FILED
07/05/2023
Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 9, 2023

# JOSHUA ALLEN FELTS v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Davidson County**
**No. 2011-B-1597 Monte Watkins, Judge**

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**No. M2022-01736-CCA-R3-PC**

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Petitioner, Joshua Allen Felts, appeals from the Davidson County Criminal Court's denial of post-conviction relief from his 2013 convictions for theft of property valued at less than $500 (Counts One and Four), attempted theft of property valued at less than $500 (Counts Two and Three), and theft of property valued at $1,000 or more but less than $10,000 (Count Five). Petitioner contends that he was denied the effective assistance of counsel based upon trial counsel's failure to: (1) file a motion to withdraw as requested by Petitioner; (2) object to a witness's hearsay testimony regarding the ownership of the stolen items in Counts One through Four; (3) challenge the value of the stolen laptop in Count Five; (4) adequately prepare for trial; and (5) adequately communicate with Petitioner. Petitioner further contends that the cumulative effect of trial counsel's errors entitles him to relief. Following our review, we affirm the post-conviction's court denial of relief as to Petitioner's conviction in Count Five; however, we reverse the denial of post-conviction relief as to Counts One through Four. We vacate the judgments of conviction in Counts One through Four and remand for a new trial on those counts.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part; Reversed in Part and Remanded**

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which JILL BARTEE AYERS and MATTHEW J. WILSON, JJ., joined.

Dustin Faeder (on appeal), Brentwood, Tennessee, and Ashley D. Preston (at hearing), Nashville, Tennessee, for the appellant, Joshua Allen Felts.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Glenn Funk, District Attorney General; and Roger D. Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

## Factual and Procedural Background

### *Trial*

This court has previously summarized the evidence presented at Petitioner's trial, as follows:

> James Collins testified at trial that one night in November 2010, he parked his Chevrolet Suburban in his driveway. The next time he went outside, he noticed that items from the vehicle were strewn about the yard. He looked at the vehicle and noticed damage to the key lock on the driver's side door. He discerned that some items were missing from the vehicle, including his laptop computer, camera, leather-bound "Day Timer," pens, and loose change. Thereafter, he learned that on the same evening, someone had broken into his next-door neighbor's garage and that another house in the neighborhood had been burglarized. Collins said that he had paid approximately $1,300 for the computer.
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> On cross-examination, Collins said that he had purchased the computer approximately three or four years prior to the theft. Collins acknowledged that he would not be surprised to learn that a three- or four-year-old computer could be purchased for $700. Collins stated that he did not know [Petitioner].
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> Williamson County Sheriff's Detective Grant Benedict testified that on January 31, 2011, he went to 3107 Gallatin Pike to serve some papers on [Petitioner]. Prior to the visit, Detective Benedict checked records related to the building and learned that [Petitioner] was the leaseholder and that the electric bill for the property was in [Petitioner's] name. The building appeared to be a single-family residence that had been converted into a tattoo parlor. At the time Detective Benedict arrived, the business was closed. Detective Benedict knocked on the back door for some time before [Petitioner] answered. Inside the premises were Charlene Wittenmore, Pamela Martin, Joshua Spurling, and [Petitioner].
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> Detective Benedict said that when he walked through the back door, he saw a kitchen area to the right. He said that the kitchen "had a lot of groceries" in it. Further inside the house were stairs leading to a bedroom where Martin and Wittenmore were located. Spurling's work area, an open

waiting area, and [Petitioner's] work area [was] on the main floor of the building.

Detective Benedict said that as he walked through the building, he found several laptop computers, an unplugged flat screen television, a stack of DVDs, a small television, tattoo equipment, and various tools. Specifically, Detective Benedict found two laptop computers around Spurling's work area, one laptop computer upstairs, and another laptop computer in the waiting area. A Garmin was found mounted on the dashboard of [Petitioner's] car. Detective Benedict became suspicious and began checking serial numbers on the laptop computers and on the Garmin. He learned that the items had been reported stolen; two of the computers and the Garmin were stolen in Williamson County, and two computers were stolen in Rutherford County.

On cross-examination, Detective Benedict said that the lease had been signed by [Petitioner] and Wittenmore. [Petitioner's] bedroom, containing a bed, dresser, and clothing, was on the second floor. [Petitioner] and Wittenmore "were in an on again, off again relationship," and she occasionally stayed in the bedroom. He said that his "understanding" was that Martin was brought in to help run the business and also occasionally stayed in the building.

Detective Benedict said that he did not investigate Spurling's background. He explained that his "understanding" was that [Petitioner] "was in control of that building." Spurling told Detective Benedict that some of the property, including the laptop computers, was given to him by [Petitioner] to use in the business.

Detective Benedict said that when he found the Garmin, he turned on the device and checked the address that was listed as the home setting. The resident at that address told Detective Benedict that a Garmin was stolen from her Chevrolet Suburban at approximately 1:00 a.m. "a night earlier." The Suburban was parked in her garage. The resident had not reported the theft because she believed the loss was insignificant.

On redirect examination, Detective Benedict said that neither Spurling, Wittenmore, nor Martin were considered suspects. He explained that Wittenmore had serious health issues and, in his view, was physically unable to commit the thefts and that Martin was merely an employee of the tattoo parlor. Further, Detective Benedict noted that [Petitioner] had grown

up in Williamson County and that none of the other people in the building had any connection with Williamson County.

On recross-examination, Detective Benedict acknowledged that people from outside Williamson County frequently came into the county to commit crimes.

Detective Benedict said that he was at the tattoo parlor to serve an arrest warrant on [Petitioner] for the burglary of a Williamson County residence.[1] [Petitioner] became a suspect in the burglary after he, Wittenmore, and Brandon Whey attempted to use a credit card that was stolen from the residence to buy $400 worth of merchandise at a Walmart in Williamson County. Wittenmore was in possession of the card. Detective Benedict said that he did not try to arrest Wittenmore but that he got an arrest warrant for [Petitioner] because he was a suspect in a series of car and home burglaries. Detective Benedict explained that [Petitioner] became a suspect in the crimes after a subdivision near the Davidson County line had a rash of car and home burglaries "over nights." During patrol, the police came across [Petitioner] in the subdivision at approximately 2:00 a.m. When the police asked [Petitioner] why he was in the area, he responded that he was lost and trying to get to Fairview. The police gave [Petitioner] directions to Fairview, and he left. However, he returned to the subdivision twenty minutes later. The police spoke with him again, and he said that his global positioning system ("GPS") was not working.

Detective Benedict did not know [Petitioner] before January 31; however, he knew that [Petitioner] had a prior conviction for burglary. In order to obtain the arrest warrant, Detective Benedict stated in the affidavit that [Petitioner] had used the stolen credit card. He explained that he had security video reflecting that [Petitioner] attempted to use the stolen credit card at an automatic teller machine. However, after [Petitioner's] arrest, he learned that Wittenmore was in possession of the card; therefore, the charges against [Petitioner] were dismissed.

Despite knowing of Wittenmore's involvement with the stolen credit card, Detective Benedict acknowledged that he focused his investigation of the stolen laptop computers on [Petitioner]. He explained, "Everybody in

[1] Despite the advice of defense counsel, [Petitioner] insisted that counsel question Detective Benedict regarding his reasons for going to [Petitioner's] property. As a result, the jury heard testimony regarding [Petitioner's] prior convictions.

that house told me that the property that [was] in there belonged to [Petitioner]; it was given to them by [Petitioner], or that [Petitioner] was using it."

Detective Benedict said he took physical possession of the four computers that were seized from the tattoo parlor. Pursuant to police procedure, the items were photographed, and three of the computers were returned to their owners. The owner of the fourth computer could not be located. The police did not attempt to find fingerprints on the computers. One of the computers was sent to the Tennessee Bureau of Investigation ("TBI") for a forensic examination, but the other three were not. Detective Benedict did not know what the examination revealed. Detective Benedict said that he was not surprised to learn that Spurling had a conviction for burglary. Nevertheless, Detective Benedict did not consider Spurling to be a suspect in the instant offenses and focused the investigation completely on [Petitioner].

On further redirect examination, Detective Benedict said that one of the laptop computers belonged to Collins. Detective Benedict stated that [Petitioner] had seven convictions for aggravated burglary; however, none of the convictions related to the burglary of an automobile.

Nashville Police Department Sergeant Bryan Brown testified for [Petitioner]. Sergeant Brown said that he arrested Spurling for theft from a motor vehicle that occurred on October 11, 2011. In that case, a window was broken, and a bag containing a laptop computer was taken.

Gidget Diane Miles testified that [Petitioner] was her younger brother. She said that [Petitioner] lived with her after he was released on parole in March 2009. She said that [Petitioner] took responsibility for his actions and that he abided by the rules she imposed, such as finding employment and being home by midnight.

Miles said that [Petitioner] found employment at Payless Tattoos. After working there for approximately one to one and one-half years, he decided to open his own tattoo parlor. He rented the property on Gallatin Road, and the business was scheduled to open in mid-February 2011. Miles knew that Spurling frequently listened to music and downloaded music onto a computer. She saw posts on Spurling's Facebook page indicating that he was selling laptop computers. Miles did not know whether [Petitioner] had laptop computers at his tattoo parlor, but she knew that he had a desktop

computer in the main reception area. Miles said that each tattoo artist was responsible for providing their own computer. Miles stated that after [Petitioner] rented the tattoo parlor, he sometimes slept in a small room upstairs. She said, "I wouldn't say that somebody could live there because there is no refrigerator, stove, running water. There's no bathroom up there."

Miles said that after [Petitioner] was arrested, she spoke with Detective Benedict. At the beginning of the conversation, Detective Benedict appeared to want to help [Petitioner]. However, by the end of the conversation, Detective Benedict appeared to want to return [Petitioner] to prison.

[Petitioner] testified that he had worked at Payless Tattoos. He decided to start his own tattoo business and rented a building on Gallatin Road. He said that the building was not fit to live in because it had no heat; the building was to be used primarily for the business. Nevertheless, [Petitioner] said: "it's my house, it's my dwelling."

[Petitioner] said he had not been aware that a warrant had been issued for his arrest. Therefore, when he opened the door of the tattoo parlor and saw Detective Benedict pointing a gun at him, he became frightened. [Petitioner] was upset when he was told he was being arrested for a burglary relating to the stolen credit card because he "knew that [he] hadn't done anything wrong."

[Petitioner] said he did not know that the laptop computers in the building were stolen and that he did not know where the police found the computers. [Petitioner] told Detective Benedict that he knew nothing about the computers and that Detective Benedict should speak to Spurling. He said that Spurling brought his own computer when he was hired. [Petitioner] asserted that the tattoo artists were responsible for bringing their own supplies to the tattoo parlor; [Petitioner] supplied only the tattoo chair.

[Petitioner] acknowledged that he had been convicted of crimes when he was younger but maintained that he was changing his life and did not commit the instant crimes. [Petitioner] said that the State could not prove its case because it could not produce the stolen property.

[Petitioner] said that the Garmin was purportedly found in his car. However, the car was titled in [Petitioner's] and his mother's names because [Petitioner's] credit was too poor to buy a car. His mother drove the car

> whenever she wanted. [Petitioner] did not drive the car very often and did not know who placed the Garmin device in the car.
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> [Petitioner] said that he had never stolen anything from a car. He said that he only burglarized houses and that he committed all of his crimes during the day when people were generally not at home.
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> On cross-examination, [Petitioner] acknowledged that he had at least thirty convictions for theft. He stated that Detective Benedict could have searched his home without a warrant because [Petitioner] was a parolee. He claimed that Detective Benedict "took property that he said that he found out of my house, and never logged it into evidence, never put fingerprints on it . . . . That right there, to me, is unjust. You know, there is a fourth amendment right that says, unreasonable search and seizures . . . . [T]hat was unreasonable."

*State v. Felts*, No. M2013-01404-CCA-R3-CD, 2014 WL 2902261, at *1-4 (Tenn. Crim. App. June 25, 2014) (footnote in original). Following deliberations, the jury convicted Petitioner of theft of property valued at $500 or less, attempted theft of property valued at $1,000 or more but less than $10,000, attempted theft of property valued at over $500 but less than $1,000, and two counts of theft of property valued at $1,000 or more but less than $10,000. *Id.* at *1. Petitioner received an effective twelve-year sentence. *Id*.

On direct appeal, Petitioner raised three issues: (1) the sufficiency of the evidence; (2) the trial court's denial of his motion to suppress; and (3) the State's failure to preserve the chain of custody for the computers and the Garmin. *Id*. at *5. The State conceded on appeal, and this court agreed, that the State failed to establish the value of the stolen items in Counts One, Two, Three, and Four. *Id*. at *10. The case was remanded to the trial court for entry of amended judgments, as follows: Counts One and Four amended to theft of property valued at less than $500, and the sentences in Counts One and Four reduced to eleven months and twenty-nine days; Counts Two and Three amended to attempted theft of property valued at less than $500, and the sentences in Counts Two and Three reduced to six months. *Id*. This court affirmed Petitioner's convictions in all other respects. *Id*.

### ***Post-Conviction Proceedings***

Petitioner subsequently filed a timely pro se petition for post-conviction relief. *Felts v. State*, No. M2020-01688-CCA-R3-PC, 2022 WL 1584835, at *1 (Tenn. Crim. App. May 19, 2022). Following the appointment of post-conviction counsel, Petitioner filed an amended petition. *Id*. Following an evidentiary hearing, the post-conviction court entered an order denying relief, and Petitioner filed a timely appeal. *Id*. at *4.

On appeal, this court summarized the testimony at the post-conviction hearing, as follows:

> [A]ppellate counsel testified that [Petitioner] retained her to represent him during his sentencing and motion for a new trial proceedings, and in the appeal from his convictions. Counsel explained that trial counsel had filed a motion to suppress and that she would have handled the motion differently. Counsel said that by the time she represented [Petitioner], the suppression issue had been litigated and she was "stuck with" what trial counsel had done. Counsel said that trial counsel did not give her a copy of [Petitioner's] file and that she did not recall having any "substantive discussions" with trial counsel about [Petitioner's] case. Counsel said that on appeal, she was successful to the extent that this court granted relief on four of the five convictions. Counsel said that the State had failed to prove the value of the stolen items related to the four convictions. Counsel said she would have used a different trial strategy and made objections that trial counsel did not. Counsel said that [Petitioner] was "very upset" with trial counsel regarding how he had handled the trial. She said that in the appeal she did the best she could "with what I had to work with."
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> [Petitioner] said that he was prepared to testify about how he received . . . ineffective assistance of trial and appellate counsel. The prosecutor objected to any testimony regarding appellate counsel's representation. The prosecutor asked the post-conviction court to limit the scope of the hearing to the issues raised in the October 12, 2017 amended petition for post-conviction relief, which did not contain allegations of ineffective assistance of appellate counsel. [Petitioner] told the court that he wanted to testify about appellate counsel's ineffective assistance, and the court responded that it had to "go by the record, as what was agreed upon with respect to this hearing. That's all I'm doing. I'm not doing anything outside of that."
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> Trial counsel testified that he began representing [Petitioner] when [Petitioner's] original counsel accepted a job in another country. Counsel said that he obtained [Petitioner's] file and began representing him "a matter of weeks" before [Petitioner's] February 2013 trial. Counsel identified his October 11, 2011 email exchange with [Petitioner's] sister. Counsel identified another document as the State's notice of intent to use [Petitioner's] previous conviction as a prior bad act for impeachment purposes, which contained a certificate of service stating it was mailed to counsel on August 5, 2011. Counsel confirmed that the documents indicated he was the counsel of record on [Petitioner's] case approximately two years

before [Petitioner's] trial. Counsel said that he had difficulty obtaining [Petitioner's] file and maintained that he only had "a matter of weeks" to prepare for the trial. Counsel identified an August 5, 2011 certificate of service indicating that he had received discovery material. Counsel stated that he did not receive discovery until late 2012 and that he could not explain why the court documents said he was served with discovery in August 2011. Counsel said that [Petitioner] was incarcerated "out of county" and that he did not remember if he reviewed the discovery materials with [Petitioner]. Counsel said that he knew the stolen items in [Petitioner's] case were stolen from a location in Williamson County but were discovered in Davidson County and that there was a potential jurisdiction problem. However, counsel said that he did not recall discussing the jurisdiction issue with [Petitioner].

Trial counsel testified that [Petitioner] gave him a list of names of people to call as potential witnesses at the trial. He said the list included several of [Petitioner's] friends and several police officers. Counsel said that he did not subpoena anyone on the list because the friends on the lists were convicted felons. Counsel said that he did not believe the police officers on the list would have been helpful witnesses because they were more likely to testify against [Petitioner]. He said he discussed this with [Petitioner] shortly before trial. Counsel said that he did not employ a private investigator to try to interview the people on [Petitioner's] witness list. Counsel said that while he now knew that [Petitioner] was a career offender, he did not know if he knew this at the time of the trial.

Trial counsel testified that he did not remember the first time he spoke to [Petitioner], but that it likely would have been after he received [Petitioner's] file, which counsel said was a few weeks before trial. Counsel said that the only times he met with [Petitioner] were at the courthouse. Counsel said that he filed a motion to continue the case "shortly before trial" but that it was denied. Counsel did not recall what he discussed with [Petitioner] regarding his trial strategy. Counsel said "it was fairly obvious" [Petitioner] had not stolen the items but that most of the recovered items were found in a commercial building [Petitioner] leased. Counsel said that he did not recall if the State extended a plea offer but that if an offer were made, he would have conveyed it to [Petitioner]. Counsel said that he did not recall speaking to [Petitioner] about [Petitioner's] wanting counsel to withdraw from [Petitioner's] case. Counsel said that he would not have proceeded to trial if [Petitioner] did not want counsel to represent him. Counsel identified a letter from [Petitioner's] sister indicating that counsel received

[Petitioner's] discovery six or seven months before trial. Counsel said that this letter "clear[ed] up quite a bit" about when he received [Petitioner's] file, and he agreed that he received it months, not weeks, prior to [Petitioner's] trial.

Trial counsel testified that his trial strategy was to show that the stolen items found at [Petitioner's] tattoo parlor were brought there by his employees because [Petitioner] had no reason to go into his employees' individual workspaces. Counsel explained the evidence showed that [Petitioner] primarily kept to "his area and his area alone." Counsel said that he discussed this strategy with [Petitioner]. Regarding the search done in [Petitioner's] case, counsel said that "today," he would have "a million concerns about it," but that at the time of [Petitioner's] trial he was not concerned. Counsel said that he discussed the search with [Petitioner] but that he did not remember if he filed a motion to suppress. Counsel reiterated that he recalled "nothing about the preparation for trial." Counsel said that he did not recall viewing any of the items seized in the search following [Petitioner's] arrest.

Trial counsel testified that he did not recall filing a motion to withdraw from [Petitioner's] case. When asked if he knew whether [Petitioner] filed pro se motions requesting that counsel be removed from [Petitioner's] case, counsel said that on the morning of trial, [Petitioner] was "okay" with counsel's representing him.

Trial counsel testified that the victim testified about only one of the five theft counts in the indictment. Counsel said a detective offered testimony regarding the remaining four counts. Counsel did not recall if he objected to the detective's testimony as hearsay. When confronted with this court's opinion from [Petitioner's] appeal from his convictions, counsel said he would not dispute the opinion's statement that counsel did not object to the detective's hearsay testimony. Counsel agreed that testimony about ownership of an item was an essential element the State needed in order to prove theft. Counsel agreed that if the State were unable to establish all of the elements of theft, those charges would fail. Counsel agreed that had he objected to [the] detective's hearsay testimony, no proof regarding ownership would have existed for four of the five theft charges.

[Petitioner] testified that trial counsel began representing him in June 2011. [Petitioner] explained that he first retained a lawyer but that original counsel transferred the case to trial counsel. [Petitioner] said that he objected

> to trial counsel taking over his case but that trial counsel did not respond to his letters. [Petitioner] said that he contacted the Board of Professional Responsibility to see if they could help him remove counsel from his case. [Petitioner] said that he filed a pro se motion to remove counsel in June 2012. [Petitioner] said that he sent counsel multiple letters requesting his withdrawal from the case, discussed withdrawal during a phone call with counsel, and asked counsel to withdraw the morning of the trial. [Petitioner] said that counsel conveyed a plea offer of two years on the morning of trial but that counsel did not explain the offer or the potential consequences of proceeding to trial.

*Id*. at *2-3 (footnote omitted).[2] In a written order, the post-conviction court denied relief, and Petitioner appealed. *Id*. at *4.

Upon review, this court determined that it was unable to properly address the merits of Petitioner's post-conviction claims because the post-conviction court failed to make sufficient factual findings and conclusions of law in its order denying relief. *Id*. at *5. This court reversed the judgment of the post-conviction court for its failure to comply with Tennessee Code Annotated section 40-30-111(b) and "remanded for findings of fact and conclusions of law regarding all of [Petitioner's] ineffective assistance of counsel claims included in [Petitioner's] pro se post-conviction petition and his amended petition." *Id*.

On remand, the post-conviction court entered a supplemental order, addressing each of Petitioner's claims, detailing its findings of fact and conclusions of law. The post-conviction court concluded that Petitioner failed to establish any of his grounds of ineffective assistance of counsel by clear and convincing evidence.

As relevant to the issues raised on appeal, the post-conviction court found Petitioner's claim that trial counsel rendered ineffective assistance by failing to file a motion to withdraw was "clearly a nonissue" because "there [was] no evidence establishing that counsel's withdrawal would have affected the outcome of the trial." The post-conviction court concluded that trial counsel was not deficient in failing to file the motion.

The post-conviction court found that trial counsel was deficient in failing to object to Detective Benedict's hearsay testimony regarding the ownership of the property that was

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[2] We note that, following appellate counsel's testimony at the post-conviction hearing, the State asked the post-conviction court to limit the scope of the hearing so that Petitioner would not be allowed to testify about allegations related to appellate counsel. The post-conviction court agreed that the hearing should be limited to the issues contained in Petitioner's amended petition for post-conviction relief. Petitioner's post-conviction counsel did not object or make an offer of proof as to Petitioner's proposed testimony relative to appellate counsel.

the subject of Counts One through Four. The post-conviction court found, however, that Petitioner did not suffer prejudice from the absence of the objection. The court noted that the owner of the property that was the subject of Count Five testified and that Petitioner received the mandatory maximum sentence of twelve years for that conviction. The court further noted that Petitioner's sentences in Counts One through Four were modified to misdemeanors following his direct appeal and that those sentences were ordered to run concurrently with Petitioner's sentence in Count Five. Thus, the post-conviction court concluded that trial counsel's failure to object to Detective Benedict's hearsay testimony did not affect the outcome of Petitioner's trial.

Regarding Petitioner's claim that trial counsel was ineffective for failing to challenge the value of the stolen property in Count Five, the post-conviction court found that Petitioner failed to establish prejudice. As to Petitioner's claim that trial counsel rendered ineffective assistance based upon trial counsel's lack of preparation for trial, the post-conviction court found that counsel filed a request for discovery and provided a copy of the discovery to Petitioner. The court also noted that trial counsel filed a pretrial motion to suppress, which was ultimately denied.

Finally, as to Petitioner's claim that trial counsel rendered ineffective assistance based on counsel's failure to communicate with him, the post-conviction court found that trial counsel spoke with Petitioner in person and communicated with him by letter. The court determined that, although trial counsel had limited meetings with Petitioner, Petitioner failed to show that he was prejudiced by any lack of communication.

This timely appeal follows.

## Analysis

On appeal, Petitioner contends that he was denied the effective assistance of counsel based upon counsel's failure to: (1) file a motion to withdraw; (2) object to Detective Benedict's hearsay testimony regarding the ownership of stolen items related to Counts One through Four; (3) challenge the value of the stolen laptop at issue in Count Five; (4) adequately prepare for trial; and (5) communicate with Petitioner. Petitioner further contends that the cumulative effect of trial counsel's errors entitles him to relief. The State responds that the post-conviction court properly denied relief on Petitioner's claims.

### *I. Standard of Review*

To prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See*

*Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court's factual findings unless the evidence preponderates against such findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). When reviewing the post-conviction court's factual findings, this court does not reweigh the evidence or substitute its own inferences for those drawn by the post-conviction court. *Id.*; *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the [post-conviction court]." *Fields*, 40 S.W.3d at 456 (citing *Henley*, 960 S.W.2d at 579); *see also Kendrick*, 454 S.W.3d at 457. The post-conviction court's conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. *Kendrick*, 454 S.W.3d at 457.

### *II. Ineffective Assistance of Counsel*

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Accordingly, this court "need not address both elements if the petitioner fails to demonstrate either one of them." *Kendrick*, 454 S.W.3d at 457. Additionally, review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Henley*, 960 S.W.2d at 579. 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).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley*, 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)); *see also Goad*, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "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); *see also Baxter*, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

### A. Failure to File a Motion to Withdraw

Petitioner asserts that trial counsel rendered ineffective assistance by failing to file a motion to withdraw as requested by Petitioner. Although Petitioner testified that he asked trial counsel to withdraw from the case multiple times, trial counsel testified that he did not recall speaking to Petitioner about Petitioner's wanting counsel to withdraw from Petitioner's case. Trial counsel said that he would not have proceeded to trial if Petitioner did not want counsel to represent him, and he specifically testified that, on the morning of trial, Petitioner was "okay" with counsel's representing him. The post-conviction court implicitly accredited trial counsel's testimony over Petitioner's in its denial of this claim. Questions concerning the credibility of the witnesses are to be resolved by the post-conviction court, *Fields*, 40 S.W.3d at 456, and this court defers to the post-conviction court's credibility determinations. *Kendrick*, 454 S.W.3d at 457. The evidence does not preponderate against the post-conviction court's findings, and Petitioner is not entitled to relief on this claim.

### B. Failure to Object to Detective Benedict's Hearsay Testimony

Petitioner contends that trial counsel rendered ineffective assistance by failing to object to the hearsay testimony of Detective Benedict on the issue of ownership of the property at issue in Counts One through Four. He argues that, had trial counsel objected to the detective's hearsay testimony, the evidence would have been insufficient to convict Petitioner on those counts. Petitioner maintains that, even though he has already served his time on Counts One through Four, "they do not belong on his record."

In denying relief on this issue, the post-conviction court found that trial counsel was deficient in failing to object to Detective Benedict's hearsay testimony regarding the ownership of the property that was the subject of Counts One through Four, and we agree. At the post-conviction hearing, trial counsel agreed that testimony about ownership of an item was an essential element the State needed in order to prove theft in Counts One through Four and that, if the State were unable to establish all of the elements of theft, those charges would fail. Trial counsel further agreed that, had he objected to the detective's hearsay testimony, no proof regarding ownership would have existed for the theft charges in Counts One through Four, and counsel offered no strategic reason for his failure to raise

a hearsay objection. Thus, we conclude that Petitioner established deficient performance on the part of trial counsel.

Moreover, Petitioner has established a reasonable probability that, but for counsel's failure to object to Detective Benedict's hearsay testimony, the jury would not have found the essential elements of theft in Counts One through Four, and the results of the proceeding would have been different. *Goad*, 938 S.W.2d at 370. First, we note that "[a] person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." Tenn. Code Ann. §39-14-103 (2010). When reviewing Petitioner's challenge to the sufficiency of the evidence on direct appeal, this court stated:

> The proof at trial established that the laptop computers were found inside a building leased by [Petitioner], that the employees told Detective Benedict that [Petitioner] gave them the laptop computers to use in the business, that one of the laptop computers was found in [Petitioner's] bedroom and one in a common area, and that the Garmin was found in [Petitioner's] car. This court has previously stated that "[p]ossession of recently stolen goods gives rise to an inference that the possessor has stolen them." *State v. Tuttle*, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995) (citing *Bush v. State*, 541 S.W.2d 391, 394 (Tenn. 1976)); *see also State v. James Ray Walker*, No. W2012-01593-CCA-R3-CD, 2013 WL 3968804, at *4 (Tenn. Crim. App. Aug. 1, 2013).
>
> Further, Detective Benedict testified without objection that the four computers and the Garmin were reported stolen. Additionally, Detective Benedict testified that Spurling told him that "some of that property that was in there was given to [Spurling] to use [in] operating his business, and among those things were the laptops that he said he was provided by [Petitioner]." Detective Benedict also testified, "Everybody in that house told me that the property that [was] in there belonged to [Petitioner]; it was given to them by [Petitioner], or that [Petitioner] was using it." Although the testimony consisted of hearsay, the defense did not object; therefore, the jury could consider the testimony as substantive evidence. *See State v. Smith*, 24 S.W.3d 274, 280 (Tenn. 2000) (citing *State v. Harrington*, 627 S.W.2d 345, 348 (Tenn. 1981); *State v. Bennett*, 549 S.W.2d 949, 950 (Tenn. 1977)). We conclude that the State sufficiently established [Petitioner's] identity as the person who stole the items.

*Felts*, 2014 WL 2902261, at *9.

In this case, the victim in Count Five testified at trial regarding his stolen laptop. The State failed to call additional victims to testify regarding their ownership of the property at issue in Counts One through Four and to testify that Petitioner did not have their effective consent to obtain or exercise control over the property; instead, the State relied upon hearsay testimony from Detective Benedict to establish those elements of theft. As noted by this court on direct appeal, because there was no objection to Detective Benedict's hearsay testimony, the jury was able to consider his testimony as substantive evidence and use that evidence to convict Petitioner in Counts One through Four. *Id*.

In its brief, the State speculates that the victims in Counts One through Four may have been at the courthouse ready to testify on the morning of trial and that trial counsel may have decided to forego making a hearsay objection to Detective Benedict's testimony "in favor of preserving the valuation issue" as to those counts on appeal. However, at the post-conviction hearing, trial counsel admitted that, had he objected to the hearsay testimony, no proof regarding ownership would have existed for the theft charges in Counts One through Four. Moreover, counsel offered no strategic reason for his failure to raise a hearsay objection.

We conclude that Petitioner established trial counsel provided ineffective assistance when he failed to object to the hearsay testimony of Detective Benedict regarding the ownership of the property in Counts One through Four and that the post-conviction court erred by denying relief on this claim. Accordingly, we reverse the post-conviction court's denial of relief as to Counts One through Four and vacate Petitioner's convictions for those charges. *See, e.g.*, *Absher v. State*, 162 N.E.3d 1141, 1145 (Ind. Ct. App. 2021). Further, we remand for a new trial on those counts.

### C. Failure to Challenge the Value of the Stolen Laptop in Count Five

Petitioner asserts that trial counsel rendered ineffective assistance based upon his failure to challenge the value of the laptop at issue in Count Five. He argues that "it is highly likely that the laptop in question was not worth $1,300 at the time it was stolen" and that trial counsel "failed to provide any . . . proof that would have helped the jury understand . . . this[.]"

At the time of the offense, theft of property valued more than $500 but less than $1,000 was a Class E felony, and theft of property valued $1,000 or more but less than $10,000 was a Class D felony. Tenn. Code Ann. § 39-14-105(a)(2)-(3) (2011). "Value" was defined as the fair market value of property at the time of the offense, or its replacement value within a reasonable time after the offense. Tenn. Code Ann. § 39-11-106(36)(A)(i)-(ii) (Effective: July 1, 2009 to June 30, 2011).

At trial, Mr. Collins testified that he was the owner of the stolen laptop at issue in Count Five and that he had purchased it for $1,300 three or four years prior to the theft. He said that he did not know what a three- or four-year-old laptop computer would cost but that he would not be surprised if it was worth as little as $700. On direct appeal, this court found that a jury could reasonably have determined that the fair market value of the laptop at the time of the theft was more than $1,000 but less than $10,000, a Class D felony. *Felts*, 2014 WL 2902261, at *10.

Petitioner asserts that trial counsel should have introduced evidence at trial to establish that the value of the computer was less than $1,300 so that Petitioner would have been convicted of a Class E felony and subject only to a mandatory six-year sentence. *See* Tenn. Code Ann. § 40-35-108(c) ("A defendant who is found by the court beyond a reasonable doubt to be a career offender shall receive the maximum sentence within the applicable Range III."); Tenn. Code Ann. § 40-35-112(c)(5) (establishing that a Range III sentence for a Class E felony is not less than 4 years nor more than 6 years). However, as acknowledged by Petitioner in his brief, "none of that potential evidence is in the [post-conviction] record[.]" At the post-conviction hearing, Petitioner failed to introduce any evidence concerning the value of Mr. Collins' laptop at the time of the offense. This court may not speculate as to the evidence that trial counsel might have introduced at trial. *See* *Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). Petitioner failed to meet his burden of establishing this ground of ineffective assistance of counsel by clear and convincing evidence. He is not entitled to relief.

### D. Failure to Adequately Prepare for Trial

Petitioner contends that trial counsel rendered ineffective assistance based on his failure to adequately prepare for trial. In denying relief on this claim, the post-conviction court found that trial counsel filed a request for discovery and provided a copy of discovery to Petitioner. Additionally, trial counsel testified that his trial strategy was to show that the stolen items found at Petitioner's tattoo parlor were brought there by his employees because Petitioner had no reason to go into his employees' individual workspaces, and counsel explained that the evidence showed Petitioner primarily kept to "his area and his area alone." Counsel said that he discussed this strategy with Petitioner prior to trial. In his brief, Petitioner makes only a conclusory assertion that counsel failed to adequately prepare for trial. He fails to identify any specific way in which trial counsel's preparation was deficient or any way in which the outcome of his trial would have been different with additional preparation. Petitioner has not established deficient performance or resulting prejudice under *Strickland*. He is not entitled to relief on this ground.

### E. Failure to Communicate with Petitioner

Petitioner contends that trial counsel rendered ineffective assistance based upon his lack of communication with Petitioner. Again, however, Petitioner fails to identify any specific way in which the outcome of his trial would have been different with additional communication from trial counsel. Petitioner's conclusory assertion in his brief that trial counsel did not adequately communicate with him does not meet his burden of establishing both the deficiency and prejudice prongs of *Strickland* by clear and convincing evidence. Petitioner is not entitled to relief on this claim.

### F. Cumulative Error

Finally, Petitioner argues that cumulative error warrants reversal in this case. The cumulative error doctrine recognizes that there may be many errors committed in trial proceedings, each of which constitutes mere harmless error in isolation, but "have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). To warrant review under the cumulative error doctrine, there must have been more than one actual error during the trial proceedings. *Id*. at 77. In other words, only where there are multiple deficiencies does this court determine whether they were cumulatively prejudicial. In this case, because we have not found more than one error, cumulative error review is unwarranted. Petitioner is not entitled to relief on the basis of cumulative error.

## *III. Petitioner's Brief*

Finally, we note that, in his brief, Petitioner formally asserts the six grounds for relief discussed above. However, at the close of Petitioner's brief, Petitioner's counsel states that he "feels compelled to notify" this court that Petitioner "makes many requests that current counsel is unable to address, in large part because the relevant material is not contained within the appellate record." Petitioner's counsel then lists Petitioner's "additional concerns," as follows:

> -[Petitioner] believes the CCA ordered not merely that the PCR Court issue an amended order, but that the PCR [Court] hold another hearing so that all of [Petitioner's] claims can be fully heard. [Petitioner] requests that additional hearing.
>
> -[Petitioner] wishes to assert ineffective assistance by his original Retained Counsel, as well as Appellate Counsel and PCR [C]ounsel.

-[Petitioner] believes that additional grounds for ineffective assistance of counsel include issues related to challenging the search & seizure, the extra-jurisdictional actions of the Williamson County officers, and the chain of custody of the allegedly stolen items.

Because these "additional concerns" are not supported by any argument, citation to authorities, or references to the record, we conclude that they are waived as potential claims for relief. *See* Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived" on appeal.); Tenn. R. App. P. 27(a)(7) (requiring a brief to contain argument, citation to authorities, and appropriate references to the record); *Sneed v. Bd. of Prof'l Resp. of Supreme Court*, 301 S.W.3d 603, 615 (Tenn. 2010) ("It is not the role of the courts . . . to research or construct a litigant's case or arguments for him or her.").

## **Conclusion**

Based upon the foregoing, we affirm the post-conviction's court denial of relief as to Petitioner's conviction in Count Five; however, we reverse the post-conviction court's denial of post-conviction relief as to Counts One through Four. We vacate the judgments of conviction in Counts One through Four and remand for a new trial on those counts.

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ROBERT L. HOLLOWAY, JR., JUDGE