[Cite as *State v. Cook*, 2022-Ohio-97.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
UNION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 14-21-09**

v.

CHRISTOPHER G. COOK, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Union County Common Pleas Court
Trial Court No. 2017-CR-0249

Judgment Affirmed

Date of Decision: January 18. 2022

APPEARANCES:

***Jeremy J. Masters* for Appellant**

***Samantha M. Hobbs* for Appellee**

MILLER, J.

{¶1} Defendant-appellant, Christopher G. Cook, appeals the March 18, 2021 judgment of the Union County Court of Common Pleas denying his petition for postconviction relief without a hearing. For the reasons that follow, we affirm.

I. Facts & Procedural History

{¶2} On May 15, 2019, a Union County jury found Cook guilty of three counts of rape, one count of disseminating matter harmful to juveniles, one count of gross sexual imposition, and one count of intimidation of an attorney, victim, or witness in a criminal case. As relevant to this case, the three counts of rape were based on allegations that Cook had induced two adult women, Jacquelyn Tackett and Jessica Jude, to engage in sexual conduct with his then ten-year-old son, C.C., on several occasions in 2014. For these offenses, Cook was sentenced to an aggregate term of 82 years to life in prison.

{¶3} Cook appealed to this court. *State v. Cook*, 3d Dist. Union No. 14-19-26, 2020-Ohio-3411 ("*Cook I*"). Among his seven assignments of error on appeal, Cook argued that his trial counsel was ineffective for failing to challenge the testimony of the State's expert witness, Cindy Kuhr. At Cook's trial, Kuhr testified about "the phenomen[a] of delayed reporting of sexual abuse" and incremental disclosure, the prevalence of false accusations of child sexual abuse, "the behavioral indicators of child sexual abuse," her "experience with children who testify in court

about sexual abuse," and the effect of trauma on memory and memory formation. *Id.* at ¶ 71-73. Cook maintained that his trial counsel's failure to challenge Kuhr's "information and ultimate qualification" via pretrial motion or objection at trial was unreasonable and prejudicial because Kuhr's testimony bolstered C.C.'s credibility insofar as it allowed the jury to resolve inconsistencies and gaps in C.C.'s testimony. *See id.* at ¶ 87, 102. However, we rejected Cook's argument, finding that Kuhr was "manifestly qualified to testify as an expert on the subject of child sexual abuse." *Id.* at ¶ 103. We ultimately overruled all of Cook's assignments of error and affirmed his convictions. *Id.* at ¶ 126.

{¶4} On September 18, 2020, approximately three months after this court's decision in *Cook I*, Cook filed a petition for postconviction relief in the trial court. In his petition for postconviction relief, Cook renewed his claim that his trial counsel was ineffective for failing to take action to exclude Kuhr's testimony from trial. Attached to Cook's petition was an affidavit executed by Cook, in which he averred:

> My attorney did not file pertinent pre-trial motions, most notably, he did not challenge the competency of the State's expert witness, Cindy Kerr [sic]. Miss Kerr [sic] was otherwise disqualified as an expert witness in my co-defendant's case, *State v. Jacquelyn Tackett*, case number 2017-CR-0254, leading to the dismissal of all her charges based on the original allegations[.]

Additional documents were attached to Cook's petition, including (1) a photocopy of a November 21, 2017 indictment charging Tackett with two counts of rape and two counts of gross sexual imposition in Union County case number 2017-CR-0254;

(2) a photocopy of a November 21, 2017 indictment charging Jude with two counts of rape and one count of gross sexual imposition in Union County case number 2017-CR-0243; (3) a photocopy of a July 30, 2019 judgment entry in Union County case number 2017-CR-0254, in which the trial court sustained Tackett's "Motion to Exclude State's Expert Witness" and ordered that Kuhr "shall not be permitted to testify at trial"; and (4) photocopies of judgment entries in Union County case numbers 2017-CR-0254 and 2017-CR-0243 indicating that Tackett and Jude had each pleaded guilty to a bill of information charging one count of obstructing justice and been sentenced to five years of community control.

{¶5} On September 28, 2020, the State filed a response to Cook's petition. In its response, the State argued that Cook's claim was barred by res judicata and that, even if Cook could relitigate the issue, he would not prevail because there was no indication that his trial counsel performed deficiently or that Cook was prejudiced. On October 30, 2020, Cook filed a memorandum in support of his petition.

{¶6} On March 18, 2021, the trial court denied Cook's petition without a hearing. In its judgment entry, the trial court found as follows:

> The issues raised by [Cook] of failing to challenge the qualification of Cindy Kuhr as an expert * * * [were] addressed on the direct appeal. The Third District Court of Appeals overruled the assignments of error and affirmed the judgment of this Court. [Cook] relies upon the subsequent proceedings in the two co-defendants' cases to establish that the outcome of his trial would have been different had Ms. Kuhr's

> qualification been challenged * * *. Neither of the co-defendants' cases proceeded to trial; therefore, the analogy [Cook] is attempting to make is not simple. * * *
>
> * * *
>
> The Court finds that [Cook's] various claims for ineffective assistance of counsel could have been raised on direct appeal.
>
> Having considered [Cook's] petition, the case files, records, transcripts, and evidence of the case, the Court concludes that the petitioner is not entitled to a hearing. The Court finds that [Cook's] counsel was not ineffective * * *. The Court further finds that [Cook's] petition is barred by res judicata.

II. Assignment of Error

{¶7} On April 15, 2021, Cook timely filed a notice of appeal. He raises the following assignment of error for our review:

> **The trial court erred denying Mr. Cook's postconviction petition without a hearing. March 18, 2021 Decision and Entry.**

III. Discussion

{¶8} In his assignment of error, Cook argues that the trial court abused its discretion by denying his petition for postconviction relief without a hearing. Cook maintains his claim is not barred by res judicata because he attached evidence dehors the record to his postconviction petition and his claim is dependent on this evidence. Cook claims that by submitting this evidence for consideration alongside the materials in the original trial record, he set forth sufficient operative facts to

establish that he received ineffective assistance of counsel, thereby obligating the trial court to hold an evidentiary hearing.

A. Standard of Review

{¶9} "R.C. 2953.21 governs petitions for post-conviction relief." *State v. Wine*, 3d Dist. Auglaize No. 2-15-07, 2015-Ohio-4726, ¶ 10. The statute sets forth who may petition for postconviction relief:

> Any person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

R.C. 2953.21(A)(1)(a) (Apr. 6, 2017) (current version at R.C. 2953.21(A)(1)(a)(i), (b) (Apr. 12, 2021)).

{¶10} "The filing of a petition for postconviction relief does not automatically entitle the petitioner to an evidentiary hearing." *State v. Andrews*, 3d Dist. Allen No. 1-11-42, 2011-Ohio-6106, ¶ 11, citing *State v. Calhoun*, 86 Ohio St.3d 279, 282 (1999). Rather, "[b]efore granting a hearing on a petition filed under [R.C. 2953.21(A)], the court shall determine whether there are substantive grounds for relief." R.C. 2953.21(D) (Apr. 6, 2017) (current version at R.C. 2953.21(D) (Apr. 12, 2021)).

> In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript.

Id.

{¶11} "[I]f the court determines that there are no substantive grounds for relief, it may dismiss the petition without an evidentiary hearing." *State v. Jones*, 3d Dist. Defiance No. 4-07-02, 2007-Ohio-5624, ¶ 14. "The decision to grant the petitioner an evidentiary hearing is left to the sound discretion of the trial court." *Andrews* at ¶ 11. Accordingly, "[w]e review the trial court's dismissal of a postconviction petition without a hearing for abuse of discretion." *State v. Jeffers*, 10th Dist. Franklin No. 10AP-1112, 2011-Ohio-3555, ¶ 23. An abuse of discretion suggests the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When the abuse of discretion standard applies, an appellate court is not to substitute its judgment for that of the trial court. *State v. Thompson*, 3d Dist. Henry No. 7-16-10, 2017-Ohio-792, ¶ 11.

B. Ineffective Assistance & Res Judicata in Postconviction Proceedings

{¶12} "Substantive grounds for relief exist and a hearing is warranted if the petitioner produces sufficient credible evidence to demonstrate that the petitioner

suffered a violation of the petitioner's constitutional rights." *State v. Yarbrough*, 3d Dist. Shelby No. 17-2000-10, 2001 WL 454683, *3 (Apr. 30, 2001). Where, as here, a petitioner asserts that they were deprived of their constitutional right to the effective assistance of counsel, "the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness." *State v. Jackson*, 64 Ohio St.2d 107 (1980), syllabus. A petitioner who fails to carry his initial burden with respect to either prong of his ineffective-assistance-of-counsel claim consequently fails to demonstrate that there are substantive grounds for relief, and the trial court may deny the petition without conducting an evidentiary hearing. *See id.* at 112-113.

{¶13} In addition, a trial court may properly deny a petition for postconviction relief without holding a hearing if the claims in the petition are barred by res judicata. *State v. Curtis*, 5th Dist. Muskingum No. CT2019-0001, 2019-Ohio-2587, ¶ 22. "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any [claim] that was raised or could have been raised * * * on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. "Although a defendant may challenge his conviction and sentence by either a direct appeal or

a petition for postconviction relief, any claims raised in a postconviction relief petition will be barred by res judicata where the claim was or could have been raised on direct appeal." *State v. Schwieterman*, 3d Dist. Mercer No. 10-09-12, 2010-Ohio-102, ¶ 23. Regarding postconviction ineffective-assistance-of-counsel claims in particular, "[w]here a defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence dehors the record, res judicata is a proper basis for dismissing defendant's petition for postconviction relief." *State v. Cole*, 2 Ohio St.3d 112 (1982), syllabus.

{¶14} Res judicata is not an insurmountable obstacle. "[T]he presentation of competent, relevant, and material evidence dehors the record may defeat the application of res judicata." *State v. Dennison*, 4th Dist. Lawrence No. 18CA6, 2018-Ohio-4502, ¶ 16. "To overcome the res judicata bar, evidence offered dehors the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record." *State v. Lawson*, 103 Ohio App.3d 307, 315 (12th Dist.1995). "'This means that the evidence relied upon must not be evidence which was in existence or available for use at the time of trial or direct appeal, and * * * cannot be merely cumulative of the evidence already presented.'" *State v. Lewis*, 3d Dist. Logan No. 8-19-08, 2019-Ohio-3031, ¶ 14, quoting *State v. Murphy*, 10th Dist. Franklin No. 00AP-233, 2000

WL 1877526, *3 (Dec. 26, 2000). However, simply providing evidence dehors the record does not automatically entitle a petitioner to the requested relief or even a hearing. Rather, "'[e]vidence presented outside the record must meet some threshold standard of cogency; otherwise it would be too easy to defeat [res judicata] by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery.'" *Lawson* at 315, quoting *State v. Coleman*, 1st Dist. Hamilton No. C-900811, 1993 WL 74756, *7 (Mar. 17, 1993).

{¶15} Hence, "[a]lthough ineffective assistance of counsel ordinarily should be raised on direct appeal, res judicata does not bar a defendant from raising this issue in a petition for postconviction relief if the claim is based on evidence outside the record." *State v. Scott-Hoover*, 3d Dist. Crawford No. 3-04-11, 2004-Ohio-4804, ¶ 18. "This principle applies even when the issue of ineffective assistance of counsel was raised on direct appeal." *Id.*, citing *State v. Smith*, 17 Ohio St.3d 98, 101 (1985), fn. 1. "Generally, the introduction in an R.C. 2953.21 petition of evidence dehors the record of ineffective assistance of counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of res judicata." *Cole* at 114.

C. Expert Witness Testimony

{¶16} Cook's postconviction claim revolves around his assertion that Kuhr should have been "disqualified" as an expert witness and that his trial counsel was therefore ineffective for failing to move to exclude Kuhr's testimony. Cook repeatedly suggests that Kuhr lacked the qualifications necessary to offer expert testimony, but Kuhr's qualifications would not have been the only consideration in determining whether she could testify as an expert. Under Evid.R. 702, a witness may be permitted to testify as an expert if all of the following apply:

> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> (2) The design of the procedure, test, or experiment reliably implements the theory;
>
> (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

These requirements are distinct. *See Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶ 17. Accordingly, not only must a person possess the proper qualifications to testify as an expert, but the person's testimony must also concern matters beyond the ken of the jury and satisfy a minimum standard of reliability.

D. The trial court did not abuse its discretion by denying Cook's petition for postconviction relief without a hearing.

{¶17} Cook's most important piece of postconviction evidence is the trial court's July 30, 2019 judgment entry (the "Judgment Entry") disallowing Kuhr's testimony at Tackett's trial. The relevant portion of the Judgment Entry provides:

> This matter came before the Court for hearing on July 29, 2019, upon [Tackett's] Motion to Determine Competency of Expert Witness and Reliability of Expert Opinion, filed on July 11, 2019, and followed on July 25th with a second Motion to Exclude State's Expert Witness. * * *
>
> The State called as its sole witness, the proposed expert, Cindy Kuhr. The Court has reviewed the motion, memorandum contra, and applicable law on this matter prior to hearing and has considered the testimony of the proposed expert and arguments of counsel during the hearing. Based on the evidence presented to the Court, the Court finds that the State has wholly failed to meet its burden to qualify the expert under Ohio Evidence Rule 702(C).
>
> It is therefore ORDERED that [Tackett's] Motion is sustained and that the witness shall not be permitted to testify at trial.

The Judgment Entry thus indicates that Kuhr was excluded from testifying at Tackett's trial because the trial court deemed that her testimony did not meet the

reliability requirements of Evid.R. 702(C), not because the requirements of Evid.R. 702(A) and (B) were not satisfied.

{¶18} However, in his postconviction petition, Cook did not explicitly argue that his trial counsel was ineffective for failing to challenge the reliability of Kuhr's testimony under Evid.R. 702(C). Nor does Cook make that argument on appeal. Instead, Cook speaks generally of Kuhr's lack of qualifications without referring to any particular section of Evid.R. 702. Nevertheless, in the interests of thoroughness, we find it prudent to examine his trial counsel's performance with respect to each of the requirements in Evid.R. 702(A)-(C).

i. Res judicata bars any consideration of whether Cook's trial counsel was ineffective for failing to challenge Kuhr's testimony under Evid.R. 702(A).

{¶19} At the outset, we note that courts have concluded that the requirements of Evid.R. 702(A) were satisfied in cases where an expert witness testified about matters similar to those to which Kuhr testified. *See State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1536, ¶ 128 (7th Dist.); *State v. Carey*, 2d Dist. Miami No. 2002-CA-70, 2003-Ohio-2684, ¶ 17. "[I]t is established in Ohio law that the average fact-finder may require assistance in understanding the 'behavioral characteristics of minor victims of sexual abuse.'" *Kaufman* at ¶ 128, quoting *State v. Bell*, 176 Ohio App.3d 378, 2008-Ohio-2578, ¶ 56 (2d Dist.). "'Most jurors would not be aware, in their everyday experiences, of how sexually abused children might respond to abuse. Incest is prohibited in all or almost all cultures and the

common experience of a juror may represent a less-than-adequate foundation for assessing whether a child has been sexually abused.'" *State v. Stowers*, 81 Ohio St.3d 260, 262 (1998), quoting *State v. Boston*, 46 Ohio St.3d 108, 128 (1989). Issues such as "the manner in which child victims of sexual abuse disclose and report that abuse [are] beyond the knowledge and experience of lay persons." *State v. McGlown*, 6th Dist. Lucas No. L-07-1163, 2009-Ohio-2160, ¶ 41.

{¶20} Yet, even if Kuhr's testimony did not satisfy the requirements of Evid.R. 702(A), res judicata bars Cook from arguing that his trial counsel was ineffective for failing to move to exclude Kuhr's testimony for that reason. Cook was represented by different counsel during his direct appeal, and the transcript of Cook's trial, which contained the entirety of Kuhr's testimony, was part of the original record on appeal. Furthermore, while Cook submitted evidence dehors the record in support of his petition for postconviction relief (i.e., the Judgment Entry), this evidence is not relevant or material to determining whether Kuhr's testimony satisfied the requirements of Evid.R. 702(A) because it suggests at most that Kuhr's testimony failed under Evid.R. 702(C) rather than Evid.R. 702(A). As the only thing required to determine whether Kuhr's testimony met the requirements of Evid.R. 702(A) is Kuhr's testimony itself, this issue could have been raised by Cook on direct appeal and fairly determined by this court. Likewise, if we would have concluded in Cook's direct appeal that Kuhr's testimony did not satisfy the

requirements of Evid.R. 702(A), we would also have been able to fairly determine from the original trial record whether Cook was prejudiced by his trial counsel's failure to challenge Kuhr's testimony under Evid.R. 702(A). As a result, res judicata bars any postconviction claim that Cook's trial counsel was ineffective for failing to challenge Kuhr's testimony under Evid.R. 702(A).

ii. Res judicata bars any consideration of whether Cook's trial counsel was ineffective for failing to challenge Kuhr's testimony under Evid.R. 702(B).

{¶21} Res judicata also precludes Cook from arguing that his trial counsel was ineffective for failing to challenge Kuhr's testimony under Evid.R. 702(B). In *Cook I*, we considered and rejected Cook's argument that his trial counsel was ineffective for failing to attack Kuhr's qualifications to testify as an expert witness. Our analysis was expressly grounded in Evid.R. 702(B):

> Kuhr was manifestly qualified to testify as an expert on the subject of child sexual abuse.
>
> Under Evid.R. 702, a witness may be qualified as an expert witness by reason of her "specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Evid.R. 702(B). As the State aptly notes, the transcript of Cook's trial contains over four pages of testimony in which Kuhr detailed her educational background, relevant work history, certifications, publications, compliance with continuing educational requirements, affiliations with professional organizations, experience as an instructor, experience as an expert witness, and experience with victims of child sexual abuse. * * * Kuhr further testified that she is a subject-matter expert in the areas of child abuse, child sexual abuse, and child trauma. * * * Kuhr's testimony clearly establishes that, by reason of her education, training, experience, and specialized knowledge, she is an expert on matters of child sexual abuse. * * * Cook's trial counsel

> would almost certainly have failed to disqualify Kuhr as an expert on child sexual abuse * * *.

Cook I, 2020-Ohio-3411, at ¶ 103-104. Thus, in *Cook I*, we found that the original trial record (specifically Kuhr's testimony) contained more than enough information for us to determine that Kuhr satisfied the requirements of Evid.R. 702(B) and that Cook's trial counsel was therefore not ineffective for failing to challenge Kuhr's qualifications.

{¶22} Although Cook supported his postconviction petition with evidence dehors the record, this evidence provides no basis to revisit our conclusion in *Cook I*. Because the trial court's decision to exclude Kuhr's testimony in Tackett's case was based on Evid.R. 702(C), the Judgment Entry is neither relevant nor material to determining whether Kuhr satisfied the requirements of Evid.R. 702(B). A claim that Cook's trial counsel was ineffective for failing to challenge Kuhr's testimony under Evid.R. 702(B) was fairly determinable, and was in fact determined, on direct appeal. Consequently, res judicata also bars any postconviction claim that Cook's trial counsel was ineffective for failing to challenge Kuhr's qualifications under Evid.R. 702(B).

iii. Cook has not shown there are substantive grounds for postconviction relief because there are insufficient facts showing that his trial counsel was ineffective for failing to challenge Kuhr's testimony under Evid.R. 702(C).

{¶23} In this appeal, we do not need to decide whether res judicata bars a postconviction claim that Cook's trial counsel was ineffective for failing to challenge Kuhr's testimony under Evid.R. 702(C). Even if res judicata does not apply to this claim, after considering the Judgment Entry, as well as Cook's postconviction petition, his supporting affidavit, and all of the remaining materials in the record, we cannot conclude that the trial court abused its discretion by determining that Cook's petition failed to set forth a viable claim of ineffective assistance of counsel. Cook did not carry his initial burden of demonstrating that there are substantive grounds for relief because the entire record, even as supplemented by Cook, does not contain operative facts sufficient to establish that Cook's trial counsel was ineffective for failing to challenge Kuhr's testimony under Evid.R. 702(C).

{¶24} To begin, the Judgment Entry itself, while sufficient in Tackett's case, is not particularly probative of the specific issue raised by Cook in this case. It documents that the trial court considered Kuhr's proposed testimony, but it does not describe that testimony. Consequently, it is uncertain whether Kuhr's proposed testimony was identical to the testimony she offered at Cook's trial or whether it differed in some material respect. Furthermore, in the Judgment Entry, the trial court does not expound upon its conclusion that the State "wholly failed to meet its burden to qualify [Kuhr] under Ohio Evidence Rule 702(C)." The Judgment Entry

provides no information regarding what the State did (or did not do) at the hearing on Tackett's motion to result in the trial court holding that the State failed to establish that Kuhr's proposed testimony was reliable.

{¶25} Moreover, Cook failed to attach any additional documentation to his postconviction petition that could fill these informational gaps in the Judgment Entry. Cook did not include copies of either of Tackett's motions to exclude Kuhr's testimony. Nor did he submit copies of the State's response to Tackett's motions or Tackett's reply in support of her motions. Likewise, Cook neglected to attach a copy of a transcript from the July 29, 2019 hearing on Tackett's motions. Cook also failed to provide affidavits from Tackett's attorney, Tackett, or any of the other participants at the July 29, 2019 hearing describing what transpired there or offering any insight into the precise nature of the dispute over the reliability of Kuhr's proposed testimony. Therefore, from Cook's postconviction evidence, it is impossible to determine what Kuhr would have testified to at Tackett's trial, how Kuhr's proposed testimony compared to her testimony at Cook's trial, what Tackett seized on to claim that Kuhr's proposed testimony was not reliable, what the State argued in response, and why exactly the trial court concluded that Kuhr's proposed testimony did not meet the reliability requirement of Evid.R. 702(C).

{¶26} Weighed against the Judgment Entry is the information in the original trial record suggesting that, whatever Kuhr's testimony might have been at Tackett's

trial, Kuhr's testimony at Cook's trial was sufficiently reliable. At Cook's trial, Kuhr testified that she had "multiple trainings in the areas of child abuse [and] child trauma." (May 14, 2019 Tr. at 74). She also stated that she instructs on those topics and that she is a "subject matter expert for the Ohio Peace Officers Training Academy on topics of child abuse, child trauma, * * * and sexual assault." (May 14, 2019 Tr. at 74-75). Regarding her relevant work history, Kuhr explained that she was "a child abuse investigator solely for about seven years in the field investigating child abuse" and that "for about four of those years, [she] was one of the primary child sexual abuse investigators." (May 14, 2019 Tr. at 75). Kuhr's curriculum vitae reflects that she was an investigative caseworker with the Greene County Department of Children Services from 1986 to 1992. Kuhr explained that after leaving her job as a caseworker, she joined "a rapid response team with the Ohio Attorney General's Office," which involved assisting with child abuse investigations across Ohio. (May 14, 2019 Tr. at 75). She stated that she also served as "Director of Direct Services for the Ohio Victim Witness Association." (May 14, 2019 Tr. at 75). In that capacity, she "worked statewide at the request of jurisdictions to assist victims" in a variety of cases, including those involving child abuse, child sexual abuse, and homicide. (May 14, 2019 Tr. at 75).

{¶27} In addition, Kuhr testified that she was still a licensed social worker and that she had taken "multiple courses on child abuse and child interviewing and

crisis and trauma." (May 14, 2019 Tr. at 76-77). She further stated that she had written an article for the Ohio Attorney General's newsletter publication on "assisting interview techniques for children in child abuse cases." (May 14, 2019 Tr. at 76). Finally, Kuhr estimated that she had interviewed "at least 500 children for multiple interviews" over the course of her career. (May 14, 2019 Tr. at 78).

{¶28} With regard to the reliability requirement of Evid.R. 702(C), the Second District Court of Appeals has explained:

> A trial court must exercise a "gatekeeping" duty by testing the basis of proffered testimony for reliability. * * *
>
> The criteria that a trial court should use to test reliability depends on the nature of the testimony. In the well-known case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* * * *, the U.S. Supreme Court developed four factors to help test the reliability of testimony based on scientific information. A few years later, in *Kumho Tire Co., Ltd. v. Carmichael*, [526 U.S. 137, 119 S.Ct. 1167 (1999)] the Court revisited the issue and clarified that *Daubert*'s factors, to the extent they are relevant, may also be used to test expert testimony that is based on "technical" and "other specialized" information. The larger principle, taught the Court, is that, regardless of the expert testimony's epistemological basis, when the issue of reliability is raised, the trial court has the duty to determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." *Id.* at 149 (citation omitted). Sometimes, said the Court, "the relevant reliability concerns may focus upon personal knowledge or experience" rather than scientific methodology. *Id.* at 150.
>
> The principles in *Daubert* and *Kumho* have been incorporated into Ohio law. The Ohio Supreme Court, in [a 1998 case], adopted the four *Daubert* factors for testing scientific testimony. And in [a 2006 case], the Court relied on *Kumho* to hold that testimony on gang-related activities offered by a qualified detective was admissible under Evid.R. 702. The Court decided that in this particular discipline,

> knowledge and experience, both of which the detective had, were sufficient guarantors of reliability.

(Citations omitted.) *State v. Rosas*, 2d Dist. Montgomery No. 22424, 2009-Ohio-1404, ¶ 36-38.

{¶29} Similar to this case, the issue in *Rosas* was whether the testimony of the State's expert witness, a child psychologist with experience working with victims of child sex abuse, met Evid.R. 702(C)'s reliability requirement. In concluding that the witness's testimony satisfied the threshold test of reliability under Evid.R. 702(C), the court in *Rosas* observed:

> The field of psychology * * * is a complex admixture of science and art. To the extent that they can, psychologists try to apply the principles of scientific methodology. Yet because their object of study is the human mind, science can take them only so far. This is one of those disciplines, which *Kumho* mentions, that cannot be encompassed entirely by one category of knowledge—"scientific," "technical," or "other specialized." There is little doubt that Dr. Micelli possesses extensive formal education and broad, deep experience with sexually abused children. Her testimony here establishes this * * *.
>
> After examining the record, we find nothing that would call into question the reliability of her testimony. Her testimony on the behavioral characteristics of sexually-abused children has a reliable basis in the knowledge and experience of the field of psychology, which she has acquired from the classroom and the clinic.

(Citation omitted.) *Id.* at ¶ 40-41.

{¶30} Although Kuhr is not a psychologist like the expert witness in *Rosas*, her background in social work and law enforcement renders her no less capable of

providing reliable testimony on the subject of child sexual abuse. Indeed, the Supreme Court of Ohio has recognized that in "'child abuse cases, experts, properly qualified, might include a priest, a social worker or a teacher, any of whom might have specialized knowledge.'" *Stowers*, 81 Ohio St.3d at 262, quoting *Boston*, 46 Ohio St.3d at 118-119. In much the same way that the psychologist's "extensive formal education" and "broad, deep experience with sexually abused children" established the reliability of the expert testimony in *Rosas*, Kuhr's training and decades-long practical experience with victims of child sexual abuse support that her testimony at Cook's trial was reliable.

{¶31} "When a claim of ineffective assistance of counsel is based on counsel's failure to file an objection or file a motion, the [petitioner] must demonstrate that the objection or motion had a reasonable probability of success." *State v. Jones*, 10th Dist. Franklin Nos. 18AP-33 and 18AP-34, 2019-Ohio-2134, ¶ 52. "If the [petitioner] fails to demonstrate that there is a reasonable probability that the proposed motion [or objection] would have been granted, counsel is presumed to have been effective * * *." *State v. Thompson*, 3d Dist. Marion No. 9-20-35, 2021-Ohio-2979, ¶ 14.

{¶32} Here, the Judgment Entry precluding Kuhr from testifying in Tackett's case merely raises the *possibility* that Cook's trial counsel might also have been able to exclude Kuhr's testimony at Cook's trial based on Evid.R. 702(C), but it does

nothing more than that. As we have explained, the Judgment Entry is not especially probative on the question of whether Kuhr's testimony was reliable *in Cook's* case, and whatever value it does have is dwarfed by the indices of reliability in the original trial record. Therefore, even with the evidence he has added to the original trial record, Cook failed to demonstrate that it is reasonably probable that his trial counsel would have succeeded in challenging Kuhr's testimony under Evid.R. 702(C). Cook's trial counsel is thus presumed to have been effective. Because Cook's trial counsel is presumed to have been effective, Cook failed to demonstrate that there are substantive grounds for relief, thereby enabling the trial court to deny his postconviction petition without a hearing.

{¶33} To summarize, res judicata bars Cook from arguing that his trial counsel was ineffective for failing to challenge Kuhr's testimony under Evid.R. 702(A) and (B). Moreover, Cook did not present sufficient operative facts to demonstrate that his trial counsel was ineffective for failing to dispute the reliability of Kuhr's testimony under Evid.R. 702(C). As a result, insofar as Cook might have been able to assert a claim of ineffective assistance of counsel regarding his trial counsel's failure to challenge Kuhr's testimony under Evid.R. 702, he did not show that such claim presented a substantive ground for relief. Consequently, we conclude that the trial court did not abuse its discretion by denying Cook's petition for postconviction relief without a hearing.

{¶34} Cook's assignment of error is overruled.

IV. Conclusion

{¶35} For the foregoing reasons, Cook's assignment of error is overruled. Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the Union County Court of Common Pleas.

Judgment Affirmed

ZIMMERMAN, P.J. and SHAW, J., concur.

/jlr