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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 29, 2023

DARIUS PATTERSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 118891 Kyle A. Hixson, Judge

No. E2022-01401-CCA-R3-PC

Petitioner, Darius Patterson, appeals the denial of his post-conviction petition, arguing that the post-conviction court erred in finding that he received the effective assistance of counsel at trial. Following our review of the entire record and the briefs of the parties, we affirm the judgment of the post-conviction court.

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

JILL BARTEE AYERS, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., AND JAMES CURWOOD WITT, JR.,J., joined.

Gerald L. Gulley, Jr., Knoxville, Tennessee, for the appellant, Darius Patterson.

Jonathan Skrmetti, Attorney General and Reporter; Mary Elizabeth King, Assistant Attorney General; Charme P. Allen, District Attorney General; and TaKisha M. Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

Petitioner and co-defendant, Lavan Johnson, were indicted by the Knox County Grand Jury in case number 113005 with two alternative counts of especially aggravated kidnapping, two alternative counts of aggravated kidnapping, and one count of unlawful possession of a firearm by a convicted felon related to offenses committed against the

victim, Travis Clark.[1] In case number 113995, Defendant was indicted with one count of possession with intent to sell or deliver 26 grams or more of cocaine, one count of possession with intent to sell or deliver less than 15 grams of heroin, one count of simple possession of marijuana, one count of evading arrest, one count of unlawful possession of a firearm after having been previously convicted of a felony drug offense, one count of employing a firearm during the commission of the dangerous felony involving the possession with intent to sell or deliver cocaine, one count of employing a firearm during the commission of the dangerous felony involving the possession with intent to sell or deliver heroin, one count of employing a firearm during the commission of the dangerous felony involving the possession with intent to sell or deliver cocaine after having been previously convicted of a felony, and one count of employing a firearm during the commission of the dangerous felony involving the possession with intent to sell or deliver. *State v. Patterson*, No. E2019-01173-CCA-R3-CD, 2020 WL 3969294, at *1 (Tenn. Crim. App. July 14, 2020). The facts of this case as set forth by this court on direct appeal are as follows:

> At the defendant's October 2018 trial, Kimberly Cleek, a security guard for U.S. Security Incorporated at the Gerdau Ameristeel Plant on Tennessee Avenue in Knoxville, testified that on the morning of February 17, 2018, a man later identified as the victim "came to the window instead of the door and started, like, banging on the window and asking me to call 911." The victim, whom she described as bleeding, disheveled, and frantic, asked her "to call his girlfriend and then tell her to get ... the kids out of the house." "He kept saying they were coming after him, they were going to get him, they were going to kill him, they were chasing him." Because company policy prevented Ms. Cleek from treating the victim's injuries, or even allowing him to remain onsite, she told him to go back into the street, but he refused to move until she agreed to take his information and to call his girlfriend. The victim refused to provide his name, but Ms. Cleek nevertheless called the number that he gave her and told the woman who answered "what he looked like, what he said." When she finished that call, Ms. Cleek called 9-1-1.
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> In the meantime, the victim "continued down the street... to the next house that was across the street from us, knocked on the door." When no one answered, the victim "went down to the next house." Although Ms. Cleek could not tell whether the victim had entered that house, she later saw the police and emergency personnel respond to it. By that time, the victim was sitting on the curb.

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[1] The two indictments were consolidated for trial, and the State dismissed the firearms charge in case number 113005.

Kari Harris, the victim's fiancée, testified that at the time of the offenses, she and the victim lived at 4804 Ball Camp Pike with Ms. Harris's 14-year-old son and "[a]nother boy named Dez" who was 19 years old. Early on the morning of February 17, 2018, she and the victim awoke to someone knocking on the door of their house. The victim "ran to the living room to see who was out front. He did not see nobody. He turned back around, and next thing we know, we heard the front door open and all the sudden, cussing and screaming and going on." The co-defendant, whom she knew as "Nephew, Blue, Lavan," had entered the house and was "screaming" "Where the f***'s my s***? I want my s***. Give me my f***ing s***." Ms. Harris said that she "was kind of scared," so she stayed in the bedroom. She recalled that the victim attempted to calm the co-defendant, but the co-defendant, who appeared to have a gun in his right pocket, "just kept walking back and forth, back and forth and back and forth." Eventually, the co-defendant then demanded that the victim come outside with him.

Ms. Harris testified that she heard the men walk outside and then heard "a loud roar, like a car taking off. So I ran to the door and I just see this car taking off and there went [the victim]." She called 9-1-1 to report what had happened. A short while later, the victim called her "hysterical, crying" and told her that he was "at Massachusetts" and that she should call 9-1-1. After the call ended, Ms. Harris drove "over that way, not knowing what I was going to do. I was just trying to get the address of where he was, being careful while I was at it." She was unable to get the exact address, "but I got the house a couple up." As she drove by the house on Massachusetts, Ms. Harris "noticed a vehicle sitting outside of that address that I'd never seen before. And it was a newer-type vehicle."

At some point, Ms. Harris called 9-1-1 and drove to the parking lot of a nearby church to wait. While Ms. Harris waited at the church, she received a call from the co-defendant, who said, "[Y]ou have ten f***ing minutes. I'm, like, what are you talking about? You have ten minutes to get me my s***. I'm, like, I don't know what you want. He's, like, you know what s*** I want." She said that the co-defendant warned her that "if you don't get it, you won't never see [the victim] again and he won't see your boys. I was really scared."

Ms. Harris testified that she saw "a car pass by and ... noticed that it was ... the nice car in front of that house. And I noticed that it was Lavan driving it." She said that she was going to follow the car but decided not to do so because she did not see the victim in the car and "got really, really scared." Ms. Harris identified a black Impala from a photograph as the

nice car that she saw "sitting in front of Massachusetts house" and being driven by the co-defendant.

After seeing the black Impala drive by, Ms. Harris drove down Texas and saw two police officers. She waived the officers down and "told them what was going on." While she was speaking with the officers, Ms. Harris "got a phone call from a lady" and relayed the information she received to the officers.

Ms. Harris testified that both the defendant and the co-defendant had been to her house before and that the co-defendant had left his inoperable vehicle in their driveway. Two or three days before the offenses in this case, an incident occurred that prompted Ms. Harris to kick the defendant and the co-defendant out of the house. Ms. Harris later learned that the victim had taken $100 and some clothing from the co-defendant's vehicle on the same night as that incident.

During cross-examination, Ms. Harris claimed that the victim was able to call her after he left with the co-defendant because the co-defendant "ran out of the room real quick." Ms. Harris admitted that the co-defendant had given the victim $100 to "put it on somebody's books" and that the victim had instead spent the money on food, gas, and cigarettes. She said that she also recalled seeing the victim wearing a pair of Jordan shoes that she did not recognize. She acknowledged that, to the best of her knowledge, the victim did not have any money or property that belonged to the defendant.

The victim testified that he became addicted to opioids, that the addiction led him to begin using heroin after "[t]he pills got too expensive," and that he purchased heroin from the co-defendant. On February 17, 2018, he "heard a knock at my back door that comes into my bedroom," and when he got up to look outside, he saw the co-defendant "come around to the front of my house." The co-defendant entered through the unlocked front door "screaming, . . . who had been in his car, who got his clothes." The co-defendant saw "his shoes beside the couch." The victim acknowledged that he had gotten some clothes out of the co-defendant's car and said that he "went and got in the washer where his clothes was . . . and gave them back to him." The victim recalled that the co-defendant "said, man, if my clothes don't show up, if my stuff don't show up, everybody in this f***ing house is going to die." Ms. Harris responded, "[T]he hell? My MFing kid is here." The co-defendant then demanded that the victim go outside with him, and the victim refused. "And that's when he grabbed towards his waistband and said, come outside with me." The victim said

that he saw "the handle of a gun" when the co-defendant grabbed at the waistband of his pants.

The victim testified that he agreed to go outside with the co-defendant because his stepson was in the house. The co-defendant then demanded that the victim "take a ride" with him, and they left. At one point, the victim "unlocked the door and started to get out and [the co-defendant] said, Bro, where you going? You're making me think that you done something." The co-defendant "grabbed ahold of his waist. So I . . . shut the door back." They drove through the Lonsdale community and eventually arrived at a house on Massachusetts. When the co-defendant got out of the car, the victim "had a split second to call" Ms. Harris to tell her where he was. When he got out of the car, the victim helped the co-defendant get some clothes out of the back of the car and carry them into the house. Inside, they encountered the defendant. The co-defendant said, "Bro, Dog, they . . . stole my clothes." The defendant responded, "Where's Nephew's clothes?"

The victim testified that the two men then sat the victim "down at the doorway going out the living room into the hallway." The co-defendant went into a bedroom and returned with "an AR-15. And [the defendant] had, at this time -- I don't know if he had pulled it out of his waistband or what, but he had a Glock 9 and was pointing it at me." The defendant asked the victim if he "was wearing a wire," "so I pulled up my shirt and pulled my basketball shorts down to show that I wasn't wearing a wire." According to the victim, the defendant said, "Let's just kill him here. And Lavan was, like, no, this ain't our house, not here. We'll take him somewhere else." The defendant then "punched me in my left side of my eye and told me to open my mouth and stuck the Glock in my mouth" and told the victim that if he "tried to fight back," the co-defendant would "blow my head off." The victim testified that the defendant bound his hands with an extension cord, and the co-defendant left "to go back to the hotel" to pick up "Junior," whose car the co-defendant was driving.

After the co-defendant left, the defendant "turned to his right and I rolled to my right and took off through the hallway and dove through the closed window and just took off running and never looked back." The victim said that he ended up at the steel plant, where he "[t]old the lady to call 911, and then I told her to call my fiancée and tell her ... that I got away and to ... get herself and the kids out of the house." The guard told him to get away from the guard shack, so he went to one house, where he was turned away, and then to another house, where the man inside agreed to call 9-1-1. Shortly thereafter, the police and an ambulance arrived. The

victim did not go to the hospital but instead rode with Ms. Harris to the police station.

During cross-examination, the victim acknowledged that he had purchased heroin from the co-defendant "[p]robably six or seven times" in the few months that he had known the co-defendant, including on one occasion at the Massachusetts house. He said that he had not used heroin "for about a week" before the offenses because he had been "[d]etoxing . . . with Suboxone" that he purchased "[o]ff the street." He admitted that he had been avoiding the co-defendant because he "was trying to get myself clean" and because "he gave me $100 to go put on ... Sparkle Jones' books that was in jail and I didn't." He said that he thought that the co-defendant "possibly could have been mad." The victim said that he did not see the gun in the co-defendant's waistband but only glimpsed the handle. He did not know what happened to that weapon.

The victim denied having purchased drugs from Samuel Craddock, the father of one of Ms. Harris's sons. He said that he was "pretty sure" that Mr. Craddock had purchased heroin from the co-defendant and that some of those purchases had happened at the victim's residence. The victim also denied having purchased drugs from the co-defendant after the offenses. He acknowledged having seen the co-defendant at a gas station in the weeks before the trial but said that the two did not speak.

Avangelene Williams testified that on February 16, 2018, she and Odell Wright, whose nickname was Junior, met shortly before midnight and "went to The Ball," a gentleman's club, to hang out. After leaving The Ball, Ms. Williams and Mr. Wright went to the Motel 6 on Merchant's Drive, where they watched television for a few hours. She recalled that another black man, whom she described as "the younger guy," was also in the motel room with them. There were no white men in the motel room with them.

Ms. Williams testified that at that time, Mr. Wright drove a black or navy blue Impala that he had rented. She recalled that sometime between 6:00 a.m. and 7:00 a.m. on February 17, 2018, the younger guy took the rented Impala and "left about two hours. Then he came back and he was anxious. And then we all left. I needed to go home for my son." Ms. Williams said that the younger guy drove, Mr. Wright rode in the front passenger's seat, and Ms. Williams rode in the rear passenger's seat; there were no white men in the car. She believed the men were driving her "home to East Knoxville, but then we make a turn into Lonsdale." At that point, she noticed that the younger guy was "kind of anxious." He "ran a stop sign.

And then we go to the dead end and he automatically g[o]t out. And then Junior switched to driving and I go into the passenger side." Shortly after they pulled out to go, they were stopped by the police. Ms. Williams said that at no point did either she or Mr. Wright walk a white man into a house in Lonsdale.

During cross-examination, Ms. Williams testified that the younger guy was already in the room at the Motel 6 when she and Mr. Wright arrived at approximately 4:00 a.m. She said that Mr. Wright never referred to the younger guy by name and that she would not recognize him if she saw him.

Knoxville Police Department ("KPD") Officer Francisco Vargas testified that he responded to a call of a kidnapping with a firearm. After speaking with Ms. Harris, Officer Vargas "initiated a traffic stop on a vehicle that she described the suspect driving." After speaking with Mr. Wright, who was driving the car, Officer Vargas went to a house at 1936 Massachusetts. As he walked to the front door of the house, he saw "the defendant in the backyard, closer to the alley." When the defendant turned and made eye contact with Officer Vargas, the defendant "took off up the alley . . . toward McClellan." Officer Vargas gave chase. Officer Vargas kept the defendant in sight as the defendant ran through the alley past several houses and onto McClellan. As they ran, Officer Vargas saw the defendant jettison several items: "He dropped cash throughout the alley, a toboggan. And when he got closer to McClellan, I observed him throw a clear baggie in the front yard of that residence." The defendant ran "almost back to Massachusetts on McClellan." After the defendant was in custody, officers searched the defendant and found "a bag of powder cocaine" in his pocket. Officer Vargas retraced the route of the foot chase and found the bag that he had seen the defendant toss over a fence. It contained "more narcotics." Officer Vargas collected two baggies containing what he believed to be narcotics, one from the defendant's pocket that appeared to be "a bag of powder cocaine" and one from the area where he had seen the defendant toss a baggie over a fence that contained smaller baggies. Another officer discovered "a firearm" in the yard of a house along the same route.

KPD Officer Timothy Riddle, who investigated the kidnapping of the victim, testified that when he first encountered the victim, "you could obviously tell that he had been involved in a situation. He was bandaged up, ... he was cut up. Looked like he had maybe jumped through a glass, like he said. He seemed very scared to me that particular day." He said that the victim "seemed pretty coherent" and did not appear to be "under

the influence of anything." After speaking with the victim, Officer Riddle "could not get a definite address" where the victim had been taken but was able to get a description of the house from the victim. At that point, Officer Riddle, who was in an unmarked police car, "drove by the home" and "notified dispatch of the correct address." At that same time, he learned that officers had stopped "a black newer rental Chevy Impala" that matched the "description of the car that was given out as possible suspects." Officer Riddle arranged for the occupants of that car, Mr. Wright and Ms. Williams, to be transported to the police station, and then he drove to the police station to conduct witness interviews.

Officer Riddle interviewed the victim, Ms. Harris, Ms. Williams, and Mr. Wright before he interviewed the defendant. A video recording of the defendant's interview was played for the jury.

During the interview, the defendant said that "Odell," whom he also knew as "Junior," and the co-defendant, whom he knew as "Lavan" or "Blue," brought the victim, to whom he initially referred as "that white boy," into the house at Massachusetts. He said that, "when they pulled up, Junior and Blue was at the front, and the girl and the white boy was in the back." He said that he heard Blue threaten to kill the victim. He also claimed that Blue and Junior brought the "AR-15" and "a Glock 40" into the house. The defendant said that he left the house "for a little bit" and that, when he returned, "the window ... was busted out," the victim was gone, and "Blue was mad." The defendant claimed that he saw Junior and the girl "pull[ ] off with" the white boy. The defendant denied any knowledge of "what they had going on" and initially claimed that he did not even know the victim. The defendant later admitted that he knew the victim, that the victim bought drugs at the Massachusetts house, and that he had gotten high with the victim before. He said that Blue had "fronted" heroin to the victim. He said that Blue "ran a lot of heroin and powder down here to us," that "Junior cooks the dope," and that they sold drugs out of the house at Massachusetts. The defendant claimed that he was responsible for bringing customers to the Massachusetts house. The defendant admitted that the powder cocaine discovered in his pocket belonged to him and said that it was for his personal use. He acknowledged having thrown the baggie containing the other drugs but claimed that the second baggie belonged to Blue. The defendant said that the money seized from him was his and that it had been given to him by Blue in exchange for bringing in customers. He said that Junior and "his daddy" were at "the top of the food chain" of drug dealers in Knoxville. The defendant denied ownership of the Glock, claiming that the only reason he had the gun when the foot chase commenced was because Blue had told him to take it.

Officer Riddle testified that the defendant claimed to be high during the interview but stated that he did not believe the defendant to be under the influence. He conceded that "it's the first time I've met the young man. So he seemed normal to me." When asked about the defendant's whispering throughout the bulk of the interview, Officer Riddle opined, "First of all, he knows the interview's being recorded, so he wants to speak very softly so you can't hear him. Second of all, there was another young man in the hallway, and he didn't want that young man to know . . . what he's telling. . . ."

As the investigation progressed, Officer Riddle interviewed Ms. Cleek and confirmed that a 9-1-1 call was placed from the steel plant. He also spoke with the gentleman who called 9-1-1 after the victim arrived at the gentleman's home. Officer Riddle photographed blood on the door of that gentleman's home. These interviews, along with the 9-1-1 recordings, corroborated the victim's account of the events.

KPD Officer Phillip Jinks, who testified as an expert in narcotics investigations, conducted a search of the house at 1936 Massachusetts. He said that as he spoke to the resident of the home, Amanda Henderson, he "observed a small bag of marijuana on the table. That was just inside the door." Ms. Henderson ultimately claimed ownership of the marijuana. Inside the house, he observed "an AR-15-style rifle laying there on the floor" with "the magazine above it and ... a loose round of .223 ammunition laying above it." He found "a metal cake pan with a white bottle on top of it. That was an Inositol powder bottle." He explained that "Inositol is a dietary supplement that's frequently used in the manufacturing process for various controlled substances" and as "a cutting agent or a cut in cocaine. It's also used in the manufacture and preparation of heroin for distribution." The metal cake pan had "kind of a brownish powder in the bottom of it." A "sifter" and some "plastic cards like hotel room keycards or credit card-type cards" found nearby "had that same residue on" them. "There were also particulate masks in that cake pan as well. That's usually seen in the preparation of heroin and fentanyl, to prevent the person who's mixing it from inhaling those substances." He found "a plastic bag ... with loose rifle ammunition in it" and "a drum or double-drum magazine ... that was loaded with ammunition." "There is a digital scale with the cover off of it there with some residue on it." Digital scales, he said, "are commonly and frequently used in the distribution of controlled substances." In a bedroom, Officer Jinks found a "Pyrex-brand measuring glass. And the reason that's significant is it had a powder substance in it that was consistent with cocaine." He said that "[t]he most

frequent way that I've seen for manufacturers to cook or make crack cocaine is ... in Pyrex measuring glasses."

Officer Jinks identified a photograph of a jacket with "a corner baggie containing white powder" in the pocket. He also identified "a bag containing numerous smaller bags" called "stamp baggies," which he said were "very small Ziploc-style bags" that were "frequently used in heroin distribution, cocaine distribution sometimes." Officers ultimately found four sets of digital scales inside the house, which he described as "telling" because that number of scales was "not something that we typically see in houses where controlled substances are not being prepared for distribution." He said that, in his expert opinion, the amounts of the various narcotics in the baggie discarded by the defendant, along with the other evidence, indicated that "these items were being processed for resale."

Officers seized a cellular telephone from the defendant. Forensic examination of that telephone uncovered text messages that indicated that the defendant had been staying at 1936 Massachusetts and that he had been selling narcotics from that location. The cellular telephone also contained numerous photographs, including one of the defendant and the co-defendant taken inside the residence at 1936 Massachusetts. The photograph was also displayed "on a Facebook page named Darius Stackz" that was accompanied by the comment "Trap b****es." In the photograph, the defendant is "flipping through a quantity of money" while the co-defendant stands with "a quantity of money in his hand and what appears to be a pistol with an extended magazine in his right front pants pocket." Officer Jinks explained that "[a] trap is a location where drugs are being sold. A trap house is a house where drugs are being sold. Trapping is selling drugs."

A quantity of money was seized from the defendant's person, and more was discovered along the route of the foot chase. The total amount of cash seized was $740, consisting mostly of $20 bills, which denomination was, according to Officer Jinks, "the most common currency used to purchase controlled substances" generally and crack cocaine specifically. Utilizing his knowledge of the street value of the various controlled substances, Officer Jinks concluded that the amount of crack cocaine seized would have been worth "in the neighborhood of $800." The 2.3 grams of heroin, "if sold by the gram, that's almost $500 worth of heroin." He said that the 25 grams of powder cocaine tested by the TBI would have been worth $50 per gram if sold as powder cocaine and added that "[t]here was an additional 7.69 grams of powder, as well, that was not tested." He

estimated that the 25 grams of cocaine was worth "somewhere in the neighborhood of $1,200" as powder cocaine. Officer Jinks testified that "the important thing to note about powder cocaine in this case is that with all the ... paraphernalia for manufacture of crack cocaine, ... it would be my opinion that that powder cocaine was going to be cooked into crack cocaine" in order to "increase the quantity." The 25 grams of powder cocaine, if cooked into crack cocaine, "even if you stay consistent with that weight at 25 grams, and you sell that at $100 a gram, then that's $2,500. You double your money if you cook into crack, if sold as rocks."

Tennessee Bureau of Investigation ("TBI") Special Agent and Forensic Scientist Carolyne Simpson testified as an expert in the field of forensic chemistry and drug identification. Agent Simpson analyzed the controlled substances seized in this case. Upon opening the package obtained from the KPD, she "saw that there was an 'orange powder'" along with "multiple white powders, off-white, rock-like substance and plant material inside the case." The "orange powder" substance weighed 2.37 grams and contained heroin, fentanyl, and cocaine. The "white powder" was 25.02 grams of cocaine. The "off-white, rock-like substance" was 8.20 grams of cocaine base. Another baggie of "fine white powder" did not contain any controlled substances. The "plant material" was .51 grams of marijuana.

Samuel Douglas Craddock, the father of Ms. Harris's son, testified on behalf of the defendant that he had seen the co-defendant at the victim's house "[a]bout a half a dozen times" in the six weeks prior to the trial. He said that he was surprised to see the co-defendant at the house given the allegations against him. He said that the co-defendant and the victim "were just acting like normal. Nothing happened."
During cross-examination, Mr. Craddock said that the defendant "used to live there" with the victim. He admitted that he had spoken to the co-defendant the day before he appeared as a witness and that he had told the co-defendant he would be testifying on behalf of the defendant. He said that he was not concerned about the co-defendant's being present in the home with his son "because I never seen him do anything wrong."

Based upon this evidence, in case number 113005, the jury convicted the defendant as charged of especially aggravated kidnapping in count one, the lesser included offense of aggravated kidnapping in count two, as charged of aggravated kidnapping in count three, and the lesser included offense of kidnapping in count four. The trial court merged all of the convictions into a single conviction of especially aggravated kidnapping

> and, following a sentencing hearing, imposed an effective sentence of 30 years' incarceration to be served at 100 percent by operation of law.
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> In case number 113995, the jury convicted the defendant as charged in all counts. The trial court merged the defendant's conviction of employing a firearm during the commission of the dangerous felony involving the possession with intent to sell or deliver cocaine into his conviction of employing a firearm during the commission of the dangerous felony involving the possession with intent to sell or deliver cocaine after having been previously convicted of a felony. The court also merged the conviction of employing a firearm during the commission of the dangerous felony involving the possession with intent to sell or deliver heroin into the conviction of employing a firearm during the commission of the dangerous felony involving the possession with intent to sell or deliver heroin after having been previously convicted of a felony. Following a sentencing hearing, the trial court imposed sentences of 15 years each for the convictions of possession with intent to sell or deliver cocaine and possession with intent to sell or deliver heroin and ordered that they be served concurrently to each other. The court imposed sentences of 10 years for each of the convictions of employing a firearm during the commission of a dangerous felony and ordered that they be served concurrently to each other but consecutively to the predicate felonies for each conviction. Additionally, the court ordered 100 percent service of the 10-year sentence imposed for those convictions as required by operation of law. The court aligned the 10-year effective sentence for the defendant's firearms convictions consecutively to the 30-year effective sentence in case number 113005. The total effective sentence is, therefore, 40 years at 100 percent release eligibility percentage

Id. at *1-7.

On April 29, 2021, Petitioner filed a *pro se* petition for post-conviction relief alleging the denial of effective assistance of trial counsel for failing to "seek a dismissal due to multiplicity[.]" Counsel was appointed, and an amended petition was filed alleging that trial counsel: (1) failed to object to or request a limiting instruction regarding the testimony of "State's witness Officer Phil Jinks, who testified as both a fact witness and a purported expert witness on drugs/drug use," which violated his right to due process, and (2) failed to request a severance of the "charges involving handguns from the kidnapping charges[.]"

Post-Conviction Hearing

As relevant to the issue raised on appeal, Petitioner testified that trial counsel began representing him after he "fire[d]" his original counsel, and she was appointed a couple of months before his trial. He said that trial counsel met with him at the jail prior to trial, and they discussed Petitioner's case. Petitioner testified that he learned at trial that Officer Jinks was going to testify against him. He said that Officer Jinks was "giving his testimony on what he felt, what type of guy I was, and, you know, how much crack [cocaine] I was selling or distributing." Petitioner testified that the jury was not instructed on Officer Jinks' role as both an expert witness and a fact witness at trial and that trial counsel failed to object to the jury instructions.

Trial counsel testified that she had been practicing criminal law for thirty-one years and had tried between seventy to eighty cases, including Petitioner's. She estimated that Officer Jinks had testified ten or less times in some of those cases involving drugs. Trial counsel met with Petitioner at least thirty times, and they watched all of the videos from his case, and they reviewed his statement and other witness statements.

Trial counsel learned during Officer Jinks' trial testimony that he would be testifying as an expert witness. When asked if she had any pretrial information from the State that he would be testifying as an expert, trial counsel said:

> I don't think so. I mean, I'm sure he was on a - - obviously, he was on a witness list. But we didn't discuss that. I mean, I was never made - - thought that he was going to be a potential expert, and I had not had a case involving him where he had acted as an expert[.]

Trial counsel agreed that in addition to expert testimony, Officer Jinks also provided fact testimony about Petitioner's case.

Trial counsel testified that at the time of Petitioner's trial, she was unaware of the Sixth Circuit's opinion in *United States v. Lopez-Medina*, and she had not reviewed the case since trial. She testified that the trial court gave the standard jury instruction for an expert witness. Trial counsel did not recall any language in the jury instructions regarding the dual role of Officer Jinks as both an expert and fact witness. When asked if it occurred to her to object to the jury instructions, trial counsel testified:

> No. And quite frankly, I was the most concerned about the especially aggravated kidnapping because I knew if he was convicted of that, the drug case was going to be kind of irrelevant because he was going to get so much time as a range II on the especially aggravated kidnapping that my focus was more on the especially aggravated kidnapping, because the way that the case

> played out, there was no dispute that [Petitioner] had a serious drug issue. That's why they were all there together. He never denied that, and he gave a statement.
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> There - - in my mind, there was no way to get - - to separate him from the - - the drug dealing, and I just thought that that was - - that was not a winner, and so my focus was more trying to separate him from the especially aggravated kidnapping and sort of separate himself from the - - from the codefendant.

Trial counsel noted that there were a number of different charges related to the kidnapping. She also testified that she did not "see how [Petitioner] could get away from the drug charges[.]"

Following the hearing, the post-conviction court made extensive findings of fact in its written order denying post-conviction relief concerning each claim raised by Petitioner. The post-conviction court ultimately found that Petitioner failed to prove ineffective assistance of counsel by failing to prove either deficient performance or prejudice. It is from this judgment that Petitioner now appeals.

ANALYSIS

Petitioner contends that the post-conviction court erred in finding that he received the effective assistance of counsel when trial counsel failed to request a jury instruction regarding the dual role of a police officer who testified as both a fact and an expert witness. The State responds that the post-conviction court properly denied post-conviction relief.

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. When a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). Failure to satisfy either prong results in the denial of relief. *Strickland*, 466 U.S. at 697. Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). The burden in a post-conviction proceeding is on the petitioner to prove his allegations of fact supporting his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f); *see Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). The factual findings of the post-conviction court are binding on an appellate court unless the evidence in the record preponderates against those findings. *Dellinger*, 279 S.W.3d at 294. The post-conviction court's application of law to its factual findings is reviewed de novo with no presumption of correctness. *Calvert v. State*, 342 S.W.3d 477, 485 (Tenn. 2011). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to de novo

review with no presumption of correctness. *Id.*; *Dellinger*, 279 S.W.3d at 294; *Pylant v. State*, 263 S.W.3d 854, 867 (Tenn. 2008).

Review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997). We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006). Deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *Cooper v. State,* 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome" of the trial. *Id.* The stronger the proof of guilt presented at trial, the more difficult it is to prove the prejudice prong of *Strickland*. When proof of guilt is overwhelming, proving prejudice is exceedingly difficult. *See Proctor v. State*, 868 S.W.2d 669, 673 (Tenn. Crim. App. 1992); *Bray v. State*, No. M2011-00665-CCA-R3-PC, 2012 WL 1895948, at *6 (Tenn. Crim. App. May 23, 2012) (finding that, in light of overwhelming evidence, petitioner could not demonstrate prejudice); *McNeil v. State*, No. M2010-00671-CCA-R3-PC, 2011 WL 704452, at *6 (Tenn. Crim. App. Mar. 1, 2011) (finding that overwhelming evidence of guilt precluded showing of prejudice from admission of item of evidence at trial).

As pointed out by the both the State and the post-conviction court in its order denying relief in this case, the United States Court of Appeals for the Sixth Circuit has recognized that "when a police officer testifies in two different capacities in the same case, there is a significant risk the jury will be confused by the officer's dual role." *United States v. Thomas*, 74 F.3d. 676, 682 (6th Cir. 1996), abrogated on other grounds by *Gen. Elec. Co. v. Joinder*, 522 U.S. 136, 143 (1997). The court further noted that in order to avoid confusing the jury, "both the district court and the prosecutor should take care to assure that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness, so that the jury can give proper weight to each type of testimony." *Id.* at 683. The Sixth Circuit has also recognized that a court may provide "an adequate cautionary jury instruction" or a "clear demarcation between expert and fact witness roles" to ensure that the jury is properly informed of the dual roles of a law enforcement officer. *United States v. Young, et. al.*, 847 F.3d 328, 357 (6th Cir. 2017).

In *Thomas*, the district court did not provide a instruction to the jury on the officer's dual role as both an expert and a fact witness; however, it gave the following instruction concerning expert testimony:

> You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

Thomas, 74 F.3d.at 683. It was also noted that the prosecutor "did delineate the transition between the examination of [the officer] as an expert witness, so that the jury can give proper weight to each type of testimony." *Id*. The Sixth Circuit concluded that the district court did not abuse its discretion by allowing the officer to testify in "both capacities." *Id*.

Petitioner relies on the Sixth Circuit's holding in *United States v. Lopez-Medina*, 461 F.3d 724 (6th Cir. 2006), in support of his argument that trial counsel in this case was ineffective for failing to object to the lack of a jury instruction on Officer Jinks' dual role as an expert and a fact witness for the State. In *Lopez-Medina*, the district court did not provide a jury instruction as to the officer's dual role; however, the court also failed to provide a general instruction to the jury concerning expert testimony, and the officer's testimony "lacked any clear demarcation between expert and fact witness roles." *Id*. at 744. Although the defendant did not object to the jury instruction, the Sixth Circuit reviewed the issue for plain error and concluded that district court erred in "permitting the dual role testimony." *Id*. at 745. The Sixth Circuit further concluded that the error, "in conjunction with the other evidentiary errors we find occurred in Medina's trial, may have affected the outcome of his trial and therefore warrants a reversal of his conviction. Thus Medina can establish an effect of his substantial rights." *Id*.

Concerning this issue, the post-conviction court in this case found:

> A review of Sixth Circuit jurisprudence reveals that the reversal in *Lopez-Medina* is an outlier in cases of dual-role instructional error. *See, e.g., United States v. Young, et al.*, 847 F.3d. 328, 357-60 (6th Cir. 2017) (no reversal warranted where lack of dual-role instruction was only error in the record); *United States v. Vasquez*, 560 F.3d 461, 470-71 (6th Cir. 2009) (lack of dual-role instruction was harmless error where the trial court gave general expert witness instructions and there were no other evidentiary errors); *United States v. Martin*, 520 F.3d 656-659-60 (6th Cir. 2008) (holding that

> the lack of a cautionary instruction for an officer's dual role testimony, although erroneous, did not seriously affect the fairness, integrity, or public reputation of the proceedings in the absence other evidentiary errors); *United States v. Neeley*, 308 Fed. Appx. 870, 878-79 (6th Cir. 2009) (no reversal warranted where, despite lack of dual-role instruction, jury received general instruction on lay witness and expert testimony); *United States v. Cobbs*, 233 Fed. Appx. 524, 541 (6th Cir. 2007) ("we cannot say that if the jury had heard an instruction concerning [the agent's] dual role, the jury's verdict would have been different"). Indeed, "[i]n circumstances where the only evidence error is the failure to provide the cautionary 'dual role' jury instruction, we have not determined that the error seriously affected the fairness, integrity, or public reputation of the proceedings." *Young, et al.*, 847 F.3d at 360.
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> While the dual-role instruction is required by the Sixth Circuit under its interpretation of the Federal Rules of Evidence, the petition cites no authority in Tennessee where the instruction is required under our Rules of Evidence. Notably, none of the Sixth Circuit cases listed *supra* have been cited by a Tennessee state court.
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> With these principles in mind, the court turns to whether [trial counsel] was deficient for failing to seek a dual-role instruction in this case. The court concludes that she was not. The trial court here provided general instructions on both lay and expert witness testimony. Like some of the federal cases cited *supra*, the expert testimony of [Officer] Jinks was not the linchpin of the State's case as there was direct evidence tying the petitioner to the drug trafficking. While the dual-role instruction is required in the Sixth Circuit, its application would be novel in Tennessee state courts. [Trial counsel] cannot be reasonably expected to make a novel instructional argument of this nature in a case where she has strategically decided to link the Petitioner to the drug activity that was taking place at the residence. As [trial counsel] testified, she was not too concerned about [Officer] Jinks' testimony because she was focused on defending against the especially aggravated kidnapping charge. The petitioner has failed to show that she acted deficiently on this point. He is not entitled to relief.

The post-conviction court further found that Petitioner failed to show prejudice by trial court's failure to object to the jury instructions.

The evidence does not preponderate against the post-conviction court's findings. Trial counsel made a strategic decision to focus on Petitioner's especially aggravated kidnapping charge because the "drug case was going to be kind of irrelevant because he was going to get so much more time as a range II[.]" She further noted that "the way that the case played out, there was no dispute that [Petitioner] had a serious drug issue. That's why they were all there together. He never denied that, and he gave a statement." Trial counsel testified that there was no way to separate Petitioner from the "drug dealing," so she attempted to separate him from the "especially aggravated kidnapping" instead.

Furthermore, trial counsel testified that at the time of Petitioner's trial, she was unaware of the Sixth Circuit's opinion in *Lopez-Medina*, and therefore, it did not occur to her to object to the jury instructions which did not contain any language regarding Officer Jinks' duel role as both an expert and a fact witness. The trial court, however, did provide an instruction on expert testimony similar to instructions provided in many of the previously cited Sixth Circuit cases addressing this issue and holding that reversal was not warranted. As pointed out by both the post-conviction court and the State, Tennessee courts have not required that a dual-role instruction be given to the jury when a law enforcement officer testifies as both an expert and a fact witness at trial. Tennessee courts have held that when an officer possesses the necessary training, experience and familiarity with specific criminal activity such as illicit drug grade, the officer can testify about such matters as an expert. *See State v. Elliot,* 366 S.W.3d 139, 147 (Tenn. Crim. App. 2010); *State v. Crawford,* No. W2009–00263–CCA–R3–CD, 2009 WL 3233519, *7 (Tenn. Crim. App. Oct. 7, 2009); *State v. Potin,* W2005–01100–CCA–R3–CD, 2006 WL 1548672, at*4 (Tenn. Crim. App. June 7, 2006); *State v. Giddens,* No. M2002–00163–CCA–R3–CD, 2003, 2004 WL 2636715, at *1-2 (Tenn. Crim. App. Nov. 15, 2004); *State v. Murrell,* No. W2001–02279–CCA–R3–CD, 2003 WL 21644591, at *6-7 (Tenn. Crim. App. Jul. 2, 2003).

There are no cases in Tennessee which have addressed the issue of the dual role of a law enforcement officer that have addressed or required a dual-role instruction. *See State v. Jones*, No. M2017-01666-CCA-R3-CD, 2020 WL 2079270 (Tenn. Crim. App. April 30, 2020); *State v. Jones*, No. W2013-00333-CCA-R3-CD, 2014 WL 6680680 (Tenn. Crim. App. Nov. 6, 2014). Trial counsel in this case was not deficient for failing "to argue law that did not yet exist" in Tennessee. *Hart v. State*, No. W2008-02715-CCA-R3-PC, 2010 WL 962939, at *8 (Tenn. Crim. App. Mar. 18, 2010).

Petitioner did not allege at the post-conviction hearing or in his brief how the lack of a dual-role instruction affected his trial. The proof in this case was overwhelming. Therefore, Petitioner has not proven his factual allegation by clear and convincing evidence or shown that he was prejudiced in any way by trial counsel's performance in this area. *Strickland*, 466 U.S. at 694. Petitioner is not entitled to relief on this issue.

CONCLUSION

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

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JILL BARTEE AYERS, JUDGE