a simple knot on the front of the neck [could have] produce[d]." She further opined that based on the rigidity of the body when it was found, the victim was in a seated position for at least six hours after his death. She noted that the victim had not eaten within six hours of his death and had not been receiving adequate fluids for up to a day prior to his death. Dr. Mileusnic-Polchan testified that the victim's advanced age and dehydration contributed to his death. She further testified that the victim's left hand was severed after his death, a conclusion she reached due to the lack of bruising and minimal bleeding. She stated that the victim's autopsy also showed that he received blunt force trauma to his head. When asked whether she could determine if the victim was tortured, she replied, "[S]itting in a chair and being tied to a chair, it's already a torture. As far as being tied and being hit in the head is just, obviously, not a gentle handling."

State v. Gevon Cortez Patton, No. E2013-01355-CCA-R3-CD, 2014 WL 1512830, at *1-4 (Tenn. Crim. App. April 16, 2014) (footnotes omitted), *perm. app. denied* (Tenn. Oct. 22, 2014).

The Petitioner filed the instant petition for post-conviction relief, alleging he received the ineffective assistance of counsel from his three attorneys in the trial court proceedings and that his convictions were procured with unlawfully obtained evidence. The Petitioner also alleged he had obtained newly discovered evidence, and he attached to his petition a handwritten affidavit from codefendant Darryl Nance. The affidavit stated that codefendant Nance and the Petitioner's second pretrial counsel spoke about the offenses, that codefendant Nance agreed to testify that the Petitioner did not know what codefendant Nance had planned on the night of the offenses, that codefendant Nance prevented the Petitioner from leaving the scene, and that codefendant Nance did not know second pretrial counsel did not represent the Petitioner at the trial.

At the post-conviction hearing, the Petitioner testified that he was age sixteen at the time of the offenses and that his case was transferred from juvenile to criminal court. He said that his first pretrial counsel in criminal court "did not do anything" on his case during the one year counsel represented him and that the Petitioner did not know counsel represented him until he received a letter stating that counsel had been permitted to withdraw. The Petitioner said that he learned counsel had been appointed by reading a newspaper article and that counsel never contacted him, although he attempted to contact counsel through letters. The Petitioner said his mother called counsel's office. The Petitioner said that he received a letter stating counsel had withdrawn from the case because counsel had become a judge and that although the Petitioner could not recall who sent the letter, it was not from counsel. The Petitioner thought the letter might have been from the court clerk's office. The Petitioner recalled that he did not have any court appearances during counsel's representation and said that he first saw the trial court judge in 2012. The trial court file reflected that counsel was appointed on October 9, 2008, and withdrew on February 25, 2010.

The Petitioner testified that second pretrial counsel was appointed on February 25, 2010, and that they met several times to discuss his case. The Petitioner said that he wanted counsel to talk to codefendant Anthony Patton, who was the Petitioner's brother, to codefendant Darryl Nance, and to codefendant Desmond Nance, codefendant Darryl Nance's brother. The Petitioner said that counsel spoke to codefendants Darryl Nance and Anthony Patton, who were already serving their sentences in prison. The Petitioner said that afterward, counsel only reported that codefendants Nance and Patton were going to testify against the Petitioner. The Petitioner said that after he was convicted and sentenced, he saw codefendant Nance, who said he expected counsel to subpoena him for the Petitioner's trial because codefendant Nance had written a statement for counsel. The Petitioner said that he did not request counsel to subpoena codefendant Nance because counsel said the State planned to call codefendant Nance as a witness. The Petitioner said that he and counsel did not discuss a legal defense, although they generally discussed the Petitioner's being in the wrong place at the wrong time, but that counsel provided the Petitioner with witness statements. The Petitioner said that counsel never showed him the "exhibit book," which the post-conviction court said contained "photographs and everything."

The Petitioner testified that he and second pretrial counsel never discussed how they were "going to fight" the charges and that the Petitioner ultimately began to feel counsel was not doing his job. The Petitioner said that counsel never told him that codefendant Nance "recanted" his initial statement and that counsel did not inform the Petitioner's third attorney, who represented him at the trial, about codefendant Nance's statement to counsel. The Petitioner said second pretrial counsel was untruthful about the conversation with codefendant Nance because counsel only reported that codefendant Nance would testify against the Petitioner at the trial.

The Petitioner testified that trial counsel met with him, at most, twenty times during counsel's representation, that the meetings lasted fifteen to thirty minutes, and that counsel mostly discussed the witnesses testifying for the State. The Petitioner said that counsel never discussed possible defenses or his trial strategy and that counsel did not provide him with any evidence not provided by previous counsel. The Petitioner said that trial counsel presented him with a twenty-year plea offer at 100% service and only stated that the Petitioner would receive pretrial jail credit. The Petitioner said counsel stated that twenty years would be less than he would receive after a trial. The Petitioner said he did not want to accept the offer.

The Petitioner testified that he and trial counsel reviewed the codefendants' statements but that they did not discuss photographs, DNA or fingerprint evidence, and video recordings. The Petitioner said that he did not request counsel to speak to codefendant Nance because second pretrial counsel had spoken to codefendant Nance previously but that if the Petitioner had known codefendant Nance recanted his initial statement, the Petitioner would have discussed it with trial counsel. The Petitioner agreed that codefendant Patton was an uncooperative witness for the State but that counsel did not question him. The Petitioner said that codefendant Patton's previous statement was redacted after counsel's request for a mistrial was denied. The Petitioner said that when he asked counsel what counsel "was going to do" at the trial, counsel said that he was "going to downplay everything" the State presented. The Petitioner said that he did not know until after his trial that counsel could have presented evidence after the State rested its case-in-chief and noted that he had never been a defendant in any criminal proceeding, other than truancy-related matters in juvenile court.

The Petitioner testified that he wanted trial counsel to question codefendant Whitney Webb about her two inconsistent statements in which she first did not mention the Petitioner but later identified the Petitioner as a participant in the offenses. The Petitioner agreed that counsel questioned codefendant Webb and said that counsel also questioned codefendant Betty Fuson, who testified that the Petitioner wanted to leave and was scared. The Petitioner said that at the time of the trial, he had no complaints about counsel's cross-examinations of the State's witnesses.

The Petitioner testified that after the trial, trial counsel told the Petitioner, "Listen, I know we didn't have enough time to go back and forth over it . . . [and] I will testify to that . . . later on." The Petitioner said that he last spoke to counsel at the sentencing hearing and that counsel did not discuss the appeal. The Petitioner said that he wrote counsel a letter after the sentencing hearing and that counsel responded that counsel was waiting on a "sentencing paper" before doing anything else in the Petitioner's case. The Petitioner said

that he continued writing letters to counsel for one to two years without receiving a response, that the Petitioner requested transcripts, the appellate brief, and status updates about the appeal, that the Petitioner's family said counsel's telephone number was "out of service," and that a Google search showed counsel was no longer licensed to practice law. The Petitioner said that he received a letter, although he did not identify from whom, stating that this court denied appellate relief.

The Petitioner testified that he was sent to prison in March 2013 and that he spoke to codefendant Nance in April 2013, which was when the Petitioner learned codefendant Nance had provided a statement years earlier to second pretrial counsel. The Petitioner said that codefendant Nance prepared a duplicate statement that was notarized in 2013 and that the Petitioner wrote trial counsel about the statement but received no response.

The Petitioner testified that codefendant Patton's conduct during the trial was damaging and that the Petitioner wanted a new trial without his brother's testimony and with codefendant Nance's testimony. The Petitioner said that he wanted to tell a jury that he was already at the trailer when his codefendants arrived with the victim, that he did not know what his codefendants planned, and that the DNA and fingerprints from the Jeep did not belong to him. The Petitioner said that he relied upon trial counsel's advice not to testify because counsel said that the State had not proven "anything."

The Petitioner testified that he never saw the indictment until after the sentencing hearing and that in 2012, he asked the trial judge about the charges, at which time he learned he had been indicted for first degree murder. The Petitioner could not recall whether second pretrial counsel or trial counsel represented him at this time. The Petitioner said that he and trial counsel never discussed his possible sentence if he were convicted of murder and that a sentence for murder "was common sense." Relative to whether the Petitioner thought he was informed enough to decide whether to go to trial, the Petitioner said,

> I wanted to take it to trial from day one. I didn't feel like I did anything. I was already at the house prior to before they had brought [the victim], so I don't feel like I did anything still. You know, yeah, I didn't call the police as far as leaving, hey, dude is hurt. I mean they doing this to him, I'm next right if I tell on him, you know like how things go. I wasn't going – I was sixteen, I just left, got away, left, never went back, never nothing, help get gas as [codefendant Fuson] did on camera, no, I am not doing nothing. And they testified to that.

The Petitioner conceded that it was wrong not to call the police but said that he did not kidnap the victim and did not deserve twenty-five years.

On cross-examination, the Petitioner did not dispute that first pretrial counsel was appointed in October 2008, before the January 2009 indictment was returned. The Petitioner denied that he appeared in court with first pretrial counsel regarding counsel's motion to withdraw because counsel and the Petitioner could not "get along" well. The Petitioner denied ever speaking to first pretrial counsel. The Petitioner said that second pretrial counsel represented him the first time he saw the trial judge.

The Petitioner testified that second pretrial counsel spoke to codefendants Nance and Patton and that counsel said that codefendant Nance was not a favorable defense witness. The Petitioner denied that any of his attorneys requested a mental health evaluation and said that he underwent a mental health evaluation when his case was in juvenile court. The Petitioner agreed that second pretrial counsel noted the Petitioner's IQ score from the evaluation could have been relevant to the defense but said that counsel did not present any relevant witnesses at the trial. The Petitioner denied that he told counsel that he did not want his IQ to be part of his defense.

The Petitioner testified that codefendant Nance provided five different statements to law enforcement and that some, but not all, of those statements implicated the Petitioner. The Petitioner said that all of the codefendants, including codefendants Webb and Fuson who testified at the trial, gave multiple inconsistent statements.

Codefendant Darryl Nance testified that he was serving a life sentence for his role in the victim's death. He identified the Petitioner's second pretrial counsel and said that he spoke to counsel at the "Morgan County prison" after receiving his life sentence. Codefendant Nance said that they discussed the Petitioner's role in the offenses and codefendant Nance's testifying at the Petitioner's trial. Codefendant Nance stated that he told counsel the Petitioner's "involvement wasn't nothing," that the Petitioner "did not want to be there," and that codefendant Nance forced the Petitioner to be there. Codefendant Nance said that he carried a gun on the night of the killing and that he "didn't want nobody to leave that night and . . . wouldn't let [the Petitioner] leave." Codefendant Nance said he told counsel that he would testify to this at the Petitioner's trial.

Codefendant Nance testified that it was codefendant Jessica Lane's idea to "pick up" the victim, that he, codefendant Lane, and codefendant Patton went to the victim's home, and that they drove the victim to the trailer owned by codefendant Fuson. Codefendant Nance said that the Petitioner was inside the trailer when they arrived with the victim and that when the Petitioner "saw what was going on," the Petitioner went to a back room and stayed there until codefendant Nance "made him do something." Codefendant Nance said that the Petitioner attempted to leave the trailer, that codefendant Nance "already had a gun out," and that the gun was enough "to probably scare [the Petitioner] . . . to not leave." Codefendant Nance said that he pointed the gun at the Petitioner and told everyone, "He ain't leaving, I

ain't . . . let nobody leave till I get ready." Codefendant Nance said that afterward, the Petitioner returned to the back room until codefendants Webb and Fuson arrived.

Codefendant Nance testified that after codefendants Webb and Fuson arrived, he told the Petitioner to go with them to get gas for codefendant Nance's truck, which had run out of gas traveling to codefendant Fuson's trailer. Codefendant Nance said that the Petitioner left with them and never returned and agreed that he allowed the Petitioner to leave with them. Codefendant Nance said that the Petitioner "was just there" and was not involved. Codefendant Nance could not recall what, if anything, codefendant Patton said at the trailer.

Codefendant Nance testified that he gave inconsistent statements to the police and that he did not recall making all of them because, at the time, he had "been up three or four days . . . on drugs." Codefendant Nance said that he would testify if the Petitioner received a new trial, that he told the Petitioner's second pretrial counsel he would testify, and that he had never spoken to trial counsel. Codefendant Nance said that he went to prison in April 2010 and that he talked to second pretrial counsel in May 2010.

On cross-examination, codefendant Nance testified that he did not provide a written statement to second pretrial counsel. Codefendant Nance recalled providing a statement to Chattanooga police officers but did not recall stating that he was with the Petitioner and codefendants Lane, Patton, and Bryce Whaley and that the Petitioner went home with codefendant Webb. Codefendant Nance agreed that at this time, he denied taking the victim from the victim's home and blamed codefendant Whaley for the kidnapping. Codefendant Nance did not dispute that he told police officers that codefendant Whaley drove him, codefendant Patton, codefendant Lane, and the victim around in codefendant Whaley's Jeep and that "somehow [the Petitioner] left."

Codefendant Nance testified that in another statement to Chattanooga police officers, he stated that he, codefendant Lane, and codefendant Patton "showed J.B. Marshall and the other three guys . . . [who] had guns and . . . put the old man in the Jeep" and that codefendant Patton or the Petitioner drove the Jeep. Codefendant Nance said, though, this statement was a lie. Codefendant Nance said that he did not recall talking to Hamblen County police officers but agreed he told officers that codefendant Whaley admitted killing the victim after the Petitioner and codefendants Nance, Lane, and Whaley took the victim to the trailer near the "Expo Center." Codefendant Nance also agreed he told police officers that everyone, including the Petitioner, left the trailer with codefendants Webb and Fuson to travel to Chattanooga.

Codefendant Nance did not dispute that he also told police officers that the Petitioner was with him and codefendants Lane and Whaley at the victim's home, that the victim willingly came with them, that Donnie Johnson was supposed to meet them, and that no guns

were involved. Codefendant Nance did not recall, but did not dispute, stopping midsentence in another statement to the police, stating, "GD, I have given you three different statements," and asking for an attorney. Codefendant Nance identified the statement he wrote for the petition for relief, stating that the Petitioner was not involved in the kidnapping or killing. Codefendant Nance said he wrote the statement "on his own," not because the Petitioner asked him to write it.

On redirect examination, codefendant Nance testified that he was not permitted to interact with the Petitioner before their respective trial dates and that he first spoke to the Petitioner after they both had been convicted. Codefendant Nance said that he did not speak to the Petitioner before second pretrial counsel spoke to him.

The Petitioner's first pretrial counsel testified that according to the trial court file, he was appointed to the Petitioner's case on October 9, 2008, but that counsel did not recall anything about this case. Counsel said that he did not have his case file, that he did not recall the Petitioner's name, and that he did not recall what, if anything, he did in the Petitioner's case. Counsel said that he was not attempting to "make a game out of it" but that he genuinely did not recall anything about the Petitioner, including counsel's request for permission to withdraw from the Petitioner's case. Counsel noted that although the court file stated that he was appointed in 2008, he was elected juvenile court judge in 2006 and appointed to serve as general sessions judge in 2011. Counsel said he continued taking appointments as an attorney until October 2011. On cross-examination, counsel did not dispute that he was appointed to the Petitioner's case based upon his review of the trial court file but stated that he simply had no memory of the Petitioner's case.

The Petitioner's second pretrial attorney testified that he represented the Petitioner from 2010 to 2012, that he filed several motions, and that he and the Petitioner discussed potential defenses multiple times. Counsel said that the psychological evaluation showed that the sixteen-year-old Petitioner had an IQ of 70 and functioned as someone who was age twelve. Counsel said that his preferred defense, based upon the evaluation, was that the Petitioner was in the wrong place at the wrong time, did not comprehend what was happening, and attempted to remove himself from the situation. Counsel said, though, that the Petitioner wanted counsel to find witnesses showing the Petitioner was not present during the offenses but that counsel was unsuccessful. Counsel said that he went to the Knoxville motel at which the Petitioner reported staying, that counsel examined the guest log, and that counsel did not find the Petitioner's information in the log. Counsel said that although he had hoped he would find favorable information, counsel had doubted his efforts would be successful because the Petitioner's juvenile court counsel had previously examined the guest log. Counsel said that he also showed the Petitioner's photograph to motel staff because the Petitioner mentioned having a confrontation with a staff member but that counsel did not find anyone who recognized the Petitioner.

Second pretrial counsel testified that he spoke to codefendant Nance after codefendant Nance began serving his sentence in Morgan County. Counsel said that codefendant Nance was willing to testify truthfully about the Petitioner's lack of involvement in the offenses but that the testimony would have placed the Petitioner inside the trailer, which was not a defense the Petitioner wanted to pursue. Counsel said that he considered whether he could show that the events were so traumatic for the Petitioner that the Petitioner had blocked out any memory of the offenses. Counsel said that he knew codefendant Nance had provided the police with two conflicting statements, that one of those statements was consistent with the statement codefendant Nance provided counsel, and that counsel thought codefendant Nance's statement had "a merit of truth."

Second pretrial counsel testified that he withdrew as the Petitioner's attorney approximately eight weeks before the trial. Counsel said that he did not subpoena any witnesses because the State had subpoenaed all of the relevant witnesses. Counsel said that the only remaining witness was the psychological evaluator in Johnson City, that the evaluator knew the trial date, that counsel intended to subpoena the evaluator, and that funds remained for the evaluator's trial testimony. Counsel noted, though, that the Petitioner did not want counsel to present psychological evidence. Counsel said he withdrew from the case, in part, because the Petitioner became frustrated counsel did not embrace the theory that the Petitioner was not present for the offenses. Counsel said he also withdrew, in part, because the Petitioner became angry when counsel told the Petitioner that the prosecution's witnesses would testify that the Petitioner was present. Counsel said the Petitioner "knew beyond a doubt that he wasn't there" and "could not comprehend . . . my theory." Counsel said that the Petitioner requested another attorney, that the court denied the request, that the Petitioner became upset and said things counsel did not think the Petitioner meant, and that the Petitioner refused to speak during their next two meetings. Counsel said he sought advice from the Administrative Office of the Courts, which advised counsel to withdraw as counsel.

Second pretrial counsel testified that he and the Petitioner reviewed the discovery materials and that the Petitioner thought all of the witnesses were lying. Counsel said he and the Petitioner reviewed the photographs and reviewed "the book" but that at this time, the Petitioner was non-communicative. Counsel said that many of the photographs were excluded. Counsel said that he had no communication with the Petitioner's trial counsel.

On cross-examination, second pretrial counsel testified that he obtained the discovery materials from first pretrial counsel's office. Counsel recalled that first pretrial counsel told him that first pretrial counsel had not reviewed the materials or done any work on the case. Second pretrial counsel said that he was not prepared fully for the trial because the defense had not been chosen. Counsel said that he was "embarrassed and chagrined" that he never considered a defense that the Petitioner was present in the trailer but not a participant in the

kidnapping but that the Petitioner always contended he was in Knoxville when the offenses occurred. Counsel said he "fell down on the case in not considering all the possible scenarios that could have occurred."

Second pretrial counsel testified that the Petitioner who testified at the post-conviction hearing was not the "same" Petitioner whom counsel represented. Counsel said that the Petitioner had been immature and had acted like a typical teenage child, who had been incapable of "see[ing] things in a reasonable fashion." Counsel said he requested a mental health evaluation based, in part, on his and the Petitioner's communications and to determine possible defenses. Counsel said that the State's evaluator concluded the Petitioner's IQ was 74, that the defense's evaluator concluded it was between 68 and 72, and that counsel thought both evaluations provided a good defense. Counsel said, though, he was unable to convey this information in a manner that the Petitioner could grasp.

Second pretrial counsel testified that he did not attempt to contact trial counsel and said that he thought trial counsel would contact him if necessary. Second pretrial counsel said that he provided the mental health evaluation report to the prosecutor, that he could not recall whether he filed it with the trial court, and that he did not know if trial counsel received it. Counsel said that he did not receive any communications from the Petitioner after trial counsel began representing the Petitioner and noted that he would have forwarded any mail from the Petitioner to trial counsel without opening it. Second pretrial counsel recalled that the State provided him with all of the discovery materials and that the State was always forthcoming about the evidence. Counsel agreed, though, that he did not know some of the codefendants made third, fourth, and fifth statements and said that he only had two statements from codefendant Nance and one statement each from codefendants Patton and Whaley. Counsel said that he visited the Petitioner in the jail approximately twenty times, investigated the case in Knoxville and Greeneville, and met with the Petitioner's juvenile court attorney for at least four hours.

Second pretrial counsel reviewed a Tennessee Bureau of Investigation laboratory report, which was received as an exhibit at the post-conviction hearing and identified as trial exhibit 155, and testified that he did not recall whether the report was included in the discovery materials he reviewed with the Petitioner. Counsel identified a DNA and fingerprint report included in the discovery materials and agreed the report did not show the Petitioner's fingerprints inside the Jeep or inside the trailer. Counsel did not recall discussing the report with the Petitioner.

Trial counsel testified that initially, he met with the Petitioner once monthly and that they met multiple times per week closer to the trial date. Counsel said that he filed a couple of motions and incorporated second pretrial counsel's unresolved motions into his motions. Trial counsel recalled a motion hearing at which the parties reviewed each photograph and each proposed exhibit and discussed which exhibits were inadmissible and how the

admissible exhibits would be used. Counsel said he and the Petitioner reviewed the witness statements.

Trial counsel testified that although he did not know about codefendant's Darryl Nance's statement to second pretrial counsel, trial counsel "would have been reluctant" to call codefendant Nance as a witness. Counsel recalled the jury was composed of eleven Caucasians and one African-American and stated the following:

> And with tattoos and his appearance, it would come off – I'm afraid some of those would think gang automatically. I am not basing that on any conceived notions I have because I don't think I'm a very prejudiced person but I know how our jurors are and I know what can happen and I wouldn't have put him on the stand.

Counsel said that during trial preparation, he reviewed each codefendant's file from "archives" relative to the victim's death. Counsel said that he did not find anything useful to the defense because the files contained only enough information to support the codefendants' guilty pleas.

Trial counsel testified that he and the Petitioner discussed the defense and that counsel said "the biggest thing" was to "block what [the prosecution was] going to throw at" the defense. Counsel said the other portion of the defense was that the Petitioner abandoned the "common scheme" before the victim was killed. Counsel concluded that no need existed for the Petitioner to testify.

Trial counsel testified that although codefendant Patton's outburst hurt the defense, codefendant Patton stated in front the jury, "[W]hy are you doing this to my brother, I told you from the beginning he had nothing to do with it." Counsel said that he met with codefendants Patton and Fuson a couple times before the Petitioner's trial. Counsel said that he and the Petitioner got along well and noted that the Petitioner did not like an attorney who attempted to "force" a guilty plea. Counsel said that he may have pressured the Petitioner "a little bit" to accept the twenty-year offer because counsel feared the Petitioner would receive the maximum sentences if convicted at a trial. Counsel said that the Petitioner was young and could have another opportunity for a life but that counsel was ready to try the case and "put a lot of work in this one." Counsel noted that his career was "winding down" and that he "put more work in this case than . . . a lot of cases" because he wanted it to "be a last hurrah."

Trial counsel testified that the State issued subpoenas for all of the witnesses he wanted to testify at the trial. Counsel said that he talked to codefendant Patton before the

trial and that codefendant Patton did not want to testify. Counsel said he also spoke to codefendant Fuson before the trial, that she told counsel what her trial testimony would entail, and that she provided some favorable evidence at the trial. Counsel said that he spoke extensively with the Petitioner's juvenile court counsel, who provided him with the mental health evaluation and told him to "stay away from Knoxville" because "it may hurt" the defense. When asked whether counsel considered the conclusions contained in the mental health evaluation in formulating a defense, counsel said that the State had the burden to show guilt, that the Petitioner was with his older brother and codefendant Nance, who was an intimidating person when he was not holding a gun, and that the Petitioner left when he had the first opportunity. Counsel said that although the Petitioner's fingerprints and DNA were not found inside the Jeep, the lack of evidence in the reports did not establish the Petitioner had not been present. Counsel said he and the Petitioner discussed extensively the State's burden of proof and attempted to explain that the Petitioner did not have to prove his innocence. Counsel said that he advised the Petitioner that it was the Petitioner's choice whether to testify but that counsel felt the Petitioner's testimony might do more harm than good to the defense.

Trial counsel testified that he filed the appellate brief and that he thought the Petitioner had "a good chance" for relief. Counsel said that he challenged the reading of codefendant Patton's previous testimony in juvenile court. Counsel said that although the previous testimony was redacted, it still placed the Petitioner at the scene. Counsel said that he attempted to speak to all of the State's trial witnesses, including the investigating officers, and that he drove the route to find the homes and where the victim's body was found.

On cross-examination, trial counsel testified that he received the discovery materials from the district attorney's office. Counsel said that the Petitioner did not mention preferring a defense that he was not present for the offenses. Counsel said that based upon the discovery materials, he thought the defense should have been that the Petitioner, who was age sixteen, abandoned the common scheme because he left when he had the opportunity. Counsel recalled that all of the codefendants who testified placed the Petitioner inside the trailer and that one codefendant placed the Petitioner in the backseat of the Jeep next to the victim.

Trial counsel testified that if the Petitioner's mental health evaluation were going to be relevant to the defense, the Petitioner would have needed to testify to show the jury that he was "limited." Counsel recalled that the Petitioner "[came] across very well" at the trial and said that counsel did not have concerns the Petitioner did not understand what was happening at any time during counsel's representation. Counsel did not consider using the evaluations to show the Petitioner was incompetent because although the Petitioner's age spoke for itself, the Petitioner removed himself from the situation when the opportunity presented.

Trial counsel testified that he spoke to codefendant Patton before the trial and that codefendant Patton did not want to testify. Counsel recalled telling codefendant Patton not to answer any questions at the trial and said that codefendant Patton decided to answer the State's questions but in an inappropriate manner. Counsel said that he did not know what codefendant Patton would say during the trial, that he unsuccessfully sought a mistrial, and that he requested codefendant Patton's testimony be stricken from the record. Counsel said that codefendant Patton's outburst damaged the case and that everyone, including the Petitioner, was shocked. Counsel thought the Petitioner's shock at codefendant Patton's outburst might have helped the defense.

Trial counsel testified that initially, codefendant Patton refused to walk to the witness stand and that court officers carried him into the courtroom. Counsel said that the officers "pretty much dumped [codefendant Patton] on the floor," that codefendant Patton's mother "jumped up and put her hands on" an officer, and that she was later charged with assault. Counsel said he did not cross-examine codefendant Patton because codefendant Patton called a police officer or the prosecutor an "SOB" and repeated that he told the police from the beginning the Petitioner was not involved in the offenses. Counsel thought this was a good ending to codefendant Patton's testimony.

Trial counsel testified that he no longer practiced law as a result of a "mutual agreement" with the board of professional responsibility because counsel was "a bad bookkeeper" and "despise[d] talking on the phone." Counsel said that his disbarment was not related to this case and that he continued practicing law until late 2014. Counsel said that he did not recall this court's opinion in the previous appeal because "it was a very horrible time" in counsel's life but that his ability was not impaired during the Petitioner's trial and appeal.

Trial counsel testified that he objected to the State's reading codefendant Patton's previous statement to the jury after codefendant Patton became uncooperative for the prosecution. Counsel said a jury-out hearing was held, that counsel unsuccessfully argued codefendant Patton was not an unavailable witness, and that a redacted statement was read to the jury. Counsel said that he learned after the trial that the trial record did not contain a subpoena, that counsel did not know the reason, and that as a result, no subpoena was included in the appellate record. Counsel said that the prosecution issued the subpoena, that an transport order was entered to bring codefendant Patton to the trial, and that no return of the subpoena was included in the trial court record.

Trial counsel testified that he did recall changing his theory on appeal relative to why the juvenile court transfer hearing transcript should have been excluded at the trial, that his reference to the wrong rule of criminal procedure in the appeal was most likely a

typographical error, and that he did not know why the sentencing transcript was not included in the appellate record. Counsel did not think anything improper occurred during the sentencing hearing and said he was surprised the trial court imposed concurrent sentences, rather than consecutive service.

The post-conviction court denied relief. The court reviewed the trial record and made findings relative to the chronology of the Petitioner's representation. The post-conviction court found that first pretrial counsel was appointed on October 9, 2008, that the Petitioner was indicted on January 26, 2009, and that counsel sought to withdraw on February 24, 2010, citing a disagreement with the Petitioner. The court found that second pretrial counsel was appointed on February 24, 2010, and sought to withdraw on May 3, 2012, citing conflicts and disputes with the Petitioner. The court found that trial counsel was appointed on May 3, 2012. The court noted that trial counsel and first pretrial counsel were no longer licensed to practice law and that first pretrial counsel was previously convicted of a felony.

Relative to first pretrial counsel's failure to visit and to communicate with the Petitioner, the post-conviction court found counsel's testimony that he did not recall the Petitioner or his first degree murder case "incredible and absent some physical memory issue almost unbelievable." The court noted that the State did not offer as evidence the jail visitation logs or other evidence showing counsel's interaction with the Petitioner. The court found that the only evidence showing counsel was the attorney of record came from the trial court file, which reflected counsel filed a motion for discovery, agreed to increase the Petitioner's bond, waived arraignment, and sought to withdraw from the Petitioner's case. The court credited second pretrial counsel's testimony that he obtained the discovery materials from first pretrial counsel's office. The court determined "the Petitioner was denied the effective assistance of counsel" by first pretrial counsel "during [the Petitioner's] pretrial incarceration." The court determined, though, that "the denial did not affect the final outcome" of the trial.

Relative to second pretrial counsel's failure to discuss potential defenses, to subpoena witnesses, and to communicate with the Petitioner and trial counsel about potential witnesses, the post-conviction court determined that counsel thoroughly investigated the case, filed motions, and "did the best he could to represent" the Petitioner. The court found that the Petitioner made the attorney-client relationship "more difficult by refusing to talk" to counsel. The court determined that the Petitioner received the effective assistance of counsel.

Relative to trial counsel, the post-conviction court found that counsel was an experienced attorney "faced with a difficult case." The court found that counsel discussed the case with the Petitioner, investigated the case, filed the appropriate motions, adopted second pretrial counsel's motions, and "did the best that he could to represent [the]

Petitioner." The court noted that the Petitioner was convicted of criminally negligent homicide, a lesser included offense of first degree felony murder, and received a two-year sentence. The court noted this court's recitation of the facts in the previous appeal that the Petitioner was "seen in the red jeep with Nance and Lance on the night of the kidnapping by Roy Hollifield and Erica Lawson" and that codefendants Fuson and Webb testified that the Petitioner told them that he and codefendant Lane waited in the Jeep when codefendants Nance and Patton entered the victim's home. The court determined that trial counsel did not provide ineffective assistance.

Relative to codefendant Nance's statement that the Petitioner was not involved in the offenses, the post-conviction court determined that the statement was not newly discovered evidence sufficient to warrant a new trial. The court found that codefendant Nance's "new statements" were "merely another version which is inconsistent with his other statements and other evidence." The court found that second pretrial counsel and trial counsel both determined that codefendant Nance would not have been a credible witness for the defense.

Relative to whether "illegal evidence" was presented, the post-conviction court found that admission of a transcript of Jessica Lawson's juvenile court testimony at the Petitioner's trial was not erroneous. The post-conviction court found that Ms. Lawson was deceased at the time of the Petitioner's trial. The court found Ms. Lawson had been subjected to cross-examination by the Petitioner's juvenile court attorney. Relative to codefendant Patton's testimony at the Petitioner's trial, the court found that codefendant Patton acted "hostile to the Court and State" and that trial counsel chose not to cross-examine codefendant Patton after codefendant Patton stated the Petitioner had nothing to do with the offenses.

Relative to trial counsel's failure to present a defense, the post-conviction court found that trial counsel located no alibi witnesses and that second pretrial counsel suggested a mental health defense but that the Petitioner refused. The court found that "lawyers [cannot] fabricate evidence and invent a defense." The court found that trial counsel "effectively defended [the] Petitioner so that a jury found [him] guilty of Criminally Negligent Homicide rather than first degree murder."

The post-conviction court determined that the cumulative error doctrine did not apply in this case because "there were not numerous harmless errors in the trial." The court concluded that the Petitioner failed to show by clear and convincing evidence that he received the ineffective assistance of counsel. This appeal followed.

Post-conviction relief is available "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." T.C.A. § 40-30-103 (2012). A petitioner has the burden of proving his factual allegations by clear and convincing evidence.

Id. § 40-30-110(f) (2012). A post-conviction court's findings of fact are binding on appeal, and this court must defer to them "unless the evidence in the record preponderates against those findings." *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *see Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's application of law to its factual findings is subject to a de novo standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

I. Ineffective Assistance of Counsel

The Petitioner contends that he received the ineffective assistance of counsel from each attorney representing him in the trial court proceedings. The State responds that the post-conviction court properly denied relief.

To establish a post-conviction claim of the ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner has the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The Tennessee Supreme Court has applied the *Strickland* standard to an accused's right to counsel under article I, section 9 of the Tennessee Constitution. *See State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner must satisfy both prongs of the *Strickland* test in order to prevail in an ineffective assistance of counsel claim. *Henley*, 960 S.W.2d at 580. "[F]ailure 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). To establish the performance prong, a petitioner must show that "the advice given, or the services rendered . . . , are [not] within the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); *see Strickland*, 466 U.S. at 690. The post-conviction court must determine if these acts or omissions, viewed in light of all of the circumstances, fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A petitioner "is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision." *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); *see Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008). This deference, however, only applies "if the choices are informed . . . based upon adequate preparation." *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). To establish the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

A. First Pretrial Counsel

The Petitioner alleges that first pretrial counsel failed to take any action in his case, which prejudiced the defense with a significant delay in the investigation and trial preparation. The Petitioner asserts that the delay in the investigation resulted in codefendant Darryl Nance's "potentially exculpatory statement" not being discovered and presented at the trial.

The record reflects that the Petitioner was arrested days after the January 2008 offenses, that juvenile court counsel represented the Petitioner until the case was transferred to criminal court, that first pretrial counsel was appointed to represent the Petitioner on October 9, 2008, that the Petitioner was indicted on January 26, 2009, and that counsel sought permission to withdraw on February 24, 2010. According to the trial court file, counsel filed a motion for discovery materials, agreed to increase the Petitioner's bond, waived the Petitioner's arraignment, and sought to withdraw from the case. Counsel's post-conviction testimony that he did not recall the Petitioner or the case was discredited by the post-conviction court, and the Petitioner's uncontradicted testimony reflected that he never spoke to counsel. Although the post-conviction court stated in its order denying relief that first pretrial counsel "denied [the Petitioner] the effective assistance of counsel" during the Petitioner's pretrial incarceration, we glean from the record that the court meant counsel provided deficient performance because the court ultimately determined that "the denial did not affect the final outcome."

First pretrial counsel represented the Petitioner for more than one year but merely waived the Petitioner's arraignment, agreed to an increased bond, and filed a motion for discovery materials from the prosecution. No evidence shows that counsel performed any type of investigation, consulted an investigator, or met with the Petitioner to discuss the charges, the facts of the case, and possible defenses. Second pretrial counsel testified that he obtained the discovery materials from first pretrial counsel, who admitted to second pretrial counsel that he had not reviewed the materials or worked on the case. The record supports the post-conviction court's determination that first pretrial counsel provided deficient performance.

Although the Petitioner argues that this deficiency prejudiced the defense by causing "a significant delay in investigation and preparation," he fails to show how first pretrial counsel's lack of investigation prejudiced the defense. The Petitioner argues that the delay allowed "potentially exculpatory evidence" from codefendant Nance "to grow stale as [his] memories faded and stories changed over time." The Petitioner also argues that first pretrial counsel's lack of investigation caused the defense not to discover and present at the trial codefendant Nance's statement that the Petitioner did not participate in any of the offenses.

While the Petitioner correctly states that first pretrial counsel's lack of any investigation delayed the discovery of codefendant Nance's statement allegedly exculpating the Petitioner, second pretrial counsel spoke with codefendant Nance and knew that codefendant Nance was willing to testify that the Petitioner was not involved in the offenses. Second pretrial counsel was provided discovery materials from the prosecution and knew codefendant Nance had provided the police with two different statements at this time in the case, that one of those police statements was consistent with codefendant Nance's statement to second pretrial counsel, and that counsel believed codefendant Nance's statement had "a merit of truth." Codefendant Nance stated he spoke to second pretrial counsel in May 2010, and counsel represented the Petitioner from February 25, 2010, to May 3, 2012. The Petitioner's trial was in March 2013. The relevant statement from codefendant Nance was obtained during second pretrial counsel's representation, and at least one of codefendant Nance's police statements contained in the discovery materials was consistent with codefendant Nance's statement to second pretrial counsel. The delay caused by first pretrial counsel's failure to investigate did not prevent the discovery of codefendant Nance's relevant statement. The record supports the post-conviction court's determination that the Petitioner was not prejudiced by first pretrial counsel's deficient performance. The post-conviction court did not err by denying relief, and the Petitioner is not entitled to relief on this basis.

B. Second Pretrial Counsel

The Petitioner alleges that second pretrial counsel provided ineffective assistance by failing to pursue a viable defense theory and to preserve exculpatory evidence. The Petitioner asserts that counsel should have pursued a defense theory based upon the "mental health evidence, coupled with" codefendant Nance's statement exculpating the Petitioner from any involvement in the crimes. The Petitioner also alleges that counsel provided ineffective assistance by failing to provide trial counsel with codefendant Nance's statement and that this failure resulted in codefendant Nance's testimony not being presented at the trial.

Second pretrial counsel and the Petitioner discussed the possible defense theories multiple times. Counsel coordinated a mental health evaluation, which showed the then-sixteen-year-old Petitioner functioned as a twelve-year-old and had an IQ between 68 and 74. Counsel thought that the most appropriate defense, based upon the mental health evaluation, was that the Petitioner was in the wrong place at the wrong time, did not comprehend what was happening during the offenses, and attempted the remove himself from the situation. We note that although counsel did not consider that the Petitioner was present when the killing occurred but absent during the initial kidnapping, counsel testified that the Petitioner's post-conviction hearing testimony was the first time the Petitioner had mentioned such a scenario. In any event, counsel testified that the Petitioner did not want a defense involving his mental health and that counsel investigated to no avail the Petitioner's

claims that he was not present during the offenses. Counsel investigated the Petitioner's assertion that he was at a Knoxville motel at the time of the offenses, but the investigation did not yield results supporting the Petitioner's assertion. The State's evidence, including statements from multiple codefendants, placed the Petitioner inside the Jeep at the time of the kidnapping and inside the trailer where the killing occurred. Counsel considered, based upon the State's evidence and the mental health evaluations, whether counsel could establish that although the Petitioner had been present for the offenses, the events had been too traumatic for the Petitioner to handle and that as a result, the Petitioner had convinced himself that he was not present. Counsel said that the Petitioner thought all of the witnesses were lying and was unable to comprehend that he was present for the offenses and that multiple codefendants were going testify against him. Counsel said that codefendant Nance's statement that the Petitioner did not participate in the offenses would have been helpful to counsel's preferred defense theory emphasizing the Petitioner's mental health but that the Petitioner did not want psychological evidence presented at the trial. This conflict resulted in the Petitioner's becoming non-communicative and in counsel's obtaining permission to withdraw.

The record reflects that second pretrial counsel considered and preferred a mental-health-based defense to explain the Petitioner's presence but lack of participation in the offenses. Likewise, counsel spoke to codefendant Nance about the Petitioner's lack of participation in the offenses and believed the statement contained some level of truth, although counsel knew codefendant Nance had provided inconsistent accounts of the offenses to the police. However, counsel and the Petitioner's relationship deteriorated extensively based upon counsel's preferred defense theory, and counsel was permitted to withdraw after the Petitioner stopped communicating with counsel. Therefore, the record supports the post-conviction court's determination that counsel did not provide deficient performance relative to pursuing a viable defense theory related to the Petitioner's mental health and codefendant Nance's statement to counsel. Likewise, the record supports the court's determination that the Petitioner failed to establish any prejudice. We note the Petitioner has not alleged that second pretrial counsel had an affirmative duty or obligation in this case to present a defense theory in spite of the Petitioner's objections. The Petitioner is not entitled to relief on this basis.

The Petitioner also asserts that second pretrial counsel had affirmative duties to preserve codefendant Nance's statement and to consult with trial counsel about codefendant Nance's statement, which the Petitioner asserts exculpates him from the offenses. The post-conviction court did not address this in its order denying relief. Relative to preservation, the record reflects that second pretrial counsel was not asked whether he memorialized codefendant Nance's statement or whether his case file contained any information about the statement, and we will not speculate what counsel might have done after meeting with

codefendant Nance. Relative to counsel's duty to inform trial counsel about codefendant Nance's statement, the Petitioner does not cite to any legal authority showing second pretrial counsel had an affirmative duty to contact and consult trial counsel. After second pretrial counsel withdrew from this case, he did not receive communications from the Petitioner or trial counsel. Second pretrial counsel stated that he thought trial counsel would contact him if necessary. In any event, trial counsel received the discovery materials, which contained codefendant Nance's police statements, some of which the Petitioner testified did not implicate him. The Petitioner and trial counsel reviewed the discovery materials, which included the witness statements. As result, the Petitioner failed to show that second pretrial counsel provided deficient performance or that any deficiency resulted in prejudice to the defense. We conclude that the record supports the post-conviction court's general determination that second pretrial counsel did not provide ineffective assistance. The Petitioner is not entitled to relief on this basis.

C. Trial Counsel

The Petitioner alleges that trial counsel provided ineffective assistance by failing to conduct an adequate investigation and to present "potentially exonerating defense theories." The Petitioner argues that counsel failed to discover, either from second pretrial counsel or through trial counsel's investigation, codefendant Nance's alleged exculpatory statement and present codefendant Nance as a defense witness. The Petitioner, likewise, asserts that counsel should have presented a mental health defense based upon the expert witness secured by second pretrial counsel. Finally, the Petitioner argues that trial counsel presented an inadequate brief in the previous appeal.

Trial counsel testified that he attempted to speak to all of the prosecution's witnesses, including the investigating officers, that he drove to the area where the offenses occurred, and that he reviewed the discovery materials, which he received from the prosecution. Counsel determined, based upon the discovery materials, that the most appropriate defense theory was that the Petitioner, who was age sixteen at the time, abandoned a common scheme because he left the trailer at the first opportunity. Counsel said the codefendants' police statements placed the Petitioner inside the Jeep used during the kidnapping and inside the trailer where the victim died. Counsel said that the Petitioner never mentioned wanting a defense showing that the Petitioner was not present during the offenses.

Counsel testified that he met with codefendants Patton and Fuson before the Petitioner's trial. Counsel said that codefendant Patton did not want to testify and that codefendant Fuson told counsel the substance of her anticipated testimony, which placed the

Petitioner inside the Jeep during the kidnapping and inside the trailer where the victim died. Counsel spoke extensively with the Petitioner's juvenile court counsel but did not speak with second pretrial counsel. However, trial counsel was not questioned at the post-conviction hearing about why he did not speak to second pretrial counsel. Trial counsel was aware of the mental health evaluations but determined that the State had the burden to show guilt, that the Petitioner was with his older brother and codefendant Nance during the offenses, that codefendant Nance was an intimidating person when not holding a gun, and that the Petitioner left the group at the first opportunity. Counsel determined that in order for the mental health evaluations to have been relevant to the defense, the Petitioner would have needed to testify to show he was "limited." Counsel determined the Petitioner's age was apparent and worried that the Petitioner's testifying could have caused more harm than good to the defense. Counsel testified that he and the Petitioner discussed counsel's chosen defense theory to "block[] what [the prosecution was] going to throw" and to show the Petitioner abandoned the "common scheme" before the victim's death. Counsel said that although the Petitioner's fingerprints and DNA were not found inside the Jeep used during the kidnapping, the lack of evidence did not establish the Petitioner was not inside the Jeep. We note that Roy Hollifield's trial testimony placed the Petitioner inside the Jeep on the day of the offenses, and codefendants Fuson and Webb each testified that the Petitioner stated that he waited inside the Jeep while codefendants Nance and Patton entered the victim's residence at the time of the kidnapping.

The record reflects that trial counsel generally investigated the Petitioner's case and made strategic decisions about the defense based upon this investigation. Counsel reviewed the discovery materials, spoke to the Petitioner's juvenile court counsel, spoke to codefendants Patton and Fuson before the trial, reviewed the codefendants' courthouse records in "archives," and formulated a defense based upon this information. Relative to codefendant Nance, the indictment reflects codefendant Nance as a witness for the State, and counsel testified that he attempted to speak with all of the prosecution's witnesses. In any event, codefendant Nance provided multiple inconsistent police statements, which would have been included in the discovery materials provided by the prosecution, and at least one of these statements was consistent with codefendant Nance's statement to second pretrial counsel.

Trial counsel conceded at the post-conviction hearing that he did not know codefendant Nance had provided second pretrial counsel with a statement potentially exculpating the Petitioner. Although trial counsel conducted an investigation in this case, his investigation was deficient to the extent he failed to learn of codefendant Nance's statement to second pretrial counsel. Trial counsel would have learned about the statement had he consulted with second pretrial counsel, but trial counsel was not questioned at the post-conviction hearing why he spoke only to juvenile court counsel. After trial counsel's appointment in this case, he obtained discovery from the prosecution, which suggests

counsel obtained a police statement from codefendant Nance that was consistent with his statement to second pretrial counsel.

In any event, after trial counsel learned of the statement to second pretrial counsel at the post-conviction hearing, counsel's assessment was that codefendant Nance would not have been received well by the jury. We note that although counsel referenced the racial composition of the jury, counsel did not refer to codefendant Nance's race. Counsel's focus in determining codefendant Nance would not have been well received by the jury was based upon counsel's fearing that the jurors would associate codefendant Nance with a criminal gang based upon his tattoos and general appearance. Counsel stated relative to his trial strategy that codefendant Nance was intimidating when he was not holding a gun. We note that no evidence discrediting counsel's assessment of codefendant Nance was presented at the hearing. Counsel determined as a matter of trial strategy that codefendant Nance's testimony would not have benefited the chosen defense, which was based upon the Petitioner's presence during the offenses and upon the Petitioner's leaving the group at the first available opportunity. The trial transcript reflects that codefendants Webb and Fuson testified that the Petitioner told each of them that he waited inside the Jeep when codefendants Nance and Patton entered the victim's home at the time of the kidnapping. This placed the Petitioner's previous statement at odds with codefendant Nance's statement to second pretrial counsel that the Petitioner was at the trailer when codefendants Nance, Patton, and Lane kidnapped the victim. Furthermore, codefendant Fuson testified at the trial that codefendant Nance, while holding a gun, would not allow the Petitioner to leave the trailer, which was consistent with trial counsel's chosen defense. The Petitioner failed to show that any deficient performance resulted in prejudice to the defense, and as a result, the record supports the post-conviction court's general determination that trial counsel did not provide ineffective assistance. The Petitioner is not entitled to relief on this basis.

Relative to the previous appeal, the Petitioner asserts that trial counsel prepared a brief "rife with substantive and non-substantive errors." The Petitioner states, without citation to the record, that counsel provided an incomplete record on appeal and "misidentified common sources of law" in the brief. Tennessee Rule of Appellate Procedure 27(a)(7)(A) requires that an appellant's argument contain "citations to the authorities and appropriate references to the record . . . relied on." The rules of this court provide, "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived[.]" Tenn. Ct. Crim. App. R. 10(b).

At the post-conviction hearing, trial counsel testified that he referred to the wrong rule of criminal procedure in the appellate brief when discussing whether codefendant Patton was an unavailable witness and that the error was typographical. Although the Petitioner only asserts that the overall quality of the brief was poor, this court's opinion in the previous appeal shows that counsel cited Tennessee Rule of Criminal Procedure 15 relative to the

admissibility of depositions of unavailable witnesses. *See Gevon Cortez Patton*, 2014 WL 1512830, at *8. This court analyzed the issue pursuant to the rules of hearsay because codefendant Patton's police statement was a statement against interest and determined that his previous statement was admissible based upon his unavailability. *See id.* Trial counsel also argued in the appeal that codefendant Patton's subpoena did not contain a return of service and that as a result, codefendant Patton should not have been "forced" to testify. *See id.* at *7. Although the relevant subpoena was not contained in the appellate record, this court noted no authority showing that "a lack of return of service of process for a subpoena to testify would render a witness's testimony inadmissible" and determined that codefendant Patton was not forced to testify because he was properly declared unavailable. *See id.*

Also relevant to the previous appeal, trial counsel testified that he was unaware the sentencing hearing transcript was not included in the appellate record. This court was unable to review the Petitioner's sentences because the transcript was not included in the record. *See id.* at *10. However, this court noted that the standard of appellate review of the length and manner of service of a sentence was for an abuse of discretion with a presumption of reasonableness and determined that the Petitioner received within-range sentences for the conviction offenses. *Id*. (citing *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012)). The Petitioner has not presented any argument supporting an assertion that counsel's failure to include the sentencing transcript in the appellate record affected the outcome of the appeal, and the sentencing transcript is not included in the current appellate record. The Petitioner received within-range and concurrent sentences for criminally negligent homicide and especially aggravated kidnapping. The Petitioner failed to show that any deficient performance resulted in prejudice to the defense, and as a result, the record supports the post-conviction court's general determination that trial counsel did not provide ineffective assistance. The Petitioner is not entitled to relief on this basis.

II. Cumulative Error Doctrine

We now address the cumulative impact of counsel's deficient performance that do not in isolation result in prejudice and a deprivation of due process. The cumulative error doctrine requires relief when "multiple errors [are] committed in the trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76-77 (Tenn. 2010) (internal citations omitted); *see State v. Jordan*, 325 S.W.3d 1, 79 (Tenn. 2010) ("'[T]he combination of multiple errors may necessitate . . . reversal . . . even if individual errors do not require relief.'") (quoting *State v. Cribbs*, 967 S.W.2d 773, 789 (Tenn. 1998)).

"[W]hen an attorney has made a series of errors that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing

prejudice" of an ineffective assistance of counsel allegation. *Timothy Terell McKinney v. State*, No. W2006-02132-CCA-R3-PD, 2010 WL 796939, at *37 (Tenn. Crim. App. Mar. 9, 2010), *perm. app. denied* (Tenn. Aug. 25, 2010). More than one instance of deficient performance, when considered collectively, can result in a sufficient showing of prejudice pursuant to *Strickland*. *Id*. The question is whether counsel's deficiencies "cumulatively prejudiced . . . the right to a fair proceeding and undermined confidence in the outcome of the trial." *Id*. Counsel's failure to conduct adequate pretrial preparation and investigation may establish prejudice pursuant to *Strickland*. *Id.*

First pretrial counsel's deficient performance relates to his failure to perform any substantive work in the Petitioner's case. Trial counsel's deficient performance relates to his failure to learn of codefendant Nance's statement to second pretrial counsel. We cannot conclude, however, that the cumulative impact of these deficiencies resulted in prejudice.

Although first pretrial counsel did not perform any substantive work in this case, the delay in the pretrial investigation did not prevent the discovery of any information that was beneficial to the defense. Second pretrial counsel spoke with codefendant Nance, who told counsel that the Petitioner was not involved in the offenses, was not present for the kidnapping, and attempted to leave the trailer when the codefendants arrived with the victim. According to second pretrial counsel, at least one of codefendant Nance's two police statements provided in the discovery materials to second pretrial counsel was consistent with codefendant Nance's statement to counsel. Trial counsel received the same discovery materials, along with additional information and codefendants' police statements, that second pretrial counsel received. As a result, trial counsel possessed codefendant Nance's relevant statement. We note that although both attorneys were disbarred after the Petitioner's trial, no evidence was presented at the post-conviction hearing showing that either attorney's disbarment was related to the attorneys' conduct and performance in this case.

Likewise, we cannot conclude that due process requires a new trial in this case in light of the other evidence presented at the trial. Roy Hollifield's trial testimony placed the Petitioner inside the Jeep on the day of the offenses, and codefendants Fuson and Webb each testified that the Petitioner stated that he had waited inside the Jeep while codefendants Nance and Patton entered the victim's residence at the time of the kidnapping. This testimony contradicts codefendant Nance's statement to police and to second pretrial counsel that the Petitioner was not present during the kidnapping. Relative to the events at the trailer, codefendant Webb testified that when she and codefendant Fuson arrived at the trailer, the Petitioner was inside a bedroom and the victim was tied to a chair in the living room. Codefendant Webb also testified that codefendant Nance refused to allow her to leave the trailer. Codefendant Fuson testified that the Petitioner followed her to her bedroom inside the trailer and told her that he was going to leave when she left. Codefendant Fuson testified that codefendant Nance would not allow anyone to leave the trailer. As a result, the portion of codefendant Nance's statement to second pretrial counsel relative to the Petitioner's

wanting to leave the trailer was before the jury. In light of the testimony, we conclude that no reasonable probability exists showing that the outcome of the trial would have been different. The Petitioner is not entitled to relief on this basis.

Regarding the Petitioner's request that his case be transferred to another judge upon remand, we conclude that the Petitioner is not entitled to relief on this basis because he has failed to show his entitlement to post-conviction relief.

Based upon the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

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ROBERT H. MONTGOMERY, JR., JUDGE