IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 9, 2009

# GRADY LEE FLIPPO v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Bedford County**
**No. 11539 Lee Russell, Judge**

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**No. M2008-02079-CCA-R3-PC - Filed September 29, 2009**

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The petitioner, Grady Lee Flippo, was convicted of two counts of attempted aggravated assault and sentenced to six years and six months as a Range I Standard offender. On direct appeal, this court upheld the convictions, but modified the sentences to run concurrently resulting in an effective sentence of three years and six months. On this appeal, he asserts that he received ineffective assistance of counsel. Specifically, he argues that his trial counsel was ineffective because he failed to adequately prepare for trial; properly explain the facts, adverse testimony, and the elements of the charges; interview and call witnesses; and failed to strike a juror. Following a review of the parties' briefs, the record, and applicable law, we affirm the denial of post-conviction relief.

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

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Andrew Jackson Dearing, III, Assistant Public Defender, Shelbyville, Tennessee, for the appellee, Grady Lee Flippo.

Robert E. Cooper, Jr., Attorney General and Reporter; Melissa Roberge, Assistant Attorney General; Charles Frank Crawford, Jr. , District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Background

Following a jury trial, the petitioner was convicted of two counts of attempted aggravated assault. On appeal, this court affirmed the judgments of the trial court concerning the petitioner's convictions and the lengths of the petitioner's sentences, however, because this court concluded that the trial court improperly classified the petitioner as a dangerous offender, the trial court's order of consecutive sentencing was reversed and the case was remanded for modification of the sentences to reflect concurrent terms. *See State v. Grady Lee Flippo,* No. M2006-01182-CCA-R3-CD, 2007

WL 1628868 (Tenn. Crim. App., at Nashville, June 6, 2007). The following is a summary of the facts of the case taken from this court's opinion on direct appeal:

> This case arises from a June 14, 2005 roadside altercation occurring on Highway 41-A just north of Shelbyville in Bedford County. On August 22, 2005, the [petitioner] was charged with two counts of aggravated assault by using a handgun to cause the victims to fear imminent bodily injury and one count of felony reckless endangerment by motor vehicle. *See* Tenn. Code Ann. §§ 39-13-101 to -103.
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> At the [petitioner's] trial on these charges, the following evidence was presented. On June 14, 2005, Mr. David K. Ensey (Mr. Ensey) and his twelve-year-old son, David Ryan Ensey FN1 (David Ensey), were stopped on the side of Highway 41-A due to a flat tire on their trailer. They were attempting to load the trailer onto a larger trailer, when the [petitioner], accompanied by two men, drove past them. Mr. Ensey said to his son, "That's Grady Lee; you know he's going to start something; get back in the truck."
>
> FN1. The witness' name also appears as David Earl Ensey in portions of the record.
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> Mr. Ensey testified that, when the [petitioner] realized it was him on the side of the road, the [petitioner] "stepped on his brake, . . . turned to the left side of the road, backed up and started back" towards the Enseys. The [petitioner] then pulled into a driveway "probably 50 feet up the road from" the Enseys and exited the vehicle "with his hand in his pocket." Mr. Ensey asked, "Grady Lee, do you want to talk to me?" The [petitioner] began cursing and said, "Yeah I do." According to Mr. Ensey, the [petitioner] then "come [sic] out with his . . . weapon" from "his right-front pocket" and pointed the weapon at Mr. Ensey and his son. Mr. Ensey provided the following account of what transpired next:
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> > When he ... pulls the gun out, as high as I ever see it, gets it about here to my son's face. It's right up here in front of my-and I said "Get down." And I leaned over and pulled him to the floorboard and I never looked back. I pushed the gas and went just as hard as I could go, pulling a big long trailer.
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> Mr. Ensey stated that the [petitioner] "got [his vehicle] out of that road pretty fast" and that he kept looking for the [petitioner] in his rearview mirror as he drove away. Mr. Ensey turned off of Highway 41-A once he was behind a hill that blocked the [petitioner's] "line of sight[.]" While traveling down Dunaway Road, Mr. Ensey encountered a city police officer, flagged him down, and informed him of the situation. The officer said to Mr. Ensey, "I'll be up here at the end of the road at the highway waiting on you. I've got help on the way. You go up there and turn all that

around somewhere and I'll meet you back up there." As Mr. Ensey was trying to find a place to turn around, he again encountered the [petitioner], who was "coming around the curve." According to Mr. Ensey, once the [petitioner] rounded the curve and saw the Enseys, the [petitioner] "start[ed] off on [Mr. Ensey's] side of the road[,]" and the [petitioner] was not "driving in a way that" Mr. Ensey could have just passed him and continued on. Mr. Ensey turned into Johnny Mills' driveway in order to avoid the [petitioner]. Once in the driveway, Mr. Ensey jumped out of the vehicle with his son and ran to the front door of the home in an effort to get to safety. The [petitioner] then twice passed by Mr. Mills' house and waved.

Once the [petitioner] passed for the second time, Mr. Ensey, believing that the [petitioner] had left the area, proceeded to meet the city officer waiting for him on the side of the highway. Once there, a county officer arrived and took Mr. Ensey to identify the [petitioner], who had been located and detained by law enforcement.

Mr. Ensey testified that he was afraid when the [petitioner] pulled a gun on him on Highway 41-A and again when he met the [petitioner] several minutes later in his lane of traffic "headed straight towards him." Mr. Ensey also stated that his son was extremely frightened during the incident and still suffered from nightmares.

Mr. Ensey made several calls to authorities during this altercation, but his phone "kept breaking up in that area for some reason." Two of the calls that went through were recorded, and the recordings were entered into evidence.

Mr. Ensey testified that animosity had arisen between himself and the [petitioner] over possession of a 1959 Chevrolet truck. Two or three weeks before the June 14 altercation, Mr. Ensey had received information from Jerry Owens that the [petitioner] was in possession of the truck. Mr. Ensey encountered the [petitioner] pulled over on the side of the road and stopped to ask the [petitioner] about his truck. He asked the [petitioner], "You don't know anybody that's got any parts for a '59 Chevy, do you?" to which the [petitioner] responded, "Yeah, I got a whole truck." Mr. Ensey then inquired, "Where did you get that truck?" and the [petitioner] replied that he got the truck from Jerry Owens. Mr. Ensey said, "That's my truck; I've got the title to it." The [petitioner] proceeded to get out of his vehicle and "reached in his pocket. . . ." Mr. Ensey testified that the [petitioner] fell getting out of his truck, and he and his son ran to their vehicle and drove away.

Twelve-year-old David Ensey testified that he had been working with his father on June 14, 2005, and on their way home, their trailer had a flat tire. They went home to get a bigger trailer to carry the smaller trailer. When they returned to load the smaller trailer, they saw the [petitioner], who "kind of went off the road a little bit and turned around and pulled in the drive." His dad told him to "[j]ump in the truck." David Ensey testified that his father "said nicely [to the [petitioner]], 'Do

you want to talk to me?'" The [petitioner] then "pulled his hand out" of his right front pocket, and David Ensey "saw a handle of a gun." His father was "[p]ushing [him] down" as he got in the truck and sped away from the [petitioner]. David Ensey testified that he was scared when he saw the [petitioner] "pull his hand out of his pocket and ... had a gun in his hand. . . ."

According to David Ensey, his father turned off the highway, and they flagged down a police officer and told him what happened. After talking to the officer, they went up the "road a little further and turned left." They then saw the [petitioner], who came "[s]traight at" them, pulled into their lane of travel, and "blocked the road." His father shoved him down again. They pulled into Johnny Mills' driveway and "jumped out[,]" and Mr. Mills let them inside. According to David Ensey, his father had been attempting to contact police during the entire incident and, once at the Mills' home, his father was able to connect with authorities on his cellular telephone. The [petitioner] drove past the Mills' house twice before leaving the area. David Ensey testified that he was scared "the whole time" these events were taking place.

David Ensey also testified about the incident between his father and the [petitioner] occurring several weeks prior to June 14. He stated that, on this occasion, his father and the [petitioner] were talking about parts for a pickup truck. The [petitioner] stated that he had a "whole truck." His father then asked where the [petitioner] got the truck and said to the [petitioner], "Well, that's my truck." The [petitioner] then fell down getting out his vehicle, and they "took off."

Officer Sam Jacobs of the Shelbyville Police Department testified that he was on his way to work on June 14, 2005, when he encountered the driver of a van with his hand out the window "trying to flag [him] down." Officer Jacobs testified that Mr. Ensey told him that the [petitioner] "had just pulled a gun on him up on Highway 41-A." Officer Jacobs stated that Mr. Ensey "appeared to be pretty shaken up . . . like someone that was . . . genuinely scared or frightened." The boy in the truck also appeared "really shook up." Officer Jacobs instructed Mr. Ensey to turn around and meet him at the end of the road "to escort [Mr. Ensey] back down to 41-A where it occurred." Eventually, Mr. Ensey and his son met Officer Jacobs at the meeting place. Thereafter, Chief Deputy Sam Brady arrived and assumed control of the investigation because the altercation occurred in the county-the jurisdiction of the sheriff's department.

David Sakich of the Bedford County Sheriff's Department testified that, on June 14, 2005, he was "listening to the radio" and heard that authorities were looking for the [petitioner], who was allegedly in possession of a gun and had chased the victims down Dunaway Road. Officer Sakich knew the [petitioner] and proceeded to a location where he believed the [petitioner] might be found. He located the

[petitioner] about twelve minutes after hearing the "radio traffic. . . ." The [petitioner] and two other occupants were still inside the vehicle. The [petitioner] denied that he had a gun; officers were unable to locate a weapon in the [petitioner's] vehicle or on his person; and the [petitioner] was placed under arrest and taken to the Bedford County Sheriff's Department.

The defense called David Smith to testify on the [petitioner's] behalf. Mr. Smith stated that he had just started working for the [petitioner] on June 14, 2005. He testified that he was riding down Highway 41-A with the [petitioner] and John Wilhoit, that they were in the [petitioner's] vehicle, and that the [petitioner] was driving. Mr. Smith saw a man-who he identified as Mr. Ensey-beside a white van on the side of the road waiving at them, and they stopped. Mr. Ensey said to the [petitioner], "Do you want a piece of me?" Words were exchanged; the [petitioner] then got back in the vehicle; and they drove off.

Mr. Smith testified that he was showing the [petitioner] where he lived when they again encountered the Enseys. Mr. Ensey "swerved in front of [the [petitioner's] vehicle] into a driveway." The [petitioner] then proceeded on to the Wilhoit residence, where the three men were surrounded by law enforcement. The three men were ordered to get out of the vehicle and were put on the ground while the police searched for a weapon. No weapon was found. According to Mr. Smith, he never saw the [petitioner] brandish a weapon or dispose of a weapon on June 14. Mr. Smith testified that, to the best of his knowledge, there was not a firearm in the [petitioner's] possession or inside the vehicle on June 14.

The [petitioner] testified on his own behalf. He stated that he had been working with James Wilhoit and David Smith on June 14, 2005. That afternoon around 5:00 p.m., he was headed north on Highway 41-A when he saw a white van stopped on the side of the road. David Smith informed the [petitioner] that "somebody was wai [v]ing, or trying to flag [them] down." The [petitioner] "hit the brakes and three mail boxes up . . . turned left into a driveway. . . ." According to the [petitioner], the white van then "pulled up on the opposite side of the road [,]" and Mr. Ensey exited the vehicle and said to the [petitioner], "Do you want a piece of me?" The [petitioner] "grabbed the door handle of [his] pickup truck and said, 'Matter of fact, I believe I do.'" The [petitioner] stated his intention when he exited his vehicle "boiled down to [an] old fashioned ass whipping." In response, Mr. Ensey "took off flying down the highway. . . ." The [petitioner] claimed that he did not pull a gun on anyone that day.

The [petitioner] testified that he saw the Enseys again several minutes later when David Smith was showing him where he lived. According to the [petitioner], Mr. Ensey was turning in a driveway and "had both lanes crossed." The [petitioner] "stopped dead still in the road" to try "to pick up what [Mr. Ensey] was intending to

do next." After going into the driveway, Mr. Ensey and his son got out of the truck and ran toward the house. The [petitioner] stated that he then turned his vehicle around and proceeded to the Wilhoit residence, where he was surrounded by police who ordered him to get out of the vehicle. The officers asked the [petitioner] if he was in possession of a handgun, and the [petitioner] responded in the negative. He consented to a search of his vehicle, and no gun was found.

The [petitioner] also testified about the encounter several weeks earlier with Mr. Ensey on the roadside regarding the '59 truck. The [petitioner] stated that Mr. Wilhoit was driving his vehicle, when Mr. Ensey "pulled crossways in front of his truck. . . ." Mr. Ensey approached the [petitioner] and asked, "Have you got any parts for a '58 or '59 Chevrolet truck?" The [petitioner] responded, "I have no idea what's up there at the junkyard; you'll have to talk to my brother. The junkyard is his." Mr. Ensey became upset and accused the [petitioner] of stealing his pickup truck. Mr. Ensey then "popped the [petitioner] upside the jaw. . . ." The [petitioner] attempted to get out of his truck but fell down. While the [petitioner] was trying to get out of the truck, Mr. Ensey got in his vehicle and left.

The defense also called Jerry Owens to testify regarding the 1959 Chevrolet pickup truck. Mr. Owens testified that, although the truck did not belong to him, he was in possession of the truck for fifteen or sixteen years. Mr. Owens testified that Mr. Ensey brought the truck to him for him to paint it. After a while, Mr. Ensey asked about the truck, and Mr. Owens told Mr. Ensey that he needed more money to buy some materials but that Mr. Ensey never gave him any more money. Several years later, Mr. Ensey stated to Mr. Owens that the truck "was not worth fooling with." Four years after that, Mr. Owens had the [petitioner] remove the truck from his property. According to Mr. Owens, the [petitioner] wanted something in writing stating that removal of the truck was requested by Mr. Owens. Thereafter, Mr. Ensey came to Mr. Owens and inquired about his truck. Mr. Owens informed Mr. Ensey that the truck had been towed, and Mr. Ensey became upset and left. A piece of paper signed [by] Mr. Owens requesting removal of the truck was entered into evidence.

*Id.* at *1-5.

During the trial, the petitioner had a lead attorney who retained an additional attorney to cross-examine David Ryan Ensey. Following the conclusion of proof, the jury returned guilty verdicts on two counts of the lesser-included offense of attempted aggravated assault and a not guilty verdict on the reckless endangerment count. The trial court sentenced the petitioner, as a Range I, standard offender, to three years for the attempted aggravated assault of Mr. Ensey and three years and six months for the attempted aggravated assault of David Ensey. The sentences were to be served consecutively for an effective sentence of six years and six months. On direct appeal, this

court affirmed the convictions and sentence lengths, but reversed and remanded for modification of the sentences to reflect concurrent terms.

On April 4, 2008, the petitioner timely filed for post-conviction relief alleging the ineffective assistance of trial counsel. Thereafter, post-conviction counsel was appointed, and an amended petition for post-conviction relief alleging the ineffective assistance of both lead and co-counsel was filed. An evidentiary hearing on the merits of petitioner's claim was held on July 28, 2008.

At the hearing the petitioner testified that he retained trial counsel right after he was arrested. He spoke with trial counsel for "about two and a half, three hours" and discussed the fee for representation and the charges against the petitioner. The petitioner said that they also discussed another case in which trial counsel was providing representation for him. According to the petitioner, about two hours were spent discussing his current case. The next time the petitioner saw trial counsel was when they set a date for the preliminary hearing. The petitioner stated that when they set the date, they discussed both the preliminary hearing and his other case for "about twenty minutes." The petitioner further stated that between the time that counsel was hired and the preliminary hearing, they met three times for "three and a half hours altogether." After the preliminary hearing they met "maybe once or twice." The petitioner said that trial counsel would call and ask for money. During the meetings to pay trial counsel, they would discuss the case for about five minutes.

The petitioner testified that trial counsel instructed him to hire another attorney as co-counsel to cross-examine David Ryan Ensey. According to the petitioner, trial counsel said he could not cross-examine the child because he had children. About two weeks before trial, the petitioner hired co-counsel to cross-examine David Ryan Ensey. The petitioner stated that he discussed the case with co-counsel for "[an] hour, hour and a half." The two also "went and looked at the route" and the petitioner showed him various locations relevant to the case. The petitioner testified that his complaints concerned the performance of his lead trial counsel and he did not have a problem with co-counsel.

The petitioner stated that lead trial counsel never explained to him how a trial works, did not go over the witness list, and did not talk to him about the state's proof. The petitioner further stated he was told "it was an open and shut case, it was [his] word against [Mr. Ensey's] word." The petitioner later testified that trial counsel did not disclose the state's witnesses until the night before the trial. Petitioner said that the only witnesses that the state was going to call were the Enseys and Mr. Mills. To his knowledge counsel did not attempt to contact these witnesses. He further stated that he did not request his counsel to contact them "because [he] didn't know to."

The petitioner stated that during the trial, there was an issue with a spectator who was sitting by the jury. The petitioner saw the spectator, but did not immediately recognize him. The petitioner said that the spectator was outside of the courtroom with the jury during a break and when he returned the petitioner asked him who he was. According to the petitioner, the spectator replied "I'm . . . your executioner." The petitioner then remembered the spectator as the man who previously shot

him in his face. The petitioner said that when he asked the prosecutor why the spectator was in the courtroom he answered that the courtroom was a public place. The petitioner testified that trial counsel did not say anything about the spectator's presence in the courtroom, however, co-counsel told the judge about it and the judge had the spectator removed.

The petitioner also testified that there was a problem with a juror selected. The petitioner said that when he saw the list of jurors he told trial counsel to strike juror number nine because he and that juror constantly argued when they were in grade school. The juror's mother was the petitioner's fourth grade teacher. According to the petitioner, years ago there was "bad blood" between his mother and the juror's mother because he failed her fourth grade class.

The petitioner said that after the state closed its proof, he and his counsel discussed how he would testify on cross-examination. According to the petitioner, trial counsel "instructed [him] to say [he] was going to whip [Mr. Ensey's] blank butt." The petitioner further stated that trial counsel instructed him to do so because it "would throw the jury [and] it would be just a verbal assault."

On cross-examination, the petitioner testified that he was present when trial counsel cross-examined the Enseys at the preliminary hearing and knew what they were going to say about the events. The petitioner admitted that if counsel had interviewed Mr. Ensey again before trial "they would have got [sic] his version again." The petitioner also admitted that he cannot prove that the spectator spoke to any of the potential jurors about the prior incident between them. On further cross-examination, the petitioner stated that he had not seen juror nine since the fourth grade, and that he identified him only by name because he did not recognize him from sight. The petitioner agreed that when the jurors were asked if they knew him, juror nine did not indicate that he did. The petitioner testified that he knew that his attorney's position was that he was either guilty of aggravated assault or assault and that it was part of the defense strategy to get a conviction of simple assault rather than aggravated assault. The petitioner further said that he did not "understand how all these lesser included offenses come."

Trial counsel testified that he and the petitioner "met and discussed [this case] on numerous occasions, and spoke additionally on numerous occasions on the telephone throughout the course of this case[.]" He stated that he cross-examined the Enseys at the preliminary hearing and got their statements of the events in detail. He further stated that "[there] was a request that [he] did not speak to the little boy [and] his dad did not care to have any conversations with [him]." Trial counsel said that he went to the sheriff's office on numerous occasions and spoke with officers. Trial counsel testified that he did not have a child around the age of the victim and he suggested retaining co-counsel because co-counsel "would do an excellent job in cross-examining the young 12-year-old victim." Trial counsel also stated that he visited the places where the events occurred both before and after co-counsel came aboard. Trial counsel testified that one result that he was hoping for at trial was an acquittal, but lesser included offenses, including simple assault were discussed with the petitioner. Trial counsel stated that he did not know whether the spectator contaminated the jury pool. When the presence of the spectator was made known, co-counsel addressed the court about it. Trial counsel further stated that he did not remember whether the petitioner told him to strike

juror nine, but in past experiences he did everything to strike a juror that would be harmful to his client. He said that it is his standard practice was to take notes while co-counsel questioned potential jurors and he would have noted a juror's acknowledgment of knowing the petitioner. Trial counsel stated that he told the petitioner to tell the truth while testifying and did not tell him to curse or "spoon feed him the verbiage to use."

On cross-examination, trial counsel testified that when the petitioner initially met with him, "this criminal matter . . . basically occupied the subject matter of what [they] discussed[.]" Trial counsel testified that he could not remember the number of times they met, but he said they discussed the facts and circumstances of the case "each and every time" they had contact. Trial counsel said that he spoke with co-counsel about the case and the possibility of him cross-examining the child witness before he advised the petitioner to retain him. He stated that he told the petitioner that he talked to officers in the sheriff's office, however, he did not have notes from the meeting because he turned the file over to petitioner's appellate counsel.

On rebuttal examination, co-counsel testified that the petitioner retained him between four days to two weeks before trial. He said that he spoke with lead counsel about the case "no more than two days before [the petitioner] came to the office." He stated that he was retained to cross-examine the child witness because "[t]here had apparently been some concern that based upon the aggressive cross-examination [trial counsel] had done . . . at the preliminary hearing, that there might be an adverse reaction from the jury." During the course of representation, it was decided that co-counsel would also present the direct testimony of a witness. Co-counsel testified that he and the petitioner visited the locations relevant to the case and discussed the facts and circumstances of the case for "at least three, maybe as much as five hours." Co-counsel was present during jury selection, but stated that he did not remember any discussion between lead counsel and the petitioner regarding juror number nine. He further testified that once they discovered the spectator in the courtroom, he approached the judge and informed him that the spectator was not to be around the petitioner. Although he did not recall a motion for a mistrial, he stated that he "probably requested the court to make inquiry [of whether the spectator] had any communication or made any statements to any of the jurors." He further testified that he did not hear lead counsel give the petitioner specific instructions on how to testify. The petitioner testified, on rebuttal, that trial counsel never told him that he met with the officers at the sheriff's department and the only person who went to investigate the scene with him was co-counsel.

Based on the evidence presented at the hearing, the post-conviction court entered an order denying post-conviction relief. The post-conviction court ruled that the petitioner did not satisfy his burden of proving that he received ineffective representation. Noting the petitioner's testimony that co-counsel's service was satisfactory, the post-conviction court found that there was no evidence that co-counsel's performance was deficient and addressed the issues only as they related to lead counsel. The court found that lead counsel's performance did not fall below an objective standard of reasonableness and was within a range of competence demanded of attorneys in criminal cases. The petitioner has appealed.

## ANALYSIS

On appeal, the petitioner raises the single issue of ineffective assistance of counsel. Specifically, he argues that lead counsel was deficient because he failed to (1) adequately prepare for trial; (2) properly explain the facts, adverse testimony, and the elements of the charges; (3) interview and call witnesses; and (4) strike a juror as requested by the defendant. Upon review of the record, we conclude that the petitioner failed to demonstrate that he was denied the effective assistance of counsel.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations of fact set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns,* 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

To establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A fair assessment of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Strickland*, 466 U.S. at 697.

Petitioner argues that trial counsel failed to adequately prepare for trial. The petitioner and trial counsel both testified that they met several times and had telephone conversations to discuss the facts, circumstances, and strategies surrounding this case. As a part of trial preparation, the petitioner and at least one of his counselors visited and investigated the locations relevant to the case. Further, the evidence shows that both the petitioner and counsel knew what the victims' testimony would be and that the outcome of the case would be determined by who the jury believed. The

evidence does not preponderate against the post-conviction court's finding that the petitioner failed to prove what counsel failed to do in preparation for trial. We conclude that the petitioner has failed to show that counsel's preparation fell below the objective standard of reasonableness, or that but for counsel's lack of preparation, the outcome of the trial would have been different.

In addition, petitioner claims that trial counsel did not properly explain the facts, adverse testimony, and the elements of the charges in his case. We agree with the post conviction court's finding that there is insufficient evidence to support these claims. The record indicates that the petitioner spent several hours discussing the facts and possible outcomes of the case with counsel. Moreover, trial counsel's testimony, which was obviously accredited by the post-conviction court, established that he and the petitioner also discussed the indicted charges and the possibility of the jury considering lesser included offenses. The record indicates that the petitioner was present during the preliminary hearing and both he and trial counsel knew what adverse testimony the state would present at trial. We conclude the petitioner has not shown either a deficiency in counsel's performance or any resulting prejudice to his case.

The petitioner also asserts that trial counsel failed to prepare, interview and call witnesses told to him by the petitioner. The post-conviction court found that there was no evidence that the Enseys would have voluntarily spoken with counsel or that new information would have been developed. The record reveals that trial counsel was able to cross-examine the Enseys at the preliminary hearing and the petitioner admitted that any further attempt to talk to them would not have produced any additional information. The petitioner did not present the testimony of either victim at the post-conviction hearing. Petitioner also alleges that trial counsel did not call witnesses however, the petitioner has failed to indicate who trial counsel failed to call during trial and what their testimony would have been. Because he failed to establish what information would have been discovered with more investigation and what the witnesses' testimony would have been if trial counsel called them, the petitioner has failed to show that counsel was deficient or that he was prejudiced. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) (concluding that failure to present a material witness at the post-conviction hearing generally results in the failure to establish ineffective assistance of counsel). We conclude that the record does not support the petitioner's claim that counsel was deficient in failing to prepare, interview or investigate the victims. Additionally, we conclude that the petitioner has failed to demonstrate that he suffered any prejudice.

Finally, the petitioner argues that counsel was deficient for failing to strike the juror as requested by the petitioner. The petitioner stated that he told trial counsel to strike the juror when he saw his name on the list, but did not realize the juror had not been stricken until the jury verdict was returned. The petitioner admitted that the jurors were asked whether they knew the petitioner and none acknowledged knowing the petitioner. Trial counsel testified that he had no recollection of being asked to strike the juror, but if asked he would have requested that the juror be stricken. The record establishes that the petitioner did not recognize the juror by sight, the juror did not indicate he knew him, and the conflict between the petitioner and juror was at least thirty years ago. Furthermore, much of the jury's verdict was favorable to the petitioner. We conclude that contrary

to the petitioner's allegation, there exists no evidence in the record showing that counsel was deficient in not requesting that the juror be struck or that the petitioner suffered any prejudice by the juror's presence on the panel.

## CONCLUSION

Based on the foregoing, we affirm the judgment of the post-conviction court.

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J.C. McLIN, JUDGE