

APPENDIX A

- SUPREME COURT OF TENNESSEE OPINION

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

FILED
08/08/2023
Clerk of the
Appellate Courts

JUSTUS G. ONYIEGO v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. 15-00352

No. W2022-00629-SC-R11-PC

ORDER

Upon consideration of the application for permission to appeal of Justus G. Onyiego and the record before us, the application is denied.

PER CURIAM

APPENDIX B

- COURT OF CRIMINAL APPEALS OF TENNESSEE OPINION

JUSTUS G. ONYIEGO v. STATE OF TENNESSEE
COURT OF CRIMINAL APPEALS OF TENNESSEE, AT JACKSON
2023 Tenn. Crim. App. LEXIS 80
No. W2022-00629-CCA-R3-PC
January 5, 2023, Session
March 2, 2023, Filed

Editorial Information: Prior History

Tenn. R. App P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part, Reversed in Part, Case Remanded. Appeal from the Criminal Court for Shelby County. No. 15-00352. Glenn Ivy Wright, Judge. State v. Onyiego, 2018 Tenn. Crim. App. LEXIS 368, 2018 WL 2175819 (Tenn. Crim. App., May 10, 2018)

Disposition:

Judgment of the Criminal Court Affirmed in Part, Reversed in Part, Case Remanded.

Counsel

Jonathan Skrmetti, Attorney General and Reporter; Robert W. Wilson, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd Assistant District Attorney General, for the appellant, State of Tennessee.

Lance R. Chism, Memphis, Tennessee, for the appellee, Justus G. Onyiego.

Judges: JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which CAMILLE R. McMULLEN and J. ROSS DYER, JJ., joined.

CASE SUMMARY Post-conviction court did not err by concluding that defendant was entitled to a new trial for aggravated rape as charged in count one but that he was not entitled to a new trial for his conviction of aggravated rape as charged in count two, Tenn. Code Ann. § 39-13-502(a)(2), because victim had extensive neck injuries.

OVERVIEW: HOLDINGS: [1]-The post-conviction court did not err by concluding that defendant was entitled to a new trial for aggravated rape by the use of force or coercion and while armed with a weapon but that he was not entitled to a new trial for his conviction of aggravated rape causing bodily injury under Tenn. Code Ann. § 39-13-502(a)(2) because evidence showed extensive red marks around the victim's neck and bloody scratches on the front of her neck. No reasonable jury would have found defendant guilty of a lesser-included offense; [2]-The post-conviction court properly found that defendant failed to show he was prejudiced by trial counsel's not subpoenaing victim's medical records under § 33-3-105(3) because police report indicated that the nurse advised that victim was not being treated for the injuries related to sexual assault. Further, the records did not contain exculpatory evidence.

OUTCOME: Judgment affirmed in part, reversed in part and case remanded.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Ineffective Assistance Claims

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**Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review > De Novo Review
Evidence > Procedural Considerations > Burdens of Proof > Allocation**

Post-conviction relief shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States. Tenn. Code Ann. § 40-30-103. The petitioner bears the burden of proving factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. When reviewing factual issues, the appellate court will not reweigh the evidence and will instead defer to the post-conviction court's findings as to the credibility of witnesses or the weight of their testimony. However, a review of a post-conviction court's application of the law to the facts of the case is de novo, with no presumption of correctness. The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed de novo, with a presumption of correctness given only to the post-conviction court's findings of fact.

**Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Evidence > Procedural Considerations > Burdens of Proof > Allocation
Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial**

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. The same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee. The Strickland standard is a two-prong test: first, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by U.S. Const. amend. VI. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

**Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > Trials**

The deficient performance prong of the Strickland test is satisfied by showing that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms. The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a probability sufficient to undermine confidence in the outcome, that but for counsel's unprofessional errors, the result of the proceeding would have been different. Courts need not approach the Strickland test in a specific order or even address both components of the inquiry if the defendant makes an insufficient showing on one. Failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses

A defendant has a constitutional right to instructions on lesser-included offenses if warranted by the proof. However, when no written request is made by a party for an instruction on a lesser-included offense the trial court may charge the lesser-included offense, but a party is not entitled to such an instruction. Tenn. Code Ann. § 40-18-110(b).

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses
Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Jury Instructions

Whether a petitioner has suffered prejudice resulting from trial counsel's failure to request proper jury instructions depends on whether a reasonable probability exists that a properly instructed jury would have convicted the petitioner of the lesser-included offense instead of the charged offense. The prejudice inquiry on post-conviction mirrors the harmless error inquiry on direct appeal. In cases where the jury did not reject the immediately lesser offense or was given no option to convict of any lesser offense, courts apply the harmless error analysis adopted in *Allen*. Under the *Allen* analysis, courts should conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury. In examining the evidence presented at trial, the harmless error analysis focuses on the distinguishing element between the greater and lesser offenses, the strength of the evidence of the distinguishing element, and the existence of contradicting evidence of the distinguishing element. The jury's verdict does not factor into the analysis when the jury was not given the option to convict the defendant of any lesser-included offense.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > Elements

Aggravated rape by the use of force or coercion and while armed with a weapon is unlawful sexual penetration of the victim by the defendant and force or coercion is used to accomplish the act and the defendant is armed with a weapon. Tenn. Code Ann. § 39-13-502(a)(1). Aggravated rape causing bodily injury is unlawful sexual penetration of the victim by the defendant and the defendant causes bodily injury to the victim. Tenn. Code Ann. § 39-13-502(a)(2).

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > Sex Crimes

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > Crimes Against Persons

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > Elements

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Attempt > Elements

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Sexual Imposition > Elements

The lesser-included offense of rape is the unlawful sexual penetration of the victim by the defendant accompanied by (1) force or coercion is used to accomplish the act; (2) the sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know that the victim did not consent; (3) the defendant knows or has reason to know that the victim was mentally defective, mentally incapacitated, or physically helpless; or (4) the sexual penetration is accomplished by fraud. Tenn. Code Ann. § 39-13-503(a). Criminal attempt for the lesser-included offenses of attempted aggravated rape and attempted rape occurs when a person, acting with the kind of culpability otherwise required for the offense.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included

Offenses > Sex Crimes

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > Weapons Crimes

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > Crimes Against Persons

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Sexual Imposition > Elements

The lesser-included offense of aggravated sexual battery is unlawful sexual contact with a victim accompanied by force or coercion used to accomplish the act and the defendant is armed with a weapon or the defendant causes bodily injury to the victim. Tenn. Code Ann. § 39-13-504(a)(1), (2). The lesser-included offense of sexual battery is unlawful sexual contact with a victim by the defendant accompanied by (1) force or coercion used to accomplish the act; (2) the sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know that the victim did not consent; (3) the defendant knows or has reason to know that the victim was mentally defective, mentally incapacitated, or physically helpless; or (4) the sexual contact is accomplished by fraud. § 39-13-505(a). Sexual contact has been defined as including the intentional touching of the victim's or the defendant's intimate parts or the intentional touching of the clothing covering the immediate area of their intimate parts if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification. § 39-13-501(6). The lesser-included offense of Class B misdemeanor assault is intentionally or knowingly causing physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative. § 39-13-101(a)(3).

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > Elements

The element of sexual penetration distinguishes aggravated rape from aggravated sexual battery, which requires sexual contact. The elements of sexual penetration and armed with a weapon distinguish aggravated rape from sexual battery. Likewise, misdemeanor assault only requires physical contact that a reasonable person would regard as extremely offensive or provocative; it does not require the use of a weapon.

Administrative Law > Governmental Information > Freedom of Information > Enforcement > In Camera Inspections

A defendant has the right to review records with exculpatory information to prepare for his defense and may subpoena medical records. However, the trial court must balance these concerns and review the records in camera before determining whether the records should be provided to the defense. Tenn. Code Ann. § 33-3-105(3).

Any claims of ineffective assistance of counsel in the post-conviction petition that were identical to the petitioner's claims on direct appeal and determined by the appellate court not to rise to the level of plain error also fail to establish prejudice in the context of a post-conviction proceeding.

Criminal Law & Procedure > Trials > Closing Arguments > Fair Comment & Fair Response

It is well-established that a closing argument is an important tool for both parties during a trial and, therefore, that counsel is generally given wide latitude during a closing argument. Nevertheless, arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law. Tennessee supreme court has cautioned that the State may risk reversal by engaging in argument which appeals to the emotions and sympathies of the

jury.

Criminal Law & Procedure > Appeals > Reversible Errors > Cumulative Errors

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Criminal Law & Procedure > Counsel > Effective Assistance > Trials

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors >

Cumulative Errors

To warrant assessment under the cumulative error doctrine, there must have been more than one actual error committed in the trial proceedings. Moreover, in the context of an ineffective assistance of counsel claim, cumulative error examines the prejudicial effect of multiple instances of deficient performance.

Criminal Law & Procedure > Counsel > Effective Assistance

The Tennessee Supreme Court explained that a person's right to counsel ends at the conclusion of the first stage of direct appeal and in the absence of a Constitutional right to counsel, there can be no Constitutional right to support services at state expense. The appellate court is bound by the decisions of the Tennessee Supreme Court.

Opinion

Opinion by: JOHN W. CAMPBELL, SR.

Opinion

The Petitioner, Justus G. Onyiego, was convicted in the Shelby County Criminal Court of two counts of aggravated rape based on alternative theories. The trial court sentenced the Petitioner to seventeen years for each conviction and merged the convictions. This court affirmed the convictions, and the Petitioner filed a petition for post-conviction relief, claiming that he received the ineffective assistance of counsel at trial and on appeal. The post-conviction court held an evidentiary hearing, granted relief, and ordered a new trial for both counts based on trial counsel's failure to request jury instructions on any lesser-included offenses. The State appeals, claiming that the post-conviction court erred by granting relief, and the Petitioner cross-appeals, claiming that the post-conviction court erred by denying relief on his various other claims of ineffective assistance of counsel, that the cumulative effect of trial counsel's errors warrants relief, and that the post-conviction court erred by denying his requests for funding for an investigator and a DNA expert. Based on the oral arguments, the record, and the parties' briefs, we reverse the post-conviction court's granting relief for the Petitioner's conviction of aggravated rape causing bodily injury and reinstate his conviction for that offense. The judgment of the post-conviction court is affirmed in all other respects, and the case is remanded to the trial court for further proceedings consistent with this opinion.

OPINION

FACTS

In January 2015, the Shelby County Grand Jury indicted the Petitioner for two counts of aggravated rape, a Class A felony, that occurred in September 2004.1 Count one alleged that the Petitioner sexually penetrated the victim by the use of force or coercion and while armed with a weapon, and count two alleged that the Petitioner sexually penetrated the victim and caused her bodily injury. The

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Petitioner went to trial in June 2016, and the jury convicted him of both counts. After a sentencing hearing, the trial court sentenced the Petitioner to seventeen years in confinement to be served at one hundred percent for each conviction and merged the convictions.

On direct appeal of the Petitioner's convictions, this court gave the following factual account of the crimes:

The thirty-seven-year-old victim testified that in September 2004, she lived in an apartment in Memphis with her mother, sister, and children. On the morning of Sunday, September 5, the victim was sitting on the steps outside her apartment and noticed that a four-door, green car kept driving by the apartment. At some point, the car stopped, and the driver, whom the victim identified at trial as the [Petitioner], asked if she knew where he could buy some powder cocaine. The victim had seen the [Petitioner] in the neighborhood previously and "kind of recognized who he was" but did not know his name. The victim told the [Petitioner] that she did not know where he could buy cocaine, and he told her that "I was really trying to see could I date you, get with you." The victim knew he was talking about prostitution. The victim asked how much money he had, and he asked what he could get for forty dollars. The victim told him "[m]aybe both," meaning oral and vaginal sex. The victim wanted money to buy drugs, so she got into the [Petitioner's] car.

The victim testified that the [Petitioner] claimed he knew "a good spot" and that he pulled onto a ramp at a warehouse where trucks loaded and unloaded. The victim was scared someone would see them and told him she did not like that location. She also told him she wanted the money first. The [Petitioner] told the victim, "I ain't got no change. I give it to you afterwards." The victim said she responded, "You ain't got no change? But we just passed by the store." The [Petitioner] then told the victim, "I'm going to give it to you, I'm going to give it to you." The victim told the [Petitioner], "Man, no, that's okay. I want to go home." The [Petitioner] acted as if he did not want to take to the victim home, so the victim opened the door to get out of the car. The [Petitioner] grabbed her hair and pulled her back inside the car. The victim turned around and started hitting the [Petitioner], and they began "fighting and tussling." The victim said that the car was constantly moving on the ramp while they were fighting and that "the front two wheels went over the ramp and [the car] got stuck." The [Petitioner] began choking the victim and put a knife to her throat, and the victim passed out. She said that when she awoke, the [Petitioner's] penis was inside her vagina, and he was having sex with her. She saw a screwdriver in the car, grabbed it, and started "sticking him with it." She got out of the car and ran to a gas station.

The victim testified that when the police came to the gas station, she told them that a man had raped her and that his car was stuck on a ramp at a warehouse. The police went to the warehouse and brought the [Petitioner] to the gas station, where the victim identified him as her attacker. The victim went to the Rape Crisis Center and spoke with a nurse. She told the police and the nurse that the [Petitioner] used a knife during the attack but did not tell them that she was working as a prostitute that day. The victim identified photographs of scratches and cuts on her neck and the [Petitioner's] car stuck on the ramp for the jury.

The victim testified that she was scared to cooperate with the police because the [Petitioner] knew where she lived and that she did not have any further contact with law enforcement after September 5, 2004. Years later, though, a police officer contacted her, and she told him about what happened in September 2004. The officer showed the victim a six-photograph array, and she selected the [Petitioner's] photograph. The victim acknowledged that she originally agreed to have sex with the [Petitioner] but that she changed her mind because she did not like the location he chose and because he did not have any money.

On cross-examination, the victim denied telling the police that she was walking home after a night

of partying and smoking crack cocaine when the [Petitioner] stopped his car to talk with her. She acknowledged that she did not tell the police she was prostituting herself on September 5 and that she may have told them she was raped at gunpoint. She also acknowledged that she was addicted to crack cocaine at the time of the incident, that she agreed to get into the [Petitioner's] car, and that she agreed to have sex with him for money. However, he would not give her the money prior to the sex, so she changed her mind and told him no. She testified that they started "fight and tussling" and that she began "sticking" him with the screwdriver. She acknowledged that she broke his glasses and that she may have "bust[ed]" his lip.

Lieutenant Mark Wojcicki of the Memphis Police Department (MPD) testified that about 7:30 a.m. on September 5, 2004, he was dispatched to the Tiger Mart Exxon on the corner of Third and Crump and was the first officer on the scene. The victim was "very frantic," had been "beat up really bad," and told Lieutenant Wojcicki that "she asked a dude for a ride and he pulled around some building, and then hit her with something and tried to force her to have sex with him." The officer said that the victim's clothes were torn and that "[y]ou could see all of her bra." He identified photographs of the victim taken at the gas station and said the photographs showed "ligature marks around her neck and just redness and bruising." Lieutenant Wojcicki left the gas station, went "down the street," and saw a car "halfway off" a loading dock. He saw the [Petitioner] walking toward the Tiger Mart Exxon, and the [Petitioner] matched the description given by the victim. Lieutenant Wojcicki transported the [Petitioner] to the gas station, and the victim shouted, "That's him, that's him."

On cross-examination, Lieutenant Wojcicki acknowledged that the victim claimed that she had been walking home "after a night of partying, smoking crack"; that the [Petitioner] stopped his car and asked if she wanted a ride home; and that he raped her at gunpoint. Lieutenant Wojcicki said he did not find any weapons on the [Petitioner].

Officer William Goetsch of the MPD testified that he responded to the Tiger Mart Exxon on September 5, 2004. The [Petitioner] was in custody when he arrived, and the victim said the [Petitioner] raped her. The victim claimed the [Petitioner] used a gun "to traumatize or to hold her at bay while [the] rape had occurred." Officer Goetsch said the victim was "battered," had injuries to her neck, and "was very sincere and genuine in how she spoke about that she had just been raped." Defense counsel asked if the victim admitted to Officer Goetsch that she had been working as a prostitute that day, and he answered, "I believe so." On cross-examination, though, Officer Goetsch acknowledged that he wrote the police report for this case and that he did not mention the victim's working as a prostitute in the report. He explained that he would not have included information in the report that was not relevant to the case.

Sergeant Lavern Jones of the MPD testified that he went to the Tiger Mart Exxon and photographed the victim. He then went to the warehouse on Crump and photographed a car "hanging off the dock." A cellular telephone and a condom were on the driver's side floorboard inside the car, and clothing, including a pair of men's boxer shorts, was on the backseat. Sergeant Jones said that the police found some of the [Petitioner's] personal property, including his wallet, inside the car and that a condom wrapper was on the ground outside the car.

Kristine Gable, the Nursing Coordinator for the Rape Crisis Center, testified as an expert in forensic sexual assault examination that a nurse examined the victim at 9:30 a.m. on September 5, 2004, and that she had reviewed the nurse's report. The victim was twenty-five years old and reported that she had been raped at 6:30 a.m. The nurse described the victim as "agitated, cooperative, sobbing, and tearful," and the victim told the nurse the following: The victim had been walking home when the [Petitioner] pulled up beside her and asked if she needed a ride. The

victim got into the car, the [Petitioner] parked between two trailer trucks, and the victim tried to get out of the car. The [Petitioner] hit the victim on the head with a gun, choked her, tore off her panties, and raped her. According to the nurse's report, the [Petitioner] vaginally penetrated the victim one time, ejaculated, and did not use a condom.

Ms. Gable testified that the nurse collected vaginal swabs and slides for a rape kit and that the nurse did not see any vaginal or anal injuries. However, the nurse reported redness and three lacerations to the victim's neck and swelling and redness to the victim's left eye. The victim complained of a headache and abdominal pain.

Sergeant Israel Taylor of the MPD testified that he used to work as an investigator for the MPD's DNA Unit and was responsible for investigating "old" rape and sexual assault cases. In October 2014, Sergeant Taylor received and began investigating the victim's case, which had been closed by the original investigator because the investigator could not locate the victim. Sergeant Taylor stated, "The original investigators made several attempts to try and locate her, relative's houses, phone numbers, and it was just everything was a dead end, basically, for lack of a better term." As a result, the police released the [Petitioner] from custody.

Sergeant Taylor testified that he contacted the victim, that she agreed to cooperate, and that he took a formal statement from her in December 2014. He said the victim "was just a range of emotions when we met with her: part relief, part anger, part sadness." He showed her a six-photograph array, and she "eventually" selected the [Petitioner's] photograph. The victim told Sergeant Taylor that she was "positive" the [Petitioner] was the perpetrator. The grand jury indicted the [Petitioner], and the police arrested him and collected a buccal swab from him.

Jennifer Millsaps of the Tennessee Bureau of Investigation's Serology and DNA Unit testified as an expert in forensic DNA analysis that in June 2011, she analyzed the swabs and slides in the victim's rape kit and found sperm. In January 2015, she received a "standard" from the [Petitioner] and compared the DNA from the [Petitioner's] sample to the sperm DNA. The DNA profiles matched. On cross-examination, Agent Millsaps acknowledged that the match did not mean a rape occurred.

At the conclusion of Agent Millsaps's testimony, the State rested its case. The [Petitioner] did not present any proof. *State v. Justus Onyiego*, No. W2017-00217-CCA-R3-CD, 2018 Tenn. Crim. App. LEXIS 368, 2018 WL 2175819, at *1-3 (Tenn. Crim. App. May 10, 2018), *perm. app. denied* (Tenn. Aug. 8, 2018).

The Petitioner appealed his convictions to this court, claiming that the trial court should have dismissed the indictment due to the State's ten-year preindictment delay; that the trial court erred by failing to strike the testimony of two police officers; that the trial court erred by refusing to admit evidence of the victim's prior sexual behavior; and that a prosecutor committed prosecutorial misconduct by falsely stating during closing arguments that the Petitioner agreed to pay the victim forty dollars for sex, "knowing he didn't have a dime to his name." 2018 Tenn. Crim. App. LEXIS 368, [WL] at *8. This court concluded that the trial court did not abuse its discretion by refusing to dismiss the indictment and by ruling that evidence of the victim's prior sexual behavior was inadmissible. 2018 Tenn. Crim. App. LEXIS 368, [WL] at *6, 8. With regard to the police officers' testimony, this court concluded that any error was harmless because "the State's proof was strong." 2018 Tenn. Crim. App. LEXIS 368, [WL] at *7.

As to the prosecutor's telling the jury that the Petitioner did not have any money, the Petitioner asserted that the prosecutor knew from MPD forms turned over to the defense during discovery, but not introduced into evidence at trial, that the Petitioner had one twenty-dollar bill in his wallet at the

time of his arrest; therefore, the prosecutor's argument was "patently false" and "clearly aimed at leading the jury to infer that [the Petitioner] could not have intended to engage in a consensual encounter because he did not have the funds to follow through with the agreement." 2018 Tenn. Crim. App. LEXIS 368, [WL] at *8. Addressing the issue as plain error because the Petitioner failed to object to the prosecutor's argument at trial, this court said,

Here, no evidence was presented at trial as to whether the [Petitioner] possessed any money when he picked up the victim. However, the victim testified that the [Petitioner] refused to give her any money before they had sex. As a result, the victim logically concluded that he did not have any money. Therefore, we cannot say that the prosecutor intentionally misled the jury or misstated the evidence. 2018 Tenn. Crim. App. LEXIS 368, [WL] at *10. Accordingly, this court found no plain error and affirmed the Petitioner's convictions. *Id.*

After our supreme court denied the Petitioner's application to appeal, he filed a timely petition for post-conviction relief, claiming that he received the ineffective assistance of counsel. The post-conviction court appointed counsel, and counsel filed an amended petition. Relevant to this appeal, the Petitioner alleged in the petitions that he received the ineffective assistance of counsel at trial because trial counsel failed to request jury instructions on any lesser-included offenses, advised the Petitioner not to testify, failed to subpoena the victim's records from Regional Medical Center, failed to object when one of the prosecutors wore a St. Jude emblem pin on his lapel during the second day of trial, failed to object to the State's closing argument about the Petitioner not having any money, failed to retain the defense's own DNA expert, and told the jury during opening statements that the proof was much more consistent with a consensual encounter than rape. The Petitioner also alleged that trial counsel's cumulative errors warranted post-conviction relief and that appellate counsel was ineffective for failing to cite to trial exhibit 23, which was a police photograph showing a twenty-dollar bill in the Petitioner's wallet at the time of his arrest, in the Petitioner's motion for new trial and in his appellate brief.

The post-conviction court held evidentiary hearings for witness testimony on July 15, July 23, July 27, and October 11, 2021. At the first hearing, trial counsel testified that the Petitioner's brother retained her to represent the Petitioner. At that time, trial counsel had been practicing law about ten years and had practiced criminal law exclusively. Trial counsel had participated in about twelve jury trials, and one of them had involved a sex crime. She said that she met with the Petitioner ten to twenty times and that she received discovery. The Petitioner already had received the discovery materials from his previous attorney, so trial counsel reviewed the materials with the Petitioner. The Petitioner told trial counsel his side of the story "[n]umerous times" and gave her "multiple different explanations" for what occurred with the victim. Trial counsel said she could only remember three of them. First, the Petitioner claimed that he and the victim had sex, that she wanted a ride to a party, that he refused to give her a ride, and that his refusal "sparked" her allegations. Second, the Petitioner claimed that he ejaculated inside of the victim during sex, which made her angry and caused her to make the allegations. Third, the Petitioner claimed that the victim tried to take his wallet while they were having sex, which resulted in a struggle that caused her injuries. Trial counsel said she and the Petitioner discussed his multiple versions of the story and "whether he had a concrete idea of what he would say" if he testified at trial. Trial counsel acknowledged that all of the Petitioner's versions involved consensual sex with the victim but that his explanation for the victim's injuries differed.

Trial counsel testified that she and the Petitioner discussed the potential benefits and consequences of his testifying at trial. Trial counsel told the Petitioner that the jury would want to hear his version of the story and what motivated the victim to "make up" the allegations. Trial counsel was concerned about his multiple accounts and told him that he should know what he wanted to say before he took the stand. Trial counsel acknowledged that the Petitioner had some prior convictions of driving under

the influence but that he did not have any prior felony convictions for crimes of dishonesty; therefore, he was "pretty much unimpeachable." The Petitioner had some previous "uncharged incidents" for sexual offenses, but trial counsel told him that she did not think the trial court "would let those in." Trial counsel acknowledged that the Petitioner could have "open[ed] the door" to the offenses if he had testified. Moreover, the Petitioner had told the police in 2004 that the victim was his girlfriend and that they were fighting over money, and the State could have impeached him with that statement if he had testified differently at trial. Trial counsel and the Petitioner practiced his direct and cross-examination testimony, and trial counsel gave him her opinion as to whether he should testify. She told him that it was his decision, and he ultimately decided not to testify. Trial counsel noted that the victim had been using crack cocaine prior to her encounter with the Petitioner and that the victim lied to the police by claiming he used a weapon when the police did not find any weapon. Thus, the defense's strategy was to attack the victim's credibility and her memory of the incident.

Trial counsel testified that her memory regarding lesser-included offenses was "not so great." She said that she was "sure" she discussed all of the lesser-included offenses of aggravated rape with the Petitioner but that her "best recollection" was he wanted the trial court to instruct the jury only on simple assault. She stated, "I know we had talked about [a] lesser for misdemeanor assault. That was one of the big ones that [the Petitioner] discussed and I remember drafting the motion." At that point, post-conviction counsel showed trial counsel a motion titled "Request for Certain Jury Instructions," and she identified it as the motion she drafted. The motion included a request for a jury instruction on simple assault. Trial counsel acknowledged that she never filed the motion and said, "I believe [the Petitioner] wanted a misdemeanor assault [instruction] at that time. But my best guess is that he decided he didn't want any lessers because otherwise I would have made the request."

Trial counsel acknowledged that the statute of limitations had run on the lesser-included offenses but said she knew she could waive the statute of limitations. Post-conviction counsel then read aloud the following colloquy from the trial transcript:

THE COURT: Any requests for special instructions?

[THE STATE]: Your Honor, the only thing that I would ask of the Court is that the lesser included offenses that are in here be removed. All of the statute of limitations has run on all of those lesser included offenses, so the jury could not convict him of those. So, therefore, I don't think that they should be able to consider those lesser includeds. So I'd ask that they be taken out of the instructions.

THE COURT: [Trial counsel], how do you respond to that?

[TRIAL COUNSEL]: Your Honor, I think [the State's] absolutely right. Trial counsel said she did not remember that colloquy but explained, "I think I was just advising that yes, the statute has run but to my recollections, again, we discussed all of the lessers and what [the Petitioner] wanted to do about that." Upon being questioned by the post-conviction court, trial counsel said that she and the Petitioner "discussed all of the available instruction[s]" but that she did not remember if they discussed waiving the statute of limitations.

Trial counsel acknowledged that during discovery, she received documentation showing that the victim was transported to Regional Medical Center for cocaine addiction on the night of September 5, 2004. Trial counsel did not remember whether she considered requesting a subpoena for the records. She also did not remember if one of the prosecutors wore a St. Jude emblem pin on his suit the first day of testimony. She said she did not know if she noticed the pin or if the pin would have been objectionable. Trial counsel acknowledged telling the jury during her opening statement that "you will see the proof is much more consistent with a consensual encounter of having sex than it is with a

rape." She said she made that statement because she thought the victim "pretty blatantly lied about some type of weapon that was never recovered. And I don't know if I was going that angle or what." Trial counsel said she did not talk with the Petitioner about hiring a DNA expert because the Petitioner "always maintained" he had sex with the victim. Therefore, trial counsel did not think an expert was necessary.

Trial counsel acknowledged that there was a question at trial about whether the Petitioner's wallet contained any money. After the initial investigation of the case and the police released the Petitioner from custody, the police returned his wallet to him. However, by the time of trial ten years later, the Petitioner no longer possessed the wallet. Trial counsel thought the victim's fingerprints could have been on the wallet, which would have supported the Petitioner's claim that he and the victim struggled over it. In the "Request for Certain Jury Instructions" drafted by trial counsel, she asserted that the State failed to preserve the wallet as required by *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). However, she never filed the motion or requested a jury instruction on the missing evidence. Trial counsel said she did not know why she did not file the motion or request the instruction.

Trial counsel acknowledged that she would have seen a photograph of the contents of the Petitioner's wallet during discovery and that the photograph included one twenty-dollar bill. During closing arguments, the State told the jury that the Petitioner made an agreement with the victim for sex, "knowing that he did not have a dime to his name." Trial counsel did not know why she did not object to the statement. The State also said during its rebuttal closing, "So the State cares and that's why you all should care." Trial counsel did not know why she also did not object to or request a mistrial for that statement.

On cross-examination, trial counsel acknowledged that during her ten years of experience, she had worked both as a defense attorney in private practice and as a prosecutor in the Shelby County District Attorney's Office. She said that she had participated in a couple of trials as a defense attorney, including trials for murder and spousal rape, and that she had participated in ten trials as a prosecutor. The Petitioner's defense was that his sexual encounter with the victim was consensual and that the victim caused it to escalate into a physical altercation. However, the Petitioner's first version of events, that the victim became upset with him because he would not give her a ride to a party, did not explain her physical injuries. Trial counsel acknowledged that the Petitioner's story then "evolve[ed]" into his second version that the victim became angry because he ejaculated inside of her. That story, though, was inconsistent with the fact that the police found a condom in the car. The Petitioner then claimed that the victim tried to take his wallet and that they struggled over the wallet.

Trial counsel acknowledged that the victim's and the police officers' memories of the incident were not very good due to the passage of time and that trial counsel's strategy was to use cross-examination to challenge the victim's credibility. Trial counsel also acknowledged that she "vigorously" questioned the victim about the victim's cocaine addiction, the victim's not telling the police she was working as a prostitute, inconsistencies regarding the type of weapon the Petitioner allegedly used, and whether the victim was on her front porch or walking home from a party when the Petitioner first approached her. Trial counsel acknowledged that she wanted to show the jury that the victim was a prostitute who "cried foul" when she did not get what she wanted.

Trial counsel testified that co-counsel and another attorney helped her prepare the Petitioner for his potential direct and cross-examination testimony. After the State's case-in-chief, the Petitioner had overnight to think about whether he was going to testify. Trial counsel acknowledged that she was concerned about the Petitioner's different versions of the story and that he could open the door to uncharged conduct, which included allegations of aggravated rape and kidnapping in June 2011, statutory rape in September 2011, and aggravated rape in 2015. The next morning, the Petitioner

decided not to testify, and trial counsel conducted voir dire in front of the trial court about his decision.

Trial counsel acknowledged that the Petitioner would have had to waive the statute of limitations in order for the trial court to have instructed the jury on lesser-included offenses and that she did not request any instructions on lesser-included offenses because the Petitioner decided he did not want any lessers charged. Trial counsel also acknowledged that the Petitioner's decision was based on her "significant impeachment" of the victim's credibility and the fact that his defense was "an all-or-nothing kind of situation." Trial counsel acknowledged that if the jury had found the sex was consensual, the jury would have had to have found the Petitioner not guilty of aggravated rape. Furthermore, without any instructions on lesser-included offenses, the jury would have had to have found the Petitioner not guilty of any offenses.

Trial counsel testified that she did not see a basis for requesting the victim's medical records from Regional Medical Center. Trial counsel cross-examined the victim about the victim's drug addiction and the fact that the victim would not respond to the police when they tried to contact her. Trial counsel told the jury in her opening statement that the Petitioner's sex with the victim was consensual. She acknowledged that she did so because consensual sex was the Petitioner's "entire defense." Trial counsel tried to show the sex was consensual through her cross examination of the victim; trial counsel was not going to rely on the Petitioner's potential testimony. Trial counsel did not think a DNA expert was necessary because the Petitioner told her that he had consensual sex with the victim.

Trial counsel acknowledged that the police returned the Petitioner's wallet to him when he was released from custody in 2004. At that time, the State did not know whether it would ever prosecute the Petitioner. Moreover, given that the Petitioner told the police that the victim was his girlfriend, trial counsel had no reason to believe the wallet was exculpatory.

On redirect examination, post-conviction counsel asked, "Do you remember [the Petitioner] ever telling you something along the lines of she went to pull her panties down and it smelled funny to him and they got into an argument about that?" Trial counsel responded, "I don't recall specifically, but that does sound like it's ringing a bell." Trial counsel said that she told the Petitioner about all of the lesser-included offenses the trial court could instruct to the jury but that "I don't recall his specific response. I think we needed to sleep on it and think on it and what he wanted to do." Trial counsel said she did not remember a "minor contributor" being listed on the DNA report or the Petitioner's telling her that the defense needed to obtain its own DNA expert.

The post-conviction court questioned trial counsel about her previous experience at the time she represented the Petitioner. Trial counsel testified that she had participated in ten jury trials as a prosecutor. Several of those trials were for aggravated robberies, several were for aggravated burglaries, and one was for misdemeanor aggravated assault. For trial counsel's first few trials, she assisted other attorneys. However, she was "solo" for several of her later trials. Trial counsel had participated in two trials as a defense attorney. One of those trials was for first or second degree murder, and the other trial was for spousal rape. Trial counsel was "second chair" for both trials. Trial counsel said that she thought there were a total of eight uncharged crimes in the Petitioner's past and that all of them were "sexual based offenses." Trial counsel and the Petitioner considered those uncharged crimes when they discussed whether he should testify. The post-conviction court stated that it remembered another attorney being present during part of the Petitioner's trial. Trial counsel said that the other attorney was her "co-counsel" and that "he was our scribe for me to direct the witnesses, take the notes, be my second opinion, be our communicator with [the Petitioner] to be at the table present with him while I was up questioning." Trial counsel obtained the Petitioner's permission for co-counsel to assist her with the case.

The Petitioner testified that trial counsel met with him in jail about five times. The Petitioner's previous

attorney had given him a copy of discovery, and trial counsel went over the materials with him. The Petitioner said that during his first meeting with trial counsel, he told her the following version of events: About 6:00 a.m. on September 5, 2004, the Petitioner was driving when he was "flagged down" by the victim. She approached his car, and he rolled down his window. The victim reached inside the car, touched the Petitioner's crotch, and asked if he was a police officer. The Petitioner said no, so the victim asked if she could get into the car, and he said yes. She then asked him, "[H]ow much do you have?" The Petitioner answered, "[F]or what[?]" The victim asked if the Petitioner wanted to have some fun and told him, "I mean, . . . I charge some money for sex, you know. Pretty much I'm a prostitute." The Petitioner told her that he had forty dollars, and she said that she charged twenty dollars for vaginal sex and twenty dollars for oral sex. The Petitioner was interested in vaginal sex and agreed to pay the victim twenty dollars. The Petitioner stopped at a gas station and bought a pack of condoms, and the victim directed him to a warehouse loading dock.

The Petitioner testified that he parked his Toyota Corolla on the dock between two trailers. The victim asked him for the money, he gave her twenty dollars, and they got into the back seat of the car. The victim undressed, and then the Petitioner undressed. They had vaginal sex, and the victim got back into the front seat of the car. The Petitioner saw the victim reach into the center console to get his wallet, so he "flung" himself between the front seats. A "tussle ensued" over the wallet. Post-conviction counsel asked if the Petitioner put his hands on the victim's neck and head. The Petitioner said that he was trying to stop the victim from taking his wallet and that "I was trying to fend her off, I might've -- trying to -- I might've -- I did reach out, extended my hands to actually deflect some of the punches that she was directing them to me." Meanwhile, the car dislodged from gear, moved forward, and almost flipped off the loading dock. The Petitioner was "stunned" and thought the car was going to overturn. The Petitioner got out to assess the damage to the car, but he could not see clearly because his glasses had been broken. The victim walked toward a gas station, and the Petitioner ultimately walked toward the gas station and was apprehended by the police. A police officer put him into a patrol car and drove him to the gas station. The Petitioner saw the victim, and she identified him. The Petitioner told the police that the victim was "a girlfriend" and that they were arguing about money.

The Petitioner testified that he lied to the police about the victim being his girlfriend. He said he did so because he did not want to be arrested for soliciting a prostitute. During the Petitioner's second meeting with trial counsel, she showed him crime scene photographs. One of the photographs showed condoms in the Petitioner's car, and trial counsel asked him about the condoms. The Petitioner told trial counsel the following: When he got on top of the victim for sex, he noticed "a bad smell" from her vaginal area and was not able to obtain a full erection. The victim offered to perform oral sex on him, but he declined. He tried to wear a condom but could not wear one because his penis was "limp." The Petitioner started "stroking" his penis on the victim's vagina and finally ejaculated. He was not wearing a condom. After the Petitioner ejaculated, the victim got into the front seat. The Petitioner saw her reach into the console to get his wallet, and the fight ensued.

The Petitioner testified that he gave trial counsel only two versions of the story: the first version in which he said he had consensual vaginal sex with the victim and the second version in which he added the information about the victim's odor and his not being able to obtain an erection. During the Petitioner's first meeting with trial counsel, he did not tell her everything about his encounter with the victim because he was uncomfortable giving her all the details. Trial counsel did not discuss her defense strategy with the Petitioner but told him that "it was an open and shut case." Regarding whether the Petitioner should testify, trial counsel told him that if his 2004 statement to the police was untrue, the State would use the statement to impeach him. Trial counsel did not explain to the Petitioner any advantages of his testifying. She did not tell him that his lack of prior convictions would be beneficial or that the jury would want to hear his story. Trial counsel did not give him an opinion as to whether he should testify, but she told him that she did not want the jury to hear any inconsistencies

in his story. The Petitioner thought he needed to testify to explain the victim's injuries, but trial counsel's response was that she "had the case in the bag," meaning he did not need to testify.

The Petitioner testified that when trial counsel realized he was "adamant" about testifying at trial, she had another attorney talk with him. That attorney did not think the Petitioner should "make the case complicated by testifying," and trial counsel agreed with that attorney. The night before the Petitioner was to testify, co-counsel talked with the Petitioner about the details of his testimony and recommended that he not testify. Again, trial counsel agreed that the Petitioner should not testify. The Petitioner said he listened to trial counsel, co-counsel, and the third attorney and decided not to testify. He said that if trial counsel had explained the potential benefits of testifying and had recommended that he do so, he would have testified.

The Petitioner testified that before trial, he and trial counsel had a "passing discussion" about lesser-included offenses. Trial counsel read the lesser-included offenses of aggravated rape to him but never asked if he wanted the trial court to instruct the jury on the offenses. Trial counsel also never told him that the statute of limitations had run on the lesser-included offenses or that he could waive the statute of limitations. The Petitioner said he would have wanted the lesser-included offenses instructed to the jury if trial counsel had asked him. At first, the Petitioner said he did not remember the State and trial counsel having a colloquy about lesser-included offenses during his trial. However, he then said that after the State requested that the trial court remove the lesser-included offenses from the jury instructions, trial counsel whispered to him that she "didn't believe" the State was making the request. Trial counsel sounded "surprised" about the State's request and "painted the picture that -- that really solidified" why she thought the Petitioner should not testify.

The Petitioner testified that he asked trial counsel to obtain the victim's medical records from Regional Medical Center "to refute . . . the State's assertion that the victim went to the rehab instead of the hospital." Trial counsel told the Petitioner that because more than a decade had passed, "it would take an act of Congress" to get the records, if they even existed. On the second day of trial, the Petitioner noticed that one of the prosecutors was wearing a St. Jude emblem pin on his lapel. The Petitioner said that the pin was about the size of a quarter and that it showed a mother and daughter or two children "face to face." The Petitioner told trial counsel about the pin, and she told him that she would "address it" with the prosecutor. The Petitioner later asked trial counsel about the pin, but she "pretty much just brushed it off." Trial counsel and the Petitioner talked about hiring a DNA expert to identify the minor contributor to the DNA found on the victim's vaginal swabs, but trial counsel did not think an expert was necessary because the presence of the Petitioner's DNA was not in dispute.

The Petitioner testified that when the police arrested him in 2004, they confiscated his wallet. They returned it to him about two months later, and he kept the wallet another ten years. However, it "wore out," so he threw it away. Trial counsel and the Petitioner did not talk about a *Ferguson* motion. The Petitioner heard the State say during its closing argument that he did not have a dime to his name when he picked up the victim. The Petitioner wrote on a piece of paper that he had twenty dollars in his wallet, and he showed the paper to co-counsel. However, "nothing happened."

On cross-examination, the Petitioner testified that he had forty dollars in his wallet when he hired the victim for sex. He also had about five dollars in dollar bills and coins, which he used to buy the condoms, in the center console of his car. He acknowledged that he lied to the police in 2004 when he told them that the victim was his girlfriend and that they fought over money.

The State showed the Petitioner a crime scene photograph, and he acknowledged that the photograph showed various items on the back seat of his car, including a binder, a package, clothing, papers, and a newspaper. The Petitioner said that he and the victim moved everything onto the floor to have sex and that he moved everything back onto the seat while he was assessing the damage to

his car. At first, the Petitioner said that the police found his boxer shorts on the back seat because he did not have time to put them on after he had sex with the victim. He later said his boxer shorts were on the back seat because he used them to clean himself after having sex with the victim.

The Petitioner testified that the only reason trial counsel gave him for not testifying at trial was that his 2004 statement to the police could be inconsistent with his trial testimony. Trial counsel never talked with him about uncharged offenses and never practiced cross-examination with him. The Petitioner acknowledged that the trial court held a *Momon* hearing and that he told the trial court he was not going to testify. The Petitioner said he did so because trial counsel had told him what to say. At that point, the post-conviction court commented that the Petitioner was "a very intelligent guy" and asked if he was "educated." The Petitioner responded that he was earning his masters degree when the police arrested him and that he understood he made the decision not to testify. The Petitioner said, though, that he wanted to testify at trial but that he decided not to testify because trial counsel told him that she "had the whole case in the bag." Regarding a DNA expert, the Petitioner acknowledged that he never disputed having sex with the victim. The Petitioner said that during his first meeting with trial counsel, he was honest with her about what occurred with the victim but that he did not tell her about "not having a full erection." The Petitioner explained, "I believe I gave her just one version and I added something additional later on in the second meeting when she came with the crime scene pictures."

On redirect-examination, the Petitioner testified that he answered the questions at the *Momon* hearing the way trial counsel told him to answer them. The Petitioner acknowledged that a crime scene photograph showed a condom on the front seat. The Petitioner said the condom may have "landed" on the front seat when he "discarded" it.

At the second evidentiary hearing, co-counsel testified for the Petitioner that he became licensed to practice law in 2006. Between 2006 and the Petitioner's trial in 2016, co-counsel participated in four or five trials, and ninety-nine percent of his practice involved criminal defense. At the time of the Petitioner's trial, trial counsel and co-counsel were sharing office space, and co-counsel saw her "routinely." However, he did not assist her with her preparation of the Petitioner's trial, and he did not consider himself to be co-counsel.²

Co-counsel testified that he never met with the Petitioner before trial but that he met with the Petitioner one time in jail during the trial for about one hour. The Petitioner was trying to decide whether to testify, so co-counsel had the Petitioner explain, in detail, what occurred with the victim. The Petitioner basically said that "it was a consensual meeting with a prostitute" and that "there was some kind of struggle." After hearing the Petitioner's version of the story, co-counsel had some concerns about his ability to testify convincingly, his mannerisms, and his manner of speech. However, the decision of whether to testify ultimately rested with the Petitioner, and co-counsel did not give him any advice as to whether he should testify. Trial counsel "had some reservations" about the Petitioner's testifying because she was concerned about his ability to "stick" to the same version of events. Co-counsel did not hear trial counsel discuss the potential benefits or consequences of testifying with the Petitioner but thought trial counsel did so. He said he thought trial counsel advised the Petitioner not to testify.

Co-counsel testified that he did not remember trial counsel's talking with the Petitioner about lesser-included offenses or the prosecutor's wearing a St. Jude emblem pin. Co-counsel said, though, that he would not have been surprised by the prosecutor's wearing the pin because "he always wore a St. Jude emblem." Co-counsel did not remember the State's saying during closing arguments that the Petitioner did not have a dime to his name or the Petitioner's writing a note to co-counsel. Co-counsel said he represented the Petitioner at sentencing.

On cross-examination, co-counsel testified that trial counsel was concerned about the Petitioner's inconsistent stories whereas co-counsel was concerned about "matters and style of speech, how he

talked about it, and how it might come across" to the jury. Co-counsel never heard trial counsel say she "had this in the bag." He said that he did not know what objection could have been made to the St. Jude pin and that he did not know how a DNA expert could have helped the defense.

Upon being questioned by the post-conviction court, co-counsel testified that trial counsel was a prosecutor "for a number of years" and had "quite a bit of trial experience" before she represented the Petitioner; however, the Petitioner's trial may have been her first trial as a defense attorney. Trial counsel stopped practicing law as a result of the Petitioner's trial, so co-counsel represented the Petitioner at sentencing. Trial counsel later returned to practicing law, but not as a defense attorney.

Appellate counsel testified for the Petitioner that he drafted and filed the Petitioner's motion and amended motions for new trial, represented the Petitioner at the hearing on the motions, and represented the Petitioner on direct appeal of his convictions. At that time, appellate counsel had been practicing law about sixteen years and had handled "a lot of appellate work." During the State's closing argument, the prosecutor said that the Petitioner did not have any money when he hired the victim for sex. However, a photograph of the Petitioner's wallet, which the State introduced into evidence at trial as exhibit 23, showed that the wallet contained at least twenty dollars. Therefore, trial counsel should have objected to or clarified the State's argument. Appellate counsel learned about the money in the wallet from documents in the discovery materials, and he raised on appeal that the State's false argument violated *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), and constituted prosecutorial misconduct. He said he did not notice exhibit 23 in the discovery materials, so he did not refer to the exhibit in the motion for new trial or in the Petitioner's appellate brief. However, he said that he may have introduced the relevant discovery materials into evidence at the hearing on the motion for new trial.

On cross-examination, appellate counsel acknowledged that although he did not refer to exhibit 23 in the new trial motions or the appellate brief, he made a legal argument as to why the prosecutor's statement warranted a new trial. Appellate counsel acknowledged that this court determined that even if the Petitioner had money when he hired the victim, the jury still could have believed the victim's account of the crimes. On redirect examination, appellate counsel testified that because trial counsel did not make a contemporaneous objection to the State's argument, the Petitioner had to satisfy the "incredibly high standard" of plain error to obtain relief. Appellate counsel said that "we crafted the best argument we could" to show that the State's improper argument rose to the level of a constitutional violation.

At the third evidentiary hearing, Assistant District Attorney General Samuel Winnig testified for the Petitioner that he was one of the prosecutors at trial and that he often wore a pin, usually a United States or Tennessee flag, on his suit jacket. He said he also owned a metal pin with the St. Jude logo on it. He described the pin as one-half to one inch in size and said the logo was a "child with [a] little crest." He said that he did not remember wearing any pins during the Petitioner's trial or anyone mentioning a pin at the trial.

During the hearing, post-conviction counsel requested to recall the Petitioner to the stand to "finish out some things he wanted to say." The post-conviction court requested that trial counsel also return so that the post-conviction court could question her.

At the fourth evidentiary hearing, the post-conviction court questioned trial counsel. Trial counsel testified that she and co-counsel "were associated at the time" of the Petitioner's trial and that she "brought in [co-counsel] to assist with preparation and with the trial." She said she thought co-counsel was present during the entire trial and that she did not remember his being out of the courtroom during her cross-examination of the victim. Trial counsel said that she was "distraught" about the jury's guilty verdicts in the Petitioner's case and that she "ended up leaving the practice of law for quite a

while." Trial counsel notified the Petitioner by letter, and co-counsel represented the Petitioner at sentencing because co-counsel was "intimately involved with the case."

Upon being questioned by the State, trial counsel testified that she and co-counsel met with the Petitioner in jail when the Petitioner was deciding whether to testify and that co-counsel was "significant[y]" involved in trial preparation. Upon being questioned by post-conviction counsel, trial counsel testified that she did not remember telling the Petitioner that he did not need to testify because "this is an open and shut case" or "we've got this in the bag." She said she also did not remember whether she hired an investigator or tried to speak with the victim before trial.

The post-conviction court allowed the Petitioner to retake the stand to testify briefly about certain issues. The Petitioner acknowledged that a crime scene photograph showed a towel on the driver's floorboard of his car. The Petitioner explained that he was using the towel to clean himself after he had sex with the victim and that the victim "grabbed my wallet and tucked it inside her bra." The Petitioner immediately went to the front seat to stop the victim and dropped the towel while he was "tussling" with her. The Petitioner said that his discovery materials contained a list of his uncharged offenses but that he and trial counsel never discussed them. Trial counsel also never told him that he could open the door to the offenses if he testified. Even if trial counsel had done so, the Petitioner still would have testified and would have "treaded very carefully through [his] testimony." Trial counsel specifically advised the Petitioner not to testify, and he took her advice because he trusted her.

The Petitioner testified that he and trial counsel also never discussed omitting the lesser-included offenses from the jury instructions or discussed that the statute of limitations had run on the lesser-included offenses. Trial counsel was "in disbelief" when the State requested that the trial court remove the lesser-included instructions from the jury charge and thought the removal "would be a good decision that might help [the Petitioner] with the jury." The Petitioner stated that he "may have made a comment" to trial counsel about requesting an instruction on assault and that trial counsel said she "might think about" filing a motion to include an assault instruction. However, the Petitioner "absolutely" wanted the trial court to instruct the jury on all of the lesser-included offenses.

The Petitioner testified that after the jury convicted him, he received a letter from trial counsel, advising him that she had stopped practicing law. The Petitioner did not want co-counsel to represent him at sentencing because co-counsel was not familiar with his case.

On cross-examination, the Petitioner denied giving multiple versions of his story. He maintained that he gave trial counsel only one version and said that he withheld "some vital information" from her because he was embarrassed and uncomfortable with telling her everything that happened. The Petitioner told co-counsel the same version of the story that he told trial counsel. Trial counsel and co-counsel advised the Petitioner not to testify because "they thought they had it in the bag, . . . and it was an open and shut case for them, so they didn't see no need for [him] to testify." The Petitioner acknowledged that the trial court asked him during the *Momon* hearing if he understood that he was voluntarily giving up his right to testify and that he told the trial court yes. He said, though, that he was not truthful with the trial court because he did not want to go against the advice of trial counsel and co-counsel.

On April 14, 2022, the post-conviction court entered an order granting post-conviction relief for trial counsel's failure to request jury instructions on any lesser-included offenses. The State appeals that ruling. The post-conviction court denied relief on the Petitioner's remaining ineffective assistance of counsel claims, and the Petitioner cross-appeals, claiming that the post-conviction court also should have found that trial counsel was ineffective for advising him not to testify, for failing to subpoena the victim's medical records, for failing to object to the prosecutor's wearing a St. Jude emblem pin on the second day of trial, for failing to object to the State's improper closing arguments, for failing to retain a

DNA expert, and for telling the jury in opening statements that the proof was more consistent with a consensual encounter than rape. Additionally, the Petitioner contends that the cumulative effect of trial counsel's errors warrants relief, that appellate counsel was ineffective for failing to cite to exhibit 23 in the Petitioner's motion for new trial or in the appellate brief on direct appeal of the Petitioner's convictions, and that the post-conviction court erred by denying the Petitioner's request for funding for an investigator and a DNA expert.

ANALYSIS

Post-conviction relief "shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. The petitioner bears the burden of proving factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See *Wiley v. State*, 183 S.W.3d 317, 325 (Tenn. 2006). When reviewing factual issues, the appellate court will not reweigh the evidence and will instead defer to the post-conviction court's findings as to the credibility of witnesses or the weight of their testimony. *Id.* However, review of a post-conviction court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See *Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. See *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001); *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see *State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The *Strickland* standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. 466 U.S. at 687.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, see *Strickland*, 466 U.S. at 690, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. See *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982).

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

Courts need not approach the *Strickland* test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697; see *Goad*, 938

S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

I. Lesser-Included Offenses

The State contends that the post-conviction court erred by granting relief for trial counsel's failure to waive the statute of limitations and failure to request instructions on lesser-included offenses because no reasonable probability exists that a jury would have found the Petitioner guilty of a lesser offense. The Petitioner contends that the post-conviction court did not err. We conclude that the post-conviction court properly granted relief for the Petitioner's conviction of aggravated rape accomplished by using force or coercion and while armed with a deadly weapon but that the post-conviction court erred by granting relief for the Petitioner's conviction of aggravated rape causing bodily injury.

In its order finding that the Petitioner was entitled to post-conviction relief, the post-conviction court recounted that at trial, trial counsel immediately agreed with the State that the trial court could not instruct the jury on any lesser-included offenses because the statute of limitations for the lesser-included offenses had expired. The post-conviction court also recounted the Petitioner's testimony that he and trial counsel never discussed waiving the statute of limitations and that trial counsel "didn't believe it" when the State requested the removal of the lesser-included offenses from the final jury charge. The post-conviction court noted that trial counsel testified that she and the Petitioner discussed waiving the statute of limitations, but the court found her testimony on the issue to be "completely inconsistent." The post-conviction court concluded that trial counsel did not discuss waiving the statute of limitations with the Petitioner and that her failure to do so constituted deficient performance.

The post-conviction court then turned to prejudice and the analysis adopted in *State v. Allen*, 69 S.W.3d 181 (Tenn. 2002), which requires that the reviewing court consider the evidence at trial and the defense's theory of the case. The post-conviction court stated that the defense's theory in jury selection, opening statements, and cross-examination of the witnesses was that the victim and the Petitioner engaged in a consensual sexual encounter, that a dispute over money occurred, and that they were involved in a physical fight that did not involve a weapon. In considering the evidence at trial, the post-conviction court recalled the victim's testimony that she did not think the Petitioner had any money, that she hit him first, and that she attacked him with a weapon. The court stated that the victim's conflicting testimony as to whether the Petitioner raped her with a knife or a gun was "somewhat troubling," that the victim of an assault should remember the type of weapon used during the attack, and that the police did not recover a weapon. Therefore, the post-conviction court concluded that "the jury should have been given an option to consider a lesser-included offense." The post-conviction court stated that "in a normal situation," the facts testified to by the victim would have warranted instructions on "all lesser included offenses" of aggravated rape, which included attempted aggravated rape, rape, attempted rape, aggravated sexual battery, sexual battery, and Class B misdemeanor assault. The post-conviction court concluded that a reasonable probability existed that a reasonable jury instructed on the lesser-included offenses would have convicted the Petitioner of a lesser-included offense. Thus, the post-conviction court found that the Petitioner was prejudiced by trial counsel's deficient performance and ordered that he receive a new trial.

A defendant has a constitutional right to instructions on lesser-included offenses if warranted by the proof. *Moore v. State*, 485 S.W.3d 411, 419 (Tenn. 2016). Tennessee Code Annotated section 40-18-110(a) provides that "[w]hen requested by a party in writing prior to the trial judge's instructions to the jury in a criminal case, the trial judge shall instruct the jury as to the law of each offense specifically identified in the request that is a lesser included offense of the offense charged in the

indictment or presentment." However, "when no written request is made by a party for an instruction on a lesser-included offense, as in this case, the trial court may charge the lesser-included offense, but a party is not entitled to such an instruction." *Bryant v. State*, 460 S.W.3d 513, 523 (Tenn. 2015) (citing *State v. Fayne*, 451 S.W.3d 362, 370-71 (Tenn. 2014)); see Tenn. Code Ann. § 40-18-110(b).

Here, the post-conviction court found that trial counsel failed to advise the Petitioner that he could waive the statute of limitations on the lesser-included offenses and that trial counsel's failure constituted deficient performance. Trial counsel testified that she did not remember talking with the Petitioner about waiving the statute of limitations. Moreover, although trial counsel claimed she knew the Petitioner could waive the statute of limitations, the trial transcript confirms that she immediately agreed when the State advised the trial court that the trial court could not instruct the jury on any lesser offenses because the statute of limitations had expired. Trial counsel did not mention the possibility of waiver, did not mention that she had discussed waiver with the Petitioner, and did not advise the trial court that the Petitioner did not want to waive the statute of limitations. Therefore, the evidence does not preponderate against the post-conviction court's factual finding that trial counsel failed to discuss waiving the statute of limitations with the Petitioner. The failure to provide the Petitioner with information about waiving the statute of limitations was deficient performance.

Whether a petitioner has suffered prejudice resulting from trial counsel's failure to request proper jury instructions depends on whether a reasonable probability exists that a properly instructed jury would have convicted the petitioner of the lesser-included offense instead of the charged offense. *Moore v. State*, 485 S.W.3d at 420-21 (citing *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008)). The prejudice inquiry on post-conviction mirrors the harmless error inquiry on direct appeal. *Id.* at 421. In cases where the jury did not reject the immediately lesser offense, or was given no option to convict of any lesser offense, courts apply the harmless error analysis adopted in *Allen*, 69 S.W.3d at 191. *Id.* at 422.

Under the *Allen* analysis, courts "should conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury." In examining the evidence presented at trial, the harmless error analysis focuses on the distinguishing element between the greater and lesser offenses, the strength of the evidence of the distinguishing element, and the existence of contradicting evidence of the distinguishing element. *Id.* (footnote and internal citations omitted). The jury's verdict does not factor into the analysis when the jury was not given an option to convict the defendant of any lesser-included offense. *Id.* at 423.

Initially, we note that the post-conviction court recognized in its order granting relief that *Allen* harmless error analysis should be used in cases, like this one, where ineffective assistance of counsel claims arise from the failure to request jury instructions on lesser-included offenses and the jury was not given the option to convict of any lesser-included offenses. However, the post-conviction court did not address the distinguishing element between the greater and lesser offenses in its prejudice analysis. Moreover, the court appeared to consider prejudice only as it related to the Petitioner's conviction of aggravated rape by the use of force or coercion and while armed with a weapon.

Aggravated rape as charged in count one of the indictment is unlawful sexual penetration of the victim by the defendant and force or coercion is used to accomplish the act and the defendant is armed with a weapon. Tenn. Code Ann. § 39-13-502(a)(1). Aggravated rape as charged in count two is unlawful sexual penetration of the victim by the defendant and the defendant causes bodily injury to the victim. Tenn. Code Ann. § 39-13-502(a)(2). "Sexual penetration" means sexual intercourse, . . . or any other intrusion, however slight, of any part of a person's body." Tenn. Code Ann. § 39-13-501(7). "Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or

impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. § 39-11-106(a)(2) (2014).

The lesser-included offense of rape is the unlawful sexual penetration of the victim by the defendant accompanied by (1) force or coercion is used to accomplish the act; (2) the sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know that the victim did not consent; (3) the defendant knows or has reason to know that the victim was mentally defective, mentally incapacitated, or physically helpless; or (4) the sexual penetration is accomplished by fraud. Tenn. Code Ann. § 39-13-503(a). Criminal attempt for the lesser-included offenses of attempted aggravated rape and attempted rape occurs when a person, acting with the kind of culpability otherwise required for the offense:

- (1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;
- (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
- (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense. Tenn. Code Ann. § 39-12-101(a).

Relevant to this case, the lesser-included offense of aggravated sexual battery is unlawful sexual contact with a victim accompanied by force or coercion used to accomplish the act and the defendant is armed with a weapon or the defendant causes bodily injury to the victim. Tenn. Code Ann. § 39-13-504(a)(1), (2). The lesser-included offense of sexual battery is unlawful sexual contact with a victim by the defendant accompanied by (1) force or coercion is used to accomplish the act; (2) the sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know that the victim did not consent; (3) the defendant knows or has reason to know that the victim was mentally defective, mentally incapacitated, or physically helpless; or (4) the sexual contact is accomplished by fraud. Tenn. Code Ann. § 39-13-505(a). "Sexual contact" has been defined as including the "intentional touching" of the victim's or the defendant's intimate parts or the intentional touching of the clothing covering the immediate area of their intimate parts "if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." Tenn. Code Ann. § 39-13-501(6). The lesser-included offense of Class B misdemeanor assault is intentionally or knowingly causing physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative. Tenn. Code Ann. § 39-13-101(a)(3).

We have reviewed the trial testimony. The victim testified that on the morning of September 5, 2004, she was sitting on her front porch when she first encountered the Petitioner and that she agreed to have sex with him for forty dollars. However, the victim became uncomfortable with the arrangement when the Petitioner parked his car on the loading dock. He then refused to give her the money prior to the sex, so she tried to get out of the car. She said that he pulled her back inside by her hair and that they began fighting. The victim said the Petitioner began choking her with his hands, and she demonstrated his hands for the jury. The State asked, "You are making your hands almost like a claw?" The victim said yes. She said that the Petitioner had "a Swiss army knife thing," that the handle of the knife was black, that the silver blade of the knife was "out," and that the Petitioner held the blade to her neck "right here" and began tearing off her clothes. The victim said that she thought she passed out and that she woke to the Petitioner vaginally raping her, so she grabbed a screwdriver and began stabbing him with it. The victim escaped to a gas station, and the police were called. The victim said she did not know why she told the police that the Petitioner had a gun.

Lieutenant Wojcicki testified that the victim was "heavily disheveled," that "she had been beaten pretty bad," and that she was "very frantic." He said she had "ligature marks around her neck and just redness and bruising." Officer Goetsch said the victim "had been battered" and "injured on or about the neck." The victim told officers that the Petitioner raped her at gunpoint, but they did not find any weapons on the Petitioner or in his car. Nurse Gable testified that the victim had three "[s]ubacute lacerations" on the front of her neck, a laceration on each arm, and swelling and redness to her left eye. Ms. Gable described a laceration as "a blunt force trauma. It kind of looks like a cut sometimes in the skin." The State showed Ms. Gable a photograph of the victim's neck, and Ms. Gable said the photograph showed "redness and looks like very thin cuts all around the front of her neck." She also looked at photographs of the victim's arms and said the photographs showed "a laceration or scratch or cut" on both arms.

The Petitioner's theory of defense was that he had consensual sex with the victim and that they physically fought over money. The Petitioner did not testify or present any evidence at trial. Nevertheless, through his cross-examination of the witnesses, he was able to challenge the victim's credibility by showing that she told the police she was walking home from a party when the Petitioner first approached her; that she was addicted to crack cocaine; that she agreed to have sex with him so she could get money for crack; that she did not tell the police she was working as a prostitute; that the Petitioner would not pay her; that they had a physical altercation; that she hit him and stabbed him with a screwdriver; and that she injured his lip and broke his glasses.

Applying the prejudice analysis to the Petitioner's conviction of aggravated rape in count one, the element of "armed with a weapon" distinguishes aggravated rape from rape. Given the victim's credibility issues, the conflicting proof about the type of weapon used, the fact that the police did not find any weapon, and the Petitioner's theory of defense that no weapon was involved, the post-conviction court did not err by concluding that prejudice resulted from trial counsel's failure to request a jury instruction on rape.

The element of "sexual penetration" distinguishes aggravated rape from aggravated sexual battery, which requires "sexual contact." However, the Petitioner never contested that he sexually penetrated the victim or, for that matter, that he had sexual contact with her. Thus, we conclude that no prejudice resulted from trial counsel's failure to request a jury instruction on aggravated sexual battery.

The elements of "sexual penetration" and "armed with a weapon" distinguish aggravated rape from sexual battery. Again, the Petitioner contested being armed with a weapon, so the post-conviction court properly determined that prejudice resulted from trial counsel's failure to request an instruction on sexual battery.

Likewise, misdemeanor assault only requires physical contact that a reasonable person would regard as extremely offensive or provocative; it does not require the use of a weapon. Therefore, we conclude that the post-conviction court did not err by determining that prejudice resulted from trial counsel's failure to request an instruction on misdemeanor assault.

As to the lesser-included offenses of attempted aggravated rape and attempted rape, the State asserts that the failure to instruct the jury on those offenses was harmless because the Petitioner did not dispute having sex with the victim. We agree with the State. The Petitioner acknowledged that he penetrated the victim. Thus, there was no proof that the Petitioner attempted, but did not complete, the offense charged or any lesser-included offense. Accordingly, we conclude that the post-conviction court did not err by finding prejudice for trial counsel's failure to request jury instructions on the lesser-included offenses of rape, sexual battery, and misdemeanor assault but that the court erred by finding prejudice for trial counsel's failure to request jury instructions on attempted aggravated rape,

attempted rape, and aggravated assault.

Applying the prejudice analysis to the Petitioner's conviction of aggravated rape in count two, the element of "causes bodily injury to the victim" distinguishes aggravated rape from rape, and the element of "sexual penetration" distinguishes rape from sexual battery and misdemeanor assault. The Petitioner never contested that he sexually penetrated the victim or that she suffered bodily injury. Instead, he asserted through his cross-examination of the victim that she became angry when he would not pay her for sex, that she started fighting him, and that her injuries resulted from the fight. However, the victim testified that the Petitioner choked her with his hands, and she demonstrated his hands as claw-like for the jury. Police officers testified that the victim had been battered and beaten and that she had redness and ligature marks on her neck. A nurse testified that the victim had three lacerations on the front of her neck, a laceration on her left arm, a laceration on her right arm, and swelling and redness to her left eye.

We have looked at photographs of the victim's injuries, and they show extensive red marks around her neck and what appear to be bloody scratches or small lacerations on the front of her neck. Although the Petitioner testified at the evidentiary hearing that he and the victim "tussled" over the wallet and that he tried to "fend her off," the Petitioner chose not to testify at trial. Therefore, the jury never heard his explanation for the victim's injuries. In any event, the Petitioner's explanation does not account for the severity of her injuries, especially her neck injuries. Therefore, we conclude that even if trial counsel had requested instructions on lesser-included offenses of aggravated rape causing bodily injury, no reasonable jury would have found the Petitioner guilty of a lesser-included offense. Therefore, the post-conviction court erred by finding that the Petitioner suffered prejudice for trial counsel's failure to instruct the jury on any lesser-included offenses of aggravated rape causing bodily injury.

In sum, we conclude that the post-conviction court did not err by concluding that the Petitioner is entitled to a new trial for aggravated rape by the use of force or coercion and while armed with a weapon but that he is not entitled to a new trial for his conviction of aggravated rape causing bodily injury. We now turn to the issues raised in the Petitioner's cross-appeal.

II. Testifying

The Petitioner claims that the post-conviction court should have found that he received the ineffective assistance of counsel because trial counsel failed to explain the "pros" of testifying and advised him not to testify. The State argues that the record supports the post-conviction court's denial of relief on this issue. We agree with the State.

In its order, the post-conviction court accredited trial counsel's testimony that she explained the potential benefits and consequences of testifying to the Petitioner, that she told him that he could open the door to uncharged offenses, and that she never explicitly told him that he should not testify. The Petitioner himself testified that he lied to the police and that trial counsel did not want the jury to hear any inconsistencies in his story. It was reasonable for trial counsel to be concerned that the Petitioner would give testimony inconsistent with his police statement and that he could open the door to other offenses. Therefore, the evidence does not preponderate against the post-conviction court's conclusion that the Petitioner failed to show deficient performance by trial counsel.

III. Medical Records

Next, the Petitioner contends that the post-conviction court should have found that he received the ineffective assistance of counsel because trial counsel failed to subpoena the victim's medical records, which could have contained exculpatory information. The Petitioner acknowledges that the post-conviction court reviewed the records and asks that we do the same. We conclude that the

Petitioner is not entitled to relief.

The evidence at trial established that the Petitioner raped the victim about 6:00 a.m. on September 5, 2004. According to a police report introduced into evidence at the post-conviction evidentiary hearing, on the night of September 5, 2004, the victim was taken by ambulance to Regional Medical Center for an anxiety attack, vomiting, and shortness of breath. At some point, post-conviction counsel subpoenaed the victim's medical records and requested that they be filed as an exhibit under seal for the post-conviction court's in-camera review. At the first evidentiary hearing, post-conviction counsel asserted that the records were important "to show [the victim's] mental state and to see if she's said anything that could have been exculpatory."

In its order, the post-conviction court recalled trial counsel's testimony that she cross-examined the victim about the victim's drug addiction and that she did not think subpoenaing the victim's Regional Medical Center records was warranted due to the Petitioner's claim that he had consensual sex with the victim. The post-conviction court concluded that the Petitioner failed to show trial counsel was ineffective for failing to obtain the records. About one month after the post-conviction court entered its order granting relief, the post-conviction court advised the parties in a hearing that it had reviewed the medical records and that it "didn't find anything" that would have made a difference in the court's ruling.

A defendant has the right to review records with exculpatory information to prepare for his defense and may subpoena medical records. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). However, the trial court must balance these concerns and review the records in camera before determining whether the records should be provided to the defense. See Tenn. Code Ann. § 33-3-105(3).

According to the police report, the police officer spoke with a Regional Medical Center nurse on the morning of September 7, and she advised him that the victim was being treated for cocaine addiction and "other problems" but that the victim was not being treated for injuries related to the September 5 sexual assault. In any event, the post-conviction court, which also presided over the Petitioner's trial, reviewed the records and determined that they did not contain exculpatory evidence. Therefore, we conclude that the post-conviction court properly found that the Petitioner failed to show he was prejudiced by trial counsel's not subpoenaing the victim's medical records. Moreover, we decline the Petitioner's request to review the records.

IV. St. Jude Pin

The Petitioner contends that the post-conviction court should have found that he received the ineffective assistance of counsel because trial counsel failed to object when one of the prosecutors wore a St. Jude pin on his lapel on the second day of trial. He argues that the prosecutor's wearing the pin deprived him of an impartial jury because several members of the jury worked in the medical field or had a spouse that worked in the medical field. The State responds that the Petitioner failed to show that the pin prejudiced his case, noting that he did not present any evidence that any juror noticed the pin and that he did not establish any relevance between St. Jude Hospital and his trial. We agree with the State.

In its order, the post-conviction court found that even if General Winnig wore the St. Jude pin, the Petitioner was not prejudiced because "[t]here was nothing in this case about St. Jude and, therefore, the wearing of an emblem is not significant." The evidence presented at the post-conviction hearing does not preponderate against the post-conviction court's finding. Therefore, the Petitioner is not entitled to relief on this issue.

V. Improper Closing Argument

The Petitioner contends that the post-conviction court should have found that he received the ineffective assistance of counsel because trial counsel failed to object to the State's improper closing arguments. Specifically, the Petitioner claims that trial counsel should have objected when the prosecutor said in the State's closing argument that the Petitioner knew he did not have any money when he agreed to have sex with the victim and when the prosecutor said in the State's rebuttal closing argument, "So the State cares and that's why you all should care." In its order, the post-conviction court concluded that the challenged statements were "not so harmful as to rise beyond an expression of the State to the jury."

On direct appeal of the Petitioner's convictions, he argued that the prosecutor's statement about his not having any money violated *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), and constituted prosecutorial misconduct. This court found that the Petitioner waived plenary review because he failed to object at trial. Nevertheless, this court considered the issue under the plain error doctrine and concluded that plain error relief was not warranted because the prosecutor did not violate *Napue* and because this court could not say the prosecutor intentionally misled the jury or misstated the evidence. See *Justus Oniego*, 2018 Tenn. Crim. App. LEXIS 368, 2018 WL 2175819, at *10. "[A]ny claims of ineffective assistance of counsel in the post-conviction petition that were identical to Petitioner's claims on direct appeal and determined by this Court not to rise to the level of plain error also [fail] to establish prejudice in the context of a post-conviction proceeding." *Charles Owens v. State*, No. M2009-00558-CCA-R3-PC, 2010 Tenn. Crim. App. LEXIS 303, 2010 WL 1462529, at *6. (Tenn. Crim. App. Apr. 13, 2010). Given that the Petitioner failed to demonstrate plain error on direct appeal, he also has failed to demonstrate a reasonable probability that the outcome of the proceedings would have been different.

As to the State's rebuttal closing argument, the Petitioner claims that trial counsel should have objected to the prosecutor's statement that "the State cares and that's why you all should care" because the purpose of the statement was to inflame the passions of the jury. It is well-established that closing argument is an important tool for both parties during a trial and, therefore, that counsel is generally given wide latitude during closing argument. See *State v. Carruthers*, 35 S.W.3d 516, 577-78 (Tenn. 2000) (appendix). Nevertheless, "arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003). Our supreme court "has cautioned that the State may risk reversal by engaging in argument which appeals to the emotions and sympathies of the jury." *State v. Cribbs*, 967 S.W.2d 773, 786 (Tenn. 1998).

The recurrent theme in this case was that the victim, a prostitute and a drug addict, was not credible. In his rebuttal closing argument, the prosecutor asserted that the Petitioner carefully targeted a prostitute and drug addict because he was counting on the victim not reporting the rape to the police and, if she did, the police not taking her seriously. The prosecutor then stated as follows:

[W]ho cares about a prostitute who is addicted to drugs? The State of Tennessee cares. That's why in the indictment that I read yesterday, at the start of this trial, it says this aggravated rape is a crime not just against [the victim], but against the peace and dignity of the State of Tennessee. So the State cares and that's why you all should care.

While the prosecutor may have made the statement at issue to appeal to the jury's emotions, in the context of the prosecutor's entire argument that the Petitioner targeted the victim because she was a prostitute and a drug addict, we cannot say that the statement was so inflammatory as to have changed the verdict. Therefore, we agree with the post-conviction court that the Petitioner is not entitled to relief on this issue.

VI. DNA Expert

The Petitioner contends that the post-conviction court should have found that he received the ineffective assistance of counsel because trial counsel failed to retain a DNA expert. He claims trial counsel "should have realized that if a DNA expert was able to dispute the State's claim that [the] Petitioner's DNA was found in the victim's vagina, the defense would have had a much greater chance of success at trial." We conclude that the post-conviction court properly denied relief on this issue.

In addressing this issue in its order, the post-conviction court recalled trial counsel's testimony that she did not hire an independent DNA expert because the Petitioner always maintained that he had sex with victim. The post-conviction court then found that the Petitioner failed to present evidence as to how he was prejudiced by trial counsel's failure to obtain DNA evidence. On appeal, the Petitioner has failed to explain, and we fail to see, how an expert's not finding the Petitioner's DNA in the victim's vagina could have helped his case when his entire defense was based on his claim that he had consensual sex with the victim. Accordingly, nothing preponderates against the post-conviction court's finding that the Petitioner failed to show prejudice.

VII. Opening Statement

In a related argument, the Petitioner asserts that the post-conviction court should have found that he received the ineffective assistance of counsel because trial counsel told the jury in her opening statement that "you will see the proof in this case is much more consistent with the consensual encounter of having sex than it is with rape." The Petitioner contends that trial counsel was deficient for making the statement because the Petitioner ended up not testifying; therefore, the jury never heard about a consensual encounter. He also contends that the statement "likely damaged [trial counsel's] credibility in the eyes of the jury."

At the post-conviction evidentiary hearing, trial counsel testified that she made the statement because the Petitioner's defense was that he and the victim had consensual sex. In its order, the post-conviction court accredited trial counsel's testimony and found that her opening statement was an informed tactical decision that would not be second-guessed by the post-conviction court.

The Petitioner testified at the evidentiary hearing that he told trial counsel during their first meeting that he had consensual sex with the victim. Although the Petitioner did not testify at trial, trial counsel vigorously attacked the victim's credibility on cross-examination in an attempt to show that the victim and the Petitioner had consensual sex. Therefore, trial counsel's decision to tell the jury in her opening statement that the Petitioner had consensual sex with the victim was a reasonable tactical decision that will not provide a basis for post-conviction relief. *Taylor v. State*, 814 S.W.2d 374, 378 (Tenn. Crim. App. 1991).

VIII. Cumulative Error

The Petitioner contends that the cumulative effect of trial counsel's errors warrants relief. "To warrant assessment under the cumulative error doctrine, there must have been more than one actual error committed in the trial proceedings." *State v. Hester*, 324 S.W.3d 1, 77 (Tenn. 2010). Moreover, in the context of an ineffective assistance of counsel claim, cumulative error "examines the prejudicial effect of multiple instances of deficient performance." *Tommy Dale Adams v. State*, No. M2018-00470-CCA-R3-PC, 2019 Tenn. Crim. App. LEXIS 791, 2019 WL 6999719, at *31 (Tenn. Crim. App. Dec. 20, 2019); see *Demetrius Grimes v. State*, No. E2021-00120-CCA-R3-PC, 2022 WL 557739, at *8 (Tenn. Crim. App. Feb. 24, 2022), perm. app. denied, (Tenn. June 8, 2022); *Thomas Edward Clardy v. State*, No. M2017-01193-CCA-R3-PC, 2018 Tenn. Crim. App. LEXIS 779, 2018 WL 5046032, at *7 (Tenn. Crim. App. Oct. 17, 2018).

In this case, the Petitioner has demonstrated that he is entitled to relief for one of his convictions of aggravated sexual battery based on trial counsel's failure to advise him about waiving the statute of limitations and her failure to request jury instructions on certain lesser-included offenses. However, he has not demonstrated other multiple instances of deficient performance. Therefore, he is not entitled to relief under the cumulative error doctrine.

IX. Exhibit 23

The Petitioner contends that appellate counsel was ineffective because he failed to refer to exhibit 23, which showed a photograph of the Petitioner's wallet containing a twenty-dollar bill, in the Petitioner's motion for new trial or in the Petitioner's brief direct appeal of his convictions. The Petitioner claims that had trial counsel referred to exhibit 23 to show that the prosecutor made a false statement during closing arguments about the Petitioner not having any money, the trial court would have granted the Petitioner's motion for new trial or this court would have found that plain error warranted a new trial.

In its order, the post-conviction court found that appellate counsel's "decisions" not to refer to exhibit 23 in the motion or the appellate brief "were both strategic and tactical in nature." The post-conviction court also inherently accredited appellate counsel's testimony that he still supported the argument with documents from discovery.

At the post-conviction evidentiary hearing, appellate counsel testified that he did not refer to exhibit 23 in the motion for new trial or in the appellate brief because he did not notice the exhibit when he reviewed the discovery materials. Therefore, the evidence preponderates against the post-conviction court's finding that appellate counsel made a strategic decision not to refer to the exhibit. Regardless, our review of the record on direct appeal of the Petitioner's convictions confirms that appellate counsel introduced documentation at the motion for new trial hearing, showing that the Petitioner's wallet contained twenty dollars when he was arrested on September 5, 2004. Moreover, as this court noted in its direct appeal opinion, appellate counsel advised the trial court about the documents at the hearing.³ Appellate counsel also referred to the documents in the Petitioner's appellate brief. Therefore, the trial court and this court were aware of evidence that the Petitioner's wallet contained twenty dollars. Accordingly, even if trial counsel did not refer to exhibit 23, the Petitioner has failed to demonstrate that he was prejudiced by appellate counsel's failure.

X. Funding for Investigator and DNA Expert

Finally, the Petitioner contends that the post-conviction court erred by denying his requests for funding for an investigator and a DNA expert. The Petitioner acknowledges that Tennessee Supreme Court Rule 13 provides that he is not entitled to such funding but argues that the Rule violates his federal and state constitutional rights to due process. The State argues that the post-conviction court properly denied the Petitioner's requests. We agree with the State.

In February 2021, the Petitioner filed an ex parte motion for funding to hire a DNA expert. In the motion, the Petitioner asserted that he needed a DNA expert to establish the prejudice prong of the *Strickland* test for his claim that trial counsel was ineffective for failing to hire a DNA expert. In May 2021, the Petitioner filed an ex parte motion for funding to hire an investigator, asserting that he needed an investigator to locate the victim because one of his claims in his pro se petition for post-conviction relief was that trial counsel was ineffective for failing to interview the victim before trial. The Petitioner stated in the motion that post-conviction counsel had been unable to locate the victim through counsel's own investigation. The post-conviction court denied both motions based on Tennessee Supreme Court Rule 13.

Tennessee Supreme Court Rule 13 provides that "[i]n non-capital post-conviction proceedings,

funding for investigative, expert, or other similar services shall not be a right guaranteed by the Tennessee Constitution or the Tennessee Constitution. Sup. Ct. R. 13 § 5(a)(2). Moreover, in *Davis v. State*, 912 S.W.2d 689, the Tennessee Supreme Court explained that "[a] person's right to counsel ends at the conclusion of the direct appeal" and that "[i]n the absence of a Constitutional right to counsel, the state is not required to provide right to support services at state expense."

This court is bound by the decisions of the Tennessee Supreme Court. *Wesley Jones v. State*, No. W2015-01481-CCA-R3-PC, 2016 Tenn. Crim. App. LEXIS 595, 2016 WL 4357422, at *22 (Tenn. Crim. App. Aug. 11, 2016). Therefore, while we can appreciate the Petitioner's argument, we must conclude that he was not entitled to funds for an expert or an investigator.

CONCLUSION

Based on our review of the oral arguments, the record, and the parties' briefs, we conclude that the post-conviction court erred by granting post-conviction relief for the Petitioner's conviction of aggravated rape causing bodily injury. Thus, the Petitioner's conviction for that offense and his resulting seventeen-year sentence are reinstated. The post-conviction court's granting relief for the Petitioner's conviction of aggravated rape by the use of force or coercion and while armed with a weapon and the post-conviction court's denying relief on the Petitioner's remaining issues are affirmed, and the case is remanded to the post-conviction court for further proceedings consistent with this opinion.

JOHN W. CAMPBELL, SR., JUDGE

Footnotes

1

The Petitioner has requested that we take judicial notice of the record from *State v. Justus Onyiego*, No. W2017-00217-CCA-R3-CD, 2018 Tenn. Crim. App. LEXIS 368, 2018 WL 2175819 (Tenn. Crim. App. May 10, 2018). We choose to take judicial notice of the record. See *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009).

2

Nevertheless, we will refer to him as "co-counsel." We note that he was listed as one of the Petitioner's attorneys on the trial transcript.

3

Specifically, appellate counsel advised the trial court at the motion for new trial hearing that "according to the MPD's Crime Scene Narrative form, the MPD's Property Release form, and MPD's Evidence Permanent Assignment Receipt form, the [Petitioner's] wallet contained one twenty-dollar-bill at the time of his arrest." *Justus Onyiego*, No W2017-00217-CCA-R3-CD, 2018 Tenn. Crim. App. LEXIS 368, 2018 WL 2175819, at *9. Our review of the record in that case confirms that appellate counsel introduced all three MPD forms into evidence at the hearing.