IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 15, 2025

DEMARIO QUINTEZ DRIVER v. STATE OF TENNESSEE

Appeal from the Circuit Court for Cheatham County
No. 17834 Larry J. Wallace, Judge

No. M2024-01247-CCA-R3-PC

A Cheatham County jury convicted the Petitioner, Demario Quintez Driver, of rape and coercion of a witness. On appeal, this court affirmed the trial court's judgments. *State v. Driver*, No. M2021-00538-CCA-R3-CD, 2022 WL 1284978, at *1 (Tenn. Crim. App. April 29, 2022), *perm. app. denied* (Tenn. Sept. 29, 2022). The Petitioner filed a timely post-conviction petition, and after a hearing on the petition, the post-conviction court denied relief. On appeal, the Petitioner maintains that he received the ineffective assistance of counsel at trial and that the cumulative errors of his trial counsel warrant relief. After review, we affirm the post-conviction court's judgment.

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

ROBERT W. WEDEMEYER, PJ., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and J. ROSS DYER, JJ., joined.

Jay Umerley, Nashville, Tennessee, for the appellant, Demario Quintez Driver.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin L. Barker, Assistant Attorney General; Ray Crouch, Jr., District Attorney General; and Margaret F. Sagi, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION
I. Facts
A. Trial

This case arises from the Defendant's 2016 rape of the victim at a party. A Cheatham County grand jury indicted the Petitioner for aggravated rape and coercion of a witness. This court summarized the evidence presented at trial as follows:

Kim Freeze testified that the victim was her daughter and lived with her in March of 2016. On March 20, 2016, the twenty-one-year-old victim came home to Ms. Freeze's house from a party in a vehicle that Ms. Freeze did not recognize. . . . The victim was crying and said her truck had been stolen. The victim was "walking funny" and had bruises on her lips, neck, and arms. The victim showed Ms. Freeze her vagina, which Ms. Freeze described as "awful" looking, as if it had been "ripped." The victim took a nap but did not shower or bathe, and Ms. Freeze took the victim to the hospital the next day.

The victim testified that she . . . drove a 2007 GMC Sierra truck at that time. On March 19, 2016, the victim drove in her truck with a friend to the home of Greg Sanders. They arrived around 11 p.m. Present at the residence were Mr. Sanders, the Defendant, and about a dozen other individuals. The victim spoke with several people at the gathering, including the Defendant, whom she identified in the courtroom and described as an acquaintance. The Defendant asked to drive her truck and she told him "no." The victim stated that she consumed three alcoholic drinks at the gathering over the course of an hour and a half and that the Defendant prepared the third drink for her. The victim testified that, after the third drink, she began feeling "dizzy and woozy." The victim went into a bedroom to collect herself and use the bathroom. As the victim was using the toilet, the Defendant came into the bathroom with a "smirk" on his face. The victim's pants were not on completely, and she was dizzy. As she tried to pull up her pants, the Defendant grabbed her, and she had "no strength" to fight him off. The Defendant knocked her over and put his penis in her mouth. The victim testified that she "faded out" soon after.

The victim regained consciousness in a closet and, when someone knocked on the door, the Defendant grabbed her face to cover her mouth. The victim recalled that her pants and the Defendant's pants were both off. She recalled "glimpses" of the Defendant putting his penis in her mouth without her consent. The victim lost consciousness again and then awoke to Mr. Sanders putting her into his bed. The victim was missing half of her clothing and her remaining clothes were ripped. Money that she kept in her undergarments had been taken. Her truck was also missing, along with money, prescription medication, and personal items inside the truck. The victim testified that her mouth was sore, and her vagina felt as if it had been "ripped to pieces." The victim stated that she was terrified. Mr. Sanders gave her some clothes and then the victim arranged for a ride home. The

victim described herself as in a "daze," but eventually she went to the hospital where a rape kit was performed. . . .

The victim testified that she had been threatened several times and offered money or drugs not to testify at trial. The Defendant sent the victim a message offering to return the money and items in her truck that had been taken from her.

. . . .

Sherry Mulbarger testified that she was a registered nurse working at TriStar Medical Center in Ashland City, Tennessee, on the night the victim presented at the hospital. Ms. Mulbarger examined the victim and noted injuries to her vagina: "Swelling," "tenderness," and redness. Ms. Mulbarger stated that the victim's rectum had "mild lacerations" at the top and bottom of the rectal opening and that the victim was sore and bleeding. The victim was described as tearful, angry, depressed, and afraid for her and her family's safety. The victim's chart contained the following account of the rape:

> "[The victim was] [r]aped at a party 48 hours ago. A man she had knowledge of followed her into the bathroom and raped her. [The victim] [r]epeatedly told the man to stop, blacked out, awoke in closet, does not remember going to closet. Came out at approximately 2:00 p.m. Told mother [about] rape, did not want police contacted, was afraid."

Dr. Brenda Reilly testified that she was an emergency room physician working at the hospital when the victim presented on March 22, 2016. Dr. Reilly performed a rape kit on the victim and noted that the victim's genitalia was swollen, red, and tender. These findings were consistent with the victim's report that she had unsolicited sexual contact. Dr. Reilly described the victim as anxious, tearful, uncomfortable, and upset. Dr. Reilly testified that the victim had lacerations on her genitalia consistent with forcible penetration of that area.

TBI Special Agent Lisa Burgee conducted the DNA testing in this case. She testified that the Defendant's DNA was present in the victim's vaginal swab. An unidentified contributor's DNA was detected and Agent Burgee later determined that the DNA contributor was Mr. Sanders.

> TBI Special Agent April Bramlage was admitted as an expert in toxicology and testified that she analyzed the victim's blood sample. She stated that there was zero alcohol in the victim's blood. The blood sample did contain the chemical typically known as Xanax, a nervous system depressant, as well as Benadryl, which causes sedation, as well as Hydrocodone. Agent Bramlage testified that the presence of these drugs in the victim's system two days after ingestion indicated that a very large quantity of these drugs had been administered. Agent Bramlage noted that these sedation drugs were commonly known as "date rape drug[s]."

Driver, 2022 WL 1284978, at *1-3.

The jury convicted the Petitioner of the lesser-included offense of rape. The jury also convicted the Petitioner of coercion of a witness as charged. The trial court imposed a twelve-year sentence for the rape conviction and a consecutive four-year sentence for the coercion conviction, for a total effective sentence of sixteen years in the Tennessee Department of Correction.

The Defendant appealed the convictions, claiming that the evidence was insufficient to support the rape convictions and that the prosecutor engaged in improper closing argument. On appeal, this court affirmed the convictions, and our supreme court denied review. *Id.* at *1.

B. Direct Appeal

On direct appeal, the Petitioner argued, as is relevant to this appeal, that the trial court allowed improper closing argument by the State. On post-conviction appeal, the Petitioner again raises the issue of the State's improper closing argument but now in the context of Counsel's failure to object to the State's improper argument. On direct appeal, this court summarized the improper closing argument issue as follows:

> The State's closing argument emphasized and reiterated the victim's fear of the [Petitioner]. Defense counsel responded that the victim was not afraid, but rather a consensual participant in the night's events. Defense counsel suggested that the fear the State had argued in closing was misplaced, stating, "That should scare the hell out of every person in this room, that one woman said that she was raped after my client had consensual sex with her at a party." Defense counsel then listed what he identified as lies told by the victim. Defense counsel attacked the victim's integrity, credibility, and morals, calling her a "liar" and explaining the rape charges were the result of a "bully" and "a woman scorned."

Defense counsel argued that this case was not about the victim's fear but about the victim's intentional intimidation of the [Petitioner]. He told the jury that there was "nothing else" other than the victim's claim to support the allegation of rape. He stated that the victim was extorting the [Petitioner] "with false allegations of rape" and asserted that the State's case was nothing more than "bells and whistles" and "smoke and mirrors." About the State's proof, defense counsel stated, "There's nothing else other [than] one woman's testimony, and that to me is just scary. That's the scariest thing I have ever heard." Defense counsel concluded by telling the jury that the [Petitioner] has "been waiting so long" for the jury "to fix this." He urged the jury to "be the best part of this story."

In response, the prosecutor argued as follows:

> You know what is scary in this case? Is that the Defense, the Defense Attorney and the defendant can literally stand in front of you and suggest that this case is smoke and mirrors. That's scary.
>
> . . . .
>
> It's scary that we are in a world where a victim can be raped by more than one person, be threatened, be robbed, be coerced, be hated, be humiliated, have to testify in front of strangers and to tell you [all] of the details of what must be a nightmare. It is no wonder that we live in a world where victims are scared to come forward.
>
> Because when the Defense could suggest that there is no forensic evidence in a case where you heard from three different expert witnesses, just look you right in the eye and say there's no forensic evidence. If he can look you in the eye and say that, what else is this man hiding[?] That ends right now. The [Petitioner] raped her and we won't be bullied by him anymore. I will not stand here and let you be blown over by lies and false argument.

The prosecutor then recounted all the evidence that refuted the [Petitioner]'s assertion that there was no forensic evidence in this case. The prosecutor noted areas where the forensic evidence was inconsistent with the [Petitioner]'s statements and identified those inconsistencies as the [Petitioner]'s "lies." The prosecutor told the jury, "He's a liar. And let there be no mistake about that. That's a liar sitting right there at that table."

> The prosecutor recounted portions of the Facebook messages between the [Petitioner] and the victim. He identified one message from the [Petitioner] that stated, "I didn't touch you." About this quote, the prosecutor argued, "Another lie. I didn't touch you. That is a lie. This is not even questionable. We know he touched her. His DNA, Ladies and Gentlemen, were removed from her vagina. Don't allow this to fool you." The prosecutor also characterized the victim's response to one of the [Petitioner]'s messages as "you are a liar" although those were not the literal words used.

Driver, 2022 WL 1284978, at *5-6

After summarizing the argument at trial, this court stated:

> Initially, we have no trouble concluding that the prosecution's repeated references to "lies" and calling the [Petitioner] a "liar" were improper. It is unprofessional conduct for a prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. *See State v. Thornton*, 10 S.W.3d 229, 235 (Tenn. Crim. App. 1999); *Lackey v. State*, 578 S.W.2d 101, 107 (Tenn. Crim. App. 1978). The prosecutor's argument, to some extent, was an expression of his opinion about the proof and the guilt of the [Petitioner].

Driver, 2022 WL 1284978, at *6. The court then considered whether the improper argument affected the jury's verdict and concluded:

> The strength of the State's case was very strong. The evidence against the [Petitioner] included the victim's identification of the [Petitioner] as the perpetrator, DNA evidence of the [Petitioner]'s sperm in the victim, evidence of Xanax in the victim's system consistent with her account of the events, the [Petitioner]'s admission in messages that oral sex occurred and the victim's physical injuries which were consistent with her testimony about the rape.
>
> Considering the parties' arguments as a whole and the evidence adduced at trial, we conclude that the prosecution's references did not affect the jury's verdict.

Driver, 2022 WL 1284978, at *7.

C. Post-Conviction Hearing

The Petitioner timely filed a petition for post-conviction relief, alleging that Counsel was ineffective. On appeal, he maintains that Counsel was ineffective because he did not: (1) seek an independent DNA expert; (2) challenge the jury pool's racial makeup; (3) thoroughly impeach the victim; (4) make proper and timely objections to inadmissible evidence; (5) prepare the Petitioner to testify at trial. The Petitioner also asserts that the cumulative effect of these errors warrants relief. The post-conviction court held a hearing where the parties presented the following evidence.

The Petitioner testified that Counsel began representing him in October 2017, after the preliminary hearing. The Petitioner agreed that Counsel would meet with him, but he found the visits unproductive. He said that Counsel never showed him audio or video discovery related to his case. The Petitioner stated that he had many concerns that he shared with Counsel, but Counsel never followed through with investigating those concerns. For example, the Petitioner told Counsel that the victim had "extort[ed]" other men before by accusing them of rape. When asked how he knew this information, he responded, "[j]ust word around everybody." The Petitioner stated that Counsel never reported back to him about investigation into the victim's prior "lies" against other men.

The Petitioner met with the defense investigator and shared the name of a man, Arnold Newsome, that the victim had "done this [to] before." He also told the defense investigator that the victim had a "pill problem," and the names of witnesses who could testify to the victim's "pill problem." The defense investigator never "reported" to the Petitioner any information resulting from an investigation of these concerns.

The Petitioner testified that he also wanted Quinton Smith and Ashley Butts to testify on his behalf, and Counsel ignored this request. Counsel's disregard for the Petitioner's concern caused the Petitioner to feel that he was not a participant in his own defense. Counsel never discussed possible punishments with the Petitioner or DNA evidence. The Petitioner first learned of the DNA evidence in this case at his "412 hearing." At the hearing he learned that "the DNA on [the victim's] panties was not [his], that was Greg Sanders'[s] DNA." The Petitioner was puzzled why Counsel did not challenge "that" or object to "it" at trial.

The Petitioner testified that, before trial, he had "concerns" about Counsel. The Petitioner felt that Counsel did not take "it" seriously. He asserted that there was "stuff" that Counsel did not present to the jury that he should have. Further, Counsel provided no explanation for why this evidence was not presented to the jury. The Petitioner wanted the first police interview of the victim played for the jury so the jury could "check the tone of her voice," and this did not happen. The audio disc of victim's police interview was entered into evidence at the post-conviction hearing.

The Petitioner did not testify at trial. He stated that he wanted to testify but that Counsel failed to prepare him to testify. This lack of preparation made the Petitioner "uneasy," so he did not testify. The Petitioner stated that Counsel did not allow the Petitioner any input in jury selection. The Petitioner was concerned that "there was no black people in the jury pool that they could have pulled from." The Petitioner stated that he "was the only black guy in the courtroom." From the very start of the trial, the Petitioner did not have confidence in Counsel because "everything that [the Petitioner] was aiming for, [Counsel] ignored."

The Petitioner stated that he communicated with Counsel during the trial, but Counsel was dismissive of the Petitioner's concerns which prevented the Petitioner from participating in his defense. The Petitioner wanted Counsel to object to the DNA evidence. Counsel responded that it was better for the evidence to come in because it shifted the focus to Greg Sanders as a possible perpetrator.

On cross-examination, the Petitioner testified that Counsel should have objected to the DNA evidence, the trial court failing to give a jury instruction on missing evidence, and an all-white jury. About the DNA evidence, the Petitioner confirmed that he understood that his DNA was found in the victim. His concern about the DNA evidence, however, was that the lead detective and the Public Defender Office's private investigator were the ones who took the DNA sample from the Petitioner, and he believed someone from the Tennessee Bureau of Investigation ("TBI") should have taken the DNA sample.

The Petitioner agreed that the jury convicted him of the lesser-included offense of rape rather than aggravated rape. When asked if he thought that Counsel "did a pretty good job" obtaining a lesser offense as to the highest charge, the Petitioner responded, "I don't think so. Because I kept telling him I didn't do this." He stated that his conviction was reflective of all the things Counsel "missed."

The Petitioner agreed that he waived his right to testify at trial during a hearing. He explained that he did so because he had a criminal record. He then stated that "even if I wanted to testify on my behalf, . . . we didn't ever prepare." He agreed that he "ultimately made the choice not to testify."

Counsel testified that he was appointed to represent the Petitioner after the Petitioner had "already had a couple of circuit court attorneys;" thus, the Petitioner already had discovery that he carried with him in a large net bag. Once Counsel received discovery from the State, he mailed the Petitioner all he received, which included paper discovery and audio/video evidence. Counsel recalled that the Petitioner was at "Riverbend," which created a challenge to playing the audio recordings. Counsel stated that he brought the

audio recordings to the Petitioner. Counsel testified that he discussed with the Petitioner both the victim's and the Petitioner's statements to the police. Counsel testified that he listened to all recordings provided by the State and discussed those recordings with the Petitioner.

Counsel recalled that he and the Petitioner disagreed about the legal implications of some of the statements in the recordings. Counsel explained to the Petitioner that there were rules about the admissibility of evidence and why certain statements were not useful to the case. Specifically, Counsel testified that he talked with the Petitioner about why the victim's drug usage and a dismissed criminal charge would not be admissible at trial. Additionally, Counsel believed that there were evidentiary rules that prevented the admission of the victim's first statement to the police for purposes of allowing the jury to hear the tone of her voice. Counsel recalled that there was tension during these discussions about inadmissible evidence the Petitioner wanted introduced at trial.

Counsel testified that he did not object when the State asked the victim about Greg Sanders's violent nature. He explained that this was a strategic decision because it raised questions about why the victim chose to go to the residence in the first place. Further, it allowed the jury to consider that the injury to the victim was caused by Mr. Sanders rather than the Defendant. Counsel believed this strategy was reflected in the jury's verdict of rape rather than aggravated rape that required a showing of injury.

About the Petitioner's allegation that Counsel should have objected in closing argument to the State's reference to him as a liar, Counsel stated:

> I think that at this point in the trial things were rather heated. I think that throughout the trial there were several instances where [the Petitioner] was telling me, much like in our phone conversations, things to say, things to do. So plenty of times in that trial I was running client control, and - - but no, I should have objected to that.

Counsel added that ultimately, he did not believe an objection would have changed the outcome in the Petitioner's trial.

The Petitioner sat with Counsel at trial and spoke with Counsel about his views on strategy and how he believed each witness should be cross-examined; however, these strategies often did not comply with the Rules of Evidence. Based upon his interactions with the Petitioner, Counsel knew he needed to "make sure" the Petitioner remained calm during trial while also paying attention to the trial testimony.

Counsel testified that, before trial, he reviewed the elements of the offenses with the Petitioner and the potential punishments. He discussed sentencing with the Petitioner again in preparation for the sentencing hearing. Counsel estimated that he spoke with the Petitioner by phone weekly in preparation for the trial and that he made approximately six visits to Riverbend where the Petitioner was housed.

Counsel agreed that he employed an investigator who communicated with the Petitioner. The defense investigator shared information from the Petitioner with Counsel and then Counsel had to determine, considering court rules, what to do with that information. Counsel stated that he believed the Petitioner participated in his defense, as was evidenced by the defense witnesses in this case who were identified by the Petitioner.

Counsel testified that he did not believe an independent DNA expert was necessary in this case. Counsel found no issues with the chain of custody of the evidence and believed the evidence was going to be admitted. Further, although the DNA evidence linked the Petitioner to the crime, it also introduced a third party to the crime – Mr. Sanders. Counsel confirmed that it was a strategic decision not to object to the testimony and DNA evidence related to Mr. Sanders. Counsel "100%" believed that the victim's testimony that Mr. Sanders was violent, in addition to the DNA evidence, helped the defense case. He discussed with the Petitioner how he felt that "we were going to beat the" aggravated rape charge, which is what ultimately occurred with the jury convicting of the lesser-included offense of rape.

Counsel testified that he was prepared to cross-examine the victim as a major witness in the case and that he conducted a very thorough and lengthy cross-examination of the victim. Counsel did not see an opportunity to play her audio-recorded statement to the police at trial, but had there been the opportunity, he would have attempted to introduce it. Counsel did not attempt to introduce evidence of a charge the victim received because the charge was dismissed and he believed it was inadmissible.

Counsel testified that he never challenged the racial makeup of the jury and that he did not know the racial makeup of Cheatham County. He further agreed that there were no *Batson* challenges made during jury selection. Counsel testified that he discussed with the Petitioner the pros and cons of testifying, and ultimately the Petitioner decided he did not want to testify. Counsel discussed with the Petitioner pretrial what he would testify to at trial, if he chose to do so, and Counsel was prepared to question the Petitioner if he chose to testify.

On cross-examination, Counsel testified that the defense theory was that the victim went to the house that night where persons that she had orders of protection against were present. She went to the house to get drugs, and she performed sex acts to obtain the drugs.

Counsel could not recall whether the defense investigator spoke with the victim, and he did not remember telling the investigator to speak with the victim. Counsel knew that the victim was likely to be hostile and, therefore, Counsel believed the exchange would have been futile.

Counsel agreed that the Petitioner's case was his first criminal trial. He agreed that he did not have a background in forensic biology, but he maintained that the DNA evidence arguably helped the defense case. Counsel acknowledged that an all-white jury was "a concern of ours" but that he did not suspect that any of the jurors was racist. Counsel stated that he struck some of the potential jurors but, obviously, he could not "strike them all." Counsel did not believe that the Petitioner was prosecuted because of race, but he understood the Petitioner's concern that he was a Black man charged with rape of a Caucasian "girl" in Cheatham County.

The post-conviction court noted that it had been almost six years since the Petitioner's trial. Given that additional experience for Counsel, the post-conviction court asked if Counsel now would do anything differently. Counsel responded that the only thing he would change would be to object to the State's rebuttal closing argument. Upon further questioning, he stated that he did not believe that this would have changed the outcome of the trial.

After hearing this evidence, the post-conviction court issued a written order denying relief. It is from this judgment that the Petitioner appeals.

II. Analysis

On appeal, the Petitioner maintains that Counsel was ineffective because he did not: (1) seek an independent DNA expert; (2) challenge the jury pool's racial makeup; (3) thoroughly impeach the victim; (4) make proper and timely objections to inadmissible character evidence and statements made during the State's rebuttal closing argument; and (5) prepare the Petitioner to testify at trial. The Petitioner also contends that cumulative error warrants relief in this case. The State responds that the trial court properly denied relief.

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

choices applies only if the choices are informed ones based upon adequate preparation.'" *House*, 44 S.W.3d at 515 (quoting *Goad*, 938 S.W.2d at 369).

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

A. DNA Expert

The Petitioner argues that because his case "hinged on complex forensic DNA evidence," Counsel was ineffective for failing "to engage expert assistance." He asserts that this decision could not be strategic. The State responds that the Petitioner failed to establish that Counsel was ineffective regarding the DNA evidence. We agree with the State.

Counsel testified that he did not believe an independent DNA expert was necessary in this case. Moreover, he believed the evidence of DNA from a third party, Mr. Sanders, helped the Petitioner's case. Counsel believed the evidence of Mr. Sanders's violent nature and the DNA evidence contributed toward the jury's conviction of the lesser-included offense of rape. At the post-conviction hearing, the Petitioner did not present the testimony of an independent DNA expert. He testified that his concern centered around the fact that a TBI agent was not present when his DNA sample was obtained. The post-conviction court concluded that the Petitioner had failed to prove his allegation by clear and convincing evidence.

It is well established that when a petitioner contends trial counsel failed to discover, interview, or present a witness in support of his defense, the petitioner must generally call that witness to testify at an evidentiary hearing. *State v. Black*, 794 S.W.2d 752 (Tenn. Crim. App. 1990). Indeed, this is the only way the petitioner can establish:

> that (a) a material witness existed and the witness could have been discovered but for counsel's neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner.

Id. at 757; *see also Taylor v. State*, 443 S.W.3d 80, 85 (Tenn. 2014) ("Our Court of Criminal Appeals has observed that, '[a]s a general rule, . . . the only way [a] petitioner can establish' that trial counsel improperly failed to interview a witness is by calling the witness to testify at the post-conviction hearing" (quoting *Black*, 794 S.W.2d at 757 and alterations and omission in original)). Thus, even if a petitioner is able to show counsel was deficient in the investigation of the facts or in failing to call a known witness, the petitioner is not entitled to post-conviction relief unless he also produces that material witness at his post-conviction evidentiary hearing who "(a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called." *Black*, 794 S.W.2d at 758.

These principles apply equally to claims that trial counsel should have retained or called an expert witness to testify. *See, e.g., Delosh v. State*, No. W2019-01760-CCA-R3-PC, 2020 WL 5667487, *1, *9 (Tenn. Crim. App. Sept. 23, 2020), *perm. app. denied* (Tenn. Jan. 14, 2021); *Canales v. State*, No. E2020-01040-CCA-R3-PC, 2021 WL 3363454, at *5 (Tenn. Crim. App. Aug. 3, 2021), *perm. app. denied* (Tenn. Nov. 12, 2021). The Petitioner here did not present the testimony of a DNA expert at the post-conviction hearing. Because we may not speculate as to how this expert would have testified had the witness been presented, we conclude that the post-conviction court properly denied post-conviction relief on this ground. The Petitioner is not entitled to relief.

B. Racial Makeup of the Jury

The Petitioner contends that Counsel was ineffective for failing to investigate the composition of the jury pool. The State responds that the Petitioner has waived review of this issue because the Petitioner did not raise this issue in his *pro se* petition or either of the two amendments to the petition. We agree with the State.

A post-conviction petitioner generally waives a ground for relief where he or she does not include the ground in the petition. *See* T.C.A. § 40-30-110(c) ("Proof upon the petitioner's claim or claims for relief shall be limited to evidence of the allegations of fact in the petition."); Tenn. Sup. Ct. R. 28, § 8(D)(4) ("The hearing shall be limited to issues raised in the petition."). The statutes also provide that a petitioner may amend the petition within thirty days or at any other time upon a showing of good cause. *See* T.C.A. § 40-30-107(b)(2). Further, the post-conviction court may permit an amendment to the petition, even during the evidentiary hearing, "when the presentation of the merits of the cause will otherwise be subserved." Tenn. Sup. Ct. R. 28, § 8(D)(5).

Importantly, though, this court does not have the authority to consider a post-conviction issue that was not raised in the original petition or a recognized amendment. *See State v. Bristol*, 654 S.W.3d 917, 927 n.4 (Tenn. 2022) ("The legislature has eliminated

this discretion [to consider unpresented or unpreserved issues] in post-conviction proceedings."). Our supreme court has made clear that we may consider a post-conviction issue on appeal only when that issue (1) was formally raised in the post-conviction petition or an amendment; or (2) was argued at the evidentiary hearing and was decided by the post-conviction court without objection by the State. *See Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020) ("Tennessee appellate courts may only consider issues that were not formally raised in the post-conviction petition if the issue was argued at the post-conviction hearing and decided by the post-conviction court without objection.").

In this case, the Petitioner did not raise this issue in his original petition or either of the two amended petitions filed. There was minimal questioning during the post-conviction hearing about the racial makeup of the jury. Counsel testified that he did not know the racial makeup of Cheatham County and that he did not challenge the racial makeup of the jury. Finally, the post-conviction court did not address this issue because it was not raised in the post-conviction petition, as amended, or clearly raised as a freestanding issue during the post-conviction hearing. *Id.*

Accordingly, we conclude that the Petitioner has waived this issue.

C. Impeachment of the Victim

The Petitioner argues that Counsel "ignored multiple lines of potent impeachment." He asserts that Counsel ignored the victim's prior criminal conduct, prior inconsistent statements, and allegations of prior false accusations.

1. Victim's Prior Criminal Conduct

The Petitioner argues that the victim's prior theft charge that was dismissed should have been used to impeach the victim. He contends that this evidence would have been admissible pursuant to Tennessee Rule of Evidence 608(b), that allows specific instances of conduct to be used if probative of truthfulness.

Tennessee Rule of Evidence 608(b) provides that a witness may be questioned regarding specific instances of conduct "for the purpose of attacking . . . the witness's character for truthfulness." Upon request, the trial court must hold a jury-out hearing to "determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry[ ]" prior to questioning regarding a specific instance of conduct. Tenn. R. Evid. 608(b)(1). Generally, the specific conduct must have occurred within ten years before the commencement of the prosecution, but older conduct may be admissible

The extent of the proof offered at the post-conviction hearing supporting this issue was Counsel's testimony that he thoroughly prepared for cross-examination of the victim and extensively cross-examined the victim. He did not attempt to impeach the victim with a prior dismissed theft charge. However, "proof of deficient representation by omission requires more than a speculative showing of a lost potential benefit." *Owens v. State*, 13 S.W.3d 742, 756 (Tenn.1999). In short, other than the Petitioner's bare assertion, the Petitioner offered no proof regarding the actual existence of the charge, the date of the charge, and whether there was a sufficient basis for the trial court to allow questioning on this alleged charge during trial. Without such proof, we can only speculate as to any prejudicial effect on the Petitioner's defense. The Petitioner, therefore, has not offered clear and convincing evidence that Counsel rendered ineffective assistance, and he is not entitled to relief.

2. Victim's Prior Inconsistent Statements

The Petitioner asserts that Counsel failed to cross-examine the victim about prior inconsistent statements made at the preliminary hearing. The Petitioner, however, did not include in the record a transcript from the preliminary hearing. Moreover, even were this court to *sua sponte* take judicial notice of the preliminary hearing, the Petitioner does not identify the alleged inconsistent statements; thus, effectively precluding this court from any type of meaningful review.

As previously stated, a petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-210(f). The Petitioner in this case has failed to meet this burden. Our review of the record before us does not bear out that Petitioner's Counsel failed to effectively cross-examine the victim at trial. This court has noted that "cross-examination is a strategic and tactical decision of trial counsel, which is not to be measured by hindsight." *State v. Kerley*, 820 S.W.2d 753, 756 (Tenn. Crim. App. 1991); *see also Hellard v. State*, 629 S.W.2d 4, 9 (Tenn.1982). Counsel testified at the post-conviction hearing that he was well-prepared to cross-examine the victim and believed he effectively did so. In its written order, the post-conviction found that Counsel had discussed any inconsistent statements with the Petitioner and cross-examined the victim about those inconsistencies. We may not second-guess Counsel's tactics on appeal. *See id*. We also acknowledge the unique difficulty of cross-examining the victim at trial concerning the sensitive issue of sexual abuse. We conclude that the Petitioner failed to carry his burden of proving this allegation by clear and convincing evidence. He is not entitled to relief.

3. Prior False Accusations

The Petitioner argues that Counsel failed to call Quinton Smith and Ashley Butts who allegedly could have testified regarding prior false claims made by the victim. As discussed earlier in this opinion, the only way to prevail on this claim is by calling these witnesses to testify at the post-conviction hearing. The Petitioner did not present the testimony of Quinton Smith or Ashley Butts at the post-conviction hearing. This court will not speculate as to what their testimony might have been. The Petitioner is not entitled to relief.

D. Failure to Object

The Petitioner asserts that Counsel was ineffective because he failed to object to testimony that Mr. Sanders was violent and he failed to object to improper comments made during the State's rebuttal closing argument.

1.Character Evidence

The Petitioner contends that Counsel should have objected to "highly prejudicial evidence" of the Petitioner's association with Mr. Sanders, who was characterized as "violent." The State responds that the admission of this evidence was helpful to the defense theory and therefore, not deficient. We agree with the State.

Counsel testified that he did not object to the introduction of testimony that Mr. Sanders was violent because it aided in the defense theory that the victim "went to that house to go get drugs and with known people which she had an order of protection against and performed sex acts for those drugs." This allowed the jury to find that someone other than the Defendant caused the victim's injuries. Counsel testified that he believed the success of this strategy was reflected in the jury's conviction of the lesser-included offense of rape rather than the charged offense of aggravated rape. The post-conviction court found that the Petitioner had not proven that Counsel was deficient in this respect. We agree.

This court is to show deference to matters of strategy and tactical choices that are informed choices based upon adequate preparation.'" *House*, 44 S.W.3d at 515 (quoting *Goad*, 938 S.W.2d at 369). Here, Counsel chose not to object to allow evidence that the victim willingly went to the residence of a "violent" person, Mr. Sanders. Mr. Sanders was present at the time of the rape and interacted with the victim. Moreover, Mr. Sanders's DNA was found on the victim's vaginal swab. Counsel made a strategic decision to introduce to the jury a third party who could be responsible for the victim's injuries, thereby undermining the State's ability to prove aggravated rape beyond a reasonable doubt. It is quite possible that it was this strategy that resulted in the jury finding the Petitioner guilty of the lesser-included offense of rape.

Accordingly, we conclude that the Petitioner has failed to show by clear and convincing evidence that Counsel was deficient by not objecting to testimony about Mr. Sanders' violent character. Counsel's decision was strategic and based upon his preparation for trial. The Petitioner is not entitled to relief as to this issue.

2. The State's Improper Closing Argument

The Petitioner contends that Counsel was ineffective because he did not object during the State's rebuttal closing to the State referencing the Petitioner as a "liar," which implicitly vouched for the victim's perceived truthfulness. He also argues that Counsel should have objected to the State's "inflammatory remarks" that attacked the Petitioner's truthfulness. The State maintains that the Petitioner has failed to establish that Counsel was ineffective. We agree with the State.

This court has previously considered "whether the failure to object during a closing argument is generally sufficient for a showing of ineffective assistance of counsel." *Payne v. State*, No. W2008-02784-CCA-R3-PC, 2010 WL 161493, at *15 (Tenn. Crim. App. Jan.15, 2010), *perm. app. denied* (Tenn. May 10, 2010) (citation omitted); *see Brooks v. State*, No. M2010-02451-CCA-R3-PC, 2012 WL 112554, at *14 (Tenn. Crim. App. Jan.11, 2012), *perm. app. denied* (Tenn. May 16, 2012). Trial counsel's decisions of whether to object to the arguments of opposing counsel "'are often primarily tactical decisions.'" *Brooks*, 2012 WL 112554, at *14 (quoting *Payne*, 2010 WL 161493, at *15). Trial counsel could refrain from objecting for several valid tactical reasons, including not wanting to emphasize unfavorable evidence. *Payne*, 2010 WL 161493, at *15. As a result, "testimony from trial counsel as to why he or she did not object to the allegedly prejudicial remarks is essential to determine whether trial counsel was ineffective." *Brooks*, 2012 WL 112554, at * 14.

On direct appeal, this court concluded that the argument was improper and then considered whether the verdict should be overturned based on the improper argument. After considering the significant weight of the evidence against the Defendant, this court concluded that the State's references did not affect the jury's verdict. At the post-conviction hearing, Counsel agreed that he should have objected, but Counsel stated that he did not believe it would have affected the jury's verdict. Counsel explained, and the post-conviction court accredited this testimony, that Counsel did not object because he "was running client control during the trial" and believed it was important to keep his client calm during the trial.

As we earlier stated, to prevail on an ineffective assistance of counsel claim, the Petitioner must show that counsel performed deficiently and that the deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687. Because a petitioner must establish both

deficiency and prejudice to prove ineffective assistance of counsel, a court need not address both prongs where a petitioner has failed to establish one of them. *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697).

In order to be entitled to relief, the Petitioner must show that the defense was prejudiced by Counsel's performance. On direct appeal, this court reviewed the issue related to closing argument and determined that "the prosecution's references did not affect the jury's verdict." Therefore, Petitioner cannot show a reasonable probability that the outcome of his trial would have changed had Counsel objected to the prosecution's statements.

Accordingly, we conclude that the Petitioner has failed to establish ineffective assistance of counsel as to this issue. *See Strickland*, 466 U.S. at 693-94. The Petitioner is not entitled to relief.

E. The Petitioner's Decision to Testify

The Petitioner argues that Counsel inadequately prepared him to testify at trial. The State responds that this claim is waived for failure to present the issue in the post-conviction petition, amendment, or at the post-conviction hearing. The State contends that this is evidenced by the State's failure to argue this issue at the hearing and the post-conviction court's failure to address the issue in its written order.

Although arguably vague, the second amended petition asserts that Counsel failed to "properly prepare and communicate with the Petitioner." Our review of the record also shows that there was some testimony at the post-conviction hearing about preparation for the Petitioner testifying, and the post-conviction court made findings as to this issue in its written order. Thus, we decline to conclude that this issue is waived.

At the post-conviction hearing, the Petitioner testified that he did not testify at trial because Counsel's failure to prepare him made him feel "uneasy." On cross-examination, he agreed that he waived his right to testify at trial during a hearing and that he did so because of his criminal record. He then stated that "even if I wanted to testify on my behalf, . . . we didn't ever prepare," before concluding that he "ultimately made the choice not to testify." Counsel testified that he prepared the Petitioner to testify and discussed with the Petitioner the pros and cons of testifying. Counsel stated that ultimately it was the Petitioner's decision not to testify. About this issue, the post-conviction court credited Counsel's testimony finding that Counsel "discussed with the Petitioner regarding testifying and the advantages and disadvantages of doing so."

The evidence does not preponderate against the post-conviction court's findings about this issue. Both the Petitioner and Counsel testified that it was the Petitioner's decision not to testify. The Petitioner first noted that his decision not to testify was based on the lack of preparation but later acknowledged that he chose not to testify based upon his criminal record. Counsel testified that he was prepared to question the Petitioner if the Petitioner chose to testify and that he discussed the pros and cons of testifying with the Petitioner.

Accordingly, the Petitioner has failed to show by clear and convincing evidence that Counsel was deficient in this respect and that the alleged deficiency prejudiced him. The Petitioner is not entitled to relief as to this issue.

F. Cumulative Error Doctrine

The Petitioner claims that the cumulative effect of Counsel's errors deprived him of effective assistance of counsel. The cumulative error doctrine requires relief when "multiple errors [are] committed in the 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, 76-77 (Tenn. 2010) (internal citations omitted); *see State v. Jordan*, 325 S.W.3d 1, 79 (Tenn. 2010) ("'[T]he combination of multiple errors may necessitate . . . reversal . . . even if individual errors do not require relief.'") (quoting *State v. Cribbs*, 967 S.W.2d 773, 789 (Tenn. 1998)). When considered "in the context of an ineffective assistance of counsel claim, cumulative error examines the prejudicial effect of multiple instances of deficient performance." *Harris v. State*, No. E2022-00446-CCA-R3-PC, 2022 WL 17729352, at *9 (Tenn. Crim. App. Dec. 16, 2022) (citation and internal quotation marks omitted), *perm. app. denied* (Tenn. Apr. 18, 2023).

Because the Petitioner has not established multiple instances of deficiency, he is not entitled to relief via the cumulative error doctrine. *Hester*, 324 S.2.3d at 77.

III. Conclusion

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

S/ *ROBERT W. WEDEMEYER*
ROBERT W. WEDEMEYER, PRESIDING JUDGE