

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs August 15, 2023

FILED

10/05/2023

Clerk of the  
Appellate Courts

**ANDY F. NUNEZ v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County  
No. 2016-D-1972 Steve R. Dozier, Judge**

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**No. M2022-01748-CCA-R3-PC**

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A Davidson County jury convicted the Petitioner, Andy F. Nunez, of first degree premeditated murder, felony murder, attempted especially aggravated robbery, and attempted especially aggravated robbery, and the trial court sentenced the Petitioner to life plus five years. The Petitioner appealed, challenging the trial court's decision to quash subpoenas for information on plea agreements, and this court affirmed the Petitioner's convictions. *State v. Nunez*, No. M2019-00473-CCA-R3-CD, 2020 WL 4734916, at \*1 (Tenn. Crim. App. Aug. 14, 2020), *perm. app. denied* (Tenn. Jan. 13, 2021). The Petitioner timely filed a post-conviction petition, alleging that he received the ineffective assistance of counsel. After a hearing, the post-conviction court denied relief. After review, we affirm the post-conviction court's judgment.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and J. ROSS DYER, JJ., joined.

Manuel B. Russ, Nashville, Tennessee, for the appellant, Andy F. Nunez.

Jonathan Skrmetti, Attorney General and Reporter; Lacy E. Wilber, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and J. Wesley King, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Procedural History and Facts**

**A. Procedural History**

On October 21, 2016, a Davidson County grand jury indicted the Petitioner and two co-defendants for first degree premeditated murder, felony murder, attempted especially

aggravated robbery, attempted aggravated robbery, and reckless endangerment<sup>1</sup> for the September 25, 2016 events that resulted in the death of Theodore Grasset and money being forcibly taken from Larry Niehues. After a trial, a jury convicted the Petitioner of first degree premeditated murder, felony murder, attempted especially aggravated robbery and attempted aggravated robbery. The trial court imposed an effective sentence of life plus five years. On direct appeal, this court affirmed the trial court's judgments, and our supreme court denied the Petitioner's application to appeal. *Id.* The Petitioner, *pro se*, timely filed a petition for post-conviction relief, and his post-conviction counsel filed an amended petition.

## B. Trial

On direct appeal, this court summarized the facts presented at trial as follows:

At trial, [co-defendant Daniela] Cruz provided a detailed account of the events leading up to Mr. Grasset's death. The State put forth proof that Ms. Cruz and [the Petitioner] were dating and living together in September of 2016. Ms. Cruz and [the Petitioner] had known each other for a few months at the time. On the day of the incident, Ms. Cruz, [the Petitioner], [co-defendant Joseph] Santillan, Sami Krasniqi, and Michelle Rogers were all at an apartment in Antioch. Ms. Cruz had known Mr. Krasniqi since she was fourteen years old and had known Ms. Rogers for a few months. Mr. Krasniqi proposed that the group burglarize the home of one of his relatives to steal the contents of a safe.

At the time, Mr. Santillan drove a grey Chevrolet Impala. The Impala was equipped with a distinctive blue light near the license plate. Mr. Santillan and Mr. Krasniqi tried to remove the blue light from the license plate area prior to the planned burglary. They were unsuccessful. The group left the apartment, travelling in the Impala and another car toward the address of the proposed burglary. Once they arrived, Mr. Krasniqi tried to get [the Petitioner], Mr. Santillan, and Ms. Cruz to enter the house. They declined. The group split up with Ms. Cruz, Mr. Santillan, Ms. Rogers, and [the Petitioner] leaving in the Impala. They stopped at several different locations before finally driving toward downtown Nashville.

Ms. Cruz was driving when they arrived downtown, and [the Petitioner] was seated in the passenger seat. Ms. Rogers was in the back seat behind Ms. Cruz; Mr. Santillan was in the back seat behind [the Petitioner].

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<sup>1</sup> According to the Petitioner's brief, the State dismissed the reckless endangerment charge.

[The Petitioner] told Ms. Cruz to drive down Broadway. Ms. Cruz made a wrong turn. [The Petitioner] was angry with Ms. Cruz, corrected her, and told her where to drive. Ms. Cruz drove to Fourth Avenue South near the Country Music Hall of Fame. [The Petitioner] instructed her to stop the car on the street near Mr. Grasset and Mr. Niehues, who were walking on the sidewalk.

[The Petitioner] and Mr. Santillan got out of the car. [The Petitioner] was wearing some type of face covering. He yelled at Mr. Grasset and Mr. Niehues to stop walking. Instead of complying with [the Petitioner]'s demand, the men ran. Mr. Grasset ran back toward Broadway, and Mr. Niehues ran into an alley. [The Petitioner] shot Mr. Grasset as he ran away. Mr. Grasset fell to the ground and was able to get back up and run a short distance before collapsing. [The Petitioner] and Mr. Santillan returned to the Impala. [The Petitioner] got in the back seat and Mr. Santillan got in the front seat. Ms. Cruz drove the car out of town, heading south on I-65. When they arrived at the trailer where [the Petitioner] and Ms. Cruz were living, Mr. Santillan and Ms. Rogers left in the Impala.

Surveillance cameras at a loading dock near the scene captured the shooting. The video footage showed the Impala with the distinctive blue light. The Impala stopped and two men exited the vehicle. One of the men wore a mask and the other man wore a white baseball cap with a black bill. Police initially released limited images from the surveillance cameras; they specifically refrained from releasing images of the blue light at the license plate of the vehicle.

On October 1, Ms. Cruz and [the Petitioner] left Nashville for North Carolina. Police were able to identify Mr. Santillan as the owner of the vehicle in early October and by mid-October, located the vehicle. The blue light, front and rear bumpers, and spoiler had been removed. Police also executed a search warrant at Mr. Santillan's home, where they found a white hat with a black bill consistent with the hat worn by one of the men in the surveillance video. Police recovered Mr. Santillan's cell phone from his employer. The cell phone had been placed in a toilet tank at a construction site in Franklin.

By mid-October, police had identified Ms. Rogers and Ms. Cruz as suspects. Police interviewed Ms. Cruz's mother, Mary Cruz. Mrs. Cruz told police that she was able to identify [the Petitioner] from the surveillance video because she bought the pants he was wearing. She also recognized his

gait. She identified [the Petitioner] as her daughter's boyfriend. Mrs. Cruz called her daughter. Ms. Cruz promised her mother that she would return to Nashville to assist with the investigation. Instead, Ms. Cruz bought bus tickets to Brownsville, Texas for herself and [the Petitioner] under different names. Ms. Cruz and [the Petitioner] were eventually arrested in late October in Raleigh, North Carolina.

During her initial interview with police, Ms. Cruz was not forthcoming. Eventually, she gave police an account of the events that took place on the night of the shooting, including pieces of information about the incident that the police had not yet released to the public. Police analyzed Ms. Cruz's cell phone. Forensic analysis of location data from her cell phone was consistent with her account of the events.

During her testimony at trial, Ms. Cruz was questioned about her use immunity agreement. She stated that she had not been promised anything for her testimony but acknowledged that she hoped to get a reduced charge and lesser sentence. On cross-examination, Ms. Cruz denied that her lawyer told her testifying would be a good way to get a favorable resolution to her case. Ms. Cruz claimed that she also testified to get closure for the events that took place.

At the conclusion of the proof, [the Petitioner] was found guilty as charged in the indictment on all counts. The trial court merged the conviction for felony murder with the conviction for first degree murder. After a sentencing hearing, [the Petitioner] was sentenced to an effective sentence of life plus five years. [The Petitioner] filed a motion for new trial in which he challenged the trial court's grant of the motion to quash the subpoena. The trial court denied the motion for new trial.

*Id.* at \*2-3.

### **C. Post-Conviction Hearing**

As relevant to this appeal, the Petitioner maintains that Counsel was ineffective for failing to prevail on a Rule 404(b) motion, failing to raise more than one issue on appeal, and failing to develop an adequate defense. At the post-conviction hearing, the Petitioner testified that his trial attorney ("Counsel") met with him only a "handful of times" during the six or seven months that Counsel represented the Petitioner. The Petitioner denied that Counsel explained the process of a trial or the burden of proof required for conviction of an offense. The Petitioner stated that he did not learn of Ms. Cruz's "new interview" or

that she would be testifying against him until several days before his trial. Additionally, he claimed that other than Ms. Cruz's interview, he "had [no] knowledge [ ] of anything concerning [his] case." Upon further questioning, the Petitioner admitted that Counsel, several days before trial, had provided him with a USB drive that contained "the interview from the co-defendants and their statements" and the surveillance footage of the shooting.

The Petitioner recalled that, on the morning of trial, Counsel told the Petitioner about cross-examination of the State's witnesses. Counsel also told him he had the right to present evidence on his behalf but that "it would be irrelevant," "so don't even." The Petitioner then denied knowing that he could present witnesses. The Petitioner agreed that he was aware that he could testify at trial, but Counsel had advised him against it. The Petitioner stated that Counsel never discussed with him the elements of the charges or his rights following the trial. Further, he was unaware of the defense strategy. Upon further questioning, the Petitioner stated, Counsel "told me like, you know - - you know if you go to trial, this is the evidence that they've got to have. But he didn't show me the evidence or nothing like that to show me what they were supposed to have, he was just telling me in words, but didn't demonstrate nothing to me to break it down for my knowledge."

The Wednesday night before the trial began on Monday, Counsel conveyed an offer from the State of forty years to be served at 100%. The Petitioner declined to accept the offer, and Counsel became angry. The Petitioner testified that this was the only offer from the State. Several days later, the Petitioner tried to have Counsel removed from his case, but Counsel advised him that the trial court would not grant the request because they were so close in time to the trial date.

The Petitioner testified that he tried to make a counter-offer, telling Counsel that he would accept an offer of twenty or twenty-five years. Counsel responded that the State would not "grant that." During the trial, the Petitioner attempted to communicate "advice and situations" to Counsel, and Counsel would respond, "no, that's not going to work." The Petitioner maintained that Counsel never discussed the State's offer with him and only stated "take 40-years and I will see you in hell if you don't."

The Petitioner then contradicted his prior testimony, affirming that Counsel had discussed the State's evidence with him and defense trial strategy. The Petitioner recalled that the defense strategy was for Counsel to impeach Ms. Cruz at trial to cast doubt on her testimony. When asked how learning of Ms. Cruz's decision to testify against him "change[d] [his] thinking," he responded that it did not change his thinking at all. He maintained that, despite learning of Ms. Cruz's testimony late in the process, he had wanted to proceed to trial and not pursue a settlement agreement with the State. The Petitioner indicated that Counsel never discussed the implications of Ms. Cruz's testimony with him.

The Petitioner testified that he was not aware of his appellate rights. Counsel did not discuss the appeal with the Petitioner, but he mailed the Petitioner a copy of the appellate brief. The Petitioner stated that he had not seen or spoken with Counsel since the trial.

On cross-examination, the Petitioner agreed that he had prior experience with legal proceedings related to juvenile offenses he committed in California. The Petitioner denied any knowledge that the police were looking for him following the murder and explained that he and Ms. Cruz had planned to take a bus to Brownsville, Texas to see his son and not to flee from the police. The Petitioner agreed that, following the shooting, he was aware that “people” were calling Ms. Cruz to notify her that authorities were looking for her and the Petitioner. He then clarified that he knew authorities were looking for Ms. Cruz, but he did not know they were looking for him. He stated that he knew the police wanted to question Ms. Cruz, but he did not know what they wanted to question her about. The Petitioner maintained that his plan to go to Brownsville, Texas was unrelated to any police investigation.

After his arrest in North Carolina, the Petitioner refused to speak with the police, and he was transported back to Nashville, Tennessee. The Petitioner agreed that he did not want to talk to the police because of his involvement in the murder.

The Petitioner agreed that another attorney represented him for the first year after his arrest. This attorney, Jack Byrd, met with him multiple times, gave him the portions of discovery he had obtained, and explained the charges against the Petitioner. The Petitioner also met Mr. Byrd’s investigator. Mr. Byrd, the investigator, and the Petitioner met together, and they all discussed possible defenses and the State’s proof against him. The Petitioner denied that Mr. Byrd or his investigator ever told him that Ms. Cruz would testify against him.

The Petitioner agreed that he received the USB drive with discovery from Counsel “a week or two before the trial.” The Petitioner also agreed that he had numerous “write ups” during his pretrial detention and that proceedings to determine guilt and punishment were attendant to each of the write ups.

The Petitioner agreed that he never told Counsel that he disagreed with the defense strategy nor did he offer another strategy as a substitute. The Petitioner agreed that, at the time he declined the State’s offer to settle the case for forty years at 100%, he had seen the surveillance footage, read the transcript of Ms. Cruz’s police interview, and knew Ms. Cruz was going to testify for the State.

The Petitioner stated that, in retrospect knowing the jury would convict him, he wished he had testified at trial. He maintained that he did not testify at trial because Counsel told him it would be “irrelevant” and would “backfire” on him. Even so, the Petitioner acknowledged that he was aware that he could testify and that he chose to take Counsel’s advice not to testify.

On redirect examination, the Petitioner clarified that he did not understand that he could have testified at trial regardless of Counsel’s advice. The Petitioner denied knowing how felony murder “worked” or what criminal responsibility meant before his trial. He stated that, had he known, he would have accepted the State’s offer and pleaded guilty.

On recross-examination, the Petitioner agreed that he read the indictment charging him with the felony murder of Mr. Grasset “during the perpetration of or attempt to perpetrate a theft” and that he understood “the basics of felony murder.” He also agreed that he recalled the prosecutor giving examples to the jurors of felony murder during voir dire.

Counsel testified that he had been practicing for ten years and in March 2018, he was appointed to represent the Petitioner. Although he did not recall the specifics of his discussions with the Petitioner, Counsel testified that, when taking a case from a prior attorney, he generally obtained the file and discussed any issues already identified. He then obtained all discovery and printed out a copy of the statutes of the offenses relevant to the case. Preliminarily, he reviewed the elements of the offenses with the client and explained what the State would need to prove the client’s guilt. He stated that, at this point in his representation, he also elicited the client’s “side of the story” to try and identify any potential witnesses or information that might aid in the defense.

Counsel recalled that he was not allowed to bring his laptop into the jail when he met with the Petitioner, so he relied on paperwork for their discussions. Mr. Byrd had already given the Petitioner the USB drive containing discovery; however, the Petitioner could not view the information, so Counsel relayed what the surveillance video footage showed and brought copies of other information contained on the drive.

Counsel testified that he felt he had a good rapport with the Petitioner and that he conveyed to the Petitioner that a plea agreement was the best opportunity for him to obtain a conviction other than first degree murder. Counsel believed the surveillance footage and Ms. Cruz’s testimony was very compelling evidence. In addition, the detective work showing the defendants’ movements around the city, the attempt to tamper with the license plate, and the plan earlier in the day to commit a robbery was strong evidence in support of a conviction.

Counsel testified that it was known “early on” in Mr. Byrd’s representation of the Petitioner that Ms. Cruz planned to testify at trial. He believed the likelihood of her testifying was great, which caused him to subpoena the District Attorney’s office in an attempt to prove a pattern of co-defendants testifying without a formal plea agreement followed by a “good deal.”

Counsel testified that initially the Petitioner denied being present during the offense. With time, however, the evidence became such that it was not plausible for the Petitioner to deny being present, and he agreed that he was in the car. Counsel met with the Petitioner frequently because he felt he needed “to do everything I could as his lawyer to convince him to take a plea agreement.” Counsel discussed plea agreements with the Petitioner and believed the Petitioner was open to a sentence of forty years if Counsel could negotiate it with the State. Counsel said that the Petitioner understood what Counsel was communicating to him, but the Petitioner wanted a better offer from the State. Counsel worked hard to negotiate a plea agreement for forty years and once the State made the offer, Counsel was “flabbergasted” when the Petitioner turned it down. He advised the Petitioner that the State would likely not make an offer lower than forty years. Counsel testified that he conveyed every offer from the State, and it was the Petitioner’s decision to proceed to trial against Counsel’s advice.

Counsel testified that his strategy at trial was to impeach Ms. Cruz and cast doubt on her motive for testifying. At the post-conviction hearing, the State provided Counsel with some paperwork, and Counsel identified the paperwork as printed emails between Counsel and the prosecutor memorializing the plea negotiations.

Counsel testified that the State sought to introduce testimony about Mr. Krasniqi’s proposal that the defendants burglarize the home of one of his relatives. Although the defendants ultimately did not complete the robbery of Mr. Krasniqi’s relatives, the State argued that the evidence completed the story and showed the defendants’ intent to commit the second robbery that lead to the shooting. Counsel testified as follows about the 404(b) hearing on this issue:

I honestly don’t recall how that whole hearing played out. We had a contested hearing on that issue. And you know, I raised what I thought were the appropriate arguments and legal standards. And I remember being very frustrated that [the trial court] went ahead and let all of that stuff in.

Counsel testified that he raised only one issue on appeal related to the trial court’s granting the State’s motion to quash his subpoena. The information he sought to obtain through the subpoena was to establish that a policy existed whereby defendants testified without a formal plea agreement and received a “better deal” after the trial. Counsel said



that one can approach an appeal with a “shotgun or a rifle,” and he believed the rifle approach was more effective; therefore, he chose the issue he thought would most likely succeed on appeal. He stated that, in retrospect, he could also have raised the 404(b) issue; however, he questioned the success of such a challenge on appeal. When questioned about challenging consecutive sentencing on appeal, Counsel stated that he thought a challenge to the five-year consecutive sentence to a life sentence had little chance of success.

Post-conviction counsel recalled the Petitioner, and the Petitioner maintained that he had never agreed to a forty-year sentence. He maintained that he told Counsel that twenty or twenty-five years was the maximum sentence he would agree to in settling the case.

After hearing the evidence, the post-conviction court found that the Petitioner failed to prove the allegations by clear and convincing evidence and denied relief. It is from this judgment that the Petitioner appeals.

## **II. Analysis**

On appeal, the Petitioner asserts that he received the ineffective assistance of counsel at trial. He asserts that Counsel failed to: (1) preclude evidence of testimony about a prior discussion to commit burglary; (2) raise several issues on appeal; and (3) develop a defense strategy and to communicate effectively with the Petitioner. The State responds that the Petitioner failed to prove his allegations by clear and convincing evidence and, therefore, the post-conviction court properly denied relief. We agree with the State.

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

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

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

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

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney’s performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court should avoid the “distorting effects of hindsight” and “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S. at 689-90. In doing so, the reviewing court must be highly deferential and “should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, “in considering claims of ineffective assistance of counsel, ‘we address not what is prudent or appropriate, but only what is constitutionally compelled.’” *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). “The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.” *House*, 44 S.W.3d at 515 (quoting *Goad*, 938 S.W.2d at 369).

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

### A. 404 (b) Issue

The Petitioner argues that Counsel was ineffective because there was no legitimate purpose for introducing evidence of the defendants' initial plans to rob Mr. Krasniqi's relatives on the day of the shooting. The Petitioner attributes the trial court's ruling allowing admission of this evidence to Counsel's failure to raise "good arguments" against admission of this evidence.

Generally, a party may not introduce evidence of an individual's character or a particular character trait in order to prove that the individual acted in conformity with that character or trait at a certain time. Tenn. R. Evid. 404(a). Similarly, 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." Tenn. R. Evid. 404(b). Such evidence may be admitted for other purposes, though, if relevant to some matter actually at issue in the case and if its probative value is not outweighed by the danger of its prejudicial effect. Tenn. R. Evid. 404(b); *State v. Wyrick*, 62 S.W.3d 751, 771 (Tenn. Crim. App. 2001). Issues to which such evidence may be relevant include identity, motive, common scheme or plan, intent, or the rebuttal of accident or mistake defenses. Tenn. R. Evid. 404(b), *Advisory Comm'n Cmts.*

Although the defense brief contains no citation to the record with respect to the motion hearing, the brief references what occurred at the 404(b) motion hearing. *See* Tenn. R. App. Pro. 27(a)(7)(A); Tenn. R. Ct. Crim. App. 10(b) (Issues not supported by appropriate references to the record "will be treated as waived in this court."). Additionally, the Petitioner did not include a transcript of the hearing in the record. We note that defendants have a duty to prepare a record that conveys "a fair, accurate and complete account of what transpired with respect to the issues which form the basis of the appeal" and will enable the appellate court to decide the issues. Tenn. R. App. P. 24(a); *see State v. Taylor*, 992 S.W.2d 941, 944 (Tenn. 1999). *State v. Draper*, 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990). Normally, when a defendant fails to provide a complete record on appeal, this Court concludes that the defendant waived appellate review of the claim.

Waiver notwithstanding, the post-conviction court made the following findings:

[The] Petitioner avers that trial counsel failed to effectively oppose the motion which allowed admission of evidence characterized as other bad acts. However, such evidence "may . . . be admissible for other purposes," including, but not limited to, establishing identity, motive, common scheme or plan, intent, or absence of mistake. *See State v. McCary*, 119 S.W.3d 226, 243 (Tenn. Crim. App. 2003). Specifically, [the] Petitioner states that trial

counsel failed to file an answer to the State's request for admission and was deficient in appropriate arguments to prevent the Court from making an unfavorable ruling. [C]ounsel is not required to file a written answer on the State's notice of intent to introduce 404(b) evidence. The Court properly conducted two 404(b) hearings at the State's request. At the second hearing, this Court determined that material issues of motive and intent made the evidence admissible, were corroborated by clear and convincing proof, and outweighed the danger of unfair prejudice. Tenn. R. Evid. 404(b).

Additionally, the Petitioner avers that trial counsel made ineffective and incomplete arguments. Post-conviction counsel includes lengthy arguments in the post-conviction petition asserting that the outcome of the 404(b) hearing would have been different had it been adequately challenged. The Court disagrees. The Court of Criminal Appeals opined that discussion and contemplation of a crime a defendant ultimately did not commit does not implicate a prior bad act. *State v. Ellis*, 2021 WL 488317 at \*9 (Tenn. Crim. App. 2021). [The] Petitioner and his co-defendants discussed, but did not commit, a different robbery earlier in the day of the criminal incident for which he was ultimately charged and found guilty. This Court agrees with the *Ellis* court that those discussions between the co-defendants did not invoke Rule 404(b) as a prior bad act where the action itself never occurred. Admissibility of the evidence was therefore governed under relevancy and the Court's determination whether the probative value was substantially outweighed the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* Tenn. R. Evid. 401, 403.

[The] Petitioner also asserts that the discussion and planning of a robbery earlier in the day of the criminal incident in which [the] Petitioner and his co-defendants were ultimately charged is itself a criminal conspiracy and thus a crime under Tenn. Code Ann. § 39-12-103. The Court likewise disagrees with this argument where the conduct, as the basis for the crime of conspiracy, is not governed by Rule 404(b) and Ms. Cruz's testimony was admitted for motive and intent purposes of the later crime, not to prove a conspiracy. *See State v. Tunstall*, No. W2014-00257-CCA-R3-CD, 2015 WL 1089742, at \*11 (Tenn. Crim. App. Mar. 10, 2015) (quoting NEIL P. COHEN, SARAH Y. SHEPPEARD & DONALD F. PAINE, TENNESSEE LAW OF EVIDENCE § 4.04 [12][a], at 4-115 (6th ed.2013)). Therefore, the Court cannot find that [the] Petitioner's further and more comprehensive post-conviction arguments would have effected a different result in the 404(b) admissible evidence. Thus, it fails to meet the *Strickland* prong of ineffectiveness through deficiency of performance. Additionally, the Court

observes the jury was instructed that if they “[found] that the defendant has committed [an] alleged crime other than that for which he is on trial, you may not consider such evidence to prove his disposition to commit such a crime as that on trial.” The Court further instructed that the jury must only consider such evidence for the limited purpose of motive and intent. This issue is without merit.

The evidence does not preponderate against the post-conviction court’s findings, and the Petitioner has failed to prove by clear and convincing evidence that Counsel’s arguments with regard to the 404(b) issue were deficient. The trial court determined that the evidence was relevant to establishing the Petitioner’s intent and motive, along with the intent of his co-defendants, to commit the robbery in which Mr. Grasset was shot and later died, and that the evidence was not unfairly prejudicial. *See* Tenn. R. Evid. 401, 403. The record supports the trial court’s determinations. The evidence of the defendants’ agreement to burglarize a relative’s home established the Petitioner’s intent to commit a robbery. Likewise, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The record reflects that Ms. Cruz testified that the contemplated robbery of Mr. Krasniqi’s relatives never occurred. Furthermore, the jury was instructed to consider the evidence only for the limited purpose of determining whether it showed the Petitioner’s motive or intent in the present case. The trial court did not abuse its discretion by admitting the relevant evidence and, therefore, the Petitioner has failed to prove this allegation by clear and convincing evidence. The Petitioner is not entitled to relief on this basis.

## **B. Appellate Issues**

On appeal, the Petitioner asserts that Counsel was ineffective in representing the Petitioner in his direct appeal because he only raised a single issue of error on appeal. The sole issue raised on appeal was the trial court’s grant of the State’s motion to quash a defense subpoena seeking records pertaining to a use immunity agreement. He asserts that Counsel should have raised on appeal: (1) the erroneous admission of the 404(b) evidence; (2) the insufficiency of the evidence; and (3) the improper consecutive sentencing. The State responds that the post-conviction court properly credited Counsel’s informed and strategic “rifle” approach in deciding which issues to present on appeal. We agree with the State.

A defendant has a right to effective representation both at trial and on direct appeal. *Campbell v. State*, 904 S.W.2d 594, 596 (Tenn. 1995) (citing *Evitts v. Lucey*, 469 U.S. 387 (1985)). The test for ineffective assistance of counsel is the same for both trial and appellate counsel, under the *Strickland* standard set forth above. *Id.* That is, a petitioner alleging ineffective assistance of appellate counsel must prove both that appellate counsel

was deficient in failing to adequately pursue or preserve a particular issue on appeal and that, absent counsel's deficient performance, there was a reasonable probability that the issue "would have affected the result of the appeal." *Id.* at 597; *see also Carpenter*, 126 S.W.3d at 886-88.

In *Carpenter v. State*, our supreme court provided:

Appellate counsel are not constitutionally required to raise every conceivable issue on appeal. Indeed, experienced advocates have long emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues. The determination of which issues to raise on appeal is generally within appellate counsel's sound discretion. Therefore, appellate counsel's professional judgment with regard to which issues will best serve the appellant on appeal should be given considerable deference.

*Carpenter*, 126 S.W.3d at 887 (internal quotation marks and citations omitted).

The *Carpenter* court provided the following non-exhaustive list of inquiries when evaluating the strength of an omitted issue for the purpose of assessing deficiency:

- 1) Were the omitted issues "significant and obvious"?
- 2) Was there arguably contrary authority on the omitted issues?
- 3) Were the omitted issues clearly stronger than those presented?
- 4) Were the omitted issues objected to at trial?
- 5) Were the trial court's rulings subject to deference on appeal?
- 6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
- 7) What was appellate counsel's level of experience and expertise?
- 8) Did the petitioner and appellate counsel meet and go over possible issues?
- 9) Is there evidence that counsel reviewed all the facts?
- 10) Were the omitted issues dealt with in other assignments of error?
- 11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

*Id.* at 888 (quoting *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999)) (internal quotation marks omitted). The court further explained:

If a claim of ineffective assistance of counsel is based on the failure to raise a particular issue, as it is in this case, then the reviewing court must determine the merits of the issue. Obviously, if an issue has no merit or is

weak, then appellate counsel's performance will not be deficient if counsel fails to raise it. Likewise, unless the omitted issue has some merit, the petitioner suffers no prejudice from appellate counsel's failure to raise the issue on appeal. When an omitted issue is without merit, the petitioner cannot prevail on an ineffective assistance of counsel claim.

*Id.* at 887-88 (internal citations omitted).

In its written order, the post-conviction court made the following findings:

[The] Petitioner contends ineffective assistance of trial counsel where a single issue of error was submitted as the basis for relief: a quashed subpoena for records seeking previous instances of use immunity agreements by the State. The Court's finding on this issue was upheld by the Court of Criminal Appeals. *See Nunez*, 2020 WL 4734916. Petitioner avers trial counsel was negligent to not submit as issues (1) the other acts evidence, as discussed above, (2) sufficiency of the evidence, and; (3) a sentencing challenge.

This Court accredits [C]ounsel's testimony in the instant hearing that he made the strategic choice to use a rifle approach rather than a shotgun approach in his appeal. When a claim of ineffective assistance of counsel is premised on the failure to raise an issue, the reviewing court should address the merits of the issue. *Carpenter v. State*, 126 S.W.3d 879, 887 (Tenn. 2004). Where "an issue has no merit or is weak, then appellate counsel's performance will not be deficient if counsel fails to raise it." *Id.*

This Court has already considered the merit of an unargued 404(b) issue raised by post[-]conviction counsel. As such, the Court cannot find that appellate counsel's lack of arguing a meritless 404(b) issue is indicative of deficient performance. The Court further recognizes the same 404(b) issue was likewise unaddressed in the appeal of co-defendant Santillan. *See State v. Santillan*, No. M2020-00074-CCA-R3-CD, 2021 WL 3422981 (Tenn. Crim. App. Aug. 5, 2021).

In considering the sufficiency of the evidence argument, the Court accredits [C]ounsel's testimony that the only path he could see forward for Petitioner was to reach a settlement. [C]ounsel aptly articulated in the instant hearing that along with other evidence at trial, the shocking execution recording would surely motivate the jury to protect the community from "everyone on that video." That appellate counsel strategically determined to

not raise the issue of insufficient evidence was neither deficient nor prejudicial. Where this issue was not stronger than the one presented, it was not unreasonable to omit it. *See Carpenter*, 126 S.W.3d at 888. This issue was brought up in co-defendant Santillan's appeal and was found meritless. *See Santillan*, 2021 WL 3422981, at \*7.

Similarly, the unargued issue of this Court's sentencing regime was likewise not ineffective assistance of appellate counsel. The Court accredits appellate counsel's testimony in the instant hearing that he did consider appealing the sentence regime but discarded that argument as unworthwhile. This Court issued a written sentencing order detailing its reasoning for a consecutive sentence where [the] Petitioner had been convicted on multiple charges. The order found that [the] Petitioner was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation to commit that crime where the risk to human life was high. Again, where appellate counsel strategically determined to not dilute his strongest argument after the trial court made a reasoned and determined finding under Tennessee Code Annotated § 40-35-115 is neither deficient nor prejudicial. This issue is not stronger than the one presented and was not unreasonable to omit it. *See Carpenter*, 126 S.W.3d at 888. As with the 404(b) issue, sentencing was also unaddressed in Santillan's appeal. *See Santillan*, 2021 WL 3422981. Therefore, having considered [the] Petitioner's claims of ineffective assistance of counsel based on the rifle approach of a single issue chosen strategically for its strength, the Court finds appellate counsel was neither deficient nor prejudicial in his approach. This issue is without merit.

### **1. 404(b) Issue**

The Petitioner argues that Counsel should have raised the 404(b) issue on direct appeal. As we have already resolved the merits of a 404(b) issue, we conclude that the Petitioner has failed to show that Counsel was deficient in this respect.

### **2. Sufficiency of the Evidence**

The Petitioner contends that he was denied the effective assistance of appellate counsel based on Counsel's failure to challenge the sufficiency of the evidence on appeal. The Petitioner makes the blanket assertion that, had Counsel included this issue, the Petitioner would have received a new trial. He makes no further argument on this issue and provides no citation to the law or the record in support of his assertion.



In considering the merits of the claim that there was not sufficient evidence to support the Petitioner's conviction, the record reflects that Counsel testified that there was "compelling" surveillance footage of the shooting, the co-defendant's mother identified the Petitioner in the surveillance video, the Petitioner's co-defendant testified at trial about his role in the offenses, and the police investigation evidence showed the defendants' attempt to tamper with the car license plate and the defendants' movements around the city. This evidence indicates that the merits of this argument were not strong and that the State had strong evidence to support the Petitioner's convictions.

Furthermore, the omitted issue was not significant nor clearly stronger than the issue presented by Counsel on direct appeal. The record reflects that Counsel had ten years of experience and offered a reasonable explanation, that the trial court credited, as to the decision to omit the issue from the direct appeal. Moreover, the trial court's and jury's determinations are given considerable deference on appeal in challenges to the sufficiency of the evidence. *State v. Smith*, 24 S.W.3d 274, 278 (Tenn. 2000) (quoting *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999))("the standard for review by an appellate court is whether, after considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

Because the issue lacks merit, the Petitioner has not established deficient performance or prejudice based on Counsel's failure to challenge the sufficiency of the evidence on direct appeal. *Carpenter*, 126 S.W.3d at 887-888. The Petitioner is not entitled to relief as to this issue.

### **3. Sentencing**

The Petitioner asserts that Counsel was ineffective because he failed to raise the issue of consecutive sentencing on appeal. Once again, in his brief, he makes the bare assertion that had Counsel raised the issue of consecutive sentencing, it would have led to "a resentencing for [the Petitioner]." He does not make any other argument with respect to this issue or cite to the record or any legal authority in support of this contention. Further, he did not include a transcript of the sentencing hearing in the record nor does he ask this court to take judicial notice of the record on direct appeal.

In the present case, Counsel testified that he did not challenge the Petitioner's sentence on direct appeal because he believed the challenge was without merit and that, instead, he chose to focus on the issue that he believed to be viable. The post-conviction court found that trial counsel's strategy was reasonable, stating that "appellate counsel strategically determined to not dilute his strongest argument after the trial court made a reasoned and determined finding under Tennessee Code Annotated § 40-35-115."

Both the Tennessee Supreme Court and the United States Supreme Court have recognized that “experienced advocates have long ‘emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues.’” *Cooper v. State*, 849 S.W.2d 744, 747 (Tenn. 1993) (quoting *Jones*, 463 U.S. at 751); *see Carpenter*, 126 S.W.3d at 892 (concluding that counsel’s strategic decision to not raise on appeal the trial court’s failure to instruct the jury on a lesser-included offense was reasonable when counsel did not believe the issue had merit and decided to instead focus on other issues he believe to be viable). This court also has held that counsel made a reasonable tactical decision to forego challenging a defendant’s sentence on direct appeal when counsel did not believe the challenge would be successful and decided to focus on issues which he believed had more merit. *See, e.g. Churchman*, 2019 WL 3072166, at \*5; *Feaster v. State*, No. E2018-00193-CCA-R3-PC, 2018 WL 5734476, at \*3 (Tenn. Crim. App. Nov. 1, 2018), *perm. app. denied* (Tenn. Jan. 16, 2019); *Neighbours v. State*, No. M2015-01904-CCA-R3-PC, 2016 WL 6678535, at \*11 (Tenn. Crim. App. Nov. 14, 2016).

At the post-conviction hearing, the Petitioner made no allegations regarding the basis upon which trial counsel should have challenged the Petitioner’s sentence on direct appeal. Because the relative strength of the omitted issue is one of the factors that a court must consider in evaluating whether counsel was deficient in omitting a particular issue on direct appeal, *see Carpenter*, 126 S.W.3d at 887-88, the Petitioner, who bears the burden of establishing deficiency, was required to present evidence during the post-conviction hearing regarding the basis upon which his sentence was challengeable on direct appeal.

The evidence presented during the post-conviction hearing and the record establish that trial counsel made a reasonable, strategic decision to forgo challenging the Petitioner’s sentence on direct appeal. The post-conviction court gave deference to Counsel’s tactical choice, and the evidence does not preponderate against the post-conviction court’s finding. The Petitioner is not entitled to relief as to this issue.

### **C. Communication & Defense Strategy**

The Petitioner asserts generally that Counsel “failed to perform[ ] various other defense tasks.” He specifically identifies that Counsel did not communicate effectively with him during representation and failed to “adequately develop a coherent theory of defense.” The State responds that the Petitioner has failed to prove by clear and convincing evidence that Counsel was deficient with regard to the development of a defense theory or communication with the Petitioner.

#### **1. Failure to Communicate**

In its order denying relief, the post-conviction court made the following findings relevant to this issue:

Petitioner avers trial counsel was deficient in performance by failing to adequately communicate: a defense strategy, evidence against Petitioner, explanation of a trial, and plea negotiations. Under direct examination in the instant hearing, Petitioner claimed he did not know how a trial worked, what evidence was against him, or have knowledge of co-defendant Cruz's statements until a few days prior to trial. However, under cross-examination he admitted to seeing the video of the incident well before the trial, that he did view a copy of Ms. Cruz's statement transcript, that he had gone over his charges with trial counsel, had met with trial counsel in jail, also heard and understood the examples given to the jury by trial counsel regarding felony murder. The Court discredits Petitioner's statement that he did not see or speak with trial counsel after the trial when, at minimum, Petitioner was present and met with trial counsel on February 19, 2019, at the motion for a new trial.

The Court accredits trial counsel's description of negotiating with the State for a reduced charge and a chance for a sentence not measured in life terms. The exhibit of emails between counsel and the State bolster this assertion. Petitioner himself stated that trial counsel told him that he would "see him in hell" when Petitioner declined a settlement offer. While the Court agrees with the slightly less offensive version of events as described by trial counsel, it leaves no doubt that negotiations had taken place on behalf of Petitioner, offers had been relayed to Petitioner, and Petitioner rejected the offer despite ongoing encouragement by his knowledgeable trial counsel. Petitioner appears to have buyer's remorse, and the Court accredits Petitioner's statement in the instant hearing where he was again offered the forty (40) year settlement and rejected it on Friday stating, "I'm just gonna go to trial," scheduled for the following Monday. That Petitioner chose to decline that agreement is not an absolute treatise against the defense counsel who negotiated on his behalf. The Court does not find trial counsel failed to explain or reveal information to Petitioner and accredits trial counsel's version of events.

Petitioner also asserts he was inadequately prepared by trial counsel on why he should not testify before the jury. Petitioner testified in the instant hearing that trial counsel did not confirm that Petitioner could still testify despite counsel's strong recommendation to not do so. However, on cross-

examination in the instant hearing he recalled the judge questioning him about not testifying. The Court has within the case file a signed copy of Petitioner's waiver of his right to testify before the jury. Petitioner stated on the record he understood his right and still decided to not testify. Thus, the Court does not accredit Petitioner's assertion he did not understand he was giving up a right to testify as he was clearly informed by and agreed to the colloquy. The Court does not find that trial counsel failed to prepare Petitioner in making that decision. This issue of trial counsel's failure to communicate with Petitioner is without merit.

On appeal, the Petitioner maintains only two issues as it relates to Counsel's alleged failure to communicate. First, he argues that Counsel never informed the Petitioner that "the State initially sought to use him as a cooperating witness rather than trying him." The only evidence about this issue presented at the post-conviction hearing was when the Petitioner was asked to confirm that Counsel "never told [him]" that the State was seeking to have him testify against his co-defendants. The Petitioner agreed. There is no evidence in the record that the State wanted the Petitioner to testify against the co-defendants rather than Ms. Cruz, a participant of arguably lessor culpability. The fact that Counsel never conveyed that the State was seeking to have him testify against his co-defendants is not evidence that the State, in fact, made such an inquiry and Counsel failed to convey it. The Petitioner has failed to prove this allegation by clear and convincing evidence.

Second, the Petitioner claims that Counsel failed to discuss the burden of proof, the elements of felony murder, and the Petitioner's right to testify. He argues that had he understood felony murder, he would have accepted the State's plea offer. The record belies this assertion. The Petitioner initially denied any understanding of felony murder; however, upon further questioning, the Petitioner admitted reading the indictment charging him with felony murder during the perpetration of a robbery, that he understood "the basics of felony murder," and that he recalled the prosecutor giving examples to the jurors of felony murder. The Petitioner also admitted that Counsel had reviewed the charges against him and the State's proof. Finally, he testified that he understood he had the right to testify, but he took Counsel's advice. The evidence does not preponderate against the trial court's findings about Counsel's communication with the Petitioner and the Petitioner has failed to show by clear and convincing evidence that Counsel's communication was deficient. The Petitioner is not entitled to relief as to this issue.

## **2. Defense Strategy**

The Petitioner also claims that Counsel failed to develop a "coherent" theory of defense. The post-conviction court made the following findings about this claim:

Petitioner avers trial counsel did not develop a coherent strategy to any of the charged offenses and the primary goal was to impeach and attempt to discredit Ms. Cruz's testimony. During the instant hearing, trial counsel testified Petitioner initially claimed he was not present at the shooting. Trial counsel had discussed the State's proof with Petitioner and advised it was not plausible to deny his presence due to multiple evidentiary sources to the contrary. This Court accredits the testimony of trial counsel that plausible deniability thwarted most of the defense options available and largely limited defense arguments to impeaching co-defendant Cruz. The Court discredits Petitioner's assertion in the instant hearing that he did not have knowledge of the defense or that the evidence was not explained to him. Indeed, Petitioner admitted to this Court he was present at the shooting.

Trial counsel had the opportunity to cross-examine Ms. Cruz after her testimony at trial. The appellate opinion established that the witness was "question[ed] and alert[ed] the jury as to Ms. Cruz's motivation for testifying . . . why she was testifying for the State and whether she received the promise of leniency for her testimony." *Nunez*, 2020 WL 4734916 at \*5. This Court disagrees with Petitioner's argument that trial counsel conducted his line of questioning in an ineffective matter and did not address other possible avenues of impeachment open to him. That trial counsel's strategy was not successful does not render trial counsel's performance deficient. *Bryant v. State*, 460 S.W.3d 513, 526 (Tenn. 2015). The Court does not find that trial counsel was deficient in his defense theory to impeach the State's witness, thus negating a *Strickland* prong. This issue is without merit.

The evidence does not preponderate against the post-conviction court's findings. Counsel testified at the hearing about the strong evidence against the Petitioner. This evidence left fewer options for a defense strategy. Considering Ms. Cruz's testimony, the surveillance footage and other evidence developed during the investigation, Counsel ultimately decided that the best strategy was to try to impeach Ms. Cruz, thereby creating doubt as to her credibility. The Petitioner testified that the defense strategy was to impeach Ms. Cruz and that he never told Counsel he disagreed with such a strategy. Further, he made no suggestion at the hearing or in his brief about what the defense strategy should have been in light of the State's evidence against him, which included surveillance footage of him during the shooting.

The record reflects that Counsel, in light of the strong evidence against the Petitioner, chose the strategy of attempting to impeach Ms. Cruz's testimony. The

Petitioner has not proven by clear and convincing evidence that Counsel failed to develop a defense strategy. The Petitioner is not entitled to relief.

### **III. Conclusion**

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

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ROBERT W. WEDEMEYER, JUDGE