IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
June 25, 2020 Session

FELIX HALL v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 12-05589 Jennifer J. Mitchell, Judge

No. W2019-00242-CCA-R3-PC

The Petitioner, Felix Hall, appeals the Shelby County Criminal Court's denial of his petition for post-conviction relief challenging his convictions for theft of property valued at $10,000 or more but less than $60,000, burglary of a building other than a habitation, and theft of property valued at $500 or less. The Petitioner contends that he received ineffective assistance of counsel. After review, we affirm the judgment of the post-conviction court.

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

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, P.J., and J. ROSS DYER, J., joined.

Benjamin Israel, Memphis, Tennessee, for the Petitioner, Felix Hall.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

This case arose following the theft of a Freightliner tractor-truck and the burglary and theft at a Wendy's restaurant. Thereafter, the Petitioner was indicted for theft of property valued at $10,000 or more but less than $60,000, burglary of a building other than a habitation, and theft of property valued at $500 or less.

Trial. The proof at trial established that on May 22, 2012, the Petitioner was stopped by police while driving a 2005 Freightliner tractor-truck that had been taken without permission from a Le-Mar Holdings' lot several days before. State v. Felix Hall, No. W2014-02199-CCA-R3-CD, 2015 WL 6942505, at *1 (Tenn. Crim. App. Nov. 10,

2015), perm. app. denied (Tenn. Mar. 23, 2016). Le-Mar Holdings had purchased this tractor-truck at auction for $20,000. Id. The police, upon stopping the Petitioner, found a pair of bolt cutters, a padlock that had been cut, and a box of cold chicken inside the cab of the truck. Id. at *1-2. Earlier that morning, the police had responded to a nearby Wendy's restaurant where officers found that padlocks had been cut from at least one of the restaurant's storage buildings. Id. at *2. The Wendy's manager testified that less than $500 worth of chicken was missing from the storage building. Id. The Petitioner testified on his own behalf at trial, claiming that he received the keys to the tractor-truck from Eric Davis, a man with whom he used cocaine and who was staying at the nearby American Inn. Id. The Petitioner asserted that he did not know that the tractor-truck was stolen. Id. He said that he went to Davis's hotel room at 8:00 a.m. on May 22, 2012, and that Davis gave him the keys to the truck so he and Sherry Hutchensen, who was also at Davis's room, could retrieve money from a Western Union. Id. The Petitioner said that he and Sherry Hutchensen were stopped by police before they could find the Western Union and that Hutchensen told a police officer that Davis, who was staying at the American Inn, had given the Petitioner the keys to the tractor-truck. Id. The Petitioner said that he did not realize that the tractor-truck did not have a license plate. Id. He also asserted that he did not break into the Wendy's restaurant and did not have any knowledge of the crimes committed there. Id. During the State's rebuttal proof, Nikunj Patel, the general manager of the American Inn, testified that every person checking in at the hotel had to present a photograph identification and that all of the information from this identification was entered into the hotel's database system. Id. at *3. Patel stated that although he searched the hotel's database for the names Eric Davis, Felix Hall, and Sherry Hutchensen, there were no records under these names; however, he acknowledged that someone could stay in a hotel room rented by someone else. Id. Officer Hardy D. Savage III testified that upon stopping the tractor-truck, neither the Petitioner nor Hutchensen mentioned Eric Davis or the American Inn. Id. Officer Savage recalled the Petitioner telling him at the time of the stop that Hutchensen "didn't have anything to do with this." Id. Detective James Harden, who was also at the scene of the stop, testified that the Petitioner never said anything to him about the American Inn. Id.

At the conclusion of trial, the jury convicted the Petitioner as charged of theft of property valued at $10,000 or more but less than $60,000, burglary of a building other than a habitation, and theft of property valued at $500 or less. See Tenn. Code Ann. §§ 39-14-103, -105, -402 (Supp. 2011). On direct appeal, this court affirmed the judgments of the trial court, and the Tennessee Supreme Court denied the Petitioner's application for permission to appeal. Felix Hall, 2015 WL 6942505, at *1.

Post-Conviction. On July 11, 2016, the Petitioner filed a timely pro se petition for post-conviction relief. Thereafter, the Petitioner was appointed counsel, who filed an amended petition for post-conviction relief, alleging that trial counsel provided

ineffective assistance in failing to object to the State's comments regarding the Petitioner's decision not to make a statement to police, in informing the Petitioner that he could not "win" unless the Petitioner testified at trial, and in failing to object to prejudicial testimony and photographic evidence of ammunition and a crack pipe that were found near the Petitioner at the time of his arrest.

At the post-conviction hearing, trial counsel testified that he was an Assistant Public Defender and that he had represented the Petitioner at trial. He stated that he did not recall testimony at the Petitioner's trial about a crack pipe or ammunition being found in the truck. Trial counsel acknowledged that the Petitioner was charged with theft of property valued at between $10,000 and $60,000, burglary of a building, and theft of property valued at $500 or less and that none of the Petitioner's charges involved, drugs, drug paraphernalia, weapons, or ammunition. When asked why he did not object when the State introduced testimony about a crack pipe and ammunition found in the truck, trial counsel replied, "I actually don't remember and if it is as you say, I should have and I erred."

When asked if he recalled advising the Petitioner that he should testify at trial, trial counsel said he did not have a specific recollection of doing so but that if he did, it "would have actually come out during voir dire that we talked about it and that I gave him my opinion." He added:

> I think basically the way that I would have voir-dired him, and I'm probably sure that I did is, I basically told him that—I gave him my opinion that I think he should testify, that I probably told him that I felt, in my opinion that he would have been convicted if he did not testify and that he may very well be convicted even if he does [testify]. But, it would obviously give us a defense for him to testify, despite his [criminal] record.

Trial counsel further asserted that "based on . . . the proof [the State] had presented, if it went unrebutted, or unanswered then in my opinion [the Petitioner] would have been convicted, at that particular time." He acknowledged that the Petitioner had a lengthy criminal history at the time of his trial and that the State used his criminal record to impeach him; however, he said he took the Petitioner's criminal record into account when he advised him to testify. Trial counsel explained that when representing a persistent or career offender, "one of the problems that you have is if you don't have any proof, other than your client, then you're going to have to deal with the [criminal] record issue. And that is something that I advised [the Petitioner], even well before we went to trial."

Trial counsel stated that the defense's theory at trial was that the Petitioner "was borrowing the truck from a friend[,]" that the Petitioner "believed [this friend] was employed to drive that truck[,]" that the Petitioner and this friend had "spent the night . . . in a hotel room"[,] and that the Petitioner had "asked his friend if he could borrow the truck to go somewhere . . . without any knowledge that [the truck] was stolen, without any knowledge of what was in [the truck]." Post-conviction counsel then asked trial counsel why he failed to object when the State asked the Petitioner the following question on cross-examination: "Isn't it true that when [the officer] stopped you, you refused to talk to him? You refused to sign a waiver and you refused to tell him information, at all?." Trial counsel replied:

> To be honest with you[,] I'd think that you'd have to take it [in] context of all of the testimony but just on its face I think in him testifying and in questioning about that, I'm frankly not sure [whether] that is impermissible, or not[,] in that context. I think certainly if [the State] commented about it in closing arguments that would [have been] impermissible.
>
> And, if you're asking if that was something that I should have objected to, I probably should have.

On cross-examination, trial counsel asserted that the State asked the Petitioner at trial if he had told the police about Eric Davis and the Petitioner replied that he had, in fact, informed the police about Davis. Trial counsel said that the State then challenged the Petitioner at trial about whether he had actually signed a waiver and given the police any information, and the Petitioner insisted that he gave the police information about Eric Davis at the time he was stopped. Trial counsel said that he was familiar with the concept, noted in State v. Cazes, 875 S.W.2d 253, 266-267 (Tenn. 1994), that if a defendant takes the stand and testifies, then a prosecutor is not prohibited from commenting on the defendant's silence, so long as the comment is a fair response to the defendant's testimony. He stated that although he believed now that he should have objected to the State's questioning, he did not believe that his failure to object was "outcome determinative."

Trial counsel asserted that the testimony and photographs regarding the crack pipe and ammunition were admitted as part of a series of photographs that depicted the contents of the tractor-truck and included some photographs of personal items belonging to the Petitioner. He stated that these photographs were admitted to show who had been in the truck, how long the truck had been gone, and how long the Petitioner may have had

possession of the truck. Trial counsel agreed that the Petitioner testified at trial that he knew Eric Davis, who had the truck, because he and Davis had used crack cocaine together at the hotel room.

Trial counsel said that he talked to the Petitioner "way before trial" about testifying because the Petitioner was the only available person who could present the defense theory that he had borrowed the truck from Davis . He added, "[W]ithout [the Petitioner's testimony [at trial,] . . . we would have been stuck with the State's version of events." Trial counsel said he ultimately made a strategic decision at the time the case was set for trial that the Petitioner would need to testify, despite his extensive criminal record, in order to present this defense theory. He said he continued to discuss with the Petitioner the need for him to testify "in the hopes of possibly settling [the case]." He said that he considered both the Petitioner's criminal record and the alternative avenues of defense when deciding whether to have the Petitioner testify. Trial counsel said that at the time of the Petitioner's trial, he had been practicing law for twenty-nine years and had tried over a hundred felony cases.

On redirect examination, when asked whether his failure to object to the evidence of the crack pipe being found in the truck was a strategic decision, trial counsel replied, "As I am sitting here now, I think it did pass me by, although I could [have] argue[d] . . . that [Davis and the Petitioner] smoked crack together, obviously, but I don't remember arguing that." When he was asked whether there was any strategic value in the jury knowing there were bullets in the truck, trial counsel admitted, "There was not." Post-conviction counsel also asked whether trial counsel made a strategic decision not to object to the State's comments about the Petitioner's failure to make a statement to police, and trial counsel replied, "I think when we got to the waiver, when she starts talking about the waiver, I think in retrospect I should have objected to that."

Trial counsel asserted that it "would have been extremely difficult" to argue that Davis stole the tractor-truck without the Petitioner's testimony. However, he acknowledged that the truck in question had been sitting in a lot for several days and that the truck's owner could not testify to exactly when the truck had been stolen, only that it had been stolen sometime during a span of nine days. When trial counsel was asked if he could have at least argued that these nine days were enough time for the truck to have been stolen by someone else and for the Petitioner to have obtained it later, trial counsel stated, "[T]hat would have been a difficult argument, I think, but yes."

On recross examination, trial counsel stated that because the State had presented evidence that the Petitioner was in possession of the stolen truck at the time of the stop, it was important for someone to testify that the Petitioner had simply borrowed this truck

from Davis. He agreed that at the time of trial, the only witness available to present that defense theory was the Petitioner.

The Petitioner also testified at the post-conviction hearing. He said he was not pleased with trial counsel's representation of him and did not believe that trial counsel was "really trying to work for [him], to show that [he] had nothing to do with this."

The Petitioner claimed that he gave Sherry Hutchensen's name and address to trial counsel so he could contact her. He also said he told trial counsel that the police had detained Sherry Hutchensen and had stopped her on prior occasions, so the police should also have her contact information.

When the Petitioner was asked whether he wanted to testify at trial, he stated, "I was told by [trial counsel] that if I didn't testify he felt we were going to lose and then he made the statement that 'We have nothing to lose.' I had everything to lose." He asserted that he testified because he "felt like [he] had no options."

The Petitioner said that although he informed trial counsel that he had received the truck from Eric Davis, who was staying at the American Inn, trial counsel waited almost two years to do an investigation. He added, "[A]fter two years it was going to be kind of hard to pull that information up." Then the Petitioner stated the following:

> I would just like to make a statement for the record that Ms. Hutchison[1] gave them this information [about the fact that I borrowed the truck from Eric Davis] on the scene. I didn't give them any information. Ms. Hutchison gave them this information on the scene and she was still let go. So I couldn't understand it, because when she walked over to the police car that I was in she told me, out of her mouth, she said, "Well, I told them where we got the truck from." And I was like, "How could they let you go?"

The Petitioner was unhappy that the State had mentioned the ammunition that was found in the truck, given that he was never charged with any crime related to ammunition, and he felt that trial counsel should have objected when the State first mentioned the ammunition. The Petitioner claimed that when he talked to trial counsel

[1] Although this individual's name was spelled "Sherry Hutchensen" in the trial transcript, it was spelled "Sherry Hutchinson" in the post-conviction hearing transcript.

about the State's mention of the ammunition in the absence of charges related to it, trial counsel told him it did not make any difference.

The Petitioner also asserted that he said something to trial counsel when one of the officers testified that he never gave him a statement at the scene of the stop:

> In the trial when the officer, himself, sat here, he made the statement that, "Oh [the Petitioner] didn't give me any information" and just like y'all spoke of, I asked [trial counsel], I'm like, "Okay, well [the State] just stated that I said this and I said that[,"] I was like, something ain't right. And he said he wouldn't, you know, we are not going to worry about it.

The Petitioner said that William Godfrey, whose company owned the tractor-truck, admitted that he "hired four people from Pro-Driver out of Memphis to drive this truck[,]" which meant that there were "four people with permission to drive this truck." He then asserted, "The key [to the truck] was given to me, so how could I steal something and the key was given to me, you know. I just couldn't understand that." The Petitioner asserted that he informed trial counsel that "yes [he] was driving the vehicle, but [he] did not steal the vehicle."

On cross-examination, the Petitioner admitted that Godfrey testified that he never gave the Petitioner permission to use the truck. The Petitioner asserted that he was able to locate Sherry Hutchensen and when he provided trial counsel with Hutchensen's telephone number, trial counsel "still wouldn't try to reach out to get this information from her." The Petitioner acknowledged that Nikunj Patel of the American Inn testified at trial that even though a photographic identification had to be presented to rent a hotel room, no one by the name of Eric Davis or Sherry Hutchensen had rented a room at the American Inn.

During redirect examination, the Petitioner insisted that trial counsel waited until the last minute to try to find Ms. Hutchensen for trial, even though he knew her location for the entire sixteen months that he represented him.

Regarding the testimony from Nikunj Patel, the general manager of the American Inn, the Petitioner stated:

> I would like to say for the record that when this Mr. Patel . . . made the statement that none of us had ever registered or checked into that hotel, I was one of the painters that painted the inside of that hotel. Mr. Davis

> was one of the guys [who] was hired through this hotel to be a carpet cleaner for that hotel. So everything that he stated up here, under oath, was a lie.

The Petitioner claimed that he stayed in a room at the American Inn when he was painting the hotel, even though it was not registered in his name, and the cost of the room was deducted from his painter's fee. He also claimed that Eric Davis was staying at the American Inn the day he was arrested and that if the police had properly investigated, they would have found Davis there.

The Petitioner denied that the information about his borrowing the truck from Eric Davis came out for the first time at trial. He admitted that an officer testified at trial that no one at the time of the Petitioner's arrest provided any information about Eric Davis or the American Inn. The Petitioner also admitted that he never mentioned anything at trial about how he and Eric Davis worked at the hotel and got a free room to stay in; however, the Petitioner claimed he had given trial counsel this information.

The Petitioner asserted that the very first time he and trial counsel discussed his testifying at trial was just before trial counsel put him on the stand to testify. He claimed trial counsel had been telling him during the trial, "We're looking good, we're looking good," and then suddenly trial counsel told him, "If you don't testify we are going to lose and right now you've got nothing to lose."

Following this hearing, the post-conviction court entered an order denying post-conviction relief on January 9, 2019. In this order, the post-conviction court made the following findings of fact and conclusions of law:

> With regard to the claim that trial counsel provided ineffective assistance of counsel by failing to object to the admission of photos and testimony about ammunition and a crack-pipe found in the truck, trial counsel admits that he probably should have objected. Although it appears to the Court that he probably should have objected, and counsel conceded this point, this does not rise to the level of a deficient performance as set out in State v. Goad, 938 S.W.2d 363, 369 (Tenn. 1996).
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> . . . .
>
> Attorneys may often choose not to object to damaging evidence for strategic reasons so as to avoid emphasizing the unfavorable evidence.

State v. [Robby Lynn] Davidson, [No. M2005-02270-CCA-R3-PC,] 2006 WL 3497997 (Tenn. Crim. App. 2006).

. . . .

With regard to the claim that trial counsel advised the petitioner that he would not win if he did not testify, counsel admits that he probably did tell the petitioner that because he realized that the defendant's testimony was the only way his story would be told. The petitioner even testified in this hearing that during trial, counsel assured him that things were going well. And at some point in the trial that changed and counsel informed the petitioner that he would have to testify. This is trial strategy. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). A reviewing court should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. Strickland v. Washington, 466 U.S. 668, 689 (1984). 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].

The decision whether to testify or not is a decision ultimately made by the criminal accused after full consultation with counsel. See ABA Standards, The Defense Function (3rd ed. 1993), Standard 4-5.2. The commentary to the above referenced Standard provides, in part: With respect to the decision whether the defendant should testify, the lawyer should give his or her client the benefit of his or her advice and experience, but the ultimate decision must be made by the defendant, and the defendant alone. In making each of these decisions—whether to plead guilty, whether to accept a plea agreement, whether to waive jury trial, whether to testify, and whether to appeal—the accused should have the full and careful advice of counsel. Although it is highly improper for counsel to demand that the defendant follow what counsel perceives as the desirable course or for counsel to coerce a client's decision through misrepresentation or undue influence, counsel is free to engage in fair persuasion and to urge the client to follow the proffered professional advice. Ultimately, however, because of the fundamental nature of decisions such as these, so crucial to the accused's fate, the accused must make the decisions himself or herself.

. . . .

With regard to the claim that counsel did not object when the prosecutor was questioning the petitioner during cross-examination about what he did or did not say to the police at the time of the stop, counsel conceded that he probably should have objected. Although he added that at the time, taken in context, the questioning may have been appropriate. The decisions of a trial attorney as to whether to object to opposing counsel's arguments are often primarily tactical decisions. Attorneys may often choose not to object to damaging evidence for strategic reasons so as to avoid emphasizing the unfavorable evidence. [Robby Lynn] Davidson, 2006 WL 3497997 (Tenn. Crim. App. 2006). 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. Strickland v. Washington, 466 U.S. 668, 690 (1984).

In this case, the defendant testified on cross-examination . . . that he had made certain statements to the police about whom he had gotten the vehicle from he was found in. The prosecution cross-examined him about his silence at the time which was contradictory to his testimony at the time. Petitioner alleges that this was improper. "A witness may be cross-examined on any matter relevant to any issue in the case . . . , including credibility . . ." Tenn. R. Evid. 611 (b). "[E]ven in such special situations, a defendant may be completely and thoroughly cross-examined about all testimony given or fairly raised by the defendant on direct examination." State v. Cazes, 875 S.W.2d 253, 266 ([Tenn.] 1994). The United States Supreme Court does not prohibit a prosecutor from commenting on a defendant's silence, if such comment is a fair response to a position that was taken by either the defendant or defense counsel." [Id. at 267] (citing United States v. Robinson, 485 U.S. 25, 31-33 (1988)). Petitioner has failed to show "deficient performance."

. . . .

The Petitioner has failed to prove ineffective assistance of counsel. With regard to his claims that trial counsel provided ineffective assistance of counsel in failing to object to various matters during the trial and advising the petitioner to testify at trial even though he was subject to extensive prison time if convicted[,] [the Petitioner] has not shown by a preponderance of the evidence . . . that trial counsel's performance was deficient. And even if trial counsel's performance could be found to be deficient, petitioner has not shown that this deficiency prejudice[d] the defense.

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

ANALYSIS

The Petitioner argues that he received ineffective assistance of counsel. In particular, he claims trial counsel failed to object to the State's comments about his postarrest silence, that trial counsel erred in advising him that he had to testify at trial, and that trial counsel failed to object "to patently irrelevant and highly prejudicial photographs of ammunition and drug paraphernalia" presented by the State at trial. The Petitioner also asserts that the cumulative effect of trial counsel's errors negatively impacted his case. We conclude that the post-conviction court properly denied relief.

Post-conviction relief is only warranted when a petitioner establishes that his or her conviction or sentence is void or voidable because of an abridgement of a constitutional right. Tenn. Code Ann. § 40-30-103. The Tennessee Supreme Court has held:

> A post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. When reviewing factual issues, the appellate court will not re-weigh or re-evaluate the evidence; moreover, factual questions involving the credibility of witnesses or the weight of their testimony are matters for the trial court to resolve. The appellate court's review of a legal issue, or of a mixed question of law or fact such as a claim of ineffective assistance of counsel, is de novo with no presumption of correctness.

Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006) (citations and internal quotation marks omitted); see Felts v. State, 354 S.W.3d 266, 276 (Tenn. 2011); Frazier v. State, 303 S.W.3d 674, 679 (Tenn. 2010). A post-conviction petitioner has the burden of proving the factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Tenn. Sup. Ct. R. 28, § 8(D)(1); Dellinger v. State, 279 S.W.3d 282, 293-94 (Tenn. 2009). Evidence is considered clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from it. Lane v. State, 316 S.W.3d 555, 562 (Tenn. 2010); Grindstaff v. State, 297 S.W.3d 208, 216 (Tenn. 2009); Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

In order to prevail on an ineffective assistance of counsel claim, the petitioner must establish that (1) his lawyer's performance was deficient and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). A petitioner successfully demonstrates deficient performance when the petitioner establishes that his attorney's conduct fell "below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688; Baxter, 523 S.W.2d at 936). Prejudice arising therefrom is demonstrated once the petitioner establishes "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. at 370 (quoting Strickland, 466 U.S. at 694). "Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." Id.

A. Comments about Postarrest Silence. First, the Petitioner contends that trial counsel's failure to object to the State's repeated comments about his postarrest silence constitutes ineffective assistance. He claims that he never opened the door to such comments at trial and that the State improperly opened the door to his postarrest silence during its cross-examination of him. The Petitioner insists that he never testified he gave the police a statement after his arrest or was denied the opportunity to do so and that he only testified that Sherry Hutchensen, his female passenger, "told [him] that she had told the police about Eric Davis and the American Inn." Consequently, the Petitioner insists that "[n]o fair reading of [United States v.] Robinson[, 485 U.S. 25 (1988),] could suggest that [he] or his attorney . . . opened the door to [this] prosecutorial comment." See Robinson, 485 U.S. at 868-70 (concluding that the prosecutor's comments during summation that the defendant could have taken the stand and explained his version of events did not violate the defendant's Fifth Amendment privilege to be free from compulsory self-incrimination, where these comments were a fair response to the defense's statements during closing argument that the Government had not allowed the defendant, who did not testify, to explain his side of the story) (noting that "where as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege.").

Alternatively, the Petitioner contends that even if he did testify that he informed the police about Eric Davis and the American Inn, his testimony would not have opened the door for the State's comments about his postarrest silence because, pursuant to Doyle v. Ohio, 426 U.S. 610 (1976), the State is prohibited from impeaching a testifying defendant by asking about his postarrest silence. He asserts that Robinson did not overturn this holding in Doyle because Robinson "allowed prosecutorial comment on a

defendant's failure to testify at trial under very limited circumstances" but "said nothing about a prosecutor's right to comment on a defendant's refusal to speak to police."

Initially, we note that the Petitioner failed to include the transcript from his trial in in the appellate record. Because this trial transcript contained information that was essential to this appeal, the Petitioner has come perilously close to waiving all of his post-conviction issues. See State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993) ("Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue."). Although we have decided to take judicial notice of the technical record and trial transcript that were included in the record from the Petitioner's direct appeal in order to resolve the issues in this case, such accommodation is never guaranteed. Consequently, to avoid waiver of issues, parties should always prepare a record conveys "a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b).

The trial transcript shows that Officer Savage testified on cross-examination that he did not recall whether the tractor-truck the Petitioner had been driving had keys or had damage to the steering column indicating that it had been "hot-wired." Later during this cross-examination, trial counsel and Officer Savage had the following exchange concerning his investigation in this case:

> Q. Did you learn from either [the Petitioner] or miss—and it was Sherry Hutchenson, was it not?
>
> A. I believe that's what her name was.
>
> Q. Okay. Did you learn where they had gotten the keys [for the truck] from? From whom they [had] gotten the keys?
>
> A. I don't recall, sir, no.
>
> Q. You don't recall?
>
> A. No.
>
> . . . .
>
> Q. So you don't recall anything of that nature?

A. No, sir.

Q. And was any investigation done at a nearby hotel?

A. I wasn't involved in it.

Still later at trial, Detective Harden testified on cross-examination that neither he nor the other officers on the scene investigated the American Inn after speaking with the Petitioner and Sherry Hutchensen at the scene of the stop. On redirect examination, Detective Harden clarified that no one gave him any information on May 22, 2012, causing him to do an investigation of any hotel, and that if someone had given him any information, he would have investigated that information.

The Petitioner testified at trial that Eric Davis, whom he had known for approximately a year, gave him the keys to the tractor-truck after he had seen Davis driving it for a week. He stated that when Davis gave him these keys, Davis had been staying at the nearby American Inn and that he, Davis, and Sherry Hutchensen had been using cocaine together at Davis's hotel room. The Petitioner claimed that he did not know the truck was stolen because he had seen Davis "riding up and down the streets" in it. He said he first saw Davis on May 22, 2012, at 8:00 a.m. when Davis gave him the keys to the truck so the Petitioner and Sherry Hutchensen could "drive to Western Union to pick up some money." He stated that as he and Hutchensen were looking for the Western Union, he was stopped by police.

Trial counsel then asked the Petitioner the following questions:

Q. When you were pulled over did Ms. Hutchensen say anything to an officer about where the keys [to the truck] came from?

A. Well she mentioned to one of the officers that Mr. Davis was in the American Inn. She was in one [patrol] car and I was in the other. But when she got out of the car, when they allowed her to get out she walked over to the door and told me what had happened, what she had told them. And like you say, you know, I don't think—he said he didn't go and investigate it any further.

Q. Okay. So to your knowledge nobody went to talk to Mr. Davis?

A. No.

Q. Did you steal this truck?

A. No, I did not, sir.

. . . .

Q. Neither person, Mr. Davis or Ms. Hutchensen, ever mention that this truck was stolen?

A. Not at all.

Q. Is there anything about that truck that made you think it was stolen?

A. No. Like I said—

Q. Did you notice that there wasn't a license plate on it?

A. I, you know, I didn't really pay attention to it because basically I was—my mind was sidetrack[ed] on obtaining drugs. . . .

On cross examination, the State asked the following questions of the Petitioner:

Q. I understand the reason you were getting the money was for drugs but the reason the money was going to be handed over was because Western Union had a name.

A. But Sherry—

Q. Correct?

A. —was fixing to pick it up, so I'm assuming it was going to be in her name or they had something [sic] going to get.

Q. But Sherry's not the one that called to make sure it was there, Mr. Davis did; is that correct?

A. Yes.

Q. Okay. And you gave this information to the police on that day; correct? On May 22nd, 2012?

A. You mean—I'm not understanding your question.

. . . .

Q. Everything you've told this jury . . . you told the police; right?

A. Yes.

Q. Because you wanted to make sure that they knew you didn't do it; correct?

A. Yes.

Q. And so when they pulled you over and stopped you and asked you about the truck you told them, oh, it was Mr. Davis at the American Inn; correct?

A. Yes, I stated that to them.

Q. And you told them, go over there right now, he's there, we're trying to pick up money for drugs; correct?

A. I didn't know—I wouldn't of never mentioned that we was going to pick up money for drugs.

Q. So you might of told the police part of the truth but not all the truth?

A. I told them we was—

Q. Is that correct?

A. I was driving the truck . . . and we was headed to Western Union.

. . . .

Q. So, you told the officers about Mr. Davis. You told . . . [O]fficer Savage that; right?

A. Yes.

. . . .

Q. Okay. Back on Eric Davis giving you the keys and loaning you this really nice expensive Freightliner [truck] that doesn't belong to him, you told [D]etective Harden that; right?

A. Who?

Q. The guy that just said he talked to you after you had been caught driving the Freightliner. You told him about Eric Davis; correct?

A. Yes, I did, ma'am.

Q. Because you wanted to make sure he knew you didn't do it; correct?

A. Yes, ma'am.

. . . .

Q. So on May 22nd when you get stopped with cold chicken, bolt cutters and a padlock you tell them Eric Davis gave me the keys. You told Detective Harden that; right?

A. Yes, I did.

Q. You told the jury that.

A. Yes.

. . . .

Q. Isn't it true that when he stopped you you refused to talk to him, you refused to sign a waiver and you—

A. No.

Q. —you refused to tell him information at all?

A. No.

Q. That's not true?

A. No, it's not.

Q. Just making sure, there's no second thinking about that; right?

A. Because I told him—

Q. The guy that was in here.

A. I told him exactly what happened at that time on the scene, ma'am.

During the State's rebuttal proof, Nikunj Patel, the general manager at the American Inn, testified that he had not heard anything about the Petitioner's case until he got a call from Detective Harden that morning of trial. Patel stated that anyone attempting to rent a hotel room at the American Inn had to show a photograph identification, and then a hotel clerk, using this identification, would enter the person's first name, last name, address, zip code, driver's license number and contact number are into the hotel's database. Patel said that he was unable to find Eric Davis or Erik Davis, Sherry Hutchensen, or the Petitioner's name in the hotel's database. He acknowledged that a person could stay in a hotel room that was under someone else's name.

Also during the State's rebuttal proof, Officer Savage testified that after he stopped the tractor-truck, neither the Petitioner nor Sherry Hutchensen said anything to him about Eric Davis or the American Inn. Officer Savage said that when he got the Petitioner and Sherry Hutchensen out of the truck, the Petitioner immediately stated, "[T]hat's my girl, she didn't have anything to do with this."

Finally, during the State's rebuttal proof, Detective Harden testified that the Petitioner and Sherry Hutchensen never gave him any information about Eric Davis or the American Inn. He stated that the first time he heard anything about the American Inn was the previous day at trial. Detective Harden added that although he tried to speak to the Petitioner on May 22, 2012, the Petitioner "didn't want to give a statement," and after that, the police "charged him and put him in jail."

During its closing statement at trial, the State made the following arguments:

[The Petitioner] didn't get out of the [truck] and say I borrowed it from my

> friend. He didn't get out of the truck and say go check . . . with Eric Davis. He didn't get out of the truck and say go down to the American Inn. Nobody ever heard any of that, ladies and gentleman, until he got up there yesterday and told it to you. The first time.
>
> You heard from Mr. Patel, he never knew anything because he wasn't called in [un]til today because nobody knew about it until [the Petitioner] got up there yesterday and told it to you. But you heard yesterday even before he got up there and told it to you from Officer Savage that he talked to him only about his licen[s]es, he didn't ask him any questions about anything else. You heard yesterday from Detective Harden before the [Petitioner] got up there and told you what he told you. [Detective Harden] was never told anything about an American Inn. He never went to check out an American Inn because he wasn't told anything about an American Inn. First time anybody heard any of that, ladies and gentlemen, is when [the Petitioner] got up there yesterday, before he started laughing and when he told it to you. That's it.

The defense during its closing argument made the following statements:

> The State has to prove that [the Petitioner] had knowledge that the truck was stolen. You've heard his testimony about the fact that he got this truck from Mr. Davis.

During the State's rebuttal closing statement, it made these arguments:

> [W]hen you look at [the Petitioner's] credibility and you look at what he's told you and how he's told you on that stand, none of that makes sense. He told you Eric [Davis] is the one that called to make sure the money is ready. Eric didn't go with him to get the money from Western Union. And the Western Union is not going to turn . . . over money that belongs to somebody else. None of it makes sense. And they didn't—[the Petitioner] didn't tell a single thing to the police officers on that day.
>
> Detective Harden can't get up here and tell you that [the Petitioner] refused to give a statement. The [Petitioner] is presumed to be innocent. You know that. You've got the instruction. We talked about it. And

> [Detective Harden] can't tell you the [Petitioner] invoked his rights. He's got the right to remain silent. He's got the right not to get on the stand, not to incriminate him and you can't use it against him. But ladies and gentlemen[,] he gives that up when he gets up there and testifies. So after [the Petitioner] testified[,] Detective Harden gets to tell you, by the way, you know I said I tried to talk to him, guess what, he refused to give me a statement. He didn't tell me jack. He didn't give them information to look at. He told them, [Sherry Hutchensen's] my girl, she had nothing to do with it. Because he knew [the truck] was stolen. He knew it didn't belong to him. And, ladies and gentlemen, this Eric [Davis] guy doesn't exist.

The Fifth Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment, states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. Similarly, Article I, section 9 of the Tennessee Constitution provides that "the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. Both of these constitutional provisions guarantee criminal defendants the right to remain silent. State v. Jackson, 444 S.W.3d 554, 585 (Tenn. 2014) (citing Carter v. Kentucky, 450 U.S. 288, 305 (1981); Momon v. State, 18 S.W.3d 152, 162 (Tenn. 1999)).

In Doyle v. Ohio, 426 U.S. at 619, the United States Supreme Court held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving Miranda warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." The Court recognized that a defendant's postarrest silence following Miranda warnings "is insolubly ambiguous" because the Miranda warnings contain an implicit assurance that a defendant's silence will not be used against him and "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights." Id. at 617-18. However, the Supreme Court in Doyle also recognized the following:

> It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

Id. at 619 n.11.

A few years later, in Jenkins v. Anderson, 447 U.S. 231, 238-40 (1980), the United States Supreme Court held that the Fifth and Fourteenth Amendments were not violated by the use of a defendant's prearrest silence for impeachment purposes. Specifically, the court held that the Fifth Amendment, as applied to the states by the Fourteenth Amendment, is not violated by the State's use of prearrest silence to impeach a defendant's credibility because such "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." Id. at 238. The court also held that the State's use of prearrest silence to impeach a defendant's credibility does not deny him the fundamental fairness required by the Fourteenth Amendment. Id. at 240. The Supreme Court recognized that "the fundamental unfairness present in Doyle is not present in this case" because "[t]he failure to speak occurred before the petitioner was taken into custody and given Miranda warnings." Id. However, the court stated that "[o]ur decision today does not force any state court to allow impeachment through the use of prearrest silence" and that "[e]ach jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative th[a]n prejudicial." Id.

Still later, in Fletcher v. Weir, 455 U.S. 603, 606-07 (1982), the United States Supreme Court held that the Constitution does not prohibit the State from using a defendant's postarrest silence for impeachment purposes if the record does not indicate that Miranda warnings were given. Specifically, the Court stated the following:

> In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.

Id. at 607; see State v. Chris Haire, No. E2000-01636-CCA-R3-CD, 2002 WL 83604, at *15 (Tenn. Crim. App. Jan. 22, 2002) (where a panel of the Tennessee Court of Criminal Appeals concluded that the "patently inconsistent" qualification in Braden v. State, 534 S.W.2d 657, 660-61 (Tenn. 1976), was still viable in the factual context present in Weir and that "the result is that Tennessee restricts impeachment use of a defendant's postarrest silence that precedes Miranda warnings to those situations wherein it is patently or blatantly inconsistent with trial testimony."); cf. Cazes, 875 S.W.2d at 266-67

(concluding that the trial court's failure to limit cross-examination of the defendant during the sentencing hearing did not result in prejudicial error because the State's questions were a proper response to the defendant's testimony on direct examination at the sentencing hearing about the night of the murder) (reiterating the rule in Robinson, 485 U.S. at 868-70, that a prosecutor is not prohibited from commenting on a defendant's silence "if such comment is a fair response to a position taken by either the defendant or defense counsel").

The holdings in Jenkins and Weir were based on the premise that silence prior to arrest or silence after arrest in the absence of Miranda warnings is "probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." Brecht v. Abrahamson, 507 U.S. 619, 628 (1993) (citing Jenkins, 447 U.S. at 238).

The Petitioner asserts that the prosecutor opened the door of his postarrest silence when she asked, "And you gave this information to police on that day; correct? On May 22, 2012?" He asserts that "[t]his question put [him] in precisely the kind of dilemma that the Fifth Amendment is supposed to prohibit: he could either claim that he had told one of the [o]fficers about Eric Davis and the American Inn, or he could admit that he had not made any statement to the police. He claims that "[i]f he chose the first option, he would contradict the testimony of police officers" or "[i]f he chose the second option, the implication [would be that] he refused to give a statement because he was guilty."

Based on the State's proof, the first time that anyone mentioned that Eric Davis gave the Petitioner the keys to the Freightliner truck was, coincidentally, during the Petitioner's testimony at trial. Consequently, it was both proper and probative for the State to impeach this testimony by emphasizing that the Petitioner never told the police on May 22, 2012, that he borrowed the truck from Eric Davis. Under Doyle, the State was free to comment on the Petitioner's postarrest silence following any Miranda warnings because the Petitioner, on direct and cross-examination "testifie[d] to an exculpatory version of events" and on cross-examination "claim[ed] to have told the police the same version upon arrest." 426 U.S. at 619 n.11. Therefore, the State could "use" the Petitioner's postarrest silence, not "to impeach [the Petitioner's] exculpatory story" but "to challenge the [Petitioner's] testimony as to his behavior following arrest." See id. Even under the more stringent standard espoused in Chris Haire, 2002 WL 83604, at *15, an unpublished case from this court, the State's questions about the Petitioner's silence prior to his arrest would have been proper and the State's questions about the Petitioner's postarrest silence preceding Miranda warnings would also have been proper so long as the Petitioner's silence was "patently or blatantly inconsistent" with his trial testimony. We note that the overwhelming majority of the State's questions, if not all, were aimed at the Petitioner's silence prior to his arrest and were therefore

proper. However, the Petitioner testified on cross-examination that he told the officers at the scene of the stop that Eric Davis had given him the keys to the tractor-trailer, and this testimony was "patently or blatantly inconsistent" with his silence. Accordingly, under Chris Haire, any of the State's questions that were aimed at the Petitioner's postarrest silence preceding Miranda warnings were also proper. Moreover, we note that if the State made any comments regarding the Petitioner's post-Miranda silence, these comments were simply "cumulative" to the State's "extensive and permissible references to [the Petitioner's] pre-Miranda silence[.]" Brecht, 507 U.S. at 639.

The problem in this case is that there was absolutely no proof offered at trial that the Petitioner was actually given his Miranda rights at the time of his arrest or any other time or that the Petitioner relied on his Miranda rights when he remained silent. Cf. State v. Jonathan D. Rosenbalm, No. E2002-00324-CCA-R3-CD, 2002 WL 31746708, at *6 (Tenn. Crim. App. Dec. 9, 2002) (concluding that no error existed because it was the appellant's duty to supply an adequate record for review and there was no indication in the record that the appellant had been informed of his Miranda rights or that he had relied on that advice in remaining silent). Because the overwhelming majority, if not all, of the State's questions and comments were aimed at the Petitioner's prearrest silence, we conclude that the Petitioner not shown that trial counsel was deficient in failing to object.

B. Advice to Testify at Trial. The Petitioner also contends that trial counsel was ineffective in advising him that he had to testify at trial. He claims that he never knowingly waived his privilege against self-incrimination and that his decision to testify "resulted from fundamental misconceptions about what would happen if he asserted his right to remain silent" and from "undue pressure from his attorney."

The trial transcript shows that during the Momon hearing that took place out of the jury's presence, the Petitioner confirmed that he understood that he had a right to testify, that he had a right not to testify, that no one could make him testify, and that it was his decision about whether or not he testified. See Momon, 18 S.W.3d at 161-62 (requiring a jury-out voir dire of a defendant only when the defendant is knowingly and voluntarily waiving his right to testify). During this jury-out hearing, trial counsel and the Petitioner had the following lengthy exchange:

> Q. Now, you understand that if you take the stand the State is going to be allowed to ask you about [your] three prior theft convictions, felony theft convictions that you have?
>
> A. Yes, sir.
>
> Q. You understand that?

A. Yes, sir.

. . . .

Q. You understand that and the jury is going to hear that?

A. Yes, sir.

Q. If you don't take the stand, obviously the jury is not going to hear that.

Now one of the important things about statements that you made to the police didn't come out in questioning, that [the police] denied that you ever made these statements, you understand that?

A. Yes, sir.

Q. And I've explained to you that I can't really argue that if there's no testimony about it.

A. Yeah.

Q. Remember that? The judge is going to tell the jury the questions I ask are not evidence. You understand? So I asked [the officer] that now and he said no. And we've talked about that; right?

A. Yeah. Yes, sir.

Q. I told you that [in] my opinion I think you need to testify because if you don't, I won't be able to argue these things, you understand that?

A. Yes, sir.

Q. But you understand it's your decision whether or not to testify?

A. Yes, sir.

Q. Do you want to testify?

A. Yes, I do, sir.

Q. Are you sure?

A. I'm positive, sir.

Q. Now we've kind of gone both ways on this, have we not?

A. Yes.

Q. Because we didn't—I told you about the [Rule] 609 hearing and didn't know what the judge was going to do. I gave you my opinion and it's kind of a little bit different but I knew that he was going to let some of those thefts come in at least, you know?

A. Yes.

Q. So he let half of them I think were eligible, he left half of them in. Do you understand that?

A. Yes, sir.

Q. And obviously three [convictions] is better than six as far as what the jury is going to hear; right?

A. Yes, sir.

Q. Now are you making this decision to testify, [are] you making it freely and voluntarily?

A. Yes, I am, sir.

Q. Now you're not doing it just because I think you need to testify. And I did tell you that, did I not?

A. Yes.

Q. And in my opinion I honestly think if the jury doesn't hear from you that they'll—right now, if we stop right now I think they'll convict you. So they have to, in my opinion, I think they need to hear from you?

A. Yes, sir.

Q. And I don't know how your testimony is going to be received but in my honest professional opinion I'm telling you now, here on the record, that if you do not testify I think you will be convicted. So in other words, to put it another way, I think despite those, the jury hearing about those three convictions I think you have really nothing to lose in my opinion. Okay. I'm telling you that as your lawyer, telling you that as giving that putting it on the record in my professional opinion that that's what I've told you.

A. Yes, sir.

Q. But you got to understand this is your decision.

A. Yes, sir.

Q. I can tell you what I think. Okay. But whether you get up there or not that's on you and that's your decision.

A. This [sic] totally.

Q. Are you comfortable with the advice I gave you in that regard and whether you want to testify or not?

A. Yes, I am, sir.

Q. Okay. And what do you wish to do?

A. I wish to testify.

Q. Are you sure?

A. I'm positive.

Q. Have you considered all the factors, all the things we've talking about?

A. I considered all of that.

Q. You got any questions about your decision to testify?

A. No, sir.

Q. Any questions of the Court before you get up there?

A. No, not really because all of the things that should have been said wasn't [sic] said by the officers, so I feel freely I want to testify.

Q. Okay. That doesn't come as a surprise to you, though, does it?

A. No, sir.

Here, the Petitioner asserts that while his statements during the Momon hearing suggest that he was eager to testify at trial, he made this decision only after trial counsel informed him that if he failed to testify, the defense would be unable to present an alternative explanation to the State's facts. He claims that trial counsel's statements during the Momon hearing suggested to him, a layman, that trial counsel "would only be allowed to offer explanations of the evidence for which there was direct testimonial support," which improperly shifted the burden of proof from the State to the defense. He also insists that trial counsel "could have argued that the State had not proved [his] guilt beyond a reasonable doubt" and could have "offered alternative explanations of the evidence without requiring [the Petitioner] to testify." In addition, he asserts that trial counsel, after giving him this misleading advice about how he had to testify, then "applied additional pressure by telling [him] that he would be found guilty if he did not testify." The Petitioner claims that trial counsel's failure to properly advise him about what would happen if he remained silent, when coupled with counsel's strong pressure to testify, amounted to ineffective assistance of counsel.

At the post-conviction hearing, trial counsel explained that he told the Petitioner to testify because he felt that the Petitioner would be convicted if he did not testify and that the Petitioner might well be convicted even if he did testify. He added that "it would obviously give us a defense for [the Petitioner] to testify, despite his [criminal] record." Trial counsel said, "[I]f [the State's proof] went unrebutted, or unanswered then in my opinion [the Petitioner] would have been convicted, at that particular time." Trial counsel stated that he specifically considered the Petitioner's criminal record when he gave this advice; however, he explained that "one of the problems you have is if you don't have any proof, other than your client, then you're going to have to deal with the [criminal] record issue. And that is something that I advised [the Petitioner], even well before we

went to trial."

Because the State's proof of the Petitioner's guilt was overwhelming and the only evidence to support the Petitioner's claim that Eric Davis gave him access to the stolen truck was through his own testimony, trial counsel advised the Petitioner that if he did not testify at trial he would most likely be convicted. Trial counsel recognized that having the Petitioner testify would allow the State to cross-examine the Petitioner about three of prior convictions; however, he still believed that it would be in the Petitioner's best interests to testify about Eric Davis, so that this defense theory could be presented to the jury. Despite the Petitioner's claims to the contrary, trial counsel asserted that the Petitioner was the only available person who could present this theory to the jury. Our evaluation of the Momon hearing, which was not required in light of the Petitioner's decision to testify, shows that the Petitioner received competent advice from trial counsel before making a voluntary, knowing, and intelligent decision to testify in order to present his version of events, a decision that was reasonable in light of the evidence that had already been presented at trial. See id. at 162 (requiring that trial counsel show at a minimum at the hearing that the defendant knows and understands that "(1) the defendant has the right not to testify, and if the defendant does not testify, then the jury (or court) may not draw any inferences from the defendant's failure to testify; (2) the defendant has the right to testify and that if the defendant wishes to exercise that right, no one can prevent the defendant from testifying; (3) the defendant has consulted with his or her counsel in making the decision whether or not to testify; that the defendant has been advised of the advantages and disadvantages of testifying; and that the defendant has voluntarily and personally waived the right to testify"). Accordingly, we conclude that the record fully supports the post-conviction court's conclusion that trial counsel's advice was a reasonable strategic decision given the circumstances in this case. Because the Petitioner has failed to establish that trial counsel's advice that he testify amounted to deficient performance, he is not entitled to relief.

C. Admission of Photographs. In addition, the Petitioner argues that trial counsel's failure to object to "patently irrelevant and highly prejudicial photographs of ammunition and drug paraphernalia" constituted ineffective assistance. He contends that the photographs depicting the ammunition were irrelevant to any of his charges and that trial counsel's testimony at the post-conviction hearing, wherein he admitted that the photograph "pass[ed] [him] by," shows that his failure to object to the photographs of ammunition was not a strategic decision. Although the Petitioner acknowledges that trial counsel likely opened the door to "the photographs of the crack pipes" by eliciting testimony about the Petitioner's drug use, he nevertheless asserts that trial counsel's failure to object to the photographs of ammunition was reversible error.

At the Petitioner's trial, Officer Hardy Savage testified that he stopped the Petitioner on May 22, 2012, at approximately 10:26 a.m. Officer Savage then identified

several photographs that were taken at the scene of the stop, including photographs depicting "a box of ammunition" and a "bag of ammunition" that were found in the tractor-truck shortly after the Petitioner was stopped. Later at trial, Detective Harden testified on direct-examination that when he inventoried the truck the Petitioner was in, he found "bolt cutters, a box of chicken, some different types of ammunition" and a "crack pipe." Although the Petitioner claims that the State also introduced photographs of crack pipes, the trial transcript shows that all the photographs of the items removed from the truck were admitted during Officer Savage's testimony and that Officer Savage never referenced any photographs depicting crack pipes or drug paraphernalia.

At the post-conviction hearing, post-conviction counsel asked the following questions of trial counsel:

> Q. Do you recall that there was some testimony about a crack pipe being found in the truck?
>
> A. I don't really recall that, but.
>
> Q. Would you agree with me that that happened, if I was to say that?
>
> A. Sure, absolutely.
>
> Q. Would you agree that along with the testimony about a crack pipe being found in this stolen truck, that there was also testimony of a case of ammunition being found in the truck?
>
> A. I don't remember that, but if that is in the record, then sure.
>
> Q. Would you agree that none of the charges involved drugs, or drug paraphernalia?
>
> A. I would agree with that, yes.
>
> Q. Would you agree that there was no allegation of use of a weapon, or ammunition?
>
> . . . .
>
> A. No, I mean, there was not.
>
> Q. Okay. So I'll put the question to you sir, so when you have this trial

> that's not about drugs, it is not about guns, when the State began to introduce testimony about this crack pipe and the bullets that are just sort of found, along with it, why didn't you object?
>
> A. I actually don't remember and if it as you say I should have and I erred.

Regarding this claim, the post-conviction court stated that "[a]lthough it appears to this Court that he probably should have objected, and counsel conceded this point, this does not rise to the level of . . . deficient performance[.]" The post-conviction court also recognized that "the petitioner must show that the deficiencies actually had an adverse effect on the defense."

Because the Petitioner has failed to identify the photograph or photographs depicting a crack pipe that were admitted at trial, he has waived this issue. "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Tenn. R. Ct. Crim. App. 10(b); see State v. Thomas, 158 S.W.3d 361, 393 (Tenn. 2005) (acknowledging that the defendant had waived his issue regarding the admission of photographs for failing to offer a citation to the record). The Petitioner has also waived this issue by failing to include the photographs depicting the crack pipes in the appellate record. See Tenn. R. App. P. 24(b). Waiver notwithstanding, we conclude that trial counsel was not deficient in failing to object to photographs of crack pipes because it appears, based on the very limited record before us, that although there was testimony as to a crack pipe, no photographs depicting crack pipes were actually admitted at trial.

Regarding the Petitioner's claim that photographs depicting ammunition were admitted, we note that the Petitioner has waived this issue by failing to include these photographs in the appellate record. See id. Moreover, while the Petitioner generally claims that these photographs were irrelevant and prejudicial, he has also waived this issue by failing to explain why admission of these photographs was detrimental to his case. See Tenn. Ct. Crim. App. R. 10(b); Tenn. R. App. P. 27(a)(7). In any case, the Petitioner is not entitled to relief on this issue. Although we have taken judicial notice of the technical record and trial transcript from the direct appeal record, we decline to take judicial notice of the pertinent photographs because such is unnecessary for a proper determination of this issue. See Valentino L. Dyer v. State, No. E2017-00213-CCA-R3-PC, 2018 WL 1433241, at *8 (Tenn. Crim. App. Mar. 22, 2018); Cf. State ex rel. Wilkerson v. Bomar, 376 S.W.2d 451, 453 (Tenn. 1964). The trial transcript shows that Officer Savage and Detective Harden mentioned the ammunition in passing and only as a

part of their inventory of the items found inside the truck. Neither officer suggested that the ammunition belonged to the Petitioner. In addition, neither the State nor the defense mentioned the two photographs depicting the ammunition in their closing arguments. In determining this issue, we note that "[t]here is no obligation on a lawyer to object at every opportunity." State v. Donald Craig, No. 85-10-III, 1985 WL 3866, at *3 (Tenn. Crim. App. Nov. 27, 1985). This court must indulge in the strong presumption that the conduct of trial counsel fails within the range of reasonable professional assistance, see Strickland, 466 U.S. at 690, and we may not second-guess the strategic choices made by counsel unless they were uninformed because of inadequate preparation, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Our review of the trial transcript shows that trial counsel was adequately prepared for trial. Accordingly, because the Petitioner not shown that trial counsel's failure to object the two photographs depicting ammunition was deficient, he is not entitled to relief on this issue.

D. **Cumulative Error.** Lastly, the Petitioner contends that "[t]he numerous errors of [trial] counsel had a disastrous impact on [his] defense and almost certainly impacted the outcome of his case." In particular, he claims that trial counsel's errors allowed the State to assassinate his character, to comment repeatedly on his refusal to speak to the police, to impeach him with his substantial criminal record, and to portray him as a dangerous and drug-addicted criminal. The Petitioner asserts that "[i]f you strip away [trial counsel's] errors, the State presented only a circumstantial case."

The Petitioner argues that trial counsel's errors had a cumulative effect on his trial. See State v. Hester, 324 S.W.3d 1, 76 (Tenn. 2010) ("The cumulative error doctrine is a judicial recognition that there may be multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but 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."). The cumulative error doctrine only applies when there has been more than one error committed during the trial proceedings. Id. at 77. "In the post-conviction context, 'a petitioner cannot successfully claim he was prejudiced by [trial] counsel's cumulative error when the petitioner failed to show [trial] counsel's performance was deficient.'" Tarrants Yvelt Chandler v. State, No. M2017-01639-CCA-R3-PC, 2018 WL 2129740, at *10 (Tenn. Crim. App. May 9, 2018) (quoting James Allen Gooch v. State, No. M2014-00454-CCA-R3-PC, 2015 WL 498724, at *10 (Tenn. Crim. App. Feb. 4, 2015)). Because the Petitioner has failed to establish that trial counsel's performance was deficient, he is not entitled to post-conviction relief under the cumulative error doctrine.

CONCLUSION

Based on the aforementioned authorities and reasoning, we affirm the post-conviction court's denial of relief.

_____

CAMILLE R. MCMULLEN, JUDGE