

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 27, 2023

FILED

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Clerk of the
Appellate Courts

BENJAMIN SCOTT BREWER v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Hamilton County
No. 310932 Don W. Poole, Judge**

No. E2022-01191-CCA-R3-PC

Petitioner, Benjamin Scott Brewer, appeals as of right from the Hamilton County Criminal Court's denial of his petition for post-conviction relief, wherein he challenged his convictions for six counts of vehicular homicide by intoxication, four counts of reckless aggravated assault, driving under the influence, violation of motor carrier regulations, and speeding. Petitioner contends that he was denied the effective assistance of counsel based upon counsel's failure to object to witnesses' descriptions of the crash scene as unfairly prejudicial under Tennessee Rule of Evidence 403. Upon review, we affirm the judgment of the post-conviction court.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT H. MONTGOMERY, JJ., joined.

John G. McDougal (on appeal) and Jonathan H. Carroll (at hearing), Chattanooga, Tennessee, for the appellant, Benjamin Scott Brewer.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Coty G. Wamp, District Attorney General; and Raven Austin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

Following a trial, a Hamilton County jury found Petitioner guilty of six counts of vehicular homicide by intoxication, four counts of reckless aggravated assault, driving

under the influence, violation of motor carrier regulations, and speeding, for which he received a total effective sentence of fifty-five years' incarceration. *State v. Brewer*, No. E2019-00355-CCA-R3-CD, 2020 WL 1672958, at *1-6 (Tenn. Crim. App. Apr. 6, 2020) (footnotes omitted), *perm. app. denied* (Tenn. Aug. 6, 2020).

On direct appeal, this court summarized the evidence presented at trial, as follows:

At approximately 7:09 p.m. on June 25, 2015, [Petitioner] was driving a Peterbilt semi-truck on I-75 in a construction zone near Chattanooga when he crashed into multiple cars from the rear. The semi-truck's speed was approximately seventy-eight to eighty-two miles per hour. The entire crash scene was 453 feet long. As a result of the horrific crash, six people were killed and four people were injured.

...

On the day of the crash, Curtis Caulder, a commercial driver for Old Dominion Freightliners, was driving his personal vehicle on I-75 from Atlanta toward Chattanooga when he saw [Petitioner] driving in his "big pretty purple Peterbilt." Mr. Caulder described [Petitioner's] driving as "reckless" and noted that he was "speeding." Mr. Caulder followed [Petitioner] and "tried to catch him" so that he could "call his company and let them know how he was driving." Mr. Caulder saw [Petitioner] "tailgating people and driving way over the posted speed limit." Mr. Caulder estimated that [Petitioner] was driving "way over 80 [miles per hour]" and did not see [Petitioner] use his brakes before hitting multiple vehicles that were either slowed or stopped in the construction zone. Mr. Caulder witnessed what he described as "the worst crash scene [he had] ever seen in [his] whole life." He saw one car "blow up." One of the cars "attached to [Petitioner's] front bumper and went past the crash scene probably 400 feet or so past where he hit the first vehicle." Mr. Caulder pulled off the exit closest to the crash site, called 911, and tried to help some of the injured people. He was afraid for his own life because there were cars on fire and fluid on the roadway.

Tina Marie Close, her husband, and their two children were traveling in their truck near mile marker eleven on I-75 on the day of the crash. The family was on the first leg of their summer vacation when the navigation system gave them a warning about slowing traffic ahead. One of their children was asleep in the back seat and the other child was watching a movie while wearing headphones. There was a road sign notifying drivers of a left lane closure for construction. Mr. Close moved their vehicle to the center

lane and continued to advance in traffic until he was eventually forced to stop because of the construction.

Mrs. Close heard “an explosion or implosion” and turned to look out the rear window of their truck in the direction from which the noise originated. She saw [Petitioner’s] semi-truck coming toward them “very fast, it was not appearing to slow down” and she saw cars “going everywhere.” Mrs. Close yelled to warn her husband because she was afraid that they were about to be killed. Their truck was hit from the rear by [Petitioner’s] semi-truck; the impact destroyed their truck bed. All four members of the family were able to get out of the vehicle. They saw a “group of vehicles behind [them] on fire.” Mr. and Mrs. Close were both treated for whiplash as well as other injuries. The experience was so traumatic that Mr. and Mrs. Close received counseling after the wreck.

Nancy Stanley was riding in a 2007 Chevy Uplander van with her husband, John Stanley, on I-75 on the day of the crash. They were headed to Gatlinburg when they saw signs announcing that there was construction ahead on the roadway. Traffic was moving at a “creepy crawl” pace. Mr. Stanley saw the construction zone and the slowing traffic from the “top of a hill.” When they reached the “zone,” traffic was just about at a “complete stop.” He “heard a racket” and looked in the mirror on the left door of his van and saw cars coming toward them. He told Mrs. Stanley that they were about to be hit. Their van was hit “so hard it broke the seats and [they] both fell back.” Mr. Stanley saw fire and told Mrs. Stanley to get out of the van. They were both injured – Mrs. Stanley sustained bruising on her right side and has a permanent knot on her side, and Mr. Stanley received an injury to his lower back, his shins, and bruising on his lower extremities. He still felt pain in his legs a year after the crash.

Ryan Humphries also received injuries in the crash. He was driving his Ford F-150 truck on I-75 when he noticed overhead signs announcing construction. Mr. Humphries also saw construction trucks and saw that traffic was “getting backed up because of construction.” Mr. Humphries did not recall the actual crash; his first memory after the crash [was] in an ambulance. Mr. Humphries sustained a cut on the back of his head that needed a total of six to ten staples. He also suffered from a shattered elbow and detached bicep from the crash. It took almost a year to regain the use of his arm. Mr. Humphries had surgery to insert pins and a rod into his arm. Additionally, he sustained severe burns on his heel that necessitated a double

skin graft. It took nearly two years for him to regain the ability to walk normally.

Justin Knox, the driver of a Cadillac CTS-V, was driving from Atlanta to Knoxville when his car was hit during the crash. He did not recall the accident. He woke up in the hospital. As a result of the crash, he suffered a brain bleed and a severe concussion. It took him several months to regain his memory and start functioning normally. At the time of trial, Mr. Knox still had difficulty doing his job and had anxiety when he drove.

Robert Delay witnessed the accident. He was driving home on I-75 when he saw traffic slow because of construction. He looked behind his vehicle and could see [Petitioner] driving his truck in the left lane, where cars were slowed because of the construction. Mr. Delay opined that [Petitioner] could have moved his truck over to the right to avoid hitting cars but [Petitioner] did not do so. Mr. Delay did not see [Petitioner] hit the brakes prior to the crash and estimated that [Petitioner's] truck was traveling approximately seventy miles per hour when it struck the first car. Mr. Delay could see cars "going everywhere." Mr. Delay saw Tiffany Watts get ejected from her car; her body landed in front of his truck. Mr. Delay got out of his car to check on Ms. Watts but she was already deceased. Another car, driven by Jason Ramos, was "[s]quashed . . . like an accordion" against the front of [Petitioner's] semi-truck. By the time Mr. Delay got to this car, Mr. Ramos was also already deceased. Mr. Delay saw [Petitioner] get out of the cab of his truck, look at the front of his truck, and get back into the truck. [Petitioner] did not check on any of the people in the vehicles that he hit with his truck.

Tennessee Highway Patrol Trooper Gray Gibson was the first officer to arrive on the scene. He was parked north of the accident on I-75, providing protection for the construction zone when a construction worker told him that there was a lot of smoke in the area. Trooper Gibson drove southbound in the northbound lane toward the direction of the smoke. He estimated that it took him thirty seconds to arrive on the scene of what he described as the "worst traffic crash" he had seen in his 20 years on the job. As he surveyed the "chaotic" scene, he saw a "tractor-trailer . . . , up against the barrier wall." [Petitioner] was seated in the passenger seat of his semi-truck. He told Trooper Gibson that he hit his head and did not remember anything. There were "burning cars and just cars everywhere." People were running from a nearby motel with fire extinguishers to assist with the crash scene. Trooper Gibson placed [Petitioner] in the right rear seat of the police car and set about

locating witnesses to the crash. Trooper Gibson described [Petitioner] as cooperative in the report he submitted after the crash. Trooper Gibson “did not indicate” that [Petitioner] displayed any signs of intoxication on his report.

Lisa Martin, a phlebotomist, worked as an independent contractor for law enforcement agencies in the Chattanooga area. She routinely travelled to accident sites or hospitals to obtain blood samples for law enforcement agencies after accidents involving fatalities and/or driving under the influence. Her husband, a Chattanooga police officer, woke her up on the night of the accident to inform her that she was needed at an accident scene. On her arrival, she witnessed “[h]orrific devastation.” She saw “a vehicle, . . . that had slammed into a wall, and there was a fatality in that vehicle.” She saw another “vehicle that had been burnt” with “burnt corpses” inside and a “fatality laying [on] the side of the road.” She described the scene as gruesome—“you could smell burnt flesh, diesel fuel, almost like a metallic smell” and there was “debris everywhere; car parts, fire extinguishers, bandages, blood, glass, tires.”

Mrs. Martin reached Trooper Gibson’s vehicle and placed her medical bag on his trunk. She saw [Petitioner] sitting in the trooper’s vehicle but did not immediately identify him as the driver because “his demeanor did not match [the] scenario.” She introduced herself. [Petitioner] consented to the blood draw so she put on her gloves and prepared to draw [Petitioner’s] blood by applying a tourniquet and wiping his arm off with a wipe. [Petitioner] did not appear to be injured. He told Mrs. Martin, “What’s done’s done, I can’t undo it, I don’t understand why I’m here, they won’t let me go home, can I go home after the blood draw?” [Petitioner] held his breath during the blood draw. Mrs. Martin described this as behavior that indicated someone was trying to pass out intentionally in order to avoid the blood draw. When she completed the blood draw, she wrote [Petitioner’s] name on both vials of the blood, did “everything that’s required in that TBI [Tennessee Bureau of Investigation] kit, sealed it up and gave it to [Officer Thomas] Seiter.”

Officer Seiter was part of the traffic division and motorcycle unit of the Chattanooga Police Department. He and his partner Officer Casey Cleveland responded to a dispatch call about a “multiple vehicle, possible multiple fatalit[y]” crash. They stopped to get the Total Station, “survey equipment for surveying a scene.” When he arrived, he encountered [Petitioner], who “was a little agitated.” He asked [Petitioner] if he would give a written statement, and [Petitioner] told Officer Seiter that he could not

see without his glasses. Officer Seiter climbed into the cab of [Petitioner's] semi-truck, retrieved [Petitioner's] glasses, and gave them to him. [Petitioner] gave the following written statement: "I seen brake lights tried to stop + couldn't hit brakes + couldn't stop." In a later recorded statement, [Petitioner] explained that he started his delivery on Monday in London, Kentucky. He made that delivery on Wednesday and started to head back home. [Petitioner] explained as he was driving near Chattanooga, he "[s]een the brake lights" and tried to engage his brakes but that they did not work. [Petitioner] claimed that he had some problems with the brakes leaking air but he thought that the issue had been fixed.

Officer Joe Warren, an accident reconstructionist, examined the crash scene. In his opinion, [Petitioner] would have had about one mile of visibility prior to the crash site. There were no observable skid marks prior to the first impact between [Petitioner's] semi-truck and a Toyota Prius. The Prius was travelling at five miles per hour when it was hit by the semi-truck traveling between 78 and 82 miles per hour. Officer Warren opined that the semi-truck knocked the Prius into a Toyota Scion and then into a LeafGuard van. The Prius was moved approximately 200 feet from the initial impact point. Ms. Watts, the driver of the Scion, was ejected from the vehicle and landed about 200 feet north of the collision site despite wearing her seatbelt. A Mazda Tribute ended up sideways against the hood of [Petitioner's] semi-truck and continued to collide with other vehicles while stuck to the front of [Petitioner's] semi-truck. The Mazda was completely crushed and went from being about six feet wide to about two feet wide.

The posted regular speed limit in the area of the crash was 65 for passenger vehicles and 55 for trucks. An inspection of [Petitioner's] semi-truck revealed that the brakes were working properly and that the brake shoes were properly adjusted. The tractor protection valve was not working, but this did not contribute to the crash because the tractor and the trailer were not disconnected from each other. There were no visible skid marks at the scene that indicated the emergency braking system engaged after the air brakes failed.

Autopsies of the six victims, including two children ages nine and eleven, revealed that they died of multiple blunt force injuries caused by a motor vehicle collision. Several of the victims sustained extensive burns in addition to their other injuries.

Chief Brian Hickman of the Collegedale Police Department was certified as a Drug Recognition Expert (“DRE”) in the area of drug recognition evaluation over the objection of counsel for [Petitioner]. Chief Hickman explained that a DRE rules out medical issues and alcohol as reasons for impairment and uses certain tests to determine “which drug or drug categories that [the person is] under the influence of.” He went through training in order to get certified as a DRE that included two days of school, a test, seven more days of school, a second test, twelve supervised evaluations, and a final knowledge exam. Chief Hickman was required to get recertified every two years.

Chief Hickman explained the “12-step process” for his evaluation of an individual. First, alcohol should be ruled out as the impairment. Second, a “preliminary examination” should be performed by talking to the individual to determine if there are “any medical issues.” Chief Hickman explained that the individual may be asked “when did you sleep, when did you eat, have you taken any medications, do you take any drugs, those sort of things” Then, the individual’s eyes are examined for “certain clues.” The test advances to the “divided attention tests” before assessing “vital signs” like pulse, blood pressure, and body temperature. The next step is a “dark room exam” of the eyes under different lighting conditions. The individual should be examined for injection and/or ingestion sites for drugs. Additionally, the individual should be informed of the results of the evaluation and asked “if they confirm anything or add anything to it.”

Chief Hickman evaluated [Petitioner] at the Collegedale Police Department. [Petitioner] arrived by patrol car. [Petitioner] was quiet. [Petitioner’s] breath test was a “zero zero.” The results of the blood test were not available at the time of the evaluation. [Petitioner] informed Chief Hickman that [Petitioner] had a bump on his head but [Petitioner] denied that he needed medical care or an ambulance. Chief Hickman observed the “abrasion” on [Petitioner’s] forehead.

Chief Hickman administered four divided-attention tests: the modified Romberg balance test, the walk-and-turn, the finger-to-nose, and the one-leg stand. The modified Romberg balance test requires an individual to “stand with their feet together, their arms down to their side, they slightly tilt their head back, close their eyes, and then they estimate the passage of 30 seconds.” At the end of the 30 seconds, the individual tilts their head back to the forward position and tells the test administrator to stop. Chief Hickman looked for any type of swaying, tremors, and the accuracy of the estimation

of time. [Petitioner] performed this test, stopping at 27 seconds. During the test, Chief Hickman saw both eyelid and body tremors. Chief Hickman next asked [Petitioner] to perform the walk-and-turn. Chief Hickman demonstrated the proper technique of walking “heel-to-toe” to the end of the line. [Petitioner] was wearing sandals and stepped out of balance during the instruction stage. He took off his sandals, got back into the instruction stage position, and still could not maintain balance. According to Chief Hickman’s notes, [Petitioner] raised his arms three times and missed heel-to-toe on the first nine steps. At the turn, [Petitioner] “completely stepped off the line, went to the side, turned around, came back around and then got back in position to continue the test” against the instructions. On the second set of steps, [Petitioner] “raised his arms and missed the heel-to-toe again.”

Next, [Petitioner] was asked to perform the one-legged stand. He was instructed to stand on his left leg first, raise his right leg six inches off the ground, keep his arms to his side, keep both of his legs straight, look down at his foot and count “one thousand one, one thousand two,” etc. until he was told to stop. [Petitioner] “did not follow . . . instructions, especially on counting.” [Petitioner] swayed for balance, used his arms for balance, and put his foot down three times during the test.

[Petitioner] was then asked to perform the finger-to-nose test. [Petitioner] was instructed to “stand with feet together, arms down to [his] side” and to extend his arms “just a little bit, close all fingers [ex]cept [his] index finger, and . . . tilt [his] head back slightly, [and] close [his] eyes.” [Petitioner] was then asked to take the tip of his finger and alternatively touch his nose with each finger. [Petitioner] missed the tip of his nose on several tries and used the pad of his finger rather than the tip of his finger. [Petitioner’s] pulse rate was measured as high, in the range of 108 to 110 beats per minute. [Petitioner’s] blood pressure was also high, at 174/130 compared to a normal reading of 120/70 to 140/90.

As a result of [Petitioner’s] performance on the tests and the visual observations, Chief Hickman surmised that [Petitioner] was impaired. Based on his observations, Chief Hickman opined that [Petitioner] was likely under the influence of both a depressant and a stimulant. Chief Hickman acknowledged that the results of [Petitioner’s] blood test indicated that [Petitioner] was positive for methamphetamine, a stimulant, but did not indicate the presence of a depressant.

On cross-examination, Chief Hickman admitted that the DRE test was standardized and that the steps needed to be done in the same way and in the same order each time they are administered. He admitted that he failed to interview the arresting officer but acknowledged that [Petitioner] was not in custody at the time he started the test. Additionally, Chief Hickman talked to the officer but noted that “there was nothing that [the officer] gave [him] to put in the report that would be valuable for it.” According to Chief Hickman, field studies estimated the accuracy of the DRE test as 50% reliable for predicting stimulants and 33% reliable for predicting depressants. However, he explained that the field studies did not validate the tests with people who had been involved in an accident.

Special Agent Melinda Quinn of the TBI was certified as an expert in the field of forensic toxicology. She tested [Petitioner’s] blood. The test reflected that the blood sample was positive for methamphetamine at .08 micrograms per milliliter and amphetamine at less than .05 micrograms per milliliter. She explained that the amphetamine was likely a metabolite of methamphetamine and that the methamphetamine exceeded the therapeutic range. At the levels found in [Petitioner’s] blood, methamphetamine caused jitteriness and restlessness, impaired spatial judgment, led to increased risk taking, and made it more difficult to perform “divided attention tasks” like driving a vehicle.

On cross-examination, Special Agent Quinn explained the testing procedure. Part of the procedure involved the use of a solvent named ammonium hydroxide to adjust the pH of a sample. For each blood test, tests are run with the actual sample and with quality control samples. According to Special Agent Quinn, the solvent used by the TBI in running [Petitioner’s] test “was contaminated with naphthalene.” On the printout from the chromatogram for [Petitioner’s] sample there was “naphthalene peak.” She explained that the naphthalene was not in “the blood sample, and [she] can show that because it shows up in all of [her] quality control samples. It was in the ammonium hydroxide that we used to help extract the blood.” She further explained that naphthalene was “a byproduct that’s familiar to most people in terms of mothballs.” It also appears in diesel fuel. Special Agent Quinn admitted that she did not make any notes regarding naphthalene in the report about [Petitioner’s] sample but that it was “something that we noticed in our laboratory.” She further explained that the naphthalene “did not prevent [the TBI] from being able to detect drugs that were present in the sample.” Special Agent Quinn did not recall making any notes on the report of [Petitioner’s] blood sample.

Todd Fortune, a semi-truck driver, testified on behalf of the defense at trial. He witnessed the crash. Mr. Fortune followed [Petitioner] for about five or six miles prior to the accident, going about 64 miles per hour. Mr. Fortune's semi-truck had a governor on it to regulate speed. He acknowledged that the area prior to the wreck was downhill and that Mr. Fortune's semi-truck was probably traveling closer to 70 miles per hour. Mr. Fortune saw [Petitioner's] "brake lights c[o]me on." Mr. Fortune described that [Petitioner] "was bailing out [toward the exit ramp] and he caught that car [sitting in the pie shaped area near the exit ramp] with the right-hand side of his bumper." This was followed by "a violent explosion" where flames shot 25 feet into the air. [Petitioner] then "jerked the wheel back to the left." Mr. Fortune stopped his truck and turned on his flashers.

Dr. Robert Belloto, Jr., testified for the defense as an expert in pharmacology. He criticized the TBI test. He testified that the substances identified in [Petitioner's] blood were likely not methamphetamine or amphetamine. He explained "the way chromatography works" and that the goal is to try to quantitate a substance by looking at the "mass spectrum" to see if you have a match for a drug like methamphetamine. The software used to perform the test gives "what percentage of a match that is, it's based upon some mathematics." In [Petitioner's] sample, "[n]aphthalene was a better match." He explained naphthalene was a component of diesel fuel and diesel exhaust. He further explained that the software "gives you an idea of what's there" in a mass spectrum, and "you now have to interpret that mass spectrum" to determine what organic compounds make the "peaks" on the results. Dr. Belloto explained that if he were performing the test on [Petitioner's] sample and he saw the spike come up at naphthalene he would "keep digging" and further interpret the results. He interpreted [Petitioner's] results to have "an overlap of other compounds that are coming off approximately the same time, with the same ions." While you "can't separate" every molecule in drug analysis, Dr. Belloto expressed concern that the results did not "all line up . . . [f]or it to be methamphetamine." Dr. Belloto opined that the TBI should have disclosed the contamination and started over with a fresh sample but acknowledged that it would not be entirely unusual to find naphthalene in the blood sample of a truck driver. Dr. Belloto took issue with the TBI's failure to differentiate between L and D methamphetamine. Dr. Belloto admitted that he always testified for the defense and that he did not review the DRE evaluation or law enforcement investigative file prior to his testimony. Dr. Belloto informed the defense that the blood was contaminated with naphthalene. Dr. Belloto did not think

the TBI test was reliable because the sample was contaminated, and he did not think the results showed the presence of methamphetamine.

Id. at *1-6. This court affirmed Petitioner's judgments of conviction, and the Tennessee Supreme Court denied further review. *Id.* at *1.

Petitioner subsequently filed a timely pro se petition for post-conviction relief. After issuing a preliminary order and receiving additional pro se filings from Petitioner, the post-conviction court appointed counsel. Following the appointment of counsel, Petitioner filed two amended petitions, alleging in relevant part, that trial counsel rendered ineffective assistance by "not invoking [Tennessee Rule of Evidence] 403 and objecting to cumulative and unfairly prejudicial descriptions of the scene, including fires, explosions, and burnt corpses[.]"

At the post-conviction hearing, Petitioner introduced, as exhibits, a copy of Petitioner's indictment and the transcripts of his trial and sentencing hearing. Trial counsel testified that he had been practicing law since 1997, had represented other DUI defendants, and had tried around fifteen homicide cases in his career. Trial counsel stated that he represented Petitioner from the commencement of the prosecution through the conclusion of the direct appeal. He explained that the accident occurred when Petitioner, in his semi-truck, "ran into cars that were stalled behind a construction area" on Interstate 75. He said that the accident killed six victims and injured four others.

Trial counsel testified that he conducted several pretrial suppression hearings in Petitioner's case and that they reached an agreement with the State about the photographs to be admitted at trial. Trial counsel explained that there were photographs of burnt corpses and "corpses covered by a sheet" that were excluded, noting that the photographs were "extremely prejudicial" to Petitioner.

Trial counsel noted that, among the witnesses at trial, were several who were involved in or witnessed the accident and described the scene. Those witnesses included Mr. Caulder, Mr. Delay, Mrs. Martin, and Mrs. Close. Trial counsel conceded that, although the testimony from these witnesses was prejudicial, he did not object to the descriptions of the accident scene. Trial counsel stated that the accident scene was "horrific" and that the mere fact there were "six dead bodies" was prejudicial "[i]n and of itself." Trial counsel explained that the defense did not dispute the accident or its seriousness and did not consider it appropriate to do so; thus, absent repetitiveness, he decided not to object to testimony about the accident and its aftermath for strategic reasons. Trial counsel stated that he did not "want to draw any more attention to the fact that it was a horrible accident" by making an objection because he was concerned that an objection

“would have just made . . . the jury more aware of it.” Trial counsel said that the testimony never became repetitive.

Trial counsel summarized the trial testimony concerning Petitioner’s field sobriety tests and blood test. He explained that the officer who conducted the field sobriety tests concluded that Petitioner was “on a stimulant and maybe a depressant”; the officer admitted that the tests were only “33 percent” or “50 percent” accurate. Trial counsel explained that Petitioner’s blood tested positive for methamphetamine but that the TBI agent admitted on cross-examination “that the sample was contaminated” with naphthalene. He said that the defense expert concluded that the model showed naphthalene in Petitioner’s system and not methamphetamine. He stated that part of the defense strategy included focusing on the contamination issue and highlighting, in the closing argument, the naphthalene found in Petitioner’s system and the defense expert’s testimony. He explained that he relied upon Mrs. Martin’s testimony about “diesel fuel being on the road” at the scene in his closing argument.

At the close of the hearing, the post-conviction court took the matter under advisement and then entered a written order denying relief. In its order, the post-conviction court concluded that Petitioner failed to establish by clear and convincing evidence that he was denied the effective assistance of counsel. The post-conviction court determined that the testimony from Mrs. Close, Mr. Caulder, and Mr. Delay describing the accident and its circumstances were relevant to establish:

various elements of the charged offenses, including identity, speed, recklessness as reflected in speed and failure to heed construction notices or take avoidant action by braking or leaving the road on the right instead of veering across the road to strike slowed or stopped passenger vehicles on the left, cause of injury, cause of death, and . . . Petitioner’s impairment.

The post-conviction court found that the witnesses’ descriptions of the accident reflected “different perspectives” on the circumstances of the accident and “were not repetitive or, if repetitive to the extent of their agreement, were relevant on the issue of the witnesses’ credibility.” Accordingly, the post-conviction court found no deficient performance in trial counsel’s failure to raise an objection under Tennessee Rule of Evidence 403.

Likewise, the post-conviction court concluded that the testimony from Mrs. Close, Mr. Caulder, Mr. Delay, and Mrs. Martin regarding the post-accident scene was not irrelevant or repetitive. The post-conviction court noted that Mr. Delay’s and Mrs. Martin’s descriptions of Petitioner at the scene after the accident were relevant to establish his impairment or lack thereof and to provide context for the drug recognition expert’s

evidence. The court further determined that the testimony about “explosions, fires, burnt or mangled vehicles, bodies, and the smell of burnt flesh” were relevant to provide context to the descriptions of Petitioner’s behavior at the scene, the drug-recognition expert’s evidence, the medical examiner’s testimony about the deceased victims’ injuries and causes of death, and the victims’ testimony about the degree of their injuries. The court noted that trial counsel did not cross-examine the witnesses about their descriptions and that counsel succeeded in excluding prejudicial photographs of the scene. The post-conviction court, therefore, concluded that there was “no deficiency in counsel’s failure to object to descriptions of the [post-accident] scene.”

This timely appeal follows.

Analysis

On appeal, Petitioner asserts that he was denied the effective assistance of counsel at trial based upon trial counsel’s failure to object, under Tennessee Rule of Evidence 403, to the introduction of testimony describing the accident and its aftermath, including the injured and deceased victims. Petitioner contends that the testimony “was more prejudicial than probative and that it caused the jury to find against [him].” The State responds that the post-conviction court properly denied relief because Petitioner failed to show that trial counsel’s representation was deficient and prejudicial. We agree with the State.

To prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court’s factual findings unless the evidence preponderates against such findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). Additionally, “questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the [post-conviction court].” *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997)); *see also Kendrick*, 454 S.W.3d at 457. The trial court’s conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. *Kendrick*, 454 S.W.3d at 457.

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. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel’s performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same

standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). 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)). Additionally, 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*, 960 S.W.2d at 579. 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).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley*, 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)); *see also Goad*, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688); *see also Baxter*, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

"[E]vidence is relevant if it helps the trier of fact resolve an issue of fact." *State v. James*, 81 S.W.3d 751, 757 (Tenn. 2002) (quoting NEIL P. COHEN, ET AL., TENNESSEE LAW OF EVIDENCE § 4.01[4], at 4-8 (4th ed. 2000)). However, relevant evidence should be excluded if its prejudicial effect substantially outweighs its probative value. *State v. Banks*, 564 S.W.2d 947, 951 (Tenn. 1978). Rule 403 of the Tennessee Rules of Evidence provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. "Unfair prejudice" is defined as "[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Banks*, 564 S.W.2d at 951 (quoting Advisory Committee Note to Federal Rule of Evidence 403).

In this case, the record supports the post-conviction court's determination that Petitioner failed to show he was denied effective assistance of counsel based upon trial counsel's failure to object, under Tennessee Rule of Evidence 403, to the introduction of testimony describing the accident and its aftermath, including the injured and deceased victims. At the post-conviction hearing, trial counsel testified that it had been a strategic decision on the part of the defense not to object to descriptions of the accident and the crash scene to avoid drawing the jury's attention to "the fact that it was a horrible accident." Trial counsel testified that he had intended to object if the testimony became repetitive but stated that, in his opinion, the witness testimony had not been repetitive or lengthy. Moreover, trial counsel did not cross-examine the witnesses about their descriptions, and counsel successfully argued for the exclusion of prejudicial photographs of the scene. In denying relief, the post-conviction court agreed that the disputed testimony was relevant to establish the elements of the charged offenses, determine witness credibility, and provide context and was not repetitive. Because the probative value of the disputed testimony was not substantially outweighed by the danger of unfair prejudice and because trial counsel's decision not to object was a strategic one, the record supports the post-conviction court's determination that Petitioner failed to establish deficient performance under *Strickland*. Petitioner is not entitled to relief on this claim.

Conclusion

Based on the foregoing, the judgment of the post-conviction court is affirmed.

ROBERT L. HOLLOWAY, JR., JUDGE