IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 7, 2023 Session

JOSEPH LANGLINAIS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Chester County
No. 19-CV-20 Donald H. Allen, Judge

No. W2022-00317-CCA-R3-PC

The Petitioner, Joseph Langlinais, appeals from the denial of his petition seeking post-conviction relief from his convictions of rape of a child, aggravated sexual battery, and attempted rape of a child, for which he received an effective sentence of twenty-eight years in prison. State v. Joseph Langlinais, No. W2016-01686-CCA-R3-CD, 2018 WL 1151951 (Tenn. Crim. App. Mar. 2, 2018), perm. app. denied (Tenn. July 19, 2018). In this appeal, the Petitioner argues (1) that the post-conviction court deprived this court of meaningful appellate review because it failed to consider certain issues as raised in his petition and failed to provide sufficient findings of fact in its order denying relief; (2) that the Petitioner was deprived of his Sixth Amendment right to the effective assistance of counsel under United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039 (1984), or alternatively, Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); (3) that trial counsel was ineffective based on eighteen separate grounds; and (4) that the cumulative effect of trial counsel's deficiencies entitles him to relief. After a thorough review of the record, we conclude that the aggregate effect of trial counsel's deficiencies requires a new trial. Accordingly, we reverse the order of the post-conviction court, vacate the Petitioner's convictions, and remand for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed, Convictions Vacated and Case Remanded

CAMILLE R. MCMULLEN, P.J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT H. MONTGOMERY, JR., JJ., joined.

William D. Massey and Seth Segraves, Memphis, Tennessee, for the Petitioner-Appellant, Joseph Langlinais.

Jonathan Skrmetti, Attorney General and Reporter; Jonathan H. Wardle, Senior Assistant Attorney General; Jody S. Pickens, District Attorney General; and Alfred Earls, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The facts giving rise to the Petitioner's convictions stem from his engagement in various sex-related crimes committed in 2012 against his girlfriend's twelve-year-old sister. Law enforcement first became aware of the offenses in 2015, and the victim at that time recounted the details of the crimes to a forensic examiner. The victim advised that her then-17-year-old sister and then-19-year-old Petitioner were going to teach her about sex and that while in the back of the Petitioner's truck, the Petitioner sucked the nipple of her breast, allowed her to perform fellatio on him, and attempted to penetrate her vaginally with his penis. Law enforcement interviewed the Petitioner in the parking lot of a business where he had been doing maintenance work, and the Petitioner made numerous incriminating statements which were audio recorded. On March 30, 2016, a jury convicted the Petitioner of rape of a child, aggravated sexual battery, and attempted rape of a child, and he received an effective sentence of twenty-eight years in prison. Joseph Langlinais, 2018 WL 1151951, at *1.

On July 15, 2019, the Petitioner filed a pro se petition seeking post-conviction relief. The State filed a response on July 22, 2019, and on July 25, 2019, post-conviction counsel filed their notice of appearance. On April 6, 2020, the first amended and supplemental petition for post-conviction relief was filed and contained 23 issues, multiple sub-issues, supporting citations and excerpts from the trial transcript, and was over 118 pages in length. On May 5, 2020, the State filed an equally extensive response to the amended petition and denied each of the Petitioner's claims. Notably, the State likened the Petitioner's case to one "in which there [was] no true defense" because "[i]t was undisputed that the [Petitioner] drove a twelve-year-old girl to a park in Chester County for the purpose of engaging in sex with the twelve-year old girl" and her sister. The State further moved for dismissal of the petition because it was not verified via the Petitioner's signature as required by statute. In addition to addressing each of the Petitioner's claims, the State accused post-conviction counsel of "fly specking" the record in search of every conceivable inconsistency to attribute to the ineffectiveness of trial counsel. Finally, because the proof at trial established that the Petitioner admitted to the crimes as charged, the State argued the claims raised in the post-conviction petition were "strategic choices" and "virtually unchallengeable." On May 22, 2020, a second supplemental petition was filed to include the Petitioner's signature verifying the issues as stated in the petition.

On September 9, 2021, an evidentiary hearing was held, and the Petitioner presented two witnesses: trial counsel and Attorney Claiborne Ferguson, a criminal trial specialist. Trial counsel began practicing law in 2000, and he focused exclusively on civil law. In

2008, trial counsel joined another lawyer and shared a practice until 2014 or 2015. During that time, trial counsel "had a couple of murder cases and . . . a rape of a child" case. Trial counsel had attended various continuing legal education courses, and he was familiar with the criminal adversarial process. However, trial counsel agreed that he had no formal training in cross-examination or opening statements since law school. Trial counsel represented the Petitioner from general sessions court to first tier appellate review. Trial counsel waived the preliminary hearing at the general sessions level because he believed generally that preliminary hearings were not beneficial for a defendant. He also had "an idea" of what the State was going to produce at trial based on the forensic interview of the victim. As such, he believed it was not in the Petitioner's best interest to give the State an opportunity to do a "rehearsal run" at the preliminary hearing. Trial counsel stated that at the time of the Petitioner's trial, he was familiar with the elements of the offense of rape of a child and the definition of sexual penetration. Nevertheless, trial counsel agreed that he asked Investigator Crouse a series of questions during trial including: "Was anybody raped here?" and "Do you feel like [the Petitioner] ever had intercourse with [the victim]?" Trial counsel explained his reasoning for posing the questions as follows:

> Well, because I couldn't ask the jury. I'm operating down here in a small town. Jason Crouse is an investigator. He's a lifelong member of this community. There's a statutory definition of what occurred and then there's a community definition of rape. I thought it would be beneficial to [the Petitioner] to plant the idea in the jury's mind, and I know this kind of goes to jury nullification, but that's not exactly what I had in mind, but I wanted to get an idea from Jason Crouse what he felt about the activities that occurred because I thought it might be a good reflection of how the jury was going to view it.

Trial counsel said that he had several conversations with Investigator Crouse prior to trial during which trial counsel could have asked Investigator Crouse the above questions. However, trial counsel wanted to "kind of catch [Investigator Crouse] by surprise [at trial] to get his honest – without thinking about it, his honest opinion as to whether he actually thought a rape occurred." Trial counsel acknowledged that Investigator Crouse testified at trial that the Petitioner had intercourse with the victim as defined by law, and Investigator Crouse further explained that intercourse was "if part of [the Petitioner's] penis goes inside [the victim's] body, that's considered intercourse." Trial counsel further agreed that it was not helpful to ask Investigator Crouse if he heard the victim testify during trial that intercourse never happened, and Investigator Crouse clarified, "No, sir. She testified that [the Petitioner] put his penis inside her mouth."

Trial counsel said the defenses available in a rape of a child case were "very limited" because it was "essentially a strict liability crime." Trial counsel testified that the only

available defense was "intent" and even that was "very shaky." Trial counsel wanted to "plant the seed with the jurors that while this may have happened, the [Petitioner] did not intend for that action to happen." In other words, the trial strategy was to "always show the jury that [the Petitioner] had an intention to do one thing and something else entirely happened." When pressed further, trial counsel said the "primary defense" was that "it just did not happen . . . . Everybody agreed something did happen. But you - - the defense was always going to be what did [the Petitioner] intend to do that day . . . ." Trial counsel did not request the court to instruct the jury as to any inaccuracies in Investigator Crouse's testimony because he did not want to place any more emphasis on it. Trial counsel later explained that he did not ask the trial court to correct the inaccuracy because he had gotten what he thought was "some pretty good testimony" from Investigator Crouse, and at that point, Investigator Crouse "was bowing up on" trial counsel, so he did not press him further on the issue.

Trial counsel denied that consent, apology, remorse, "it didn't feel like it was right," and the Petitioner was a follower were defenses to a rape of a child case. Trial counsel said that he was trying to "cultivate some sympathy from the jury and the Court" by suggesting that the offenses were not the Petitioner's idea. He further agreed that the list of questions posed by post-conviction counsel were sentencing factors. Trial counsel agreed those factors could imply the Petitioner's guilt.

At the time of the Petitioner's trial, trial counsel was familiar with the rape shield law. He acknowledged that he filed a Rule 412 motion at trial, which was admitted into evidence as an exhibit. Trial counsel agreed that the motion was not timely filed. Although he could not recall the specifics of why he filed the motion, trial counsel agreed that he filed the motion to show that the victim and her sister "had sex together previously so that [the Petitioner] would not have been teaching them anything about sex." Trial counsel further agreed that this was not relevant, and he ultimately withdrew the motion noting to the trial court that he may have to raise the issue at a later time during trial. Pressed about his understanding of Rule 412, trial counsel explained that the Petitioner had charges in two jurisdictions, and trial counsel was attempting to limit the victim's testimony about unindicted crimes. The victim's sister was also "under the threat of indictment." Trial counsel ultimately agreed that he was prohibited by the trial court from asking the victim about prior sexual conduct by the trial court, that he would not have asked the victim about such acts because they were not relevant, and that it would not have been beneficial to the Petitioner's case to do so.

Trial counsel said he filed at trial a motion to amend the indictment, admitted as an exhibit to the hearing, because he believed the State was uncertain about the victim's age at the time of the offenses. Asked why he did not style his motion under Rule 7(c) of the Tennessee Rules of Criminal Procedure seeking a bill of particulars, trial counsel noted

that it was not incumbent upon him to assist the State in determining the correct date for the offense. Moreover, there were two active investigations in Madison and Chester County, and he was "attempting to create as much confusion about when these activities might have occurred and what the State was trying to prove." He also argued pre-trial that if the State "didn't tighten up the date," the Petitioner would be denied the opportunity to present an alibi defense. Although trial counsel had not filed a notice of alibi, and his motion to amend the indictment was heard two days prior to trial, trial counsel maintained that an alibi was a potential defense.

In regard to the motion to suppress the Petitioner's statement to police, exhibit three, trial counsel acknowledged, generally, the legal requirements under the Fifth Amendment. He did not know why the motion was heard only two days prior to trial, but he knew that there was going to be an evidentiary hearing on the matter and reminded post-conviction counsel that there was indeed a hearing. Post-conviction counsel then questioned trial counsel about statements made during the hearing concerning the Petitioner's cell phone. Trial counsel acknowledged that during the hearing he did not know whether the cell phone was going to be used in his investigation. Trial counsel believed the Petitioner voluntarily gave the police his cell phone and that the police had returned the Petitioner's phone prior to trial. Trial counsel did not know if anything incriminating had been retrieved from the Petitioner's phone. However, trial counsel said he had an agreement with the district attorney "in principle" that nothing gleaned from the phone was going to be used at trial. Trial counsel filed the motion to suppress in the event "a handshake with the DA" was insufficient on appeal.

Post-conviction counsel pointed to statements from the district attorney at the motion to suppress hearing such as "this is the first I've heard of a cell phone is today" and the fact that neither the State nor the trial court could tell from trial counsel's motion to suppress what evidence it sought to suppress. Trial counsel acknowledged that he was not certain of what he wanted to suppress either because he did not know exactly what was on the Petitioner's cell phone. Trial counsel attributed any confusion in the motion to suppress to the fact that he wanted to advise the court that the Petitioner's phone was seized in relation to another case and not the instant case. Trial counsel denied that the confusion indicated unfamiliarity with the Petitioner's case. He said it "just indicates that there was evidence seized in one jurisdiction that could possibly impact the trial in another jurisdiction." Trial counsel said that he had open file discovery with the State, which is why he did not file a motion in limine to limit the evidence to be offered by the State. Trial counsel believed that the motions he filed in this case were "entirely appropriate" and that he had "more information than the State did[.]" Without explaining his reasons, trial counsel believed if some of the motions were pushed too aggressively, then it could have "opened up an entirely different Pandora's box."

Trial counsel was "in contact" with the Petitioner "all the time" for approximately six or eight months regarding the contents of the Petitioner's cell phone. Asked why he did not ask Investigator Crouse any questions concerning Miranda warnings or coercive conduct, trial counsel said that it was not necessary because, based on the recordings, the Petitioner was clearly not in custody at the time of the statement. Trial counsel testified that he knew the purpose of a motion in limine and when to file such a motion. Trial counsel agreed that allowing the jury to hear the age of the victim's older sister was neither relevant nor beneficial to the Petitioner's case. He further acknowledged that the State argued "you've got two underage girls" in this case. He acknowledged that the age of the victim's older sister was offered into evidence through the testimony of the victim.

Trial counsel further agreed that the sex lives of the Petitioner and the victim's older sister were admitted during trial; but he explained this evidence was helpful because he anticipated testimony that the "motivation" of "some of the parties was to teach" the victim about sex and that she was going to watch. Trial counsel believed that it was helpful for the jury to know the Petitioner and his girlfriend, the victim's older sister, had a sex life before the instant offense and that sex was "nothing out of the ordinary." Trial counsel explained that if the jury "did the math" the Petitioner would have been 17 years of age. Asked if this conduct was inadmissible under Rule 404(b) as improper propensity evidence, i.e. having sex with one underage girl when he is on trial for having sex with another underage girl, trial counsel said that, with the benefit of hindsight, it would not have been beneficial for the jury to hear the evidence.

Asked why he did not file a motion in limine to exclude the fact that the victim's older sister became pregnant with the Petitioner's child, trial counsel explained that they were married at the time of trial. Trial counsel agreed that "in a vacuum" it may not have been beneficial for the jury to hear this evidence. However, trial counsel believed it demonstrated that the Petitioner and the victim's older sister had a deeper commitment to each other and engaged in more than casual sex. In trial counsel's view, this evidence bolstered the Petitioner's credibility and showed that he was "taking responsibility for what he did." Similarly, although it may have had a "negative impact," trial counsel believed that it was important for the Petitioner to testify about "having sex while others watched" or "taking videos of sex" because of the conservative makeup of the jury. Trial counsel's objective was to "be up front . . . and disclose that this couple having sex in front of someone else was not necessarily unusual."

In regard to the Rule 404(b) issue concerning the recording admitted into evidence containing sexual misconduct involving other minors, trial counsel testified that he could understand the audio on the disc containing the recording, and that it played on his equipment. He agreed that sexual misconduct involving other minors would not be beneficial to the Petitioner's case, particularly when he is charged with the same offense.

Trial counsel opined that, based on this court's direct appeal opinion, this court heard the entire recording. However, trial counsel did not believe the portion of the tape containing the improper conduct was played for the jury. Trial counsel agreed that he initially objected when he thought he heard the word "video" when the recording was being played for the jury. From that point, trial counsel believed only the portion containing the conversation between the Petitioner and Investigator Crouse was played for the jury. Trial counsel testified that there was a conversation with the trial court as to whether he could hear the sound. Trial counsel said he could hear it, but he could not understand the words. Asked why he agreed to the admission of the recording (exhibit one from trial), trial counsel said his agreement was "couched on the agreement that he had with the District Attorney that that portion would not be played." He agreed, with hindsight, that the better practice would have been to redact the recording as noted in this court's opinion on direct appeal. However, trial counsel had no reason to move to redact the recording because the equipment he initially listened to the recording on was "crystal clear," and the copy of the disc trial counsel had pre-trial was not difficult to hear. Trial counsel relied on his agreement with the district attorney, and trial counsel believed the district attorney "stuck to it."

At the end of the Petitioner's trial, trial counsel made a motion for judgment of acquittal and a motion for directed verdict because "some jurisdictions like one; some jurisdictions like the other." Trial counsel agreed that he may have told the trial court that he would rely on the district attorney general for the specific rule number. When advised that directed verdicts had been abolished pursuant to Rule 29(g), trial counsel said that he had been made aware of the rule change some time ago.

Trial counsel was again asked about his defense theory and explained as follows:

> He had no intention to have sex with [the victim] . . . . Well, I couldn't get past the event because everybody who was there would testify to the same thing. We had what was tantamount to at least two confessions. So, I didn't have the first defense, it just didn't happen.
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> So, conceding in my preparation that something happened, you have to look at what you're left with, and in a rape of a child, again, it's almost strict liability statute. So, you have to find the narrow hole that you can punch and[,] in this case, it was intent. He just - - and a little bit colored by maybe he didn't know who was doing what.

When confronted with the fact that the State was going to offer proof that the Petitioner penetrated the victim, trial counsel said his only defense was the Petitioner's testimony. Trial counsel reiterated when "we don't have the defense of it didn't happen,

so we are left with . . . what are the circumstances?" Trial counsel said the Petitioner was believable, talkative, and "a good old boy." Trial counsel thought the Petitioner would connect with the jury, and he believed it was in the Petitioner's best interest to "simply tell the jury what happened." Trial counsel agreed that the primary issue in the case was whether the victim placed the Petitioner's penis in her mouth. Trial counsel agreed that the victim testified at trial that she "put her head over [the Petitioner's] penis," and that she did not say the Petitioner placed his penis inside her mouth. When confronted with the testimony by Investigator Crouse that the "victim did say she inserted it and that came in before the jury," trial counsel said, "If it's in there it came in." Trial counsel acknowledged that he may not have argued *mens rea* or intent in voir dire, opening statement, or closing argument.

Trial counsel denied that the Petitioner's stating during the motion to suppress hearing that the Petitioner had not heard the recording of his statement to the police prior to the hearing was evidence of trial counsel's failure to review discovery with the Petitioner. Trial counsel insisted that he had reviewed the recording of the Petitioner's statement to the police with the Petitioner and his mother. Trial counsel was asked why he objected based on speculation during the motion to suppress when the Petitioner testified that he had not heard the recording. Trial counsel explained that, while he did not agree that the Petitioner had not heard the recording, if that was the Petitioner's testimony, then the district attorney should be required to stop questioning the Petitioner about it. When pressed further about his precise language to the trial court that the Petitioner "ha[d]n't heard" the recording, trial counsel replied, "that's just semantics." Trial counsel denied that the Petitioner was being dishonest with the trial court. Trial counsel explained that there were multiple recordings involved in the case and that the Petitioner may not have known to which recording the district attorney referred. Trial counsel said he did not remember if he ever received the recording between the Petitioner and Investigator Crouse because it was not used. Trial counsel had received the recording between the Petitioner and Michael Lewis, the victim's father, during which Lewis was wearing a wire while the police listened to his discussion with the Petitioner. Trial counsel said he listened to the Lewis recording within a few days of receiving the recording and did not recall when he listened to the recording from Investigator Crouse. Trial counsel explained that the two recordings "tracked" one another and that he was familiar with both.

Because trial counsel and the district attorney had arranged pre-trial the evidence that was going to be admitted, trial counsel opined that it was a "clean" trial with very few objections. Trial counsel testified that he was also familiar with the jury selection process. Post-conviction counsel directed trial counsel to a series of questions from the State's voir dire and the fact that the State reminded the jury of those questions during closing argument. Specifically, during voir dire, the State inquired of each juror whether they could imagine any circumstance under which it would be okay for an adult to have sex

with a twelve-year-old child and whether each juror had children or young girls. Trial counsel acknowledged that such questions "theoretically" may be considered "extracting commitments from a jury as to a course of action," and were "misleading[.]" However, trial counsel did not believe the trial court would have sustained an objection to those questions. Moreover, trial counsel did not believe the questions were legally objectionable. Asked if the State was "linking up [the victim] to the juror's family members," trial counsel said that was "really gray" and that "it was not prohibitive to . . . try to get the jurors to identify with your victim." However, trial counsel did not believe it was appropriate to "start naming names." Trial counsel said while these questions were personally objectionable, they were not legally objectionable. Trial counsel opined that the State "did not cross the line."

Trial counsel did not follow-up to the State's voir dire questions because "it would have hammered home the point that we have an adult having sex with a child," and trial counsel wanted to "diminish that chatter as much as possible." Trial counsel also explained that he had to "choose his battle" because he was conceding that sex occurred, but the Petitioner did not intend for it to happen. Moreover, trial counsel did not believe any juror would openly concede a circumstance under which it was appropriate for an adult male to have sex with a 12-year-old girl. Finally, trial counsel testified that he used every peremptory strike he had during voir dire.

Trial counsel said he did not ask any questions during his first round of voir dire because the jury was "too conservative. Way too conservative." He explained that he did not ask the jury about potential bias or prejudice because he wanted to connect with the jury on a more basic level and simply to appeal to their sense of justice and whether they could give the Petitioner a fair trial. Trial counsel did not ask 10 of the 12 jurors and the alternate any questions because he believed the district attorney had covered it. Trial counsel said he was from the area and knew most of the jurors. He was confident they would listen to the facts and, while conservative, they were "going to do everything they could to give [the Petitioner] a fair trial." Trial counsel was asked to explain his response to a juror who said during voir dire that she "thought she had heard it all." Trial counsel explained that his response, "he thought he had too," was another way of connecting with the jury.

Trial counsel acknowledged that in his opening statement he agreed with "most everything" the district attorney said in his opening statement. Trial counsel explained the district attorney stated the facts of the case "pretty accurately." Trial counsel did not address explicitly the "core" of his defense theory in his opening statement. He did not explain to the jury that the Petitioner did not know that it was the victim, instead of her sister, engaged in fellatio. Trial counsel was certain he addressed this aspect of his defense theory during the direct examination of the Petitioner and during closing argument. Trial

counsel disagreed that the jury did not hear the Petitioner's defense theory until the Petitioner testified. When pressed on this issue, trial counsel believed the jury hearing the defense theory from the Petitioner's mouth was more powerful. Trial counsel did not mention intent in his opening statement because he did not know how the victim was going to testify. Trial counsel said the victim's "stories had been a little bit inconsistent. And quite frankly, he was a little surprised at her testimony. It was more beneficial to the Petitioner than he had expected."

Over the State's objection, Attorney Claiborne Ferguson was permitted to testify as a criminal trial specialist and to provide his opinion regarding trial counsel's performance in this case. Attorney Ferguson testified that he was a criminal defense attorney with an exclusive criminal defense practice. He had been practicing law since 2000, and was certified by the National Board of Trial Advocacy as a criminal trial specialist. He listened to the testimony of trial counsel throughout the post-conviction hearing. Based on his review of the transcripts from the voir dire, opening statements, trial testimony, sentencing, and motion for new trial, he said that he had formed an opinion as to the case.

Attorney Ferguson opined that trial counsel was trying to "run a defense of jury nullification," and that jury nullification was not a defense in Tennessee. He said there was only one reasonable defense in this case, a lack of mens rea or intent to commit the offenses charged. Upon his review of the transcript, Attorney Ferguson said nowhere does it show or suggest that trial counsel argued intent as a defense. Attorney Ferguson testified there was no basis to support trial counsel's waiver of the preliminary hearing, and he believed that trial counsel should have had the preliminary hearing to obtain the testimony of the victim and her sister. Attorney Ferguson further believed that trial counsel should have had an investigator attempt to talk with the victim, so he could develop a defense theory. Attorney Ferguson opined that trial counsel had a "substandard understanding of the Rules of Criminal Procedure [and the] Rules of Evidence." Attorney Ferguson opined that while none of the issues raised in the post-conviction proceeding alone supported ineffectiveness of counsel, when taken together, the first prong of Strickland had been satisfied because trial counsel's conduct fell below a reasonable "standard of care" for criminal defense attorneys. He testified further that upon listening to the testimony of trial counsel during the hearing, trial counsel had "no understanding of how to protect the appellate record, [or] how to make the appropriate appellate record[.]"

Attorney Ferguson opined that it was plain error for the State to "link up" their questions from voir dire and the closing argument, and that there were "hundreds" of cases from this court so holding. He testified that rape of a child is not a strict liability offense because there is always an issue of intent in criminal defense. He opined that trial counsel was overly deferential to the prosecutor such that it injured his client, the Petitioner. Attorney Ferguson opined that trial counsel did not engage in any meaningful questions

during voir dire. Although he recognized that trial counsel used all of his peremptory challenges, Attorney Ferguson did not know "what he got out of them." In other words, there was no way to determine whether trial counsel effectively used his challenges because no questions were asked.

Attorney Ferguson testified that trial counsel's opening statement was "subpar" and "strange" because trial counsel appeared to be asking jurors questions. There was no meaningful, informative opening statement given. He further opined that a motion in limine or an objection to the age of the victim's older sister should have been made because her age was not relevant because sex between the Petitioner and the victim's older sister was not a crime, and because it enabled the State to prejudice the jury in its closing argument. Attorney Ferguson believed that trial counsel asked the victim open ended questions, which allowed her to provide a narrative answer. This was deficient because it enabled the victim to provide speculative answers. For example, when the victim interjected that the Petitioner had to know that it was she engaged in fellatio because "it was a different hand touching him," and she and her sister did not look alike and had a difference in weight. Attorney Ferguson said trial counsel should have followed up to impeach the victim because she did not observe the Petitioner observe that it was she during fellatio. Finally, none of the "open ended" questions related to the defense theory of lack of intent, and trial counsel did not impeach the victim. As such, Attorney Ferguson opined that trial counsel's cross-examination of the victim fell below a reasonable standard of care.

Attorney Ferguson testified that trial counsel elicited from Investigator Crouse other crimes from other charges. Throughout this section of his testimony, Attorney Ferguson generally referred to propensity evidence in the case without specifically identifying it and without discussing the requirements for Rule 404(b). Attorney Ferguson believed trial counsel's reason for admitting the other act evidence belied logic because trial counsel did not argue the same reasoning or point it out in his closing statement. Attorney Ferguson testified that Investigator Crouses' cross-examination "wasn't good" but did not fall below the Strickland standard or meet the second prejudice prong. Attorney Ferguson further opined that trial counsel failed to preserve the record for appeal in regard to the recording of the Petitioner's statement.

In Attorney Ferguson's view, there was no cross-examination concerning the defense theory. Moreover, Attorney Ferguson emphasized that it was a misstatement of the victim's testimony that the Petitioner placed his penis in her mouth and that trial counsel should have been objected. This was significant because it undermined the defense theory of a lack of intent to commit the offense, even though it was not really raised in this case. Attorney Ferguson said trial counsel's comments that Petitioner was remorseful implied guilt and supported a defense theory of jury nullification and not a lack of intent. According to Attorney Ferguson, trial counsel never argued intent to the jury, never told

the jury that intent was a viable defense, and never corrected the State in its voir dire regarding the elements of the offense. The only defense presented by trial counsel was that the Petitioner was "a good old boy, he's really sorry, let him go home." When asked if he had an opinion if this was a McCoy violation, Attorney Ferguson replied, "it is not necessarily on all four corners with McCoy, which, again, was a death penalty case . . . [however] it all but was an admission of guilt." Asked by the post-conviction court to point to where in the transcript trial counsel said the Petitioner was guilty, Attorney Ferguson stated that there was a "tacit flow" of jury nullification throughout the case.

Attorney Ferguson opined that trial counsel's closing argument overall did not have a "road map" or defense. Although trial counsel testified at the post-conviction hearing that his defense was intent, Attorney Ferguson said the transcripts from the trial clearly show it was jury nullification. Put simply, Attorney Ferguson said that if trial counsel's defense theory was a lack of intent to commit the offense, then it was deficient performance because trial counsel never mentioned it at trial. On the other hand, if trial counsel's defense theory was jury nullification, it was not permitted by law and illegal. On cross-examination, Attorney Ferguson testified that he had been paid $2,500 for his work on the case. Attorney Ferguson conceded that he had not listened to the recording of the Petitioner's confession, but he had read a transcript of it. In an exchange with the post-conviction court, Attorney Ferguson acknowledged hearing trial counsel say during his testimony that his defense in this case was lack of intent. However, Attorney Ferguson explained that trial counsel took that position only after trial counsel had a conversation with Attorney Ferguson prior to the post-conviction hearing, and trial counsel was "on notice" of Attorney Ferguson's position.

On February 8, 2022, the post-conviction court sent a written letter to the parties. Within the letter, the post-conviction court denied the petition and reasoned as follows:

> [Trial counsel] testified that he had been licensed to practice law since 2000, and that he represented [the Petitioner] at both the preliminary hearing and at the trial court level. He testified that he believed that it was in his client's best interest (Trial strategy) (in original) to waive the preliminary hearing, since he had seen and reviewed the statement of [the minor victim's name] (the 12[-]year[-]old alleged victim) which she gave to the forensic examiner and officer, and was aware of the statement his client had given to the police. He testified that he had experience trying several criminal cases and had received formal trial court training[] and had personally observed other attorneys trying criminal cases as well. I find his testimony credible.
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> He testified that he understood the elements of the offenses for which his client had been charged and indicted, and that he did full discovery of the

State's evidence against [the Petitioner]. He testified that he interviewed the witnesses, including investigating Officer Jason Crouse.

[Trial Counsel] testified that he and his client developed a trial strategy[,] and he knew what his client was going to say if he took the witness stand. His defense was that [the Petitioner] "didn't initiate any sexual contact" with the 12[-]year[-]old child [victim name] and that he didn't have any intent or knowledge of having any sexual contact or sexual penetration with [the victim], the much younger sister of his girlfriend, [name of victim's older sister]. He said that he understood that consent was not a defense to the charges of Rape of a Child and Aggravated Sexual Battery, since the victim was under 12 years of age. (Emphasis in original).

[Trial Counsel] testified that he had fully investigated the case before the trial and had considered all potential defenses. He also filed various pre-trial motions, including a Motion to Suppress his client's statement to the law enforcement officer, and a Motion to Suppress other evidence in the case. Those motions were denied by the Court at a hearing on March 28, 2016.

Trial Counsel also testified that his client had told him that there was "some incriminating evidence" on his cell phone when he gave it to the police officer and when he made "incriminating statements to the police officers as well.["] Although his client was not in custody when he made those incriminating statements, which were audio recorded by the police, counsel was nevertheless attempting to keep any incriminating videos, photos, or statements out of evidence at the trial by filing and arguing these motions to suppress. (Emphasis in original).

In the audio recording of [the Petitioner's] statements to police, he acknowledged and admitted that he had kissed [the victim] (who he knew was 12 years old at the time) and had "sucked on her breast", and that both [the victim] and her sister [victim's older sister] had both performed fellatio (oral sex) on him, and that [the victim] had "nicked" his penis with her teeth. He also admitted that he had "kind of half-way tried to put his penis in her vagina" and that it was "the worst mistake of his life."

At trial, the victim [the victim] described in great detail what [the Petitioner] did to her sexually that night which included his sucking her nipple (breast), placing his penis inside her mouth, and trying to put his penis into her vagina, and telling her not to tell anyone about what had happened.

Investigator Jason Crouse also testified about the admissions and statements that [the Petitioner] made to him, in which he admitted to everything [the victim] had accused him of doing.

[The Petitioner] also testified at his trial about the sexual events which occurred between he, his girlfriend [victim's older sister] and her younger sister [the victim] that night in his car. He also acknowledged that he was aware that [the victim] was 12 years old at the time, and that [the victim] and [the victim's older sister] did not look alike and that there was a difference in their weights and sizes.

The Court notes that both [the victim] and Investigator Jason Crouse, were both credible witnesses at the trial. The Court also notes that [the Petitioner's] own testimony at his trial and his statements to police in which he acknowledged all three instances of sexual contact between himself and the victim, was corroborating to the State's witness' testimonies. [Emphasis in original].

[Trial Counsel] also testified that he and his client had reviewed the audio recording of his client interview with the police prior to the trial and that he could understand what was being said by the officer and [the Petitioner]. He said it was "crystal clear" when I listened to it pre-trial, which is the reason why he filed a motion to suppress the audio recorded statement, which the Court denied.

He testified further that it was part of his defense strategy to show that [the Petitioner] never had "any intention" to have sexual contact with [the victim]. Defense theory was that [the victim] was just "suppose to watch" while he and her sister [victim's older sister] had sex in the car. Defense theory was that [the Petitioner] never "knew" that [the victim] was going to participate in any sexual acts, but simply going to watch as he and [victim's older sister] had sex in his car. [Emphasis in original].

[Trial Counsel] also testified that he and his client had discussed what [the Petitioner's] testimony would be as part of the trial strategy. He stated that he knew beforehand what his client's testimony was going to be from the witness stand.

Trial [C]ounsel also testified that he used all of his challenges during the Jury selection process. He also testified that he did not believe the prosecutor's questioning of jurors during voir dire examination was

objectionable or improper, or that the prosecutor's closing arguments to the jury were objectionable, improper or had "crossed the line." The Court credits [trial counsel's] testimony in this regard.

The [P]etitioner called Attorney Claiborne Ferguson to testify about his review of the trial court transcript and record, and his opinions concerning [trial counsel's] performance at the Jury trial of [the Petitioner].

He opined that the "lack of Mens Rea" on [the Petitioner's] part was the only defense that was appropriate in this case, and that Jury nullification was not a defense.

He opined that [trial counsel] failed to make objections to comments by the prosecutor during his closing arguments, and that [trial counsel's] performance during voir dire examination and opening statement were both "substandard[.]"

Mr. Ferguson also opined that the four pre-trial motions filed by trial counsel were either untimely or insufficient. He also criticized [trial counsel's] cross-examination of the alleged victim [name of victim]. He also criticized the cross-examination of Investigator Crouse by [trial counsel]. He also criticized trial counsel's performance during his closing arguments to the Jury. [Emphasis in original].

Attorney Ferguson testified that in his opinion [trial counsel's] performance as trial counsel was "sub-par" and "insufficient." He also testified that he had "no concern" or criticism over the Jurors who were selected to hear the criminal case against [the Petitioner], and who ultimately found the [Petitioner] guilty on the three charges. He stated that [the Petitioner] didn't get a fair trial. He also stated that he was being paid $2,500 to testify at the post-conviction hearing in this matter.

After careful review of the entire trial transcripts and all the evidence in this case, the Court finds that none of the trial counsel's actions or omissions were so serious as to fall below the objective standard of reasonableness under prevailing professional norms. The Court finds that [trial counsel's] representation was appropriate and that he provided [the Petitioner] with reasonably effective assistance. **Most importantly**, the Court further finds that the [P]etitioner has failed to show that there is a reasonable probability that, but for trial counsel's performance, the result of the proceeding would have been different. The proof in this case against the

> [Petitioner] was very compelling, overwhelming and sufficient to support the guilty verdicts. In fact, [trial] counsel did argue to the Jury that his client didn't have the requisite "Mens Rea" in the matter, and that they should find him not guilty. The Jury rejected that argument. [Emphasis in original].
>
> The Court credits the testimony of Trial counsel [] and finds that his representation of [the Petitioner] at trial was sufficient and appropriate.

On February 14, 2022, the order denying post-conviction relief was filed, and the Petitioner subsequently filed a timely notice of appeal. This case is now properly before this court for review.

ANALYSIS

I. Sufficiency of the Record. As a threshold matter, the Petitioner contends the record is insufficient for appellate review because the post-conviction court failed to make sufficient factual findings regarding several claims of ineffective assistance of counsel. The Petitioner further claims that the post-conviction court failed to consider several claims of ineffective assistance of counsel raised by the Petitioner. Specifically, trial counsel's failure to familiarize himself with Rule 412 of the Tennessee Rules of Evidence and subsequent failure to comply with the ten day notice requirement prior to trial; trial counsel's failure to familiarize himself with Rule 7 (c) of Tennessee Rules of Criminal Procedure; trial counsel's failure to file motions in limine to preclude testimony on three separate issues pursuant to Rules 401, 402, and 403, trial counsel's failure to file motions in limine to preclude testimony regarding five separate issues pursuant to Rule 404(b); trial counsel's failure to move for redaction of parts of the Petitioner's statement pursuant to Rule 404(b); trial counsel's failure to understand the purpose of opening statements and inappropriately asking questions of the jurors during opening statements; trial counsel's repeated concessions of guilt in opening statements, in the closing argument, and the breach of the duty of loyalty; trial counsel's ineffective appellate advocacy; and trial counsel's cumulative errors.[1]

In response, the State contends the record is sufficient for this court's review. Given the structure, volume, and overlap of the issues contained in the petition, the State argues the post-conviction court should be given some "leeway." The State submits the post-conviction court's letter fairly summarized the evidence offered at the hearing and credited the testimony of trial counsel. The post-conviction court then concluded, with emphasis,

[1] We have renumbered the Petitioner's issues for clarity. This section addresses the Petitioner's issues raised in section four of his brief.

that the Petitioner "failed to show that there is a reasonable probability that, but for trial counsel's performance, the result of the proceeding would have been different." Because the Petitioner had asked the post-conviction court to consider the cumulative effect of the alleged errors, and considering that he still opted to argue the cumulative effect of counsel's supposed deficiencies rather than arguing that any single one prejudiced the case on appeal, the State argues "it is entirely fitting that the post-conviction court considered the prejudicial effect as a whole rather than prejudice created by each allegation of deficient conduct individually." Finally, even if the post-conviction court should have made more findings of fact, the State submits reversal is not required because the record is "sufficient for meaningful appellate review."

The Post-Conviction Procedure Act requires the post-conviction court to make factual findings and conclusions of law with regard to each ground raised in the petition. Tenn. Code Ann. § 40-30-111(b) (mandating that the court "shall set forth in the order or a written memorandum of the case all grounds presented, and shall state the findings of fact and conclusions of law with regard to each ground"); see also Tenn. Sup. Ct. R. 28, § 9(A). The reasoning behind the requirement is to establish a basis adequate for appellate review. Strouth v. State, 755 S.W.2d 819, 822 (Tenn. Crim. App. 1986) (order denying post-conviction relief was sufficiently clear to permit appellate review, even if it lacked desired specificity on some points); Davis v. State, No. M2019-01017-CCA-R3-PC, 2020 WL 4282733, at *6 (Tenn. Crim. App. July 27, 2020). Accordingly, "[n]oncompliance by the post-conviction court does not warrant a reversal if the record is sufficient to effectuate a meaningful appellate review." Rickman v. State, 972 S.W.2d 687, 692 (Tenn. Crim. App. 1997). A failure to make a finding on a question of fact which is not dispositive of the legal issue of ineffective assistance of counsel does not require a remand to the trial court. State v. Swanson, 680 S.W.2d 487, 489-90 (Tenn. Crim. App. 1984).

We agree with the Petitioner and note that the post-conviction court's order denying the petition is somewhat unorthodox. The actual order states that the Petitioner failed to prove the allegations in his petition by clear and convincing evidence, that trial counsel rendered services within the range of competence demanded of attorneys, and that the Petitioner failed to show that trial counsel was deficient or that any alleged deficiency prejudiced the Petitioner, and incorporated the post-conviction court's February 8, 2020 letter to the parties containing its "full findings with regard to each specific claim of the Petitioner[.]" We acknowledge further that the February 8 letter did not address *in seriatim* the twenty-three issues raised in the post-conviction petition. Nevertheless, the February 8 letter summarized the testimony of trial counsel, Attorney Ferguson, and specifically referenced "the four pre-trial motions filed by trial counsel were either untimely or insufficient." Additionally, as pointed out by the State, the Petitioner asked the post-conviction court to consider the cumulative effect of the alleged errors rather than arguing that any single one prejudiced case. Moreover, based on the evidence from the post-

conviction hearing, most, if not all of the claims raised by the Petitioner required the post-conviction court to determine the propriety of trial counsel's strategic decisions throughout his representation of the Petitioner, and the post-conviction court determined that trial counsel's testimony in that regard was credible. The February 8 letter and the actual order also clearly show that the post-conviction court determined that the Petitioner had failed to establish that trial counsel was deficient or that trial counsel's deficiency prejudiced his case. Accordingly, we conclude the record is sufficient for meaningful appellate review.

II. Applicable Legal Framework. In section two of his brief, the Petitioner alleges trial counsel was deficient based on eighteen separate grounds for relief.[2] Each ground focuses primarily on trial counsel's alleged deficient performance. Section two does not provide this court with any corresponding argument regarding the prejudicial effect of trial counsel's alleged deficiency to his case.[3] Instead, in section three subsection one of his brief, the Petitioner generally argues under Strickland v. Washington, that "[e]ach error of trial counsel is distinctly interrelated, and the [Petitioner] was prejudiced, if not by each of these individual errors, the avalanche as a whole." Additionally, in section three, subsection two, the Petitioner argues the cumulative effect of trial counsel's errors was so pervasive that this court should presume prejudice under United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984), because trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Accordingly, we must now determine whether to review the Petitioner's Sixth Amendment ineffective assistance of counsel claims pursuant to Strickland or Cronic.

A claim for post-conviction relief based on alleged ineffective assistance of counsel and presents mixed questions of law and fact. Mobley v. State, 397 S.W.3d 70, 80 (Tenn. 2013) (citing Calvert v. State, 342 S.W.3d 477, 485 (Tenn. 2011)). In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. Jaco v. State, 120 S.W.3d 828, 830 (Tenn. 2003). A post-conviction court's findings of fact are conclusive on appeal unless the evidence in the

[2] As pointed out by the State, although this section of the Petitioner's brief purports to present nineteen grounds for relief, we note only eighteen grounds because the brief does not include a ground for number twelve.

[3] The Petitioner's argument appears to be twofold: (1) that prejudice should be presumed pursuant to United States v. Cronic, as discussed in this section, because trial counsel failed to subject the prosecution's case to meaningful adversarial testing; and (2) that prejudice should be presumed pursuant to Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997) (quoting United States v. Cronic, 466 U.S. 648, 654 n.11 (1984)), as discussed in subsection (14), failure to give effective opening statement, and subsection (16), failure to give an effective closing argument by failing to present a defense. Accordingly, we will address prejudice under Rickman v. Bell, separately in those subsections.

record preponderates against them. Calvert, 342 S.W.3d at 485 (citing Grindstaff, 297 S.W.3d at 216; State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999)). "Accordingly, we generally defer to a post-conviction court's findings with respect to witness credibility, the weight and value of witness testimony, and the resolution of factual issues presented by the evidence." Mobley, 397 S.W.3d at 80 (citing Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999)). However, we review a post-conviction court's application of the law to its factual findings de novo without a presumption of correctness. Id. (Grindstaff, 297 S.W.3d at 216; Finch v. State, 226 S.W.3d 307, 315 (Tenn. 2007); Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006)).

The right to effective assistance of counsel is protected by both the United States Constitution and the Tennessee Constitution. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. 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. Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Strickland v. Washington, 466 U.S. 668, 687 (1984). 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, 938 S.W.2d at 369 (citing Strickland, 466 U.S. at 688; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). 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).

In assessing an attorney's performance, we "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 (citing Strickland, 466 U.S. at 689). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. In addition, we must avoid the "distorting effects of hindsight" and must "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. 689-90. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Id. at 688-89. However, "'deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.'" House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (quoting Goad, 938 S.W.2d at 369).

The prejudice showing is in most cases a necessary part of a Strickland claim. Weaver v. Mass., 582 U.S. 286, 137 S. Ct. 1899, 1910 (2017). The reason is that a defendant has a right to effective representation, not a right to an attorney who performs his duties mistake-free. Id. (citations and internal quotation marks omitted). As a rule, therefore, a violation of the Sixth Amendment right to effective representation is not "complete" until the defendant is prejudiced. Id. Under Strickland, "[b]ecause 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." Goad, 938 S.W.2d at 370.

In United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984), the Supreme Court of the United States recognized "a narrow exception" to Strickland's requirement that a defendant must prove prejudice to establish ineffective assistance of counsel. Cronic acknowledged the existence of "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id. at 658, 104 S. Ct. 2039. Those circumstances include: (1) "the complete denial of counsel"; (2) when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) when circumstances are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. at 659-60, 104 S. Ct. 2039; Howard v. State, 604 S.W.3d 53, 58 (Tenn. 2020). In these instances, the process is presumptively unreliable, and proof of actual prejudice is not required.

In this case, the Petitioner relies on the second Cronic exception: he contends that trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." The Supreme Court has explained "[w]hen we spoke in Cronic of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete." Bell v. Cone, 535 U.S. 685, 696-97, 122 S.Ct. 1843 (2002); see also Fla. v. Nixon, 543 U.S. 175, 190, 125 S.Ct. 551 (2004). To trigger the second Cronic exception, an attorney must completely fail to challenge the prosecution's case, not just individual elements of it. The Court in Bell further noted that when applying Strickland or Cronic, the distinction between counsel's failure to oppose the prosecution entirely and the failure of counsel to do so at specific points during the trial is a "difference . . . not of degree but of kind." Bell v. Cone, 535 U.S. at 697, 122 S.Ct. 1843. Under this rationale, when counsel fails to oppose the prosecution's case at specific points or concedes certain elements of a case to focus on others, he has made a tactical decision. By making such choices, defense counsel has not abandoned his or her client by entirely failing to challenge the prosecution's case. Such strategic decisions do not result in an abandonment of counsel, as when an attorney completely fails to challenge the prosecution's case. Under the Court's reasoning, then, Cronic is reserved only for those extreme cases in which counsel fails to present any defense. Phillips v. White, 851 F.3d

567, 580 (6th Cir. 2017) (quoting Miller v. Martin, 481 F.3d 468, 473 (7th Cir. 2007)) (to trigger the second Cronic exception, "counsel's performance [must be] so defective that he may as well have been absent"; "'non-representation, not poor representation, triggers a presumption of prejudice.'"); U.S. ex rel. Madej v. Schomig, 223 F. Supp. 2d 968, 971-72 (N.D. Ill. 2002) ("the standard is extremely high for a petitioner asserting that his counsel entirely failed to subject the prosecution's case to meaningful adversarial testing"; to satisfy that standard, "counsel's performance must move beyond patent ineffectiveness into rank incoherence."); United States v. Holman, 314 F.3d 837, 839 n.1 (7th Cir. 2002) ("Cronic only applies if counsel fails to contest any portion of the prosecution's case; if counsel mounts a partial defense, Strickland is the more appropriate test.").

Upon our review, the record shows that trial counsel attempted to represent the Petitioner's best interest and filed various pre-trial motions including a motion for exculpatory evidence; motion for disclosure of impeaching evidence; motion to make the arrest history of State's witnesses available; motion to suppress evidence; and a motion to suppress the Petitioner's statement. Trial counsel also participated in voir dire and exercised each of his peremptory challenges on behalf of the Petitioner in selecting a jury. At trial, trial counsel presented an opening statement, cross-examined witnesses, moved for a judgment of acquittal at the close of the State's proof which resulted in dismissal of one of the counts, and presented closing argument. Although trial counsel's performance very well may have been "subpar" as stated by Attorney Ferguson, the record does not reflect that trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." As will be discussed more fully below, trial counsel made various tactical decisions throughout this case. In making such choices, however, trial counsel did not abandon the Petitioner by entirely failing to challenge the prosecution's case as required for this court to presume prejudice under Cronic. Accordingly, we will now turn to review each of the Petitioner's claims applying the traditional legal framework under Strickland.

III. Ineffective Assistance of Counsel Claims. 1. The Petitioner first argues that trial counsel was ineffective in advising the Petitioner to waive the preliminary hearing. He acknowledges, however, that failure to conduct a preliminary hearing, taken alone, is rarely sufficient to sustain a finding of ineffective assistance of counsel. See State v. Dennis Harmon, No. M2004-00453-CCA-R3-PC, 2005 WL 1353325, at *8 (Tenn. Crim. App. June 8, 2005). Nevertheless, the Petitioner insists that trial counsel's advice to waive the preliminary hearing provided no strategic or tactical advantage to the Petitioner and hampered his cross-examination of the victim. According to the Petitioner, this decision set the tone for the entirety of trial counsel's representation. In response, the State contends that trial counsel had legitimate strategic reasons to waive the preliminary hearing and was not deficient in this regard. Here, trial counsel testified at the post-conviction hearing that a preliminary hearing could be more beneficial for the State than the defense. Trial counsel

also said that he had already reviewed the affidavit of complaint and the transcript of the forensic interview of the victim. Trial counsel anticipated that he would receive open file discovery from the State, so he would not learn anything new from the preliminary hearing. Finally, trial counsel did not want to give the prosecutor or the witnesses a "dress rehearsal" for their testimonies and did not want to alert the prosecutor or the witnesses to what questions he might ask at trial, and he did not want to preserve any testimony that could be used later if a State's witness became unavailable. This court will not second-guess trial counsel's reasonable strategic decisions on review. Therefore, we conclude that the record supports the determination of the post-conviction court that trial counsel was not deficient in advising the Petitioner to waive the preliminary hearing. Smith v. State, 757 S.W.2d 14, 17-18 (Tenn. Crim. App. 1988); William Hatmaker v. State, No. 03C01-9506-CR-00169, 1996 WL 596949, at *6 (Tenn. Crim. App. Oct. 18, 1996). He is not entitled to relief as to this issue.

2. The Petitioner alleges that trial counsel was deficient in his "failure to understand the elements of the charged offense and included definitions." The extent of the Petitioner's claim is that during closing arguments, trial counsel twice asked the jury to consider, "Was anyone raped?" The Petitioner asserts this question was asked with the intent to illustrate the image of "forced rape" and force is not an element of rape of a child. In response, the States contends the post-conviction court credited the testimony of trial counsel at the post-conviction hearing that he knew the elements of the offense of rape of a child. Our law certainly permits trial counsel wide latitude in arguing their cases to the jury. State v. Cauthern, 967 S.W.2d 726, 737 (Tenn. 1998). Additionally, trial counsel's decisions on how or what to argue in opening or closing argument are strategic, and virtually unchallengeable, unless they are ill-informed or based on inadequate preparation. However, labeling a trial tactic "strategic" does not insulate it, perforce, from Strickland review. Lovett v. Foltz, 884 F.2d 579 (6th Cir.1989) (per curiam). "[E]ven deliberate trial tactics may constitute ineffective assistance of counsel if they fall outside of the wide range of professionally competent assistance." Martin v. Rose, 744 F.2d 1245, 1249 (6th Cir.1984) (internal citation omitted).

At the post-conviction hearing, trial counsel said he asked these types of questions because he "couldn't ask the jury" and he was "operating down here in a small town." Trial counsel further explained that "there's a statutory definition of what occurred and then there's a community definition of rape." Trial counsel admitted, "I know this kind of goes to jury nullification, but that's not exactly what I had in mind[.]" Trial counsel also said he was hoping the jurors would remember when they were teenagers. The record also shows that trial counsel believed that rape of a child was "essentially a strict liability offense" and presented an underlying theme of jury nullification. While the post-conviction court appears to have accredited trial counsel's testimony that he understood the elements of the charged offense and included definitions, the record casts doubt on this

determination. As opined by Attorney Ferguson, the record belies trial counsel's claim that he understood the elements of the offense of rape of a child because trial counsel never expressly argued to the jury the lack of the Petitioner's intent to commit the crime. In other words, if the Petitioner's lack of intent to commit the crime was indeed the defense theory, as stated by trial counsel, the record is unclear why trial counsel did not expressly argue it. Moreover, even if the Petitioner testified that he was not "paying attention" during the act of fellatio and did not see that it was the victim so engaged until after she "nicked" his penis, trial counsel was obligated to translate for the jury how this testimony served to negate the *mens rea* of the offense of rape of a child, and he failed to do so. The record shows trial counsel never discussed the elements of the offense with jury. While we are perplexed by trial counsel's decisions, the record supports the post-conviction court's determination that the Petitioner has not established by clear and convincing evidence that trial counsel did not know the elements of the offense or the definitions of penetration and sexual intercourse. We note, however, that this issue appears to overlap with subsection (16), that trial counsel was deficient in failing to present in closing argument the Petitioner's defense that he did not know it was the victim who put her mouth over the Petitioner's penis, which will be discussed more fully below.

3. The Petitioner alleges trial counsel's failure to comply with the ten-day notice requirement of Tennessee Evidence Rule 412 demonstrated a lack of basic knowledge required for litigating a rape of a child case. Specifically, the Petitioner claims trial counsel's Rule 412 motion failed to include an offer of proof and was untimely. In response, the State contends trial counsel testified at the post-conviction hearing that he did not actually want to introduce evidence of the victim's alleged other sex acts and that the Petitioner did not put forth any evidence at the post-conviction hearing of what trial counsel could have or should have presented at the Rule 412 hearing.

Tennessee's rape shield rule, which is found in Tennessee Rule of Evidence 412, "recognizes that, despite the embarrassing nature of the proof, sometimes the accused can only have a fair trial if permitted to introduce evidence of the alleged victim's sexual history." Tenn. R. Evid. 412, Advisory Comm'n Cmts. (1991). Rule 412's "purpose is to exclude all evidence regarding the complainant's prior sexual behavior unless the procedural protocol is followed, and the evidence conforms to the specifications of the Rule." State v. Brown, 29 S.W.3d 427, 430 (Tenn. 2000).

The provisions of Rule 412 provide in pertinent part:

> (c) Specific Instances of Conduct. Evidence of specific instances of a victim's sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is:

(1) Required by the Tennessee or United States Constitution, or
(2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or

. . . .

(4) If the sexual behavior was with persons other than the accused,

. . . .

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters[.]

(d) Procedures. If a person accused of an offense covered by this Rule intends to offer under subdivision (b) reputation or opinion evidence or under subdivision (c) specific instances of conduct of the victim, the following procedures apply:

(1) The person must file a written motion to offer such evidence.

(i) The motion shall be filed no later than ten days before the date on which the trial is scheduled to begin, except the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case.
(ii) The motion shall be served on all parties, the prosecuting attorney, and the victim; service on the victim shall be made through the prosecuting attorney's office.
(iii) The motion shall be accompanied by a written offer of proof, describing the specific evidence and the purpose for introducing it.

Tenn. R. Evid. 412(c)(1), (4)(ii), (d)(1)(i)-(iii).

The Petitioner claims trial counsel failed to comply with the above mandates of Rule 412. Our review of the trial court transcript shows that on March 21, 2016, nine days before the Petitioner's March 30, 2016 trial, trial counsel filed a Rule 412 motion requesting a pretrial hearing to determine the admissibility of the victim's prior sexual behavior. The motion was not accompanied by a written offer of proof, describing the specific evidence and the purpose for introducing it. On March 28, 2016, two days before trial, a hearing was held on the Rule 412 motion. The State explained to the trial court that its "theory of the offense [was] three participants and not just the [Petitioner] and the victim alone, but there was a third person involved in the sex acts [on the night of the offense]. That would be the victim's older sister,[] who is now the [Petitioner's] wife []." Trial counsel agreed with the State and noted "that would be an issue we address at trial" and that he would need a decision about the sexual activity of both girls. The trial court asked trial counsel about his failure to comply with Rule 412 and the fact that as a minor, the victim could not provide consent. Trial counsel said he "understood" but the victim was seven-years old when "the incident" occurred with her sister and that the statements of the victim and her sister in the instant case alleged that "they were going to teach the victim about sex when she's twelve years old." Asked how that was admissible, trial counsel replied, "Why did [the Petitioner] need to teach [the victim] about sex when she's been having sex for five or six years with her sister?" Again, the trial court pressed trial counsel about his failure to comply with the ten-day filing requirement under Rule 412, and his failure to include in his motion any alleged prior sexual acts of the victim. Trial counsel initially replied, "I don't have an answer for that question." After further questioning from the trial court, trial counsel capitulated and said, "We'll withdraw that motion."

At the post-conviction hearing, trial counsel agreed that he filed the motion to show that the victim and her sister "had sex together previously so that [the Petitioner] would not have been teaching them anything about sex." Trial counsel further agreed that this information was not relevant, that he ultimately withdrew the motion, and that he told the trial court in error that he may have to raise the issue at a later time during trial. When further pressed about his understanding of Rule 412 based on his actions, trial counsel explained that the Petitioner had charges in two jurisdictions, and trial counsel was attempting to limit the victim's testimony about unindicted crimes. The victim's sister was also "under the threat of indictment."

Upon our review, we acknowledge that the post-conviction court failed to expressly address the Rule 412 motion in its order denying relief. Although the 412 motion was untimely, the transcript from the hearing on the motion demonstrates that trial counsel was attempting to admit evidence of the victim's prior sex acts with her sister to rebut the

victim's anticipated testimony that the Petitioner and her older sister asked her if she wanted to learn about sex. At the motion hearing, it was clear that trial counsel was attempting to admit the evidence of sex between the sisters to impeach the victim's anticipated testimony. However, the trial court denied the motion because it determined that the anticipated testimony was not relevant, and trial counsel ultimately withdrew the motion. At the post-conviction hearing, there was no proof offered to establish that had trial counsel complied with the procedural requirements of Rule 412, the outcome of the trial would have been different. Accordingly, the record supports the determination of the post-conviction court that the Petitioner has failed to establish prejudice as a result of trial counsel's alleged deficiency, and he is not entitled to relief.

4. The Petitioner argues that trial counsel "did not know what a motion for a bill of particulars" was because trial counsel filed a motion to amend the indictment to include a more specific date and time. In support of this issue, the Petitioner points out that two days prior to trial, trial counsel addressed the court on the issue and stated "it's not just one incident. It's several incidents. They overlap." Because the indictment is clear that the alleged acts occurred on one day and in one county, the Petitioner argues that trial counsel did not know the allegations the Petitioner was facing two days before trial and was clearly unprepared. Trial counsel testified at the post-conviction hearing that he knew what a bill of particulars was and intentionally styled the motion as something more "vague." Trial counsel also believed the State was uncertain about the victim's age at the time of the offense and did not wish to aid the State in determining the correct date for the offense. Moreover, there were two active investigations in Madison and Chester Counties, and trial counsel was "attempting to create as much confusion about when these activities might have occurred and what the State was trying to prove." Trial counsel's decision to label the motion as a motion to amend, rather than a bill of particulars appears to be based on a reasonably informed trial tactic or strategy. Accordingly, the record supports the post-conviction court's determination that the Petitioner has failed to establish that trial counsel was deficient in labeling the motion to amend the indictment or that but for trial counsel's alleged deficiency, the result of the proceeding would have been different.

5. The Petitioner argues that trial counsel's failure to "properly draft, investigate, and litigate multiple motions to suppress [is] evidence of the ineffective representation provided throughout the trial process." The Petitioner argues that Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574 (1986), and Phillips v. State, 647 S.W.3d 389 (Tenn. 2022), set the standard for failure to file a motion to suppress and are inapplicable because trial counsel filed a facially defective motion to suppress. The Petitioner asserts the motion filed by trial counsel contained a single paragraph alleging vague constitutional violations, did not allege any facts, did not allege the evidence that was seized or sought to be suppressed. The Petitioner argues trial counsel did not know the evidence he sought to suppress, the evidence the State was seeking to introduce, or the

basic facts surrounding the seizure of the Petitioner's cell phone until the motion to suppress was heard two days prior to trial. Based on this, the Petitioner contends trial counsel placed the Petitioner on the stand unprepared to testify. Finally, the Petitioner insists the above demonstrates trial counsel's lack of preparation and understanding of the adversarial process. The State argues the Petitioner is not entitled to relief because he failed to put forth proof of its success on the motions to suppress at the post-conviction hearing pursuant to Kimmelman and Phillips.

Upon our review, the record shows that two days prior to trial, the trial court conducted hearings on all of the pre-trial motions filed by trial counsel on behalf of the Petitioner. In regard to the motion to suppress evidence and the motion to suppress the Petitioner's statement, trial counsel advised the court that they "could be handled together." Trial counsel also explained that the instant case overlapped with another case that originated in Madison County charging the Petitioner with patronizing prostitution. Trial counsel believed the cases overlapped because during the patronizing prostitution case, the Petitioner's cell phone was taken by the police. Trial counsel was uncertain whether any information was taken from the cell phone seized in the Madison County case and used in the instant, Chester County case. On the morning of the hearing, Investigator Crouse advised trial counsel that he did not obtain any information from the Petitioner's cell phone, and if he did, it was not going to be used in the instant case. For reasons unknown, trial counsel nevertheless announced to the trial court that the Petitioner "certainly can take the stand." The hearing proceeded with Investigator Crouse testifying that he took a statement from the Petitioner on June 15, that he spoke with the Petitioner strictly about the instant, Chester County case, not the Madison County case, and that the Petitioner was not in custody at the time he gave the statement. Trial counsel cross-examined Investigator Crouse, who confirmed that he was unaware of any evidence that had been seized from the Petitioner's cell phone. Investigator Crouse further confirmed that there was a joint investigation conducted with the Madison County Sheriff's Department; however, the only information shared was regarding the instant case.

Following Investigator Crouse's testimony, trial counsel called the Petitioner to the witness stand to testify without qualification that his testimony would be limited to the motion. The Petitioner testified that he was detained in a hotel room in March 2015 by the Jackson Police Department (JPD). He entered an agreement with them which allowed him to leave so long as he turned over his cell phone. The JPD kept his cell phone for four months, and shortly thereafter, the Petitioner was indicted with the instant offenses. Trial counsel asked the Petitioner questions concerning how the statement in the instant case was obtained, and the Petitioner testified that the police did not have his cell phone at the time the statement was given and that they did not ask him about any information they had taken off of the cell phone. During cross-examination by the State, the Petitioner testified that he gave the statement to Investigator Crouse on June 15, 2015, that it was his voice on the

recording, that the officers told him he was not under arrest or in custody at the time, and that he continued to speak with them freely. Although he had not listened to the recording, the Petitioner further agreed that he "made some statements and some admissions" about an incident with the victim on the recording. The Petitioner was unaware that he was being recorded at the time. At this point, trial counsel objected based on speculation. The record does not show a ruling from the trial court. The Petitioner was aware of the recordings of statements he made to the victim's father and the police; however, he had not listened to either recording. The State continued during cross-examination with the following exchange:

> STATE: Did you – based on your recollection, do you remember speaking to them about what you're charged with as far as an incident involving yourself, [the victim's older sister], and [the victim]?
>
> PETITIONER: Yes, sir.
>
> STATE: At no time were you ever forced to give statements to law enforcement, were you? You were never told they were going to do anything to you if you didn't speak, did they?
>
> PETITIONER: No, sir.
>
> STATE: Okay. So, when you spoke to them did you admit that something did take place between you and [the victim]?
>
> PETITIONER: Yes, I did.
>
> . . . .
>
> STATE: Was that you voluntarily telling that to law enforcement as far as they didn't put words in your mouth, did they? Did you tell them what happened?
>
> PETITIONER: Yes.
>
> . . . .
>
> STATE: Did you make descriptions of what happened and how it happened, where it happened, and when it happened?
>
> PETITIONER: Yes.

STATE: Okay. And I guess later, you even took Investigator Crouse to the location where that incident occurred; correct?

PETITIONER: Yes.

Trial counsel argued to the court "the primary focus of the motions is information that may or may not have been taken from the cell phone. . . . we object to any evidence that directly came from that cell phone or anything that was derived from it later on" as fruit of the poisonous tree. Trial counsel then stated "[t]he motion is not much addressing what [the Petitioner] told investigators because that does appear to be voluntary and proper[.]" At the post-conviction hearing, trial counsel acknowledged that during the hearing he did not know whether the cell phone was going to be used in his investigation. Trial counsel believed the Petitioner voluntarily gave the police his cell phone and that the police had returned the Petitioner's phone prior to trial. Trial counsel did not know if anything incriminating had been retrieved from the Petitioner's phone. Trial counsel acknowledged that he was not certain of what he wanted to suppress because he did not know exactly what was on the cell phone, even though it had been returned to the Petitioner. Trial counsel attributed any confusion in the motion to suppress to the fact that he wanted to advise the court that the Petitioner's phone was seized in relation to another case and not the instant case.

Based on the above testimony, we can conceive of no legitimate tactical or strategic reason why trial counsel filed a motion to suppress evidence or statements in this case. Trial counsel conceded before the trial court that he knew the Petitioner was not in custody at the time the statements were given and that the Petitioner had given the statements in this case voluntarily. We find it mind-boggling that trial counsel placed the Petitioner on the witness stand and subjected him to cross-examination by the State to achieve trial counsel's goal of notifying the trial court of potential evidence from another case. This action enabled the State to elicit and confirm the Petitioner's admission to "something" that happened with the victim. We cannot condone trial counsel's action, and agree with the Petitioner that his behavior demonstrates a lack of preparation and understanding of the adversarial process. We therefore conclude that the record preponderates against the post-conviction court's determination that trial counsel actions fell within the objective standard of reasonableness under prevailing professional norms. However, the Petitioner does not argue how he was prejudiced by trial counsel's deficient act or behavior. Accordingly, we conclude that while trial counsel was deficient in filing the above motions to suppress the Petitioner's statement/evidence and in calling the Petitioner to testify in this regard, the Petitioner has failed to demonstrate prejudice stemming from this deficiency.

6. The Petitioner argues trial counsel's failure to file several motions in limine was objectively unreasonable and ineffective. The Petitioner asserts that trial counsel was ineffective in failing to (A) file a motion in limine to prevent the jury from hearing the age of the victim's older sister; (B) file a motion in limine to prevent the jury from hearing about the victim's older sister's sex life with the Petitioner or their proclivity for involving others in their sex life; and (C) file a motion in limine regarding the victim's older sister's subsequent pregnancy. The Petitioner insists this deficiency enabled the State to have its theme of "sex with two minor girls." In response, the State argues trial counsel's decision not to file a motion in limine was not ineffective because, as part of his defense strategy, trial counsel wanted to show that the Petitioner was also young when he began having sex with the victim's older sister and that the Petitioner married the victim's older sister when she became pregnant to take responsibility for what he had done. The State asserts this testimony was also offered to show that Petioner was not a sex-obsessed teenager.

Objections to the admission of evidence are generally made when the evidence is offered. Pullum v. Robinette, 174 S.W.3d 124, 135-37 (Tenn. Ct. App. 2004). They may, however, be raised earlier, for example by pretrial motions in limine. "In limine " means "[o]n the threshold; at the beginning; or preliminarily." Id. (quoting BLACK'S LAW DICTIONARY 787 (6th ed.1990)). A motion in limine affords parties a means of "requesting guidance from the trial court prior to trial regarding an evidentiary question which the court may provide, at its discretion, to aid the parties in formulating their trial strategy." Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 192 (Tenn. Ct. App. 2008).

Although neither federal nor Tennessee procedural rules specifically authorize motions in limine, they have long been used and have been recognized as useful in management of cases. The court's authority in Tenn. R. Civ. P. 16 to manage a case through pretrial conferences and orders includes the discretion to rule on evidentiary issues raised in pretrial motions. Pullum v. Robinette, 174 S.W.3d at 135-37 (citing Advisory Commission Comments (2003) to Rule 16.02(6) ("pretrial conferences may greatly facilitate the efficient use of juror time by encouraging the pretrial resolution of evidentiary and other issues . . . .")).

The Tennessee Rules of Evidence provide that all "relevant evidence is admissible," unless excluded by other evidentiary rules or applicable authority. Tenn. R. Evid. 402. Of course, "[e]vidence which is not relevant is not admissible." Id. Relevant evidence is defined as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Even relevant evidence, however, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

Tennessee Rule of Evidence 404(b) provides as follows:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> > (1) The court upon request must hold a hearing outside the jury's presence;
> > (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
> > (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
> > (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

A. The Petitioner asserts that trial counsel was ineffective in failing to file a motion in limine to prevent the jury from hearing the age of the victim's older sister. At the post-conviction hearing, trial counsel acknowledged that the age of the victim's older sister, 17, was offered into evidence through the testimony of the victim. Trial counsel agreed that allowing the jury to hear the age of the victim's older sister was neither relevant nor beneficial to the Petitioner's case. He further acknowledged that the State argued "you've got two underage girls" as the theme of their closing argument. Moreover, the proof at trial, in context, showed that the Petitioner was 19 years old and the victim's older sister was 17 years old at the time of the offense. Given their respective ages, trial counsel did not believe that teenagers' having sex was a crime. We agree that the age of the victim's older sister had no probative value to any issue of consequence in the case. However, any error in the admission of this evidence was harmless. Contrary to the Petitioner's claims, the State did not use "two underage girls" as their theme in this case. The record reveals that the State twice referred to the age of the victim's older sister in closing argument. The State also noted in its closing argument that sex between the Petitioner and the victim's older sister was "okay," but only became a problem when the victim became involved. Accordingly, the record supports the post-conviction court's determination that the Petitioner has failed to demonstrate deficient performance or prejudice as to this issue.

B. The Petitioner asserts that trial counsel was ineffective in failing to file a motion in limine to prevent the jury from hearing about the victim's older sister's sex life

with the Petitioner or their proclivity for involving others in their sex life. At the post-conviction hearing, trial counsel testified that the sex life of the Petitioner and the victim's older sister was admitted during trial. Trial counsel first explained his familiarity with the community and his belief that the jury was conservative. Given the make-up of the jury, trial counsel believed it was important to show the jury that the Petitioner and his girlfriend, the victim's older sister, had a sex life before the instant offense and that sex was "nothing out of the ordinary." Trial counsel further believed the testimony was helpful and offered in anticipation of the testimony that the victim's older sister wanted "to teach" the victim about sex and that the victim was only going to watch.

Additionally, from our review of the trial transcript, the Petitioner testified that he and the victim's older sister had been dating for a year, had an active sex life, and that it was not unusual for them to engage in sexual intercourse with someone watching. The Petitioner testified that he did not know the victim was joining the Petitioner and the victim's older sister on the night of the offense, and that it was "sprung on" him while they were in the truck that the victim wanted to learn about sex. The victim also testified that it was her intent to watch the Petitioner and her older sister on the night of the offense, until her sister "French kissed" her. We conclude that introduction of this evidence was relevant to establish why the Petitioner would not be alarmed with having the victim watch him engaged in intercourse with her older sister. In other words, the Petitioner's prior active sex life with the victim's sister which involved having someone watch while they were engaged in sex was consistent with what the Petitioner thought the victim was going to do that night: that is watch them have sex and not participate. Admission of this evidence was also relevant because it was consistent with the Petitioner's belief that the victim's sister, not the victim, performed fellatio on him that night. Accordingly, the record supports the determination of the post-conviction court that the Petitioner has failed to establish deficient performance or prejudice stemming from this alleged deficiency. He is not entitled to relief.

C. The Petitioner asserts that trial counsel was ineffective in failing to file a motion in limine regarding the victim's older sister's subsequent pregnancy with the Petitioner's child. At the post-conviction hearing, trial counsel explained that the Petitioner and the victim's older sister were married at the time of trial. Trial counsel agreed that "in a vacuum" this testimony may not have been beneficial to the Petitioner's case. However, trial counsel believed it demonstrated that the Petitioner and the victim's older sister had a deeper commitment to each other and engaged in more than casual sex. In trial counsel's view, this evidence bolstered the Petitioner's credibility and showed that he was "taking responsibility for what he did." Similarly, although it may have had a "negative impact," trial counsel believed that it was important for the Petitioner to testify about "having sex while others watched" or "taking videos of sex" because of the conservative make-up of the jury. Trial counsel's objective was to "be up front . . . and disclose that this couple

having sex in front of someone else was not necessarily unusual." In our view, this was a reasonably informed trial strategy. Accordingly, the record supports the post-conviction court's determination that the Petitioner has failed to demonstrate deficient performance or prejudice as to this issue.

Finally, in regard to each of the above issues, the record supports the post-conviction court's determination that the Petitioner has not shown that he was prejudiced by trial counsel's failure to file any of the above motions in limine because he has not shown that any such motion would have been granted by the trial court or that the jury's verdict would have changed had a motion in limine been granted. Christopher Bailey v. State, No. W201900678-CCA-R3-PC, 2020 WL 3410245, at *10 (Tenn. Crim. App. June 19, 2020). The Petitioner is not entitled to relief.

7. The Petitioner argues trial counsel was ineffective in failing to file a motion in limine under Rule 404(b) to exclude proof of other bad acts concerning Petitioner's sexual misconduct with other minors as contained in his recorded statement. Specifically, the Petitioner asserts trial counsel failed to move to exclude evidence of the Petitioner's alleged sexual misconduct with other minors, the Petitioner's sexual conduct with the victim's older sister when she was a minor, or specifics regarding the Petitioner's sexual relationship with the victim's older sister. The Petitioner argues further that trial counsel failed to move to redact portions of or move to exclude entirely the recording of the Petitioner's statement pursuant to Rules 403 and 404(b).[4] The Petitioner insists the recording contained references that were clearly not relevant and highly prejudicial. Moreover, trial counsel failed to object to the recording which contained bad acts and was of low audio quality. Finally, although the Petitioner concedes that it is unclear what the jury heard from the poor audio quality, the State was able to use in closing argument the words "two underage girls" from Investigator Buckley who did not testify at trial. In response, the State emphasizes that it remains unclear which of these acts the jury actually heard, that trial counsel testified that the jury never heard any of the other bad act evidence, and that this court's opinion on direct determined the same. The State further argues that trial counsel was not deficient concerning the unredacted audio recording because trial counsel admitted that it is unclear how much of the bad acts the jury actually heard and the closing remark was referring to the instant case, not some other bad act.

In regard to trial counsel's failure to file a motion in limine pursuant to Rule 404(b) to preclude references to other sexual misconduct involving other minors contained in the Petitioner's recorded interview with law enforcement and his failure to move to redact the

[4] The Petitioner's brief has separate subsections for each of these issues identified as subsection 2.6.2., and 2.7. Because we consider them to be related, we have combined these issues for clarity.

Petitioner's recorded interview of the same, trial counsel testified at the post-conviction hearing that he did not file a motion in limine under Rule 404(b) to exclude proof of other bad acts or a motion to redact the same because trial counsel had an agreement with the district attorney that that portion of the recording would not be played, that he relied on his agreement with the district attorney, and that he believed the district attorney "stuck to it." Trial counsel agreed, in hindsight, that the better practice would have been to have redacted the recording as noted in this court's opinion on direct appeal. However, trial counsel explained that unlike the equipment used to play the recording at trial, the equipment he used initially to listen to the recording was "crystal clear," and he could understand the recording. In any case, trial counsel did not believe the portion of the tape containing the improper conduct was played for the jury.

We need not tarry long in resolving this issue. No one disputes that the Petitioner's recording with law enforcement contained inadmissible bad act evidence pursuant to Rule 404(b). However, the post-conviction court was unable to conclude that trial counsel was deficient in not filing a motion in limine to preclude or a motion to redact the Petitioner's other bad acts from the recorded interview with law enforcement. The record supports this determination. While certainly the better practice would have been to redact the recording prior to trial, trial counsel's reliance on his agreement with the district attorney to play only the admissible portion of the recording and not the portion of the recording containing the other bad acts did not fall below an objective standard of reasonableness under prevailing professional norms. Additionally, on direct review of this case, we concluded that the Petitioner was not entitled to plain error relief because the record did not demonstrate what occurred in the trial court and consideration of the issue was not necessary to do substantial justice based on the overwhelming evidence of the Petitioner's guilt. In denying relief, we observed "the trial court found that the inadmissible portions of the tape 'never came in as evidence' and that 'there was no reference . . . to other evidence in other cases.'" State v. Joseph Langlinais, No. W2016-01686-CCA-R3-CD, 2018 WL 1151951, at *6-8 (Tenn. Crim. App. Mar. 2, 2018). "Unlike this court, which can review the disc at its leisure, the trial court heard the recording once, in the courtroom, through equipment which provided substandard sound quality to the point that defense counsel described the recording as 'unintelligible.'" The trial court found that there were no audible references to any bad acts in the portion of the recording which was put before the jury, and given the widespread agreement that the recording was barely audible, the record as it stands does not preponderate against that finding. Id. Accordingly, the record supports the determination of the post-conviction court that the Petitioner has failed to establish any prejudice stemming from this alleged deficiency. He is not entitled to relief.

8. The Petitioner contends that trial counsel demonstrated his "unfamiliarity with the criminal trial process" by stating that he was "unsure" if the motion for judgment of acquittal could be referred to as a motion for directed verdict. While it is true that

motions for directed verdicts have been abolished and replaced by motions for judgment of acquittal, see Tenn. R. Crim. P. 29(a), the record shows that at the close of the State's proof, trial counsel said, "we would like to make a motion for, some judges call it a directed verdict and some call it a judgment of acquittal, as to one of these counts, and I'll have to rely on my colleague to tell me[.]" In so moving, trial counsel was successful in dismissing count three of the indictment. At the post-conviction hearing, trial counsel explained that he called the motion a directed verdict because other jurisdictions still refer to it that way. As we see it, the Petitioner does not argue that trial counsel was deficient, in substance, in arguing the motion for judgment of acquittal; but rather, he focuses on trial counsel's lack of knowledge as to the proper title or form for the motion. Accordingly, the record supports the post-conviction court's determination that the Petitioner has failed to establish deficient performance or prejudice, and he is not entitled to relief as to this issue.

9. Based on the Petitioner's testimony during the motion to suppress hearing stating that he had not reviewed the recording of the statement, the Petitioner argues that trial counsel failed to meet with and to review discovery with Petitioner. At the post-conviction hearing, trial counsel testified and denied that the Petitioner's responses at the motion to suppress hearing were evidence that he had not reviewed the recorded statements with the Petitioner. Trial counsel said that he had reviewed the discovery with the Petitioner and explained that the Petitioner may have been confused as to which recording the State referred at the hearing. There was no other proof offered at the post-conviction hearing as to this issue. As such, we conclude that the Petitioner failed to present clear and convincing evidence of any fact establishing any deficiency that resulted in prejudice. He is not entitled to relief.

10. The Petitioner argues that trial counsel was deficient in failing to prepare the Petitioner to testify at trial and subsequently eliciting prior bad acts through the Petitioner's testimony. In support of this issue, the Petitioner relies on the testimony of Attorney Ferguson, who opined that trial counsel did not prepare the Petitioner to testify. At the post-conviction hearing, trial counsel and Attorney Ferguson testified. The Petitioner did not testify. See Tenn. Code Ann. § 40-30-110(a) ("The petitioner shall appear and give testimony at the evidentiary hearing if the petition raises substantial questions of fact as to events in which the petitioner participated . . . ."); Timothy Evans v. State, No. E2017-00400-CCA-R3-PC, 2018 WL 1433396, at *4 (Tenn. Crim. App. Mar. 22, 2018) (concluding that because the petitioner did not testify at the post-conviction hearing, he did not support the factual allegations regarding his claim that trial counsel failed to adequately prepare him for cross-examination by clear and convincing evidence). Trial counsel was not asked directly if or how he prepared the Petitioner to testify at trial. Attorney Ferguson testified that he had listened to trial counsel's testimony at the post-conviction hearing and reviewed the trial transcripts. Attorney Ferguson had not interviewed the Petitioner. Other than the brief interaction prior to the hearing, Attorney Ferguson had not interviewed trial

counsel. The record supports the post-conviction court's determination that the Petitioner failed to present clear and convincing evidence of any fact establishing any deficiency that resulted in prejudice. He is not entitled to relief.

11. The Petitioner argues that trial counsel was deficient in failing to adequately prepare for and cross-examine the State's witnesses. Here, the Petitioner maintains that trial counsel did not conduct a vigorous cross-examination. In support, the Petitioner cites to instances during the trial where trial counsel's questions of the victim were "open ended" and not leading. According to the Petitioner, the most damaging example of trial counsel's open-ended questions was during the victim's cross-examination when the victim stated that the Petitioner did not penetrate her, but he tried. The Petitioner further points to the exchange with Investigator Crouse during which Investigator Crouse explained his definition of intercourse, mischaracterized the victim's earlier testimony, and trial counsel failed to correct it.

Trial counsel's decision regarding whether to cross-examine a witness regarding an issue "is a strategic or tactical choice, if informed and based on adequate preparation." Lawrence Warren Pierce v. State, No. M2005-02565-CCA-R3-PC, 2007 WL 189392, at *7 (Tenn. Crim. App. Jan. 23, 2007) (citing Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982)); see Rachel Kay Bond v. State, M2018-01324-CCA-R3-PC, 2019 WL 4508351, at *20 (Tenn. Crim. App. Sept. 19, 2019). "[S]trategic decisions during cross-examination are judged from counsel's perspective at the point of time they were made in light of the facts and circumstances at that time." Johnnie W. Reeves v. State, No. M2004-02642-CCA-R3-PC, 2006 WL 360380, at *10 (Tenn. Crim. App. Feb. 16, 2006) (citing Strickland, 466 U.S. at 690). "Where an attorney accidentally brings out testimony that is damaging because he has failed to prepare, his conduct cannot be called a strategic choice: an event produced by the happenstance of counsel's uninformed and reckless cross-examination cannot be called a 'choice' at all." Fisher v. Gibson, 282 F.3d 1283, 1296 (10th Cir. 2002).

Our review of trial counsel's entire cross-examination of the victim shows that trial counsel was indeed deferential to the victim given her status as a minor and an alleged sexual assault victim. During cross-examination, trial counsel established that the victim had previously asked her older sister about sex, the timeline of the events on the night of the offense, that it was dark at the time, that the victim's sister, not the Petitioner, asked the victim if she wanted to learn about sex, that the victim believed she was only going to watch and not participate in the activity that night, that the sexual contact was initiated by the victim's older sister, that the victim and her sister were positioned on opposite sides of the Petitioner, that the victim' sister was engaged in fellatio with Petitioner while the victim watched "down there," and that the victim "then performed oral sex on the [Petitioner]." The cross-examination further established that the victim could not see the Petitioner's face

while she was so engaged because the Petitioner was not talking to her. At the post-conviction hearing, trial counsel testified that he cross-examined the victim in this way for the jury to hear in the victim's own words how the Petitioner never actually sexually penetrated her. Although trial counsel elicited from the victim that the Petitioner "did not penetrate her, but he tried to," this was not the sole evidence established in support of the attempted rape of a child conviction (count four) as implied in the Petitioner's brief. On direct examination, the victim clearly testified that the Petitioner "tried to stick his penis in me." Investigator Crouse also testified that in the recorded interview with the Petitioner, "[e]verything that [the victim] . . . had accused [the Petitioner] of, he admitted to." On the recording, the Petitioner was asked if he had penetrated the victim's vagina with his penis, and the Petitioner can be heard to clearly respond "yes and no, if that makes sense." The Petitioner continued to explain that "he kind of half-way tried to put it in her[.]" Joseph Langlinais, 2018 WL 1151951, at *3. Moreover, while the Petitioner points to various other open-ended questions throughout trial counsel's cross-examination of the victim that may have been ill-crafted, the record supports the determination of the post-conviction court that trial counsel's cross-examination of the victim was not deficient or prejudicial. He is not entitled to relief as to this issue.

In regard to trial counsel's cross-examination of Investigator Crouse, the Petitioner relies on the following exchange from trial:

> TRIAL COUNSEL: And based on your investigation in this case, do you feel like [the Petitioner] ever had intercourse with [the victim]?
> INVESTIGATOR: Yes.
> TRIAL COUNSEL: You think he had intercourse?
> INVESTIGATOR: What I consider to be intercourse, yes.
> TRIAL COUNSEL: Can you explain that?
> INVESTIGATOR: Well, intercourse is if his - - part of his penis goes inside of her body, that would be considered intercourse.
> TRIAL COUNSEL: Did you hear [the victim] testify this morning that that never happened?
> INVESTIGATOR: No, sir. She testified that he put his penis inside her mouth.

At trial, the victim testified that after the Petitioner "sucked on [her] nipple," he pulled off his shorts and pulled out his penis. The victim's older sister then began to touch and rub the Petitioner's penis with her hands. The victim said she then began to do "the same thing" "because they were teaching [her] what to do." The victim agreed that she touched and rubbed the Petitioner's penis with her hand. The victim's older sister then "licked the side of his penis with her tongue[,]" and the victim did the same thing. The victim said her sister was teaching her, and the Petitioner was "just sitting there." There

was no direct testimony in the record from the victim that the Petitioner "put his penis inside [the victim's] mouth." At the post-conviction hearing, trial counsel said that he did not discuss this line of questioning with Investigator Crouse prior to trial because he wanted to surprise him in an effort to get an honest answer from Investigator Crouse as to whether he believed this was, in fact, a rape. Trial counsel also did not request a curative instruction or for the trial court to instruct the jury as to any inaccuracies in Investigator Crouse's testimony because trial counsel did not want to place any more emphasis on it. Trial counsel later explained that he did not ask the trial court to correct the inaccuracy because he had gotten what he thought was "some pretty good testimony" from Investigator Crouse, and at that point, Investigator Crouse "was bowing up on" trial counsel, so he did not press him further on the issue.

We disagree that trial counsel's line of questioning and decision not to correct Investigator Crouse's mischaracterization of the victim's testimony was informed and based on adequate preparation. The testimony trial counsel elicited from Investigator Crouse was damaging because the purported defense theory was that the Petitioner did not know that it was the victim instead of her older sister who was engaged in fellatio with him. Without the accidentally elicited testimony from Investigator Crouse, there was no direct evidence of the Petitioner's intent to commit the offense of rape of a child. Accordingly, we conclude that trial counsel was deficient in cross-examining Investigator Crouse and in failing to correct his mischaracterization of the victim's testimony. The more difficult question, however, is whether trial counsel's deficiency resulted in prejudice to the Petitioner's case. In our view, the record provides sufficient circumstantial evidence of the Petitioner's intent to engage in rape of a child including the lighting in the truck, the close proximity of the victim, and the difference in size, hands, and weight of the sisters. The record supports the post-conviction court's determination that the Petitioner has failed to establish prejudice stemming from trial counsel's deficiency, he is not entitled to relief.

12. The Petitioner argues trial counsel was deficient in failing to object to improper questions posed by the State in voir dire which led to improper closing arguments by the State. Specifically, the Petitioner contends the State asked improper questions of the venire including "whether or not they knew or had a child or grand-child that was 12-years old," and "whether they thought it was appropriate for a 12-year-old to have sex with an adult." The Petitioner asserts these questions "left the realm of hypothetical regarding impartiality and crossed into an attempt to exact a promise in violation of [State v.] Coe, 655 S.W.2d 903, 911 (Tenn. 1983)." As related to these alleged errors, the Petitioner also argues trial counsel was deficient in failing to ask any questions during voir dire regarding the jurors' ability to be fair and impartial. The State contends the questions were appropriate because the State immediately followed up with questions concerning whether the jurors would be comfortable sitting on a jury involving those facts and that the

prosecutor never exacted commitments from the jurors as argued by the Petitioner. The State further contends that trial counsel was not deficient in his questioning of the venire.

"The ultimate goal of voir dire is to ensure that jurors are competent, unbiased and impartial." Smith v. State, 357 S.W.3d 322, 347 (Tenn. 2011) (quoting State v. Hugueley, 185 S.W.3d 356, app. 390 (Tenn. 2006)). "By posing appropriate questions to prospective jurors, a defense lawyer is able to exercise challenges in a manner that ensures the jury passes constitutional muster." William Glenn Rogers v. State, No. M2010-01987-CCA-R3-PD, 2012 WL 3776675, at *36 (Tenn. Crim. App. Aug. 30, 2012) (citing United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973)). Tennessee Rule of Criminal Procedure 24 provides, in part, that only the initial remarks by counsel can include information about the general nature of the case, and this information must be non-argumentative. Tenn. R. Crim. P. 24(a)(2). Questioning of potential jurors by counsel is limited to "questions for the purpose of discovering bases for challenge for cause and intelligently exercising peremptory challenges." Id. at (b)(1). As this court has previously recognized, trial counsel's "actions during voir dire are considered to be matters of trial strategy," which is generally entitled to deference "unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." William Glenn Rogers, 2012 WL 3776675, at *36 (quoting Hughes v. United States, 258 F.3d 453, 457 (6th Cir. 2001)). However, trial counsel cannot assert trial strategy as a defense for failure to object to comments which constitute error of law and are inherently prejudicial. Moreover, while an attorney may not extract a pledge by asking a prospective juror how they will vote, State v. King, 718 S.W.2d 241, 246 (Tenn. 1986) (upholding trial court's restriction of trial counsel's question to venire, "If you had to vote right now, how would you vote?"), this court has held that it is not improper for the State to ask a prospective juror if they can follow the law and sign their name to a death verdict if the State has met its burden. Detrick Cole, 2011 WL 1090152, at *13. Finally, even if a petitioner were to establish that trial counsel's performance during voir dire was objectively unreasonable, he would not be entitled to post-conviction relief unless he establishes that the resulting jury was not impartial. Smith, 357 S.W.3d at 348.

The record shows that throughout the first round of voir dire, the prosecutor generally asked the jurors if they had any children or grandchildren. The prosecutor also stated, "you're going to hear some proof about some things that happened when young [victim's name] was 12 years old[.]" Have you known anybody . . . that that has happened to or they've told you that that has happened to them or have known somebody who's been accused of doing that to other people?" When the first juror responded affirmatively, the prosecutor followed up with questions including when it occurred, how was the situation handled, and how did the juror feel about it. When the juror responded, "I don't like it[,]" the prosecutor stated, "I would be worried if you did say you like child rape. Nobody likes

it." The prosecutor ultimately asked if the juror would be comfortable sitting on the jury or if the case might "hit too close to home." The same juror replied, "It might."

The next juror was asked, "The nature of this case is . . . dealing with allegations of child rape and aggravated sexual battery of a girl who was 12 years old at the time. Do you have any grandchildren?" When this juror replied yes, the prosecutor asked, "So you have some experience with – any little girls about 12 years old? You have experience with them?" The juror replied yes, and the prosecutor asked, "Is it going to pose a problem for you in the case here today? Do you think you can be fair and open minded?" The juror replied, "I can be fair." In response to another juror, who said that she had an older granddaughter, the prosecutor explained,

> "The reason I say that is because it's – if you're on the jury as you're hear the proof in the case, there's going to be things that happened to the girl, alleged to have happened to this girl, when she was 12-years old, okay? Do you think that you would have a problem sitting on a jury knowing – you don't know the whole case, but just the little bit I shared with you, do you see any issue with that?"

The prosecutor again asked questions of the jurors concerning whether they "knew anyone who had been accused of doing something sexual to a child or had had that happened to them as a child." He then asked follow-up questions as to whether the jurors had "any strong feelings about it to the point where you might be so prejudiced that you couldn't be a fair juror." The record shows the entire venire was asked the same set of questions within the same context.

Because of the nature of the case, it was reasonable for the prosecutor to ask these questions of the venire. We further agree that had trial counsel objected to these questions, the trial court likely would have overruled the objection. When the prosecutor's statements are read in context, it is clear he was trying to determine whether the jurors would be incompetent or biased based on the subject matter of the case and how the prosecutor would present the evidence—mainly through the testimony of a young child. Id. While the record does not show how the parties exercised their peremptory strikes, the jurors who expressed skepticism as to their ability to be fair and impartial were struck from the venire. Accordingly, the prosecutor's inquiry was not only a proper inquiry for voir dire but helped to select jurors who were competent and unbiased. Our consideration of subsection (16) discussing the prosecutor's reference back to these questions in his closing argument notwithstanding, the record supports the post-conviction court's determination that the Petitioner failed to establish that trial counsel was deficient in failing to object to the prosecutor's examination during voir dire or that the resulting jury was not impartial.

However, on the heels of what appears to be the second round of voir dire, the prosecutor asked, "Just as a general question, knowing what little you know about it, I'm just going to ask people at random, [name of juror], how do you feel about – just knowing what little you know, the accusation of a man about [age] 19, 20 accused of sexually penetrating or sexually touching a 12-year old girl? Are you ok with that?" The prosecutor also asked a variation of this question, "[t]he allegation is you have a 12-year-old girl and a guy who was 19, almost 20 years old. Would it ever be – do you ever think it would be okay or acceptable to you for a man that age to have sex with a girl aged 12[?]" All of the jurors were asked this question, and each juror responded, "No, sir." There were no follow-up questions to this line of questioning.

Here, the State contends the prosecutor did not extract a commitment from the jurors because he never asked the jurors to guarantee a verdict of guilt or to commit to a conviction if certain facts came out. The State argues that the prosecutor was merely trying to assess the jurors' general attitudes about child rape and that the Petitioner has failed to show that the resulting jury was not impartial. We disagree. This line of questioning had nothing to do with whether the potential jurors could perform their duties without regard to bias or prejudice. Because intent is an element of the offense of rape of a child and must be proven before a conviction is sustained, the question was an improper statement of the law and misleading to the jury. State v. Clark, 452 S.W.3d 268, 296-97 (Tenn. 2014) (holding that the generic *mens rea* statue applies to both elements of rape of a child: sexual penetration and the age of the child). The question went beyond determining whether the jurors could be fair and impartial and improperly sought to influence the jury on a key element in this case, the Petitioner's intent, and exceeded the proper scope of voir dire. The questioning also invited the prospective jurors to pre-judge the facts of the case, which is improper. Finally, the questioning also appears to be for the purposes of pre-conditioning the jury in anticipation of the Petitioner's defense and as an attempt to extract a commitment from the jury, which will be more fully discussed in subsection (15), discussing closing argument. While the questioning did not explicitly ask the jurors for a guarantee to convict the Petitioner, the question required the jurors to forecast how they were going to receive the evidence in this case. As such, we conclude that the record preponderates against the post-conviction court's determination that the prosecutor's questions were proper, and that trial counsel's performance was not deficient when he failed to object. However, because the record supports the post-conviction court's determination that the Petitioner has failed to establish that the ultimate jury empaneled was not impartial, he has failed to demonstrate prejudice. Accordingly, he is not entitled to relief.

13. We apply the same legal standard as set forth above to the Petitioner's claim that trial counsel was deficient in failing to ask any questions during voir dire relevant to the jurors' ability to be fair and impartial. At the post-conviction hearing, trial counsel

testified that he was "from that area" and that he already knew most of the jurors or their families because this was a "small town." Trial counsel said he observed the jurors during the prosecutor's voir dire, that the prosecutor's questions covered everything that he had to ask, and that some of trial counsel's questions were designed to connect or build a relationship with the jury. Trial counsel also stated that he knew the make-up of the jury was conservative and that he used all of the preemptory strikes available to him. Based on our review of the record, trial counsel exercised a reasonably informed strategy in his examination of the jury during voir dire. We note that the Petitioner does not claim that trial counsel should have struck a particular juror from the panel or that the resulting jury was impartial. Accordingly, we conclude that the record supports the post-conviction court's determination that the Petitioner has failed to establish deficient performance or prejudice. He is not entitled to relief.

14. The Petitioner argues trial counsel was deficient in failing to prepare for, understand the nature of, and effectively give a cohesive opening statement. The purpose of an opening statement is to set forth each side's "respective contentions, views of the facts and theories of the lawsuit." Tenn. Code Ann. § 20-9-301 (2011). Waiver of or even "scant" opening statements have been held to be valid strategic decisions by this court. See Aaron Jermaine Walker v. State, No. 03C01-9802-CR-00046, 1999 WL 39511, at *2, Hamilton County (Tenn. Crim. App., Knoxville, Jan. 28, 1999), perm. to appeal denied (Tenn. 1999) (citing Bacik v. Engle, 706 F.2d 169, 171 (6th Cir.1983)). Moreover, this court has previously acknowledged that overstatement or misstatement during opening statement may have an adverse effect. State v. Zimmerman, 823 S.W.2d 220, 225 (Tenn. Crim. App. 1991). At the post-conviction hearing, trial counsel explained that his opening statement was limited because the prosecutor had described most of the facts accurately, and the defense would have to eventually concede that something happened, but trial counsel did not want to commit to what the proof was going to show. We conclude that the record supports the post-conviction court's determination that trial counsel's opening statement was based on well-informed trial strategy. The Petitioner is not entitled to relief.

15. The Petitioner contends that trial counsel was deficient in failing to object to the State's improper closing arguments. The Petitioner cites three sections of the State's closing, as detailed more fully below, and argues "the State piggybacked from its prior improper voir dire" regarding their familiarity with 12-year-old girls and their views on a 12-year-old girl having sex with an adult man. The Petitioner further argues the State improperly commented on the statement by Investigator Buckley from the Petitioner's recorded interview. The State contends the prosecutor's comments were not improper as they were in response "to the unspoken subtext that was ever-present throughout the trial: the defense playing to the sympathies of the jury." The State insists the prosecutor never asked the jury to send a message to the community or for any other improper purpose.

The Tennessee Supreme Court has stated that closing argument is a "valuable privilege that should not be unduly restricted." Terry v. State, 46 S.W.3d 147, 156 (Tenn. 2001) (citing State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978) (citation omitted)). As a result, attorneys have considerable leeway in arguing their positions during closing arguments. Id. The closing argument, however, "must be temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues being tried." Russell v. State, 532 S.W.2d 268, 271 (Tenn. 1976). In State v. Goltz, this court recognized general areas of prosecutorial misconduct in the context of closing argument, including arguments calculated to inflame the passions or prejudices of the jury, arguments which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, and by intentionally referring to or arguing facts outside the record. 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003). Thus, the State must not engage in arguments designed to inflame the jurors and should restrict its comments to matters properly in evidence at trial. State v. Hall, 976 S.W.2d 121, 158 (Tenn. 1998). However, this court has previously recognized that "[t]he decisions of a trial attorney as to whether to object to opposing counsel's arguments are often primarily tactical decisions." Derek T. Payne, No. W2008-02784-CCA-R3-PC, 2010 WL 161493, at *15 (Tenn. Crim. App. Jan.15, 2010), perm. app. denied (Tenn. May 10, 2010) (citations omitted).

"A criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument." State v. Banks, 271 S.W.3d 90, 131 (Tenn. 2008) (internal citations omitted). "An improper closing argument will not constitute reversible error unless it is so inflammatory or improper that i[t] affected the outcome of the trial to the defendant's prejudice." Id. at 131; see Harrington v. State, 385 S.W.2d 758, 759 (1965) (the "general test" for determining whether there is reversible error "is whether the conduct could have affected the verdict to the prejudice of the defendant"). Tennessee courts have recognized five factors that must be considered in determining if the improper arguments had a prejudicial effect upon the verdict:

> (1) the conduct complained of in light of the facts and circumstances of the case;
> (2) the curative measures undertaken;
> (3) the intent of the prosecutor in making the improper remarks;
> (4) the cumulative effect of the improper conduct and any other errors in the record; and
> (5) the relative strength or weakness of the case.

Hawkins, 519 S.W.3d at 48 (citing State v. Jackson, 444 S.W.3d 554, 591 n.50 (Tenn. 2014)).

At the top of the State's closing argument, the prosecutor stated that "the Petitioner put his penis in the victim's mouth." The prosecutor made this statement two more times in its closing. After explaining to the jury that consent was not a defense to this case, the prosecutor commented as follows:

> The law recognizes the same thing that I talked about this morning; when I asked the question, can you think of any situation where it's okay for a 20-year-old to have sex with a 12-year-old? You all told me, no, and the law agrees with you. It's the same thing.
>
> Even if the 12-year-old comes running and begging for sex, the adult is supposed to be the adult and say, no, stop, don't do that. Did that happen in this case? No.
>
> . . . .
>
> And he acted either intentionally, knowingly, or recklessly based on the description that [the victim] gave and also based on the description you heard both in the recording and from what I went over with Investigator Crouse about, the [Petitioner] pretty much agreed with [the victim's] rendition of what happened.
>
> There's also mention that [victim's older sister] also agreed with the rendition of what happened. This was a sexual threesome. Basically, everybody doing sex acts to each other three ways, two sisters and him. Two of which are underage. But [the victim] is 12. [The victim] that is. She has no business having sex with her older sister and with her older sister's boyfriend. He's a grown man.

After summarizing the proof supporting the other counts in the indictment, which amounted to seven pages of their closing argument in the transcript, the prosecutor stated:

> I asked you when we – when we were picking a jury, have any of you had experience with a 12-year-old girl, and here's the reason I asked that. I want you to think about the 12-year-old girls that have been in your life, that you've raised up, nieces, daughters, granddaughters, what have you. How easily influenced are they? What if their older sister leads them into doing something? What if an adult male asks them to do something? What if they find themselves in the back seat of a truck with two other people getting ready to engage in sexual stuff?

In the State's rebuttal closing argument, the prosecutor stated:

> But it's sort of like what Investigator Buckley said in the recording. You know, here's what it looks like, dude, you're an of age guy, you're an adult. These are two underage girls who are sisters, and you're just doing these sexual things to them?" And his response at the time, "Yeah. Well, we had this fantasy of a threesome. Me and [the victim's older sister] talked about it." Brought [the victim] into that.

Although trial counsel testified at the post-conviction hearing that the prosecutor's comments were zealous but not over the line and that the trial court would not have sustained an objection to them, we disagree. We consider the prosecutor's comments telling the jury that "the law recognizes the same thing that I talked about this morning; when I asked the question, can you think of any situation where it's okay for a 20-year-old to have sex with a 12-year-old? You all told me, no, and the law agrees with you. It's the same thing" and his comment asking the jury to relate back to voir dire when he asked them if they had any minor female relatives and how easily influenced they are to be "calculated to inflame the passions or prejudices of the jury" and designed to "divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused." Goad v. State, 938 S.W.2d at 370. Accordingly, we conclude that the record preponderates against the post-conviction court's determination that trial counsel's failure to object to the prosecutor's improper comments during closing argument did not fall below an objective standard of reasonableness under prevailing professional norms.

In determining whether the Petitioner's convictions should be reversed based on the prosecutor's improper comments, factor (2) weighs in favor of reversal because no curative measures were undertaken. See Alfred Calvin Whitehead, No. M2019-00790-CCA-R3-PC, 2020 WL 2026010, at *5 (Tenn. Crim. App. Apr. 27, 2020). Next, we will evaluate factor (1), the conduct complained of in light of the facts and circumstances of the case, and factor (5) the relative strength or weakness of the case. The evidence at trial establishing the Petitioner intentionally, knowingly, or recklessly engaged in sex with a child under age 13 was substantial and included the victim's testimony that she was 12 years of age at the time of the offense, that she and her older sister performed fellatio on the Petitioner, and that the Petitioner knew it was the victim performing fellatio on him given the lighting in the truck, the positioning of the victim and her sister on each side of the Petitioner, and the difference in size and weight between the victim and her sister. The proof further supporting the elements of the offenses was offered in the form of a recorded interview between the Petitioner and law enforcement during which the Petitioner admitted that he "sucked on [the victim's] breast," that "'something like' both sisters performing fellatio and the victim hurting him with her teeth occurred, and that the Petitioner "halfway

attempted to' penetrate the victim vaginally." Joseph Langlinais, 2018 WL 1151951, at *3. However, according to the Petitioner, the victim's sister began to perform oral sex on him while the victim watched. The Petitioner testified that he was "not really paying attention" and that as far as he knew, only the victim's sister performed fellatio on him. He testified that the victim's sister habitually bit him during oral sex. When the Petitioner looked up, the victim was sitting nude on his lap and at that point he "was just done." Joseph Langlinais, 2018 WL 1151951, at *4. The Petitioner explained that he told Investigator Crouse "yes and no" when asked if he penetrated the victim because he was confused.

As far as factor (3), the intent of the prosecutor in making the improper remarks, it appears the prosecutor was attempting to negate trial counsel's underlying jury nullification theme. However, the comments were improper because the prosecutor asked the jurors to put their own minor female relatives in the victim's place in considering how susceptible the victim was to peer pressure. The prosecutor's improper comments were also a misstatement of the law because they suggested that rape of a child was a strict liability offense: that is, all the law required to convict was a minor and an adult male engaged in sex. As to factor (4), the cumulative effect of the improper conduct and any other errors in the record, we conclude that although the prosecutor's comments were improper, they were not "so inflammatory or improper" so as to affect the "outcome of the trial to the Petitioner's prejudice," nor did they deprive Petitioner of a fair trial. Banks, 271 S.W.3d at 131. In other words, the failure to object to these statements did not create a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. The record supports the post-conviction court's determination on this issue.

16. The Petitioner contends that trial counsel was deficient in failing to present in closing argument the Petitioner's defense that the Petitioner did not know it was the victim who put her mouth over the Petitioner's penis. Citing Rickman v. Bell, the Petitioner argues that prejudice should be presumed based on the underlined comments below demonstrating trial counsel's bias against him, trial counsel's breach of the duty of loyalty, and trial counsel's open hostility toward the Petitioner. 131 F.3d 1150, 1156-60 (6th Cir.1997) (holding that Cronic applied where defense counsel "combined a total failure to actively advocate his client's cause with repeated expressions of contempt for his client for his alleged actions"). The Petitioner additionally argues that trial counsel made multiple comments which implied the Petitioner's guilt in violation of McCoy v. Louisiana, 138 S.Ct. 1500, 1508 (2018).

The following underlined comments during trial counsel's closing are at issue:

> Well, we got through this thing in a day. But I'm going to tell you, this is my favorite part of the trial—and the reason that it is because I have

been living with this case for nearly a year and in just a few minutes, I get to take that burden off my shoulder and hand it to you and let you wrestle with it.

. . . .

It was a stupid idea. It was a stupid idea cooked up by a bunch of young people. [Victim] is 12. She plays no role in that. But [victim's older sister] and [the Petitioner] should know better.

And the General has referred to [the Petitioner] time and time again as a 20-year-old man, a grown man, a 20-year-old man. The truth is, he was a 19-year-old boy. Just a big ole dumb boy from Montezuma.

Now, how smart is he? I don't know. He – he's gone to Jackson State, but I can tell you this, I've been dealing with this young man for a year, and I can tell you, he's not very clever. He is just about what you see, and he is a follower, and followers tend to get their butts in trouble.

. . . .

And [the Petitioner] told you, we had done that before with other people, people had watched us, I thought [the victim] was going to watch us as well. It was not unusual. Is it right? No. It's not right. They should have known better. We've got two teenagers, a 17-year-old and a 19-year-old. They should have known better, but you know what? 17-year-olds and a 19-year-olds do stupid things. Somewhere right now 17-year-olds and a 19-year-olds are doing stupid things. So, they go somewhere to complete this act.

They get started. [Victim] tells one version. The Petitioner tells another. I wasn't there. I don't have a version.

. . . .

I have two daughters. I have two daughters. If I have knowledge that somebody has raped one of my daughters, we are not going to wait three years to do something about it. I assure you that's not going to happen. But it did in this case.

. . . .

> I'm going to ask you on behalf of [the Petitioner] to find him not guilty. Let this young man walk out of this building, go home to his family, and put this episode behind him, an episode that he is remorseful for, the only person in the whole group who's ever apologized is [the Petitioner]. And the General's asking you to punish him for that. He has remorse for it. He told you. It occurred to me when this got out of hand that this is wrong. [The Petitioner] has apologized.
>
> Thank you for your time. If I said anything that was offensive, hold that against me, don't hold it against [the Petitioner]. This was a – this is—this is probably the most difficult case to try. I think my colleague, General Gilliam, would agree, and I'm going to commend him right here in front of everybody, he did a great job. These are hard, hard things to talk about. Hard things to talk about. We'd rather not. Thank you for your time.

As an initial matter, we agree that trial counsel did not expressly argue in closing argument that it was the victim who placed her mouth over the Petitioner's penis as opposed to the Petitioner who initiated the contact. Nor did trial counsel expressly challenge the *mens rea* element of rape of a child or explain to the jury that the State was required to prove the Petitioner's intent to engage in sex with the victim in order to convict him of rape of a child. Instead, trial counsel twice asked the jury, "Was anybody raped?" Given this comment, it is clear that trial counsel argued jury nullification, which was improper. Trial counsel additionally corrected the prosecutor's misstatement regarding the Petitioner's age. By referring to the Petitioner as "a big ole dumb boy," it appears trial counsel was attempting to cast the Petitioner as a follower and minimize the Petitioner's role in the offense. Trial counsel also recounted the proof as it came into the case, rebutted the prosecutor's statements regarding why the Petitioner gave the statements in the recording with law enforcement, addressed reasonable doubt, questioned why the victim's parents waited so long to report the offense, addressed the fact that the victim's father was angry with the Petitioner and the victim's sister for getting married over his objection and sought revenge by putting the Petitioner in prison. However, most, if not all, of trial counsel's argument in closing did not address the defense of intent, which was a viable defense based on the proof adduced at trial. There is no reasonable strategy or tactic to explain why trial counsel failed to do so. Accordingly, we conclude that trial counsel's decision not to argue explicitly the defense of intent in this case fell below an objective standard of reasonableness under prevailing professional norms. As a result, the record preponderates against the post-conviction court's determination as to deficiency.

As to the prejudice prong, we find trial counsel's performance readily distinguishable from Rickman. In Rickman, trial counsel pursued a strategy of attempting to portray his client as a "sick" and "twisted" individual to mitigate the death sentence.

Trial counsel's strategy in Rickman involved repeated attacks on his client's character, eliciting damaging character evidence about his client, making disparaging comments to any witness who spoke favorably about his client, and apologizing to the prosecutors for his client's crime. Id. at 1157. The Sixth Circuit concluded that counsel's performance was "outrageous" because his attacks on Rickman equaled or exceeded those of the prosecution. Id. The court found that the defendant was effectively deprived of assistance of counsel in light of the severity of counsel's conduct. Id. at 1160. Here, trial counsel's comments during closing argument were not so outrageous to compel this court to presume prejudice. Accordingly, we are unable to conclude that trial counsel's performance amounted to the constructive denial of counsel based on his hostility towards his client at trial, and he is not entitled to relief. See Moss v. Hofbauer, 286 F.3d 851, 860-61 (6th Cir. 2002) (noting precedent of applying Cronic only where the constructive denial of counsel and the associated collapse of the adversarial system is imminently clear). The record supports the post-conviction court's determination on this issue.

Based on trial counsel's reference to the victim as "the victim," trial counsel's comment "If I have knowledge that somebody has raped one of my daughters," and trial counsel's comment that this was "an episode that [the Petitioner] was remorseful for," the Petitioner argues further that trial counsel impliedly conceded his guilt in violation of McCoy v. Louisiana, 138 S. Ct. 1500 (2018). In McCoy, trial counsel stated in his opening statement that his client had undoubtedly committed the murders of which he was accused, in an effort to spare his client a sentence of death. Id. Defendant McCoy's clear and insistent objection to his counsel telling the jury he had committed the murders was ignored by counsel. Id. at 1511-10. The United States Supreme Court concluded that this decision was McCoy's alone and should not have been ignored by his trial counsel, was in violation of his constitutional rights, and entitled McCoy to post-conviction relief. Id. at 1510-12. As an initial matter, the Petitioner's own defense witness, Attorney Ferguson, testified that this case was "not necessarily on all four corners with McCoy, which, again, was a death penalty case . . . [however] it all but was an admission of guilt." Asked by the post-conviction court to point to where in the transcript trial counsel said the Petitioner was guilty, Attorney Ferguson stated that there was a "tacit flow" of jury nullification throughout the case. We conclude that McCoy is distinguishable from the instant case. Here, trial counsel never expressly conceded the Petitioner's guilt, and trial counsel's comments do not rise to the functional equivalent of a guilty plea. Our review of the law shows no case authority extending McCoy in the context of "tacit" jury nullification, and we decline to do so here. The record supports the post-conviction court's determination as to this issue. Accordingly, the Petitioner is not entitled to relief.

17. The Petitioner argues trial counsel was deficient in failing to preserve and present issues in his motion for new trial. In his brief, the Petitioner repeats the issues as raised in his petition and on appeal and argues that trial counsel was deficient in failing to

include those issues in his motion for new trial. In addition, the Petitioner argues that trial counsel was deficient in failing to include whether the introduction of the recording violated the Confrontation Clause of the Sixth Amendment concerning the right of the accused to confront witnesses by physically facing witnesses and cross-examining witnesses. At the post-conviction hearing, the Petitioner did not offer any proof as to this specific issue. As we see it, the Petitioner relies collectively on the issues raised herein in support of this claim. To that extent, we conclude the Petitioner is not entitled to relief for the same reasons as stated in the corresponding subsections of this opinion. As to the Confrontation Clause issue, we rejected this claim in the Petitioner's direct appeal on plain error review. Joseph Langlinais, 2018 WL 1151951, at *8. In doing so, we reasoned that the recording at issue contained statements and questions from Investigator Crouse, Investigator Buckley, and statements made by the Petitioner. Although Investigator Buckley did not testify at trial, we noted that "the Confrontation Clause does not bar statements lacking assertive content, such as commands or questions." Id. We further noted that the statements and questions of investigators were offered only to give context to the Petitioner's statements. Accordingly, we conclude that the Petitioner failed to present clear and convincing evidence of any fact establishing any deficiency that resulted in prejudice. The record supports the post-conviction court's determination as to this issue. He is not entitled to relief.

18. The Petitioner argues trial counsel was deficient in failing to prepare and present an appeal. As grounds, the Petitioner asserts trial counsel "waived every issue with regard to the [recording] for purposes of Rule 404(b)" and trial counsel's failure to "make a clear record on appeal." To establish ineffective assistance of counsel on appeal, the petitioner must demonstrate that appellate counsel was deficient in failing to adequately pursue or preserve a particular issue on appeal and that, absent appellate counsel's deficient performance, there was a reasonable probability that the issue "would have affected the result of the appeal." Campbell v. State, 904 S.W.2d 594, 597 (Tenn. 1995). When a claim of ineffective assistance of counsel is premised on the failure to preserve an issue on appeal, the reviewing court should determine the merits of the omitted issue. Carpenter, 126 S.W.3d at 888. In subsection (7), we determined that the Petitioner failed to establish deficient performance or prejudice stemming therefrom based on trial counsel's failure to object to, move to exclude, or move to redact the recording of the Petitioner's interview with law enforcement at trial because it was reasonable to rely on the district attorney's assurance that only the admissible portions of the recording would be played. We further concluded that the Petitioner was not prejudiced based on this ground because the inadmissible portions of the recording never came in as evidence, and there was no reference to other evidence in other cases at the Petitioner's trial. For the same reasons, we conclude the record supports the post-conviction court's determination that the Petitioner has failed to establish that trial counsel, acting as appellate counsel, was deficient

or that the Petitioner suffered any prejudice from this alleged deficiency. He is not entitled to relief.

IV. Cumulative Effect of Alleged Deficiencies. The Petitioner argues he was prejudiced by the cumulative effect of trial counsel's deficiencies and this court should presume prejudice pursuant to Cronic. We have already determined that there was not a complete breakdown of the adversarial process in this case, and thus decline to presume prejudice under Cronic. The Petitioner further asserts that trial counsel was ineffective based upon the doctrine of cumulative error and argues that the aggregate total of trial counsel's deficiencies, while not individually prejudicing his trial, did amount to prejudice when taken as a whole.

The cumulative error doctrine recognizes that "there may be multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." State v. Hester, 324 S.W.3d 1, 76 (Tenn. 2010). When determining whether to apply this doctrine, a reviewing court must consider the nature and number of the errors, their interrelationship, any remedial measures taken by the trial court, and the strength of the State's case. Id. (quoting United States v. Sepulveda, 15 F.3d 1161, 1196 (1st Cir. 1993)).

The Sixth Circuit and this court have concluded, in the context of claims of ineffective assistance of counsel, that multiple instances of deficient performance by counsel may be considered together in assessing whether the petitioner suffered prejudice. See U.S. v. Dado, 759 F.3d 550, 563 (6th Cir. 2014) (recognizing that "examining an ineffective assistance of counsel claim requires the court to consider the combined effect of all acts of counsel found to be constitutionally deficient, in light of the totality of the evidence in the case" (internal quotation marks and citation omitted)); State v. Taylor, 968 S.W.2d 900, 912 (Tenn. Crim. App. 1997) (concluding on direct appeal that the cumulative effect of trial counsel's deficiencies deprived the defendant of a meaningful defense); Timothy Terell McKinney v. State, No. W2006-02132-CCA-R3-PD, 2010 WL 796939, at *37 (Tenn. Crim. App. Mar. 9. 2010) (concluding that "[c]ounsel's deficient actions throughout the[] representation of the Petitioner collectively establish[ed] a prejudice of such magnitude that we can reach no conclusion other than that the errors cumulatively prejudiced the Petitioner's right to a fair proceeding and undermined confidence in the outcome of the trial"); see also Corinio Pruitt v. State, No. W2019-00973-CCA-R3-PD, 2022 WL 1439977, at *97 (Tenn. Crim. App. May 6, 2022) ("In the context of claims of ineffective assistance of counsel, multiple instances of deficient performance by counsel may be considered together in assessing whether the petitioner suffered prejudice."); Tommy Dale Adams v. State, No. M2018-00470-CCA-R3-PC, 2019 WL 6999719, at *31 (Tenn. Crim. App. Dec. 20, 2019) ("Cumulative error examines the prejudicial effect of

multiple instances of deficient performance[.]"); Sylvester Smith v. State, No. 02C01-9801-CR-00018, 1998 WL 899362, at *24 (Tenn. Crim. App., at Jackson, Dec. 28, 1998) ("When an attorney has made a series of errors that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice.").

We must now determine if there is "a reasonable probability that, but for [these five] errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. In this case, the primary issue to be resolved by the jury was whether the Petitioner intended to engage in fellatio with the victim. Other than demonstrating his lack of preparedness and familiarity with the Petitioner's case, we do not consider trial counsel's filing of the motions to suppress his statement or other evidence in this case to have much bearing on the ultimate issue. More importantly, and as previously discussed, trial counsel's failure to object to the prosecutor's improper comments to the jury during voir dire misled the jury into believing that rape of a child was a strict liability offense, which it is not. This deficiency was not corrected by trial counsel in voir dire, opening statement, or closing argument. The deficiency was compounded when trial counsel failed to correct Investigator Crouse's mischaracterization of the victim's testimony that the Petitioner, not the victim, placed the Petitioner's penis in her mouth, and trial counsel failed to request any curative measures from the trial court. The deficiency was further compounded when trial counsel failed to explain to the jury in his closing argument the elements of the offense, failed to provide the jury with the testimony as stated by the victim that she placed her mouth over the Petitioner's penis, and failed to guide the jury on the Petitioner's testimony as to his lack of intent. Given the unique facts of this case, we conclude these issues collectively establish "a prejudice of such magnitude that we can reach no conclusion other than the errors cumulatively prejudiced [the Petitioner's] right to a fair proceeding." Sylvester Smith, 1998 WL 899362, at * 24.

CONCLUSION

Although the Petitioner was charged with heinous crimes, the Federal and State constitutions provide him with the right to effective assistance of counsel. We conclude that trial counsel's aggregate failures to perform his duties in a reasonably competent manner deprived the Petitioner of this constitutional right. Accordingly, upon review of the entire record, we conclude that the evidence preponderates against the findings of the post-conviction court. We reverse the judgment of the post-conviction court, vacate each of the Petitioner's convictions, and remand this matter for a new trial on all counts.

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CAMILLE R. MCMULLEN, PRESIDING JUDGE