

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 3, 2018 Session

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Appellate Courts

JEFFREY SCOTT v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 07-07601 James M. Lammey, Judge

No. W2017-00392-CCA-R3-PC

The Petitioner, Jeffrey Scott, appeals the post-conviction court’s denial of his petition for post-conviction relief, in which he challenged his conviction for second degree murder and resulting twenty-five-year sentence. The Petitioner maintains that he received ineffective assistance of counsel at trial. Upon reviewing the record and the applicable law, we affirm the judgment of the post-conviction court.

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

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

William D. Massey and Melody M. Dougherty, Memphis, Tennessee, for the appellant, Jeffrey Scott.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; Amy P. Wierich, District Attorney General; and Tyler Parks and Karen Cook, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The Petitioner was charged with premeditated first degree murder of his wife following her death on November 23, 2006. The jury convicted the Petitioner of second degree murder, and the trial court imposed a twenty-five-year sentence. This court affirmed the Petitioner’s conviction and sentence on direct appeal. *See State v. Jeffrey Scott*, No. W2009-00707-CCA-R3-CD, 2011 WL 2420384, at *1 (Tenn. Crim. App. June 14, 2011), *perm. app. denied* (Tenn. Oct. 18, 2011).

Trial Proceedings

The State presented evidence at trial that on the afternoon of November 23, 2006, which was Thanksgiving, police officers and paramedics responded to the home of the Petitioner and the victim after the Petitioner called 9-1-1. They found the victim lying on the floor beside her bed. She was badly bruised and unresponsive, and she showed signs of a head injury. She was transported to the hospital where she died. The Petitioner gave statements to officers that on the previous night, he and the victim had been drinking alcohol and began arguing, which then turned into a physical altercation. The Petitioner told an officer that he did not believe that he hit the victim hard enough to injure her. He stated that he gave the victim a pillow and a blanket and made her sleep in the garage. The next morning, he brought her inside and placed her beside the fireplace in the den. He said he later moved her to the bedroom but was unable to get her on the bed. That afternoon, he contacted a friend, Dr. Robert McGee, to examine the victim. Upon examining the victim, Dr. McGee instructed the Petitioner to call 9-1-1.

This court summarized the evidence presented at trial in our opinion on direct appeal as follows:

Dr. Robert McGee testified that he had been friends with the defendant for over twenty years. He knew the victim through the defendant. Dr. McGee testified that on November 23, 2006, he was a resident physician in Shelby County. He said that on that day, which was Thanksgiving Day, he received a call from the defendant during the afternoon. The defendant asked how he was and what he was doing the rest of the day. After Dr. McGee answered, the defendant asked if he could come to the Scotts' house to take a look at the victim because the defendant "had some concern about [her.]" Dr. McGee testified that the defendant's tone of voice had "an element of concern, but there was not an element of ... urgency." The defendant told Dr. McGee that the victim was "not waking up right—[she was] not acting right." Dr. McGee asked him if they had been drinking, and the defendant responded affirmatively. Dr. McGee said that the defendant asked him to come alone. After a discussion with his wife, who was in the car with him at the time of the defendant's call, Dr. McGee called the defendant back to get more information, and the defendant responded by repeating his request that Dr. McGee come over to the Scotts' house. In order to get to the Scotts' house faster, Dr. McGee took his family to his parents' house, let his wife take his car, and borrowed his parents' car. When he got to the Scotts' house, he met the defendant in the den. The defendant pointed Dr. McGee to their bedroom, where Dr. McGee found the victim lying on the floor next to the bed. He testified that

the victim “was very bruised and beaten.” Dr. McGee identified a photograph of the victim and testified that the photograph showed the condition in which he found her. He said that he asked the defendant what had happened, and the defendant responded that they had gotten into an argument. Dr. McGee checked the victim’s pulse and told the defendant to call 911, which the defendant did. Dr. McGee said that the victim was dressed in a shirt and jeans.

On cross-examination, Dr. McGee agreed that he told the police that the victim had vomit coming from her mouth and nose when he saw her. He also told police that she was not wearing shoes, and her feet were bluish. He described her hands as being blue and white. Dr. McGee agreed that he told the police that the victim had a bruise on her right forehead and around her right eye. Dr. McGee testified that the post-mortem photograph that he had previously identified might show bruises that were not present when he saw the victim because the body goes through post-mortem changes. Dr. McGee further testified that the defendant appeared “very calm” and “very much in shock.”

On re-direct examination, Dr. McGee said that he arrived at the Scotts’ house forty-five minutes to an hour after speaking with the defendant. He said that he did not observe any injuries on the defendant.

Paula Hagood testified that she was a police radio dispatcher for the Memphis Police Department. She testified that on November 23, 2006, she took a 911 call from the defendant, which was recorded in the normal course of business. The state played the recording for the jury....

Memphis Police Officer Sloan Liddell testified that he was the first to respond to the Scotts’ house. Upon entering the bedroom, he observed a man giving the victim CPR. He testified that he perceived the situation as an emergency and shouted to the fire department personnel to hurry. Officer Liddell said that the victim “appeared to have been beaten about the head.” Officer Liddell and his partner, Officer Elkins, spoke with the defendant, who told them that he and the victim had argued, and the argument turned into a physical altercation. After another officer related to Officer Liddell that the victim had more injuries than Officer Liddell had personally noticed, he detained the defendant in his police car.

On cross-examination, Officer Liddell agreed that the defendant told him that the subject of the argument with the victim was a text message that the defendant found on her phone.

Gary Kent Garmon testified that he was a firefighter-paramedic for the Memphis Fire Department.... Mr. Garmon testified that he and his partner responded to the Scotts' house on November 23, 2006. He initially observed blunt trauma to the victim's head, and after someone removed her clothing, he also observed blunt trauma to her legs, chest, and back. Mr. Garmon stated that the victim had no pulse or blood pressure and was not breathing. He said the victim's pupils were dilated and non-responsive, which indicated to him that she suffered trauma to her head. He said that another indication of head trauma was the blood-colored vomit coming from the victim's mouth and nose. Mr. Garmon testified that the victim had "raccoon eyes which [is seen] when [one] get[s] hit in the face or head trauma" and "battle signs, which is a bruising behind the ears, which usually indicates head trauma." He further stated that he observed a bruise on her back that, to him, appeared to be a shoe print. Mr. Garmon testified that he and the EMT used a defibrillator to shock the victim four times and also administered various medications to start the victim's heart. When that was not successful, they continued CPR and intubated the victim. Mr. Garmon said that, in his experience, the injuries to the victim's lip were not caused by intubation. They ultimately transported the victim to the hospital.

On cross-examination, Mr. Garmon agreed that his report did not indicate bruising on the victim's chest, mouth, knees, lower legs, ankles, or feet.

On re-direct examination, Mr. Garmon testified that he might not document injuries that did not pertain "to the mechanism of saving [the patient's] life."

Chief Daniel Wakefield, the battalion chief of emergency medical services for the Memphis Fire Department, testified ... that he responded to ..., the Scotts' home, after the dispatch office related that they were sending police to the scene, and he arrived two to three minutes after the ambulance. When he first saw the victim, the paramedic and EMT were treating her and had removed some of her clothing. He observed bruising to her head, face, flank, abdominal area, knees, and lower legs. Chief Wakefield testified that it "looked like the [victim] had been assaulted." He said that a half-moon-

shaped bruise on the victim's flank indicated, to him, trauma caused by the toe of a shoe. He described another bruise as appearing "to be a bottom imprint of a shoe." Chief Wakefield explained that the paramedic and EMT attempted to resuscitate the victim and that they transported her to the hospital because their monitor showed that she had some pulseless electrical activity, indicating a possibility that they could revive her.

Memphis Police Officer Stan Elkins testified that he arrived at the Scotts' home after Officer Liddell and before the ambulance. He said that the victim was "lying on the floor, and it appeared she had been beaten up." Officer Elkins spoke with the defendant, who told him that he and the victim had been drinking the night before, they had argued, and the victim had been in the garage from 1:00 a.m. until 9:00 a.m., when he brought her into the bedroom. Officer Elkins arrested the defendant and wrote a domestic assault report.

On cross-examination, Officer Elkins agreed that he smelled alcohol on the defendant's breath. The defendant told him that the victim passed out around 1:00 a.m. and slept in the garage. The defendant further told him that he moved the victim from the garage into the den at 9:00 a.m. and from the den to the bedroom at 12:00 p.m. The defendant reported that the victim had been "breathing fine" throughout the day.

Memphis Police Sergeant Robert Edwards testified that he ... responded to a suspected aggravated assault at [the Scotts' home]. He spoke with the defendant, who was sitting in a patrol car, and the defendant reported that he and the victim had gotten into an argument over a text message from a male on the victim's phone, which turned into a physical altercation. The defendant did not believe that he had injured the victim. The defendant said that he gave the victim a pillow and blanket and made her sleep in the garage. He eventually brought her inside and placed her in front of the fireplace. The defendant stated that he tried to put her into their bed but was unable to do so. Sergeant Edwards said that he had the defendant transported to 201 Poplar Avenue after interviewing him and Dr. McGee.... Sergeant Edwards stated that he did not see any injuries on the defendant, and the defendant turned down medical treatment.

Michelle Ann Bowe, an emergency room nurse at Baptist Memorial Hospital-Memphis ("BMH-Memphis"), testified that the victim was in critical condition when she arrived at the emergency room. The victim had a faint pulse and minimal blood pressure, so the hospital staff gave her

medications to increase her blood pressure. Ms. Bowe testified that the victim had bruising around both of her eyes and multiple bruises in other locations....

Dr. Miguel Rodriguez, an emergency room physician at BMH-Memphis, testified that he treated the victim on November 23, 2006. He said that she was not breathing on her own and had bruising throughout her body. Dr. Rodriguez recalled a large bruise on her right flank that “looked like a foot mark or a boot mark.” He said that one of her ears was very swollen, and he described it as a cauliflower ear, typically seen on a person who has been struck multiple times in the ear. Dr. Rodriguez testified that intubation would not have caused the swelling of the victim’s lips. He said that based on his training in recognizing child abuse, the victim’s extensive bruising “raise[d] the suspicion that there [was] some pattern of abuse here, and she had clear evidence that [there] was potential abuse here.” Dr. Rodriguez testified that the victim’s fixed pupils indicated that she was either comatose or semi-comatose and that she might have had a brain injury. He said that a CAT scan indicated that the victim had severe swelling of the brain with a shifting of the brain.

On cross-examination, Dr. Rodriguez testified that his report from November 23, 2006, indicated that the CAT scan showed a “subdural hematoma along the right side with a mid-line shift and massive cerebral edema.”

On re-direct examination, Dr. Rodriguez testified that the victim’s blood tests revealed that she had “an extensive amount of muscle cell breakdown.” He said that her alcohol level was “132” at 5:00 p.m. He explained that normal on the scale would be less than ten while “[g]reater than 50 would be considered toxic, and greater than 400 [would be] fatal.” He testified that the victim’s blood glucose level was elevated, which he opined could have been caused by the body’s release of glucose during a stressful situation, undiagnosed diabetes, or having had a meal that was high in carbohydrates.

Dr. Michael Smith, a pulmonary and critical care physician at BMH-Memphis, testified that Dr. Rodriguez called him to help with the victim’s treatment. He recalled that his initial impression was that the victim “[l]ooked like someone that had been beaten to death.” He testified that the victim had bruising on “[b]oth legs, knees, stomach[,] her back, her face, her ear, her head, [and] both arms....” Dr. Smith said that [one] bruise

“appear[ed] to be a boot print.” Dr. Smith testified that lividity was setting in but would not have caused the victim’s bruising. He said that his report stated that the victim’s bruises “appear[ed] to be in different stages of age,” but he explained that the use of bruise coloration to age bruises was controversial and that bruise coloration varied from person to person. He further testified that in consultation with Dr. Rodriguez as well as a neurosurgeon, they reached the conclusion that the victim was brain dead and that massive head trauma caused the brain death. Dr. Smith testified that the victim’s alcohol level when at the hospital was 132, and he opined that the alcohol level did not cause her death.

Special Agent Linda Littlejohn, a forensic scientist at the Tennessee Bureau of Investigation Crime Laboratory’s micro-analysis section, testified that the Memphis Police Department sent her three pairs of shoes and a disk containing photographs of the victim’s injuries so that she could attempt to compare the shoe patterns to the injury patterns. Agent Littlejohn visually compared the shoe treads to the pattern of the injury and concluded that the three pairs of shoes were inconsistent with the injury. She said that the injury pattern could have been a shoe print but she could not state that conclusion with certainty because she did not have a matching shoe.

Dr. Jonathan Bradley Stern, an obstetrician and gynecologist, testified that the victim was his patient in 2006. He said that she was on a medication to increase her chances of ovulating. Dr. Stern saw the victim on November 14, 2006, and gave her a full physical at that time. He testified that she did not have any bruises.

Theresa Gayle Smith testified that she worked for Dr. Stern. She saw the victim on November 22, 2006, when the victim went to Dr. Stern’s office for a blood test. Ms. Smith testified that she did not notice any bruising on the victim at that time.

Lisa Harris, a realtor, testified that she assisted the defendant and the victim in the sale of their home ... and in the purchase of another home. She further testified that they signed a contract on the new home on November 14, 2006, and the contract became effective on November 17.

Memphis Police Officer Patricia Kay Turnmire, with the crime scene unit, responded to [the Scotts’ home] on November 23, 2006, along with Officer Allen Pounds. She testified that she photographed the garage,

where a Jeep and a Volkswagen were parked. Officer Turnmire said that the trunk of the Volkswagen contained clothes, some of which were on hangers. She testified that a pet cage was in the garage and that it appeared that someone had moved it because there was an indentation on the wall where the cage had been. Officer Turnmire photographed and took samples of stains on the garage floor that appeared to be body fluids or blood. She said that a broken vase and dried flower arrangement were in a garbage can in the garage.

Officer Turnmire further testified that she did a walkthrough of the house on November 23 and observed a purse, cell phone, the defendant's passport, and a wine bottle on the kitchen counter. She said that there was a vase and dried flower arrangement on the fireplace mantle that matched the broken vase found in the garage. Officer Turnmire observed a house shoe and a pillow next to the fireplace, as well as particles that appeared to be part of the broken vase. She testified that a printed e-mail addressed to the victim was on the desk in the home's office, and the [S]tate published the e-mail to the jury. Officer Turnmire said that there was some type of fluid on the floor of the master bedroom. She collected a towel from the bedroom floor that appeared to have the same type of fluid on it as the bedroom floor and the garage floor. The parties stipulated that the crime laboratory was unable to complete testing of the collected fluid samples by the time of trial.

Investigator Thomas Helldorfer testified that he was retired from the Memphis Police Department and had been the case coordinator for this investigation. Investigator Helldorfer recalled seeing the defendant's passport at [the Scotts' home], on the kitchen counter next to the refrigerator, on November 25, 2006. Someone from the defense counsel's office brought the defendant's passport to Investigator Helldorfer on January 29, 2007. He further recalled seeing a laptop at the house, which belonged to the school where the victim taught, but when he attempted to collect it at a later point in time, the laptop "turned up missing." Investigator Helldorfer testified that he collected a DNA sample from the defendant. He said that when he collected the sample, he told the defendant that they could not discuss the case but could talk about something else, such as the weather. The defendant asked what day it was, and upon being informed that it was Tuesday, he asked who had won the Monday Night Football game.

Memphis Police Sergeant William D. Merritt testified that on November 24, 2006, he photographed the defendant for purposes of documenting what, if any, injuries he had. Sergeant Merritt said that he did not see any injuries on the defendant.

Paul Dooley testified that he worked with the victim at Bolton High School. He described himself as her department chair, mentor, and friend. He said that her classroom was across the hall from his. Mr. Dooley recalled that the victim received a DUI conviction in August 2005, and she began to complain of verbal and emotional abuse at home after that. He said that on one occasion in November 2005, the victim called him at 6:00 a.m. to tell him that she would not make it to school because she and the defendant had been fighting. He stated that she sounded very upset. Mr. Dooley recalled another incident on July 29, 2006, when the victim called him at 3:15 a.m. and said that the defendant had hit her and strangled her. He described her as being panicky.

Elizabeth Scism testified that she and the victim became friends when the victim was her student teacher in 2003. Ms. Scism said that she and the victim remained friends after the victim's student teaching period was over, and they kept in touch through e-mails and instant messaging as well as seeing each other in person. Ms. Scism testified that the victim called her soon after Thanksgiving in 2005. She said that the victim called from Blair Brown's house and spoke very fast. Ms. Scism testified that the victim

told [her] she refused to go to Thanksgiving dinner; that she and [the defendant] were not getting along. She proceeded to tell [her] that he tried to choke her, and then she went on to talk about some sex life—that [the defendant] was into porn; that [the defendant] refused to kiss her; that she would ask him to kiss her, and he wouldn't do it.

Ms. Scism further testified that the victim called her in January 2006 and asked Ms. Scism to cover for her because she had checked into a hotel but had told the defendant that she was at Ms. Scism's house. Ms. Scism said that the victim told her in "numerous conversations" that the defendant called her "lots of bad names [and] insulted her in other ways." Ms. Scism stated that the victim told her that the defendant said she was not a good teacher and would not be a good mother. She said that the victim was

“depressed, hurt, [and] frustrated” when she related what the defendant said.

On cross-examination, Ms. Scism admitted that she had been concerned about the victim’s drinking because the victim had been in an accident and received a DUI conviction. Additionally, she agreed that the victim had told her that she did not go a day without getting drunk and never remembered going to bed. Ms. Scism further agreed that when the victim asked Ms. Scism to cover for her, the victim told her that she went to the hotel with “bad intentions” but “decided against it” when she got there.

Virginia Blair Brown testified that she met the defendant when she began working for his father’s company in March 2000. She said that she had a sexual relationship with the defendant “off and on” from December 2002 until the middle of 2005. Ms. Brown testified that she knew the victim through the defendant and became “good friends” with the victim. She stated that the defendant told the victim about his relationship with her after their relationship ended. Ms. Brown testified that the victim came to her house more than once because the victim had a fight with the defendant “and she wanted to get away.” On one occasion in November 2005, the victim went to Ms. Brown’s house and was lying on the bed in Ms. Brown’s bedroom when the defendant arrived. Ms. Brown testified that the defendant “had been drinking” and “was in a rage.” She said that he “punched her in the back about ... three times real [sic] fast.” She recalled that she got him away from the victim and made him leave her house, but when she asked the victim about calling the police, the victim told her not to call them.

Ms. Brown testified that she was with the victim when the victim met Mr. Lowe, and she knew that the victim had an affair with him. She further testified that in late October or early November 2005, on one occasion when the victim went to Ms. Brown’s house, the defendant called Ms. Brown and told her that he had learned about the affair when he saw text messages between the victim and Mr. Lowe on the victim’s cell phone. She recalled that the victim spoke about leaving the defendant in 2005 but did not recall the defendant ever saying that he considered leaving the victim.

Ms. Brown said that she last saw the victim on November 22, 2006, when they went together to see the house that the victim and the defendant had bought. She testified that after they saw the new house, they went to

the Scotts' current house, and she stayed with the victim until the defendant arrived, at which time she left.

On cross-examination, Ms. Brown testified that at some point during the victim's affair with Mr. Lowe, the victim and Mr. Lowe were together in Ms. Brown's guest bedroom, and Ms. Brown called the defendant and told him to come to her house because she wanted him to catch the victim. She explained that she felt that the victim was using her, and she was frustrated.

Ms. Brown testified that on another occasion, she and the victim were at a bar, and the victim began speaking with a man there. The victim did not want to leave with Ms. Brown and said she would get a ride from the man. Ms. Brown testified that she called the defendant and told him what the victim was doing, but she said she did not know whether the defendant found the victim with the man.

Ms. Brown recalled the victim being "in a rage," yelling at her on more than one occasion, but she did not remember the victim ever being "in a rage" directed at the defendant. She said that she was aware that the victim and defendant "were going to a counselor to try to work things out."

Ms. Brown testified that she and the victim went to a concert in the fall of 2005. They both were drinking, and the victim fell down. Ms. Brown said that she did not remember the victim hitting her head but she "remember[ed] a knot being caused from it."

Ms. Brown recalled an incident involving the victim's dog, when the defendant took the dog for a ride in his Jeep. She said the dog was hurt somehow, but she did not know exactly what happened. She met the victim and the defendant at the veterinarian's office, and the victim and defendant were yelling at each other.

Regarding November 22, 2006, Ms. Brown recalled that the victim had several glasses of wine at lunch and was in a good mood. She said that the victim was excited about the new house and the possibility of having a child with the defendant.

Lori Machen testified that she and the victim met when they were in fifth grade in Bossier City, Louisiana. They were best friends until the

victim died. She and the victim kept in touch by telephone and occasional visits. Ms. Machen knew the defendant through the victim. She testified that she began getting phone calls from the defendant in November 2005. He called once every week or every other week for a month and a half to two months. He told her that the victim “was drinking a lot; that she was falling down; getting hurt; waking up the next morning and not remembering it happening.” The defendant said that the victim was spending time with Ms. Brown and that Ms. Brown was a bad influence on her. In one conversation, the defendant told Ms. Machen “that he wanted to have children but that he did not want [the victim] to be the mother of his children.” He also “called to tell [her] about the affair [the victim] was having [and] that he thought that he deserved better than [the victim].”

Ms. Machen testified that during the time period that the defendant was calling her, she called the victim, but the victim would not return her calls. She said that she encouraged the defendant to see a counselor because she “was always going to [be] biased toward [the victim] because she was [her] best friend.” The last time that the defendant called her, he told her “that the counselor had advised him to leave [Ms. Machen] out of it,” and he would not call her again. After that phone call, she began communicating with the victim again.

Ms. Machen testified that she saw the victim in September 2006, when the victim stayed at her house in Louisiana and they attended their ten year high school reunion. The defendant did not go with the victim to her reunion. Ms. Machen said that when she tried to discuss the victim’s marriage, the victim told her that she was having a good time and did not want to talk about it. According to Ms. Machen, the defendant called the victim “constantly” while the victim was in Louisiana. Ms. Machen said that the last time she talked to the victim was in November 2006, but she could not recall the exact date. She had a missed call from the victim on her cell phone at either 10:42 or 10:43 on November 22, 2006, but the victim did not leave a message.

Michael Lowe testified that he “met [the victim] out one night” in the fall of 2005. He said that they stopped having an intimate relationship in the spring or summer of 2006 but remained friends until the victim died. He said that they communicated mostly through text messages. Mr. Lowe did not recall sending her any text messages on November 22 or 23, 2006, nor did he remember receiving any text messages from her on those days.

On cross-examination, Mr. Lowe testified that he and a friend were at the Fox and Hound, watching football, when the victim and Ms. Brown sent drinks over to them. He and his friend joined them where they were sitting, and later that night he went to the victim's house with her. Mr. Lowe recalled seeing the defendant at Ms. Brown's house on the only occasion that he and the victim had sexual relations at Ms. Brown's house. He said that he did not remember the victim sending him pictures of herself. He agreed that their text message communications were sometimes sexual in nature.

... Mr. Lowe testified that he would have remembered it if the victim had sent him pictures of herself. He said that they had sex on four occasions, the last time being at Ms. Brown's house the day that he saw the defendant there.

Megan Tate testified that she had been the victim's student and teacher's assistant. She said that the victim was friendly and gave out her cell phone number to students. Ms. Tate said that on Thanksgiving Day, 2006, she sent a mass text message saying "Happy Thanksgiving" to two groups, one at midnight and one at 6:00 a.m. She said that the victim was in one of those two groups, but she could not recall which one. Ms. Tate stated that the victim did not respond. She said that on November 23, 2006, after she heard a rumor about the victim's death, she called the victim and left a voice mail.

Rachel Songstad testified that she was a divorce lawyer. She said that she met the victim in August 2005 after a mutual friend asked Ms. Songstad to refer the victim to a criminal lawyer who could represent her in her DUI case. She saw the victim at Bolton High School in September 2005, and she told the victim that she was a divorce attorney. The victim responded by asking Ms. Songstad for advice about a friend who was being abused.

Ms. Songstad again saw the victim in October 2005, at which time she observed a knot on the right side of the victim's head, and the victim again asked about her friend's situation. Ms. Songstad testified that she asked the victim whether she, and not a friend, was the one being abused, and she told the victim that if she hired Ms. Songstad as her attorney, that attorney-client privilege would protect their conversations. The victim said that she could not afford to hire her, so Ms. Songstad told her that a dollar would be enough consideration. The victim gave her four quarters. Ms.

Songstad testified that she considered herself retained at that point. She said that she asked the victim whether her husband had given her the knot on her head, and the victim responded affirmatively. Ms. Songstad advised her to leave the defendant and gave her several options of what she could do. The victim replied that “[the defendant] told [her] that if [she] ever tried to leave him, he would kill [her].” The victim told Ms. Songstad that the defendant had been hitting her since college.

Ms. Songstad testified that she saw the victim with a black eye in October 2005, and the victim said that the defendant had hit her in the eye. She met with the victim in April 2006 at Bolton High School, and the victim told her that the defendant had “drug her all through the house [and] she said she had marks all over her back.” Ms. Songstad explained that the victim never called her from her cell phone because the defendant checked her phone for numbers he did not know. Ms. Songstad testified that in July 2006, the victim called her from a phone at a tanning salon, and Ms. Songstad met her in the parking lot of the tanning salon. The victim told her that the defendant “had knocked her down; and when he kicked her, she fell into a piece of furniture and busted her chin open.” Ms. Songstad said that the victim had a bandage on her chin because she had gone to a minor emergency center for treatment.

In September 2006, the victim called Ms. Songstad after she returned from her high school reunion. Ms. Songstad met with the victim at Bolton High School, and the victim told her that when she returned home, she noticed pictures turned around and things out of place. The victim said that she confronted the defendant about that, and he admitted that a prostitute had been in the house while she was gone. The victim further told her that the defendant went through her luggage and told her that she had dressed “like a whore” while she was gone. The victim told Ms. Songstad that she replied “to the effect of, ‘Well, if I dressed like a whore, maybe you would be with me instead of having prostitutes in the house.’” The victim said that the defendant knocked her down and put his foot on her chest, “kind of on her throat,” and she told him to stop because she could not breathe. She said he told her he did not want her to breathe.

Ms. Songstad testified that she and the victim discussed divorce on several occasions. She said that the victim called her on November 22, 2006, and told her that she had her filing fee money ready and wanted to file for divorce. Ms. Songstad told her that she could not meet with her right away because she was in Nashville. She advised the victim to “[j]ust

get out of there,” and she would talk to her Sunday when she returned to Memphis. The victim replied that she would get out, but “she just had to get some things from the house.” The victim asked Ms. Songstad whether she should tell the defendant that she was going to file for divorce, but Ms. Songstad advised her not to tell. Ms. Songstad testified that the victim responded that “she at least owed [the defendant] and his family an explanation as to why she was leaving.” She said that she found out that the victim was dead on November 23.

Erica Dorris, a sales support manager at AT&T, testified concerning cell phone records for an account associated with a number ending in 1009. The records listed the defendant as the billing party and user. She testified that the account was “unsuspended” on October 6, 2005, but she said that the records did not indicate when or why the defendant suspended the account. Ms. Dorris testified that the records showed two phone calls from the phone to the phone’s voice mail number on November 23, 2006, one at 10:51 a.m. and the second at 12:09 p.m.

On cross-examination, Ms. Dorris testified that the contact e-mail for the account was the victim’s e-mail address. She testified that the report indicated that from October 29, 2006, until November 22, 2006, almost all of the text messages were either sent to or received from Mr. Lowe. She agreed that of the twenty-eight multi-media messages sent in the same time frame, all but two were sent to Mr. Lowe. On November 22, 2006, five multimedia messages were sent to Mr. Lowe.

On re-direct examination, Ms. Dorris said that AT & T was unable to determine the contents of multi-media messages.

Shelby County Sheriff’s Office Deputy Steve Bierbrodt testified as an expert in the forensic analysis of cell phones. In the victim’s phone, he found five pictures of female genitalia that had been sent via multi-media messaging to Mr. Lowe’s number. Deputy Bierbrodt testified that the pictures could have been taken by the phone or downloaded from another source. He further testified that he was unable to determine when the messages were sent.

On cross-examination, Deputy Bierbrodt agreed that the sex toy pictured in some of the pictures on the victim's phone looked the same as a sex toy found in a drawer in the Scotts’ bedroom.

Dr. Lisa Funte, assistant medical examiner in Shelby County, testified that the victim died from blunt-force injuries, including

Bilateral subdural hemorrhage.

Subarachnoid hemorrhage.

Intraparenchymal hemorrhage of the pons.

[Uncal] herniation in the right temporal lobe.

Subgaleal hemorrhage[.]

[H]emorrhage in the left temporalis muscle.

Abrasions and contusions of the face and head.

Lacerations of the mucosal surface of the lower lip.

Abrasions and contusions of the torso and extremities.

Dr. Funte testified that the victim suffered multiple blows to the head, but she was unable to determine the exact number of blows. She explained that a blow or blows to the head shifted the brain inside the intracranial cavity to the point that the brain broke the vessels and veins leading into and out of the skull, and the veins and vessels bled into the brain, causing a subdural hematoma. The subdural hematoma expanded as the amount of blood increased, and it pushed down on the brain, compressing the vessels at the base of the brain. That compression prevented blood and the oxygen carried by blood from getting to the brain, causing death of the brain tissue. Dr. Funte testified that as the brainstem died, it disrupted the activity of the respiratory and cardiac centers, ultimately causing death.

Dr. Funte said that in the course of the autopsy, she did not “see any indication of any disease or disease process that would have led to [the victim’s] death.” She testified that either a blow or a fall could have caused the laceration on the victim’s lip, and that either injury or a secondary cause, such as the fluids given to her by the hospital staff, might have caused the swelling of her lip. Dr. Funte stated that the victim had contusions on her left shoulder, left hand, torso, lower left leg, left knee,

right elbow, right arm, right thigh, right leg, right foot, and flank. She opined that medical intervention caused the rectangular bruising on the victim's torso. Dr. Funte stated that some of the victim's contusions were consistent with falling, but "[t]he overall pattern and location of those contusions [were] inconsistent with falling; [they were] consistent with an assault." She testified that she ruled the victim's death a homicide.

Dr. Funte said that she sent vitreous fluid from the victim's eye to a laboratory for screening and learned that the alcohol level in the vitreous fluid was 0.113 grams per deciliter. She explained that the vitreous alcohol level was reflective of blood alcohol level but not exactly the same. Dr. Funte opined that the vitreous alcohol level could have caused impairment, including falling. She further stated that the alcohol level does not remain stable after death.

On cross-examination, Dr. Funte said that she saw three individual impacts in one image previously shown to the jury. She further said that, while the individual injuries were consistent with falling, "[i]t [was] unlikely that a person [would] get up and fall down as many times in as many directions as the overall picture of these injuries present[ed]." She agreed that the injury to the lip might have been an injury secondary to intubation.

Defendant's Proof. The defendant tendered, and the court qualified, Dr. O'Brian Cleary Smith as an expert in anatomic pathology, forensic pathology, clinical pathology, and advanced trauma life support. Dr. Smith testified that after reviewing the victim's medical records and autopsy report, he found "that there [was] a readily scientifically defensible alternative explanation to [the victim's] death," namely, alcoholic ketoacidosis. He opined that the cause of the victim's death was blunt-force trauma that occurred as a result of falling or having seizures caused by alcoholic ketoacidosis. Dr. Smith explained that alcoholic ketoacidosis was "a derangement of the body's metabolism based upon the abuse of alcohol" and affected the functions of the liver, pancreas, kidney, and other organs. He opined that alcoholic ketoacidosis explained the levels of potassium, glucose, and ketone found in the victim's blood, as well as the breaking down of her muscles. Dr. Smith said that alcoholic ketoacidosis and diabetic ketoacidosis were differentiated by the type of ketones produced by the liver, but common laboratory methods did not measure the type of ketone. He testified that the victim's blood clotting studies and the sub-therapeutic level of acetaminophen in her blood indicated to him that

she “ha[d] a propensity to bleed excessively.” Dr. Smith explained that even a small amount of acetaminophen would have been problematic for someone with a pre-existing liver disease.

Dr. Smith testified that he reviewed the victim’s CT scan from the hospital and compared it to the autopsy report. He said that the hospital CT scan indicated one subdural hematoma on the right side of the brain, and the autopsy report indicated both a hematoma on the right side and a hematoma of equal size on the left side of the victim’s brain. Dr. Smith opined that an artery that ruptured under pressure on the left side might have caused the hematoma on that side.

Dr. Smith opined that the victim’s blood alcohol level between 12:30 a.m. and 1:00 a.m. on November 23, 2006, would have been 0.349, based upon her blood alcohol level at the hospital and the average rate of alcohol metabolism. Dr. Smith further opined that the bruises on the victim’s body, which he noted were mostly on “bony prominences,” generally indicated a pattern of falling rather than assault. Dr. Smith said that he could not determine from photographs exactly what caused the injury pattern on the right side of the victim’s head, but he opined that the dog kennel in the garage could have caused the pattern of intersecting lines when the victim was either pushed into the kennel or fell onto the kennel. Dr. Smith testified that the fact that the defendant did not have any injuries was significant because he “would have expected some bruises on the [defendant's] knuckles[,] ... arm[,] or ... elbow.” Dr. Smith testified that sectioning the victim’s bruises, which Dr. Funte did not do, would have helped determine the ages of the bruises, which in turn would have helped determine whether the victim suffered her injuries due to alcoholic ketoacidosis-induced seizures over a period of time or from a beating at one time. He further testified that he would have tested the subdural hematomas to determine the timeline of when they occurred. Dr. Smith said that the symptoms of having a subdural hematoma varied depending on how fast the hematoma accumulated: a person might faint, stumble, or have seizures. He testified that Dr. Funte assessed the number of blows by “looking at the bleeding spots on the skull,” but he opined that a better method would have been to look at the victim’s skin because the skin would have been “the best repository of any sort of transfer of injury or other materials there that may suggest the instrumentality” used. Regarding the bruise that previous witnesses believed was a shoe print, Dr. Smith agreed that the bruise was a pattern contusion, but because the victim was clothed, he opined that her clothing might have caused the pattern. Dr.

Smith said that he would have taken sections of all of the victim's organs to look for damage that would only be apparent under a microscope. He concluded that the investigation was not complete enough for him to have ruled the victim's death a homicide.

State's Rebuttal. Dr. Karen Elizabeth Chancellor, the Chief Medical Examiner for Shelby County, testified as an expert in clinical pathology, anatomic pathology, forensic pathology, and neuropathology. Dr. Chancellor testified that after reviewing the victim's autopsy report, autopsy photographs, and medical records, she concurred with Dr. Funte's finding as to cause of death—blunt-force trauma to the head. Dr. Chancellor said that the “chain of events [that] led to [the victim's] death ... started with blunt-force injuries to the head that led to the subdural hematoma, that led to the brain swelling and herniation, which led to the brainstem hemorrhage and caused her death.” She opined that the laboratory results from the hospital were “all consistent with someone who has suffered a severe traumatic injury.” Dr. Chancellor testified that she did not see any laboratory values that indicated that alcoholic ketoacidosis caused the victim's death. She said that hospital CT scans have proven to be inaccurate regarding the presence or absence of subdural hematomas, and autopsies were the most accurate method to determine whether a person had a subdural hematoma. Dr. Chancellor opined that estimating a blood alcohol level prior to time of death would be difficult because the fluids administered at the hospital would have skewed the blood alcohol level taken at the hospital and because people metabolize alcohol at different rates. Dr. Chancellor stated that sectioning the victim's bruises to determine age would have been unnecessary because the autopsy clearly revealed the cause of death. She further stated that sectioning the victim's organs would only have been necessary if the medical examiner could not otherwise determine the cause of death.

*See Jeffrey Scott, 2011 WL 2420384, at *1-13 (footnote omitted).*

Post-Conviction Proceedings

The Petitioner, through counsel, filed a petition and an amended petition for post-conviction relief, raising multiple issues of ineffective assistance of counsel. During the hearing, trial counsel testified that the defense at trial was that the Petitioner did not possess the culpable mental intent to be guilty of murder. Trial counsel described the defense strategy as “[v]oluntary manslaughter with a side of ‘I didn't intend to commit

homicide at all.” He noted that the Petitioner’s anger regarding text messages that the victim had sent to others factored into the defense. He explained that he argued that the Petitioner did not intend to kill the victim and that the victim’s death was “fueled in jealousy causing [the Petitioner] to act in an irrational manner.”

Trial counsel met with the Petitioner, obtained discovery from the State, and retained an investigator. Trial counsel reviewed the files of Dr. Jane Abraham, who had counseled the Scotts at one point, and met with Dr. Abraham at her office. Dr. Abraham told trial counsel that she believed that the Scotts were alcoholics, that alcohol was causing problems in their marriage, and that they should not have quit counseling.

Trial counsel believed that the Scotts had issues with alcohol and were drinking heavily and that their behavior while drinking alcohol was an issue. Trial counsel acknowledged having information that the Petitioner was an alcoholic and stated that the Petitioner was unable to recall the events of the night prior to the victim’s death due to his alcohol usage. Trial counsel recalled that Dr. McGee asked the Petitioner if he had been drinking that night, that Sergeant Edwards testified that he smelled alcohol on the Petitioner’s breath, and that the Petitioner told Mr. Wakefield that he had been drinking beer, wine, and liquor on the night prior to the victim’s death. Trial counsel believed that he investigated the Petitioner’s alcohol use by discussing it with the Petitioner and reviewing statements of witnesses taken from trial counsel’s investigator. Trial counsel did not pursue the issue at trial.

Trial counsel stated that he did not consult an expert regarding alcoholism, its effect on the Petitioner’s ability to form the requisite mens rea, or the possibility that the Petitioner experienced an alcohol blackout on the night of the victim’s death. Trial counsel did not recall determining whether he did or did not need an expert in alcoholism or addressing the issue with his legal team, which included the investigator, co-counsel, and a paralegal. Trial counsel agreed that “in hindsight,” the issue of whether the Petitioner was able to form the applicable mens rea due to intoxication would have been an additional ground to investigate and that trial counsel would have utilized an expert if the expert opined that the Petitioner was unable to form the applicable mens rea due to intoxication. Trial counsel acknowledged that such evidence could have enabled the jury to find a lesser-included offense such as voluntary manslaughter, reckless homicide, or negligent homicide. He stated that the presentation of expert testimony that the Petitioner experienced an alcoholic blackout was “something that in hindsight I wish I had done.” He noted that the State would have presented evidence that the Petitioner beat the victim regardless of the evidence presented by the defense at trial.

Trial counsel presented the testimony of Dr. O.C. Smith to explain the victim’s injuries visible in the autopsy photographs could have been sustained by means other

than the Petitioner striking the victim. Trial counsel agreed that Dr. O.C. Smith's testimony was supposed to be an alternative explanation for the cause of the victim's death and that Dr. O.C. Smith was to explain that the victim's usage of ibuprofen would cause her to bruise more easily due to the alcohol in her system. Trial counsel stated that prior to trial, he interviewed the State's experts and Dr. O.C. Smith and that he relied upon Dr. O.C. Smith to explain the possible causes of death to him. Trial counsel recalled that Dr. O.C. Smith's testimony at trial was different from what trial counsel anticipated it would be based on their pretrial discussions and that Dr. O.C. Smith's testimony did not come across well to the jury.

Trial counsel recalled that the State presented evidence at trial that the Petitioner beat the victim, which caused blunt force trauma that led to her death, and that the Petitioner then put her in the garage. Trial counsel also recalled that the State's theory was that the Petitioner left the victim in the garage to die because he was insensitive and did not care about the victim. Trial counsel was concerned that the jury was left with the impression that the Petitioner beat his wife and threw her out in the garage and acknowledged that "in hindsight," he may not have countered the State's theory as he should have. Trial counsel acknowledged that an alcoholic blackout could have explained the Petitioner's actions to the jury. Trial counsel believed evidence that the Petitioner lacked the requisite mens rea or was in an alcoholic blackout would have been compatible with the defense presented at trial.

Trial counsel did not recall whether he asked Dr. O.C. Smith if the victim's death could have been caused by hypothermia. Trial counsel did not know whether death by hypothermia would have been a beneficial defense, explaining that "if you are the person who sets in motion the events that causes a person to be exposed to hypothermia and that's the cause of death, that doesn't feel right as a defense to me." He agreed that a defense that the victim died from hypothermia and a fall in the garage would have left a better impression on the jury than evidence that the Petitioner beat the victim to death. He also agreed that evidence of hypothermia as the cause of the victim's death would have supported his argument to the jury that the Petitioner did not intend to cause the victim's death.

While trial counsel did not recall his specific conversation with the Petitioner regarding the issue of whether the Petitioner should testify at trial, trial counsel stated that his general practice was to discuss the topic with his clients. Trial counsel stated that he always gives his opinion to his clients regarding whether they should testify but that he leaves the decision up to them. He was aware that the Petitioner did not have a felony record and acknowledged that the Petitioner's prior convictions for driving under the influence and minor in possession of alcohol would have supported the Petitioner's claim of alcoholism. Trial counsel stated that he would have addressed the Petitioner's prior

history of alcohol use had the Petitioner testified at trial. Trial counsel testified that “[i]n hindsight,” he probably would have “done things differently based on the result.” He did not recall that he requested a jury instruction on intoxication and that the trial court denied the request upon finding that intoxication was not sufficiently raised in the proof presented at trial. Trial counsel did not recall presenting evidence of the Petitioner’s alcoholism or his experiencing an alcoholic blackout during the sentencing hearing to support the catch-all mitigating factor or a strategic reason for failing to do so.

On cross-examination, trial counsel testified that he had practiced law for forty years and had tried thirty-six to fifty murder trials. He retained an investigator, who provided him with memoranda and reports of the investigation. He met with the Petitioner, who was released on bond pending trial, on several occasions and reviewed the discovery with him. Trial counsel utilized co-counsel and a paralegal and decided on a defense theory to pursue based on his conversations with his defense team and the Petitioner and his review of the discovery and the materials from his investigator. He confirmed that the defense strategy was that the text messages that the victim sent to another man, the alcohol use, and Dr. O.C. Smith’s explanation of how the victim sustained the injuries led to something less than an intentional or knowing killing. Trial counsel recalled that after numerous jury-out hearings, the trial court allowed the State to present evidence regarding the Petitioner’s prior physical altercations with the victim and that the trial court’s decision was upheld on direct appeal. He also recalled that he emphasized the use of alcohol during the trial.

Trial counsel testified that Dr. O.C. Smith was the former medical examiner for Shelby County during which he provided an opinion regarding the cause of death in hundreds of homicide cases. After Dr. O.C. Smith left the medical examiner’s office, trial counsel utilized him as a defense expert. Trial counsel interviewed Dr. O.C. Smith a final time during a lunch break prior to Dr. O.C. Smith’s testimony at trial. Trial counsel stated that when Dr. O.C. Smith testified at trial, his answers to questions were not consistent with the answers that trial counsel anticipated based on their pretrial meetings. Trial counsel did not recall the issue of hypothermia being raised during his pretrial conversations with Dr. O.C. Smith or the State’s expert witnesses.

Trial counsel testified that “[i]n hindsight,” he may have been deficient in not consulting with an expert on alcoholism. He acknowledged that an expert’s testimony would have been based on a history given by the Petitioner and any supporting information such as his criminal history, his family history, and information provided by family members and friends. Trial counsel did not agree that any testimony from an expert regarding the Petitioner’s statement during the evaluation would be self-serving hearsay and inadmissible unless the Petitioner testified first.

On redirect examination, trial counsel acknowledged that proof of alcoholism would have explained some of the prior bad acts and would have assisted the jury in understanding the Petitioner's actions on the night of the victim's death.

In response to questioning by the post-conviction court, trial counsel testified that he was disappointed in Dr. O.C. Smith's testimony at trial and that his testimony was not consistent with what he had told trial counsel during their pretrial meetings, including a meeting less than one hour before Dr. O.C. Smith testified. Trial counsel recalled that he "did a tightrope type of act" in arguing that the victim's death was not "a knowing killing" and that even if it was, the circumstances were such that it would have led a reasonable person to act in an irrational manner. Trial counsel stated that he could see where he "would have done things differently" if he had an expert on alcoholism. He did not believe that the Petitioner would have had to testify in order to present an expert's testimony regarding the Petitioner's ability to form the requisite mens rea due to intoxication, but trial counsel acknowledged that the trial court likely would have prohibited the expert's testimony unless the Petitioner testified first. Trial counsel stated that he would have advised the Petitioner to testify if the trial court had made such a ruling.

The Petitioner presented the testimony of Dr. Murray Smith, a physician who the post-conviction court accepted as an expert in addiction medicine. In September 2012, Dr. Murray Smith interviewed the Petitioner at the prison and reviewed the victim's autopsy report, the amended report, two toxicology reports, the police reports, the crime scene reports, statements of witnesses, the victim's medical records, and the trial testimony of the forensic pathologist and Dr. O.C. Smith.

Dr. Murray Smith concluded that the Petitioner met the diagnosis criteria for alcoholism. The Petitioner had the genetic background in that his grandfather, uncle, and cousin were alcoholics, and some of his relatives died from alcoholism. Dr. Murray Smith stated that the Petitioner was preoccupied with obtaining and using alcohol and was unable to control his use of it. He also stated that while the Petitioner was under the care of Dr. Jane Abraham in the fall of 2005 and the spring of 2006, he attempted to stop using alcohol but was unable to do so. Dr. Murray Smith said the Petitioner continued to drink alcohol even though it caused problems in his life, including alcoholic blackouts and the loss of control of his temper.

Dr. Murray Smith also concluded that the victim met the diagnostic criteria for alcoholism based on her personal history as relayed to Dr. Abraham, the statements of witnesses, and her commitment to stop drinking but her inability to do so on multiple occasions while under Dr. Abraham's care. Dr. Murray Smith stated that the records revealed deterioration in the victim's personal appearance, her ability to arrive at work on

time, her attendance at work, and her relationships with others. He noted that the victim had multiple falls, including a severe fall around June 2006 during which the victim hit the edge of a piece of furniture and resulted in a laceration to her chin.

Dr. Murray Smith discussed the events that led to the victim's death with the Petitioner and stated that the Petitioner was unable to provide all of the details because he experienced an alcoholic blackout that night. Dr. Murray Smith said the Petitioner had a "general perception" of what occurred based on his prior experiences with the victim. Dr. Murray Smith developed a general understanding of the events based upon the witnesses' testimony at trial.

Dr. Murray Smith testified regarding his understanding of the events prior to the victim's death. He stated that the Petitioner met the victim after work, that they viewed a house that they had considered purchasing, and that they went to a bar and had several alcoholic drinks. They rented a movie and had dinner during which they drank wine and vodka, and they continued to drink after dinner. Dr. Murray Smith understood that the Scotts drank about the same amount of alcohol on a "continuing basis." He stated that both the Petitioner and the victim appeared to have been intoxicated and that the toxicology report confirmed the victim's intoxication.

Dr. Murray Smith testified that according to the Petitioner, after the Petitioner and the victim became intoxicated and were involved in altercations during which they hit each other, the victim commonly left on her own or had someone pick her up and that she stayed with someone or at a motel to allow things to cool off before rejoining the Petitioner. Dr. Murray Smith understood from the Petitioner that the victim usually left through the garage. The Petitioner told Dr. Murray Smith that the victim exited the home and went into the garage at approximately 1:00 a.m. on the night prior to her death. The Petitioner stated that at approximately 8:00 or 9:00 a.m., he entered the garage and was surprised to find the victim there. He reported that the victim was cold, and Dr. Murray Smith stated that according to the weather report for the night of November 22, 2006, the outside temperature was thirty-one degrees. The Petitioner stated that he believed the victim was hungover and brought her into the living room and put her in front of the fireplace to warm her. He stated that at about 10:30 a.m., he decided to place the victim in their bed to allow her to continue to sleep off her hangover but that he was unable to lift her onto the bed once he got her to the bedroom. The Petitioner reported that he expected the victim to begin arousing but that she continued to be sedated and seemed to have trouble breathing with some gurgling. He stated that at approximately 3:00 p.m., he called Dr. McGee and asked him to check on the victim.

Dr. Murray Smith testified that the amount of alcohol that the Petitioner drank impacted his ability to perceive the severity of the events and his judgment regarding

what actions to take. Dr. Murray Smith stated that the Petitioner was unable to recall the details of that night because he had “alcoholic blackouts” or alcohol-induced amnesia. He also stated that the Petitioner would not have been able to perceive that the victim’s going into the garage would have been reasonably certain to cause her death and that the Petitioner believed that the victim would have taken actions similar to those she had taken on prior occasions. Dr. Murray Smith agreed that the victim’s death was caused by blunt force trauma.

Dr. Murray Smith estimated that the victim’s blood alcohol level at 1:00 a.m. was between 0.35 and 0.4, which is at almost a fatal level. He stated that the amount of alcohol in the victim’s system would have affected her ability to reasonably understand what was happening around her and her ability to successfully maintain ambulation. He said the victim would have been stumbling, dizzy, and nauseated and that the victim’s “understanding of what was happening, her ability to discern what was the next right thing to do would have been significantly impaired.” He testified that the cold temperature would have made the victim uncomfortable and that she would not have known how to handle the discomfort. He noted that according to the crime scene investigator, an animal carrier was displaced as if it had been knocked or kicked about. He also noted that three spots of fluid were on the garage floor and that he did not know whether the fluid was mucus or urine because he could not find where any analysis was performed. He stated that, nevertheless, the spots of fluid were consistent with the victim stumbling around while severely intoxicated.

Dr. Murray Smith testified that the victim’s severe intoxication coupled with the cold temperature increased the changes of hypothermia. The Petitioner told him that the victim seemed very cold, and the Petitioner believed that the cold temperature might have been as much of a problem as the hangover. Dr. Murray Smith stated that the victim had an increased chance of bruising or bleeding from falls or anything else that would cause an injury.

On cross-examination, Dr. Murray Smith testified that while he reviewed the transcript of the testimony of Dr. O.C. Smith and Dr. Funte, he did not review the transcript of the testimony of Dr. Chancellor. Dr. Murray Smith acknowledged that the majority of his testimony about the events that occurred between the Petitioner and the victim was based on the Petitioner’s statements to him during the interview.

Dr. Murray Smith testified that the administration of fluids to the victim at the hospital would have only slightly lowered her alcohol level. He stated that as a result, the victim’s blood alcohol level would have been slightly higher at 1:00 a.m. and that her estimated blood alcohol level of 0.35 to 0.40 possibly was an underestimation of the victim’s severe intoxication.

Dr. Murray Smith stated that he was unable to provide “exact numbers” as to the Petitioner’s degree of intoxication because the Petitioner could only tell him that he and the victim drank alcohol steadily from 5:00 p.m. to 1:00 a.m. Dr. Murray Smith stated that the Petitioner could only say that “their pattern of drinking was to drink on a continuous basis.” He based the Petitioner’s degree of intoxication on the victim’s degree of intoxication because they drank “at approximately the same level of intake.”

The Petitioner told Dr. Murray Smith that he and the victim argued and that the argument led to a physical altercation during which he and the victim hit each other with their fists. Dr. Murray Smith stated that the Scotts had engaged in this pattern of physical altercations during which they struck each other with fists for several years. The Petitioner did not tell Dr. Murray Smith what led to the physical altercation or the number of times that he struck the victim. Dr. Murray Smith testified that while the Petitioner “had some snippets of memory,” it was not possible for him to recall the number of times and location in which they hit each other. Dr. Murray Smith stated that while the Petitioner was able to provide some general details, “he had the type of alcoholic blackout that is incomplete, with the little snippets like little tiny parts of a movie that you’re just seeing a few scenes out but you’re not seeing in detail the whole picture.” Dr. Murray Smith also stated that the Petitioner’s statements were consistent with his experience in interviewing someone who “was saying what they knew and nothing else.” He concluded that the Petitioner was severely intoxicated, that he was in a partial amnesic state, and that his judgment, his perceptions, and his ability to discern the situation were impaired.

Dr. Murray Smith testified that the statements of witnesses regarding prior physical altercations between the Scotts confirmed that physical violence occurred when the Scotts were drinking alcohol. He stated that the altercations did not occur when the Scotts were not drinking alcohol. Dr. Murray Smith stated that while the Petitioner did not specifically tell him that he experienced similar blackouts during the prior physical altercations, “it would be expected.” He did not see anything in the records indicating that the Petitioner sustained bruising or any other injury on the night before the victim’s death. He explained that bruising has a variable effect that was dependent upon the individual, the person’s bone marrow, and the person’s gender and that a female is generally more likely to bruise. He stated that it would be “impossible” to determine whether the Petitioner could have been susceptible to bruising just like the victim on the night prior to the victim’s death. He noted that the Petitioner was male and did not have a history of bruising.

Dr. Murray Smith believed some of the victim’s bruising was caused by her falling and that the victim could have received bruises from being hit, brushing up against objects, and the attempted lifting by the Petitioner onto the bed. Dr. Murray Smith

acknowledged that he relied upon the Petitioner's account in determining how the victim sustained the bruises and the doctor's "general impression there are multiple causes for why somebody might be bruised other than [by] just fists, especially when they are severely intoxicated."

On redirect examination, Dr. Murray Smith testified that he reviewed the records of Ms. Jane Abraham, a psychological counselor from whom the Petitioner and the victim received marriage counseling from November 2005 through the spring of 2006. The records included a document completed by the victim regarding her family history, her history of abuse, her sexual history, and her physical history. Dr. Murray Smith stated that Ms. Abraham's records indicated that the Petitioner and the victim shared one and one-half gallons of vodka each week and that physical altercations occurred when they drank alcohol together. He noted that on multiple occasions, the Petitioner and the victim assured Ms. Abraham that they would refrain from drinking alcohol and that when they returned to a counseling session, they reported that they drank alcohol and fought.

Dr. Murray Smith testified that witnesses reported that in the beginning of 2006, they began noticing changes in the victim in that her appearance was disheveled, she was tardy, and she frequently showed signs of bruising. He stated that such changes were typical of a chronic alcohol user. He acknowledged on recross-examination that such factors also could relate to physical abuse.

In response to questioning by the post-conviction court, Dr. Murray Smith testified that the Petitioner began experiencing alcohol-induced blackouts at the age of eighteen and that he was arrested for driving under the influence at the age of twenty. He was aware that the Petitioner never tested positive for drugs or alcohol while released on bond pending trial. He explained an alcoholic finds it easier to refrain from alcohol than to limit his or her alcohol intake. Dr. Murray Smith was aware that the Petitioner was convicted of second degree murder. He stated that he did not conclude that the Petitioner suffered from a mental disease or defect but that his conclusion was that the Petitioner suffered from alcoholism, which is a medical illness.

Dr. Jane Turner, a pathologist, was accepted by the post-conviction court as an expert in anatomic, clinical, and forensic pathology. She reviewed the autopsy report, the amended autopsy report, photographs from the crime scene and the autopsy, police reports, statements of witnesses, and the victim's medical records. She testified that the victim was a chronic alcoholic, had a prior conviction for driving under the influence, and had been treated for chronic alcoholism. Witnesses reported that the victim had been drinking excessively. Dr. Turner noted that the victim had missed a number of days of work due to unaccounted illnesses and was intoxicated prior to her death as evidenced by her vitreous fluid concentration and her medical records. Dr. Turner stated that the

victim had a number of cutaneous injuries that were consistent with someone who was a chronic alcoholic and was acutely inebriated. She also stated that the victim had numerous bruises primarily on boney surfaces where she appeared to have knocked into hard objects.

Dr. Turner testified that the crime scene was void of any blood and that she would have expected to see blood at a crime scene involving an assault. She noted that the body fluids described in a police report were confirmed to be vomit and that the victim was in a state of “poor hygiene” with her hair matted and vomit on her clothing. She also noted that chronic alcoholics tend to ignore their hygiene.

Dr. Turner was aware that the victim was placed in the garage to remain for the night, that the victim had been lying in the garage for a period of time, that a dog kennel in the garage had been displaced, and that there were marks on the wall suggesting that the kennel had been knocked up against the wall. Dr. Turner concluded that the fact that the victim had “a bruise on the back of her head, as well as bruising on the front of her brain, suggests that she fell probably in the garage, knocking the dog kennel out of its place and marking the wall with it.” She believed the victim’s injuries were consistent with falling rather than being beaten to death. She stated that the victim’s internal head injuries indicated that she had blunt head trauma. Dr. Turner testified, however, that the pattern of the head injury suggested that the victim “fell backward hitting the back of her head and [that] her brain was pushed forward causing bruising on the surface of her brain.” She concluded that the cause of the victim’s death was “blunt force injury of the head in the setting of acute ethanol intoxication in someone who had chronic alcoholism” and that the manner of death was an accident.

Dr. Turner testified that someone of the victim’s age who was not a chronic alcoholic and was not acutely intoxicated likely would not have died from a fall from a standing position and would not have sustained the same degree of injuries. Dr. Turner explained that acute alcohol intoxication interferes with the neurochemical processes of the brain and that, therefore, an intoxicated person who sustains a blow to the head is more seriously injured than a person who sustains a similar head injury while sober.

Dr. Turner stated that because the victim was inebriated and was a chronic alcoholic with impaired liver function, her bruising appeared worse than it would have on an individual who did not have liver disease from chronic alcoholism. Dr. Turner also stated that internal bleeding is more significant in chronic alcoholics because of the blood’s decreased ability to clot. She testified that the victim’s “raccoon eyes” were not necessarily caused by a strike to her eyes but could have been caused by the injuries to her scalp, which caused the blood to seep down and pool around her eyes. Dr. Turner said she would not be surprised if the victim’s raccoon eyes were caused by her bumping

into an object while intoxicated. She noted that the bruises on the victim's chest could have occurred during CPR and that the superficial tears in her lower lip were consistent with manipulation of the mouth during CPR and intubation of tubes.

On cross-examination, Dr. Turner testified that Dr. Funte's testimony that the victim had bruises on her left shoulder, left hand, torso, lower left leg, left knee, right elbow, right arm, right thigh, right leg, right foot, and flank were consistent with her findings. Dr. Turner did not recognize an injury in the pattern of a boot print or a shoe print in the autopsy photographs. She stated that although she reviewed statements of witnesses regarding prior physical altercations between the Scotts and was aware of the Petitioner's statement that he and the victim had a physical altercation prior to her death, she determined that the victim's cause of death was due to a fall and not from the Petitioner beating her. Dr. Turner recalled that Dr. O.C. Smith testified at trial that the victim fell but acknowledged that her conclusion was that the victim fell due to the level of alcohol in her body.

Dr. Turner did not recall Dr. Chancellor's testimony at trial regarding the fluids administered to the victim at the hospital and their effect on her blood alcohol level. Dr. Turner stated that based on her training and experience, the fluids would have had very little effect on the blood alcohol level.

Dr. Turner complained that the forensic pathologist "immediately" decided that the victim's death was a homicide without reviewing the police reports, the statements of witnesses, and the case as a whole. Dr. Turner stated that while the manner of the victim's death was possibly homicide, it also was possibly accidental. She also stated that the victim's medical records, her history with the criminal justice system, her personal history, and her treatment for chronic alcoholism supported her conclusion that "more likely than not, this [wa]s an accident."

Dr. Turner testified that the scene did not show a "knock-down-drag-out where things were turned over and disturbed." Rather, the scene did not include a major disruption of household items, and Dr. Turner did not believe the scene was cleaned due to the presence of vomit at the scene. She stated that the victim's injury to the back of her head was consistent with her falling backwards and that "[a]n assault isn't done at the back of the head causing injury to the front of the head." She also stated while the victim's injuries possibly were the result of a physical assault, "I just don't think it's as likely."

Dr. Turner testified that the victim's bruises were caused by her falling and knocking into objects and by the administration of life-saving measures. She was aware of the victim's statement that the Petitioner threatened to kill her if she left him. Dr.

Turner did not recall evidence that on the day of the victim's death, she told her attorney that she was leaving the Petitioner. Dr. Turner stated that regardless, the evidence did not change her opinion.

On redirect examination, Dr. Turner testified that she believed the trauma that caused the victim's death occurred in the garage and not in the house because the Petitioner stated that he found the victim lying in the garage and brought her inside the house. She noted that the broken vase found in the garbage can did not have blood spatter on it. She believed it was possible that the victim became intoxicated at some point prior to the day of her death, broke the vase by knocking it over, and cleaned it up. Dr. Turner testified that the victim had subdural hematoma, which is generally a slow hemorrhage, and that the symptoms increase as the injury slowly bleeds. She stated that a person such as the Petitioner who was not medically trained would be unable to recognize the injury.

In response to questioning by the post-conviction court, Dr. Turner testified that she was unable to determine whether the victim would have survived had she received medical care after she initially fell. Dr. Turner stated that the victim may have survived but sustained a brain injury. She said that the victim had a coup injury, which is an injury on the back of the head when the head contacts a hard surface, and that the injury generally occurs when a person falls backwards. Dr. Turner explained that when the head contacts a hard surface, the brain "sort of sloshes" forward and contacts the bony surfaces of the inside of the skull, which causes bruising on the front of the brain. She acknowledged that her testimony regarding the victim's head injury may have been consistent with Dr. O.C. Smith's testimony at trial.

Mr. David Neese met the Petitioner in 2001 when they worked together, and they often socialized outside of work. Mr. Neese testified that the Petitioner drank alcohol whenever they were together outside of work and that there were times during which Mr. Neese believed that the Petitioner's drinking was excessive. Mr. Neese stated that the Petitioner was quiet and generally did not show outward signs of intoxication.

Mr. Neese testified that the victim's drinking was more noticeable to him and that it became a problem. He stated that on each occasion that he saw the victim drink alcohol, she blacked out and fell. He recalled one occasion during which the victim fell backwards while intoxicated and injured both herself and Mr. Neese's wife. He also recalled a New Year's Eve during which the victim became intoxicated and was lying on the floor unconscious. He stated that he saw the victim fall on multiple occasions and pass out while in a standing position. He also stated that he never saw any problems in the marriage between the Scotts. Mr. Neese did not believe that he was contacted prior to trial and stated that he would have testified at trial had he been asked to do so.

On cross-examination, Mr. Neese initially testified that he last socialized with the Scotts on New Year's Day of 2008. When asked whether he was aware that the victim died in November 2006, Mr. Neese acknowledged that he was mixing up the years and that he last socialized with them on New Year's Day of 2006. He stated that he was not with the Petitioner on November 22 or 23 of 2006 and did not have personal knowledge of the events that occurred on those days. Mr. Neese said that he was unsure of whether a defense attorney contacted him but that he spoke to a private detective either before or after trial.

On redirect examination, Mr. Neese testified that after the victim's death, he called and spoke to someone in the homicide office of the Memphis Police Department. He stated that when he heard that the victim had died, his initial concern was that she had fallen and hit her head. He also stated that he always believed that she died due to a fall because he had witnessed her fall on many prior occasions and believed it was "a matter of time before she would seriously injure herself."

Mrs. Nichole Scott, the Petitioner's sister-in-law, testified that the Scotts had a "toxic" and "very volatile" relationship that involved excessive drinking. She stated that the Scotts drank alcohol on a daily basis, including beer, wine, and vodka. She believed both the Petitioner and the victim were alcoholics. She stated that she was never contacted by trial counsel even though she drove the Petitioner to a meeting with trial counsel and offered to speak to trial counsel. She also stated that she attended the trial and was available to testify.

On cross-examination, Mrs. Nichole Scott testified that during the fall of 2006, the Scotts were drinking heavily and that she regularly received calls from them when they argued or the victim decided to leave. Mrs. Nichole Scott saw the Scotts two or three times a week in the fall of 2006 until Mrs. Nichole Scott moved to Texas at the end of October 2006. Mrs. Nichole Scott never saw the Petitioner involved in a physical altercation with the victim and said the victim never called her and reported that the Petitioner had physically assaulted her.

Mr. Ronnie Scott, the Petitioner's first cousin, testified that alcoholism was present in their family. Mr. Ronnie Scott was a recovering drug addict and alcoholic, and his grandfather and great-grandfather were alcoholics. Both Mr. Ronnie Scott's father, who was the Petitioner's uncle, and a cousin died from alcoholism. Mr. Ronnie Scott only saw the Petitioner and the victim during the holidays and said no one drank alcohol while their family was together. He acknowledged that he was not around the Petitioner and the victim during Thanksgiving of 2006.

The Petitioner testified that he began drinking alcohol at the age of eighteen and that he had two prior convictions in Florida for minor in possession of alcohol and a conviction for driving under the influence in 2001 at the age of thirty. He stated that he primarily drank vodka and that his drinking continued to progress to the point that he was drinking on a nightly basis by the age of thirty. He said that he and the victim were drinking one-half gallons of vodka every two to three days and that they drank shots of 170-proof pure grain alcohol approximately every hour on a nightly basis. They would drink more alcohol if they did not have to work the following day. The Petitioner maintained that he informed trial counsel about his drinking habits and that he had drunk a large amount of alcohol on the night prior to the victim's death. The Petitioner stated that the victim's blood alcohol level was .40 and that he assumed his blood alcohol level was the same amount or higher. He did not recall what he told trial counsel regarding his memory of the incident and said, "It's little snippets of information that I can recall." The Petitioner stated that he told trial counsel that it was not unusual for either him or the victim to experience a blackout. He initially testified that he and trial counsel discussed using intoxication to explain his conduct to the jury, but he later testified that he did not know that intoxication could be a defense at trial and that he did not recall discussing it with trial counsel.

The Petitioner testified that he did not receive treatment for his drinking other than to attend counseling sessions with Dr. Abraham. He explained that after he and the victim began experiencing marital problems in 2005, he contacted his insurance company and was referred to Dr. Abraham. He believed alcohol was causing problems in his life.

The Petitioner stated that he did not testify at trial and that trial counsel advised him that his testimony was not necessary. The Petitioner stated that had he testified, he could have told the jury that he experienced a blackout on the night prior to the victim's death. He also stated that he did not have strong feeling as to whether he should testify at trial and that he relied on trial counsel's advice regarding whether to testify.

When asked whether he recalled a confrontation with the victim, the Petitioner replied, "Not specific details." While he recalled that he and the victim argued over a text message, he maintained that he did not recall striking the victim and did not know how the victim received her injuries. He stated that he provided this information to trial counsel. He maintained that he did not recall requiring the victim to go into the garage or bringing her a pillow and a blanket. He explained that it was not unusual for the victim to go into the garage because she generally left the home through the garage.

The Petitioner testified that he awoke at approximately 9:00 a.m. the following morning, saw a broken vase, and attempted to repair it. He said he entered the garage where he found the victim either sleeping or passed out, brought her inside their home,

and placed her by the fireplace to warm. He stated that the victim was breathing, that he believed the victim was passed out, and that he did not believe she was dying. He said he called Dr. McGee once he realized that the victim had a problem.

The Petitioner said he believed Dr. O.C. Smith was supposed to offer testimony at trial similar to Dr. Turner's testimony at the post-conviction hearing. The Petitioner also said that trial counsel did not present an expert to testify regarding the Petitioner's ability to form the mens rea necessary to establish first degree or second degree murder and that he did not recall discussing with trial counsel whether such an expert would have been beneficial.

On cross-examination, the Petitioner testified that he did not know how many drinks that he had on the night of the victim's death and estimated that he drank almost one-half gallon of vodka. He recalled seeing the victim's cellular phone at one point and stated that his memory was "like Polaroid pictures of certain aspects." He recalled that they argued in the bedroom and in the kitchen. He maintained that he did not recall physically assaulting the victim, but he did not deny that a physical altercation occurred. He stated that in the past, their arguments generally turned physical. He denied that the physical altercation caused the victim's injuries.

The Petitioner testified that he had blacked out during physical altercations with the victim in the past and that when they woke up the following day, they discussed it to determine what had occurred. He stated that he did not recall choking the victim as described by witnesses at trial, and he maintained that Ms. Songstad's testimony at trial was "pretty much false." He acknowledged punching the victim three times in the back in November 2005 as described by Ms. Brown at trial. He denied that the victim told him prior to her death that she was leaving him and seeking a divorce.

The Petitioner testified that he decided to obtain counseling for the victim from Dr. Abraham and that he drove the victim to the initial appointment. He denied that he refused to return to counseling with the victim and stated that they attending counseling on a weekly basis for a period of time. He said they stopped drinking and began getting their lives in order. In February or March of 2006, Dr. Abraham informed them that she wanted to continue to counsel the victim while the Petitioner obtained counseling elsewhere. The Petitioner denied that Dr. Abraham made the decision because he was being difficult.

The Petitioner stated that when he found the victim in the garage, he did not call 911 because he had seen the victim passed out on many prior occasions. He did not recall seeing any injuries to the victim's face and said he did not see any injuries on other areas of the victim's body because she was wearing clothes. He did not recall whether

the victim had bruises on her face while in the bedroom. He testified that he became concerned when the victim did not wake up by the time he took her into the bedroom. He said he knew something was wrong when the victim began vomiting and that he called Dr. McGee. Once Dr. McGee arrived, the Petitioner called 9-1-1.

The Petitioner testified that he had multiple meetings with trial counsel while he was released on bond prior to trial. He said trial counsel advised him against testifying at trial. He did not recall whether trial counsel questioned him at trial about his decision. The Petitioner affirmed that it was his decision not to testify but stated, “I think if the other evidence had been presented, then it would have given me the ability to have testified and helped the case.”

At the conclusion of the evidentiary hearing, the post-conviction court made oral findings denying the Petitioner’s petition for post-conviction relief. The post-conviction court subsequently entered an order adopting the oral findings and denying the Petitioner relief. This appeal followed.

ANALYSIS

The Petitioner maintains that he received ineffective assistance of counsel at trial. Specifically, he asserts that trial counsel was ineffective in failing to (1) present evidence combatting the State’s theory regarding the victim’s cause of death; (2) consult an expert on alcoholism and intoxication; (3) advise the Petitioner to testify at trial; (4) interview and present witnesses in support of the defense; and (5) present evidence of the Petitioner’s alcoholism during the sentencing hearing. The Petitioner also asserts that the cumulative effect of trial counsel’s errors warrants a new trial.

A post-conviction petitioner must establish that his conviction or sentence is void or voidable due to the abridgment of any constitutional right. T.C.A. § 40-30-103. The petitioner bears the burden of proving the allegations of fact in the petition by clear and convincing evidence. T.C.A. § 40-30-110(f); *Ward v. State*, 315 S.W.3d 461, 465 (Tenn. 2010). “Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009) (quoting *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)). The findings of fact made by a post-conviction court are conclusive on appeal unless the evidence preponderates against them. *Ward*, 315 S.W.3d at 465. This court may not substitute its own inferences for those drawn by the post-conviction court, and questions concerning the credibility of witnesses, the weight and value of the evidence, and the factual issues raised by the evidence are resolved by the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001). A claim of ineffective assistance of counsel raises a mixed question of law and fact which this court

reviews de novo. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). The trial court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *Id.*

Both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee the accused the right to counsel. This right has been defined as the right to the reasonably effective assistance of counsel, or assistance “within the range of competence demanded of attorneys in criminal cases.” *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006) (quoting *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999)). The overall standard of effectiveness is “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

To show that relief is warranted on a claim of ineffective assistance of counsel, the petitioner must establish both that counsel’s performance was deficient and that the deficiency prejudiced the defense. *Finch v. State*, 226 S.W.3d 307, 315 (Tenn. 2007). Deficiency requires showing that counsel’s errors were so serious “that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. To demonstrate deficiency, the petitioner must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms. *Pylant v. State*, 263 S.W.3d 854, 868 (Tenn. 2008).

Courts must make every effort “to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Felts v. State*, 354 S.W.3d 266, 277 (Tenn. 2011) (quoting *Strickland*, 466 U.S. at 689). “[A] reviewing court must be highly deferential and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* (quoting *Burns*, 6 S.W.3d 453 at 462. In evaluating counsel’s performance, strategic choices “made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* (quoting *Strickland*, 466 U.S. at 690-91). The reviewing court must begin with “the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all strategic and tactical significant decisions.” *Davidson v. State*, 453 S.W.3d 386, 393 (Tenn. 2014).

In determining prejudice, the post-conviction court must decide whether there is a reasonable probability that, absent the errors, the result of the proceeding would have been different. *Grindstaff*, 297 S.W.3d at 216. “A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Honeycutt*, 54 S.W.3d at 768 (quoting *Strickland*, 466 U.S. at 694). “That is, the Petitioner must establish that his counsel’s deficient performance was of such a degree that it deprived him of a fair trial and called into question the reliability of the outcome.” *Finch*, 226 S.W.3d at 316. Because both prongs must be established for relief, a court need not address both if the defendant has failed to prove either deficiency or prejudice. *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996).

I. Failure to Present Evidence Regarding the Victim’s Cause of Death

The Petitioner maintains that trial counsel was ineffective in failing to present evidence to adequately combat the State’s evidence regarding the victim’s cause of death. He argues that Dr. Turner provided a more reasonable alternative theory as to the victim’s cause of death during the post-conviction hearing than the theory provided by Dr. O.C. Smith at trial.

The Tennessee Supreme Court recently recognized that in most cases, “the decision to select an expert, or which expert to select, constitutes one of the ‘strategic’ defense decisions that *Strickland v. Washington* shields from scrutiny.” *Kendrick v. State*, 454 S.W.3d 450, 475 (Tenn. 2015). “The selection of an expert witness is a paradigmatic example of the type of ‘strategic choic[e]’ that, when made ‘after thorough investigation of [the] law and facts,’ is ‘virtually unchallengeable.’” *Hinton v. Alabama*, 571 U.S. ___, 134 S. Ct. 1081, 1089 (2014) (quoting *Strickland*, 466 U.S. at 690); see *Kendrick*, 454 S.W.3d at 474.

Trial counsel interviewed the State’s expert witnesses regarding the victim’s cause of death and retained Dr. O.C. Smith to review the materials and provide an opinion. Dr. O.C. Smith was the former medical examiner for Shelby County and had performed autopsies and provided opinions on the causes of death in hundreds of homicide cases. Trial counsel utilized Dr. O.C. Smith as an expert in multiple cases after he left the medical examiner’s office. Dr. O.C. Smith rendered an opinion regarding the victim’s cause of death, and trial counsel met with him on multiple occasions regarding his findings. While the Petitioner contends that Dr. Turner’s opinion was more reasonable than Dr. O.C. Smith’s opinion, a defense attorney “is not required to question a diagnosis put forth by a professional expert in the field.” *Christa Gail Pike v. State*, No. E2009-00016-CCA-R3-PD, 2011 WL 1544207, at *54 (Tenn. Crim. App. Apr. 25, 2011). Although Dr. O.C. Smith’s testimony differed from his statements to trial counsel during their meetings, trial counsel cannot be faulted for Dr. O.C. Smith’s testimony when he met with the doctor about his findings on multiple occasions prior to trial, including approximately one hour before he testified. We conclude that trial counsel made a reasonable, strategic decision to present Dr. O.C. Smith as a witness at trial to counter the

State's evidence of the victim's cause of death. Accordingly, the Petitioner is not entitled to relief regarding this issue.

II. Failure to Consult an Expert on Alcoholism and Intoxication

The Petitioner maintains that trial counsel was ineffective in failing to investigate the Petitioner's alcoholism and alcohol use prior to the events leading to the victim's death and to present an expert to negate the mens rea for premeditated first degree murder and second degree murder. Because the Petitioner was acquitted of premeditated first degree murder, we conclude that trial counsel was not ineffective with regard to the presentation of evidence of intoxication to negate the State's claim that the Petitioner intentionally killed the victim. Rather, we will review trial counsel's actions in light of the Petitioner's conviction for second degree murder.

The Petitioner relies upon Dr. Murray Smith's testimony at the post-conviction hearing that the Petitioner was intoxicated and experienced an alcohol-induced blackout at the time of the events leading to the victim's death. Dr. Murray Smith acknowledged that in reaching his conclusions, he relied upon his interview with the Petitioner during which the Petitioner discussed his recollection of the events and the amount of alcohol that he drank on the night prior to the victim's death. The post-conviction court found that the Petitioner's testimony was not credible. The post-conviction court further found that if the Petitioner had sought medical treatment for the victim upon discovering her the following morning, such proof would have given more credence to the Petitioner's claim that he was intoxicated and, therefore, did not knowingly or intentionally inflict injuries on the victim that caused her death. However, when the Petitioner found the unconscious and battered victim in the garage the following morning, he did not seek medical treatment until later that afternoon and did not call 9-1-1 until specifically instructed to do so by Dr. McGee. We conclude that there is not a reasonable probability that if trial counsel had presented such expert testimony at trial, the result of the proceeding would have been different. Accordingly, any deficiency did not result in prejudice.

III. Failure to Advise the Petitioner to Testify at Trial

The Petitioner contends that trial counsel was ineffective in failing to advise him to testify at trial. He maintains that his testimony was necessary to "present a full version of his theory of the facts" and to explain his relationship with the victim and their problems with alcohol.

During the post-conviction hearing, the Petitioner acknowledged that although trial counsel advised him against testifying at trial, he affirmed that it was his decision not to testify. During a jury-out hearing at trial, the Petitioner stated that he decided not to

testify at trial and that he made the decision of his own free will without any pressure, threats, or promises. The post-conviction court found that the Petitioner's testimony, which included his claims that he was intoxicated and recalled little of the events that led to the victim's death, was not credible. The post-conviction court found that the Petitioner's testifying would have been "a prosecutor's delight" in that the prosecutor would have cross-examined the Petitioner about his prior bad acts, his claim that he did not notice the victim's beaten and bruised face when he first saw her in the garage on the morning of her death, and his calling of a friend to come over to check on the victim rather than calling 9-1-1. We conclude that trial counsel was not deficient and that any deficiency did not result in prejudice.

IV. Failure to Interview and Present Witnesses

The Petitioner asserts that trial counsel was ineffective in failing to interview and present Ms. Nichole Scott, Mr. Ronnie Scott, and Mr. Neese as witnesses at trial. The Petitioner failed to question trial counsel at the post-conviction hearing regarding whether he was aware of the witnesses and the information that they could provide. None of the witnesses were present for the events that led to the victim's death. Furthermore, evidence was presented at trial regarding the volatile relationship between the Petitioner and the victim, their alcohol usage, and a prior instance during which the victim fell and injured herself while intoxicated. At trial, trial counsel was successful in persuading the trial court to exclude a large amount of evidence that the State sought to introduce regarding the victim's prior injuries because testimony did not establish whether the victim sustained those injuries at the hands of the Petitioner or as a result of falling while intoxicated. We conclude that trial counsel was not deficient and that any deficiency did not result in prejudice.

V. Failure to Present Evidence of Alcoholism During the Sentencing Hearing

The Petitioner contends that trial counsel was ineffective in failing to present evidence of the Petitioner's alcoholism under the catch-all mitigating factor during the sentencing hearing. *See* T.C.A. § 40-35-113(13) (2006). During the sentencing hearing, the State presented the testimony of the victim's father, her sister, and a friend regarding the impact of her death. The State also presented a Memphis Police Officer who testified regarding the number of domestic homicides in Shelby County. The Petitioner presented the testimony of his father regarding the Petitioner's compliance with the conditions of his bond pending trial and his request for "mercy." The Petitioner entered multiple letters from friends in support of his request for a more lenient sentence. He also presented an allocution during which he expressed remorse for the victim's death and stated that "[a]lcohol and jealousy played a major role in the events." Trial counsel argued for the application of multiple mitigating factors, including the Petitioner's good social history,

his remorse, and the circumstances that led to the victim's death, which included "the history of alcohol," the Petitioner's alcohol use on the night prior to the victim's death, and the victim's sending photographs of herself to another man.

In sentencing the Petitioner to the maximum twenty-five-year sentence, the trial court applied the following enhancement factors as enumerated in Tennessee Code Annotated section 40-35-114 (2006): (1) the Petitioner has a history of prior criminal behavior; (5) the Petitioner treated the victim with exceptional cruelty; (6) the personal injuries inflicted on the victim were particularly great; and (14) the Petitioner abused a position of trust. The trial court placed great weight on enhancement factor (5) and "a lot of weight" on factors (1) and (6). With regard to the mitigating factors, the trial court declined to give any weight to the Petitioner's arguments that he acted under strong provocation or that substantial grounds existed to justify the offense. The trial court stated that it had insufficient information to determine whether the circumstances were so unusual that it was unlikely that the Petitioner had a sustained intent to violate the law or whether the Petitioner presented a danger to commit crimes in the future. While the trial court acknowledged that it could give the Petitioner's lack of a criminal record some weight, the lack of a record did not explain "why somebody would just beat the living heck out of somebody and leave them to die." The trial court declined to place any weight on the Petitioner's potential to contribute positively to society based on his stable work history and his college degree.

On appeal, this court determined that the trial court misapplied enhancement factors (6) and (14). *See Jeffrey Scott*, 2011 WL 2420384, at *33-34. However, this court upheld the Petitioner's sentence, concluding that the record supported the trial court's application of the two remaining enhancement factors and that the record reflected that the trial court considered the provisions of Tennessee Code Annotated section 40-35-210 and the required principles of sentencing in determining the length of the sentence. *Id.* at *34.

Although the Petitioner testified at the post-conviction hearing regarding his history of drinking and of blackouts, the post-conviction court found that the Petitioner's testimony at the post-conviction hearing was not credible. Thus, trial counsel was not deficient in failing to present such evidence. As noted by the post-conviction court, even if the Petitioner blacked out on the night before the victim's death, the blackout did not explain his allowing the beaten and bruised victim to lie on the floor for several hours on the following day before seeking medical help. The Petitioner has failed to present clear and convincing evidence establishing a reasonable probability that evidence of his history of alcoholism and blackouts would have resulted in a lesser sentence. Accordingly, any deficiency did not result in prejudice.

VI. Cumulative Error

The Petitioner contends that cumulative acts of deficiency entitle him to relief. The doctrine of cumulative error recognizes that “there may be multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant’s right to a fair trial.” *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). This court has previously held that a petitioner “who has failed to show that he received constitutionally deficient representation on any single issue may not successfully claim that his constitutional right to counsel was violated by the cumulative effect of counsel’s errors.” *Tracy F. Leonard v. State*, No. M2006-00654-CCA-R3-PC, 2007 WL 1946662, at *21 (Tenn. Crim. App. July 5, 2007) (citing cases). Because the Petitioner has not demonstrated multiple errors, he is not entitled to relief.

CONCLUSION

Because the Petitioner has not demonstrated that he received the ineffective assistance of counsel, we affirm the judgment of the post-conviction court.

JOHN EVERETT WILLIAMS, JUDGE