

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs January 21, 2016

JEREMY CURTIS WORKMAN v. STATE OF TENNESSEE

Appeal from the Criminal Court for Greene County
No. 13CR238 John F. Dugger, Jr., Judge

No. E2015-00531-CCA-R3-PC – Filed April 29, 2016

A Greene County jury convicted the Petitioner, Jeremy Curtis Workman, of five counts of rape of a child and two counts of incest, and the trial court sentenced him to serve twenty-five years, at 100%, followed by twelve years, at 30%. This Court affirmed the Petitioner's convictions. *State v. Jeremy Workman*, No. E2010-02278-CCA-R3-CD, 2011 WL 6210667 (Tenn. Crim. App., at Knoxville, Dec. 13, 2011), *perm. app. denied* (Tenn. Aug. 16, 2012). The Petitioner filed a petition for post-conviction relief in which he alleged, *inter alia*, that his trial counsel failed to present a defense by not presenting witnesses on the Petitioner's behalf and by failing to subpoena Dr. Chang, a doctor who examined the victim and who the Petitioner asserts gave "different conclusions." After a hearing, the post-conviction court denied the Petitioner relief. We affirm the post-conviction court's judgment.

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

ROBERT W. WEDEMEYER, J. delivered the opinion of the Court, in which NORMA MCGEE OGLE and CAMILLE R. MCMULLEN, JJ. joined.

Jeffrey D. Johnson, Johnson City, Tennessee, for the appellant, Jeremy Curtis Workman.

Herbert H. Slatery III, Attorney General and Reporter; Clarence E. Lutz, Senior Counsel; Dan E. Armstrong, District Attorney General; and Cecil Clayton Mills, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

This case arises from the Petitioner's convictions for repeatedly sexually abused his stepdaughter, who was between the ages of twelve and fourteen at the time of the

abuse. A Greene County grand jury indicted the Petitioner for five counts of rape of a child and three counts of incest.

In our opinion disposing of the Petitioner's direct appeal, this Court summarized the pretrial proceedings and the facts presented at the trial. *State v. Jeremy Workman*, No. E2010-02278-CCA-R3-CD, 2011 WL 6210667, at *2 (Tenn. Crim. App., at Knoxville, Dec. 13, 2011), *perm. app. denied* (Tenn. Aug. 16, 2012), *opinion designated not for citation*. We noted that the Petitioner, through counsel, had filed a motion to suppress his statements to police, a motion to sever the offenses, and a motion for a change of venue, all of which the trial court denied. *Id.* Lastly, the Petitioner filed a motion to exclude the proposed testimony of two members of the clergy who planned to testify that the Petitioner admitted his sexual relationship with the victim. *Id.* The trial court denied this motion.

This Court went on to summarize the facts presented at trial:

At trial, the State called both of the investigators who testified in the pretrial hearings: Susan Barnes, a DCS investigator; and Jim Ellison, a detective lieutenant with the Greene County Sheriff's Department. Barnes testified that she responded to a complaint made to a sexual abuse hotline in Nashville, and she spoke with the victim at Nolichucky Elementary School about the occurrences. She testified that she asked the victim's mother and the Defendant to come to the DCS Office in Greeneville. She testified that she and Lieutenant Ellison were present for the December 12, 2008 interview with the Defendant.

Barnes stated the same facts that she explained during her testimony at the pretrial hearing. She testified that the Defendant acknowledged sexual activity with the victim at least twice a month from May 2008 until August 2008, and he admitted that "about five months [earlier] had touched the child inappropriately." The Defendant admitted to having sexual intercourse and oral sex with the victim. Barnes testified that the Defendant stated that his wife, the victim's mother, had knowledge that he "messed around" with the victim, but he claimed that she was unaware that he had sexual intercourse with the victim. The Defendant stated that his "other children would be upstairs in their room or playing when that happened." Barnes testified that the Defendant admitted to being the "aggressor" in the encounters, which included genital penetration, digital penetration, and oral sex. The Defendant acknowledged that this took place "more than once." Barnes testified that the Defendant stated that "he would never do anything with the child as far as anal sex but that he would put his

penis in her or would finger her.” During the interview, the Defendant stated that he could not touch “his own children” like that, but he would touch the victim, who was his stepdaughter, in those ways. The Defendant admitted that “he first felt bad but then the more it happened the more he enjoyed it.”

Barnes stated on cross-examination that the Defendant did not admit to any penetration of the victim before her fourteenth birthday on October 4, 2008. Barnes also testified on cross that the victim reported sexual penetration by the Defendant prior to her thirteenth birthday, at which time defense counsel asked Barnes if “[t]hat was a complete statement of what [the victim] stated to [Barnes].” Barnes testified that “[the victim] told [Barnes] that things had been going on with her since she was five.” The Defendant made a motion for mistrial at that time, based on Barnes’s testimony of prior sexual conduct that occurred before the indictment period. The trial court denied the motion, and it gave a curative instruction to the jury.

Lieutenant Ellison testified that he sat in on the December 12, 2008 interview with the Defendant at the DCS office in Greeneville. Lieutenant Ellison also testified that the Defendant admitted to having sexual intercourse with the victim from May 2008 until December 2008, and that the intercourse included oral sex and digital penetration. Lieutenant Ellison testified that the Defendant stated he had sexual intercourse with the victim an average of twice a month during that time period. Lieutenant Ellison further testified that, after the interview, he asked the Defendant to stop by the police department on the following Monday to read and review the statement. The Defendant then left the DCS Office. On that following Monday, the Defendant told Lieutenant Ellison that he would not come to the police department to speak with him.

The victim, A.F., was fifteen years old at the time of trial. She testified that she was born on October 4, 1994. She explained that the Defendant had been her stepfather for “about ten years.” The victim testified that on December 12, 2008, she told the school bus driver that the Defendant sexually abused her. The victim explained that she told the bus driver because “[a] couple of days before [she] told about everything that was going on, [the Defendant] was sexually abusing [her] and [she] got tired of it.” She testified that all of the rapes occurred at her home in Greene County, specifically in the bedroom used by her mother and the Defendant.

The victim testified that the first incident of sexual abuse took place in October 2006, which occurred soon after the victim moved to a new school in Greene County. The victim “got off the bus from school . . . and [she] walked in the house and then [the Defendant] talked [her] into going into [his] bedroom and he shut and locked the door behind [them] and then he took [her] clothes off and his clothes off and then he stuck his penis in [her] vagina.” She testified that her brothers and sisters were “upstairs cleaning” at the time. She also testified that she turned twelve years old on October 4, 2006.

The victim testified that a second incident occurred in December 2006. The victim recalled it was around Christmas because she was on a school break. The Defendant told the victim to go to his bedroom shortly after she woke up. He shut and locked the door and “started taking [her] clothes off and then stuck his hands in [her] vagina and fingered [her].”

The victim testified that another rape occurred around the time of her sister’s February 13, 2007 birthday. The Defendant again took the victim into his bedroom and “stuck his penis in [her] vagina.” The victim testified that she was “upset and mad[,]” but the Defendant threatened to hit her if she told anyone.

The victim testified to an additional rape, which took place on her brother’s birthday, July 22, 2007. After her brother’s birthday party, the Defendant took the victim into his bedroom and locked the door. The victim testified that the Defendant “started taking both of our clothes off and stuck his penis in [her] vagina.” The victim recalled that her mother was cleaning the carport and on the computer during the rape.

The victim testified that another rape took place in August 2007, after the family had gone shopping for school supplies at Wal-Mart. The Defendant “talked [the victim] into [the bedroom]” by asking her to help him clean the bedroom. The victim testified that “[he] shut the door and locked it behind us and then he started taking both of our clothes off . . . and then stuck his penis in [her] vagina.”

An additional rape took place around the end of the school year in May 2008. The victim testified that, after school that day, the Defendant entered her bedroom and told her to go to his bedroom where he again “took both of [their] clothes off and then stuck his penis in [her] vagina.”

The victim testified to digital penetration and oral sex in addition to the penile penetration on this occasion. After this rape, the victim testified that she informed her mother of the Defendant's actions. The victim's mother asked the Defendant whether the victim's allegations were true, and he "nodded his head and said, yes, that was true." The victim's mother then kicked the Defendant out of the house.

Before the final instance of rape occurred in December 2008, the Defendant had returned to live in the victim's home. The victim testified that the Defendant talked her into the bedroom, where he closed and locked the door. He then took her clothes off and his clothes off, and "he stuck his penis in [her] vagina." This rape prompted the victim to tell a non-family member, her school bus driver, about the abuse. The victim testified that she did not ask to be penetrated by the Defendant, and she usually left the bedroom "crying."

Dr. Peter Reardon, an obstetrician-gynecologist, examined the victim on January 2, 2009. He conducted a normal female gynecological exam, "and her genital examination indicated that she was not a virgin." Dr. Reardon testified that the examination gave him the opinion that the victim had been having regular sexual intercourse. He could not state within a reasonable degree of medical certainty how long the victim had been having sexual intercourse or with whom she had been sexually active. He also testified that her hymen presented a scar, which indicated that an object had torn her hymen in the past.

Tracy Jones, pastor at Appalachian Baptist Church, testified that, in 2008, the Defendant told Jones that he had an inappropriate relationship with the victim. The Defendant explained to Jones that he had sexual intercourse with the victim, and the victim had reported his actions to the authorities. Jones testified that the Defendant did not share specific dates on which the Defendant had sexual intercourse with the victim. Jones further testified that he later told the church congregation and another pastor, Pastor David Fox, about the Defendant's admission.

David Fox, pastor at the Eastside Baptist Church, testified that the Defendant "showed up one Sunday morning" in 2008. Fox testified that the Defendant attended another church at the time, but the Defendant came by himself to Fox's church that Sunday. Fox testified that the Defendant told Fox that he needed to speak with him, and the Defendant returned to the church office later in the week. The Defendant told Fox that he "had

had a sexual relationship with [the victim]” and “that they had [a] sexual relationship for about a three month period” in 2008. Fox testified that the Defendant admitted that he “did the wrong thing” and deserved to go to jail. Fox further testified that he did not report the conversation to authorities because he knew it had already been reported.

At the end of the State’s proof, the Defendant moved for a judgment of acquittal, arguing that the State had not met its burden of proving the case. The trial court denied the motion because “[c]onsidering the evidence in the best light for the State of Tennessee, a rational trier of fact could conclude that the [D]efendant committed the offenses as charged.”

Based upon the evidence, the jury convicted the Defendant of five counts of rape of a child and two counts of incest. The trial court sentenced the Defendant to twenty-five years for each rape of a child conviction and six years for each incest conviction. The trial court ordered the Defendant to serve the five rape of a child sentences concurrently with one another, but it imposed consecutive sentencing for each of the two six-year incest convictions, for a total effective sentence of thirty-seven years.

Workman, 2011 WL 6210667, at *3-5 (footnote omitted). This Court affirmed the Petitioner’s convictions. *Id.* at *1.

B. Post-Conviction

The Petitioner filed a petition for post-conviction relief in which he alleged that: (1) his conviction was based on a violation of his Fifth Amendment right against self-incrimination; (2) his conviction was based on the unconstitutional failure of the prosecution to disclose evidence favorable to him; (3) he received the ineffective assistance of counsel at trial; and (4) the trial court allowed illegal evidence to be admitted. The post-conviction court appointed the Petitioner an attorney, who filed an amended petition on his behalf. The amended petition contended that the Petitioner had received the ineffective assistance of counsel. It alleged that his trial counsel (“Counsel”) failed to present a defense, failed to subpoena key witnesses, failed to adequately cross-examine key witnesses, failed to present witnesses who had knowledge of the Petitioner’s former wife stating that she would have him arrested for child abuse, and failed to present evidence that the victim had never engaged in sexual activity. The petition stated that Counsel did not call Dr. Ann Chang, who had examined the victim on the day of one of the alleged rapes and found that the victim showed “no signs of rape.” The Petitioner noted that Counsel did not call this witness or investigate her report further. Finally, the

Petitioner contended that Counsel was ineffective because he forbade him from testifying.

The post-conviction court held a hearing. Before the hearing began, the Petitioner's post-conviction attorney noted that a witness, Dr. Chang, whom he had subpoenaed, was not present. The post-conviction court stated that it would hear some of the evidence and allow the Petitioner to call Dr. Chang at a later date. The Petitioner testified that the trial court appointed Counsel to represent him before the Petitioner's trial in 2010. The Petitioner said that, from his discussions with Counsel, he believed that Counsel intended to interview April Burchnell, a friend of the victim, and her brother Jonathan Burchnell, who was allegedly in a "relationship" with the victim.

The Petitioner testified that he believed that Counsel should have interviewed Dr. Chang because her testimony would have been "extremely important to the case." The Petitioner said that Dr. Chang examined the victim on the day the victim made her allegations. He said that Dr. Chang's report stated that there were "no signs of abuse" when she examined the victim. In a separate section of the report, she noted that the victim had no vaginal tearing. This report, the Petitioner said, contradicted Dr. Reardon's report. The Petitioner said that Counsel told him that he did not call Dr. Chang to testify because Dr. Chang would not be considered an expert witness.

The Petitioner testified that he also asked Counsel to interview some of his family members that had been present during the time period that the victim said the inappropriate conduct occurred.

The Petitioner testified that, during Counsel's cross-examination of the victim, he asked her if anyone had told her what to say to authorities. The victim responded that her mother had told her what to say, but Counsel did not ask her any further questions.

The Petitioner said that he and Counsel discussed several times whether the Petitioner should testify. Counsel "suggested" that he not testify. At the conclusion of the State's case, Counsel said, "I suggest that you don't testify." The Petitioner said that he then told the trial court that he was not going to testify.

The Petitioner said that Counsel called Ms. Burchnell and the Petitioner's mother to testify. The State objected to Ms. Burchnell's testimony on hearsay grounds. The trial court sustained the objection, and Ms. Burchnell was dismissed as a witness. The Defendant said that, after his mother testified, he expressed to Counsel his desire to testify. He said that he did not feel like the jury was getting "any closure from the defense" and did not get to hear his "side of what was being said."

During cross-examination, the Petitioner agreed that he met with Counsel ten times and that there was an investigator working on his case. The Petitioner agreed that Counsel filed motions in limine and a bill of particulars on his behalf. The Petitioner acknowledged that Counsel was his second court-appointed attorney. The trial court originally appointed an attorney from the public defender's office, but the Petitioner filed a motion requesting a new attorney. He said that his motion stated that he felt the public defender was working for the prosecution and not for the Petitioner. The trial court appointed Counsel as his new attorney. The Petitioner said that he sent Counsel numerous letters to which Counsel did not respond.

The Petitioner said that he met with Counsel on several occasions and that the two discussed a legal defense and a factual defense, namely attempting to prove that the victim was thirteen years of age and not twelve when this happened. The Petitioner agreed that, during these meetings, he gave Counsel the names of several people with whom the investigator could speak. The Petitioner conceded that Counsel attempted to have the clergy members excluded from testifying, and Counsel appealed this issue.

The Petitioner testified that he was interviewed December 12, 2008, which was shortly after these allegations. He said that Counsel argued to have the statements from this interview excluded on the grounds that the Petitioner was in custody at the time. The Petitioner said that he never made the statements attributed to him, but he agreed that there were three officers present who all agreed that he had in fact made those statements. He expressed dissatisfaction that Counsel failed to assert his complete denial of the statements and only argued that the statements should have been suppressed because he was in custody.

The Petitioner agreed that Counsel cross-examined every witness the State called. The Petitioner agreed he told the trial court he did not wish to testify. He said that this was based upon his attorney's advice.

The Petitioner testified that the investigator who investigated his case "didn't know what he was doing." The Petitioner said that his wife instigated these allegations after he discovered her having an affair online. He told her that he wanted a divorce and that he wanted custody of his two biological children. Shortly thereafter, his wife went to the police with allegations that the Petitioner had sexually abused the victim. The Petitioner said he never admitted to these allegations.

During redirect examination, the Petitioner testified that he felt pressured into not testifying at trial. He noted that he had never before been in legal trouble, so he relied upon Counsel's advice in this regard.

Counsel testified that, after the trial court appointed him to represent the Petitioner, he filed a motion for discovery, a motion for a bill of particulars, and a motion to sever, with supporting memorandum. Counsel testified that court records reflected that he worked ninety hours out of court and fifteen in court on the Petitioner's case. Counsel said he filed, and the trial court granted, his motion to have an investigator appointed to the case. The investigator interviewed multiple witnesses, including the Burchnells. Counsel also interviewed the Burchnells, but he did not recall their being willing to discuss the case with him.

Counsel testified that he filed a motion to exclude any evidence about the Petitioner's conduct before October 2006. He said that he got the impression that DCS workers might testify about such events, and the State had not charged the Petitioner with conduct before that date. The trial court granted this motion. Counsel said that a DCS investigator testified at trial that the abuse may have started when the victim was five or six. Counsel objected, asked for a jury out hearing, and moved for a mistrial. The trial court denied the mistrial but gave the jury an instruction regarding the evidence.

Counsel said that he argued to have the Petitioner's statement to police excluded on the grounds that he was in custody at the time he made the statement. The trial court denied this motion, and Counsel requested an interlocutory appeal, which the trial court denied. Counsel said that, during the interview, the Petitioner did not admit to anything that constituted rape of a child. Further, the clergy who testified for the State could not provide time frames for the alleged events. The victim provided the only testimony as to dates of the encounters.

Counsel said that he engaged in extensive plea negotiations with the State. On the eve of trial, he was at the jail with the Petitioner, and the two were negotiating with the State about a plea agreement. The trial judge was involved in the negotiations several times that evening. Ultimately, the Petitioner declined the plea offer.

Counsel said he discussed the Petitioner's right to testify with him on several occasions. The two discussed several times "the pros and cons" of the Petitioner testifying.

Counsel discussed his strategy in this case. He noted that there were DCS employees who testified that the Petitioner admitted to sexual contact with the victim. Detective Ellison testified about being present when the Petitioner admitted some sexual contact but did not give a time frame, although it appeared to be after the victim was thirteen. There were two clergy members who said the Petitioner confessed to them. The victim also testified. Counsel said that, in light of this testimony and the fact that Greene County is a conservative setting, his strategy was to make sure to "knock out as much of

under the age of thirteen [conduct] as possible” rather than attempt to eliminate all of the charges against the Petitioner.

Counsel testified that he subpoenaed Dr. Chang to various hearings. Unlike Dr. Reardon, Dr. Chang was not an obstetrician or gynecologist (OB/GYN) but an emergency room doctor. There was a question, however, of whether Dr. Chang performed a rape kit. Dr. Chang’s notes indicated that she saw no signs of abuse, but she referred the victim to an OB/GYN. Dr. Chang’s notes indicated that the victim said that the Petitioner had been abusing her since she was five years old and sexually penetrating her from the time she was nine. According to the report, the victim also told Dr. Chang that the Petitioner had intercourse with her two days before the emergency room visit. Dr. Chang’s report included:

December 12, 2008 according to these notes. Records state that [the victim] reported that her step-father started having sexual intercourse with penetration at the age of nine. He did not use condoms. [The victim] also has irregular periods. Records also indicate that blood work was completed and pregnancy test was also completed. Minimal discharge in vaginal vault. Rape kit done, completed due to length of time since the last intercourse. . . . Child was prescribed certain medications. Records also stated [the victim] needs to follow up with OB/GYN for pelvic and pap smear. Mother was advised.

During cross-examination, Counsel testified that, while he was unsure, he believed Dr. Chang failed to appear at either the hearing or the trial despite the fact that he had subpoenaed her to both. Counsel said he was sure that Dr. Chang never testified, so he assumed she was not present. Counsel recalled that Dr. Reardon testified that the victim was not a virgin but that he could not tell when she last had intercourse or with whom. He therefore felt Dr. Chang’s testimony was not critical.

Counsel testified that many of the witnesses the Petitioner mentioned were out of state family members. He said that they could not offer testimony that would aid the Petitioner’s defense.

The post-conviction court adjourned, giving the Petitioner a week to find Dr. Chang. When the post-conviction court reconvened, the Petitioner’s attorney informed the post-conviction court that he could not locate Dr. Chang. He said, however, he did not believe he needed her testimony because he had her report, which stated that there was “no vaginal tearing” and no “signs of abuse.” The post-conviction court noted that the doctor’s report was hearsay. He pointed out to the Petitioner’s post-conviction attorney that he was in the same position as Counsel, who had subpoenaed Dr. Chang for

the hearing and trial. The Petitioner's post-conviction attorney asked for more time to find Dr. Chang.

When the post-conviction court again convened, the Petitioner's post-conviction attorney informed the post-conviction court that he had located Dr. Chang and met with her twice. After speaking with her, looking at all the facts, and having her relate to him what information she could provide, he determined that she could not provide anything helpful to the defense.

Based upon all the evidence, the post-conviction court denied the Petitioner post-conviction relief. In a written order, it concluded:

Petitioner's first alleged ground for post conviction relief is that his conviction was based on a violation of the privilege against self incrimination. Petitioner says he did not confess to committing acts to two clergy members. Petitioner says he sought spiritual counsel after being confronted by Detective Ellison and DCS investigators Susan Barnes and Jeremy Hall. Petitioner argues that clergy was not obligated to disclose his conversation.

Petitioner's right of privilege against self incrimination involves state action. Members of the clergy were not employees of the state nor were they agents of the state when Petitioner confessed to them. Therefore, Petitioner's privilege against self incrimination was not violated. In addition, child sexual abuse cases are an exception to the clergy-penitent privilege. Therefore, Petitioner can not rely on the clergy - penitent privilege.

Petitioner's second alleged ground for post conviction relief is that his conviction was based on the unconstitutional failure of the prosecution to disclose to [the Petitioner] evidence favorable to [the Petitioner]. Petitioner alleges that the prosecution did not state that the rape examination completed on December 12, 2008 resulted in "no signs of Abuse" and "No vaginal tearing". Petitioner alleges his counsel was informed and nothing was done. Petitioner alleges that the state did not provide dates of the alleged offenses and he could not prepare an alibi defense. Petitioner alleges his wife was Director of Greeneville Family Services and his investigation was biased and prejudiced.

The Court reset the conclusion of Petitioner's evidentiary hearing for approximately three months so that Petitioner's attorney could locate the ER doctor, Dr. Ann Chang and have her subpoenaed to court so that she could give exculpatory evidence. On January 23, 2013, Petitioner's counsel announced to the Court that he had located Dr. Ann Chang and that she could not recall the incident and could not assist the [Petitioner]. At trial, the state called Dr. Peter Reardon, an obstetrician - gynecologist who testified the victim had been having regular intercourse and her hymen presented a scar, which indicated that an object had torn her hymen in the past.

Petitioner alleged he did not have exact date of the alleged offenses so that he could establish an alibi. The defense filed for a bill of particulars and the state responded by alleging what manner of sexual penetration occurred in each count. The Petitioner was given sufficient notice of the charges against him. Petitioner has the burden of proving each allegation by clear and convincing evidence. Petitioner has failed to prove his conspiracy theory that his wife worked as Director of Greeneville Family Services and the investigation was biased and prejudiced.

Petitioner's third alleged ground for post conviction relief and which encompasses the allegations in Petitioner's Amended Petition (entitled Motion for New Trial) filed by [post-conviction counsel] is he was denied the effective assistance of counsel by his attorney [trial counsel]. Petitioner alleges that his attorney did not actively communicate with him while he was in custody. Petitioner says [trial counsel] and the investigator did not investigate his case nor talk to known relatives or associates of the defendant. Petitioner, by and through his counsel, alleges that [trial counsel] did not present any defense and did not attempt to locate nor subpoena Dr. Ann Chang to give exculpatory evidence. Petitioner alleges [trial counsel] would not let him testify and told him to tell the court that he did not want to testify.

[Trial counsel] testified that he did the following on Petitioner's case:

- 1) interviewed Petitioner's prior attorney . . .;
- 2) filed motion for Discovery;
- 3) filed Bill of Particulars;
- 4) filed motion to Sever offenses and Memorandum;
- 5) obtained name and telephone number of victim's boyfriend;

- 6) filed motion for investigator which was approved;
- 7) Investigator John Maddux interviewed witnesses and I interviewed witnesses;
- 8) filed Motion to Suppress Statement;
- 9) Documented ninety hours out of court work and fifteen hours in court work on the case;
- 10) filed motions to exclude prejudicial information prior to Oct. 24, 2006; and
- 11) Discussed trial strategy with Petitioner and whether he should testify. The Court finds that [trial counsel] counseled with Petitioner, investigated the case with the help of an investigator, filed the appropriate motions and made reasonable tactical decisions throughout [the P]etitioner's trial. [Trial counsel] testified he itemized ninety hours of out of court work on the case and fifteen hours in court on the case which is reasonable for this type of case. [Trial counsel] was faced with a very difficult case.

Petitioner had given incriminating statements to Detective Ellison, two Department of Child Services employees and two ministers. Dr. Rearden, OB/GYN, corroborated the victim's statements and Petitioner's statements with physical medical findings. Petitioner claims [trial counsel] told him to tell the Court he did not want to testify when in fact he did want to testify. Petitioner is telling the Court he testified untruthfully because his attorney told him to. [Trial counsel] said he and Petitioner discussed whether Petitioner would testify because it was so serious. The Court cannot find Petitioner credible when he said he was untruthful with the Court. Under the guidelines of *Baxter v. Rose*, 523 S.W.2d 932 (Tenn. 1975) and *Strickland v. Washington*, 466 U.S. 668 (1984), the Court finds that Petitioner received effective assistance of counsel by his attorney, [trial counsel].

Petitioner alleges that illegal evidence was used to convict him because Dr. Reardan testified that he examined the alleged victim twenty-one days after the incident. Petitioner alleges that Dr. Reardan testified that he could not, with any medical or scientific certainty, say that Petitioner was the person the alleged victim had sexual intercourse with. Petitioner says Dr. Reardan's testimony was biased because he does many examinations for the State. The Court finds that Dr. Reardan was a witness called by the State of Tennessee and subject to cross examination by [the Petitioner]. State witnesses normally present prejudicial evidence against a [d]efendant that is why they are called to testify. [The Petitioner] can combat the prejudicial evidence by cross-examination.

Finally, Petitioner alleged other grounds for relief in his petition. Petitioner alleged to “formally request that at such a time, he be allowed to further expound on the above grounds previously mentioned[.]” The Court finds that Petitioner presented no other grounds which have not been previously set out in this memorandum opinion and order.

For the foregoing reasons, the court finds that Petitioner failed to carry his burden under Tennessee Code Annotated §40-30-110(f) of proving by clear and convincing evidence the alleged grounds in his Petition for Post Conviction Relief and Amended Petition.

It is from this judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends that the post-conviction court erred when it denied his petition because: (1) his interrogation was a “state action” and he did not feel free to leave; (2) Counsel was ineffective for failing to adequately cross-examine the State’s witnesses; (3) Counsel was ineffective because he thought the Petitioner was guilty; (3) Counsel was ineffective for failing to subpoena Dr. Chang. The State counters that the post-conviction court properly denied relief because the Petitioner has failed to show any deficiency in Counsel’s performance or that he was prejudiced by Counsel’s performance. We agree with the State.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2014). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2014). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999) (citing *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997)). A post-conviction court’s factual findings are subject to a *de novo* review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court’s factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court’s conclusions of law are subject to a purely *de novo* review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, "a petitioner must show that counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court should avoid the "distorting effects of hindsight" and "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 689-90. In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v.*

Cronic, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). “The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.” *House*, 44 S.W.3d at 515 (quoting *Goad*, 938 S.W.2d at 369).

If the petitioner shows that counsel’s representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating “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; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

In the case under submission, we conclude that the post-conviction court did not err when it denied the Petitioner post-conviction relief. We first note that the Petitioner has failed to include citations to the record in the entirety of his brief, thereby risking waiver. Tenn. Ct. Crim. App. R. 10(b) (providing that “[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court.”). We further find the issues he presents are without merit.

The issue surrounding his statement to police is one that this Court has previously examined and determined is without merit. *Workman*, 2011 WL 6210667, at *7. It is therefore not properly before us in this current appeal. See *McBee v. State*, 655 S.W.2d 191, 196 (Tenn. Crim. App. 1983) (holding, “A matter decided on direct appeal cannot be relitigated in post-conviction relief proceedings” and citing *Searles v. State*, 582 S.W.2d 391, 392–393 (Tenn. Crim. App. 1979)).

As to the effectiveness of Counsel, we conclude that the Petitioner has not proven he is entitled to relief. The Petitioner contends that Counsel should have called more witnesses, but he does not offer names or the testimony of any of those potential witnesses. Generally, “[w]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing.” *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). We may not speculate on the potential benefit the witnesses might have offered to the Petitioner’s case. *Id.* Accordingly, the Petitioner has also failed to demonstrate prejudice as to this issue.

The Petitioner complains that Counsel should have more vigorously cross-examined the witnesses, but he offers no suggestion about what such cross-examination would have shown. The Petitioner similarly complains that Counsel failed to subpoena Dr. Chang. Counsel testified that he subpoenaed Dr. Chang but that she did not appear in court. The Petitioner's post-conviction attorney also subpoenaed Dr. Chang, who again did not appear. When the post-conviction attorney spoke with Dr. Chang, she offered no information that would be helpful to the defense. Under these circumstances, we conclude, as did the post-conviction court, that the Petitioner has not shown that Counsel was ineffective or that he was prejudiced by Counsel's representation of him. The Petitioner is not entitled to relief.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the post-conviction court's judgment.

ROBERT W. WEDEMEYER, JUDGE