

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

APPENDIX A: UNITED STATES COURT OF APPEALS DECISION.
Marvin Davis v. Kevin Genovese, Warden, # 21-58216 (6th Cir. 6/6/2022)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 6, 2022
DEBORAH S. HUNT, Clerk

MARVIN DAVIS,)
Petitioner-Appellant,)
v.)
KEVIN GENOVESE, Warden,)
Respondent-Appellee.)

ORDER

Before: SUHRHEINRICH, Circuit Judge.

Marvin Davis, a pro se Tennessee prisoner, appeals the judgment of the district court denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Davis's notice of appeal is construed as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(2). Davis moves to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

Davis was convicted of rape of a child and sentenced to 25 years of imprisonment. *State v. Davis*, No. W2013-00656-CCA-R3-CD, 2014 WL 1775529, at *1 (Tenn. Crim. App. May 1, 2014). Davis appealed, challenging the admission of a videotaped forensic interview of the victim on the basis that the state statute allowing its admissibility was unconstitutional. *Id.* at *5. The Tennessee Court of Criminal Appeals determined that the claim was waived by Davis's failure to raise it in the trial court. *Id.* Nevertheless, the court reviewed the claim for plain error and found none. *Id.* at *5-9. In a second assignment of error, Davis asserted that the evidence was insufficient to support his conviction. *Id.* at *9. The state appellate court rejected this claim and affirmed. *Id.* at *11. The Tennessee Supreme Court denied an appeal.

Davis next filed a petition for post-conviction relief, claiming that counsel was ineffective for failing to object to hearsay evidence, emphasizing the hearsay evidence by using the same phrasing during cross-examination, failing to schedule a hearing pursuant to Tennessee Rule of

Evidence 412, and failing to cross-examine the forensic interviewer about the use of leading questions. *Davis v. State*, No. W2015-02129-CCA-R3-PC, 2016 WL 6791078, at *3-8 (Tenn. Crim. App. Nov. 16, 2016). Following a hearing where trial co-counsel testified,¹ the trial court denied the petition. The Tennessee Court of Criminal Appeals affirmed, *id.*, and the Tennessee Supreme Court denied an appeal.

Davis timely filed his habeas petition in November 2017, raising the following claims: (1) the trial court erred by admitting the victim’s videotaped forensic interview under state law and the state law allowing its admission is unconstitutional; and (2) trial counsel was ineffective for (a) failing to object to hearsay statement, (b) referring to the hearsay statements, (c) failing to follow up on a Rule 412 motion, and (d) failing to cross-examine the forensic interviewer. In response, the warden argued that Davis’s first claim was procedurally defaulted and that the state court’s adjudication of his ineffective-assistance claims was not unreasonable.

The district court determined that Davis’s constitutional claim relating to the admission of the video interview was procedurally defaulted because it was deemed to be waived by the Tennessee Court of Criminal Appeals. To the extent that Davis was asserting that the admission of the video violated Tennessee law or Tennessee’s Rules of Evidence, the district court determined that the claim raised a non-cognizable issue of state law. The district court further determined that the state court did not unreasonably deny Davis’s ineffective-assistance-of-counsel claims. The district court denied Davis’s habeas petition and declined to issue a COA.

Davis now seeks a COA from this court. To obtain a COA, a petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). He may do so by demonstrating that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Where the district court denies a claim on procedural grounds without evaluating the merits of the claim, courts should grant a COA only if two requirements are satisfied: first, the court must determine that reasonable jurists would find

¹ Lead trial counsel had died by the time of the post-conviction hearing.

the district court's procedural assessment debatable or wrong, and, second, the court must determine that reasonable jurists would find it debatable or obvious that the petition states a valid constitutional claim. *See Slack*, 529 U.S. at 484-85. “[A] COA does not require a showing that the appeal will succeed,” *Miller-El*, 537 U.S. at 337; it is sufficient for a petitioner to demonstrate that “the issues presented are adequate to deserve encouragement to proceed further.” *Id.* at 327 (citing *Slack*, 529 U.S. at 484).

In his first claim, Davis argued that the trial court's admission of the victim's videotaped forensic interview violated Tennessee state law and that the state law allowing its admission was unconstitutional. To the extent that Davis challenged the admission under Tennessee law or the Tennessee Rules of Evidence, reasonable jurists would not debate the district court's conclusion that Davis's claim is not cognizable on habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

Regarding Davis's claim that the Tennessee state law allowing admission of the videotaped interview violated his constitutional rights, reasonable jurists would not debate the district court's conclusion that this portion of his claim was procedurally defaulted due to his failure to raise the claim before the trial court. For a federal court to reach the merits of a habeas petitioner's claim, he must have first presented the claim to each level of the state courts, including the highest court to which he is entitled to appeal. *See Rayner v. Mills*, 685 F.3d 631, 643 (6th Cir. 2012). If the petitioner fails to obtain consideration of a claim by a state court, and a state procedural rule now bars the state court from considering it, the claim is procedurally defaulted and may not be considered by a federal court. *See Martin v. Mitchell*, 280 F.3d 594, 603 (6th Cir. 2002). When a state procedural rule prevented the state court from deciding the claim on the merits, a procedural default occurs if the prisoner failed to comply with the rule, the state court enforced the rule, and the rule is an adequate and independent state ground to bar federal review of the claim. *See Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006).

This court has previously recognized the adequacy of Tennessee's contemporaneous objection rule. *See Butler v. Rose*, 686 F.2d 1163, 1168 (6th Cir. 1982). Davis's failure to adhere

to the rule thus acts as a procedural bar on habeas review. Further, the fact that the Tennessee Court of Criminal Appeals alternatively engaged in a plain error review does not change the analysis, because “plain error review does not constitute a waiver of state procedural default rules.” *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000). Accordingly, reasonable jurists would not debate the district court’s conclusion that Davis procedurally defaulted this claim.

“In all cases in which a state prisoner has defaulted his federal claims in state court . . . federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A petitioner may also overcome default by demonstrating that the habeas court’s failure to review a claim would result in a fundamental miscarriage of justice. *Williams v. Anderson*, 460 F.3d 789, 805-06 (6th Cir. 2006). Davis, however, did not attempt to establish cause to excuse his default. Nor did he attempt to establish that a fundamental miscarriage of justice would occur if his defaulted claims were not reviewed. Davis’s claim regarding the trial court’s admission of the videotaped interview therefore does not deserve encouragement to proceed further.

Davis’s remaining habeas claim is that counsel was ineffective for (a) failing to object to hearsay statements, (b) referring to the hearsay statements, (c) failing to follow up on a Rule 412 motion, and (d) failing to cross-examine the forensic interviewer. To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to “show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. The prejudice inquiry requires the defendant to “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. In habeas proceedings, the district court must apply a doubly deferential standard of review: “[T]he question [under § 2254(d)] is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Reasonable jurists would not debate the district court's denial of Davis's ineffective-assistance-of-counsel claim. First, counsel was not ineffective for failing to object to hearsay statements because the statements that Davis identifies were determined by the state court not to be hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Such evidence is inadmissible unless it falls within an exception to the rule against hearsay. Tenn. R. Evid. 802.

Davis challenged statements made by the victim's mother and Dr. Karen Lakin, who examined the victim at the hospital. As the Tennessee Court of Criminal Appeals explained, the victim's mother was asked at trial why she took the victim to the hospital and she answered that it was because Davis "had freaked on her" and that her stomach was hurting. *Davis*, 2016 WL 6791078, at *3. Likewise, Dr. Lakin testified that, during the victim's sexual assault examination, she asked the victim why she was there and the victim stated, "that her aunt's boyfriend had freaked on her." *Id.* at *4. Davis argued that trial counsel should have objected to the "freaked on" statements, but the state court concluded that the statements were admissible. Specifically, the court found that the victim's mother's response explained why she took the victim to the hospital; it did not prove that the stated reason for the hospital visit—Davis's alleged conduct—was true. And the court noted that the victim's statement to Dr. Lakin was made for the purpose of medical diagnosis or treatment, which is a recognized exception to the hearsay rule. *See* Tenn. R. Evid. 803(4). Because the state appellate court ruled that the testimony at issue was not hearsay under Tennessee law—a ruling to which a habeas court must defer, *see Davis v. Straub*, 430 F.3d 281, 291 (6th Cir. 2005)—Davis cannot show that an objection by counsel would have been successful. And because counsel cannot be ineffective for failing to make meritless objections, *see Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001), reasonable jurists could not debate the denial of this claim.

Davis also claimed that counsel was ineffective for repeatedly referring to the statements that he "freaked on" the victim. But there was nothing improper about trial counsel using the same

phrasing used by the witnesses to clarify their testimony. In any event, the victim testified at trial, and, in light of her testimony regarding Davis's conduct, Davis cannot establish that he was prejudiced by counsel's choice of words during cross-examination.

Next, Davis claimed that counsel was ineffective for failing to follow up on a Rule 412 motion. Tennessee Rule of Evidence 412 provides that evidence of a victim's sexual behavior with an individual other than the defendant may be admissible in limited circumstances. Tenn. R. Evid. 412(c)(4). On post-conviction review, the state appellate court determined, however, that the trial court would not have admitted Davis's evidence. *Davis*, 2016 WL 6791078, at *6-7. Because this court must defer to the state court's interpretation of its evidentiary rules, *see Davis*, 430 F.3d at 291, any motion would have been unsuccessful and reasonable jurists would not debate that counsel was not ineffective for failing to pursue it.

Last, Davis claims that counsel performed deficiently by failing to cross-examine Patricia Lewis, the forensic interviewer with the Memphis Child Advocacy Center, about her use of leading questions during her interview with the victim. Co-counsel testified at the post-conviction hearing that, in most cases, a forensic interviewer will testify that they are trained not to ask leading questions and will deny using such a tactic. *Davis*, 2016 WL 6791078, at *7. Co-counsel stated that lead counsel had previously cross-examined Lewis at a preliminary hearing and had an idea of how she would testify; as a result, co-counsel believed that lead counsel might not have asked about leading questions and instead reserved the issue for closing argument. *Id.* Given Lewis's anticipated testimony, the state appellate court concluded that it was a valid trial strategy for lead counsel to decide to attack Lewis's credibility in closing arguments rather than through cross-examination. *Id.*

Reasonable jurists would not debate the district court's conclusion that the state court's adjudication was not unreasonable. Counsel's strategic decisions are entitled to deference. *See Strickland*, 466 U.S. at 690; *Tackett v. Trierweiler*, 956 F.3d 358, 374 (6th Cir. 2020). Considering what lead counsel knew about Lewis's likely testimony, it was not unreasonable for counsel not to cross-examine her on that point. Further, Davis could not establish that he was prejudiced by

counsel's decision, given that the victim herself testified and was subject to cross-examination about her interview with Lewis. Considering the deference due under *Strickland* and on habeas review, Davis's ineffective-assistance-of-counsel claims do not deserve encouragement to proceed further.

For the foregoing reasons, Davis's application for a COA is **DENIED**. His motion to proceed in forma pauperis on appeal is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 6, 2022
DEBORAH S. HUNT, Clerk

No. 21-5816

MARVIN DAVIS,

Petitioner-Appellant,

v.

KEVIN GENOVESE, Warden,

Respondent-Appellee.

Before: SUHRHEINRICH, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Marvin Davis for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

APPENDIX B: UNITED STATES DISTRICT COURT DECISION.
Marvin Davis v. Michael Parris, Warden, # 2:17-cv-02846-MSN-tmp
(8/6/2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MARVIN DAVIS,

Petitioner,

v.

No. 2:17-cv-02846-MSN-tmp

MICHAEL PARRIS,

Respondent.

**ORDER OF DISMISSAL,
ORDER DENYING CERTIFICATE OF APPEALABILITY,
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH,
AND
ORDER DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL**

Before the Court are the Petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody filed by Petitioner Marvin Davis, Tennessee Department of Correction (“TDOC”) register number 248020, who is confined at the Northwest Correctional Complex (“NWCX”) in Tiptonville, Tennessee, (Petition (“Pet.”), ECF No. 1), and the Answer filed by Respondent (Answer, ECF No. 18). As more fully discussed below, the issues Petitioner raises in the habeas petition fall into three categories: 1) whether the claim presents a violation of federal law, 2) whether the claim is procedurally defaulted, and 3) whether the state court identified and applied the correct federal legal principles. For the reasons discussed below, the petition is **DISMISSED**.

I. STATE COURT PROCEDURAL HISTORY

On December 13, 2012, a Shelby County Criminal Court jury convicted Petitioner Marvin Davis of one count of rape of a child. (Record (“R.”), Minutes (“Mins.”), ECF No. 16-1 at PageID 147.) The trial court sentenced Davis to 25 years in prison, to be served at 100

percent. (R., Judgment ("J."), ECF No. 16-1 at PageID 160.) Davis appealed. (R., Notice of Appeal, ECF No. 16-1 at PageID 166.) The Tennessee Court of Criminal Appeals ("TCCA") affirmed. State v. Davis, No. W2013-00656-CCA-R3-CD, 2014 WL 1775529 (Tenn. Crim. App. May 1, 2014), *perm. app. denied* (Tenn. Dec. 5, 2014).

On February 3, 2015, Davis filed a *pro se* petition in Shelby County Criminal Court pursuant to the Tennessee Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-101 through 122. (R., Pet. for Post-Conviction Relief, ECF No. 16-15 at PageID 880-907.) The post-conviction court conducted an evidentiary hearing and denied relief in an order entered on October 9, 2015. (R., Order, ECF No. 16-15 at PageID 928-30.) Davis appealed. (R., Notice of Appeal, ECF No. 16-15 at PageID 931.) The TCCA affirmed. Davis v. State, No. W2015-02129-CCA-R3-PC, 2016 WL 6791078 (Tenn. Crim. App. Nov. 16, 2016), *perm. app. denied* (Tenn. Mar. 9, 2017).

II. FEDERAL COURT PROCEDURAL HISTORY

On November 17, 2017, Petitioner Davis filed this petition pursuant to 28 U.S.C. § 2254 challenging his state conviction. (Pet., ECF No. 1.) On December 11, 2017, United States District Judge Samuel H. Mays, Jr. directed Respondent to file a response to the petition. (Order, ECF No. 6.) On March 15, 2018, Respondent filed the state court record and an answer to the petition. (R., ECF No. 16, Answer, ECF No. 18.) On November 26, 2018, the case was reassigned to the undersigned judge. (Order, ECF No. 23.)

A. Federal Habeas Issues

In the petition, Davis raises the following issues:

1. The trial court's evidentiary ruling admitting the victim's videotaped forensic interview pursuant to Tenn. Code Ann.

§ 24-7-123 was in error and the statute is unconstitutional.
(Pet., ECF No. 1 at PageID 5); and

2. Trial counsel provided ineffective assistance by:

- a. failing to object to prejudicial hearsay statements (*id.* at PageID 7),
- b. repeatedly referring to the prejudicial hearsay statements (*id.*),
- c. failing to follow up on a Rule 412 motion (*id.*), and
- d. failing to cross examine the child forensic interviewer. (*Id.*)

All issues have been reviewed by the TCCA and are exhausted.

III. THE EVIDENCE

On direct appeal, the TCCA summarized the evidence presented at Davis' trial:

The defendant was indicted on charges of rape of a child and aggravated sexual battery arising out of his sexual encounters with his girlfriend's six-year-old great-niece, between March 18, 2010, and January 22, 2011.

The victim's mother testified that the victim was born on March 18, 2004, and was eight years old at the time of trial. Shortly after the victim was born, the victim's great-aunt, Vuryum Fitzpatrick, began caring for her and continued doing so for approximately five years. The victim viewed Ms. Fitzpatrick and the defendant as her parents and loved both of them. Around the age of six, the victim began spending more time with her mother but continued to stay with Ms. Fitzpatrick and the defendant. The victim's mother said that when the victim stayed with Ms. Fitzpatrick and the defendant, she slept either in the bedroom or on a couch that folded out into a bed.

The victim's mother testified that on January 28, 2011, the victim complained of her stomach hurting and reported that the defendant had "freaked" on her. The victim's mother said the victim had last been to the home of Ms. Fitzpatrick and the defendant on January 21. The victim's mother took her to Le Bonheur Children's Hospital to be examined. They then went to the Memphis Child Advocacy Center where the victim was interviewed and examined.

On cross-examination, the victim's mother testified that after the victim reported the abuse, the victim's mother called Ms. Fitzpatrick, who began

screaming and crying upon learning of the allegations. The victim's mother informed Ms. Fitzpatrick of her plans to have the victim examined at Le Bonheur. The victim's mother said that Ms. Fitzpatrick and the defendant met them at Le Bonheur but that the defendant did not say anything about the allegations. The victim's mother acknowledged that she examined the victim before taking her to Le Bonheur and that she did not see any trauma.

The victim testified that although she was living with her mother at the time of trial, she had previously lived with Ms. Fitzpatrick in an apartment for a long period of time. The victim, Ms. Fitzpatrick, and the defendant slept in the same room. Ms. Fitzpatrick and the defendant slept on a portion of the couch that folded out into a bed while the victim slept on the other portion of the couch.

The victim recalled one occasion when the defendant woke her up, carried her upstairs, took off her pants, and put his "middle part" in her "behind" and into her vagina. The victim said the defendant's "middle part" was located above his knees and below his waist and was used to urinate. She stated that the defendant told her not to tell anyone and then carried her back downstairs where Ms. Fitzpatrick was sleeping. The victim further stated that she was six years old at the time.

The victim testified that during a separate incident, the defendant again woke her up, carried her upstairs, took her clothes off, put his "middle part" in her "behind" and into her vagina, and carried her back downstairs where Ms. Fitzpatrick was sleeping. The victim said the defendant's "middle part" went into her vagina. When she returned to her mother's home, her stomach began hurting, and she informed her mother of the defendant's actions. The victim's mother took her to a children's hospital where she was examined. The victim said she then went to another building where she told someone that the defendant had touched her.

On cross-examination, the victim testified that both assaults occurred the same way. She said she first reported the abuse to Ms. Fitzpatrick, who did not respond. The victim then waited some time before telling her mother.

Dr. Karen Larkin, an assistant professor of pediatrics and the medical director for the child assessment program at Le Bonheur Children's Hospital, was admitted by the trial court as an expert in "child abuse pediatrics." Dr. Larkin examined the victim in the Le Bonheur Clinic at the Memphis Child Advocacy Center on February 1, 2011. She recalled that the victim was six years old at the time of the examination.

Dr. Larkin testified that she interviewed the victim alone after introducing herself and speaking to the victim's mother. The victim told Dr. Larkin that she had been brought to the clinic because her aunt's boyfriend had "freaked" on her.

The victim reported having pain during the assault but said she did not have any pain at the time of the examination.

Dr. Larkin said that although the victim did not tell her when the assault occurred, children around the victim's age generally do not understand the concept of time. Dr. Larkin generally obtained such information from the child's parents. The victim's mother told Dr. Larkin that the assault occurred on January 21, 2011. Dr. Larkin explained that no DNA evidence was obtained due to the difficulty in obtaining such evidence forty-eight to seventy-two hours following a sexual assault.

During the physical examination, Dr. Larkin noted a deep cleft or notch on the victim's hymen. She explained that this finding did not mean that something did or did not occur. Rather, the cleft can be a normal variant in both children and adolescents. Dr. Larkin said the cleft also could be the result of healing from a tear and could support sexual assault. Because she could not make a definite finding as to whether the cleft was the result of sexual assault, her finding was "indeterminate." Dr. Larkin noted that more than 95% of sexual assault victims do not have physical injuries.

On cross-examination, Dr. Larkin testified that she concluded that indeterminate findings from the physical examination may support the victim's disclosure of abuse. Dr. Larkin said that she found no evidence of penetration but that a child can be sexually penetrated without physical injury. She further said the victim and her mother reported only one incident of sexual assault.

Patricia Lewis, a forensic interviewer with the Memphis Child Advocacy Center, was accepted by the trial court as an expert in forensic interviewing. Ms. Lewis testified that she conducted a forensic interview of the victim on January 28, 2011, at 1:30 p.m. Only the victim and Ms. Lewis were in the room during the interview.

Ms. Lewis said the victim was cooperative and seemed nervous. At one point, the victim mentioned that her stomach was hurting. Ms. Lewis stated that the victim was a typical six-year-old child who demonstrated appropriate verbal skills and appropriate knowledge of body parts for her age level. The videotape and transcript of the interview were entered into evidence.

During the interview, the victim informed Ms. Lewis that the defendant touched her "coochie" and her "butt" with his "middle part" on one occasion while on the couch and on one occasion while upstairs. The victim said the defendant told her not to tell anyone. She also said that during the assault that occurred upstairs, the defendant was "inside" her "coochie." Following Ms. Lewis' testimony, the State rested.

The defense presented the testimony of Vurvum Fitzpatrick, who testified that at the time of trial, she and the defendant had been dating for approximately eight years. She said the victim came to live with her and the defendant after the victim's mother planned to put her up for adoption. Ms. Fitzpatrick begged the victim's mother not to do so and agreed to care for the victim. The victim began living with Ms. Fitzpatrick when the victim was three weeks old. Ms. Fitzpatrick said that as the victim got older, her mother tried to use the victim to control Ms. Fitzpatrick.

Ms. Fitzpatrick testified that she and the defendant slept in the living room on a sectional that folded out into a bed. The victim slept on the couch portion of the section. Ms. Fitzpatrick said they slept in the living room downstairs rather than the bedroom upstairs because she did not want to walk up and down the stairs often. She stated that the apartment was located in an unsafe neighborhood. She explained that she was a light sleeper because she was not comfortable with the neighborhood and woke up if the defendant got out of bed.

Ms. Fitzpatrick denied that the victim told her that the defendant had touched her inappropriately. Rather, she said the victim's mother called and told her. Ms. Fitzpatrick began crying and became so "hysterical" that the defendant took the telephone. Ms. Fitzpatrick said she and the defendant accompanied the victim to Le Bonheur. She also said the defendant was aware of the accusations and wanted to assist in any way that he could. Ms. Fitzpatrick denied ever seeing the defendant act inappropriately toward the victim or any other children.

At the conclusion of the proof, the State dismissed the charge of aggravated sexual battery. The State then elected to rely upon the alleged vaginal penetration occurring during the second incident upstairs as a basis for the child rape charge. The jury convicted the defendant of child rape, and the trial court sentenced the defendant to twenty-five years to be served at 100%. This appeal followed.

State v. Davis, 2014 WL 1775529, at *1-3.

The TCCA opinion on post-conviction appeal summarized Davis' ineffective assistance of counsel claims, the evidence presented at the post-conviction hearing, and the post-conviction trial court's decision:

At the post-conviction hearing, co-counsel testified that his duties involved analyzing the medical evidence, jury selection, opening statements, medical testimony, and cross-examination. He said lead counsel handled all other aspects of the case and made the major decisions. He said that lead counsel was now deceased.

Co-counsel testified that he did not know why lead counsel had not objected to the victim's mother's testimony that she had taken the victim to a hospital after the victim stated the Petitioner had "freaked on" the victim. He said he did not think the statement was hearsay because it had not been offered for the truth of the matter asserted. Co-counsel did not know why lead counsel had not objected when Dr. Karen Lakin¹ testified that the victim told Dr. Lakin that the victim "freaked on" the victim but said he did not think the evidence had been offered for the truth of the matter asserted. In his opinion, the victim's statement to Dr. Lakin was made for purposes of medical diagnosis and treatment. He did not know why lead counsel repeated the victim's statement during cross-examination of witnesses and said he thought it was "how the cross examination was phrased."

Co-counsel acknowledged that a motion pursuant to Tennessee Rule of Evidence 412 regarding "other potential explanations for injuries or the testimony of Dr. Karen Lakin" was filed but did not know why lead counsel had not argued the motion at a hearing. Co-counsel said the motion pertained to allegations that two individuals other than the Petitioner sexually abused the victim. The motion was received as an exhibit. Co-counsel said the only injury to the victim identified by the evidence was a hymenal notch which, according to Dr. Lakin, was a non-specific finding that might or might not indicate sexual activity.

Co-counsel testified that he had adequately prepared lead counsel to cross-examine Patricia Lewis, the child forensic interviewer who testified for the State. He did not know why lead counsel had not cross-examined Ms. Lewis regarding what the Petitioner believed were leading questions the prosecutor had asked Ms. Lewis. Co-counsel said that in most cases, an interviewer would say that he or she had not asked leading questions because they were trained not to do so. Co-counsel said that lead counsel might not have asked about alleged leading questions in order to reserve the issue for closing argument. He said lead counsel had a good idea of how the forensic interviewer would testify at the trial because lead counsel had been able to cross-examine the interviewer at an earlier hearing.

Co-counsel testified that lead counsel had been organized, kept her files well documented, saw her clients many times, and conducted appropriate investigation. He said lead counsel had empathy toward the Petitioner, and he noted that her file relative to the Petitioner's case indicated she had worked a "vast amount of time," prepared for trial, prepared for the medical examiner's

¹ Dr. Lakin is referred to as Dr. Larkin in this court's opinion in the previous appeal and as Dr. Lakin in the trial transcript and the post-conviction hearing transcript. Dr. Lakin testified at the trial and spelled her name at the beginning of her testimony. We use the spelling provided by the witness.

testimony, “went above and beyond” to visit the Petitioner in jail, and had been extremely meticulous and organized.

The Petitioner elected not to testify at the hearing. After receiving the proof, the post-conviction court denied relief in a written order. This appeal followed.

Davis v. State, No. W2016-02129-CCA-R3-PC, 2016 WL 6791078, at *1–2.

IV. LEGAL STANDARDS

Federal courts have authority to issue habeas corpus relief for persons in state custody under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). A federal court may grant habeas relief to a state prisoner “only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

A. Exhaustion and Procedural Default

A federal court may not grant a writ of habeas corpus on behalf of a state prisoner unless, with certain exceptions, the prisoner has exhausted available state remedies by presenting the same claim sought to be redressed in a federal habeas court to the state courts pursuant to 28 U.S.C. § 2254(b) and (c). *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The petitioner must “fairly present”² each claim to all levels of state court review, up to and including the state’s highest court on discretionary review, *Baldwin v. Reese*, 541 U.S. 27, 29 (2004), except where the state has explicitly disavowed state supreme court review as an available state remedy, *O’Sullivan v. Boerckel*, 526 U.S. 838, 847–48 (1999). Tennessee Supreme Court Rule 39

² For a claim to be exhausted, “[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made.” *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (internal citation omitted). Nor is it enough to make a general appeal to a broad constitutional guarantee. *Gray v. Netherland*, 518 U.S. 152, 163 (1996).

eliminated the need to seek review in the Tennessee Supreme Court to “be deemed to have exhausted all available state remedies.” *Adams v. Holland*, 330 F.3d 398, 402 (6th Cir. 2003); *see Smith v. Morgan*, 371 F. App’x 575, 579 (6th Cir. 2010).

The procedural default doctrine is ancillary to the exhaustion requirement. *See Edwards v. Carpenter*, 529 U.S. 446, 452–53 (2000) (noting the interplay between the exhaustion rule and the procedural default doctrine). If the state court decides a claim on an independent and adequate state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the procedural default doctrine ordinarily bars a petitioner from seeking federal habeas review. *Wainwright v. Sykes*, 433 U.S. 72, 81–82 (1977); *see Walker v. Martin*, 562 U.S. 307, 315 (2011) (“A federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment”) (internal quotation marks and citation omitted)).³ In general, a federal court “may only treat a state court order as enforcing the procedural default rule when it unambiguously relied on that rule.” *Peoples v. Lafler*, 734 F.3d 503, 512 (6th Cir. 2013).

If a petitioner’s claim has been procedurally defaulted at the state level, the petitioner must show cause to excuse his failure to present the claim and actual prejudice stemming from the constitutional violation or that a failure to review the claim will result in a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 320–21 (1995); *Coleman v. Thompson*, 501

³ The state-law ground may be a substantive rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits. *Walker*, 562 U.S. at 315. A state rule is an “adequate” procedural ground if it is “firmly established and regularly followed.” *Id.* at 316 (quoting *Beard v. Kindler*, 558 U.S. at 60–61 (2009)). “A discretionary state procedural rule . . . can serve as an adequate ground to bar federal habeas review . . . even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others.” *Id.* (quoting *Kindler*, 558 U.S. at 54.) (internal quotation marks and citations omitted).

U.S. 722, 750 (1991). The latter showing requires a petitioner to establish that a constitutional error has probably resulted in the conviction of a person who is actually innocent of the crime. *Schlup*, 513 U.S. at 321; *see also House v. Bell*, 547 U.S. 518, 536–39 (2006) (restating the ways to overcome procedural default and further explaining the actual innocence exception).

B. Merits Review

Pursuant to Section 2254(d), where a claim has been adjudicated in state courts on the merits, a habeas petition should only be granted if the resolution of the claim:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2). Petitioner carries the burden of proof on this “difficult to meet” and “highly deferential [AEDPA] standard,” which “demands that state-court decisions be given the benefit of the doubt.” *Cullen*, 563 U.S. at 181 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011), and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

Review under § 2254(d)(1) is limited to the record before the state court that adjudicated the claim on the merits. *Cullen*, 563 U.S. at 182. A state court’s decision is “contrary” to federal law when it “arrives at a conclusion opposite to that reached” by the Supreme Court on a question of law or “decides a case differently than” the Supreme Court has “on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). An “unreasonable application” of federal law occurs when the state court “identifies the correct governing legal principle from” the Supreme Court’s decisions “but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 412–13. The state court’s application of

clearly established federal law must be “objectively unreasonable” for the writ to issue. *Id.* at 409. The writ may not issue merely because the habeas court, “in its independent judgment,” determines that the “state court decision applied clearly established federal law erroneously or incorrectly.” *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citing *Williams*, 529 U.S. at 411).

There is minimal case law addressing whether, under § 2254(d)(2), a decision was based on “an unreasonable determination of the facts.” In *Wood v. Allen*, 558 U.S. 290, 301 (2010), the Supreme Court stated that a state-court factual determination is not “unreasonable” merely because the federal habeas court would have reached a different conclusion.⁴ In *Rice v. Collins*, 546 U.S. 333 (2006), the Court explained that “[r]easonable minds reviewing the record might disagree” about the factual finding in question, “but on habeas review that does not suffice to supersede the trial court’s . . . determination.” *Rice*, 546 U.S. at 341–42.

The Sixth Circuit has described the § 2254(d)(2) standard as “demanding but not insatiable” and has emphasized that, pursuant to § 2254(e)(1), the state court factual determination is presumed to be correct absent clear and convincing evidence to the contrary. *Ayers v. Hudson*, 623 F.3d 301, 308 (6th Cir. 2010). A state court adjudication will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented during the state court proceeding. *Id.*; see also *Hudson v. Lafler*, 421 F. App’x 619, 624 (6th Cir. 2011) (same).

⁴ In *Wood*, the Supreme Court granted certiorari to resolve whether, to satisfy § 2254(d)(2), “a petitioner must establish only that the state-court factual determination on which the decision was based was ‘unreasonable,’ or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence.” *Wood*, 558 U.S. at 299. The Court found it unnecessary to reach that issue, and left it open “for another day.” *Id.* at 300–01, 303 (citing *Rice v. Collins*, 546 U.S. 333, 339 (2006), in which the Court recognized that it is unsettled whether there are some factual disputes to which § 2254(e)(1) is inapplicable).

C. Ineffective Assistance

A claim that ineffective assistance of counsel has deprived a defendant of his Sixth Amendment right to counsel is controlled by the standards stated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To succeed on this claim, a movant must demonstrate two elements: 1) that counsel's performance was deficient, and 2) "that the deficient performance prejudiced the defense." *Id.* "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

Recently, the Sixth Circuit opined that this standard is "even more difficult to meet in habeas cases, where the review that applies to *Strickland* claims is 'doubly deferential.'" *Tackett v. Trierweiler*, 956 F.3d 358, 373 (6th Cir. 2020) (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). "The question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Id.* (internal quotation marks and citation omitted).

To establish deficient performance, a person challenging a conviction "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range of reasonable professional assistance." *Id.* at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

To demonstrate prejudice, a petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

at 694.⁵ “A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough ‘to show that the errors had some conceivable effect on the outcome of the proceeding.’ Counsel’s errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *Harrington*, 562 U.S. at 104 (citing *Strickland*, 466 U.S. at 687, 693–94) (internal citations omitted); *see also Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam) (“But *Strickland* does not require the State to ‘rule out’” a more favorable outcome to prevail. “Rather, *Strickland* places the burden on the defendant, not the State, to show a ‘reasonable probability’ that the result would have been different.”).

The deference accorded a state-court decision under 28 U.S.C. § 2254(d) is magnified when reviewing an ineffective assistance claim:

Establishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both “highly deferential,” *id.*, at 689; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997), and when the two apply in tandem, review is “doubly” so, *Knowles [v. Mirzayance]*, 556 U.S., at 123, 129 S. Ct. at 1420 [(2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.

Harrington, 562 U.S. at 105.

A criminal defendant is entitled to the effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The failure to raise a nonfrivolous issue on appeal does not constitute *per se* ineffective assistance of counsel, as “[t]his process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being

⁵ If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel’s performance was deficient. *Strickland*, 466 U.S. at 697.

evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536 (1986) (internal quotation marks and citation omitted). Claims of ineffective assistance of appellate counsel are evaluated using the *Strickland* standards. *Smith v. Robbins*, 528 U.S. 259, 285–86 (2000) (applying *Strickland* to claim that appellate counsel rendered ineffective assistance by failing to file a merits brief); *Smith v. Murray*, 477 U.S. at 535–36 (failure to raise issue on appeal). To establish that appellate counsel was ineffective, a prisoner

must first show that his counsel was objectively unreasonable in failing to find arguable issues to appeal - that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [the prisoner] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel’s unreasonable failure to file a merits brief, he would have prevailed on his appeal.

Smith v. Robbins, 528 U.S. at 285 (citation omitted).⁶

An appellate counsel’s ability to choose those arguments that are more likely to succeed is “the hallmark of effective appellate advocacy.” *Matthews v. Parker*, 651 F.3d 489, 523 (6th Cir. 2011) (quoting *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003)). It is difficult to show

⁶ The Sixth Circuit has identified a nonexclusive list of factors to consider when assessing claims of ineffective assistance of appellate counsel:

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 the appellate counsel’s level of experience and expertise?
8. Did the petitioner and appellate counsel meet and go over possible issues?
9. Is there evidence that counsel reviewed all the facts?
10. Were the omitted issues dealt with in other assignments of error?
11. Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Franklin v. Anderson, 434 F.3d 412, 429 (6th Cir. 2006) (citation omitted).

that appellate counsel was deficient for raising one issue, rather than another, on appeal. *See id.* “In such cases, the petitioner must demonstrate that the issue not presented was clearly stronger than issues that counsel did present.” *Id.* Defendant must show that “there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.” *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004).

“There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” *Coleman*, 501 U.S. at 752 (internal citations omitted). Attorney error cannot constitute “cause” for a procedural default “because the attorney is the petitioner’s agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error.” *Id.* at 753 (internal quotation marks omitted). Where the State has no constitutional obligation to ensure that a prisoner is represented by competent counsel, the petitioner bears the risk of attorney error. *Id.* at 754.

In 2012, the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), which recognized a narrow exception to the rule in *Coleman*, “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding” *Martinez*, 566 U.S. at 17. In such cases, “a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance [of counsel] at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Id.* The Supreme Court also emphasized that

[t]he rule of *Coleman* governs in all but the limited circumstances recognized here It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

Id. The requirements that must be satisfied to excuse a procedural default under *Martinez* are:

- (1) the claim of “ineffective assistance of trial counsel” was a “substantial” claim;
- (2) the “cause” consisted of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding;
- (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim”; and
- (4) state law *requires* that an “ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.”

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (emphasis and alterations in original).

Martinez considered an Arizona law that did not permit ineffective assistance claims to be raised on direct appeal. *Martinez*, 566 U.S. at 4. In the Supreme Court’s subsequent decision in *Trevino*, 569 U.S. at 429, the Court extended its holding in *Martinez* to states in which a “state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal” *Trevino* modified the fourth *Martinez* requirement for overcoming a procedural default. *Martinez* and *Trevino* apply to Tennessee prisoners. *Sutton v. Carpenter*, 745 F.3d 787, 790 (6th Cir. 2014).

V. ANALYSIS OF PETITIONER’S CLAIMS

A. Trial Court Error

- 1. The trial court’s evidentiary ruling admitting the victim’s videotaped forensic interview pursuant to Tenn. Code Ann. § 24-7-123 was in error and the statute is unconstitutional. (Pet., ECF No. 1 at PageID 5.)**

Petitioner Davis argued on direct appeal the trial court’s admission of the videotaped forensic interview of the child victim violated his right to confront witnesses, violated the separation of powers doctrine, violated his right to a jury trial and the presumption of innocence,

and violated his due process rights.⁷ (R., Br. of Appellant, ECF No. 16-9 at PageID 774-86.) *See also State v. Davis*, 2014 WL 1775529, at *5. Respondent contends that the claim as raised before the TCCA is barred by procedural default because it was deemed waived by the TCCA. (*Id.* at PageID 1097.)

The TCCA addressed this claim on direct appeal and opined:

The defendant asserts that the trial court erred in admitting the video recording of the victim's forensic interview pursuant to Tennessee Code Annotated section 24-7-123. This section provides for the admissibility of the video recording of a forensic interview of a child under the age of thirteen during which the child described any act of sexual contact performed on or with the child if certain requirements are met. Tenn. Code Ann. § 24-7-123(a). The video recording "may" be admitted if:

- (1) The child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross examination;
- (2) The video recording is shown to the reasonable satisfaction of the court, in a hearing conducted pre-trial, to possess particularized guarantees of trustworthiness. In determining whether a statement possesses particularized guarantees of trustworthiness, the court shall consider the following factors:

⁷The petition raises a claim that the interview's admission violated Rules 613(b) and 803(26) of the Tennessee Rules of Evidence. Respondent replies that any claim that the admission of the video violated these Tennessee evidentiary rules is procedurally defaulted because it was not presented to the TCCA and is noncognizable because it alleges an error of state law. (Answer, ECF No. 18 at PageID 1096.)

Claims that the state courts misapplied Tennessee evidentiary rules during the trial are not cognizable in a federal habeas petition. *See* 28 U.S.C. § 2254(a) (a federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); *Wilson v. Parker*, 515 F.3d 682, 705 (6th Cir. 2008) ("[a] federal court cannot issue a writ of habeas corpus 'on the basis of a perceived error of state law.'") (quoting *Pulley v. Harris*, 465 U.S. 37, 41 (1984)). The unexhausted, defaulted portion of Issue One is noncognizable and is **DENIED**.

- (A) The mental and physical age and maturity of the child;
- (B) Any apparent motive the child may have to falsify or distort the event, including, but not limited to, bias or coercion;
- (C) The timing of the child's statement;
- (D) The nature and duration of the alleged abuse;
- (E) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
- (F) Whether the statement is spontaneous or directly responsive to questions;
- (G) Whether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of any leading questions;
- (H) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;
- (I) The relationship of the child to the offender;
- (J) Whether the equipment that was used to make the video recording was capable of making an accurate recording; and
- (K) Any other factor deemed appropriate by the court;

(3) The interview was conducted by a forensic interviewer who met the following qualifications at the time the video recording was made, as determined by the court:

- (A) Was employed by a child advocacy center that meets the requirements of § 9-4-213(a) or (b);
- (B) Had graduated from an accredited college or university with a bachelor's degree in a field related to social service, education, criminal justice, nursing, psychology or other similar profession;

(C) Had experience equivalent to three (3) years of fulltime professional work in one (1) or a combination of the following areas:

- (i) Child protective services;
- (ii) Criminal justice;
- (iii) Clinical evaluation;
- (iv) Counseling; or
- (v) Forensic interviewing or other comparable work with children;

(D) Had completed a minimum of forty (40) hours of forensic training in interviewing traumatized children and fifteen (15) hours of continuing education annually;

(E) Had completed a minimum of eight (8) hours of interviewing under the supervision of a qualified forensic interviewer of children;

(F) Had knowledge of child development through coursework, professional training or experience;

(G) Had no criminal history as determined through a criminal records background check; and

(H) Had actively participated in peer review;

(4) The recording is both visual and oral and is recorded on film or videotape or by other similar audio-visual means;

(5) The entire interview of the child was recorded on the video recording and the video recording is unaltered and accurately reflects the interview of the child; and

(6) Every voice heard on the video recording is properly identified as determined by the court.

Tenn. Code Ann. § 24-7-123(b).

In the present case, an evidentiary hearing was held prior to trial during which multiple witness, including the victim, testified. At the conclusion of the

hearing, the trial court found that the requirements of subsection (b) had been satisfied and allowed the State to present the video recording at trial.

The defendant does not contend that the requirements in subsection (b) were not met. Rather, the defendant challenges the constitutionality of Tennessee Code Annotated section 24-7-123. The defendant contends that the statute violates a defendant's right to confront witnesses, the separation of powers doctrine, a defendant's right to a jury trial and the presumption of innocence, and his due process rights.

The defendant did not raise the constitutionality of the statute in the trial court. Our supreme court has held that "questions not raised in the trial court will not be entertained on appeal and this rule applies to an attempt to make a constitutional attack upon the validity of a statute for the first time on appeal unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion." *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983) (citations omitted). The failure to present a constitutional challenge in the trial court deprives the court of the opportunity "for the introduction of evidence which might be material and pertinent in considering the validity of the statute." *Id.* The defendant also failed to raise the issue in its motion for new trial. Accordingly, this issue is waived. *See* Tenn. R. App. P. 3(e), 36(a); *Lawrence*, 655 S.W.2d at 929-30.

The defendant requests that this court review the issue under the plain error rule. In order for us to find plain error: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice." *State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). The presence of all five factors must be established by the record before we will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one factor cannot be established. *Id.* at 283.

It is well-established in Tennessee that when considering the constitutionality of a statute, we must start with a strong presumption that acts passed by the legislature are constitutional. *See Osborn v. Marr*, 127 S.W.3d 737, 740-41 (Tenn. 2004). We must "indulge every presumption and resolve every doubt in favor of constitutionality." *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996). A party challenging the constitutionality of a statute may challenge the statute as unconstitutional on its face or unconstitutional as applied to that party's case. It is well recognized that a facial challenge to a statute, is "the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be

valid.”” *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)).

A. Confrontation Clause

The defendant asserts that Tennessee Code Annotated section 24-7-123 is unconstitutional on its face because it violates the Confrontation Clause in the United States and Tennessee Constitutions. Interpreting the Sixth Amendment, the United States Supreme Court noted in *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L.Ed.2d 177 n. 9 (2004), that “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” The Confrontation Clause “does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.” *Id.* Our supreme court has reached the same conclusion under article I, section 9 of the Tennessee Constitution. *State v. Banks*, 271 S.W.3d 90, 118-19 (Tenn. 2008).

In order for the video recording to be admitted pursuant to section 24-7-123, the child must testify, “under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross examination.” Tenn. Code Ann. § 24-7-123(b)(1). This subsection, however, does not specify whether the child must testify at trial. Nevertheless, circumstances exist under which the statute does not violate an accused’s right to confront witnesses. The right to confrontation of witnesses is not violated by the admission of a video recording of the forensic interview when the child testifies at trial and is subject to cross-examination by the defendant “face to face,” which is what occurred in the present case. Because the statute does not violate an accused’s right to confront witnesses on its face or as applied to the defendant’s case, a clear and unequivocal rule of law was not breached.

B. Separation of Powers

The defendant next asserts that section 24-7-123 violates the separation of powers doctrine. According to the defendant, the video recording of the interview constitutes hearsay, and the General Assembly does not have the authority to create exceptions to the hearsay rule.

Article II, section 1 of the Tennessee Constitution provides, “The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.” Article II, section 2 further provides, “No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.” While no precise lines of demarcation in the respective roles of our three branches of government exist, the traditional rule is that “the

legislative [branch] [ha]s the authority to make, order, and repeal [the laws], the executive . . . to administer and enforce, and the judicial . . . to interpret and apply.” *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975) (citation omitted).

Only the Tennessee Supreme Court has the authority to oversee the practice and procedure in Tennessee’s courts. *Bush v. State*, — S.W.3d —, 2014 WL 295187 (Tenn. 2014). However, “[a] legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of government.” *Lynch v. City of Jellico*, 205 S.W.3d 384, 393 (Tenn. 2006) (quoting *Underwood*, 529 S.W.2d at 47).

In *State v. Mallard*, 40 S.W.3d 473, 479 (Tenn. 2001), our supreme court addressed Tennessee Code Annotated section 39-17-424 (1997), which set forth several factors for courts to consider “in addition to all other logically relevant factors” in determining whether an object was drug paraphernalia. One of the factors, “[p]rior convictions, if any, of the owner or of anyone in control of the object for violation of any state or federal law relating to controlled substances,” conflicted with Tennessee Rule of Evidence 404(b), which generally precludes the admission of evidence of “other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity with the character trait.” *See Mallard*, 40 S.W.3d at 479-80.

Our supreme court noted that the judicial branch will consent to rules of procedure or evidence that are promulgated by the legislature only when they “(1) are reasonable and workable within the framework [of] the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court.” *Id.* at 481. The court stated that it will consent “purely out of considerations of inter-branch comity” and that to hold otherwise “would be to irreparably damage the division of governmental power so essential to the proper maintenance of our constitutional republic.” *Id.* at 482. Our supreme court further explained:

[T]he legislature can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court’s exercise of judicial power. Among these inherent judicial powers are the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved. As an essential corollary to these principles, any determination of what evidence is relevant, either logically or legally, to a fact at issue in litigation is a power that is entrusted solely to the care and exercise of the judiciary. Indeed, a “court’s constitutional function to independently decide controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate.” Consequently, any legislative

enactment that purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy impairs the independent operation of the judicial branch of government, and no such measure can be permitted to stand.

Id. at 483 (citations omitted) (quoting Opinion of the Justices, 141 N.H. 562, 688 A.2d 1006, 1016 (N.H. 1997)). Respectful of the presumptive constitutionality of all legislative acts, the court interpreted the statute as supplemental and held that the statute applied so long as the evidence otherwise met the requirements for admissibility under the Rules of Evidence. *Id.* at 484. Since *Mallard*, our supreme court has noted that “when it comes to Tennessee’s courts, our commitment to cooperation among the three branches of government has prompted us to acquiesce in and to apply statutes affecting the operation of the courts when they do not interfere with the courts’ adjudicative functions or otherwise impermissibly encroach on the Judicial Branch.” *Bush*, — S.W.3d at —, 2014 WL 295187, at *11.

In the present case, the defendant argues that the admission of the video recording of a forensic interview pursuant to Tennessee Code Annotated section 24-7-123 would violate the “hearsay rule.” Tennessee Rule of Evidence 802 provides that “[h]earsay is not admissible except as provided by these rules or otherwise by law.” Tenn. R. Evid. 802 (emphasis added). The last phrase suggests that hearsay exceptions created by statute do not necessarily conflict with Rule 802.

The rationale supporting recognition of the various exceptions to the hearsay rule is to “admit only hearsay evidence that exhibits inherent trustworthiness and indicia of reliability.” *Arias v. Duro Standard Prods. Co.*, 303 S.W.3d 256, 263 (Tenn. 2010). The State argues that while a legislative-crafted hearsay exception that eliminates a judicial determination of reliability might be susceptible to a challenge based upon the separation of powers doctrine, section 24-7-123 does not dispense with a judicial determination of reliability. We agree. Section 24-7-123(b)(2) requires that a trial court determine that the recording “possess[es] particularized guarantees of trustworthiness” before admitting it into evidence. The statute lists several factors for the trial court to consider in making this determination, including “[a]ny other factor deemed appropriate.” Tenn. Code Ann. § 24-7-123(b)(2)(K).

Finally, section 24-7-123 does not “remove the discretion of a trial judge in making determinations of logical or legal relevancy.” *Mallard*, 40 S.W.3d at 483. Rather, the statute provides that a recording of a forensic interview “may be considered for its bearing on any matter to which it is relevant. . . .” Tenn. Code Ann. § 24-7-123(a) (emphasis added). A trial court may exclude a recording if it finds that it is not relevant to the issues at trial. Moreover, even if the video recording satisfies the statutory prerequisites in section 24-7-123, the trial court

is afforded the discretion to determine that the recording is nevertheless inadmissible. *See* Tenn. Code Ann. § 24-7-123(b) (providing that the “video recording may be admitted”); *State v. Barry D. McCoy*, No. M2011-02121-CCA-R9-CD, 2012 WL 1941775, at *4 (Tenn. Crim. App. May 30, 2012), *perm. app. denied* (Tenn. Sept. 19, 2012). Thus, for example, the trial court may exclude the recording pursuant to Tennessee Rule of Evidence 403 upon finding that the probative value of the recording is “substantially outweighed by the danger of unfair prejudice.”

Section 24-7-123 does not “strike at the very heart of a court’s exercise of judicial power.” *Mallard*, 40 S.W.3d at 483. Therefore, the defendant has failed to show that the statute violates the separation of powers doctrine. Accordingly, a clear and unequivocal rule of law was not breached by the admission of the video recording, and the requirements for plain error were not met.

C. Trial by Jury and Presumption of Innocence

The defendant next argues that section 24-7-123 violates an accused’s constitutional rights to a jury trial and the presumption of innocence. The defendant acknowledges that he did not find any cases addressing this issue. We likewise have found no authority supporting the defendant’s claim. Accordingly, the defendant has failed to establish that a “clear and unequivocal” rule was breached and that the admission of the recording rose to the level of plain error.

D. Due Process

Finally, the defendant asserts that the admission of the recording of the victim’s forensic interview in this case violated his due process rights. While the defendant cites to authority regarding the general principles of due process, the defendant has failed to cite to any authority addressing this specific issue. Accordingly, the defendant has failed to establish that a “clear and unequivocal” rule was breached and that the admission of the recording rose to the level of plain error.

State v. Davis, 2014 WL 1775529, at *4-9.

If a state court decides a claim on an independent and adequate state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the petitioner ordinarily is barred by procedural default from seeking federal habeas review. *See supra* p. 8-10. The Sixth Circuit applies a four-part test to determine whether a habeas claim has been procedurally defaulted due to a petitioner’s failure to comply with a state procedural rule:

.... First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule....

Second, the court must decide whether the state courts actually enforced the state procedural sanction....

Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim....

Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1985) (citations and footnote omitted); *see also Van Hook v. Bobby*, 661 F.3d 264, 269 (6th Cir. 2011); *Clinscale v. Carter*, 375 F.3d 430, 440–41 (6th Cir. 2004).

Davis failed to raise this issue during trial, in the motion for new trial, or on direct appeal. Tennessee Code Ann. § 40-30-106(g) bars relief in a post-conviction proceeding for issues that could have been raised in an earlier proceeding. *See, e.g., Mobley v. State*, 397 S.W.3d 70, 104 (Tenn. 2013) (holding failure to raise claim in trial court or on direct appeal results in waiver); *Brimmer v. State*, 29 S. W.3d 497, 530 (Tenn. Crim. App. 1998) (holding failure to pursue issues at trial or on appeal results in waiver). The first *Maupin* factor has been satisfied. The second *Maupin* factor also has been satisfied; the TCCA enforced the procedural rule. *State v. Davis*, 2014 WL 1775529, at *4–9.

The third requirement, that the state procedural rule be an "adequate and independent" state ground, focuses on "the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims." *Maupin*, 785 F.2d at 138; *see also Henry v.*

Mississippi, 379 U.S. 443, 447-48 (1965) (“[A] litigant’s procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State’s insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.”). The adequacy of a state procedural rule “is itself a federal question.” *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)). “Ordinarily, violation of ‘firmly established and regularly followed’ state rules . . . will be adequate to foreclose review of a federal claim.” *Id.* at 376 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). The Supreme Court has held a procedural ground to be inadequate in “exceptional cases,” such as where the application of a “generally sound rule” has been deemed “exorbitant.” *Id.* at 376; *see also Walker v. Martin*, 562 U.S. at 320 (a state procedural rule may be inadequate when a state court “exercised its discretion in a surprising or unfair manner”).

The Sixth Circuit Court of Appeals has held that § 40-30-106(g) is an independent and adequate state ground. *Cone v. Bell*, 243 F.3d 961, 969 (6th Cir. 2001), *overruled on other grounds* by *Bell v. Cone*, 535 U.S. 685 (2002); *see e.g. Wallace v. Sexton*, No. 3:10-0521, 2013 WL 785914, at *4 (M.D. Tenn. Feb. 28, 2013) (citing *Cone*); *Holt v. Carlton*, No. 2:06-CV-247, 2008 WL 687509, at *9 (E.D. Tenn. Mar. 12, 2008) (citing *Cone*).⁸ The third *Maupin* factor has been satisfied.

⁸The Supreme Court’s decision in *Cone v. Bell*, 556 U.S. 449 (2009), is not to the contrary. In *Cone*, 556 U.S. at 464, the State presented two justifications for denying review of the prisoner’s *Brady* claim: that it was barred because it was presented on direct appeal and that it was waived because it had never been properly presented in the state courts. The Supreme Court held that “the Tennessee appellate court did not hold that Cone’s *Brady* claim was waived.” *Id.* at 467-68. Cone’s post-conviction petition contained numerous claims, and the

The fourth *Maupin* factor, whether cause existed for petitioner to not follow the procedural rule and whether petitioner was prejudiced by the constitutional error, has also been satisfied. The TCCA determined that Davis had failed to establish cause or prejudice sufficient to excuse the waiver. In this proceeding, Davis disagrees with the TCCA's plain error analysis. (Pet., ECF No. 1-1 at PageID 22-24, 29-31.) “[A] state court's plain error analysis . . . is not equivalent to a review of the merits,” and plain error review enforces rather than waives procedural default rules. *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006); *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001) (characterizing plain error review as the enforcement of a procedural default). Davis' argument is not sufficient to rebut the state court's determination that this claim was waived. Based on the *Maupin* factors, this claim is barred by procedural default due to Davis' failure to raise the issue during trial, in the motion for new trial or on direct appeal. The claim is DENIED.

B. Ineffective Assistance

2(a). Trial counsel provided ineffective assistance by failing to object to prejudicial hearsay statements. (Pet., ECF No. 1 at PageID 7.)

Tennessee Court of Criminal Appeals had stated, without elaboration, that Cone had “failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined.” *Cone v. State*, 927 S.W. 2d 579, 582 (1995). According to the Supreme Court, “[w]ithout questioning the trial court's finding that Cone's *Brady* claim had been previously determined, the Court of Criminal Appeals affirmed the denial of Cone's postconviction petition in its entirety. Nothing in that decision suggests the appellate court believed the *Brady* claim had been waived in the court below.” *Cone*, 556 U.S. at 467 n.13. The Supreme Court went on to explain that it was unclear precisely what the Court of Criminal Appeals had held. *Id.* at 467 n.13. Thus, the Supreme Court concluded that “the Tennessee Courts did not hold that Cone waived his *Brady* claim,” and that “we have no concomitant duty to apply state procedural bars where state courts have themselves declined to do so.” *Id.* at 468–69.

Petitioner raised his contention that his trial counsel provided ineffective assistance by failing to object to prejudicial hearsay statements in the post-conviction appeal. (R., Br. of Appellant, ECF No. 16-18 at PageID 988-90.) Davis contends that Shuntonya Scruggs testimony that the victim told Scruggs that “Marvin freaked on her” and Dr. Lakin’s testimony that the victim told Lakin that “her aunt’s boyfriend had freaked on her” were hearsay statements. (Pet., ECF No. 1-1 at PageID 35-37.) Respondent replies that the TCCA’s decision that Petitioner failed to demonstrate deficient performance by counsel does not contradict *Strickland* and is not based on an unreasonable determination of the established facts. (Answer, ECF No. 18 at PageID 1099.)

After identifying the proper federal standard for analysis of Petitioner’s claims of ineffective assistance, *Strickland*, see *Davis v. State*, 2016 WL 6791078, at *2, the TCCA reviewed this claim and opined:

The Petitioner contends that his trial attorneys provided ineffective assistance when they failed to object (1) to the victim’s mother’s direct examination testimony that she had taken the victim to a hospital because the victim stated the Petitioner had “freaked on” the victim and (2) to Dr. Lakin’s direct examination testimony that the victim told Dr. Lakin that the victim’s aunt’s boyfriend had “freaked on” the victim. The Petitioner argues that the testimony was inadmissible hearsay and that counsel should have requested a hearing for the court to determine whether the statements were “made under circumstances indicating trustworthiness” pursuant to Tennessee Rule of Evidence 803(26)(C), the hearsay exception pertaining to admission of prior inconsistent statements of a testifying witness. The State contends that the Petitioner’s trial attorneys did not provide ineffective assistance because the testimony was not hearsay.

1. Victim’s Mother’s Testimony

We consider, first, the Petitioner’s argument that counsel provided ineffective assistance in failing to object to the victim’s mother’s testimony. Co-counsel was not asked why he did not object, but when he was asked why lead counsel might not have objected, he testified to his opinion that the evidence was not offered for the truth of the matter asserted.

The trial transcript, which is contained in the record of the Petitioner's previous appeal, reflects the following testimony:

Q. Did you take your daughter to LeBonheur Children's Hospital on that day?

A. Yes, ma'am.

Q. Why?

A. Because she told me that morning that [the Petitioner] had freaked on her. And her stomach was hurting real bad.

Q. Had she been acting differently or complaining of anything before she talked to you about [the Petitioner]?

A. Yes.

Q. What had she been complaining about?

A. Bad stomach aches.

Q. Had she ever complained about her stomach hurting like that before?

A. No, ma'am.

Q. Did you ask her about her stomach ache?

A. Yes, ma'am.

Q. And after talking to her, is that why you took her to LeBonheur?

A. Yes, ma'am.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Such evidence is inadmissible unless it qualifies as an exception. *Id.* at 802.

In the present case, the witness was asked why she took the victim to the hospital, and she responded that she had done so because of the statement the victim made about the Petitioner's actions and about the complaints of a stomach

ache. The import of the testimony was to explain why the witness took the victim to the hospital, not to prove the Petitioner's conduct toward the victim. The evidence, when elicited from the victim's mother, was not offered to prove the truth of the matter asserted and, therefore, the Petitioner failed to show that his trial attorneys provided deficient performance when they did not make a hearsay objection.

With regard to the question of prejudice, we note that the victim testified at the trial regarding two rapes, one of which the State elected as the basis upon which it sought conviction. The victim stated that the Petitioner woke her, carried her upstairs, removed her pants, and put his "middle part" into her vagina and her "behind." In light of this testimony, we fail to discern how the Petitioner could have been prejudiced by the admission of the complained-of evidence.

We have considered the Petitioner's argument that his trial attorneys should have requested a hearing for the trial court to determine whether the victim's statement was made "under circumstances indicating trustworthiness" pursuant to Tennessee Rule of Evidence 803(26)(C). This rule pertains to admission of otherwise hearsay statements that qualify as prior inconsistent statements of a testifying witness. The Petitioner has not explained this rule's relevance to the present case, and we see none. The Petitioner failed to show that his trial attorneys should have requested a hearing to determine the trustworthiness of a prior inconsistent statement of a testifying witness. He is not entitled to relief on this basis.

2. Dr. Lakin's Testimony

We turn to the Petitioner's contention that his trial attorneys provided ineffective assistance by failing to object to the victim's statement to Dr. Lakin that the Petitioner had "freaked on" the victim. The trial transcript reflects the following direct examination testimony:

Q: . . . When you're asked to perform a sexual assault examination on a patient[, a]re there certain procedures that you follow?

A. Yes.

Q. Can you tell us what those are?

A. Well, first and foremost, we always take a medical history of the patient. One of the things that I emphasize and certainly want to train people is that when we are examining our children for any type of abuse, first and foremost, the medical condition is very important, and so,

we need to approach the patient as we do all of our medical patients and medical history is very important for us to make a diagnosis. So, we always go in and ask pertinent questions related to why are you here today. What is the reason for you presenting. And in some situations, we have to get that information from parents because the children are too young to give us that information. But if the children are verbal, then we try very much to ask them specific questions about their condition as well.

....

Q. When you are asking about why a patient is there and in [a] sexual assault examination situation, are you looking for every detail of the assault that has brought them to your clinic?

A. Not every detail. Again, our part is as the medical provider to make sure that the child is examined and treated for the complaint at hand which in this particular situation would be a complaint of sexual assault so it's very important for us to know information that would help us in the examination of the patient. For example, any details that the patient may give us about what part of the body has been assaulted helps us target our examination. The type of assault that occurs will determine what type of testing we do. So that is—and then, also, the history that's given to us will often times help us in terms of the interpretation of any findings that we have on the examination.

Q. Did you have the opportunity to meet with [the victim] on February 1st of 2011?

A. Yes, I did.

....

Q. And what did you learn from her?

A. [The victim] was interviewed and she was interviewed alone after I had just introduced myself and spoke to her mother. And when I asked her why she was there, she told me that she had been brought to the clinic because her aunt's boyfriend and this is what she actually said to me was that her aunt's boyfriend had freaked on her.

Q. Did she have any physical complaints, any pain that she talked to you about?

A. She did speak to me about having pain during the incident but at the time of the actual examination, she did not.

Tennessee Rule of Evidence 803(4) provides a hearsay exception for “[s]tatements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment.”

Dr. Lakin testified about her protocol in interviewing suspected victims of child sexual abuse and the specifics about which she questioned the individuals in order to make an accurate diagnosis and provide treatment. She said that her questions were designed to ensure the patient was treated for the complaint at hand, that it was important to obtain information that helped in the examination, that details of the body part that had been assaulted was helpful in targeting the examination, and that the nature of the assault was determinative of the appropriate testing, and that the history provided by the patient assisted the medical professionals in interpreting any findings relative to the examination. The victim’s statement about the Petitioner having “freaked on” her was made during the course of this interview. The trial record reflects that the victim’s statement to Dr. Lakin was made for the purposes of medical diagnosis and treatment. *See State v. McLeod*, 937 S.W.2d 867, 870–71 (Tenn. 1996) (holding that in child sexual abuse cases, the admissibility of the victim’s statement to a medical provider is predicated upon a thorough examination of the circumstances surrounding the statement relative to the statement’s truthfulness); *see also State v. Gordon*, 952 S.W.2d 817, 822 (Tenn. 1997). Co-counsel testified that in his opinion, the testimony did not contain hearsay because the victim’s statement had been made for the purposes of medical diagnosis and treatment.

The Petitioner failed to show that his trial attorneys provided deficient performance by not objecting to this testimony, and because the evidence was properly admitted, he likewise failed to demonstrate that prejudice occurred due to his attorneys’ lack of objection. As we have noted, the victim testified about the facts of the rape, and the jury considered her testimony when rendering its verdict. Viewed in this context, prejudice cannot be said to have resulted from counsel’s lack of objection. The post-conviction court did not err in denying relief. The Petitioner is not entitled to relief on this basis.

Davis v. State, 2016 WL 6791078, at *3–5.

Davis argues that the statements by the victim's mother and Dr. Lakin were hearsay. (Pet., ECF No. 1-1 at PageID 35–37.) He does not explain how the TCCA's decision was contrary to *Strickland*. Petitioner has not satisfied his burden of showing that the decision was objectively unreasonable. Petitioner does not provide argument or evidence that refutes the presumption of correctness accorded the state court's factual determination. A state court's factual findings are entitled to a presumption of correctness in the absence of clear and convincing evidence to the contrary. 28 U.S.C. §§ 2254(d)(2), 2254(e)(1).

Based on this Court's review of the trial transcript (R., Trial Tr., ECF No. 16-3) and the post-conviction hearing transcript, (R., Tr. of Post-Conviction Hr'g., ECF No. 16-16), the determination of the TCCA was not an unreasonable determination of the facts. Counsel did not perform deficiently by making frivolous objections to admissible testimony. Issue 1(a) is **DENIED**.

2(b). Trial Counsel performed deficiently by repeatedly referring to the prejudicial hearsay statements. (Pet., ECF No. 1 at PageID 7.)

Davis contends that trial counsel "caused prejudice when he continually referred to the alleged victim's disclosure statement on multiple occurrences during trial while cross-examining the State's witnesses." (*Id.* at PageID 37.) The State replies that the TCCA's decision that Petitioner was not prejudiced by counsels' performance did not contradict *Strickland* and was not based on an unreasonable determination of the established facts. (Answer, ECF No. 18 at PageID 1101.)

The TCCA reviewed this allegation and the post-conviction court's ruling and opined:

The Petitioner contends that lead counsel and co-counsel provided ineffective assistance when they emphasized the victim's mother's testimony and Dr. Lakin's testimony on defense cross-examination regarding the victim's

statement that the Petitioner “freaked on” her. He complains that counsel used this terminology in their cross-examination questions. The Petitioner argues that counsel added credibility to the victim’s hearsay assertion and offered it to the jury for its truth. The State contends that the Petitioner’s attorneys’ use of the terminology was part of an effort to cross-examine the witnesses thoroughly and that the evidence was not hearsay.

The cross-examination to which the Petitioner refers consists of a portion of lead counsel’s questioning of the victim’s mother and a portion of co-counsel’s cross-examination of Dr. Lakin. The first involved lead counsel’s asking the victim’s mother if she recalled having been asked by the police if she had checked the victim’s genital area after the victim reported that the Petitioner “freaked on” her. After the victim’s mother said she remembered the question, the court stated that the question had been improper and instructed the jury that the testimony of witnesses was not evidence but that

What statements [witnesses have] made sometime in the past with very few limited exceptions, they’re not evidence, but they’re designed to help you and if a witness in the past has made a consistent statement with what they’ve said or they’ve made an inconsistent statement with what they’ve testified to here, that’s for you to consider in weighing the evidence.

But what they say here today is the evidence. These other statements, that’s what they’re for and that’s why we go through this and we have certain forms that we have to use[.]

Lead counsel then rephrased the question, “At any time after . . . [the victim] told you that [the Petitioner] had freaked on her, did you check any of [the victim’s] genital area or anything like that? Answer, yes, I did. Do you remember that?”

The second instance of which the Petitioner complains involved co-counsel’s asking Dr. Lakin about the history she had recorded when Dr. Lakin examined the victim. The following questioning, which related to the date of the incident under indictment, is pertinent:

- Q. Do you remember writing a history on this?
- A. Yes. And I may have to go back and look at that again.
- Q. Yes. Page two, of your history.
- A. Yes. Yeah, that history did come from the mother.

Q. Okay. Because it says ten year old who disclosed to mom—

A. Six.

Q. Six year old who disclosed to mom that Marvin freaked on her and put his thing in the victim's—

A. Vagina.

Q. Vagina. The incident occurred last Friday, the 21st. So you're saying you got that from the mother?

A. The mother.

Q. And not the child?

A. Right. The only thing I got from the child is what's in quotation marks.

Q. Okay.

A. Which is [under the assessment section].

Q. Okay. And she didn't tell you, the child or the mother didn't tell you of a second incident, right? Any other incident besides the one on the 21st?

A. No.

When considered in context, the complained-of questioning by the Petitioner's attorneys was brief and occurred in the context of overall thorough cross-examination of two State's witnesses. The questions were not posed based upon an assumption that the victim's underlying statement had been truthful. The purpose of the questioning in the case of lead counsel's cross-examination of the victim's mother was to determine whether the victim's mother had checked the victim's vaginal area after the victim's report of the Petitioner's "freaking on" her. Ultimately, the victim's mother stated that she had checked the victim's vaginal area but had not seen anything suspicious. The purpose of the questioning in the case of co-counsel's cross-examination of Dr. Lakin was to establish the date the incident occurred and that only one incident was reported. As we stated in the previous section, the evidence elicited on direct examination regarding the victim's report of the Petitioner's having "freaked on" her was not hearsay. The Petitioner failed to establish that his trial attorneys performed deficiently in their cross-examination of the victim's mother and Dr. Lakin.

Relative to the question of prejudice, we note, as we did in the previous section, the victim's testimony about the facts of the offense. Considered in light of the victim's testimony establishing the Petitioner's conduct constituting guilt of the offense, the Petitioner cannot show that he was prejudiced by the manner in which his trial attorneys chose to cross-examine the victim's mother and Dr. Lakin. The Petitioner is not entitled to relief on this basis.

Davis v. State, 2016 WL 6791078, at *5–6.

Petitioner contends that trial counsel's use and repetition of the statements during cross-examination compounded the prejudice of the hearsay statements. (Pet., ECF No. 1-1 at PageID 37–39.) Petitioner's insistence that the admissible statements were inadmissible and should not have been referenced by counsel during cross-examination is insufficient to rebut the TCCA's determination that Petitioner failed to establish prejudice on this issue. Issue 1(b) is **DENIED**.

2(c). Trial counsel provided ineffective assistance by failing to follow up on a Rule 412 motion. (Pet., ECF No. 1 at 7.)

Petitioner Davis alleges that, had counsel gone forward with a Rule 412 motion, "other statements made by the victim that she had been 'messed with' by others" could have been used for impeachment and to create reasonable doubt. (Pet., ECF No. 1-1 at PageID 40–42.) Respondent replies that the TCCA's decision was not objectively unreasonable and is supported by proof in the record. (Answer, ECF No. 18 at PageID 1103.)

After reviewing the Petitioner's allegations and the post-conviction court's determination on the issue, the TCCA held:

The Petitioner contends that his trial attorneys provided ineffective assistance in failing to schedule a hearing on lead counsel's motion pursuant to Tennessee Rule of Evidence 412, which sought admission of evidence of sexual abuse of the victim by individuals other than the Petitioner. The Petitioner argues the evidence could have explained the hymenal notch noted during the victim's medical examination. The State contends that because no evidence was presented

at the trial to show that any physical injuries were the result of the Petitioner's rape of the victim, the Petitioner had no need to offer proof of the victim's sexual activity with other individuals.

Tennessee Rule of Evidence 412 provides that although evidence of reputation or opinion evidence of a victim's sexual behavior or evidence of sexual behavior with an individual other than the defendant is generally inadmissible, it may be admissible in limited circumstances. Tenn. R. Evid. 412(c)(4). In order for the evidence to be admitted, a motion complying with certain requisites must be filed, and the trial court must determine at a hearing that the evidence relates to reputation or opinion regarding the victim's sexual behavior or is evidence of sexual behavior with someone other than the defendant and is offered to rebut scientific or medical evidence. *Id.* at 412(d). The court must also determine that the probative value of the evidence outweighs its unfair prejudice to the victim. *Id.* at 412(d)(4).

The Rule 412 motion alleges that the victim's great aunt revealed during defense investigation of the case that the victim told the great aunt that the victim had been "messed with" by a family member and by a friend of the victim's mother. The motion states that the defense sought to cross-examine the State's witnesses to determine if someone other than the Petitioner had sexually assaulted the victim.

At the post-conviction hearing, co-counsel testified that he did not know why lead counsel, who had filed the Rule 412 motion, had not pursued it at a hearing. Co-counsel noted Dr. Lakin's opinion that the hymenal notch was a non-specific finding that might or might not indicate sexual contact. The trial evidence supports co-counsel's testimony in this regard. *See Marvin Davis*, 2014 WL 1775529, at *2 (noting Dr. Lakin's testimony that the finding of a deep cleft or notch in the victim's hymen was "indeterminate" and that over 95% of sexual assault victims did not exhibit physical injuries).

The Petitioner contends that the evidence of sexual abuse of the victim by individuals other than him was relevant to rebut Dr. Lakin's testimony about the notch in the victim's hymen. The record reflects, however, that Dr. Lakin testified that the hymenal notch was an indeterminate finding that neither indicated nor excluded sexual assault. The Petitioner did not offer any additional proof at the post-conviction hearing regarding the interpretation of this finding. The record does not support a conclusion that the evidence would have been admissible under Rule 412's limited exception to the general rule of exclusion of evidence of a victim's other sexual behavior. Because the record does not support a conclusion that the trial court would have admitted the evidence, the Petitioner failed to show at the post-conviction hearing that counsel's performance was deficient and that he was prejudiced by counsel's alleged deficient performance. The Petitioner is not entitled to relief on this basis.

Davis v. State, 2016 WL 6791078, at *6–7.

Petitioner repeats the argument presented to the TCCA. (Pet., ECF No. 1-1 at PageID 40–42, R., Br. of Appellant, ECF No. 16-18 at PageID 992–94.) The argument fails to satisfy his burden of demonstrating that the decision of the TCCA was contrary to *Strickland* or based on an unreasonable determination of the established facts. Davis has failed to demonstrate any prejudice resulting from trial counsel’s failure to litigate the motion. Issue 1(c) is **DENIED**.

2(d). Trial counsel performed deficiently by failing to cross examine the child forensic interviewer. (Pet., ECF No. 1 at PageID 7.)

Davis contends that trial counsel should have cross-examined Patricia Lewis, the forensic interviewer, about the content of the forensic interview. (*Id.* at PageID 42.) Respondent replies that the decision of the TCCA does not contradict *Strickland*. (Answer, ECF No. 12 at PageID 1715.)

The TCCA considered the issue and opined:

The Petitioner contends that his trial attorneys failed to cross-examine Patricia Lewis, the forensic interviewer, about her use of leading questions when she interviewed the victim. The State contends that the decision to attack Ms. Lewis’s testimony in closing argument was a strategic decision entitled to deference and that the Petitioner failed to establish ineffective assistance in this regard. We agree with the State.

The trial record reflects that Ms. Lewis testified for the State and that the defense did not cross-examine her. The closing arguments are not part of the trial record. At the post-conviction hearing, co-counsel testified that in most cases, a forensic interviewer would say that he or she had not asked leading questions because they were trained not to do so. He said that he had prepared lead counsel to cross-examine Ms. Lewis and agreed that lead counsel might not have asked about alleged leading questions in order to reserve the issue for closing argument. He noted that lead counsel had a good idea of how Ms. Lewis would testify at the trial because lead counsel cross-examined her at an earlier hearing.

We note that the trial court conducted a pretrial admissibility hearing regarding admission of the recorded forensic interview, which contains the alleged leading questions. *See* T.C.A. § 24-7-123 (Supp. 2012) (amended 2015) (admission of video recording or interview of child describing sexual conduct). Among the matters the court was required to consider in determining whether the recording was trustworthy included “[w]hether the statement is spontaneous or directly responsive to questions” and “[w]hether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of any leading questions[.]” *Id.* § 24-7-123(b)(2)(F), (G). The record reflects that the court considered the relevant statute in making its determination regarding the admissibility of the recording. It found, in pertinent part:

In watching the questions, it looks like Ms. Lewis worked very hard not to suggest any answers to the questions and the manner in which the interview was conducted does seem to be reliable and very little if any leading questions. Ms. Lewis was very careful not to suggest that the child’s relationship to the offender makes it I think again appropriate.

The court also found that Ms. Lewis met the statutory requirements for forensic interviewers permitted to conduct interviews that are admissible pursuant to the statute. *Id.* § 24-7-123(3).

In light of the trial court’s pretrial determination that Ms. Lewis had not asked leading questions in the interview, the court’s ruling admitting the evidence, co-counsel’s post-conviction testimony that lead counsel was prepared to cross-examine Ms. Lewis but may have instead chosen to attack her credibility in closing arguments, and the absence of the closing arguments from the record, we conclude that the post-conviction court did not err in determining that the Petitioner failed to carry his burden of showing that his trial attorneys were ineffective in not cross-examining Ms. Lewis regarding alleged leading questions. *See State v. Kerley*, 820 S.W.2d 753, 756 (Tenn. Crim. App. 1991) (stating that “cross-examination is a strategic and tactical decision of trial counsel, which is not to be measured by hindsight”).

Turning to the question of prejudice, we again note the victim’s detailed trial testimony about the facts of the offense. We note, as well, the evidence that the victim reported the offense to her mother before she was interviewed by Ms. Lewis. The victim likewise reported the facts of the offense to Dr. Lakin independently of Ms. Lewis. *See Marvin Davis*, 2014 WL 1775529, at *2-3. The evidence from the forensic interview was only one component of the State’s proof of the Petitioner’s guilt. We conclude that the post-conviction court did not err in determining that the Petitioner failed to establish prejudice from lead counsel’s failure to cross-examine Ms. Lewis about the manner in which she questioned the victim.

The Petitioner failed to establish that lead counsel provided ineffective assistance of counsel in her decision not to cross-examine Ms. Lewis. The Petitioner is not entitled to relief on this basis.

Davis v. State, 2016 WL 6791078, at *7–8.

Davis repeats the argument raised in the post-conviction appeal. (Pet., ECF No. 1-1 at PageID 42–47, R., Br. of Appellant, ECF No. 16-18 at PageID 994–99.) Petitioner’s conclusory statement that trial counsel “failed to prepare for this witness” is contradicted by co-counsel’s post-conviction testimony. (R., Tr. of Post-Conviction Hr’g., ECF No. 16-16 at PageID 948–49.) Trial counsel participated in and was privy to the forensic examiner’s testimony during the pretrial hearing on the admissibility of the videotaped interview. (R., Tr. of Pretrial Mot., ECF No. 16-2.) Counsel’s strategic decision to forego cross-examination of the witness where the trial court had already determined that the forensic examiner had not asked leading questions was not deficient. The decision of the TCCA that counsel’s performance was a reasonable determination. Issue 1(d) is **DENIED**.

The issues raised in this petition are noncognizable, procedurally defaulted, and without merit. The petition is **DISMISSED WITH PREJUDICE**. Judgment shall be entered for Respondent.

VI. APPELLATE ISSUES

There is no absolute entitlement to appeal a district court’s denial of a § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). The Court must issue or deny a certificate of appealability (“COA”) when it enters a final order adverse to a § 2254 petitioner. Rule 11, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P.

22(b)(1). A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2)-(3). A “substantial showing” is made when the petitioner demonstrates that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Miller-El*, 537 U.S. at 336 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *Henley v. Bell*, 308 F. App’x 989, 990 (6th Cir. 2009) (per curiam) (holding a prisoner must demonstrate that reasonable jurists could disagree with the district court’s resolution of his constitutional claims or that the issues presented warrant encouragement to proceed further).

A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App’x 809, 814–15 (6th Cir. 2011) (same). Courts should not issue a COA as a matter of course. *Bradley v. Birkett*, 156 F. App’x 771, 773 (6th Cir. 2005) (quoting *Slack*, 537 U.S. at 337).

In this case, there can be no question that the claims in this petition are noncognizable, procedurally defaulted, and without merit. Because any appeal by Petitioner on the issues raised in this petition does not deserve attention, the Court **DENIES** a certificate of appealability.

In this case for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore **CERTIFIED**,

pursuant to Fed. R. App. P. 24(a), that any appeal in this matter would not be taken in good faith and leave to appeal *in forma pauperis* is **DENIED**.⁹

IT IS SO ORDERED, this 6th day of August 2021.

s/ Mark S. Norris

MARK S. NORRIS
UNITED STATES DISTRICT JUDGE

⁹ If Petitioner files a notice of appeal, he must pay the full \$505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days of the date of entry of this order. *See* Fed. R. App. P. 24(a)(5).

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

APPENDIX C: TENNESSEE COURT OF CRIMINAL APPEALS DECISION
Marvin Davis v. State of TN., W2015-02129-CCA-R3-PC (TCCA 11/16/2016)

WESTLAW**Davis v. State**

Court of Criminal Appeals of Tennessee, AT JACKSON, November 16, 2016 Not Reported in S.W. Rptr. 2016 WL 6791078 (Approx. 8 pages)

2016 WL 6791078

Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO
PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
AT JACKSON.

Marvin DAVIS

v.

STATE of Tennessee

No. W2015-02129-CCA-R3-PC

Assigned on Briefs at Knoxville July 26, 2016

Filed November 16, 2016

Application for Permission to Appeal Denied by Supreme Court March 9, 2017.

Appeal from the Criminal Court for Shelby County, No. 11-06514, J. Robert Carter, Jr., Judge

Attorneys and Law Firms

Patrick M. Brooks (on appeal and at hearing) and Josie S. Holland (on appeal), Memphis, Tennessee, for the appellant, Marvin Davis.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin E.D. Smith, Assistant Attorney General; Amy P. Weirich, District Attorney General; Dru Carpenter, Assistant District Attorney General, for the appellee, State of Tennessee.

Robert H. Montgomery, Jr., J., delivered the opinion of the court, in which Thomas T. Woodall, P.J., and Camille R. McMullen, J., joined.

OPINION

Robert H. Montgomery, Jr., J.

*# The Petitioner, Marvin Davis, appeals the Shelby County Criminal Court's denial of his petition for post-conviction relief from his rape of a child conviction, for which he is serving a twenty-five-year sentence. He contends that he received the ineffective assistance of counsel and that the post-conviction judge erred in denying the Petitioner's motion to recuse. We affirm the judgment of the post-conviction court.

The Petitioner's conviction pertains to the rape of his girlfriend's six-year-old great-niece. The victim frequently stayed in the home the Petitioner and his girlfriend shared and slept in the same room with them. According to the trial proof, the Petitioner woke the victim while the Petitioner's girlfriend slept, carried the victim upstairs, and sexually penetrated her vaginally and anally on two occasions. The second of these occasions is the basis for the conviction. On appeal, the Petitioner challenged the sufficiency of the evidence and the trial court's evidentiary ruling admitting a videotaped forensic interview of the victim. This court affirmed the conviction, and the supreme court denied the Petitioner's application for permission to appeal. See *State v. Marvin Davis*, No. W2013-00656-CCA-R3-CD, 2014 WL 1775529 (Tenn. Crim. App. May 1, 2014), *perm. app. denied* (Tenn. Dec. 5, 2014).

The Petitioner filed the present post-conviction action alleging he received the ineffective assistance of counsel from the two attorneys who acted as his trial counsel. Post-conviction counsel was appointed. Post-conviction counsel filed a motion for the judge to recuse himself based upon alleged bias in favor of the State due to a ruling the judge made at the Petitioner's trial, and the judge denied the motion in a written order.

At the post-conviction hearing, co-counsel testified that his duties involved analyzing the medical evidence, jury selection, opening statements, medical testimony, and cross-examination. He said lead counsel handled all other aspects of the case and made the major decisions. He said that lead counsel was now deceased.

Co-counsel testified that he did not know why lead counsel had not objected to the victim's mother's testimony that she had taken the victim to a hospital after the victim stated the Petitioner had "freaked on" the victim. He said he did not think the statement was hearsay because it had not been offered for the truth of the matter asserted. Co-counsel did not know why lead counsel had not objected when Dr. Karen Lakin¹ testified that the victim told Dr. Lakin that the victim "freaked on" the victim but said he did not think the evidence had been offered for the truth of the matter asserted. In his opinion, the victim's statement to Dr. Lakin was made for purposes of medical diagnosis and treatment. He did not know why lead counsel repeated the victim's statement during cross-examination of witnesses and said he thought it was "how the cross examination was phrased."

Co-counsel acknowledged that a motion pursuant to Tennessee Rule of Evidence 412 regarding "other potential explanations for injuries or the testimony of Dr. Karen Lakin" was filed but did not know why lead counsel had not argued the motion at a hearing. Co-counsel said the motion pertained to allegations that two individuals other than the Petitioner sexually abused the victim. The motion was received as an exhibit. Co-counsel said the only injury to the victim identified by the evidence was a hymenal notch which, according to Dr. Lakin, was a non-specific finding that might or might not indicate sexual activity.

*2 Co-counsel testified that he had adequately prepared lead counsel to cross-examine Patricia Lewis, the child forensic interviewer who testified for the State. He did not know why lead counsel had not cross-examined Ms. Lewis regarding what the Petitioner believed were leading questions the prosecutor had asked Ms. Lewis. Co-counsel said that in most cases, an interviewer would say that he or she had not asked leading questions because they were trained not to do so. Co-counsel said that lead counsel might not have asked about alleged leading questions in order to reserve the issue for closing argument. He said lead counsel had a good idea of how the forensic interviewer would testify at the trial because lead counsel had been able to cross-examine the interviewer at an earlier hearing.

Co-counsel testified that lead counsel had been organized, kept her files well documented, saw her clients many times, and conducted appropriate investigation. He said lead counsel had empathy toward the Petitioner, and he noted that her file relative to the Petitioner's case indicated she had worked a "vast amount of time," prepared for trial, prepared for the medical examiner's testimony, "went above and beyond" to visit the Petitioner in jail, and had been extremely meticulous and organized.

The Petitioner elected not to testify at the hearing. After receiving the proof, the post-conviction court denied relief in a written order. This appeal followed.

1

Ineffective Assistance of Counsel

Post-conviction relief is available "when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103 (2012). A petitioner has the burden of proving his factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f) (2012). A post-conviction court's findings of fact are binding on appeal, and this court must defer to them "unless the evidence in the record preponderates against those findings." *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); see *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's application of law to its factual findings is subject to a *de novo* standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

To establish a post-conviction claim of the ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner has the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The Tennessee Supreme Court has applied the *Strickland* standard to an accused's right to counsel under article I, section 9 of the Tennessee Constitution. See *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner must satisfy both prongs of the *Strickland* test in order to prevail in an ineffective assistance of counsel claim. *Henley*, 960 S.W.2d at 580. "[F]ailure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). To establish the performance prong, a petitioner must show that "the advice given, or the services rendered

..., are [not] within the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); *see Strickland*, 466 U.S. at 690. The post-conviction court must determine if these acts or omissions, viewed in light of all of the circumstances, fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A petitioner "is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision." *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); *see Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008). This deference, however, only applies "if the choices are informed ... based upon adequate preparation." *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). To establish the prejudice prong, a 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." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

A. Failure to Object to Hearsay Evidence

*3 The Petitioner contends that his trial attorneys provided ineffective assistance when they failed to object (1) to the victim's mother's direct examination testimony that she had taken the victim to a hospital because the victim stated the Petitioner had "freaked on" the victim and (2) to Dr. Lakin's direct examination testimony that the victim told Dr. Lakin that the victim's aunt's boyfriend had "freaked on" the victim. The Petitioner argues that the testimony was inadmissible hearsay and that counsel should have requested a hearing for the court to determine whether the statements were "made under circumstances indicating trustworthiness" pursuant to Tennessee Rule of Evidence 803(26)(C), the hearsay exception pertaining to admission of prior inconsistent statements of a testifying witness. The State contends that the Petitioner's trial attorneys did not provide ineffective assistance because the testimony was not hearsay.

1. Victim's Mother's Testimony

We consider, first, the Petitioner's argument that counsel provided ineffective assistance in failing to object to the victim's mother's testimony. Co-counsel was not asked why he did not object, but when he was asked why lead counsel might not have objected, he testified to his opinion that the evidence was not offered for the truth of the matter asserted.

The trial transcript, which is contained in the record of the Petitioner's previous appeal, reflects the following testimony:

Q. Did you take your daughter to LeBonheur Children's Hospital on that day?

A. Yes, ma'am.

Q. Why?

A. Because she told me that morning that [the Petitioner] had freaked on her. And her stomach was hurting real bad.

Q. Had she been acting differently or complaining of anything before she talked to you about [the Petitioner]?

A. Yes.

Q. What had she been complaining about?

A. Bad stomach aches.

Q. Had she ever complained about her stomach hurting like that before?

A. No, ma'am.

Q. Did you ask her about her stomach ache?

A. Yes, ma'am.

Q. And after talking to her, is that why you took her to LeBonheur?

A. Yes, ma'am.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Such evidence is inadmissible unless it qualifies as an exception. *Id.* at 802.

In the present case, the witness was asked why she took the victim to the hospital, and she responded that she had done so because of the statement the victim made about the Petitioner's actions and about the complaints of a stomach ache. The import of the testimony was to explain why the witness took the victim to the hospital, not to prove the Petitioner's conduct toward the victim. The evidence, when elicited from the victim's mother, was not offered to prove the truth of the matter asserted and, therefore, the Petitioner failed to show that his trial attorneys provided deficient performance when they did not make a hearsay objection.

With regard to the question of prejudice, we note that the victim testified at the trial regarding two rapes, one of which the State elected as the basis upon which it sought conviction. The victim stated that the Petitioner woke her, carried her upstairs, removed her pants, and put his "middle part" into her vagina and her "behind." In light of this testimony, we fail to discern how the Petitioner could have been prejudiced by the admission of the complained-of evidence.

We have considered the Petitioner's argument that his trial attorneys should have requested a hearing for the trial court to determine whether the victim's statement was made "under circumstances indicating trustworthiness" pursuant to Tennessee Rule of Evidence 803(26)(C). This rule pertains to admission of otherwise hearsay statements that qualify as prior inconsistent statements of a testifying witness. The Petitioner has not explained this rule's relevance to the present case, and we see none. The Petitioner failed to show that his trial attorneys should have requested a hearing to determine the trustworthiness of a prior inconsistent statement of a testifying witness. He is not entitled to relief on this basis.

2. Dr. Lakin's Testimony.

*4 We turn to the Petitioner's contention that his trial attorneys provided ineffective assistance by failing to object to the victim's statement to Dr. Lakin that the Petitioner had "freaked on" the victim. The trial transcript reflects the following direct examination testimony:

Q: ... When you're asked to perform a sexual assault examination on a patient[, a]re there certain procedures that you follow?

A. Yes.

Q. Can you tell us what those are?

A. Well, first and foremost, we always take a medical history of the patient. One of the things that I emphasize and certainly want to train people is that when we are examining our children for any type of abuse, first and foremost, the medical condition is very important, and so, we need to approach the patient as we do all of our medical patients and medical history is very important for us to make a diagnosis. So, we always go in and ask pertinent questions related to why are you here today. What is the reason for you presenting. And in some situations, we have to get that information from parents because the children are too young to give us that information. But if the children are verbal, then we try very much to ask them specific questions about their condition as well.

....

Q. When you are asking about why a patient is there and in [a] sexual assault examination situation, are you looking for every detail of the assault that has brought them to your clinic?

A. Not every detail. Again, our part is as the medical provider to make sure that the child is examined and treated for the complaint at hand which in this particular situation would be a complaint of sexual assault so it's very important for us to know information that would help us in the examination of the patient. For example, any details that the patient may give us about what part of the body has been assaulted helps us target our examination. The type of assault that occurs will determine what type of testing we do. So that is—and then, also, the history that's given to us will often times help us in terms of the interpretation of any findings that we have on the examination.

Q. Did you have the opportunity to meet with [the victim] on February 1st of 2011?

A. Yes, I did.

....

Q. And what did you learn from her?

A. [The victim] was interviewed and she was interviewed alone after I had just introduced myself and spoke to her mother. And when I asked her why she was there, she told me that she had been brought to the clinic because her aunt's boyfriend and this is what she actually said to me was that her aunt's boyfriend had freaked on her.

Q. Did she have any physical complaints, any pain that she talked to you about?

A. She did speak to me about having pain during the incident but at the time of the actual examination, she did not.

Tennessee Rule of Evidence 803(4) provides a hearsay exception for "[s]tatements made for purposes of medical diagnosis and treatment describing medical history: past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment."

Dr. Lakin testified about her protocol in interviewing suspected victims of child sexual abuse and the specifics about which she questioned the individuals in order to make an accurate diagnosis and provide treatment. She said that her questions were designed to ensure the patient was treated for the complaint at hand, that it was important to obtain information that helped in the examination, that details of the body part that had been assaulted was helpful in targeting the examination, and that the nature of the assault was determinative of the appropriate testing, and that the history provided by the patient assisted the medical professionals in interpreting any findings relative to the examination. The victim's statement about the Petitioner having "freaked on" her was made during the course of this interview. The trial record reflects that the victim's statement to Dr. Lakin was made for the purposes of medical diagnosis and treatment. See *State v. McLeod*, 937 S.W.2d 867, 870–71 (Tenn. 1996) (holding that in child sexual abuse cases, the admissibility of the victim's statement to a medical provider is predicated upon a thorough examination of the circumstances surrounding the statement relative to the statement's truthfulness); see also *State v. Gordon* 952 S.W.2d 817, 822 (Tenn. 1997). Co-counsel testified that in his opinion, the testimony did not contain hearsay because the victim's statement had been made for the purposes of medical diagnosis and treatment.

*5 The Petitioner failed to show that his trial attorneys provided deficient performance by not objecting to this testimony, and because the evidence was properly admitted, he likewise failed to demonstrate that prejudice occurred due to his attorneys' lack of objection. As we have noted, the victim testified about the facts of the rape, and the jury considered her testimony when rendering its verdict. Viewed in this context, prejudice cannot be said to have resulted from counsel's lack of objection. The post-conviction court did not err in denying relief. The Petitioner is not entitled to relief on this basis.

B. Method of Cross-Examination

The Petitioner contends that lead counsel and co-counsel provided ineffective assistance when they emphasized the victim's mother's testimony and Dr. Lakin's testimony on defense cross-examination regarding the victim's statement that the Petitioner "freaked on" her. He complains that counsel used this terminology in their cross-examination questions. The Petitioner argues that counsel added credibility to the victim's hearsay assertion and offered it to the jury for its truth. The State contends that the Petitioner's attorneys' use of the terminology was part of an effort to cross-examine the witnesses thoroughly and that the evidence was not hearsay.

The cross-examination to which the Petitioner refers consists of a portion of lead counsel's questioning of the victim's mother and a portion of co-counsel's cross-examination of Dr. Lakin. The first involved lead counsel's asking the victim's mother if she recalled having been asked by the police if she had checked the victim's genital area after the victim reported that the Petitioner "freaked on" her. After the victim's mother said she remembered the question, the court stated that the question had been improper and instructed the jury that the testimony of witnesses was not evidence but that

What statements [witnesses have] made sometime in the past with very few limited exceptions, they're not evidence, but they're designed to help you and if a witness in the past has made a consistent statement with what they've said or they've made an inconsistent statement with what they've testified to here, that's for you to consider in weighing the evidence.

But what they say here today is the evidence. These other statements, that's what they're for and that's why we go through this and we have certain forms that we have to use[.]

Lead counsel then rephrased the question, "At any time after ... [the victim] told you that [the Petitioner] had freaked on her, did you check any of [the victim's] genital area or anything like that? Answer, yes, I did. Do you remember that?"

The second instance of which the Petitioner complains involved co-counsel's asking Dr. Lakin about the history she had recorded when Dr. Lakin examined the victim. The following questioning, which related to the date of the incident under indictment, is pertinent:

Q. Do you remember writing a history on this?

A. Yes. And I may have to go back and look at that again.

Q. Yes. Page two, of your history.

A. Yes. Yeah, that history did come from the mother.

Q. Okay. Because it says ten year old who disclosed to mom—

A. Six.

Q. Six year old who disclosed to mom that Marvin freaked on her and put his thing in the victim's—

A. Vagina.

Q. Vagina. The incident occurred last Friday, the 21st. So you're saying you got that from the mother?

A. The mother.

Q. And not the child?

A. Right. The only thing I got from the child is what's in quotation marks.

Q. Okay.

A. Which is [under the assessment section].

Q. Okay. And she didn't tell you, the child or the mother didn't tell you of a second incident, right? Any other incident besides the one on the 21st?

*6 A. No.

When considered in context, the complained-of questioning by the Petitioner's attorneys was brief and occurred in the context of overall thorough cross-examination of two State's witnesses. The questions were not posed based upon an assumption that the victim's underlying statement had been truthful. The purpose of the questioning in the case of lead counsel's cross-examination of the victim's mother was to determine whether the victim's mother had checked the victim's vaginal area after the victim's report of the Petitioner's "freaking on" her. Ultimately, the victim's mother stated that she had checked the victim's vaginal area but had not seen anything suspicious. The purpose of the questioning in the case of co-counsel's cross-examination of Dr. Lakin was to establish the date the incident occurred and that only one incident was reported. As we stated in the previous section, the evidence elicited on direct examination regarding the victim's report of the Petitioner's having "freaked on" her was not hearsay. The Petitioner failed to establish that his trial attorneys performed deficiently in their cross-examination of the victim's mother and Dr. Lakin.

Relative to the question of prejudice, we note, as we did in the previous section, the victim's testimony about the facts of the offense. Considered in light of the victim's testimony establishing the Petitioner's conduct constituting guilt of the offense, the Petitioner cannot show that he was prejudiced by the manner in which his trial attorneys chose to cross-examine the victim's mother and Dr. Lakin. The Petitioner is not entitled to relief on this basis.

C. Failure to Schedule Admissibility Hearing

The Petitioner contends that his trial attorneys provided ineffective assistance in failing to schedule a hearing on lead counsel's motion pursuant to Tennessee Rule of Evidence 412, which sought admission of evidence of sexual abuse of the victim by individuals other than the Petitioner. The Petitioner argues the evidence could have explained the hymenal notch noted during the victim's medical examination. The State contends that because no evidence was presented at the trial to show that any physical injuries were the result of the Petitioner's rape of the victim, the Petitioner had no need to offer proof of the victim's sexual activity with other individuals.

Tennessee Rule of Evidence 412 provides that although evidence of reputation or opinion evidence of a victim's sexual behavior or evidence of sexual behavior with an individual other than the defendant is generally inadmissible, it may be admissible in limited circumstances. Tenn. R. Evid. 412(c)(4). In order for the evidence to be admitted, a motion complying with certain requisites must be filed, and the trial court must determine at a hearing that the evidence relates to reputation or opinion regarding the victim's sexual behavior or is evidence of sexual behavior with someone other than the defendant and is offered to rebut scientific or medical evidence. *Id.* at 412(d). The court must also determine that the probative value of the evidence outweighs its unfair prejudice to the victim. *Id.* at 412(d)(4).

*7 The Rule 412 motion alleges that the victim's great aunt revealed during defense investigation of the case that the victim told the great aunt that the victim had been "messed with" by a family member and by a friend of the victim's mother. The motion states that the defense sought to cross-examine the State's witnesses to determine if someone other than the Petitioner had sexually assaulted the victim.

At the post-conviction hearing, co-counsel testified that he did not know why lead counsel, who had filed the Rule 412 motion, had not pursued it at a hearing. Co-counsel noted Dr. Lakin's opinion that the hymenal notch was a non-specific finding that might or might not indicate sexual contact. The trial evidence supports co-counsel's testimony in this regard. See *Marvin Davis*, 2014 WL 1775529, at *2 (noting Dr. Lakin's testimony that the finding of a deep cleft or notch in the victim's hymen was "indeterminate" and that over 95% of sexual assault victims did not exhibit physical injuries).

The Petitioner contends that the evidence of sexual abuse of the victim by individuals other than him was relevant to rebut Dr. Lakin's testimony about the notch in the victim's hymen. The record reflects, however, that Dr. Lakin testified that the hymenal notch was an indeterminate finding that neither indicated nor excluded sexual assault. The Petitioner did not offer any additional proof at the post-conviction hearing regarding the interpretation of this finding. The record does not support a conclusion that the evidence would have been admissible under Rule 412's limited exception to the general rule of exclusion of evidence of a victim's other sexual behavior. Because the record does not support a conclusion that the trial court would have admitted the evidence, the Petitioner failed to show at the post-conviction hearing that counsel's performance was deficient and that he was prejudiced by counsel's alleged deficient performance. The Petitioner is not entitled to relief on this basis.

D. Failure to Cross-Examine a Witness

The Petitioner contends that his trial attorneys failed to cross-examine Patricia Lewis, the forensic interviewer, about her use of leading questions when she interviewed the victim. The State contends that the decision to attack Ms. Lewis's testimony in closing argument was a strategic decision entitled to deference and that the Petitioner failed to establish ineffective assistance in this regard. We agree with the State.

The trial record reflects that Ms. Lewis testified for the State and that the defense did not cross-examine her. The closing arguments are not part of the trial record. At the post-conviction hearing, co-counsel testified that in most cases, a forensic interviewer would say that he or she had not asked leading questions because they were trained not to do so. He said that he had prepared lead counsel to cross-examine Ms. Lewis and agreed that lead counsel might not have asked about alleged leading questions in order to reserve the issue for closing argument. He noted that lead counsel had a good idea of how Ms. Lewis would testify at the trial because lead counsel cross-examined her at an earlier hearing.

We note that the trial court conducted a pretrial admissibility hearing regarding admission of the recorded forensic interview, which contains the alleged leading questions. See T.C.A. § 24-7-123 (Supp. 2012) (amended 2015) (admission of video recording or interview of child describing sexual conduct). Among the matters the court was required to consider in determining whether the recording was trustworthy included "[w]hether the statement is spontaneous or directly responsive to questions" and "[w]hether the manner in which the

interview was conducted was reliable, including, but not limited to, the absence of any leading questions[.]" *Id.* § 24-7-123(b)(2)(F), (G). The record reflects that the court considered the relevant statute in making its determination regarding the admissibility of the recording. It found, in pertinent part:

*8 In watching the questions, it looks like Ms. Lewis worked very hard not to suggest any answers to the questions and the manner in which the interview was conducted does seem to be reliable and very little if any leading questions. Ms. Lewis was very careful not to suggest that the child's relationship to the offender makes it I think again appropriate.

The court also found that Ms. Lewis met the statutory requirements for forensic interviewers permitted to conduct interviews that are admissible pursuant to the statute. *Id.* § 24-7-123(3).

In light of the trial court's pretrial determination that Ms. Lewis had not asked leading questions in the interview, the court's ruling admitting the evidence, co-counsel's post-conviction testimony that lead counsel was prepared to cross-examine Ms. Lewis but may have instead chosen to attack her credibility in closing arguments, and the absence of the closing arguments from the record, we conclude that the post-conviction court did not err in determining that the Petitioner failed to carry his burden of showing that his trial attorneys were ineffective in not cross-examining Ms. Lewis regarding all leading questions. See *State v. Kerley*, 820 S.W.2d 753, 756 (Tenn. Crim. App. 1991) (stating that "cross-examination is a strategic and tactical decision of trial counsel, which is not to be measured by hindsight").

Turning to the question of prejudice, we again note the victim's detailed trial testimony about the facts of the offense. We note, as well, the evidence that the victim reported the offense to her mother before she was interviewed by Ms. Lewis. The victim likewise reported the facts of the offense to Dr. Lakin independently of Ms. Lewis. See *Marvin Davis*, 2014 WL 1775529, at *2-3. The evidence from the forensic interview was only one component of the State's proof of the Petitioner's guilt. We conclude that the post-conviction court did not err in determining that the Petitioner failed to establish prejudice from lead counsel's failure to cross-examine Ms. Lewis about the manner in which she questioned the victim.

The Petitioner failed to establish that lead counsel provided ineffective assistance of counsel in her decision not to cross-examine Ms. Lewis. The Petitioner is not entitled to relief on this basis.

E. Cumulative Effect of Errors

The Petitioner contends that even if the individual errors and omissions of his trial attorneys failed to establish ineffective assistance of counsel, the cumulative effect of their conduct negatively impacted the outcome of his trial. The State contends that the Petitioner's claim must fail because he failed to show that his trial attorneys provided deficient performance in any of the claimed instances. We agree with the State. The Petitioner failed to show that his trial attorneys performed deficiently, and his claim that he was prejudiced by the cumulative effect of their individual errors and omissions must fail. He is not entitled to relief on this basis.

II

Denial of Motion to Recuse

The Petitioner contends that the post-conviction judge erred in denying a motion to recuse himself "because the judge made hearsay objections for the prosecution" at the trial. The State contends that the judge did not err in denying the motion. We agree with the State.

The Code of Judicial Conduct provides:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

*9 (1) The judge had a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

Tenn. R. Sup. Ct. 10, Canon 2, Rule 2.11(A)(1). A judge should grant a motion to recuse if the judge has any doubts about the judge's ability to preside impartially. *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994); see *Lackey v. State*, 578 S.W.2d 101, 104 (Tenn. Crim. App. 1978). Likewise, recusal is appropriate "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Alley*, 882 S.W.2d at 820 (citing *State v. Cash*, 867 S.W.2d 741 (Tenn. Crim. App. 1993)). An appellate court conducts a de novo review of a trial court's denial of a motion to recuse. Tenn. R. Sup. Ct. 10B, § 2.01.

The Petitioner's complaint relates to the following, which occurred during examination of a defense witness at the trial:

Q. [Lead Counsel:] [D]id you hear what he said on the phone? Don't tell me what he said on the phone but did you hear what he said?

A. I heard him say I didn't do that.

[Prosecutor]: Objection, Your Honor, hearsay.

[Lead Counsel]: I'm sorry, Judge.

The Court: Sustained.

Q. [Lead Counsel:] Whose idea was it to go to the hospital? There was a decision made to go to LeBonheur Hospital?

A. Mr. Davis. He said—

The Court: You can't tell us what somebody said.

The Petitioner argues that the judge's admonition to the witness amounted to the judge's "inserting himself into the role of the prosecution making objections to hearsay statements." We disagree. The prosecutor made a hearsay objection, and the court sustained the objection. When the witness offered further hearsay testimony, the court *sua sponte* instructed the witness not to testify about what another person said. In the previous instance, the court had not explained the basis of the ruling to the witness, and its subsequent admonition explained the limits of permissible testimony. This instance was a single occurrence in one witness's trial testimony and fails to indicate bias toward the State or prejudice against the Petitioner that precluded the judge from impartial consideration of the Petitioner's post-conviction action. The court did not err in denying the motion to recuse. The Petitioner is not entitled to relief on this basis.

In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

All Citations

Not Reported in S.W. Rptr., 2016 WL 6791078

Footnotes

1 Dr. Lakin is referred to as Dr. Larkin in this court's opinion in the previous appeal and as Dr. Lakin in the trial transcript and the post-conviction hearing transcript. Dr. Lakin testified at the trial and spelled her name at the beginning of her testimony. We use the spelling provided by the witness.

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

APPENDIX D: TENNESSEE COURT OF CRIMINAL APPEALS DECISION
State of TN. v. Marvin Davis, W2013-00656-CCA-R3-CD (TCCA 12/5/2014)

WESTLAW**State v. Davis**

Court of Criminal Appeals of Tennessee, at Jackson. May 1, 2014 Not Reported in S.W.3d 2014 WL 1775529 (Approx. 9 pages)

2014 WL 1775529

Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO
PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
at Jackson.

STATE of Tennessee

v.

Marvin DAVIS.

No. W2013-00656-CCA-R3-CD.

May 1, 2014.

Application for Permission to Appeal Denied by Supreme Court Dec. 5, 2014.

Appeal from the Criminal Court for Shelby County, No. 1106514; J. Robert Carter, Jr.,
Judge.

Attorneys and Law Firms

Stephen C. Bush, District Public Defender; Barry W. Kuhn, Assistant Public Defender (on
appeal); and E. Jane Sturdivant and Sanjeev Memula, Assistant Public Defenders (at trial),
for the appellant, **Marvin Davis**.

Robert E. Cooper, Jr., Attorney General & Reporter; J. Ross Dyer, Senior Counsel; Amy P.
Weirich, District Attorney General; and Terre Fratesi and Abby Wallace, Assistant District
Attorneys General, for the appellee, State of Tennessee.

ALAN E. GLENN, J., delivered the opinion of the Court, in which JOHN EVERETT
WILLIAMS and CAMILLE R. McMULLEN, JJ., joined.

OPINION

ALAN E. GLENN, J.

*1 A Shelby County jury convicted the defendant, **Marvin Davis**, of rape of a child, and the
trial court sentenced him to twenty-five years at 100%. On appeal, the defendant contends
that (1) the trial court erred in admitting the videotaped forensic interview of the victim; and
(2) the evidence is insufficient to support his conviction. We affirm the judgment of the trial
court.

FACTS

The defendant was indicted on charges of rape of a child and aggravated sexual battery
arising out of his sexual encounters with his girlfriend's six-year-old great-niece, between
March 18, 2010, and January 22, 2011.

The victim's mother testified that the victim was born on March 18, 2004, and was eight
years old at the time of trial. Shortly after the victim was born, the victim's great-aunt,
Vurvum Fitzpatrick, began caring for her and continued doing so for approximately five
years. The victim viewed Ms. Fitzpatrick and the defendant as her parents and loved both
of them. Around the age of six, the victim began spending more time with her mother but
continued to stay with Ms. Fitzpatrick and the defendant. The victim's mother said that
when the victim stayed with Ms. Fitzpatrick and the defendant, she slept either in the
bedroom or on a couch that folded out into a bed.

The victim's mother testified that on January 28, 2011, the victim complained of her
stomach hurting and reported that the defendant had "freaked" on her. The victim's mother
said the victim had last been to the home of Ms. Fitzpatrick and the defendant on January
21. The victim's mother took her to Le Bonheur Children's Hospital to be examined. They
then went to the Memphis Child Advocacy Center where the victim was interviewed and
examined.

On cross-examination, the victim's mother testified that after the victim reported the abuse, the victim's mother called Ms. Fitzpatrick, who began screaming and crying upon learning of the allegations. The victim's mother informed Ms. Fitzpatrick of her plans to have the victim examined at Le Bonheur. The victim's mother said that Ms. Fitzpatrick and the defendant met them at Le Bonheur but that the defendant did not say anything about the allegations. The victim's mother acknowledged that she examined the victim before taking her to Le Bonheur and that she did not see any trauma.

The victim testified that although she was living with her mother at the time of trial, she had previously lived with Ms. Fitzpatrick in an apartment for a long period of time. The victim, Ms. Fitzpatrick, and the defendant slept in the same room. Ms. Fitzpatrick and the defendant slept on a portion of the couch that folded out into a bed while the victim slept on the other portion of the couch.

The victim recalled one occasion when the defendant woke her up, carried her upstairs, took off her pants, and put his "middle part" in her "behind" and into her vagina. The victim said the defendant's "middle part" was located above his knees and below his waist and was used to urinate. She stated that the defendant told her not to tell anyone and then carried her back downstairs where Ms. Fitzpatrick was sleeping. The victim further stated that she was six years old at the time.

*2 The victim testified that during a separate incident, the defendant again woke her up, carried her upstairs, took her clothes off, put his "middle part" in her "behind" and into her vagina, and carried her back downstairs where Ms. Fitzpatrick was sleeping. The victim said the defendant's "middle part" went into her vagina. When she returned to her mother's home, her stomach began hurting, and she informed her mother of the defendant's actions. The victim's mother took her to a children's hospital where she was examined. The victim said she then went to another building where she told someone that the defendant had touched her.

On cross-examination, the victim testified that both assaults occurred the same way. She said she first reported the abuse to Ms. Fitzpatrick, who did not respond. The victim then waited some time before telling her mother.

Dr. Karen Larkin, an assistant professor of pediatrics and the medical director for the child assessment program at Le Bonheur Children's Hospital, was admitted by the trial court as an expert in "child abuse pediatrics." Dr. Larkin examined the victim in the Le Bonheur Clinic at the Memphis Child Advocacy Center on February 1, 2011. She recalled that the victim was six years old at the time of the examination.

Dr. Larkin testified that she interviewed the victim alone after introducing herself and speaking to the victim's mother. The victim told Dr. Larkin that she had been brought to the clinic because her aunt's boyfriend had "freaked" on her. The victim reported having pain during the assault but said she did not have any pain at the time of the examination.

Dr. Larkin said that although the victim did not tell her when the assault occurred, children around the victim's age generally do not understand the concept of time. Dr. Larkin generally obtained such information from the child's parents. The victim's mother told Dr. Larkin that the assault occurred on January 21, 2011. Dr. Larkin explained that no DNA evidence was obtained due to the difficulty in obtaining such evidence forty-eight to seventytwo hours following a sexual assault.

During the physical examination, Dr. Larkin noted a deep cleft or notch on the victim's hymen. She explained that this finding did not mean that something did or did not occur. Rather, the cleft can be a normal variant in both children and adolescents. Dr. Larkin said the cleft also could be the result of healing from a tear and could support sexual assault. Because she could not make a definite finding as to whether the cleft was the result of sexual assault, her finding was "indeterminate." Dr. Larkin noted that more than 95% of sexual assault victims do not have physical injuries.

On cross-examination, Dr. Larkin testified that she concluded that indeterminate findings from the physical examination may support the victim's disclosure of abuse. Dr. Larkin said that she found no evidence of penetration but that a child can be sexually penetrated without physical injury. She further said the victim and her mother reported only one incident of sexual assault.

*3 Patricia Lewis, a forensic interviewer with the Memphis Child Advocacy Center, was accepted by the trial court as an expert in forensic interviewing. Ms. Lewis testified that she

conducted a forensic interview of the victim on January 28, 2011, at 1:30 p.m. Only the victim and Ms. Lewis were in the room during the interview.

Ms. Lewis said the victim was cooperative and seemed nervous. At one point, the victim mentioned that her stomach was hurting. Ms. Lewis stated that the victim was a typical six-year-old child who demonstrated appropriate verbal skills and appropriate knowledge of body parts for her age level. The videotape and transcript of the interview were entered into evidence.

During the interview, the victim informed Ms. Lewis that the defendant touched her "coochie" and her "butt" with his "middle part" on one occasion while on the couch and on one occasion while upstairs. The victim said the defendant told her not to tell anyone. She also said that during the assault that occurred upstairs, the defendant was "inside" her "coochie." Following Ms. Lewis' testimony, the State rested.

The defense presented the testimony of Vurvum Fitzpatrick, who testified that at the time of trial, she and the defendant had been dating for approximately eight years. She said the victim came to live with her and the defendant after the victim's mother planned to put her up for adoption. Ms. Fitzpatrick begged the victim's mother not to do so and agreed to care for the victim. The victim began living with Ms. Fitzpatrick when the victim was three weeks old. Ms. Fitzpatrick said that as the victim got older, her mother tried to use the victim to control Ms. Fitzpatrick.

Ms. Fitzpatrick testified that she and the defendant slept in the living room on a sectional that folded out into a bed. The victim slept on the couch portion of the section. Ms. Fitzpatrick said they slept in the living room downstairs rather than the bedroom upstairs because she did not want to walk up and down the stairs often. She stated that the apartment was located in an unsafe neighborhood. She explained that she was a light sleeper because she was not comfortable with the neighborhood and woke up if the defendant got out of bed.

Ms. Fitzpatrick denied that the victim told her that the defendant had touched her inappropriately. Rather, she said the victim's mother called and told her. Ms. Fitzpatrick began crying and became so "hysterical" that the defendant took the telephone. Ms. Fitzpatrick said she and the defendant accompanied the victim to Le Bonheur. She also said the defendant was aware of the accusations and wanted to assist in any way that he could. Ms. Fitzpatrick denied ever seeing the defendant act inappropriately toward the victim or any other children.

At the conclusion of the proof, the State dismissed the charge of aggravated sexual battery. The State then elected to rely upon the alleged vaginal penetration occurring during the second incident upstairs as a basis for the child rape charge. The jury convicted the defendant of child rape, and the trial court sentenced the defendant to twenty-five years to be served at 100%. This appeal followed.

ANALYSIS

*4 The defendant contends that (1) the trial court erred in admitting the videotaped forensic interview of the victim; and (2) the evidence is insufficient to support his conviction.

I. Admission of the Videotaped Forensic Interview

The defendant asserts that the trial court erred in admitting the video recording of the victim's forensic interview pursuant to Tennessee Code Annotated section 24-7-123. This section provides for the admissibility of the video recording of a forensic interview of a child under the age of thirteen during which the child described any act of sexual contact performed on or with the child if certain requirements are met. Tenn.Code Ann. § 24-7-123(a). The video recording "may" be admitted if:

- (1) The child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross examination;
- (2) The video recording is shown to the reasonable satisfaction of the court, in a hearing conducted pre-trial, to possess particularized guarantees of trustworthiness. In determining whether a statement possesses particularized guarantees of trustworthiness, the court shall consider the following factors:
 - (A) The mental and physical age and maturity of the child;

- (B) Any apparent motive the child may have to falsify or distort the event, including, but not limited to, bias or coercion;
- (C) The timing of the child's statement;
- (D) The nature and duration of the alleged abuse;
- (E) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
- (F) Whether the statement is spontaneous or directly responsive to questions;
- (G) Whether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of any leading questions;
- (H) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;
- (I) The relationship of the child to the offender;
- (J) Whether the equipment that was used to make the video recording was capable of making an accurate recording; and
- (K) Any other factor deemed appropriate by the court;

(3) The interview was conducted by a forensic interviewer who met the following qualifications at the time the video recording was made, as determined by the court:

- (A) Was employed by a child advocacy center that meets the requirements of § 9-4-213(a) or (b);
- (B) Had graduated from an accredited college or university with a bachelor's degree in a field related to social service, education, criminal justice, nursing, psychology or other similar profession;
- (C) Had experience equivalent to three (3) years of fulltime professional work in one (1) or a combination of the following areas:
 - (i) Child protective services;
 - (ii) Criminal justice;
 - *5 (iii) Clinical evaluation;
 - (iv) Counseling; or
 - (v) Forensic interviewing or other comparable work with children;
- (D) Had completed a minimum of forty (40) hours of forensic training in interviewing traumatized children and fifteen (15) hours of continuing education annually;
- (E) Had completed a minimum of eight (8) hours of interviewing under the supervision of a qualified forensic interviewer of children;
- (F) Had knowledge of child development through coursework, professional training or experience;
- (G) Had no criminal history as determined through a criminal records background check; and
- (H) Had actively participated in peer review;

(4) The recording is both visual and oral and is recorded on film or videotape or by other similar audio-visual means;

(5) The entire interview of the child was recorded on the video recording and the video recording is unaltered and accurately reflects the interview of the child; and

(6) Every voice heard on the video recording is properly identified as determined by the court.

Tenn. Code Ann. § 24-7-123(b).

In the present case, an evidentiary hearing was held prior to trial during which multiple witness, including the victim, testified. At the conclusion of the hearing, the trial court found that the requirements of subsection (b) had been satisfied and allowed the State to present the video recording at trial.

The defendant does not contend that the requirements in subsection (b) were not met. Rather, the defendant challenges the constitutionality of Tennessee Code Annotated section 24-7-123. The defendant contends that the statute violates a defendant's right to confront witnesses, the separation of powers doctrine, a defendant's right to a jury trial and the presumption of innocence, and his due process rights.

The defendant did not raise the constitutionality of the statute in the trial court. Our supreme court has held that "questions not raised in the trial court will not be entertained on appeal and this rule applies to an attempt to make a constitutional attack upon the validity of a statute for the first time on appeal unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion." *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn.1983) (citations omitted). The failure to present a constitutional challenge in the trial court deprives the court of the opportunity "for the introduction of evidence which might be material and pertinent in considering the validity of the statute." *Id.* The defendant also failed to raise the issue in its motion for new trial. Accordingly, this issue is waived. See Tenn. R.App. P. 3(e), 36(a); *Lawrence*, 655 S.W.2d at 929-30.

The defendant requests that this court review the issue under the plain error rule. In order for us to find plain error: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice." *State v. Smith*, 24 S.W.3d 274, 282 (Tenn.2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn.Crim.App.1994)). The presence of all five factors must be established by the record before we will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one factor cannot be established. *Id.* at 283.

*6 It is well-established in Tennessee that when considering the constitutionality of a statute, we must start with a strong presumption that acts passed by the legislature are constitutional. See *Osborn v. Marr*, 127 S.W.3d 737, 740-41 (Tenn.2004). We must "indulge every presumption and resolve every doubt in favor of constitutionality." *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn.1996). A party challenging the constitutionality of a statute may challenge the statute as unconstitutional on its face or unconstitutional as applied to that party's case. It is well recognized that a facial challenge to a statute, is "the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn.1993) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)).

A. Confrontation Clause

The defendant asserts that Tennessee Code Annotated section 24-7-123 is unconstitutional on its face because it violates the Confrontation Clause in the United States and Tennessee Constitutions. Interpreting the Sixth Amendment, the United States Supreme Court noted in *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 n.9 (2004), that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." The Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id.* Our supreme court has reached the same conclusion under article I, section 9 of the Tennessee Constitution. *State v. Banks*, 271 S.W.3d 90, 118-19 (Tenn.2008).

In order for the video recording to be admitted pursuant to section 24-7-123, the child must testify, "under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross examination." Tenn.Code Ann. § 24-7-123(b)(1). This subsection, however, does not specify whether the child must testify at trial. Nevertheless, circumstances exist under which the statute does not violate an accused's right to confront witnesses. The right to confrontation of witnesses is not violated by the admission of a video recording of the forensic interview when the child testifies at trial and is subject to cross-examination by the defendant "face to face," which is what occurred in the present case. Because the statute

does not violate an accused's right to confront witnesses on its face or as applied to the defendant's case, a clear and unequivocal rule of law was not breached.

B. Separation of Powers

The defendant next asserts that section 24-7-123 violates the separation of powers doctrine. According to the defendant, the video recording of the interview constitutes hearsay, and the General Assembly does not have the authority to create exceptions to the hearsay rule.

⁷ Article II, section 1 of the Tennessee Constitution provides, "The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial." Article II, section 2 further provides, "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." While no precise lines of demarcation in the respective roles of our three branches of government exist, the traditional rule is that "the legislative [branch] [ha]s the authority to make, order, and repeal [the laws], the executive ... to administer and enforce, and the judicial ... to interpret and apply." *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn.1975) (citation omitted).

Only the Tennessee Supreme Court has the authority to oversee the practice and procedure in Tennessee's courts. *Bush v. State*, —— S.W.3d ——, 2014 WL 295187 (Tenn.2014). However, "[a] legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of government." ⁸ *Lynch v. City of Jellico* 205 S.W.3d 384, 393 (Tenn.2006) (quoting *Underwood*, 529 S.W.2d at 47).

In *State v. Mallard*, 40 S.W.3d 473, 479 (Tenn.2001), our supreme court addressed Tennessee Code Annotated section 39-17-424 (1997), which set forth several factors for courts to consider "in addition to all other logically relevant factors" in determining whether an object was drug paraphernalia. One of the factors, "[p]rior convictions, if any, of the owner or of anyone in control of the object for violation of any state or federal law relating to controlled substances," conflicted with Tennessee Rule of Evidence 404(b), which generally precludes the admission of evidence of "other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity with the character trait." See *Mallard*, 40 S.W.3d at 479-80.

Our supreme court noted that the judicial branch will consent to rules of procedure or evidence that are promulgated by the legislature only when they "(1) are reasonable and workable within the framework [of] the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court." *Id.* at 481. The court stated that it will consent "purely out of considerations of inter-branch comity" and that to hold otherwise "would be to irreparably damage the division of governmental power so essential to the proper maintenance of our constitutional republic." *Id.* at 482. Our supreme court further explained:

[T]he legislature can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power. Among these inherent judicial powers are the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved. As an essential corollary to these principles, any determination of what evidence is *relevant*, either logically or legally, to a fact at issue in litigation is a power that is entrusted solely to the care and exercise of the judiciary. Indeed, a "court's constitutional function to independently decide controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate." Consequently, any legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy impairs the independent operation of the judicial branch of government, and no such measure can be permitted to stand.

⁸ *Id.* at 483 (citations omitted) (quoting *Opinion of the Justices*, 141 N.H. 562, 688 A.2d 1006, 1016 (N.H.1997)). Respectful of the presumptive constitutionality of all legislative acts, the court interpreted the statute as supplemental and held that the statute applied so long as the evidence otherwise met the requirements for admissibility under the Rules of Evidence. *Id.* at 484. Since *Mallard*, our supreme court has noted that "when it comes to Tennessee's courts, our commitment to cooperation among the three branches of government has prompted us to acquiesce in and to apply statutes affecting the operation of the courts when they do not interfere with the courts' adjudicative functions or otherwise

impermissibly encroach on the Judicial Branch." *Bush*. — S.W.3d at —, 2014 WL 295187, at *11.

In the present case, the defendant argues that the admission of the video recording of a forensic interview pursuant to Tennessee Code Annotated section 24-7-123 would violate the "hearsay rule." Tennessee Rule of Evidence 802 provides that "[h]earsay is not admissible except as provided by these rules or otherwise by law." Tenn. R. Evid. 802 (emphasis added). The last phrase suggests that hearsay exceptions created by statute do not necessarily conflict with Rule 802.

The rationale supporting recognition of the various exceptions to the hearsay rule is to "admit only hearsay evidence that exhibits inherent trustworthiness and indicia of reliability." *Arias v. Duro Standard Prods. Co.*, 303 S.W.3d 256, 263 (Tenn. 2010). The State argues that while a legislative-crafted hearsay exception that eliminates a judicial determination of reliability might be susceptible to a challenge based upon the separation of powers doctrine, section 24-7-123 does not dispense with a judicial determination of reliability. We agree. Section 24-7-123(b)(2) requires that a trial court determine that the recording "possess[es] particularized guarantees of trustworthiness" before admitting it into evidence. The statute lists several factors for the trial court to consider in making this determination, including "[a]ny other factor deemed appropriate." Tenn. Code Ann. § 24-7-123(b)(2)(K).

Finally, section 24-7-123 does not "remove the discretion of a trial judge in making determinations of logical or legal relevancy." *Mallard*, 40 S.W.3d at 483. Rather, the statute provides that a recording of a forensic interview "may be considered for its bearing on any matter to which it is relevant...." Tenn. Code Ann. § 24-7-123(a) (emphasis added). A trial court may exclude a recording if it finds that it is not relevant to the issues at trial. Moreover, even if the video recording satisfies the statutory prerequisites in section 24-7-123, the trial court is afforded the discretion to determine that the recording is nevertheless inadmissible. See *Tenn. Code Ann. § 24-7-123(b)* (providing that the "video recording may be admitted"); *State v. Barry D. McCoy*, No. M2011-02121-CCA-R9-CD, 2012 WL 1941775, at *4 (Tenn. Crim. App. May 30, 2012), *perm. app. denied* (Tenn. Sept. 19, 2012). Thus, for example, the trial court may exclude the recording pursuant to Tennessee Rule of Evidence 403 upon finding that the probative value of the recording is "substantially outweighed by the danger of unfair prejudice."

*9 Section 24-7-123 does not "strike at the very heart of a court's exercise of judicial power." *Mallard*, 40 S.W.3d at 483. Therefore, the defendant has failed to show that the statute violates the separation of powers doctrine. Accordingly, a clear and unequivocal rule of law was not breached by the admission of the video recording, and the requirements for plain error were not met.

C. Trial by Jury and Presumption of Innocence

The defendant next argues that section 24-7-123 violates an accused's constitutional rights to a jury trial and the presumption of innocence. The defendant acknowledges that he did not find any cases addressing this issue. We likewise have found no authority supporting the defendant's claim. Accordingly, the defendant has failed to establish that a "clear and unequivocal" rule was breached and that the admission of the recording rose to the level of plain error.

D. Due Process

Finally, the defendant asserts that the admission of the recording of the victim's forensic interview in this case violated his due process rights. While the defendant cites to authority regarding the general principles of due process, the defendant has failed to cite to any authority addressing this specific issue. Accordingly, the defendant has failed to establish that a "clear and unequivocal" rule was breached and that the admission of the recording rose to the level of plain error.

II. Sufficiency of the Evidence

The defendant contends that the evidence presented at trial is insufficient to support his conviction for rape of a child. In considering this issue, we apply the rule that where sufficiency of the convicting 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, 99 S.Ct. 2781, 61 L.Ed.2d 560 (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 findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190-

92 (Tenn.1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn.Crim.App.1992). The same standard applies whether the finding of guilt is predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn.Crim.App.1990).

A criminal offense may be established entirely by circumstantial evidence. *State v. Majors*, 318 S.W.3d 850, 857 (Tenn.2010). It is for the jury to determine the weight to be given the circumstantial evidence and the extent to which the circumstances are consistent with the guilt of the defendant and inconsistent with his innocence. *State v. James*, 315 S.W.3d 440, 456 (Tenn.2010). In addition, the State does not have the duty to exclude every other reasonable hypothesis except that of the defendant's guilt in order to obtain a conviction based solely on circumstantial evidence. See *State v. Dorantes*, 331 S.W.3d 370, 380–81 (Tenn.2011) (adopting the federal standard of review for cases in which the evidence is entirely circumstantial).

*10 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). Our supreme court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing *Carroll v. State*, 212 Tenn. 464, 370 S.W.2d 523 (1963)). "A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn.1982).

Rape of a child is defined as "the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is more than three (3) years of age but less than thirteen (13) years of age." Tenn.Code Ann. § 39–13–522(a). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, or any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required." Tenn.Code Ann. § 39–13–501(7).

The State presented evidence of more than one sexual assault and sought a conviction for the second instance of vaginal penetration which occurred upstairs. The victim, who was six years old at the time of the rape, testified that the defendant took her to an upstairs bedroom and penetrated her anally and vaginally with his penis. During the forensic interview, the victim said that during the second assault, the defendant's penis was "inside" her vagina. Both the victim's mother and Dr. Larkin testified that the victim reported to them that the defendant had "freaked" on her.

The defendant argues that the evidence is insufficient due to the lack of DNA evidence and physical evidence of sexual penetration. However, Dr. Larkin explained that no DNA evidence was obtained because of the length of time between the rape and her examination of the victim. While Dr. Larkin could not determine whether the cleft or notch on the victim's hymen was the result of sexual penetration, Dr. Larkin testified that more than 95% of sexual assault victims do not have physical injuries and that a child can be sexually penetrated without physical injury. When viewed in a light most favorable to the State, we conclude that the evidence is sufficient to support the defendant's conviction for rape of a child.

CONCLUSION

*11 For the reasons stated above, we affirm the judgment of the trial court.

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