

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 21, 2023 Session

FILED

06/07/2023

Clerk of the
Appellate Courts

WILLIAM ROLANDUS KEEL v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Davidson County
No. 2013-A-673 Angelita Blackshear Dalton, Judge**

No. M2022-00089-CCA-R3-PC

The Petitioner, William Rolandus Keel, appeals the denial of his petition for post-conviction relief from his convictions for two counts of rape of a child, arguing that the post-conviction court erred in not admitting relevant evidence consisting of a recorded phone call (“Phone Call Recording” or “recording”) between the victim and her mother, in limiting the Petitioner’s testimony at the remand evidentiary hearing, in finding that the Petitioner received the effective assistance of counsel, and in denying post-conviction relief when the Petitioner is “one hundred percent innocent and [was] wrongfully convicted.” Based on our review, we affirm the judgment of the post-conviction court.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and TOM GREENHOLTZ, JJ., joined.

Daniel J. Murphy, Lewisburg, Tennessee, (on appeal and at hearing), for the appellant, William Rolandus Keel.

Jonathan Skrmetti, Attorney General and Reporter; T. Austin Watkins, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and Chad Butler, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS and PROCEDURAL HISTORY

Trial

The Petitioner was charged by the Davidson County Grand Jury with two counts of rape of a child and tried before a Davidson County Criminal Court jury. His first trial, in which he was represented by an attorney (“trial counsel”), ended in a hung jury and a mistrial. He represented himself at the second trial with the assistance of trial counsel as elbow counsel. The second trial concluded with the jury’s convicting the Petitioner of both counts as charged in the indictment, and the trial court’s sentencing him to an effective term of sixty years at 100% in the Department of Correction. At the Petitioner’s request, trial counsel was appointed to represent the Petitioner in the motion for new trial and in the direct appeal. The Petitioner’s convictions were affirmed by this court on direct appeal, and our supreme court denied his application for permission to appeal. *State v. William Rolandus Keel*, No. M2016-00354-CCA-R3-CD, 2017 WL 111312, at *1 (Tenn. Crim. App. Jan. 11, 2017), *perm. app. denied* (Tenn. Apr. 13, 2017). Our direct appeal opinion provides the following summary of the evidence presented at trial:

The State’s proof at trial showed that the victim [] was born in June 2000 and lived with her grandparents and her younger siblings in Nashville. At some point in 2011 or early 2012 when the victim was either 10 or 11 years old, the victim and the [Petitioner], who was her then-stepfather, were playing the board game Monopoly in the [Petitioner]’s bedroom; the bedroom was located on one side of the duplex owned by the victim’s grandmother. During the course of the game, the [Petitioner] and the victim “came up with a bet” that if the victim won, she would “get ungrounded,” and if the [Petitioner] won, he could “do whatever.” After the [Petitioner] won the game, he instructed the victim to turn around. When he told her to turn back toward him, his genitals were exposed. The [Petitioner] forced the victim to sit on the ground, used his hands to forcibly open her mouth, and he placed his penis inside her mouth. The victim could not recall the length of time of the assault, and she did not see the [Petitioner] ejaculate. The [Petitioner] told the victim “not to tell anybody or it would happen again.” Following the assault, the victim returned to her grandmother’s side of the duplex. She testified that she told no one because she “was too scared . . . of what he said.”

The victim testified that the second incident occurred at the residence of the [Petitioner] and the victim’s mother when the victim was “[a]round 11” years of age. The [Petitioner] came to the victim’s grandmother’s house one morning to drive the victim to school, and while en route to school, the victim told the [Petitioner] that she needed to use the restroom. The

[Petitioner] stopped at the house in Donelson. When the victim came out of the bathroom, the [Petitioner] was “standing right there.” She attempted to shut the bathroom door, but the [Petitioner] pushed it open, causing the victim to fall to the floor. The [Petitioner] had again exposed his genitals and forced his penis into the victim’s mouth. The victim denied that she saw the [Petitioner] ejaculate, and she testified that this assault did not last “too long” because she “had to get to school.” The [Petitioner] then drove the victim to school, and the victim did not immediately tell anyone about the assault because she “was scared that he would do it again.”

The victim eventually informed her grandmother [] that the [Petitioner] had “made [her] put his private part in [her] mouth.” [The victim’s grandmother] then contacted law enforcement officers.

Denise Alexander, a forensic social worker with Our Kids Clinic, conducted a pediatric forensic medical examination of the victim on March 22, 2012. Ms. Alexander found the victim to be “outgoing and friendly” until Ms. Alexander mentioned the [Petitioner]’s name, at which time the victim “became very quiet and stated [that] she didn’t like him very much.” At that point, the victim “refused to speak about [the [Petitioner]] any further.” The victim denied that anyone had ever touched her inappropriately. Ms. Alexander explained that such denials are “not uncommon” during interviews with suspected child sexual abuse victims.

Lori Littrell, a physician assistant at Our Kids Clinic, performed the physical portion of the victim’s forensic medical examination. Ms. Littrell found no “trauma or visible injury” to the victim, which she testified was not uncommon. Ms. Littrell testified that, because the time period from the victim’s initial disclosure to [the victim’s grandmother] until the victim’s examination was greater than 72 hours, she knew “the likelihood of recovering any type of DNA” would be “pretty much non-existent.”

Charlsi Legendre, senior forensic interviewer with the Nashville Children’s Alliance, testified that her organization provides forensic interviews and counseling services for minor victims of sexual abuse and other victims of severe physical abuse and neglect. Ms. Legendre explained that one of her former employees had conducted a forensic interview of the victim in May 2012. Through Ms. Legendre’s testimony, the State introduced into evidence and played for the jury a video recording of the victim’s forensic interview, during which the victim described the incidents

of sexual abuse perpetrated by the [Petitioner] following the game of Monopoly and inside the bathroom at the [Petitioner]'s house.

With this evidence, the State rested. Following the trial court's denial of the [Petitioner]'s motion for judgments of acquittal and a *Momon* colloquy, the [Petitioner] elected not to testify but did choose to present other proof.

Kenneth Hardy testified that he had been previously employed as a case manager with the Department of Children's Services ("DCS"). Mr. Hardy stated that, on June 29, 2011, he conducted a home visit at the residence of [the victim's grandmother] and spoke with the victim. Mr. Hardy explained that "[s]omeone reported to [DCS] something concerning these children" and that he was the case manager assigned to conduct "a physical view of the children in their home." When Mr. Hardy interviewed the victim, she told him that she was not afraid of the [Petitioner]; that she had received "a whooping with a paddle" approximately two years prior but that she had never been injured; and that her mother was currently incarcerated. Mr. Hardy testified that the victim did not mention anything about sexual abuse during the interview.

Rashondalyn Nixon testified that she had been a case manager with DCS in 2012 and that she had been present on the night that the victim accused the [Petitioner] of sexual abuse. Ms. Nixon reviewed her notes from her interview with the victim and testified that, with respect to the Monopoly incident, the victim stated that she had lost the game and the [Petitioner] "made her look at his body part."

Id. at *1-2. The issues the Petitioner raised in the direct appeal of his convictions were whether the trial court erred by denying his motion to compel production of DCS records, whether the trial court erred in excluding the testimony of his expert witness, and whether his sentence was excessive. *Id.* at *2.

Post-Conviction Proceedings

The Petitioner filed a timely petition for post-conviction relief, which was denied by the post-conviction court after evidentiary hearings held on September 14, 2018, February 6, 2019, and February 21, 2019. The Petitioner then appealed to this court, arguing, among other things, that he was deprived of a full and fair hearing by the post-conviction court's limiting of his testimony about his post-conviction claims. *William*

Rolandus Keel v. State, No. M2019-00612-CCA-R3-PC, 2020 WL 5407489, at *1 (Tenn. Crim. App. Sept. 9, 2020). We affirmed many of the post-conviction court’s rulings but remanded for the Petitioner to be afforded the opportunity to testify with respect to his allegations that trial counsel provided ineffective assistance in the motion for new trial and on appeal. *Id.* Before summarizing the Petitioner’s testimony at the remand evidentiary hearing, we will review the relevant portions of our summary of the three earlier evidentiary hearings.

At the first evidentiary hearing, trial counsel provided the following testimony:

[Trial c]ounsel testified that he was appointed to represent the Petitioner on the rape of a child charges and that he represented the Petitioner through the first trial that resulted in a hung jury and mistrial. After the mistrial, the Petitioner asked the trial court to appoint Frank Mondelli, and [trial c]ounsel transferred the Petitioner’s file to Mr. Mondelli, who was also representing the Petitioner on a civil matter. At some point, Mr. Mondelli’s representation of the Petitioner on the rape charges ended, and the trial court requested [trial c]ounsel serve as “elbow counsel” for the Petitioner’s second trial due to his familiarity with the case. [Trial c]ounsel agreed, and the Petitioner represented himself during the second trial and was convicted. Following the second trial, the Petitioner asked [trial c]ounsel to represent him on the motion for new trial and appeal, and [trial c]ounsel agreed.

About serving as “elbow counsel” during the second trial, [trial c]ounsel said that he largely viewed his role as a resource for the Petitioner should the Petitioner need assistance. He recalled an issue that arose during the second trial related to introduction of a recorded police interview with the Petitioner. Based upon [trial c]ounsel’s involvement with the first trial, he was aware that portions of the interview were ruled inadmissible and that the State had created a redacted copy for trial; however, during the second trial, when the State played the recording, [trial c]ounsel realized that it was the unredacted recording and intervened. The trial court gave the jury a curative instruction, and the State played the redacted version of the interview. He explained that he believed that it was an oversight where the State “simply pulled the wrong CD.” Other than this involvement, [trial c]ounsel “had no interaction in the second trial.”

[Trial c]ounsel testified that, following the conviction in the second trial, he began representing the Petitioner at the Petitioner’s request. He consulted with the Petitioner about various appellate issues prior to filing the

appeal. [Trial c]ounsel stated that the Petitioner “correspond[ed] with [him] regularly,” but [trial c]ounsel did not specifically recall a request for “an amended appeal.” He recalled the Petitioner identifying the introduction of the unredacted recording as possible prosecutorial misconduct, but [trial c]ounsel did not raise it on appeal. He explained that he was uncomfortable asserting prosecutorial misconduct based upon an inadvertent mistake. Furthermore, he believed any error was cured by the trial court’s instruction to disregard the incorrect recording.

[Trial c]ounsel testified that he did not recall the Petitioner asking him to raise, in either the motion for new trial or the appeal, the trial court’s denial of the Petitioner’s request for transcripts from the first trial. Neither did he recall any discussion at the second trial during which the [Petitioner] was denied transcripts from the first trial. Nonetheless, [trial c]ounsel did not believe the denial of trial transcripts would have been an appealable issue because the Petitioner “was provided with the entirety of the transcripts.”

[Trial c]ounsel recalled a recording of a phone call (“Phone Call Recording”) that the Petitioner and his wife placed to the victim. During the conversation, the Petitioner and his wife asked the victim “why would you say this about . . . [the Petitioner?]” [Trial c]ounsel reviewed the Phone Call Recording “a lot” and, after determining that this recording was not favorable to the Petitioner, he chose not to introduce it during the first trial. [Trial c]ounsel did not recall the Petitioner attempting to introduce the Phone Call Recording during the second trial but noted that he was unaware of what motions had been filed with regard to the recording before he served as “elbow counsel.” He did not recall raising any issue about the Phone Call Recording in the motion for new trial or the appeal. Further, he acknowledged that he did not raise sufficiency of the evidence on appeal but rather chose to focus on sentencing.

[Trial c]ounsel testified that the trial court admitted into evidence a video recording of the victim’s interview at the second trial, but he did not recall whether the Petitioner objected to the introduction of the video interview or whether [trial c]ounsel raised it in the motion for new trial and on appeal. [Trial c]ounsel did, however, challenge the trial court’s exclusion of expert testimony from Dr. William Bernet.

On cross-examination, [Trial c]ounsel testified that he had been practicing law for thirteen years and, since 2010, a large portion of his

practice was criminal law. [Trial c]ounsel estimated that he spent approximately 800 hours working on the Petitioner's case and considered himself "well versed in every aspect." [Trial c]ounsel stated that after sitting through the second trial, based on his experience, he raised every issue he believed was "ripe" for the motion for new trial and appeal.

Id. at *2-3.

During the second and third evidentiary hearings, the post-conviction court addressed several motions filed by the Petitioner and heard testimony of two additional witnesses with respect to the post-conviction petition. The relevant portion of our summary of what transpired at the second evidentiary hearing is below:

Motion to Obtain a Recording of the July 25, 2015 Hearing

The Petitioner next was asked about his "motion to obtain the audio with video of the July 25th hearing." The Petitioner explained that, during the July 25, 2015 hearing, the trial court told [trial c]ounsel to provide the State with a copy of the Phone Call Recording, the content of which the Petitioner interpreted as the victim recanting. Despite this instruction, [trial c]ounsel failed to do so, preventing the Petitioner from presenting the Phone Call Recording during the second trial. The Petitioner explained that he wanted the recording of the July 25, 2015 hearing to show that the trial court had told [trial c]ounsel to provide the State with the Phone Call Recording to support his claim that [trial c]ounsel was ineffective for failing to do so. The post-conviction court denied the Petitioner's request for a recording of the hearing but suggested that he request a copy of the hearing transcript.

The State then questioned the Petitioner, who agreed that [trial c]ounsel was questioned about the Phone Call Recording during the previous, September 14, 2018 hearing. He further agreed that [trial c]ounsel had testified that he had reviewed the recording and did not seek to introduce the Phone Call Recording because the content was not beneficial to the Petitioner. The State then offered to provide the second trial transcript for further discussion of this motion at the next hearing. The post-conviction court retracted the earlier ruling denying this motion and stated that it would take this motion under advisement.

Id. at *4-5.

The relevant portions of our summary of what transpired at the third evidentiary hearing are below:

The post-conviction court then returned to the Petitioner's motion requesting a recording of the July 25, 2015 hearing. The post-conviction court stated that it had reviewed the transcript of the second trial. The post-conviction court found that the trial court had initially denied the Petitioner's request to introduce the Phone Call Recording at trial because the State had not received a copy but that the parties had litigated the issue nonetheless. The transcript indicated that the State and the trial court had reviewed the Phone Call Recording after court adjourned. The following day, the trial court found that the victim's statement during the recorded telephone conversation was not inconsistent but consistent with her trial testimony and therefore could not be admitted under the Rules of Evidence. Based upon the review of the transcript of the second trial, the post-conviction court denied the Petitioner's "motion to obtain the audio with video of the July 25th hearing."

After the post-conviction court addressed the matters it had previously taken under advisement, the Petitioner presented further testimony in support of his post-conviction petition. Charles Hale testified that he was the Petitioner's case manager at the Whiteville Correctional Facility from June 2017 until "about September." Mr. Hale stated that he placed telephone calls to [trial c]ounsel at the Petitioner's request on August 16, 2017, and August 24, 2017. On neither occasion was Mr. Hale able to speak with [trial c]ounsel, so Mr. Hale left a message instead. [Trial c]ounsel never returned the phone calls. Mr. Hale stated that he was unaware of any video conference calls arranged between [trial c]ounsel and the Petitioner or any in-person visits. On cross-examination, Mr. Hale agreed that he would not have been made aware of any written communication between [trial c]ounsel and the Petitioner.

Id. at *6 (footnote omitted).

Testimony at Remand Post-Conviction Evidentiary Hearing

At the December 14, 2021 hearing held upon our remand of the case to the post-conviction court, the Petitioner testified that he wanted trial counsel to raise the trial court's exclusion of the Phone Call Recording as an issue in the motion for new trial and on appeal, but trial counsel did not. The Petitioner stated that he asked the victim during the second

trial if her grandmother had told her that she would go to jail if she “told the police, told the Judge or the State or anybody anything different from what they talked about[,]” and the victim “said yes, on the record.” He said he attempted to introduce the Phone Call Recording to “back it up[,]” but the trial court sustained the State’s objection.

Post-conviction counsel then attempted to introduce a copy of the Phone Call Recording as an exhibit to the evidentiary hearing. The State objected, arguing that the “issue was litigated ad nauseum[,]” and that the substance of the phone call was irrelevant to whether trial counsel was ineffective for not raising the issue in the motion for new trial and on appeal. Post-conviction counsel responded that the substance of the recording was “pertinent to whether or not [trial counsel] should have brought it up on the motion for new trial[,]” and cited *Goad v. State*, 938 S.W.2d 363 (Tenn. 1996), for the proposition that there are limits to the deference afforded to trial counsel’s strategic decisions. The post-conviction court would not allow post-conviction counsel to play the recording in open court but marked it as an exhibit for identification purposes only, with the post-conviction court reserving its ruling on its admissibility pending further research into the law.

When the Petitioner’s testimony resumed, he agreed that the State objected at trial to the introduction of the Phone Call Recording on the basis that it had not been disclosed in discovery. He testified that the trial court adjourned to take the matter under advisement. When court resumed the next day, the trial court allowed argument on the issue but ultimately excluded the Phone Call Recording because a copy had not been provided to the State in discovery and because it was not a prior inconsistent statement.

With respect to the trial court’s exclusion of the evidence on the basis that the Petitioner had not provided it in discovery, the Petitioner testified that a former lawyer, who had passed away, gave the State notice of the existence of the Phone Call Recording in his response to discovery at the beginning of the proceedings before the first trial was held. As for the trial court’s exclusion of the Phone Call Recording on the basis that it was not admissible as a prior inconsistent statement, the Petitioner expressed his opinion that the trial court misinterpreted the evidence and stated the reason he wanted it played for the jury:

Q. Okay. What about the claim that it’s a prior inconsistent statement, not a prior inconsistent statement?

A. Well, um, it wouldn’t be a prior inconsistent statement, because what she said on there was the truth. It wasn’t an inconsistent statement. It was never mentioned before.

Q. Right.

A. And I was trying to use it to impeach her.

The Petitioner testified that in the Phone Call Recording, the victim said that her grandmother had told her that “if she told the truth that it didn’t happen that she’d go to jail.” He agreed that the statement was slightly different from what he initially asked the victim at trial. He further agreed that he inquired in a sidebar if he could ask the victim if she ever acknowledged to her mother “that the truth is that this did not happen[,]” and that the trial court allowed the question but told him that he was “stuck with whatever the answer is.” He said the victim’s response was, “I don’t think I ever have.” The Petitioner testified that the victim was lying and that he wanted to play the Phone Call Recording “[t]o impeach her and to show the motive.” The Petitioner acknowledged that the victim’s grandmother responded “no” when he asked her if she ever told the victim that she could go to jail if she changed her story about what had happened. He stated that the Phone Call Recording would have also proved that the grandmother was lying.

When asked how the Phone Call Recording came about, the Petitioner explained that the victim called the victim’s mother when the Petitioner and the victim’s mother were together at the mile-long yard sale in Watertown and that the victim’s mother put the call on speaker phone. According to the Petitioner, during that unrecorded phone conversation, the victim said, “Mommy, I told Meme the truth that [the Petitioner] didn’t do that to me and Meme told me if I told the truth it didn’t happen I’d go to jail. I’m scared, Mommy.” The Petitioner testified that the victim’s mother called the victim back the following day and recorded the conversation to confirm what the victim had told her in the previous day’s unrecorded phone conversation.

The Petitioner testified that he attempted multiple times to contact trial counsel to discuss the issue, but he never heard from trial counsel after the guilty verdicts were returned. He said he wrote trial counsel “letters, upon letters, upon letters” and “even went to his case manager Charles Hale,” who “verified [at the earlier evidentiary hearing] that [trial counsel] never contacted [the Petitioner] back when he tried to call him” and never came to see the Petitioner.

The Petitioner testified that the trial court granted his pretrial motion to prevent Detective Ferrell from saying anything that could be construed as his opinion on the truthfulness of the victim. As a result of that ruling, the Petitioner’s recorded interview with Detective Ferrell was redacted to eliminate prejudicial portions, including where Detective Ferrell stated that he, the district attorney, and the DCS case manager could tell when a victim was lying and that the victim in this case was telling the truth. The Petitioner

stated that during the trial, the State played the original version, and the jury “heard the whole unredacted CD.” He said when he realized what was happening, he looked at trial counsel and saw him holding his phone underneath the table texting someone. Trial counsel put his phone down, and a second later, the prosecutor picked up his phone, looked over at trial counsel, and stopped the proceedings. The Petitioner testified that the parties approached the bench and that he and trial counsel “objected to it because some of the things were already said.” The trial court responded by issuing a curative jury instruction, but the Petitioner believed it was insufficient because “you can’t paint a pink polka dotted elephant in front of a jury and tell them to disregard it.” He said trial counsel raised the issue in the motion for new trial but did not raise it on appeal. The Petitioner stated that he did not find trial counsel’s rationale for not raising the issue on appeal to be sufficient because, regardless of whether the playing of the unredacted CD was accidental rather than intentional, the jury’s having heard it prejudiced his case.

The Petitioner testified that he also wanted trial counsel to raise as an issue in the motion for new trial and on appeal the trial court’s having allowed the State’s expert witnesses, Lori Littrell and Denise Alexander, to testify about common characteristics of sexually abused children. He said their testimony was the same type of testimony that he had sought to introduce through his excluded expert witness, Dr. William Bernet. He provided the following example of testimony that he believed to be objectionable:

A. - - and, uh, I believe the question was asked, um, to her didn’t [the victim] say and deny that these things ever happened to her and instead of saying yes, and leaving the question at that she goes on to say something around the lines, I can’t quote what she said exactly, but she, she portrayed it as though, but, uh, children lie.

The Petitioner said he did not object to the testimony at trial because he “didn’t want to bring the issue of Dr. B[ernet]¹ in front of the jury.” However, he believed it was plain error and that trial counsel should have raised it in the motion for new trial and on appeal.

The Petitioner also thought that trial counsel should have raised in the motion for new trial and on appeal issues related to the sufficiency of the evidence and the trial court’s failure to comply with the provisions of Tennessee Code Annotated section 24-7-123 in determining the admissibility of the forensic interview of the victim. He thought trial counsel should have raised an issue regarding the trial court’s failure to comply with Tennessee Code Annotated section 24-7-123 because the forensic interviewer was not

¹ Dr. Bernet’s name is incorrectly spelled as “Burnette” in the transcript of the post-conviction evidentiary hearing.

qualified and used improper coercive tactics and leading questions. He thought trial counsel should have raised an issue regarding the sufficiency of the evidence because the only proof at trial consisted of “he said, she said” evidence. Moreover, had he been permitted “to provide the evidence that [he] wanted to provide,” the proof “would have clearly showed that [he] was actually innocent[.]”

On cross-examination, the Petitioner acknowledged it was the prosecutor who stopped the playing of his unredacted police interview, and that he did not object prior to the prosecutor’s actions. He insisted that the entire CD was played before the prosecutor stopped the recording. He conceded the trial transcript appeared to show otherwise, reflecting that the prosecutor told the trial court that he thought they were “about to get into something [that they] were not supposed to.” Nonetheless, the Petitioner was adamant that the jury heard the entire unredacted interview: “I don’t care what the transcripts say. I know I was there. They played the entire tape.” The Petitioner testified that he asked trial counsel to raise the issue on appeal, but trial counsel did not.

The Petitioner acknowledged that he failed to object to the State’s expert witnesses and repeated that it was because he did not want to mention Dr. Bernet in front of the jury. He also cited the exclusion of Dr. Bernet’s testimony as the reason he failed to file a motion in limine to exclude the victim’s forensic interview, asking, “And how am I going to argue it if the expert child psychologist wasn’t allowed to be used?”

On January 14, 2022, the post-conviction court entered an order sustaining the State’s objection to the introduction of the Phone Call Recording as an exhibit to the post-conviction proceedings. The post-conviction court found that trial counsel made an informed decision based on adequate preparation in his determination of which issues to raise on appeal, and, as such, that the content of the recording had “no bearing on the existence of any fact that is of consequence to the determination of [trial counsel’s] effectiveness in his representation of [the Petitioner.]”

On January 19, 2022, the post-conviction court entered a lengthy written order denying the petition for post-conviction relief. Among other things, the court reviewed the merits of the omitted issues before finding that the Petitioner failed to show that trial counsel was deficient for not raising the issues. This appeal followed.

ANALYSIS

On appeal, the Petitioner contends that the post-conviction court erred in not admitting the Phone Call Recording as an exhibit at the evidentiary hearing, in limiting the Petitioner’s testimony to trial counsel’s representation at the motion for new trial and on

appeal, in finding that the Petitioner received the effective assistance of trial counsel, and in denying the Petitioner post-conviction relief “notwithstanding the fact that [he] is actually innocent of the charges[.]”

With respect to the ineffective assistance of counsel claim, the Petitioner argues that trial counsel provided ineffective assistance in his first trial by not impeaching the victim with the Phone Call Recording and not moving for a mistrial and then seeking to bar a retrial on double jeopardy grounds due to what he characterizes as “blatant prosecutorial misconduct” in the State’s closing argument. He argues that trial counsel provided ineffective assistance in the motion for new trial and on appeal by not raising the following issues: whether the trial court erred by not allowing the Petitioner to impeach the victim with the Phone Call Recording; whether the trial court erred by allowing the State to play the unredacted police interview that exposed the jury to prejudicial information; whether the trial court erred in allowing testimony by the State’s expert witnesses about the characteristics of sexually abused children “as a means of justifying the alleged victim’s initial denial of sexual abuse during her forensic interview”; whether the trial court erred by failing to follow the provisions of Tennessee Code Annotated section 24-7-123 for the admission of the victim’s forensic interview; whether the trial court erred by not allowing the Petitioner to impeach the victim with statements she made during the first trial; and whether the evidence was sufficient to sustain the convictions.

Post-conviction relief “shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103. The petitioner bears the burden of proving factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. *See Wiley v. State*, 183 S.W.3d 317, 325 (Tenn. 2006). When reviewing factual issues, the appellate court will not reweigh the evidence and will instead defer to the post-conviction court’s findings as to the credibility of witnesses or the weight of their testimony. *Id.* However, review of a post-conviction court’s application of the law to the facts of the case is *de novo*, with no presumption of correctness. *See Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court’s findings of fact. *See Dellinger v. State*, 279 S.W.3d 282, 294 (Tenn. 2009).

To show ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel’s performance was deficient and that counsel’s deficient performance

prejudiced the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* standard is a two-prong test:

First, the defendant 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 defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, *see Strickland*, 466 U.S. at 690, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. *See Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006).

The prejudice prong of the test is satisfied by showing a reasonable probability, *i.e.*, a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Courts need not approach the *Strickland* test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697; *see Goad*, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

The test used to determine whether appellate counsel was constitutionally effective is the same test applied to claims of ineffective assistance of counsel at the trial level. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004). "The determination of which issues to raise on appeal is generally within appellate counsel's sound discretion." *Id.* at 887

(citations omitted). “Deference to counsel’s tactical choices, however, applies only if such choices are within the range of competence required of attorneys in criminal cases.” *Id.* (citing *Campbell v. State*, 904 S.W.2d 594, 597 (Tenn. 1995)). In determining whether trial counsel was ineffective for not raising an issue on appeal, the reviewing court examines the issue to determine its merits. As our supreme court explained:

If a claim of ineffective assistance of counsel is based on the failure to raise a particular issue, as 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 888-89 (citations omitted). In conducting an evaluation of the merits of an omitted issue, our supreme court adopted the following non-exhaustive list of factors to be considered:

- 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?

Id. at 888 (quoting *Maples v. Coyle*, 171 F. 3d 408, 427-28 (6th Cir. 1999)).

I. Phone Call Recording as Exhibit to Post-Conviction Proceeding

The Petitioner contends that the post-conviction court erred by sustaining the State's objection to the Phone Call Recording as an exhibit to the evidentiary hearing, arguing that the content of the recording was relevant and necessary to prove his ineffective assistance of counsel claim. The State agrees the recording should have been admitted and considered by the post-conviction court because it was relevant to whether trial counsel was ineffective for not raising the exclusion of the Phone Call Recording as an issue on appeal. The State argues, however, that because the issue was meritless, the post-conviction court properly found that trial counsel's failure to raise the issue did not constitute ineffective assistance of counsel.

Generally, questions concerning the admissibility of evidence are left to the sound discretion of the trial court, whose decision will not be disturbed on appeal absent an abuse of discretion. *Pylant v. State*, 263 S.W.3d 854, 870 (Tenn. 2008) (citations omitted). An abuse of discretion occurs when the trial court applies an incorrect legal standard, reaches an illogical or unreasonable decision, or bases its decision on a clearly erroneous assessment of the evidence. *State v. Mangrum*, 403 S.W.3d 152, 166 (Tenn. 2013) (citation omitted).

"The Tennessee Rules of Evidence apply in post-conviction proceedings except as otherwise provided by these rules." Tenn. R. Sup. Ct. 28, § 3(A). Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Relevant evidence is generally admissible, subject to certain exceptions. Tenn. R. Evid. 402.

Because the content of the Phone Call Recording was relevant to whether the trial court erred in excluding the recording at trial, it was also relevant to whether trial counsel provided ineffective assistance by not raising the trial court's exclusion of the recording as an issue in the motion for new trial and on appeal. Accordingly, we agree with the Petitioner that the Phone Call Recording should have been admitted as an exhibit to the hearing. However, we also agree with the State that the content of the recording shows that the issue was meritless, as we discuss in further detail later in this opinion.

II. Limitation of Testimony at Remand Hearing

The Petitioner contends that the post-conviction court erred by limiting his testimony at the remand evidentiary hearing to his allegations that trial counsel provided ineffective assistance at the motion for new trial and on appeal. Specifically, he argues that he should have been allowed to testify with respect to his allegations that trial counsel provided ineffective assistance at his first trial by not impeaching the victim with the Phone Call Recording and not moving for a mistrial based on the prosecutor's allegedly improper closing argument and then seeking a dismissal of the case on double jeopardy grounds. The Petitioner acknowledges that this court remanded the case for testimony "about Counsel's representation during the motion for new trial and on appeal[.]" *William Roludus Keel*, 2020 WL 5407489, at *8. The Petitioner suggests, however, that the above language must have been a "scrivener's error" because the reason for the remand was that he was not previously afforded the opportunity to testify with respect to his ineffective assistance of counsel claim, and his ineffective assistance of counsel claim included allegations of ineffective assistance "beyond the scope of his motion for new trial and his appeal[.]" The State responds that the post-conviction court properly complied with this court's explicit directions by limiting the Petitioner's testimony upon remand. We agree with the State.

In our opinion addressing the Petitioner's first post-conviction appeal, we noted that the "Petitioner was never allowed the opportunity to testify about the reasons the Petitioner believed Counsel was ineffective at trial as it related to the motion for new trial and on appeal." *Id.* at *7. Thus, we remanded the case to the post-conviction court "for a hearing at which the Petitioner may testify about Counsel's representation during the motion for new trial and on appeal[.]" *Id.* at *8. A trial court's authority on remand is limited to the directions it receives from the appellate court. *Weston v. State*, 60 S.W.3d 57, 59 (Tenn. 2001); *Raleigh Commons, Inc. v. SWH, LLC*, 580 S.W.3d 121, 129-30 (Tenn. Ct. App. 2018); *State v. Darlene Renee Blackhurst*, No. E2002-01249-CCA-R3-PC, 2003 WL 21920251, at *6 (Tenn. Crim. App. Aug. 12, 2003), *perm. app. denied* (Tenn. Feb. 2, 2004). As we explained in *Darlene Renee Blackhurst*:

The appellate court directs actions and dictates results through its orders, judgments, and mandates and may limit the scope of a remand. Such orders and mandates are controlling, and the lower court does not have the authority to expand the directive or purpose of the higher court imposed upon remand. Otherwise, there would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decision.

2003 WL 21920251 at *6 (citations and internal quotations omitted). Accordingly, we agree with the State that the trial court did not err in its limitation of the testimony at the remand evidentiary hearing.

We further agree with the State that the Petitioner is not entitled to post-conviction relief based on his allegations of ineffective assistance of counsel at his first trial. First, as the State points out, this court observed in a similar case that “[t]he Post-[C]onviction Procedure Act does not contemplate a collateral attack on a proceeding that did not result in a judgment.” *David Neal Davis v. State*, No. M2012-02643-CCA-R3-PC, 2014 WL 1260610, at *11 (Tenn. Crim. App. Mar. 27, 2014), *perm. app. denied* (Tenn. Aug. 27, 2014); *see also Emma Jean Bilbrey v. State*, No. 03C01-9711-CR-00498, 1998 WL 827080, at *6 (Tenn. Crim. App. Dec. 1, 1998), *perm. app. denied* (Tenn. Apr. 19, 1999) (concluding that trial counsel’s alleged ineffective assistance in cross-examining a witness at a first trial “will not provide a basis for post-conviction relief from the conviction in the second trial”); *but see Sentoria Lawand Young v. State*, No. M2010-01762-CCA-R3-CD, 2011 WL 3630128, at *4 (Tenn. Crim. App. Aug. 18, 2011), *perm. app. denied* (Tenn. Nov. 16, 2011) (addressing whether trial counsel’s failure to seek a mistrial with prejudice in order to raise double jeopardy as a bar to retrial constituted ineffective assistance of counsel).

Second, as the State also points out, the Petitioner’s allegations of ineffective assistance based on trial counsel’s performance at his first trial were not raised in his petition or considered by the post-conviction court. The Petitioner’s allegation that trial counsel was ineffective for not impeaching the victim at the first trial with the Phone Call Recording was never raised in his petition. As for the double jeopardy argument, the Petitioner alleged in his petition only that trial counsel was ineffective “during the appeal process related to Petitioner’s second trial” for not raising as an issue the trial court’s denial of the Petitioner’s pro se objection to retrial on double jeopardy grounds. As such, even if tenable, the Petitioner’s allegations based on trial counsel’s representation during his first trial would be waived.

III. Ineffective Assistance During Motion for New Trial and on Appeal

The Petitioner next contends that the post-conviction court erred in finding that he received effective assistance of counsel in the motion for new trial and on appeal. The Petitioner argues that trial counsel was deficient in his representation by not raising various meritorious issues in the motion for new trial and/or on appeal, thereby prejudicing the outcome of his case.

A. Phone Call Recording

We begin with the issue on which the Petitioner appears to most heavily rely in support of his petition: trial counsel's failure to raise the trial court's exclusion of the Phone Call Recording as an issue in the motion for new trial and on appeal. The Phone Call Recording consists of a brief snippet of what was clearly a longer conversation. In the clip, a woman, presumably the victim's mother, asks, "Whenever I talked to you yesterday when I was at the mile-long yard sale and you said something about if you told the truth that it didn't happen, that Meme said you would go to jail. Is that right?" A child, presumably the victim, says in a slightly exasperated tone, "Yes."² The same CD contains two additional portions of a telephone conversation between the victim and the victim's mother. In the second recorded clip, the victim's mother, again asking leading questions, and in a slightly badgering tone, unsuccessfully attempts to get the victim to admit that the victim overheard a conversation between a neighbor and the neighbor's boyfriend in which the neighbor spoke of having been molested by "some guy" when she was a young child. In the third recorded clip, the victim and her mother hold a longer conversation about what each is doing. At the beginning of the clip, the victim says to "tell Billy I forgive him for what he did."

As previously discussed, the post-conviction court did not consider the actual recording in its determination of whether the Petitioner was entitled to post-conviction relief. Instead, the post-conviction court found that if the victim's statement on the recording was what it was purported to be, it would not have been inconsistent with her affirmative response to the Petitioner's query of whether the victim's grandmother told the victim that if she "told police, the judge, or prosecutors anything differently that what they talked about, [the victim] would go to jail." The post-conviction court noted that there was no rule of evidence that would have allowed for the introduction of a conversation between the victim and the victim's mother to impeach the grandmother's testimony. The post-conviction court further noted that there was no indication that the Petitioner renewed his attempt to introduce the Phone Call Recording after the victim's response to the Petitioner's follow-up question of whether she had ever acknowledged to her mother that the allegations were not true. Finally, after noting trial counsel's testimony that he thought the Phone Call Recording would not have been beneficial to the Petitioner's case, the post-conviction court concluded that trial counsel "exercised reasonable discretion based on his experience and professional judgment in determining whether to raise this issue in the motion for new trial or on appeal."

² Given the nature of the recording, which clearly contains edited snippets of a longer conversation, we have purposefully avoided characterizing the "yes" by the victim as an answer to the question.

The record supports the findings and conclusions of the post-conviction court. The trial transcript reflects that the prosecutor initially objected to the recording on the basis that it was hearsay and had not been provided in discovery. The following day, the Petitioner responded to the discovery objection by handing the trial court what was apparently a 2013 response to discovery filed by the Petitioner's former lawyer, since deceased, which mentioned the existence of the recording.

The prosecutor then renewed the State's objection to the introduction of the recording, citing the fact that a copy had never been provided to the State, that the recording was not authenticated, that it contained hearsay, and that it was not a prior inconsistent statement. In sustaining the objection, the trial court stated that there were several different reasons to exclude the recording, including that the State was never provided with a copy and that the recorded statement was not inconsistent with the victim's previous day's trial testimony. The trial court granted permission for the Petitioner to ask the victim if she had ever told her mother that the truth was that the incidents did not happen but warned that the Petitioner would be bound by the victim's answer. The Petitioner then asked the victim if she ever acknowledged to her mother "that the truth is that this didn't happen?" The victim responded, "I don't think I ever have." During the remainder of the lengthy and wide-ranging cross-examination by her accused rapist, the victim maintained that her allegations against the Petitioner were true, testifying that she told the truth to the DCS workers and that she was not worried about going to jail because she was not a liar.

As the trial court observed in its ruling, there were a number of valid reasons to exclude the Phone Call Recording from trial, not the least of which was the Petitioner's failure to provide a copy to the State in discovery. Moreover, the small snippet of conversation that the Petitioner asserts contains the victim's recantation would not have necessarily helped his case, whereas the additional portions of conversation would have clearly been detrimental. Even assuming, *arguendo*, that the Petitioner could have authenticated the recording, under the rule of completeness he would not have been allowed to pick and choose only those one or two sentences that he believed would be beneficial. *See* Tenn. Rule Evid. 106. Undoubtedly, that is the reason trial counsel wisely chose not to attempt to introduce the recording at the first trial. Because there was no merit to this issue, the Petitioner cannot show that trial counsel provided ineffective assistance by not raising the exclusion of the Phone Call Recording as an issue in the motion for new trial and on appeal.

B. Unredacted Police Interview

The Petitioner argues that trial counsel was ineffective for not raising as an issue on appeal the State's playing of the Petitioner's unredacted police interview in front of the

jury. In denying relief on the basis of this allegation, the post-conviction court noted trial counsel's testimony that he believed the playing of the unredacted interview was unintentional and that the trial court appropriately addressed the issue in its curative instruction to the jury. The post-conviction court then concluded that trial counsel exercised his professional judgment and was not deficient in his representation for not raising the issue on appeal.

The record supports the findings and conclusions of the post-conviction court. There is no evidence that would suggest that trial counsel was wrong in his assessment that the playing of the unredacted interview was anything other than inadvertent, or that the error was not appropriately handled by the trial court in its curative jury instruction. As such, the Petitioner cannot show that trial counsel provided ineffective assistance by not raising this issue on appeal.

C. Testimony of State's Expert Witnesses

The Petitioner argues that trial counsel was ineffective for not raising as an issue in the motion for new trial and on appeal whether the trial court committed plain error by allowing the State's expert witnesses to testify about the common characteristics of sexually abused children. Specifically, the Petitioner objects to the State's witnesses having explained inconsistencies in the victim's accounts by testifying that it is not uncommon for sexually abused children to initially deny sexual abuse, when the Petitioner's expert witness, who would have testified that the victim was asked leading and suggestive questions, was not allowed to testify.

In denying relief on the basis of this allegation, the post-conviction court reviewed the doctrine of plain error and the merits of the issue before finding that the Petitioner failed to demonstrate that a clear and unequivocal rule of law was breached or that a substantial right was adversely affected by the State's expert witnesses' testimony. The post-conviction court, therefore, concluded that the Petitioner failed to show that trial counsel was deficient in his representation for not raising the issue in the motion for new trial and on appeal.

We, again, conclude that the record supports the findings and conclusions of the post-conviction court. As the post-conviction court observed, the Petitioner failed to provide "any legal basis that would have prohibited the testimony of the State's expert witnesses at trial[.]" Moreover, "[a]n error would have to [be] especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error." *State v. Page*, 184 S.W.3d 223, 231 (Tenn. 2006); *see also Lemar Brooks v. State*, No. M2010-02451-CCA-R3-PC, 2012 WL 112554, at *17 (Tenn. Crim.

App. Jan. 11, 2012) (“Appellate counsel testified that because the issue had been waived it would have had to been analyzed using the plain error standard, and that he did not feel he would have been successful under such a strict standard. Appellate counsel made a sound professional judgment in deciding not to pursue this issue and we will not second guess that judgment here.”).

The Petitioner has not met his burden of demonstrating that trial counsel provided ineffective assistance by not raising this issue in the motion for new trial and on appeal.

D. Admission of Victim’s Forensic Interview

The Petitioner argues that trial counsel provided ineffective assistance by not raising as an issue of plain error in the motion for new trial and on appeal the trial court’s alleged failure to comply with the provisions of Tennessee Code Annotated section 24-7-123 in admitting the forensic interview of the victim.

In denying relief on the basis of this allegation, the post-conviction court, noting that the Petitioner failed to file a motion in limine to exclude the interview under Tennessee Code Annotated section 24-7-123, found that the issue did not rise to the level of plain error because the Petitioner could not demonstrate that a clear and unequivocal rule of law was breached or that a substantial right was adversely affected. The post-conviction court, therefore, concluded that the Petitioner failed to show that trial counsel was deficient in his representation by not seeking plain error review of the issue in the motion for new trial and on appeal.

The record, once again, supports the findings and conclusions of the post-conviction court. The trial record shows that the Petitioner filed a pro se “Motion to Suppress Forensic Interview” on July 22, 2015, in which he argued that the interview violated his due process and confrontation rights because the victim was not under oath, only the victim and the interviewer were present, and the interviewer coerced the victim into making false accusations by the use of a faulty methodology. On September 10, 2015, the trial court issued an oral ruling on that motion, stating that it had “ruled on that the last time that we had this trial with a jury in here and that motion is going to be denied[.]” The trial record does not contain the trial court’s previous ruling on the issue.

At the evidentiary hearing, the Petitioner testified that he did not file a motion in limine to exclude the interview on the grounds that it did not comply with the provisions of Tennessee Code Annotated section 24-7-123 because he relied on his expert witness to offer testimony that the interview was coercive and suggestive, and his expert witness was excluded from trial. Trial counsel’s evidentiary hearing testimony, which was accredited

by the post-conviction court, established that he was an experienced defense attorney, that he had spent hundreds of hours working on the case, and that he made an informed decision to raise the issues on appeal that he believed had the best chance at success. The Petitioner has not shown that trial counsel was deficient for not raising this issue in the motion for new trial and on appeal, or that he was prejudiced by trial counsel's failure to do so.

E. Impeachment with Testimony from First Trial

The Petitioner argues that trial counsel provided ineffective assistance by not raising as an issue in the motion for new trial and on appeal whether the trial court erred by not allowing him to impeach the victim with her testimony from his first trial. The trial transcript reflects that the trial court quickly put an end to the Petitioner's attempts to do so, admonishing the Petitioner that the jury was not to even know that there had been a previous trial. Although the Petitioner alleged in his petition that trial counsel was ineffective for not raising the issue on appeal, he offered no testimony in support of the allegation during his evidentiary hearing, and the post-conviction court did not address it in its order denying the petition. As such, we conclude that the Petitioner has waived our consideration of this issue on appeal. “[I]ssues not addressed in the post-conviction court will generally not be addressed on appeal.” *Lane v. State*, 316 S.W.3d 555, 561-62 (Tenn. 2010) (quoting *Walsh v. State*, 166 S.W.3d 641, 645-46 (Tenn. 2005)).

F. Sufficiency of the Evidence

The Petitioner argues that trial counsel was ineffective for not raising in the motion for new trial or on appeal the issue of whether the evidence was sufficient to sustain his convictions. In denying relief on the basis of this claim, the post-conviction court observed that the jury, the finder of fact, found the Petitioner guilty of the offenses beyond a reasonable doubt after consideration of all the evidence in the case. The post-conviction court therefore concluded that the issue was without merit, and that the trial counsel was not ineffective for not raising the issue in the motion for new trial and on appeal.

Once again, the record supports the findings and conclusions of the post-conviction court. When the sufficiency of the evidence is challenged, the relevant question of the reviewing court is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also* Tenn. R. App. P. 13(e) (“Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt.”). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the

trier of fact. *See State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973).

The victim was unwavering in her testimony about the incidents and insisted that she had not fabricated her allegations against the Petitioner. The Petitioner was able to point out inconsistencies in her accounts and to suggest reasons that she might have fabricated the allegations against him. However, by convicting the Petitioner of the indicted offenses, the jury obviously accredited the victim’s testimony, as was within its province. Trial counsel testified at the evidentiary hearing that he chose to concentrate on sentencing rather than the sufficiency of the evidence, and that he raised every issue that he thought was “ripe” in the motion for new trial and on appeal. The Petitioner has not met his burden of demonstrating that trial counsel was ineffective for not raising the sufficiency of the evidence as an issue in the motion for new trial and on appeal.

IV. Actual Innocence

Finally, the Petitioner contends that the post-conviction court erred in denying his petition for post-conviction relief because the record demonstrates his actual innocence of the crimes. A petitioner may raise a claim of actual innocence based on new scientific evidence in a petition for post-conviction relief. *See Dellinger v. State*, 279 S.W.3d 282, 290-91 (Tenn. 2009); *see also* Tenn. Code Ann. §§ 40-30-102(b)(2), -117(a)(2). Claims of actual innocence that are not based on newly discovered scientific evidence are not cognizable in a petition for post-conviction relief. *See Kevin L. French v. State*, No. M2019-01766-CCA-PC-R3, 2021 WL 1100765, at *20 (Tenn. Crim. App. Mar. 3, 2021); *Shaun Alexander Hodge v. State*, No. E2009-02508-CCA-R3-PC, 2011 WL 3793503, at *7-8 (Tenn. Crim. App. Aug. 26, 2011), *perm. app. denied* (Tenn. Feb. 15, 2012); *James W. Vanover v. State*, No. E2010-00203-CCA-R3-PC, 2011 WL 3655136, at *5 (Tenn. Crim. App. Aug. 19, 2011), *perm. app. denied* (Tenn. Oct. 18, 2011); *see also Dellinger*, 279 S.W.3d at 291 n.7. Here, the Petitioner’s claim of actual innocence is not based on newly discovered evidence, but instead on his assertion that the victim was not credible and that the proof shows that he did not commit the crimes. The Petitioner is not entitled to post-conviction relief on the basis of this claim of actual innocence.

CONCLUSION

Based on our review, we affirm the denial of the petition for post-conviction relief.

JOHN W. CAMPBELL, SR., JUDGE