

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 21, 2026 Session

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Clerk of the
Appellate Courts

KENNETH COX v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 125404 Steven W. Sword, Judge

No. E2025-00801-CCA-R3-PC

The Petitioner, Kenneth Cox, appeals the denial of his petition for post-conviction relief from his Knox County Criminal Court jury convictions of criminally negligent homicide and especially aggravated robbery, arguing that the post-conviction court erred by denying relief on his claim that he was denied the effective assistance of counsel at trial and on appeal. Because we find no reversible error, we affirm the denial of post-conviction relief.

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

STACY L. STREET, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and ROBERT H. MONTGOMERY, JR., JJ., joined.

Melissa C. DiRado, Knoxville, Tennessee, for the appellant, Kenneth Cox.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Assistant Attorney General; Charme P. Allen, District Attorney General; and Ta Kisha M. Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner's convictions of three counts of criminally negligent homicide and two counts of especially aggravated robbery relate to the June 8, 2017 shooting death of the victim, Daryl Singleton. This appeal arises from the Petitioner's unsuccessful attempt to obtain post-conviction relief from those convictions.

Factual and Procedural Background

The Knox County Grand Jury charged the Petitioner and Adam Holmes with one count of felony murder in the perpetration of robbery, *see* T.C.A. § 39-13-202(a)(2); one count of felony murder in the perpetration of theft, *see* T.C.A. § 39-13-202(a)(2); one count

of felony murder in the perpetration of burglary, *see* T.C.A. § 39-13-202(a)(2); one count of first-degree premeditated murder, *see* T.C.A. § 39-13-202(a)(1); and two counts of especially aggravated robbery, *see* T.C.A. § 39-13-403. The Petitioner’s case proceeded to trial on all counts after the trial court severed the cases.

I. Trial

The proof at trial established that the Petitioner and Mr. Holmes were with the victim in the Hyundai that the victim was driving when the victim was fatally shot on June 8, 2017.

Vanessa Clemons,¹ testified that “she heard a ‘pop’” while sorting food as a church volunteer and that when she “looked across the street,” she “saw the victim ‘leaned over in the car’ with a gunshot wound to the head.” *State v. Cox*, No. E2021-00621-CCA-R3-CD, 2022 WL 984330, at *1 (Tenn. Crim. App. Apr. 1, 2022). She saw two men exit the vehicle and run from the scene; the taller of the two exited from the front passenger seat, and the shorter of the two exited from the back passenger seat. Ms. Clemons “saw the shorter man run back to the vehicle, lean over the victim on the driver’s side, and take a duffel bag² and a ‘big, silver gun.’” *Id.* The shorter man “handed the bag and gun to the taller man,” and both men ran in the direction of what Ms. Clemons described as “a neighborhood safe house.” *Id.* Ms. Clemons identified Mr. Holmes as one of the perpetrators from a photographic lineup but was unable to identify the Petitioner as the other. *See id.*

While waiting for officers to secure the scene, paramedics Shawn Casey O’Brien and Laura O’Brien saw two black men walk “quickly” to and enter a car that had stopped in front of the waiting ambulance. *Id.* One of the two carried a black duffel bag and got into the rear passenger seat of the vehicle. *See id.* Mr. Holmes’ girlfriend, Kristin Brown, testified that she picked up Mr. Holmes and the Petitioner on the day of the shooting. *See id.* Mr. Holmes rode in the front passenger seat of her vehicle, and the Petitioner rode in the back seat. *See id.*

Knoxville Police Department (“KPD”) Investigator Jeff Day found the deceased victim in the driver’s seat of the Hyundai with the driver’s side door open. *See id.* Investigator Day testified that it appeared that a single bullet had been fired from the direction of the front passenger’s side of the vehicle. Inside the Hyundai, officers recovered the title to a different vehicle, a Caprice Classic, that showed that Mr. Holmes had

¹ At trial, Ms. Clemons’ surname was Teasley.

² Although witnesses used different terms to describe the item removed from the vehicle as a “bag”, “backpack,” or “duffel bag,” the record reflects that they were referring to the same item.

previously sold that vehicle to the victim. Officers “also found approximately \$6000 in cash inside the vehicle and a nine-millimeter shell casing under the vehicle.” *Id.*

Dominique Bailey, the victim’s girlfriend, testified that the victim had purchased the Caprice from Mr. Holmes and that he had been attempting to transfer the title to himself without success.³ Ms. Bailey said that the victim dealt drugs and that he carried cash in a black pencil case that she had last seen in her home on the morning of his death. The victim stored the pencil bag either inside his backpack or between the driver’s seat and the center console of his vehicle.

During an interview with Investigator Day, the Petitioner “initially denied being present” during the shooting and claimed, instead, that he had “heard about it on Facebook.” *Id.* at *2. Eventually, the Petitioner acknowledged that he had been in the vehicle with Mr. Holmes and the victim but maintained that he exited and ran from the vehicle before the shooting occurred. *See id.* “He also admitted that he grabbed a black backpack from the car before fleeing and that Ms. Brown picked him and Holmes up near the scene of the crime.” *Id.* The video recording of the Petitioner’s interview was played during trial.

Officers did not recover any bag from the Hyundai or elsewhere during the investigation.

Based upon this evidence, the jury acquitted the Petitioner of premeditated murder but convicted him of three counts of criminally negligent homicide as a lesser included offense of felony murder and two counts of especially aggravated robbery as charged in the indictment. The trial court merged the jury verdicts as required by law and imposed an effective sentence of 38 years’ incarceration. This court affirmed the judgments on direct appeal. *See id.* at *1, *2, *6.

II. Post-Conviction

The Petitioner filed a timely pro se petition for post-conviction relief which was later amended by counsel, in which he argued that he had been deprived of the effective assistance of counsel at trial and on appeal. As is relevant to this appeal, he claimed that trial counsel performed deficiently by failing to interview and present certain witnesses at

³ Ms. Bailey’s testimony was not summarized in this court’s opinion on direct appeal. However, “[b]ecause this court does maintain the original copy of the trial transcript as a part of the record from the petitioner’s direct appeal and because the post-conviction court relied upon the transcript in formulating its decision, we will take judicial notice of our own records to assist in our review.” *Phillips v. State*, No. M2018-00058-CCA-R3-PC, 2018 WL 4523210, at *6 (Tenn. Crim. App. Sept. 21, 2018) (citing *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009)).

trial and sentencing hearing and that the cumulative effect of trial counsel's deficient performance prejudiced him. He asserted that appellate counsel performed deficiently by failing to challenge the sufficiency of the evidence to support the robbery conviction and by failing to file a petition to rehear when this court allegedly relied on its own misstatement of his pretrial statement when assessing the sufficiency of the evidence.

At the post-conviction evidentiary hearing, Cobie Curry, who was then serving a federal prison sentence, testified that he saw the victim every day for months before his death and that on the day of the offenses, the victim planned to have the title to the Caprice transferred to his name. Mr. Curry said that although the victim had previously carried his money in a black backpack, the victim switched to a camouflage backpack and pencil bag in November 2016. He stated that the victim kept this bag on his lap or on top of the center console in his vehicle.

Ms. Howard testified that the victim carried a backpack and that she had not seen him carry "a duffel bag."

Ms. Clemons testified that trial counsel did not attempt to interview her before trial. She stated that she knew Mr. Holmes and that she saw him exit the Hyundai on the day of the shooting. She acknowledged that she identified another person whose skin was much darker than the Petitioner's as the man with Mr. Holmes. She did not remember testifying at the Petitioner's trial and, thus, did not remember that she told the jury that she was unable to identify the Petitioner.

Willie Robinson, whose palm print was found on the exterior of the Hyundai after the shooting, testified that he did not know the Petitioner but did know Mr. Holmes. Mr. Robinson invoked his Fifth Amendment privilege against self-incrimination in response to all the inquiries related to the shooting.

The Petitioner testified that he did not know that he could present witnesses at his sentencing hearing and that he would have presented the testimony of his mother and sister. He said that he read this court's opinion on direct appeal and stated that this court had misquoted his statement to police when analyzing the sufficiency of the evidence. This court quoted the Petitioner as saying, "[W]e was robbing him, and I ain't got no problem saying this was going on. But I didn't shoot." *Cox*, 2022 WL 984330, at *5. According to the Petitioner, he actually said, "If we was there robbing him, I ain't got no problem saying that, but I didn't shoot, but that wasn't what was going on." The Petitioner said that appellate counsel did not respond to his inquiry about filing a petition for rehearing in this court.

The Petitioner's mother, Kim Lewis, testified regarding the Petitioner's childhood, upbringing, family members, his relationship with his father, and the time he spent in state

custody as a juvenile. She stated that although she attended the Petitioner's trial, she did not attend the sentencing hearing because she was devastated. She said that she would have made arrangements to attend if she had been told she needed to be there.

The Petitioner's sister, Shanika Smith, testified regarding her relationship with the Petitioner and her observations of his life as a teenager and an adult. Ms. Smith stated that trial counsel did not contact her about attending the Petitioner's trial or sentencing hearing and that if asked, she would have testified at the sentencing hearing. She also stated that she did not attend any of the trial proceedings because she was struggling with personal issues that caused her difficulty in going to court.

The Petitioner's trial counsel testified that it was his practice to send an investigator to interview potential witnesses and that he did not interview witnesses himself. In the Petitioner's case, trial counsel and an investigator developed the defense strategy that Mr. Holmes was the shooter, which he said resulted in the Petitioner's being acquitted of first-degree murder. Trial counsel recalled that Mr. Curry was mentioned in the narrative of the incident report but said that nothing prompted him to interview Mr. Curry because the Petitioner was not connected to any issue related to the title of the Caprice. Trial counsel did not recall Mr. Robinson's palm print being lifted from the hood of the Hyundai but asserted that his investigator would have investigated anyone listed in the fingerprint report.

Trial counsel testified that he reviewed the presentence report prior to the sentencing hearing and that he determined that additional live testimony, including testimony from the Petitioner's family, would not meaningfully affect sentencing. He said that the Petitioner had already received mitigation in the form of an acquittal on the original charge and convictions for lesser included offenses and that he did not believe he could have further mitigated the damage done by the convictions or the sentence the Petitioner would receive.

Appellate counsel, who represented the Petitioner at the hearing on the motion for new trial and on direct appeal, acknowledged that he conceded in his brief to this court that sufficient evidence existed to support the jury's conclusion that a robbery occurred and that, in consequence, he could not credibly argue that the jury's verdict on the robbery counts was unreasonable. Instead, he chose to argue that the State failed to prove that the Petitioner was criminally responsible for Mr. Holmes' conduct in an attempt to further mitigate the Petitioner's role. Appellate counsel testified that he read this court's opinion and that he did not believe that this court misunderstood the Petitioner's statement. He classified this court's recitation of the Petitioner's statement "as an issue of them just choosing to include a smaller portion of that in their opinion."

At the conclusion of the hearing, the post-conviction court took the matter under advisement. In a later-filed written order, the court denied post-conviction relief. The Petitioner filed a timely notice of appeal.

Analysis

On appeal, the Petitioner argues that the post-conviction court erred by denying relief because his trial counsel rendered ineffective assistance by failing to call witnesses or present mitigating evidence at sentencing and because the cumulative effect of trial counsel's instances of deficient performance prejudiced him. He also contends that the trial court erred by denying relief because appellate counsel rendered ineffective assistance by conceding the robbery when challenging the sufficiency of the evidence and by failing to file a petition for rehearing when this court mischaracterized his statement in our opinion. The State argues that the post-conviction court properly denied relief.

We address first the Petitioner's allegations about trial counsel, then address the claims relating to appellate counsel's performance.

Post-conviction proceedings are not constitutionally required, *see Dotson v. State*, 673 S.W.3d 204, 216 (Tenn. 2023) (citing *Davis v. State*, 912 S.W.2d 689, 695 (Tenn. 1995)), but our legislature has provided a statutory framework for collateral attack "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," T.C.A. § 40-30-103; *see also* T.C.A. § 40-30-101 to -123 (collectively the Post-Conviction Procedure Act). A petition for post-conviction relief must "include allegations of fact supporting each claim for relief" as well as "allegations of fact explaining why each ground for relief was not previously presented in any earlier proceeding." T.C.A. § 40-30-104(e). To obtain relief, the Petitioner must prove "the allegations of fact by clear and convincing evidence" at the hearing on his or her petition. *Id.* § 40-30-110(f).

On appeal, our review is limited to those issues either "formally raised in the post-conviction petition or an amendment" or "argued at the evidentiary hearing and . . . decided by the post-conviction court without objection by the State." *Lowe v. State*, 703 S.W.3d 319, 335 (Tenn. Crim. App. 2024) (quoting *Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020) (stating that "issues that were not formally raised in the post-conviction petition" will be considered only when "argued at the post-conviction hearing and decided by the post-conviction court without objection"))). We review the "post-conviction court's conclusions of law, decisions involving mixed questions of law and fact, and its application of law to its factual findings de novo without a presumption of correctness." *Holland*, 610 S.W.3d at 455 (quoting *Whitehead v. State*, 402 S.W.3d 615, 621 (Tenn. 2013)); *see also Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015)). The post-conviction court's findings of fact, however, are presumed to be correct unless the evidence preponderates

against them. *See Lowe*, 703 S.W.3d at 333 (citing *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001)); *see also Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). Under this standard, we will not reweigh the evidence, reconsider witness credibility, or reassess the factual issues resolved by the post-conviction court. *Lowe*, 703 S.W.3d at 333-34 (citing *Fields*, 40 S.W.3d at 456).

Both the state and federal constitutions guarantee the right to counsel, *see* U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defen[s]e.”); Tenn. Const. art. 1, § 9 (“That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel[.]”). These provisions “envision[] counsel’s playing a role that is critical to the ability of the adversarial system to produce just results,” and, accordingly, “the right to counsel is the right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970)). To prevail on a claim that he or she has been denied the constitutional right to the effective assistance of counsel, the petitioner must establish “both that counsel’s performance was deficient and that counsel’s deficient performance prejudiced the defense.” *Kendrick*, 454 S.W.3d at 457 (first citing *Strickland*, 466 U.S. at 687; and then *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011)). Because the right to the effective assistance of counsel is constitutionally guaranteed, the denial of the effective assistance of counsel may be raised in a petition for post-conviction relief. *See Phillips v. State*, 647 S.W.3d 389, 401 (Tenn. 2022) (citing *Mobley v. State*, 397 S.W.3d 70, 79-80 (Tenn. 2013)).

To obtain relief on a claim of ineffective assistance of counsel, the petitioner must demonstrate that “the advice given, or the services rendered by the attorney, are [not] within the range of competence demanded of attorneys in criminal cases,” *see Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), and “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. This means that “the petitioner is required to prove the *fact* of counsel’s alleged error by clear and convincing evidence” and that the post-conviction court determines from the factual showing whether the alleged “error ‘fell below an objective standard of reasonableness’ and whether the error raised ‘a reasonable probability . . . that the result of the proceedings would have been different.’” *Phillips*, 647 S.W.3d at 401 (quoting *Dellinger v. State*, 279 S.W.3d 282, 294 (Tenn. 2009)) (emphasis in *Dellinger*). “A court need not address both requirements if the [petitioner’s] proof fails to support either prong.” *Howard v. State*, 604 S.W.3d 53, 57-58 (Tenn. 2020) (first citing *Strickland*, 466 U.S. at 687; and then *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996)).

Our analysis of counsel's performance "begins with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions." *Kendrick*, 454 S.W.3d at 458 (citing *Strickland*, 466 U.S. at 689). "The petitioner bears the burden of overcoming this presumption." *Id.* (citing *Strickland*, 466 U.S. at 697); *see also Goad*, 938 S.W.2d at 370. This court will not second-guess a reasonable trial strategy and will not grant relief on the basis of a sound, but unsuccessful, tactical decision made after adequate preparation. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992); *see also Strickland*, 466 U.S. at 691 (stating that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). We do not view the petitioner's claim through the lens of hindsight but, instead, "evaluate the conduct from counsel's perspective at the time." *Phillips*, 647 S.W.3d at 407 (quoting *Strickland*, 466 U.S. at 689).

"Appellate review of an ineffective assistance of counsel claim is a mixed question of law and fact," and our review is de novo, granting a presumption of correctness to the post-conviction court's findings of fact but not its conclusions of law. *Phillips*, 647 S.W.3d at 400 (first citing *Dellinger*, 279 S.W.3d at 294; and then Tenn. R. App. P. 13(d); and then *Fields*, 40 S.W.3d at 456, 458; and then *Mobley*, 397 S.W.3d at 80).

I. Trial Counsel

As indicated, the Petitioner asserts that the post-conviction court erred by denying relief because trial counsel performed deficiently by failing to call certain witnesses at trial and at the sentencing hearing, resulting in prejudice. "When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Therefore, a petitioner is not entitled to relief "on this ground unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called." *Id.* at 758; *see also Cauthern v. State*, 145 S.W.3d 571, 616 (Tenn. Crim. App. 2004).

The Petitioner first asserts that trial counsel should have presented Mr. Curry as a witness at trial to contradict the testimony regarding the color of the bag that the victim was carrying at the time of his death. He also claims that Mr. Curry's testimony that the victim and Mr. Holmes had arranged to meet to attempt to settle a title issue with the vehicle would have undermined the State's theory that he and Mr. Holmes planned to rob the victim. The post-conviction court concluded that Mr. Curry's evidentiary hearing testimony "added little information to what was presented at trial" and that "it would have

had no impact on the jury's" verdict. In our view, the evidence does not preponderate against these findings.

Mr. Curry's testimony that Mr. Holmes and the victim arranged to meet about the title to the Caprice would have been cumulative to other evidence establishing this same point at trial. As to Mr. Curry's claim that the bag that the victim carried was camouflage rather than black, the post-conviction court observed that the Petitioner admitted in his recorded statement that he was present during the shooting and that he removed a bag from the victim's vehicle after the victim was shot. Ms. Bailey's testimony that the victim held cash in a pencil case stored either in the vehicle in the center console or in a backpack and Ms. Clemons' testimony that she saw the shorter perpetrator reach across the victim to remove a bag from the center console of the vehicle corroborated his admission. The Petitioner is not entitled to relief on this claim.

The Petitioner next contends that the post-conviction court erred by failing to grant relief based on his claim that trial counsel performed deficiently by failing to interview Ms. Clemons prior to trial, resulting in prejudice. He claims that had he interviewed Ms. Clemons, trial counsel could have discovered that she knew Mr. Holmes and that she had suggested that someone other than the Petitioner was the shorter perpetrator who exited the vehicle from the back seat after the shooting. The Petitioner asserts that trial counsel could have used this information to more effectively cross-examine Ms. Clemons and undermine the State's proof identifying him as the individual who removed the bag from the victim's vehicle. Neither trial counsel nor Ms. Clemons could recall whether she was interviewed by a member of the defense team prior to trial. Given Ms. Clemons' poor memory, the post-conviction court found "little credibility in her testimony" at the evidentiary hearing. Moreover, Ms. Clemons candidly acknowledged during the Petitioner's trial that she could not identify him as the second perpetrator. The record reflects that trial counsel thoroughly cross-examined her regarding her inability to identify the Petitioner and that she told the jury that the man she saw was not the Petitioner. Additionally, Ms. Clemons failed to identify from a photographic lineup the man she identified at the evidentiary hearing as the second perpetrator, and that man had an independently established alibi. As the post-conviction court found, trial counsel got Ms. Clemons to admit that any additional information elicited on this topic "would have added little to the trial." The Petitioner is not entitled to relief on this claim.

The Petitioner also argues that the post-conviction court erred by denying relief on his claim that trial counsel's failure to call Mr. Robinson as a witness at trial prevented him from arguing that the Petitioner and Mr. Holmes did not plan to rob the victim or that Mr. Robinson was with Mr. Holmes, resulting in prejudice. As the post-conviction court found, proof that Mr. Robinson's palm print was found on the outside of the Hyundai "would not have negated the Petitioner's admission" that he was present at the shooting and that he took a bag from the Hyundai after the shooting. The evidence does not preponderate

against these findings, and, accordingly, the Petitioner failed to prove by clear and convincing evidence facts to support a finding that counsel performed deficiently. The Petitioner is not entitled to relief on this issue.

The Petitioner next argues that trial counsel should have presented the testimony of his mother and sister at his sentencing hearing about his childhood, relationships with family, and background to provide context to his criminal history. He claims that this testimony would have resulted in a more favorable sentence. However, the record supports the conclusion that the Petitioner failed to demonstrate that trial counsel's tactical decision amounted to deficient performance, much less that he was prejudiced by the decision.

Trial counsel said that he rarely calls witnesses at sentencing hearings and that, in any event, he did not believe testimony from the Petitioner's family members was necessary in this case. The post-conviction court found that much of the evidence produced at the post-conviction hearing was contained in the presentence report and considered by the trial court at sentencing and that none of the evidence presented at the evidentiary hearing would have altered the sentence. The record does not preponderate against this finding. Certainly, nothing suggests that trial counsel overlooked available mitigating evidence or failed to familiarize himself with the Petitioner's background before sentencing. Rather, the record reflects that trial counsel made a strategic determination that live testimony would add little to the information already presented. We will not second guess a reasonably based strategic decision made after adequate preparation, *see Henley*, 960 S.W.2d at 579; *see also Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008), and we may not grant relief merely because "a different procedure or strategy might have produced a different result," *Alley v. State*, 958 S.W.2d 138, 149 (Tenn. Crim. App. 1997) (quoting *Williams v. State*, 599 S.W.2d 276 (Tenn. Crim. App. 1980)). The Petitioner is not entitled to relief on this basis.

The Petitioner next argues that the post-conviction court erred by failing to grant relief because he was prejudiced by the cumulative effect of trial counsel's deficiencies. Multiple allegations of counsel's deficient performance are treated as a single claim such that a petitioner may rely on multiple instances of deficient performance to satisfy the prejudice requirement under *Strickland*. *See Thompson v. State*, 958 S.W.2d 156, 161 (Tenn. Crim. App. 1997) ("Ineffective assistance of counsel is generally 'a single ground for relief' under the post-conviction statute." (citing *Cone v. State*, 927 S.W.2d 579, 581-82 (Tenn. Crim. App. 1995))); *Harris v. State*, No. E2022-00446-CCA-R3-PC, 2022 WL 17729352, at *9 (Tenn. Crim. App. Dec. 16, 2022). Here, however, the Petitioner has failed to establish by clear and convincing evidence any instance of deficient performance, and accordingly, he is not entitled to relief because he has failed to show that any errors existed to accumulate. *See Martin v. State*, No. E2022-00688-CCA-R3-PC, 2023 WL 3361543, at *5 (Tenn. Crim. App. May 11, 2023) ("[C]umulative error does not apply in

post-conviction cases where the petitioner has failed to show any instance of deficient performance by counsel.”).

II. Appellate Counsel

The Petitioner argues that the post-conviction court erred by denying relief because appellate counsel rendered ineffective assistance by conceding that a robbery occurred and by limiting his sufficiency challenge to whether the State proved that the Petitioner was criminally responsible for Mr. Holmes’ conduct.

Our supreme court has observed:

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

Carpenter v. State, 126 S.W.3d 879, 887 (Tenn. 2004) (internal quotation marks and 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)). To determine whether appellate counsel was ineffective for omitting or abandoning an issue, a court generally considers the factors in *Carpenter*, including, as is relevant here, whether appellate counsel testified that omitting the issue was a strategic decision and whether the omitted issue qualified as “significant and obvious” or “stronger than” the other issues presented. *Carpenter*, 126 S.W.3d at 888.

Appellate counsel testified that rather than challenge the sufficiency of the evidence proving that a robbery occurred, he focused on trying to mitigate the Petitioner’s role in the offense by arguing that the State failed to prove that the Petitioner was criminally responsible for Mr. Holmes’ conduct. The post-conviction court rejected the Petitioner’s argument that counsel performed deficiently by employing this strategy, finding that the evidence presented at trial was sufficient to support the jury’s verdict that a robbery occurred and that the addition of a sufficiency challenge to the robbery would not have caused a different result on appeal. The record does not preponderate against these

findings, and, in consequence, the post-conviction court did not err by failing to grant relief on this issue.

The Petitioner also contends that the post-conviction court erred by denying relief based on appellate counsel's failure to petition this court for rehearing of our direct appeal opinion based on a misquotation in the sufficiency-of-evidence analysis. *See Cox*, 2022 WL 984330, at *4-5. Tennessee Rule of Appellate Procedure 39 authorizes petitions to rehear in limited circumstances and identifies several nonexclusive factors that guide a court's decision whether to grant rehearing:

(1) the court's opinion incorrectly states the material facts established by the evidence and set forth in the record; (2) the court's opinion is in conflict with a statute, prior decision, or other principle of law; (3) the court's opinion overlooks or misapprehends a material fact or proposition of law; and (4) the court's opinion relies upon matters of fact or law upon which the parties have not been heard and that are open to reasonable dispute. A rehearing will not be granted to permit reargument of matters fully argued.

Tenn. R. App. P. 39(a). As our Supreme Court has explained, the limited purpose of a petition to rehear is to call the "attention of the Court to matters overlooked, not things which the counsel supposes were improperly decided after full consideration." *Knox v. Batson*, 399 S.W.2d 765, 775 (Tenn. 1966). The grant or denial of a petition to rehear lies solely within the discretion of the appellate court. *See* Tenn. R. App. P. 39(a), Advisory Comm'n cmt.

In the opinion on direct appeal, this court quoted a portion of the Petitioner's recorded statement to law enforcement as "[W]e was robbing him, and I ain't got no problem saying this was what was going on. But I didn't shoot." *Cox*, 2022 WL 984330, at *5. The recording admitted at trial, however, reflects that the Petitioner stated, "*If* we was robbing him, I ain't got no problem saying that. *That wasn't what was going on.*" (emphasis added). Thus, the quotation in our opinion appears to be inaccurate. Appellate counsel testified that he did not view the quotation as inaccurate but as this court's "choosing to include a smaller portion of that [statement] in their opinion" and that, in any event, correcting a single quotation likely would not have altered this court's analysis of the sufficiency of the evidence. The post-conviction court accredited this testimony and found that this court would not have granted rehearing. The record supports this finding because any inaccuracy was not a material fact contemplated by Rule 39, and, consequently, the record supports the post-conviction court's conclusion that appellate counsel was not ineffective for failing to seek rehearing. Under these circumstances, the evidence does not preponderate against the post-court's findings, and the Petitioner is not entitled to post-conviction relief on this claim.

Conclusion

We conclude that the record supports the post-conviction court's findings that the Petitioner failed to establish entitlement to post-conviction relief. Accordingly, we affirm the judgment of the post-conviction court.

s/ *Stacy L. Street*

STACY L. STREET, JUDGE