

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 21, 2026 Session

FILED

05/28/2026

Clerk of the
Appellate Courts

KEVIN WAGGONER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Union County
No. 5019 Zachary R. Walden, Judge

No. E2025-00434-CCA-R3-PC

Petitioner, Kevin Waggoner, appeals the denial of his petition for post-conviction relief, arguing (1) the trial court participated in an ex parte jury proceeding which violated his right to an impartial jury; (2) his trial counsel was ineffective for failing to attend the jury proceeding at the local high school; (3) his trial counsel was ineffective for failing to move to remove a juror who admitted during trial that she knew one of the State's witnesses; (4) his appellate counsel was ineffective for failing to request a subpoena duces tecum for a single record from a juror's Facebook record; (5) the post-conviction court erred in denying a subpoena duces tecum for the juror's Facebook account; and (6) the cumulative errors undermine confidence in the verdict. Upon review of the entire record, the briefs and arguments of the parties, and the applicable law, we affirm the judgment of the post-conviction court.

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

JILL BARTEE AYERS, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, P.J., and TIMOTHY L. EASTER, J., joined.

Autumn M. Bowling, Knoxville, Tennessee, for the appellant, Kevin Waggoner.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Senior Assistant Attorney General; Jared R. Effler, District Attorney General; and Rondeau T. Laffitte, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

In August 2015, a Union County grand jury returned an indictment charging Petitioner with one count of second degree murder in the shooting death of his neighbor, Michael Woodby (“victim”). Petitioner’s first trial resulted in a hung jury; upon retrial, he was found guilty and was sentenced to eighteen years to serve in confinement. *State v. Waggoner*, No. E2018-01065-CCA-R3-CD, 2019 WL 4635589, at *1 (Tenn. Crim. App. Sept. 24, 2019).

*Trial*¹

The evidence presented at trial showed that in August 2010, the victim, his wife, and their grandson moved into a house across the highway from Petitioner and his family. *Id.* at *1. Petitioner operated a firearm store on his property, which closed sometime before the shooting. *Id.* Petitioner’s family frequently discharged firearms on their property and detonated explosives, activity neighbors described as akin to a gun range, and which shook nearby homes. *Id.*

Over roughly three years, Petitioner and his family members repeatedly filmed the victim and his family, sometimes while armed. *Id.* at *1-3. This included filming the victim’s young grandson at his bus stop, prompting two school-bus drivers to alter pickup routines out of safety concerns. *Id.* at *1. When one of the bus drivers, Jessica Waggoner,² testified for the State at trial, Stephanie Toups, a juror, informed the court she recognized Ms. Waggoner as the driver of her grandson’s preschool bus. The court conducted a jury-out inquiry, and the juror affirmed the acquaintance was not personal and would not affect her impartiality. *Id.* at *17. Petitioner declined to question Juror Toups further, and neither party objected to her continued presence on the jury. *Id.*

The victim called law enforcement more than 300 times to report alleged harassment by Petitioner and his family. *Id.* at *2. Petitioner’s family, for their part, compiled recordings which showed the victim yelling and cursing at them and calling them names; these recordings were sent to the Tennessee Bureau of Investigation, the district attorney, the Department of Children’s Services, and several media outlets. *Id.* Numerous audio and video exhibits chronicling mutual hostility were entered into

¹ While neither the trial transcript nor the motion for new trial hearing transcript were included in Petitioner’s appellate filing, we take judicial notice of both, along with the record from Petitioner’s direct appeal. *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009); Tenn. R. App. P. 13(c).

² Ms. Waggoner is not related to Petitioner.

evidence at trial illustrating the victim's attempts to end the feud, the Petitioner's continued filming, the victim's periodic threats, and Petitioner's own statements. *Id.* In a May 2013 call, Petitioner remarked that it was "within [the victim's] control not to die from me." *Id.*

In the days leading up to the 2013 shooting, additional confrontations occurred: on September 3, the victim accused Petitioner and his son of harassment while Petitioner, armed, walked the highway; on September 8 and 10, the victim shouted violent threats at Petitioner; and on September 10, Petitioner, again armed, warned the unarmed victim, "Take one step, and I'll shoot a hole in your a**," while keeping his hand on his firearm. *Id.* at *2-3. On September 14, two days before the shooting, Petitioner recorded himself ranting about the victim while walking along the highway. *Id.* at *3. The victim approached Petitioner and asked Petitioner to resolve their differences. *Id.* Petitioner told the victim to leave him and his family alone, and the victim agreed to do so. *Id.*

On the evening of September 16, 2013, the victim went for his customary walk carrying a walking stick, cigarettes, and a flashlight. *Id.* Shortly after 10:00 p.m., Petitioner shot the victim four times. *Id.* He then returned home, called 911, and recorded the police radio traffic on his scanner. *Id.* When they arrived on scene, officers encountered Petitioner walking down a driveway with a holstered handgun, cell phone, flashlight, radio, and soda; after repeated commands, the handgun was secured. *Id.* Petitioner directed officers to the victim's location and acknowledged he had fired the shots. *Id.* The victim was found deceased in a ditch on the side of the highway closest to the victim's property. *Id.*

Investigators testified that in a written, signed statement given in the early hours of September 17, Petitioner asserted that he and his son were on a walk when the victim emerged from his property yelling and rushed at them, swinging a bat or a stick, striking Petitioner's son multiple times, and ignored commands to stop. *Id.* at *6. Petitioner said he drew his pistol, aimed at "center mass," and fired four rounds to prevent being killed; he radioed his wife to call 911 and requested two ambulances. *Id.* Investigators noted inconsistencies between the statements of Petitioner and his son, as well as between their statements and evidence found at the scene. *Id.* at *7.

The jury convicted Petitioner of second degree murder as charged in the indictment, and the trial court sentenced him to serve eighteen years at 100 percent. *Id.* at *12. Petitioner filed a timely motion for new trial.

Motion for New Trial

Petitioner's initial motion asserted several general categories of alleged error and expressly requested leave to amend once new counsel had reviewed the trial transcripts. The State subsequently moved to dismiss the motion, arguing that Petitioner had failed to specify adequate grounds with reasonable certainty and had not amended the filing following the preparation of the transcripts. Petitioner later sought and received continuances to allow counsel sufficient time to review the trial record, after which he filed an Amended Motion for New Trial, which set out eleven grounds for relief. As related to this appeal, those issues included claims regarding the trial court's denial of a change of venue and alleged juror misconduct or nondisclosure.

At the hearing on the motion, Petitioner argued that extensive pretrial publicity, combined with the small size of Union County and the publicity surrounding the first trial, required a change of venue. The State responded that the trial court had implemented a detailed jury-selection process designed to expose and address any influence of pretrial publicity, including the use of a juror questionnaire, which both parties participated in creating, and by summoning an unusually large venire. According to the State, this procedure was adopted specifically to address concerns that might otherwise support a change of venue. The trial court recalled that a jury orientation session was held at the local high school to accommodate a larger jury pool as part of the court's efforts to secure enough jurors who were not familiar with the case. In describing the jury orientation session, the trial court said the case was "presented very clearly. I think [d]efense counsel and the State's counsel – everyone was there, but [the attorneys] did not participate in anything, [they] just watched." When the trial court mentioned that the court reporter had also been at the jury orientation, the court reporter present at the motion for new trial hearing indicated that she had not been present at the high school, confirming that no verbatim record existed of those proceedings.

Petitioner also challenged the verdict based on alleged juror misconduct or nondisclosure by Juror Stephanie Toups. Petitioner submitted screenshots of social media posts in which Juror Toups communicated with members of the victim's family and made comments about the verdict and Petitioner. Some posts showed familiarity and friendship with the victim's family and described Petitioner and his family negatively. The exhibits of the posts which were dated showed dates after the verdict. During the hearing, Petitioner sought permission to subpoena Juror Toups, which the trial court denied. However, the victim's wife testified that she did not know Juror Toups until after the verdict and that any communication occurred only post-trial. The trial court concluded that Juror Toups' conduct after the verdict did not reflect deception in her jury questionnaire responses or during voir dire.

The court also reviewed the portion of the trial transcript in which Juror Toups reported her acquaintance with Jessica Waggoner, the bus driver who testified for the State. The court noted that the juror brought this information forward promptly, outside the presence of the jury, and that Petitioner declined the opportunity to question her further at trial. After reviewing the juror questionnaire submitted by Juror Toups and the testimony offered at the post-trial hearing, the trial court denied Petitioner's motion to subpoena and examine Juror Toups, finding no evidence she had any preexisting relationship with the victim's family or prior knowledge of the case, and rejected the claim of juror misconduct or nondisclosure.

The trial court denied Petitioner's motion for new trial, and Petitioner filed a timely notice of appeal. On direct appeal, this court affirmed Petitioner's conviction. *Waggoner*, 2019 WL 4635589; our supreme court denied Petitioner's application for permission to appeal. (Tenn. Feb. 19, 2020).

Post-Conviction Proceedings

In September 2020, Petitioner filed a timely pro se petition for post-conviction relief. Counsel was appointed and an amended petition was filed asserting multiple grounds for relief, including (1) alleged due-process and jury-trial violations stemming from the pre-trial orientation of the jury venire at Union County High School; (2) claims that trial counsel was ineffective for failing to attend that orientation and for failing to seek removal of Juror Toups; (3) claims that appellate counsel was ineffective for not seeking a subpoena duces tecum for Juror Toups's Facebook records; and (4) a request for cumulative-error relief.

Due to scheduling issues with witnesses, two evidentiary hearings were held on October 31 and November 26, 2024. Before the first evidentiary hearing, Petitioner filed a motion for a subpoena duces tecum seeking a single Facebook record from Juror Toups showing the date she joined the "Justice for Michael A. Woodby" group. After a hearing on March 11, 2024, the post-conviction court denied the request, finding no factual showing that the juror joined the group before or during trial and concluding Petitioner offered only speculation. The court allowed Petitioner to subpoena the juror for the evidentiary hearing.

A. Testimony Regarding the Jury Orientation at the High School

At the evidentiary hearing, the trial judge who presided over the jury orientation and trial testified that, due to extensive pre-trial publicity following Petitioner's first trial and the difficulty of seating a "sterile" jury, he and the parties collaborated on a detailed juror questionnaire for use before voir dire. He explained that the number of potential

jurors anticipated for the second trial exceeded courtroom capacity, so the court directed the venire to assemble at the Union County High School gymnasium on July 14, 2016, for jury orientation. He could not recall selecting a grand jury from that pool. The trial judge said he was “trying to recollect this entire process. It’s been some time ago.” He was sure the court clerk and her staff were there. He thought someone from the District Attorney General’s office was there, but he did not recall Petitioner or his counsel being present. The attorneys were invited but not required to be there because there would be no questions from them. “This would be me presenting a preamble to the jurors about what this case was about, explaining what their role was and filling out the questionnaire, handing it back in and going home.” There was to be no presentation and no one would talk other than him and the clerk who assembled the questionnaire. He did not recall what he said to the jurors but thought he would have given “enough information to where they can give intelligent answers to the questions.” After reviewing the actual questionnaire, he agreed there was no preamble or introductory information on the questionnaire itself, so he “would have given them some sort of context.”

Assistant District Attorney (“ADA”) Graham Wilson testified that both parties submitted questions for the jury questionnaire and that additional jurors were called in because of widespread publicity of the case. He attended the orientation with another prosecutor but stated they asked no questions and were not introduced to the venire. He recalled the judge explaining the questionnaire but did not specifically recall the judge discussing the facts of the case.

The court clerk, Barbara Williams, testified that the venire was summoned for both grand jury service and the regular six-month jury term, as was the regular practice, and not solely for Petitioner’s case. She stated that 400 to 450 potential jurors were summoned due to pretrial publicity, fewer than 200 appeared, grand jurors were selected first, and the remaining potential jurors completed the questionnaires. She testified that she did not recall anyone discussing Petitioner’s case at the session. Ms. Williams also confirmed that jury orientations are publicly noticed and included on the criminal court calendar distributed to attorneys.

Trial counsel testified that he had no notice of the jury orientation at the high school and neither he nor anyone from his office attended. Had he been aware of the event, there was “zero chance” he would have failed to appear, given the extraordinary pretrial publicity and the importance of identifying potential juror bias. He said he did not learn of the orientation until years later, during communication with appellate counsel. He acknowledged participating in the creation of the questionnaires and reviewing the completed forms before jury selection, but he could not recall any discussions regarding how the questionnaires were to be distributed.

Appellate counsel, who began representing Petitioner after sentencing, testified that he first became aware of the jury orientation at the high school during the motion for new trial hearing. Based on the information he had at the time, he assumed the gathering was analogous to routine jury orientation practices in other counties and did not investigate further before filing the direct appeal.

Petitioner testified that he was never informed of the jury orientation, did not attend, and did not sign a waiver of his right to be present. He testified that he did not understand the constitutional implications until reading transcripts later and had no legal training to evaluate the significance at the time.

B. Testimony Regarding Juror Toups

At the post-conviction hearing, Juror Toups testified that she did not know Petitioner, the victim, or their families before trial. She joined the “Justice for Michael A. Woodby” Facebook group only after the verdict, and she did not communicate with the victim’s family during trial. She told the court she had her phone in her car and was willing to show when she joined the group, but the court declined to allow her to do so.

Trial counsel testified that after the verdict he became aware of an online post in which the juror described the trial in personal terms and stated she was proud of the verdict. He stated that particular post could not later be located. His decision not to further question Juror Toups during trial regarding her acquaintance with Jessica Waggoner was based on his assessment that the court’s inquiry had sufficiently addressed potential bias.

Appellate counsel testified he sought permission at the motion for new trial to subpoena Juror Toups but did not pursue a subpoena duces tecum for Facebook records. He received multiple screenshots timestamped after the verdict and assumed Juror Toups’ membership in the group began post-trial. Because the trial court denied his request to subpoena the juror herself, he believed a subpoena duces tecum would not be granted.

C. Post-Conviction Court’s Ruling

Following the conclusion of the evidentiary hearing, the post-conviction court entered a written order denying relief. As to the issues regarding the jury orientation at the high school, the post-conviction court accredited the testimony of ADA Wilson and Ms. Williams that no case-specific information was conveyed and concluded that the trial judge’s statements that he gave the jurors information to provide context were not sufficiently detailed to show a constitutional violation. Additionally, the court found that the proceedings consisted of swearing the venire, reviewing juror responsibilities,

handling qualifications and excuses, and instructing jurors to complete the case-specific questionnaire, along with empaneling and swearing the grand jury. The court concluded that Petitioner failed to prove by clear and convincing evidence that the trial court engaged in any ex parte communication concerning the facts, law, or allegations of the case.

Regarding ineffective assistance, the court held that trial counsel was deficient for failing to attend the jury orientation but found no resulting prejudice, emphasizing that neither party could question jurors, both parties participated in creating the juror questionnaire, and the completed questionnaires were later available to both parties. Additionally, the court did not find trial counsel's presence would have altered the outcome. The court also found trial counsel was not deficient for failing to seek removal of Juror Toups, concluding her acquaintance with Jessica Waggoner was minimal and fully explored by the trial court. The court further found that appellate counsel was not deficient in failing to seek a subpoena duces tecum for the Facebook records, accrediting Juror Toups's testimony that her involvement in the Facebook group began after the verdict and concluding that the trial court would not likely have granted such a subpoena in any event.

Finally, the court found no basis for cumulative error relief. Petitioner filed a timely notice of appeal.

Analysis³

On appeal, Petitioner contends the post-conviction court erred in denying relief and argues that (1) the trial court participated in an ex parte jury proceeding which violated his right to an impartial jury; (2) his trial counsel was ineffective for failing to attend the jury orientation at the local high school; (3) his trial counsel was ineffective for failing to move to remove a juror who admitted during trial that she knew one of the State's witnesses; (4) his appellate counsel was ineffective for failing to request a subpoena duces tecum for a juror's Facebook record; (5) the post-conviction court erred in denying a subpoena duces tecum for the juror's Facebook record; and (6) the cumulative errors undermine confidence in the verdict.

Under the Post-Conviction Procedure Act, a criminal defendant may seek relief from a conviction or sentence that is "void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. The petitioner bears the burden of proving the allegations of fact in his post-conviction petition by clear and convincing evidence. *See* T.C.A. § 40-

³ We have reordered Petitioner's issues for clarity.

30-110(f); *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009). “Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). A post-conviction court’s factual findings are conclusive on appeal unless the evidence preponderates against them. *Howard v. State*, 604 S.W.3d 53, 57 (Tenn. 2020) (citing Tenn. R. App. P. 13(d)); *see also*, *Arroyo v. State*, 434 S.W.3d 555, 559 (Tenn. 2014); *Fields v. State*, 40 S.W.3d 450, 456, n.4 (Tenn. 2001). Accordingly, as an appellate court, we are not to re-weigh or re-evaluate the evidence or substitute our inferences for those drawn by the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001).

I. Constitutional Violations Related to Jury Orientation

Petitioner asserts that his constitutional rights to due process and to a fair and impartial jury were violated when the trial court conducted a gathering of the jury venire at Union County High School and allegedly made statements to prospective jurors outside his presence. The State argues this issue is waived because Petitioner failed to raise it on direct appeal. We agree with the State.

Under both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution, every criminal defendant has the right to a trial by an impartial jury. *State v. Adams*, 405 S.W.3d 641, 650 (Tenn. 2013) (citing *State v. Sexton*, 368 S.W.3d 371, 390 (Tenn. 2012)). Specifically, every defendant is guaranteed “a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the other of the litigation.” *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993) (quoting *Toombs v. State*, 197 Tenn. 229, 270 S.W.2d 649, 650 (1954)).

However, in the post-conviction statutory scheme, Tennessee Code Annotated section 40-30-106(g) provides that, an issue is waived “if the petitioner personally or through an attorney fail[s] to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented[,]” with two limited exceptions.⁴ *Holland v. State*, 610 S.W.3d 450, 457-58 (Tenn. 2020) (citing T.C.A. § 40-30-106(g)); *see also* *House v. State*, 911 S.W.2d 705, 714 (“Waiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney.”).

⁴ When “[t]he claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or . . . [t]he failure to present the ground was the result of state action in violation of the federal or state constitution,” the court may grant an exception to the general waiver rule. T.C.A. § 40-30-106(g)(1)-(2). Neither exception applies in this case.

Here, Petitioner was aware of the jury orientation issue no later than the motion for new trial hearing, where the trial judge and counsel discussed the jury orientation at the high school in open court. Despite this knowledge, Petitioner did not raise any claim related to the alleged ex parte proceedings or the trial court's comments to the venire in his direct appeal. Because this claim could have been, but was not, presented on direct appeal, it is waived. Neither statutory exception to waiver applies.

Even if the claim were not waived, the post-conviction court alternatively found Petitioner failed to establish by clear and convincing evidence that the trial court made statements about the facts of the case or otherwise initiated jury selection at the high-school gathering. As discussed more thoroughly below, the evidence does not preponderate against that finding.

II. Ineffective Assistance of Counsel Claims

Next, Petitioner raises several claims of ineffective assistance of counsel by both trial counsel and appellate counsel. He argues trial counsel was ineffective for failing to attend the jury orientation at the local high school and for failing to seek the removal of Juror Toups after she admitted during trial that she knew one of the State's witnesses. Petitioner contends appellate counsel was ineffective for failing to request a subpoena duces tecum for Juror Toups' Facebook records. The State maintains trial counsel and appellate counsel acted within the bounds of reasonable professional judgment and Petitioner failed to show any resulting prejudice.

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. As such, "[t]he deprivation of effective assistance of counsel is a constitutional claim cognizable under the Post-Conviction Procedure Act." *Howard*, 604 S.W.3d at 57 (quoting *Moore v. State*, 485 S.W.3d 411, 418 (Tenn. 2016)).

"Appellate review of an ineffective assistance of counsel claim is a mixed question of law and fact that this Court reviews de novo." *Phillips v. State*, 647 S.W.3d 389, 400 (Tenn. 2022) (citing *Dellinger*, 279 S.W.3d at 294). In general, we defer to a post-conviction court's findings concerning witness credibility, the weight and value of witness testimony, and the resolution of factual issues presented by the evidence. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015); *Whitehead v. State*, 402 S.W.3d 615, 621 (Tenn. 2013).

When a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Goad v.*

State, 938 S.W.2d 363, 369 (Tenn. 1996); *Kendrick*, 454 S.W.3d at 457. Deficient performance is representation that falls below “an objective standard of reasonableness” as measured by prevailing professional norms. *Kendrick*, 454 S.W.3d at 457 (quoting *Strickland*, 466 U.S. at 688); *see also Baxter v. Rose*, 523 S.W.2d 930, 932-33 (Tenn. 1975). A defendant asserting ineffective representation must overcome the strong presumption that counsel exercised reasonable judgment in all significant decisions. *Strickland*, 466 U.S. at 687-89; *Burt v. Titlow*, 571 U.S. 12, 22-23 (2013); *Kendrick*, 454 S.W.3d at 458; *Nesbit v. State*, 452 S.W.3d 779, 788 (Tenn. 2014).

Review of counsel’s performance “requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689; *see also Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997). We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006).

To show prejudice, a petitioner must demonstrate a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Kendrick*, 454 S.W.3d at 458. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Reasonable probability is a lesser burden of proof than preponderance of the evidence. *Kendrick*, 454 S.W.3d at 458 (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

Failure to satisfy either prong results in the denial of relief. *Strickland*, 466 U.S. at 697; *Nesbit*, 452 S.W.3d at 786-87. Accordingly, if either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). “[T]he petitioner is required to prove the fact of counsel’s alleged error by clear and convincing evidence.” *Phillips*, 647 S.W.3d at 401 (quoting *Dellinger*, 279 S.W.3d at 294); *see also* T.C.A. § 40-30-110(f); Tenn. Sup. Ct. R. 28, § 8(D)(1).

A. Trial Counsel’s Failure to Attend Jury Orientation

Petitioner argues that trial counsel provided ineffective assistance by failing to attend the jury orientation at Union County High School, where jurors were sworn, qualifications reviewed, and case-specific questionnaires distributed. He contends counsel’s absence deprived him of representation during a critical stage of trial, particularly given the intense local publicity. The State argues the orientation was general, Petitioner would not have been allowed to interact with the venire, it was

unusual for defense counsel to attend jury orientations, and even if counsel were deficient, Petitioner has not established prejudice.

The post-conviction court found that trial counsel was aware of the orientation and invited to attend, crediting the testimony of the trial judge and ADA Wilson over trial counsel's contrary assertion. The post-conviction court concluded that counsel's absence fell below an objective standard of reasonableness, particularly because the case had drawn substantial media attention and because counsel had participated in drafting the questionnaire used at the event.

The record supports the post-conviction court's deficiency finding. The record reflects that trial counsel helped develop a detailed questionnaire specifically designed to identify bias arising from widespread publicity surrounding the first trial. Given the extraordinary steps the court and parties took to seat an impartial jury, reasonable counsel would have attended any proceeding where the questionnaire was administered and jurors were sworn for service. *State v. Burns*, 6 S.W.3d 453, 462 (Tenn. 1999) (explaining attorney's obligation to act reasonably under prevailing professional norms).

However, the record also supports the post-conviction court's finding that Petitioner failed to establish prejudice. The post-conviction court found that the judge's comments at the orientation were limited to procedural instructions and did not include case-specific information. The court also found that the State did not question or address the venire. Petitioner has not identified any juror who would have been challenged or removed had counsel been present, nor shown that the composition of the seated jury would have changed. Trial counsel later received the completed questionnaires, reviewed them thoroughly, and collaborated with the State to strike jurors for cause. In this context, Petitioner has not demonstrated a reasonable probability that counsel's presence at the orientation would have altered the outcome of voir dire or the trial.

Petitioner points to the trial judge's statements at the motion for new trial hearing, that he "told [jurors] what the case was," as proof that prejudice must be presumed. But the post-conviction court, after hearing testimony from all participants, explicitly discredited that isolated recollection:

While it is concerning to hear [the trial judge] surmise he may have provided contextual statements relating to the facts in the case when he realized that [the] juror questionnaire did not contain a "preamble," this court specifically finds that he was merely speculating and did not have an accurate memory of the proceedings. Instead, the court credits the testimony of Assistant DA Graham Wilson, Juror Stephanie Toups, and Clerk Barbara Williams[,] none of whom heard [the trial judge] offer any

contextual statements relating to the facts in the case. As further support of [the trial judge's] inaccurate memory, he believed that the jurors were called only for the Petitioner's trial rather than the full trial term and that the Grand Jury was not selected. However, Ms. Williams accurately testified that jurors were empaneled for the full six-month jury term, and that the Grand Jury had been selected that day. This was consistent with the court's usual calendar for empaneling jurors for a six-month term, and the Clerk introduced an indictment issued for the day of the orientation – which corroborates that the Grand Jury met.

We defer to the post-conviction court's credibility determinations. See *Kendrick*, 454 S.W.3d at 457; *Whitehead*, 402 S.W.3d at 621. Without proof of substantive communication, Petitioner cannot establish prejudice. Petitioner is not entitled to relief on this issue.

B. Trial Counsel's Failure to Seek Removal of Juror

Petitioner next contends that trial counsel was ineffective in handling issues concerning Juror Toups. During trial, Juror Toups notified the court that she recognized State witness Jessica Waggoner because the juror's grandson had ridden Ms. Waggoner's bus. The trial judge immediately questioned Juror Toups, who explained the limited nature of the acquaintance and affirmed her ability to remain impartial. Trial counsel declined to further question Juror Toups. Petitioner argues that counsel should have probed further into the juror's relationship with the witness and her resulting ability to be impartial. He speculates that additional questioning would have revealed grounds to strike her for cause.

The post-conviction court rejected this claim, finding the juror's relationship with the witness was minimal and inconsequential. The court also found the trial judge's questioning was thorough and that nothing in the juror's post-conviction testimony suggested that counsel could have discovered additional disqualifying information. Nothing in the record preponderates against this finding. Trial counsel heard the juror's disclosure, observed her demeanor, and reasonably relied on the court's inquiry. Strategic decisions during voir dire are entitled to deference, particularly where the record shows no evidence that further questioning would have produced information requiring removal. *Pruitt v. State*, No. W2019-00973-CCA-R3-PD, 2022 WL 1439977 (Tenn. Crim. App. May 6, 2022) (stating "trial counsel's actions during voir dire are considered to be matters of trial strategy, which is generally entitled to deference" (internal quotations and citation omitted)).

Petitioner also asserts that trial counsel was ineffective in failing to seek removal of Juror Toups for cause. He argues she should have been disqualified either as a “proper defectum” (a general disqualification based on her relationship to a witness) or as a “proper affectum” (actual bias). The post-conviction court found that the juror’s acquaintance with the witness did not constitute a disqualifying relationship and credited her testimony that she had no personal connection to the witness. The court further found that Juror Toups was forthcoming about the acquaintance and that her conduct did not reflect bias.

Petitioner presented no evidence that the juror harbored actual bias during trial. “In order to prevail on a claim of ineffective assistance of counsel based on deficient voir dire, a petitioner is required to prove that the deficiency resulted in having a juror seated who was actually biased.” *Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011); *see Dellinger v. State*, No. E2005-01485-CCA-R3-PD, 2007 WL 2428049, at *30 (Tenn. Crim. App. Aug. 28, 2007), *aff’d*, 279 S.W.3d 282 (Tenn. 2009); *see also State v. Caughron*, 855 S.W.2d 526, 539 (Tenn. 1993) (stating in the context of a direct appeal challenge to juror bias that “[w]here a juror is not legally disqualified or there is no inherent prejudice, the burden is on the Defendant to show that a juror is in some way biased or prejudiced”); *State v. Baker*, 956 S.W.2d 8, 16 (Tenn. Crim. App. 1997) (same).

Trial counsel cannot be deemed ineffective for failing to seek removal of a juror where the record does not establish grounds that would have compelled the trial court to do so. Because Petitioner cannot demonstrate that a motion to strike would have been granted, he cannot show prejudice, and therefore, is not entitled to relief on this issue.

C. Appellate Counsel’s Failure to Seek a Subpoena Duces Tecum

Petitioner contends appellate counsel rendered ineffective assistance by failing to seek a narrowly tailored subpoena duces tecum compelling Juror Toups to produce a single Facebook record showing the date she joined the “Justice for Michael A. Woodby” Facebook group. He argues this information was crucial to determining whether Juror Toups was a member of the group during the trial, and that his inability to obtain the record was the result of appellate counsel’s deficient performance. The State maintains appellate counsel made a strategic decision to reasonably avoid making a speculative request.

Appellate counsel testified that he declined to pursue a subpoena duces tecum because the trial court had already denied his request to subpoena Juror Toups to testify at the motion for new trial hearing. He believed the trial court would not authorize a more intrusive measure requiring the juror to produce her private social media data. Counsel also explained that, based on the information he received from Petitioner’s

family members, every post or communication they identified occurred after the verdict. In his view, he had no factual basis to believe the juror joined the group before or during trial, and therefore no reasonable basis to request a subpoena for material that, at the time, appeared irrelevant.

Petitioner argues that counsel's failure to request the subpoena fell below an objective standard of reasonableness because the request would have been narrowly tailored, non-burdensome, and directly probative of potential juror bias. He asserts that, under *United States v. Nixon*, a subpoena duces tecum is proper where the movant demonstrates (1) relevance, (2) admissibility, and (3) specificity. 418 U.S. 683, 700 (1974). He maintains that his request would have easily met this test because the Facebook "join date" was a single piece of automatically generated data, obtainable by printing a simple screenshot, and capable of proving whether the juror had prior involvement with the victim's family.

The State responds that appellate counsel acted reasonably under the circumstances. Counsel had no evidence suggesting pre-verdict Facebook activity; on the contrary, all material available to him reflected only post-trial communications. Under these circumstances, the State argues that appellate counsel had no factual basis upon which to meet the *Nixon* thresholds. Additionally, the State maintains that a subpoena cannot be justified by speculation, and appellate counsel is not ineffective for declining to pursue investigative steps based solely on conjecture.

The post-conviction court concluded that appellate counsel's performance was not deficient. The record supports this finding and demonstrates that counsel evaluated the available evidence, considered the trial court's prior denial of a subpoena for testimony, and made a reasoned strategic judgment that a subpoena duces tecum would not be granted and would not materially advance Petitioner's claims. Petitioner identifies no evidence known to counsel at the time suggesting Juror Toups joined the Facebook group before the verdict. Without some factual predicate supporting the request, appellate counsel's decision not to seek the subpoena was well within the bounds of reasonable professional judgment.

Petitioner further asserts that, had counsel requested the subpoena, the trial court likely would have granted it under *Nixon* because the request was limited and proportionate. He argues that the "join date" would have shown whether the juror concealed relevant bias during voir dire and that, if she had joined the group before or during trial, the result of the trial or motion for new trial would have been different. However, the post-conviction court found that Petitioner's theory was entirely speculative. At the post-conviction evidentiary hearing, Juror Toups unequivocally testified that she joined the group only after the trial. Petitioner presented no contrary

evidence—no posts predating the verdict, no metadata, no witness testimony, and no recovered screenshot showing earlier group membership. Thus, even assuming appellate counsel had requested a subpoena, nothing in the record indicates that production of the Facebook record would have yielded information favorable to Petitioner.

Moreover, because the trial court had already denied appellate counsel’s request to subpoena the juror as a witness at the motion for new trial, Petitioner has not shown a reasonable probability that the court would have granted a more intrusive request for private digital records. The court’s prior ruling suggests that the request would have been denied regardless of how narrowly tailored it was.

Under these circumstances, Petitioner cannot demonstrate prejudice. He has not shown that the subpoena would have been granted, he has not shown that the requested material would have supported his claim, and he has not shown that the outcome of the trial, the motion for new trial, or the direct appeal would have been different had appellate counsel pursued the subpoena. Petitioner is not entitled to relief on this issue.

III. Post-Conviction Court’s Denial of Subpoena Duces Tecum

Petitioner next argues the post-conviction court erred in denying his motion for a subpoena duces tecum seeking a single Facebook record showing the date Juror Toups joined the “Justice for Michael A. Woodby” group. He contends that this narrow request satisfied the criteria set forth in *Nixon*, and that the requested information was essential to establishing whether the juror harbored undisclosed bias during trial. The State responds that Petitioner’s request was based entirely on speculation, lacked the factual predicate necessary under *Nixon*, and therefore was properly denied.

Tennessee courts have routinely applied *Nixon*’s three-part test when evaluating subpoenas duces tecum directed at third-party records. *See, e.g., State v. Johnson*, 538 S.W.3d 32, 60-62 (Tenn. Crim. App. 2017). As previously noted, under *Nixon*, the proponent of the subpoena must show: (1) the requested material is relevant to the matters at issue; (2) the material is admissible or would lead to admissible evidence; and (3) the request identifies the material sought with sufficient particularity. *Nixon*, 418 U.S. at 700.

Even when all three elements are satisfied, courts retain discretion to reject subpoenas that are speculative, oppressive, or amount to improper “fishing expeditions.” *See Johnson*, 538 S.W.3d at 61-62. In the post-conviction setting, the petitioner must also satisfy the heightened burden of demonstrating by clear and convincing evidence that the subpoenaed information would have produced evidence entitling him to relief. T.C.A. § 40-30-110(f).

Petitioner asserts that his request would have met *Nixon's* requirements because the “join date” was a single, automatically generated data point capable of conclusively establishing whether Juror Toups had undisclosed associations prior to deliberations. He argues the trial court’s refusal prevented him from proving a claim of juror bias and thereby impaired his due-process rights.

The post-conviction court rejected that argument, finding the request rested on speculation rather than evidence. The court noted that Petitioner introduced multiple screenshots of the juror’s social-media activity, all dated after the verdict. The juror testified unequivocally that she did not know the victim’s family before the trial, did not interact with them before deliberations, and did not join the Facebook group until after the verdict. The post-conviction court credited Juror Toups’s testimony after observing her demeanor and hearing corroborating testimony from the victim’s family that they first met the juror after the trial.

Based on those findings, the post-conviction court concluded there was no evidentiary basis to believe the sought-after record would show pre-verdict group membership, and thus no factual predicate supporting the subpoena. Taken together, the court found that Petitioner failed the relevancy prong of *Nixon* because nothing suggested the record would yield relevant evidence of juror misconduct. We agree. Courts do not issue subpoenas based solely on conjecture that the requested information “might” exist. Under *Nixon*, the movant must make a preliminary showing that the evidence actually has some tendency to prove a material fact. *See Nixon*, 418 U.S. at 700; *Johnson*, 538 S.W.3d at 61. Here, the petitioner offered only suspicion, not evidence, that the juror joined the group before the trial. Without such a showing, the request lacked the threshold showing of relevancy.

Petitioner also failed to satisfy the admissibility requirement. Because he produced no evidence suggesting pre-verdict membership, there was no basis to conclude that the record would lead to admissible evidence of juror bias. Tennessee courts require more than the mere possibility that a document could provide impeachment. *See Johnson*, 538 S.W.3d at 62. Finally, although the request was specific, failing one *Nixon* prong is fatal. *See Nixon*, 418 U.S. at 702.

The post-conviction court did not abuse its discretion in denying the subpoena. Without an evidentiary foundation suggesting the Facebook record would yield relevant, admissible proof of juror misconduct, Petitioner’s request amounted to a “fishing expedition,” which *Nixon* does not permit. Moreover, in light of the post-conviction court’s supported factual finding that Juror Toups did not join the Facebook group until after the verdict, Petitioner cannot demonstrate that the requested record would have

changed the outcome of his post-conviction proceeding. Petitioner is not entitled to relief.

IV. Cumulative Error

Finally, Petitioner asserts that he is entitled to relief under the cumulative error doctrine. The cumulative error doctrine recognizes that there may be many errors that are harmless in isolation, but “have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant’s right to a fair trial.” *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). To warrant relief under the cumulative error doctrine, there must have been more than one actual error committed during the trial proceedings. *Id.* at 77.

Here, the post-conviction court found, and we affirm, that trial counsel was deficient in one limited respect (failure to attend the jury orientation), and that deficiency did not prejudice Petitioner. No other deficiencies or constitutional errors have been found. Because Petitioner has not established multiple errors, the cumulative-error doctrine does not apply. Petitioner is not entitled to relief.

CONCLUSION

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

s/ *Jill Bartee Ayers*
JILL BARTEE AYERS, JUDGE