IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 12, 2009 Session

ROBERT L. MITCHELL v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2005-A-241 Steve Dozier, Judge

No. M2008-02121-CCA-R3-PC - Filed September 29, 2009

The petitioner, Robert L. Mitchell, was found guilty in 2005 of two counts of aggravated kidnapping, one count of especially aggravated kidnapping, and one count of assault. The trial court merged the aggravated kidnapping convictions and sentenced the petitioner to twelve years at 100%, to twenty-five years at 100% for the especially aggravated kidnapping, and to eleven months, twenty-nine days for the assault conviction. The sentences for the kidnapping convictions were ordered to be served consecutively, with the sentence for assault to be served concurrently, for a total effective sentence of thirty-seven years. In his timely petition for post-conviction relief, he asserted that trial counsel was ineffective for not arguing that a stepparent could not be guilty of the aggravated kidnapping of a stepchild; for not interviewing the petitioner's neighbors; for not arguing that the petitioner's sentences violated the Blakely decision; for not questioning his stepdaughter as to whether a man had been living with her mother; for not seeking a special jury instruction regarding the alleged inconsistent testimony of the victim; and for not moving to dismiss the superseding indictment. The post-conviction court dismissed the petition, and, following our review, we affirm the dismissal.

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

ALAN E. GLENN, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

David A. Collins, Nashville, Tennessee, for the appellant, Robert L. Mitchell.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Rachel Sobrero, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The facts which were the basis of the prosecution of the petitioner were set out in the direct appeal of this matter:

> On February 4th and 5th, 2004, the [petitioner] committed a series of acts against his wife, C.F.M., who was the primary victim of the crime, and his nine-year-old stepdaughter, B.R.S., which led to the various convictions. The events began at the family home in Davidson County, where the [petitioner] had not resided for the previous three months, and ended at the residence of the [petitioner's] brother, Michael Maynard, in Smith County.
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> **State's Proof**
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> At trial, B.R.S. testified that on the morning of February 4, 2004, she was at home sleeping when she heard a "bang on the door" and screams from her mother. She recalled that as the [petitioner] and her mother then entered her bedroom, the [petitioner] exclaimed that "he was not there to hurt her, he was just there to come back to his family." When B.R.S. noticed that her mother's "head was hurt," the [petitioner] pulled the plug from the telephone and warned, "If you try and call the police, I'm gonna snap your neck." B.R.S. described herself as crying and scared and described the [petitioner] as mad and "yelling in a high tone." According B.R.S., the [petitioner] ordered her to dress because they were "going for a ride." B.R.S. testified that her brother, B.M., and her sister, R.M., who were in separate bedrooms, also dressed and joined her and her mother, who had "blood all over her hands and face," in the living room. B.R.S., who said that she did not want to go with the [petitioner] because she was fearful for herself and the others, got in the backseat of the sport utility vehicle. She recalled that as her mother and siblings also got into the vehicle, the [petitioner] directed her to the cargo area of the vehicle where she went to sleep. Before falling asleep, however, B.R.S. overheard the [petitioner] announce that her mother's parents were dead. She testified that when she awoke, she was at the home of her uncle, Michael Maynard. B.R.S. remembered that the [petitioner] asked Maynard for a gun and that everyone spent the night at the house. She testified that she was in the living room with her mother, her siblings, and Maynard for "an hour or two" while the [petitioner] slept. B.R.S. stated that her mother was still bleeding when they arrived at Maynard's house, but the [petitioner] never took her to a hospital, and when the police arrived, he tried to run out the back door. B.R.S. testified that she had called the police on a prior occasion when the [petitioner] had pointed a gun at her mother and her uncle.
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> Seven-year-old R.M., who on the date of the offense also heard a "bang" and her mother screaming and running, testified that the [petitioner], who was "[k]ind of mad" because her mother was not wearing her wedding ring, ordered her to get dressed. R.M. recalled seeing blood in the hallway and the bathroom and on her mother's face and also noticed that the front door of the house had been "kicked in

and broken." She was in the back of the vehicle with B.R.S. as they traveled to Maynard's house. According to R.M., her mother was still bleeding when they arrived at Maynard's residence and the [petitioner] told them to go inside, where they watched television. She recalled that the [petitioner] whispered to her that when he found a gun, he intended to shoot her mother and himself. R.M. testified that she told her mother what the [petitioner] had said and that her mother later made dinner for everyone at Maynard's house, where they spent the night.

The victim testified that the [petitioner] had not lived in their Nashville residence since November 2003 and that she had paid the mortgage and the utility bills. She stated that she thought the [petitioner] was living with his mother. The victim testified that she was awakened at 5:00 a.m. on February 4, 2004, which was a school day, when she heard "a big bang" and saw the [petitioner] enter the doorway. She recalled that she screamed because she knew the [petitioner] "was there to kill [her]." She explained that he had repeatedly threatened to do so if she ever left him and also warned that "he would hang [her] from a tree and tie a tire around [her] neck and burn it, so it would melt over [her] body; and then he would burn [her] to ashes, to where nobody could ever find [her]." According to the victim, the [petitioner] forcefully put his hands over her mouth to stop her screams and then said in a sarcastic tone of voice, "Hi, honey, I'm home." She described the [petitioner] as having glazed, red eyes with his veins "popping out of his temples." She testified that the [petitioner] gripped her and directed her to B.R.S.'s room, explaining that he wanted to see his children, that he was not there to hurt her, that he still loved her, and that he was still wearing his wedding ring. The victim recalled that when the [petitioner] then asked why she was not wearing her wedding ring, she answered that she had taken it off the previous night prior to a domestic violence group meeting. She recalled that the [petitioner] responded by calling her a "f[* * *]ing bitch" and hitting her in the face. According to the victim, the [petitioner] repeatedly asked why she had taken off her ring and if she was dating anyone. She stated that he then walked over to the caller identification box to scroll through the list of callers, intermittently asking, "Who's this person? Is this somebody you're f[* * *]ing? Who is this person? I don't know this person." The victim testified that the [petitioner] jerked the telephone out of the wall and warned B.R.S. not to call the police, warning that he would otherwise "snap [her] neck." She recalled that the [petitioner] grabbed her by the back of her hair, forced her down the hallway, and slammed her head into a nail in the wall, which pierced her forehead. The victim stated that the [petitioner's] anger escalated and that he called her "a whore."

The victim testified that when she went to the bathroom to clean her head wound, the [petitioner] followed, continuing to badger her with the question, "Who are you f[* * *]ing?" She stated that the [petitioner] digitally penetrated her, smelled his hand, and then repeated the same question again. According to C.F.M., the [petitioner] again asked her about her missing wedding ring and, dissatisfied with her

answer, called her "a f[* * *]ing liar" and hit her in the face. She described the children, who were ages nine, six, and two at the time, as crying and scared. She recalled that when the [petitioner] ordered them to get dressed to go for "a little ride," the three children all dressed hurriedly, not even taking time to put their shoes on even though it was February. The victim explained that she was unable to take her purse with her because the [petitioner] had "his grip" on her arm. She testified that the [petitioner] directed B.R.S. and R.M. to move to the back cargo area of the vehicle and lie down as he continued to question the victim about who she was dating. She stated that as he was driving, the [petitioner] hit her in the eye and then demanded that she perform oral sex on him. She recalled that when she at first refused, the [petitioner] remarked, "You got three seconds, bitch, or you [won't] have any teeth." The victim testified that she complied with the [petitioner's] demand even though her head was still bleeding and her children were in the car. She recalled that when she asked the [petitioner] where they were going, he replied, "I told you, bitch, what I would do to you, if you ever left me. . . . I've killed your parents. I've decapitated them. I've already been to their house. . . . Now, I'm taking you to where they're at to lay you down beside them."

According to the victim, the [petitioner] drove to his brother's residence and upon his arrival, announced, "[L]ook what I've done to this bitch. I'm coming to f[* * *]ing kill her. This f[* * *]ing whore has taken her ring off. I'm gonna kill this bitch." She testified that the [petitioner] then asked Maynard for his gun, continued to threaten to kill her, and at one point said, "[I]f you don't give me a gun, I'll find another way to kill her. I'll beat her head in with a hammer. I'll take a can of corn and put it in a pillowcase, or I'm gonna tie her to the back of that truck and I'm gonna pull her behind the truck, like they did that n[* * * *]r in Texas." The victim recalled that the [petitioner] then grabbed her arm and took her to a bedroom where he "punched" her in the chest and demanded that she remove her clothes. She testified that when Maynard entered the bedroom and she motioned for help, he left the room without offering assistance. She stated that when the [petitioner] forced her to have sex, she became weak, vomited, and developed a migraine headache for which the [petitioner] supplied Lortab. The victim testified that Maynard offered her the keys to his truck but warned that the truck might not start and suggested that the [petitioner] might run her off the road because he still had the keys to their vehicle. The victim explained that she tried to think of ways to escape, but because it was raining and neither she nor the children had any coats or shoes, she did not do so. She expressed fear of calling 911 because the [petitioner] might find out. She recalled that they were at Maynard's house "[t]hat whole day and most of the next day."

The victim testified that she did call her workplace shortly after her abduction and left a message that she was sick and would not be in to work. She pointed out that the [petitioner] "was standing right there and that's what he told me to say." She

also telephoned her mother at the direction of the [petitioner], telling her that she was sick and was not bringing the children to her house which was her normal practice. The victim later called the [petitioner's] aunt, Sandy Brooks, and told her that the [petitioner] had hurt her, that she had been bleeding all day and needed help, and that she and the children were afraid for their lives. She testified that the [petitioner] also talked to Ms. Brooks and said, "Get somebody out there to clean up the blood, before somebody finds it."

The victim recalled that on the following morning, Maynard handed her the telephone and told her to call Ms. Brooks, who then placed a three-way call to the victim's parents. She stated that she again told her parents that she was sick and was not bringing the children to their house. She explained that she did not tell her parents to call the police "[b]ecause I had already heard [the petitioner] say that he was gonna take me to Louisville, Kentucky, and because I was in fear of my life. I figured he would go ahead and kill me or take off with one of the children." The victim contended that she was never allowed to use the telephone alone but that she also talked to the [petitioner's] cousin, Jennifer Reed, and asked her to come to help her. According to the victim, Ms. Reed agreed to help but never arrived. She testified that the ordeal finally came to an end when the [petitioner] took a nap and Maynard asked her if she wanted him to call the police. She recalled that the police arrived soon thereafter and placed the [petitioner] in custody. While acknowledging that the [petitioner] "didn't spend all his time watching [her]" at Maynard's house, she explained that she left her residence with the [petitioner] only "[b]ecause I thought he was gonna kill me, and I was afraid for my life. I thought, maybe, if I cooperated with him and did what I was told, instead of fighting him, that there was a possibility that I would live."

On cross-examination, the victim maintained she never saw the [petitioner] sleep during the ordeal. She acknowledged that she had been in the living room with Maynard and the children for about thirty minutes while the [petitioner] was in another room and that Maynard had not restrained her from using the telephone. She did claim, however, that Maynard told her that the [petitioner] had directed him to watch the telephone. The victim, who acknowledged that her head wound did not require stitches, recalled that the [petitioner] took the car keys when he arrived at the Maynard residence. She testified that she chose not to call out to Maynard's neighbors out of fear.

When asked if B.R.S. had ever called the police before, the victim related an incident that occurred in February 2003 at her parents' house when the [petitioner], in an effort to reconcile a separation, pushed her brother off the porch into the driveway. She recalled that when a gun fell from the coat pocket of her brother, the [petitioner] grabbed the gun, aimed at her brother, and pulled the trigger, but the gun did not discharge. She testified that the [petitioner] then pointed the gun at her head

and said, "Now, bitch, you're going with me." She stated that she refused to go with the [petitioner] and held onto the porch railing as the [petitioner] "pulled at [her], trying to get [her] loose; pulled [her] shirt off, ripped it completely off of [her]." The victim related that when her father intervened, the [petitioner] went to his truck, held the gun out the window, and warned her that if she did not go with him, he was going to shoot himself. She stated that B.R.S. called the police on this occasion but acknowledged that the charges against the [petitioner] were ultimately dismissed.

The victim also testified about a prior incident when she failed to meet the [petitioner] for lunch at her workplace. She stated that as soon as she saw his face, she knew she "was gonna get it" and the [petitioner] hit her several times in the face, leaving her with bruises, a black eye, a broken blood vessel in her eye, and a cracked tooth. She recalled that the [petitioner] refused to let her go back to work that day and took her home instead. She acknowledged that no criminal charges were pressed against the [petitioner] for this incident.

Officer Stan Goad of the Metropolitan Nashville Police Department was dispatched to the victim's home on February 5, 2004, arriving at approximately 9:00 a.m. After speaking to the victim's parents, the officer observed blood in the bathroom and hallway, a hole in the wall in the hallway, and a broken door frame.

Detective Bruce Pinkerton, who also responded to the dispatch, described the residence: "The front door was pretty much off the hinges. The door facing was laying inside on the floor. I noticed what appeared to be blood droppings, when I first walked in; and they led all through the house. There was an indent[at]ion in the drywall in the hallway." He testified that a telephone appeared to have been "snatched" from the wall in a child's bedroom. Detective Pinkerton talked to the victim's father and telephoned the [petitioner's] aunt, Sandy Brooks, in an effort to locate the victim. He recalled that about thirty minutes later, Ms. Brooks returned the call with the victim on the line. The detective testified that the victim said she was all right "in a faint voice" and informed him that the [petitioner] was with her. According to the detective, he then spoke with the [petitioner] who said, "We don't need the police. We're trying to get our life together." Detective Pinkerton, who was unable to determine from the conversation the whereabouts of the victim, was given Maynard's telephone number by Ms. Brooks; when he called back, however, he did not get an answer. The detective then called the Smith County authorities and asked them to check for the victim at Maynard's residence. Detective Pinkerton later learned that the victim, the [petitioner], and the children were at Maynard's house. Detective Pinkerton said he talked to the victim two or three days later and she gave a ten-page, written statement of what had occurred. He had no recollection of the victim telling him during the interview that the [petitioner] had digitally penetrated her.

Joyce Sullivan, the victim's mother, who babysat for the victim's youngest child, testified that in February 2004, the victim typically brought the children to her house every morning, where the older ones would catch the school bus. She stated that when the victim did not bring the children on February 4, 2004, she talked by telephone to the victim "for just about a minute" and then talked to her again the next day. Mrs. Sullivan recalled that when she told the victim that she was coming to get the children because they had missed enough school, the victim responded in a whisper from which she inferred "something was terrible wrong." Mrs. Sullivan testified that she and her husband drove to the victim's residence where they discovered the broken front door, a "hole in the wall," and blood in the kitchen, living room, hallway, and bathroom. Mrs. Sullivan stated that she saw the children's shoes and coats in the living room and "wondered why they went out in the cold" without them. She recalled that she telephoned Sandy Brooks, who returned her call five to ten minutes later with the victim on the line. Mrs. Sullivan stated she could barely hear the victim on the telephone and that she sounded like she was "down in a barrel." Mrs. Sullivan testified that the police were called and given Maynard's name.

Smith County Sheriff's Department Deputy Steven Cowan testified that on February 5, 2004, he was dispatched to Maynard's residence, arriving between 2:00 and 2:30 p.m., to "investigate a female being held against her will." He indicated that he first saw Maynard, who directed him to the back of the house where he found the victim and the [petitioner]. He described the victim as "very disoriented" and "afraid," and he noticed bruises and marks on her forehead and eye. He pointed out that when he asked the victim a question, the [petitioner] tried to answer and he recalled that the victim began to answer his questions only after she was separated from the [petitioner]. He stated that the victim told him that she was being held against her will and wanted to leave.

Smith County Deputy Ronnie Nelson Smith, who also responded to the scene at Maynard's residence, testified that he found blood on the [petitioner's] right arm and chest area and a mark and abrasions on the victim's head. He stated that the [petitioner] was "somewhat calm" but that the victim was sitting with her head down, avoiding eye contact with the officers. Deputy Smith confirmed that every time the officers asked the victim a question, the [petitioner] "would blurt something out . . . try to answer a question." He testified that the [petitioner] was arrested and transported to the sheriff's department.

Defense Proof

Ms. Reed, the [petitioner's] cousin, testified as a defense witness. She claimed she had called Maynard on the evening of February 4, 2004, and, when she heard children playing in the background, asked him who was there with him. She

recalled that Maynard informed her that the [petitioner], the victim, and their children were there, and that when she then talked to the [petitioner], he was crying and "very upset." She claimed that she also talked to the victim, who, she observed, "did not sound upset at all in any way," telling her everything was "okay." Ms. Reed denied that the victim had asked her for help.

Michael Maynard, the [petitioner's] brother, testified that on the morning of February 4, 2004, the [petitioner], the victim, and their children came to his house around 6:30 or 7:00 a.m. He recalled that he put his "guns and everything up, because of the small children" and because the [petitioner] and the victim were arguing. Maynard stated that he invited all of them inside and that he then learned that the [petitioner] had apparently found another man in the victim's house. He testified that the victim was bleeding and had "a little hole" in her head "like a pimple been's popped." He denied that the [petitioner] admitted ramming her head into a wall. Maynard stated that he and the children watched television while the [petitioner] and the victim went to the back bedroom. He claimed that when he heard a noise, he went to the bedroom and saw that both the [petitioner] and the victim had removed their pants. He then heard the victim say, "Not like this." He denied that the victim asked him for help. Maynard testified that he then returned to the living room, and the [petitioner] and the victim subsequently joined him there. Maynard claimed that the [petitioner] fell asleep around 9:00 a.m. in one of the bedrooms and slept "ninety percent of the time" he was there. He contended that he offered the victim the keys to either of his two trucks, which were in working condition, and insisted that she could have left if she had wanted. He confirmed that the [petitioner] and the victim had arrived in the [petitioner's] vehicle and that the [petitioner] had said he was not going to let her take the car. He testified that he offered the victim a Lortab, which she took "around evening time," and that the victim was allowed to use the telephone. Maynard denied that he left the house while the [petitioner] and the victim were there and refuted the claim that the [petitioner] had asked him for a gun. He acknowledged that he talked to his father, Jerry Maynard, and his cousin, Jennifer Reed, by telephone and that Sandy Brooks, who lived in Davidson County, called and informed him that a detective was trying to reach them.

Maynard acknowledged that on the second day of the [petitioner's] stay at his residence, the victim told him that the [petitioner] had touched her inappropriately. He also admitted that in his initial statement to the police, he had stated that the [petitioner] had rammed the victim's head into a wall with a nail but did not mean to do so. He also acknowledged that the [petitioner] expressed a desire to return to Nashville to clean up the blood at the victim's residence. Maynard contended that he could not remember if the victim was wearing shoes when she arrived at his house but he did acknowledge that he gave her some house slippers to wear when they went to the sheriff's department.

The [petitioner] testified that just before the events leading to his convictions, he had been in jail for two and a half months on allegations of aggravated burglary made by the victim's parents. He claimed that the victim and the children had visited him in jail and that he spoke to the victim on the afternoon of February 3rd before he made bail. He denied that the victim had asked him not to come home after his release and claimed that all of his belongings were at the victim's house. He stated that his younger brother picked him up at the jail and that they went to his brother's house in Madison. The [petitioner] claimed that he walked fifteen miles to the victim's house and arrived there between 5:30 and 6:00 a.m. He contended that when he realized that all of the locks had been changed and a deadbolt had been placed on the front door, he knocked on the door and, when no one answered, he saw through a window that the victim was with a man. He admitted that he kicked in the front door and claimed that the man tried to hide. He asserted that when he ran after the man, he pushed the victim out of the way, accidentally knocking her into the wall. The [petitioner] claimed that he and the man "scuffled," but the man "got loose and r[a]n out the door." The [petitioner] acknowledged that he hit the victim in the eye and conceded that the injuries to her eye and chin could not have been caused by one punch.

The [petitioner] admitted that the victim's head was bleeding and that she went to the bathroom to wash off the blood. He denied that he digitally penetrated her while they were in the bathroom. The [petitioner] acknowledged that he asked the victim why she was not wearing her wedding ring and why she had a man there, and asserted that she replied, "He's just a friend." The [petitioner] stated that he then started scanning the caller identification box in B.R.S.'s room and asked the victim about certain telephone numbers. He acknowledged that he "threw" the caller identification box but denied that he ripped the telephone from the wall or threatened to snap B.R.S.'s neck if she called the police. He claimed that he and the victim then went to the living room and the children followed. He admitted that he told the victim to get B.M. dressed and that he directed R.M. to get dressed because he was "taking them and leaving." The [petitioner] stated that B.R.S. was not his daughter and that he did not require her to go with him. He contended that he picked up B.M. and headed out the door, and the victim followed, saying, "You're not taking the kids without me." He stated that he put B.M. and R.M. in his vehicle and that the victim and B.R.S. got in after him. He acknowledged that he and the victim were arguing but denied that he told her that he had killed her parents or had threatened to kill her. The [petitioner] denied that he hit the victim while he was driving but acknowledged that he asked her to perform oral sex on him.

The [petitioner] stated that he then drove to Maynard's house, who asked what had happened and invited them inside. The [petitioner] claimed that the victim then voluntarily called her employer and her mother. He testified that he and the victim later went to a bedroom while the children watched television and that when he asked

to have sex, she replied, "No, not like this. It's not right." The [petitioner] claimed that when he said, "Yeah, let's do it," and removed his pants, the victim also removed her pants. The [petitioner] acknowledged that Maynard came into the room while they were having sex and asked if everything was all right. He stated that he and the victim then returned to the living room. He said that he later went to a bedroom where he slept until about 7:00 p.m. The [petitioner] acknowledged that he talked to his cousin, Jennifer Reed, by telephone outside on the deck and that he was crying and upset during their conversation. He stated that Ms. Reed then spoke to the victim outside his presence. The [petitioner] denied that he held the victim against her will and claimed that his only intention was to take his children, B.M. and R.M., to Maynard's house.

The [petitioner] testified that when Detective Pinkerton called the next day, he explained that the victim's parents had "tried to make something really bad outta this." He recalled that he went back to sleep and was later awakened by Maynard, who told him the police were there. The [petitioner] confirmed "what happened" and that when Officer Cowan asked the victim if she wanted to press charges, he shook his head, "like, 'Don't do this, man. . . . We done been through this . . . a hundred times.'" The [petitioner] claimed that when he was taken into custody, he thought the charges against him were for "domestic assault, because [the victim] had a knot on her head and a black eye." The [petitioner] denied having told R.M. that if he found a gun he would kill the victim, claiming someone had "brainwashed" his daughter into saying that. The [petitioner] denied that he had planned to take the victim across state lines and denied telling Maynard he wanted to clean up the blood at the victims' house.

The [petitioner] also testified about the 2003 incident at the Sullivans' home, claiming that he tried to hug the victim as she pushed him away. He stated that the victim's brother threatened to get his pistol if the [petitioner] did not leave, else he was going to shoot him. According to the [petitioner], he pushed the victim's brother when he returned two minutes later with a pistol. The [petitioner] claimed that because he was in danger, he grabbed the gun, pointed it at the victim's brother, and grabbed the victim, asking her to go with him. He claimed that the victim's father then grabbed her by the shirt and pulled her away from the [petitioner], tearing her shirt in the process. The [petitioner] insisted that he then went home and the victim later informed him he would be arrested for "pulling that gun on [them]."

State v. Robert L. Mitchell, No. M2005-01652-CCA-R3-CD, 2006 WL 1506519, at **1-8 (Tenn. Crim. App. June 1, 2006), perm. to appeal denied (Tenn. Nov. 13, 2006).

At the evidentiary hearing, the petitioner testified as to his various claims of ineffective assistance of counsel. He said that trial counsel should have asked for a special instruction as to the word "unlawful," for, in his view, he was a parent of B.R.S. because he had "raised [her] for . . . nine

years, took her to school, . . ., bought her clothes, fed her dinner every night." Thus, he believed that he was "her parent or, at least, a guardian." The petitioner testified that, although his trial attorney filed a motion pursuant to Tennessee Rule of Criminal Procedure 12(b) to dismiss the first indictments for especially aggravated kidnapping and aggravated burglary, she did not do so as to the superseding indictments, which were, in his view, "basically . . . the same charges."

The petitioner testified that trial counsel should have "questioned the witnesses about . . . the man being in [his] house, the night . . . [he] arrived at home, which no questions at all were asked about that." He said that his wife should have been questioned about conflicts between her testimony at the preliminary hearing and the trial. He said that, while at the preliminary hearing she testified that he did not physically force her to leave the house, at trial she said that he had a "grip on [her] arm and took [her] out." Additionally, the petitioner said that he believed the Smith County deputy sheriff who testified should have been questioned about the fact that, while his report said that he was dispatched to a "domestic-disturbance call," he testified at trial that it was a "hostage-taken call."

The petitioner said that Detective Bruce Pinkerton testified at trial to "all this blood, but he . . . couldn't produce the pictures," and this should have been raised as an issue on appeal. He said that, in his view, trial counsel should have asked for a special instruction that, if a witness gives conflicting testimony, the testimony is cancelled out, referring to the testimony of his wife. He said his appellate lawyer should have raised on appeal that he was convicted of kidnapping "the same person twice," but acknowledged that these convictions were merged. Returning to the claim that, as he entered his house, he "found [his] wife with another man," he said that trial counsel should have "talked to [his] neighbors . . . and videotaped the guy living there in [his] house." He said that another issue which should have been raised on appeal was that the trial court, in sentencing, should not have applied enhancement factor (8), that he had failed to abide by the conditions of a sentence involving release into the community, for only a jury could make that finding. He said that the "domestic-violence pamphlet," which a witness utilized in her testimony, had not earlier been provided to his counsel, and this should have been raised as an issue on appeal. The petitioner testified that appellate counsel should have raised as an issue, as the petitioner requested, the fact that the jury instructions did not include a definition of "terrorize" and argued, as well, that the trial court erred in allowing evidence of the petitioner's having raped his wife in Smith County, for he was not charged with rape.

On cross-examination, the petitioner admitted that he had not adopted B.R.S. Additionally, he acknowledged that the State asked the trial court to instruct the jury as to the meaning of "terrorize" but that, after his lawyer objected, the definition was not included in the instruction.

Diana Lynn Springer testified that she was a neighbor of the petitioner's wife at the time of the kidnapping. She said that, apparently before the petitioner's trial, "an investigator" came by her house, and she "thought it was somebody that was there on behalf of the mortgage company, since they foreclosed." She said that this happened twice and that she did not know if anyone was living there with the victim's wife. She said that B.R.S.'s father had been staying at the victim's house

"before they abandoned [it]," but she did not "know if he was there at the time of this incident." However, she believed that B.R.S.'s father did not move into the victim's house until "after this incident."

The petitioner's trial counsel testified that she was employed by the Metropolitan Public Defender's Office and had been a licensed attorney for nineteen years. She said that, while she filed a motion to dismiss the first indictments for the especially aggravated kidnapping of B.R.S., she did not do so for the superseding indictments because there was no legal basis to do so. As for whether another man had been living with the petitioner's wife, she said she believed an investigator for the public defender tried to question the neighbors about this "but wasn't able to establish that there was somebody else living in the house, or that someone else had been there on that particular day – either of those." She said she did not ask the child witnesses about this because she "thought that the [j]ury would hate [her] . . . and that it would not help [the petitioner] in any way, shape or form." She said that she extensively cross-examined both the petitioner's wife and the Smith County deputy who testified as to the difference between a domestic versus a hostage situation.

Trial counsel said that the petitioner's wife surprised her at trial "by the level of . . . force that she was alleging at the trial, as compared to the preliminary hearing," and that was why counsel had "her read the preliminary hearing transcript." As for the fact that a detective who testified for the State could not produce all of the photographs he said he had taken, counsel said that this did not "negate" his testimony, but it did "weaken" it. She said she believed she filed a motion in limine to exclude the domestic violence pamphlet. She said the jury was not instructed as to the definition of "terrorize" because the two sides could not agree on what a proper definition should be.

On cross-examination, trial counsel further explained why she did not ask B.R.S. at trial whether another man had been living at their house:

> She was a young and sweet witness, and I believed that asking her – after she had testified that she had been forced to go with her mother and her father . . . and [the] two younger children in a car to Smith County, and all the other facts, that her mother was bloody and beaten and that [the petitioner] forced her mother to do things on the way to Smith County and a number of other really unfortunate facts, I believed that asking this child whether or not there was a man in the house would not have a positive effect on the trial.

The petitioner's appellate counsel testified that he had been licensed to practice law for twenty-five years. He said that the issues he raised on appeal were that the evidence was insufficient to support the convictions for kidnapping, that the trial court erred in allowing evidence of prior bad acts, and that the sentences were excessive. He said he did not believe that an issue had been raised as to the domestic violence pamphlet "[p]robably 'cause it wasn't entered into evidence." Likewise, he did not raise an issue as to the photographs that could not be found, because he believed this went to the weight of the testimony of the witness, not its admissibility. He did not raise as an issue that the jury was not instructed as to the definition of "terrorize" because he wanted the jury to think of

it "in the nature that it's become since September the eleventh of two-thousand-one, . . . instead of a dictionary definition." Since the jurors used their common sense as to the meaning, there was "no appellate issue there."

ANALYSIS

I. and II. Trial Counsel Was Ineffective For Not Objecting to the Charge as to "Unlawful" and Appellate Counsel Was Ineffective For Not Raising This Issue on Appeal as "Plain Error"

The petitioner argues that the failure of the trial court to charge the jury as to the definition of the word "unlawful" resulted "in the jury not being fully and accurately charged with the applicable law." Additionally, he asserts that "the portion of the definition that was omitted contained the language that to be unlawful, the removal or confinement must be done without the consent of a parent, and the [petitioner] was the parent of the alleged victim." The State responds that the petitioner was the stepfather, rather than the biological father, of B.R.S. and that, even if he were, the indictment alleged, and the State proved, that he kidnapped B.R.S. by "force, threat or fraud."

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, 2064 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that 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, 104 S. Ct. at 2064.

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, 104 S. Ct. at 2065; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). 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, 104 S. Ct. at 2068.

Especially aggravated kidnapping is defined as follows:

> (a) Especially aggravated kidnapping is false imprisonment, as defined in § 39-13-302:
>
> (1) Accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon;
>
> (2) Where the victim was under the age of thirteen (13) at the time of the removal or confinement;
>
> (3) Committed to hold the victim for ransom or reward, or as a shield or hostage; or
>
> (4) Where the victim suffers serious bodily injury.

Tenn. Code Ann. § 39-13-305(a).

False imprisonment is defined as: "A person commits the offense of false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty." Id. § 39-13-302(a). Section 39-13-301(13) defines "unlawful" as:

> [W]ith respect to removal or confinement, one that is accomplished by force, threat or fraud, or, in the case of a person who is under the age of thirteen (13) or incompetent, accomplished without the consent of a parent, guardian or other person responsible for the general supervision of the minor's or incompetent's welfare.

The petitioner argues that the following exchange, as B.R.S.'s mother was testifying, established that she "considered the petitioner standing in the position of father to her child by a previous marriage":

> Q And, Ms. Mitchell, do you know the [petitioner] in this case, Robert Mitchell?
>
> A Yes, sir.
>
> Q And how do you know him?
>
> A He's my – father of my children and husband.

The State responds that, in his *pro se* petition for post-conviction relief, the petitioner refers to B.R.S. as his "stepdaughter." Tennessee Code Annotated section 36-2-302(5), regarding paternity

and legitimation, defines "parent" as the biological mother or father of a child. Thus, the petitioner was not the "parent" of B.R.S.

We will review the indictments for especially aggravated kidnapping. Indictment 2004-D-3144, the first indictment, alleged that the petitioner

> on the 4th day of February, 2004, in Davidson County, Tennessee and before the finding of this indictment, did knowingly and unlawfully remove or confine [B.R.S.], so as to interfere substantially with the liberty of [B.R.S.], and [B.R.S.] was less than thirteen (13) years of age at the time of the removal or confinement, in violation of Tennessee Code Annotated § 39-13-305, and against the peace and dignity of the State of Tennessee.

This was superseded by indictment 2005-A-241, which alleged that the petitioner

> on the 4th day of February, 2004, in Davidson County, Tennessee and before the finding of this indictment, did knowingly and unlawfully remove or confine by use of force, threat, or fraud, [B.R.S.], so as to interfere substantially with the liberty of [B.R.S.], and [B.R.S.] was less than thirteen (13) years of age at the time of the removal or confinement, in violation of Tennessee Code Annotated § 39-13-305, and against the peace and dignity of the State of Tennessee.

Thus, the second indictment added the language that B.R.S.'s removal or confinement was "by use of force, threat, or fraud."

As to the petitioner's claim that trial counsel should have sought dismissal of the superseding indictment, counsel testified:

> A As to the especially-aggravated kidnapping charge, . . . I did file a Twelve-(b) Motion.
>
> As indicted prior to trial, the District Attorney's Office had failed to allege that the false imprisonment was committed unlawfully by force, threat or fraud.
>
> My understanding, you know, what the [State v.] Goodman[, 90 S.W.3d 557 (Tenn. 2002),] case says is that, if you are to charge a parent or someone acting . . . as a parent, which [the petitioner] was, that you have to allege the false imprisonment correctly in the indictment.
>
> I filed . . . what I felt to be a very good Twelve-(b) Motion in this case. It was heard, the Judge took it under advisement, and [the prosecutor] filed a superseding indictment that fixed the issue.

So, there was no issue. I don't remember . . . any particular problem with the way [the trial judge] did the –

Q So, you're saying that, based on your knowledge of the law and your experience, that the fact that the Indictment was changed to include the force[,] threat or fraud fixed the fact of the child or –

A Right.

Q – someone being –

A I'm a little con–

Q – under the guardianship of the [petitioner].

A Yes. . . . I'm confused with the issue of whether or not [the petitioner] was [B.R.S.'s] – the question is from both sides – whether [the petitioner] was acting as [B.R.S.'s] father.

I think there was no question that he was; and, in fact, that was the force of my first Twelve-(b) Motion, that because he was, therefore, they needed to – the District Attorney's Office – to allege this especially-aggravated kidnapping and they needed to indict it in a particular way adding those words – those magic words, if you will, to the false imprisonment charge.

And I had some stipulated facts that I think that [the prosecutor] agreed to in the Twelve-(b) Motion, that would prove that [the petitioner] was [B.R.S.'s] punitive [sic] father.

That wasn't the issue. The issue was a father or punitive [sic] father can especially-aggravatedly kidnap [sic], if you will, a child, if it's committed by force, threat or fraud. That's my understanding of the law.

The post-conviction court found that this claim was without merit:

Petitioner alleged trial counsel was ineffective in failing to file a second motion to dismiss the indictment as to count one, Especially Aggravated Kidnapping. Trial counsel testified she did not believe there was a basis on which to file the motion and the Court agrees. The indictment alleged he "did knowingly and unlawfully remove or confine by use of force, threat, or fraud, [the victim]" and the Court finds that this charge is sufficient. The jury found that the facts of the case supported the elements of the crime charged. The allegation has not been proven by clear and convincing evidence, therefore it is dismissed.

The record supports this determination by the post-conviction court. It follows that since trial counsel was not ineffective in concluding that there was no basis for filing a motion to dismiss the superseding indictment, appellate counsel, likewise, was not ineffective for not raising this as an issue on appeal.

III. Trial Counsel Was Ineffective For Not Interviewing the Petitioner's Neighbors

As to this claim, the petitioner alleges that "had trial counsel interviewed neighbors of the marital home prior to trial, counsel would have learned that the petitioner's wife had a man staying at the marital residence with herself and their children."

The post-conviction court found both that the petitioner failed to prove this claim as well as show prejudice:

> In this case, the Court accredits the testimony of trial counsel that she had investigators attempt to talk with neighbors or witnesses regarding whether a man was living in the house at the time of the offense. The testimony of Ms. Spring corroborated the testimony of [trial counsel]. Moreover, the Court finds that the petitioner could not establish prejudice as to this allegation because of the nature of the events occurring after his allegation that he saw a man in the house. Even if there had been a man living in the house or at the house at the time of the offense, the Court does not believe a jury would have been persuaded that the elements of the crimes charged had not been proven. The Court finds the petitioner has failed to prove the allegation by clear and convincing evidence, therefore it is dismissed.

The record supports this determination.

IV and V. Trial Counsel Was Ineffective For Not Objecting to the Sentencing of the Petitioner and Appellate Counsel Was Ineffective For Not Raising This as an Issue on Appeal

The petitioner argues that trial counsel was ineffective for not objecting to the trial court's applying enhancement factors which were not found by the jury and that, likewise, appellate counsel was ineffective for not raising this issue in the direct appeal.

The court determined that this issue was without merit:

> As to the [petitioner's] argument that counsel was ineffective in failing to raise sentencing issues pursuant to Blakely v. Washington, 124 S. Ct. 2531 (2004)[,] the Court must disagree. The [petitioner] was sentenced on April 28, 2005. Although the Court is well aware of the current position of our sentencing law, at the time of the petitioner's sentencing, our state supreme court had just issued their opinion in State v. Gomez, 163 S.W.3d 632 (Tenn. 2005)[,] on April 15, 2005

> indicating their holding that the sentencing scheme was constitutionally firm. Trial counsel cannot be held ineffective for following the law of the State in effect at that time. Furthermore, the Court was bound by that law at the time of sentencing.

The record supports this determination by the post-conviction that, in not making the sentencing argument that the petitioner now claims should have been done, trial counsel was relying on the decision of our supreme court in Gomez. Additionally, as to the claims regarding consecutive sentencing, this court specifically considered the impact of the State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995), decision and determined that the record supported the trial court's determination to order that the sentences be served consecutively:

> In determining that the [petitioner] qualified for consecutive sentencing, the trial court found that an extended sentence reasonably related to the severity of the offenses and was necessary to protect the public against further criminal conduct by the [petitioner]. Furthermore, the presentence report established that the thirty-three-year-old [petitioner] had been convicted of evading arrest, two counts of aggravated assault, resisting arrest, two counts of aggravated domestic assault, an undefined offense, and six traffic offenses. His arrests, as an adult, began in 1991 when he was in his teens and occurred with regularity during the next thirteen years. Under these circumstances, it is our view that the trial court did not err by ordering the kidnapping sentences to be served consecutively.

Robert L. Mitchell, 2006 WL 1506519, at *16.

Thus, it appears that the petitioner is complaining of consecutive sentencing although this court already has reviewed the issue. Accordingly, we conclude that the claim as to consecutive sentencing was determined on direct appeal and cannot be raised anew in a post-conviction claim.

VI. Trial Counsel Was Ineffective For Not Cross-Examining the Petitioner's Stepdaughter About a Man Living in the Home

The petitioner argues that trial counsel was ineffective for not cross-examining the petitioner's stepdaughter about a man living in her house after the petitioner moved to another residence. The State responds that trial counsel made an informed, strategic decision not to pursue this line of questioning and that the post-conviction court correctly determined that the claim was without merit.

The court found this claim to be without merit:

> The Court finds that trial counsel was not ineffective in her cross examination during the trial. The Court finds trial counsel effectively examined the victim as to inconsistencies in her preliminary hearing testimony and notes the [petitioner] himself admitted in trial that he hit the victim more than once. Furthermore, the

Court's jury instructions include a directive as to consideration of a witness'[s] contradictory statements. Petitioner also asserts trial counsel failed to adequately cross examine the petitioner's step-daughter. Trial counsel testified she made a strategic decision as to her cross examination of the witness and the Court will not second guess that decision. As to the calling the children and asking if there had been a man in the house, again the Court will not second guess trial counsel's trial strategy and again does not believe the issues would have persuaded the jury against the elements of the crime, therefore the Court does not find the petitioner has been prejudiced. These allegations have not been proven by clear and convincing evidence, therefore they are dismissed.

The record supports this determination by the post-conviction court.

VII and VIII. Trial Counsel Was Ineffective for Failing to Ask for an Instruction as to Conflicting Testimony by a Witness and Appellate Counsel Was Ineffective For Failing to Raise This as an Issue on Appeal

On appeal, the petitioner asserts that, as to the conflicting testimony of the petitioner's wife at the preliminary hearing and the trial as to whether he "put his hands on her to make her get into the truck," trial counsel should have asked for a special instruction as to conflicting testimony by a witness, and trial counsel should have based a motion for judgment of acquittal on this testimony. Additionally, he argues that appellate counsel should have raised this issue on appeal as "plain error." The State responds that the post-conviction court correctly determined that these claims were without merit, finding that trial counsel "effectively examined the victim as to inconsistencies in her preliminary hearing testimony" and that the instructions to the jury included a section on assessing the contradictory statements of a witness.

The court found that this claim was without merit, saying that "the jury instructions include[d] a directive as to consideration of a witness'[s] contradictory statements." The court gave the following instruction as to assessing the testimony of witnesses:

> You are the exclusive judges of the credibility of the witnesses and the weight to be given their testimony.
>
> If there are conflicts in the testimony of the different witnesses, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for the law presumes that all witnesses are truthful.
>
> In forming your opinion as to the credibility of a witness, you may look to the proof, if any, of the witness'[s] reputation for truth and veracity; the intelligence and respectability of the witness; his or her interest or lack of interest in the outcome of the trial; his or her feelings; his or her apparent fairness or bias; his or her means of knowledge; the reasonableness of his or her statements; his or her appearance and

demeanor while testifying; his or her contradictory statements as to material matters; if any are shown; and all the evidence in the case, tending to corroborate or to contradict him or her.

A witness may be impeached by proving that he or she has made material statements out of court, which are at variance with his or her evidence on the witness stand.

However, proof of such prior inconsistent statements may be considered by you only for the purpose of testing the witness'[s] credibility and not as substantive evidence of the truth of the matter asserted in such statements.

Further, a witness may be impeached by a careful cross-examination, involving the witness in contradictory, unreasonable, and improbable statements.

However, immaterial discrepancies or differences in the statements of witnesses do not affect their credibility, unless it should plainly appear that some witness has willfully testified falsely.

When a witness is thus impeached, the [j]ury has the right to disregard his or her evidence and treat it as untrue, except where it is corroborated by other credible testimony, or by the facts and circumstances proved in the trial.

The record supports the determination of the post-conviction court that the petitioner failed to prove that trial counsel was ineffective by not asking for an additional instruction as to witness credibility.

In support of his argument that appellate counsel was ineffective for not raising this issue on appeal as "plain error," the petitioner relies upon State v. Matthews, 888 S.W.2d 446 (Tenn. Crim App. 1993), in which this court applied the holding of our supreme court in Johnston v. Cincinnati N.O. & T.P. Ry. Co., 240 S.W. 429 (1922):

> "If two witnesses contradict each other, there is proof on both sides, and it is for the jury to say where the truth lies. But if the proof of the fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven. For his testimony to prove it is no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way."

Matthews, 888 S.W.2d at 449-50 (quoting Johnston, 240 S.W. at 436).

However, the court in Matthews noted that, additionally, our supreme court explained in Johnston that this "rule of cancellation" is usually stated as applying "only when inconsistency in

a witness's testimony is unexplained and when neither version of his testimony is corroborated by other evidence." Id. at 450.

The State responds, and we agree, that the victim, the petitioner's wife, admitted on cross-examination that he did not physically force her into the truck. Additionally, the State points out that the petitioner's stepdaughter testified that, as they were getting into his car, he was "yelling in a high tone" of voice and his "face was red, and . . . he wasn't smiling," and that this supports his wife's statement that his threat was conveyed by his tone of voice.

We conclude that the record supports the determination of the post-conviction court that, as to this claim, the petitioner failed to establish that trial or appellate counsel was ineffective.

IX and X. Trial Counsel Was Ineffective in Failing to Move to Dismiss Count One of the Indictment and Appellate Counsel Was Ineffective by Failing to Raise This as an Issue on Appeal

The bases of these claims on appeal is that "a parent cannot be guilty of especially aggravated kidnapping of his or her own child" and that this rule applies, as well, to a stepparent. The State responds that, since the superseding indictment charged that the petitioner kidnapped his stepdaughter by force, threat, or fraud, it properly charged him with a criminal offense.

The post-conviction court determined that this claim was without merit:

> Petitioner alleged trial counsel was ineffective in failing to file a second motion to dismiss the indictment as to count one, Especially Aggravated Kidnapping. Trial counsel testified she did not believe there was a basis on which to file the motion and the Court agrees. The indictment alleged he "did knowingly and unlawfully remove or confine by use of force, threat, or fraud, [the victim]" and the Court finds that this charge is sufficient. The jury found that the facts of the case supported the elements of the crime charged. The allegation has not been proven by clear and convincing evidence, therefore it is dismissed.

As did the post-conviction court, we disagree with the petitioner's interpretation of the holding in State v. Goodman, 90 S.W.3d 557 (Tenn. 2002). In that case, our supreme court concluded that an indictment, charging a father with the kidnapping of his daughter, was defective because it failed "to allege that the defendant removed or confined the minor child by force, threat, or fraud, and the removal or confinement was not accomplished 'without the consent of a parent.'" Id. at 565.

In this appeal, the superseding indictment did allege that the petitioner kidnapped his stepdaughter by "force, threat, or fraud." Thus, as the petitioner's trial counsel testified, and as the post-conviction court determined, the petitioner's status as stepfather to B.R.S. was not a basis for seeking dismissal of the superseding indictment.

CONCLUSION

Based upon the foregoing authorities and reasoning, the judgment of the post-conviction court is affirmed.

_____

ALAN E. GLENN, JUDGE