

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 24, 2023 Session

FILED
04/12/2023
Clerk of the
Appellate Courts

KEVIN ALLEN FLEMING v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Campbell County
No. 18272 E. Shayne Sexton, Judge**

No. E2022-00286-CCA-R3-PC

The Petitioner, Kevin Allen Fleming, appeals the Campbell County Criminal Court’s denial of his petition for post-conviction relief from his convictions of three counts of aggravated vehicular homicide and one count of driving under the influence, fourth offense. On appeal, the Petitioner contends that the post-conviction court erred by denying relief on his claims alleging that he received the ineffective assistance of trial counsel. We affirm the post-conviction court’s judgment.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

Joshua D. Hedrick, Knoxville, Tennessee, for the appellant, Kevin Allen Fleming.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Jared R. Effler, District Attorney General; and Graham Wilson and Ashley Claiborne, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

A. Trial

The Petitioner’s convictions arose from a single-car crash that occurred on July 21, 2014, during which the Petitioner lost control of the car he was driving and caused the deaths of his three passengers. *State v. Kevin Allen Fleming*, No. E2016-01746-CCA-R3-CD, 2018 WL 1433503, at *1 (Tenn. Crim. App. Mar. 22, 2018), *perm. app. denied* (Tenn. July 18, 2018).

The pertinent facts from the underlying trial, as summarized by this court on direct appeal, are as follows:

John Tipton responded to this accident on July 21, 2014, in his capacity as an Emergency Medical Technician (“EMT”) with the Campbell County Emergency Medical Service (“EMS”). He testified that, when he arrived at the scene, he determined that the vehicle was still occupied by Darrell Carroll. He also noted that the [Petitioner] was in an area termed the “collapse zone,” meaning he was in an area that was in danger of collapsing, so he responded to the [Petitioner] first in order to move him to safety. The [Petitioner] was “hurting” and did not say much. Mr. Tipton did a quick assessment and secured the [Petitioner] in an ambulance. Mr. Tipton said that the [Petitioner] stated that he was the driver [of] the vehicle and that his vehicle had “come off the roadway.” The [Petitioner] asked about his dog that was at the scene, wanting to know if someone was taking care of it. The [Petitioner] also asked about the occupants of his vehicle.

Mr. Tipton described the roadway where the accident occurred as “horribly narrow.” He said that one would have to be alert when driving on the roadway, in part because it is hard to maneuver. During the ambulance ride to the hospital, Mr. Tipton asked the [Petitioner] if he was taking any medications, and the [Petitioner] said he was taking Hydrocodone.

Mr. Tipton identified a photograph of the truck involved in the accident, and he noted that the roof had been extricated off the truck.

During cross-examination, Mr. Tipton said that he saw the [Petitioner]’s dog at the scene, and he identified a picture of the dog. Mr. Tipton identified a picture of the [Petitioner], which showed that he was bleeding from both his mouth and his eyes. The [Petitioner]’s right eye was swollen shut. The [Petitioner] did not remember the accident, but knew that he had been in an accident. The [Petitioner] repeatedly asked about his friends and his dog. Mr. Tipton did not smell alcohol on the [Petitioner] and only smelled blood. Mr. Tipton noted that the [Petitioner]’s blood oxygen level was low, but Mr. Tipton had a hard time getting the [Petitioner] to accept oxygen. He said that the [Petitioner]’s head injury was of the “kind of magnitude” that it made him disoriented.

Joe Brown, a [Tennessee Highway Patrol (“THP”) trooper], testified that he arrived at the scene at around 7:30 p.m. on July 21, 2014. When he

arrived, he saw a pickup truck lying on its side and medical personnel attending to a patient trapped inside the vehicle. He also saw medical personnel attending a man who was lying on the left side of the roadway and two other people who were already loaded into ambulances, one of whom was the [Petitioner]. The trooper asked the [Petitioner] what had happened, and the [Petitioner] responded that he was attempting to pass a vehicle when his pickup truck ran off of the roadway. The [Petitioner] did not mention any animal running into the roadway.

Trooper Brown described the road where the accident had occurred as “very narrow.” He said that it was possible for two cars to pass on the roadway but that one of the cars would be in the ditch line. Trooper Brown said that, from his preliminary investigation, it appeared that the pickup truck was traveling “fast” when it left the roadside on the right and went into the ditch. He said that it appeared that the driver had overcorrected and struck the embankment, which caused the vehicle to go into a roll. Trooper Brown identified a photograph of a Bud Light can that was located at the scene.

During cross-examination, Trooper Brown testified that some of the damage to the vehicle was sustained from the “jaws of life” being used to extract the vehicle’s occupants. The trooper agreed that he did not cite speed as a factor in his initial accident report. He said that, as part of his investigation, he did not try to calculate the [Petitioner]’s speed at the time of the accident. Trooper Brown said he assumed the Bud Light can came from the vehicle, but he was not sure. Trooper Brown clarified that the [Petitioner] told him that he was attempting to pass a vehicle coming the opposite direction, toward him, at the time he lost control of his truck.

Randy Deadrick, another trooper with the THP, testified that he was asked to go to UT Medical Center to retrieve a blood draw from the [Petitioner]. Trooper Deadrick said that, at the time, he did not know the details of the accident. When he arrived at the hospital, he asked the [Petitioner] what had happened. Trooper Deadrick said that the [Petitioner] had watery, bloodshot eyes, had blood on him, smelled of beer, and was lying on a stretcher. The [Petitioner] told the officer that a cow had run in front of his truck. He also told the officer that he had consumed a “couple” of alcoholic drinks earlier and that he had taken a Hydrocodone that morning. Trooper Deadrick was certain that the [Petitioner] had not mentioned any dogs or other animals.

Trooper Deadrick testified that, at this point, he asked the [Petitioner] to submit to a blood test, and the [Petitioner] agreed. The trooper explained the process of the blood sample retrieval, and he was present when the [Petitioner]'s blood was drawn. The trooper said that after the blood was drawn, he took it to the district office, entered it into evidence, placed it in the evidence locker or "drop box," and left a copy of the paperwork with the evidence custodian, who then took it to the [Tennessee Bureau of Investigation ("TBI")] crime laboratory.

During cross-examination, Trooper Deadrick said that the [Petitioner] had his eyes open and was talking to him. He was unsure if the [Petitioner]'s eyes swelled shut after their conversation. Trooper Deadrick said that he created a memorandum summarizing his interaction with the [Petitioner] four months after the interview. He said that, in his report, he noted that the [Petitioner] had bloodshot eyes, constricted pupils, and smelled of alcohol. He said that he asked the [Petitioner] to submit to a blood test, and the [Petitioner] agreed. Trooper Deadrick testified that he also obtained blood draws from the other occupants of the vehicle.

....

[TBI] Agent [Regina] Aksanov then testified that she tested the [Petitioner]'s blood sample, which was collected at 9:45 p.m. The [Petitioner]'s blood tested positive for alcohol at a level of .07 percent. Agent Aksanov then explained that alcohol was a central nervous system depressant and it slowed down a person's senses. She said alcohol made a user's reaction times slower, made it harder for them to concentrate on more than one thing, caused slurred speech, and could make the user drowsy. She agreed that a blood alcohol level of .08 percent was the presumptive level of intoxication but said that one could be impaired at a "much lower" level.

....

Stephanie Dotson, with the TBI crime laboratory, testified as an expert in forensic drug analysis and identification that she tested the [Petitioner]'s blood. She said that the [Petitioner]'s blood tested positive for cocaine, cocaethylene, and also Hydrocodone. Agent Dotson testified that Hydrocodone was a central nervous system depressant and that cocaine, while affecting people differently, caused alertness and sometimes anxiety, confusion, restlessness, tremors, and insomnia, among other things.

Cocaethylene, she explained, was a chemical the body produced when cocaine and alcohol were consumed simultaneously. She said that cocaethylene was “just as potent as [c]ocaine.” She said it had a longer half-life, meaning that it would remain in the blood longer and produce euphoria longer in the body. Agent Dotson said that she was unable to quantify the amount of cocaine and cocaethylene because those substances are not stable in the blood, making them difficult to quantify.

During cross-examination, Agent Dotson testified that she did not quantify the amount of Hydrocodone in the [Petitioner]’s blood, although that was possible. She explained that she had “issues” with her instrument, which made her only able to report that it was positive and not the quantity.

Gary Michael Lees testified that he had lived in the area of the accident for over thirty years. He said that, around the time of this accident, he was working on a broken-down tractor. Mr. Lees said that, around 6:00 p.m., he heard a vehicle “under hard acceleration for a few seconds.” He then heard tires sliding or going sideways on the roadway, followed by an impact, and a car horn continuously sounding. Mr. Lees said that he went to his garage and got on his motorcycle and rode toward the noise. He followed the sound of the horn toward the accident site. When he arrived, he saw a man in the road walking and asking for help. Mr. Lees told him to get out of the road and sit down.

Mr. Lees testified that he could see a vehicle on its side on the passenger side. He saw a man hanging from the driver’s seat by a seatbelt or a shoulder harness. Mr. Lees called 911 but did not return to the accident scene. He said that the accident scene was “so bad” that there appeared to be nothing that he could do to help. He said that, as he called 911, he heard sirens approaching the area of the accident.

Mr. Lees testified that the road where the accident occurred was a “bad road.” He said that, at most, one could safely travel twenty miles per hour. He said that the road was too narrow to safely accelerate quickly.

During cross-examination, Mr. Lees testified that he did not see any trash or beer cans in the area of the accident but that he had picked up beer cans on that road many times.

James Fillers, a trooper with the THP, testified as an expert in accident reconstruction. He identified a scaled diagram of the accident scene that showed tire marks from the [Petitioner]'s vehicle. He said that the roadway was less than fifteen feet wide. Trooper Fillers testified that the [Petitioner]'s vehicle came to a rest 175 feet after it left the roadway. He said that, due to the dynamics of the crash, he could not determine the exact speed of the vehicle at the time that the [Petitioner] lost control. He opined, however, that speed was a factor in the accident.

During cross-examination, Trooper Fillers testified that the posted speed limit of the roadway was thirty-five miles per hour.

Dr. Darinka Mileusnic-Polchan, the chief medical examiner for Knox and Anderson Counties, testified as an expert about the deaths in this case. She said her office performed a full autopsy on the body of Charles Morris because his death occurred shortly after the accident. Her office also performed a postmortem examination, without a full autopsy, on the bodies of Carl Daugherty and Darrell Carroll based upon their relative prolonged survival period.

Dr. Mileusnic-Polchan testified about the examination of Carl Daugherty. She said that his body arrived at her office three weeks after the accident. She said that her office received the medical records from the hospitals that treated Mr. Daugherty between the time of the accident and his death. Based on those records and the fact that his injuries were well documented during his hospitalization, a complete autopsy on the body of Mr. Daugherty, who died on August 13, 2014, was unnecessary. She said that the examination that they did perform, demonstrated some "residual trauma." Mr. Daugherty suffered broken bones, pelvic fractures, femoral fractures, a ruptured diaphragm, bleeding internal organs, a "splenic" rupture, and lung complications from an extended hospitalization. He eventually died primarily of pneumonia in his injured lungs. These injuries were consistent with a high speed motor crash. Dr. Mileusnic-Polchan identified photographs that her office took of Mr. Daugherty's body. Dr. Mileusnic-Polchan noted that the bilateral extensive fractures to Mr. Daugherty's pelvis were caused by "high velocity force." Dr. Mileusnic-Polchan declared that Mr. Daugherty's cause of death was multiple blunt force injuries from the automobile crash.

Dr. Mileusnic-Polchan then discussed Darrell Carroll's injuries. She said that he died sixteen days after the accident. In the interim between the crash and his death, UT Medical Center treated Mr. Carroll's injuries. Dr. Mileusnic-Polchan said her office accessed the medical center's records, including Mr. Carroll's x-rays and CT scans. Dr. Mileusnic-Polchan recalled that Mr. Carroll suffered extensive internal and external trauma, much like Mr. Daughtery. He also suffered "overwhelming" head trauma, which was the "main kind of mechanism" behind his death. Dr. Mileusnic-Polchan described the head trauma and identified photographs of Mr. Carroll's body.

Dr. [Mileusnic-Polchan] described Mr. Morris's injuries, saying that he died within four hours of the accident. She said that an autopsy was necessary because of the short period of time Mr. Morris survived. During her examination, she discovered that Mr. Morris suffered multiple face fractures, skeletal trauma, chest injuries and trauma, contusions and bruising on his lungs, tearing of his liver, and a spleen laceration. His main mechanism of death was internal bleeding in his abdomen from his liver and spleen injuries. Dr. Mileusnic-Polchan identified photographs of Mr. Morris's body.

During cross-examination, Dr. Mileusnic-Polchan agreed that some of the injuries suffered by the three men could have been a result of being ejected from the vehicle.

Dr. Gregory James Davis, who was employed by the University of Kentucky College of Medicine, testified as an expert in the field of forensic chemistry and toxicology. He said that after a person consumed alcohol, that person would reach a peak of absorption in twenty to forty-five minutes. One drink would cause an average male, non-heavy drinker, to peak at about .02 blood alcohol content, and the average male will get rid of that amount of alcohol in their blood in about an hour. Dr. Davis discussed the formula for determining the [Petitioner]'s blood alcohol content ("BAC") at the time of the accident, extrapolating the time between the accident and the blood test.

Dr. Davis then testified that he assisted the TBI in examining the [Petitioner]'s BAC. He said that the [Petitioner]'s BAC at the time of testing, 9:45 p.m., was .07 percent. The time of the accident was 7:15 p.m. Dr. Davis testified that, assuming that the [Petitioner]'s last alcohol consumption was twenty to forty-five minutes or more before the collision, and his body absorbed alcohol at a standard, non-heavy drinker amount, his BAC at the

time of the collision would have been between .108 percent and .12 percent. If he qualified as a heavy drinker, his BAC at the time of the accident would have been .145 percent to .17 percent. Dr. Davis discussed how this BAC would have affected the [Petitioner]'s reaction time, concentration, and judgment. Dr. Davis agreed that the TBI report also showed that the [Petitioner] had consumed cocaine at the same time as alcohol. Dr. Davis discussed the effects of cocaine, including that it was a stimulant, kept adrenalin impacting one's nerves, and could cause aggressive and bizarre behavior. Dr. Davis discussed that the [Petitioner] also had consumed Hydrocodone, and the effects of Hydrocodone on one's body.

During cross-examination, Dr. Davis testified that he and Dr. Mileusnic-Polchan had had professional disagreements about their respective findings. Dr. Davis agreed that, in one case, his testimony was excluded, but he explained that it was excluded based upon the fact that the parties could not agree about the time that the collision occurred, making his testimony not relevant. Dr. Davis agreed that men of different weights would absorb alcohol at a different rate.

Bobby Smith, an officer with the Department of Safety who responded to this accident, testified on behalf of the [Petitioner] that, after he went to the accident scene, he went to the hospital where the [Petitioner] was being treated. He said that the [Petitioner]'s injuries seemed to be severe enough that he could not be interviewed at that time. During cross-examination, Officer Smith testified that the [Petitioner] was not in the "trauma bay" for seriously injured patients at the time that the officer arrived at the hospital but instead he was in a small room where he was allowed to have visitors. Officer Smith also said that his conversation with the [Petitioner] would have centered around the circumstances of the accident and would have taken longer than asking him to submit for a blood test.

Jimmy Taylor testified that he saw the [Petitioner] between 4:30 and 4:45 p.m. the day of the accident. Two other men and the [Petitioner]'s dog accompanied the [Petitioner] to the tire store where Mr. Taylor was working. The [Petitioner] asked about a set of tires, and Mr. Taylor showed him some but informed him that he would not have time to change the tires, as the shop closed at 5:00 p.m. Mr. Taylor said that he did not smell alcohol on the [Petitioner] and that the [Petitioner] appeared sober.

During cross-examination, Mr. Taylor testified that he had known the [Petitioner] for approximately two and a half years and had never known the [Petitioner] to drink and drive. He said he did not think it was possible that the [Petitioner] consumed alcohol after he left but before the accident. Mr. Taylor said he was surprised that the [Petitioner] had a BAC of .07 at 9:45 p.m. that night and was also surprised that his blood tested positive for cocaine, saying that he had never known the [Petitioner] to use drugs.

Dustin Daugherty, the son of one of the men killed in the accident, testified that he saw the [Petitioner] shortly before this accident. He said that the [Petitioner]'s eyes did not appear bloodshot and that he did not smell alcohol on him. During cross-examination, Mr. Daugherty said he was not surprised that the [Petitioner], whom he had known for three years, had alcohol and cocaine in his system.

Jamie Lawson testified that she saw the [Petitioner] driving his truck with three passengers at around 6:30 p.m. on the day of the accident. The [Petitioner] was at her home talking to her husband when she came home from work. She said that none of the men appeared intoxicated or smelled of alcohol. Ms. Lawson said that she went upstairs to change her shoes, and that she heard the [Petitioner] leave in his truck. She learned that there had been an accident between fifteen and twenty minutes later.

During cross-examination, Ms. Lawson testified that the road near her home where this accident occurred was a narrow, mainly one-lane road with ditches on either side. She said that she did not drive fast on the road.

Keith Delong testified that the [Petitioner], whom he had known for twelve years, was hired by his company to frame a house for him. Two of the men who died in the accident also worked with the [Petitioner]. The men usually arrived at day break and left at around 3:30 for the day. Mr. Delong said that the [Petitioner] always had his dog with him and that he had worked the day of this accident and appeared sober.

During cross-examination, Mr. Delong agreed that he was unsure whether the [Petitioner] consumed alcohol or drugs after he left the work site.

Melissa Fleming, the [Petitioner]'s wife, testified that the two had a ten-year-old daughter together. Ms. Fleming taught first grade at a local elementary school, and the [Petitioner] worked in construction. Ms. Fleming

recalled that, a few days before this accident, she and the [Petitioner] had purchased a truck from her father. The day of the accident, the [Petitioner] awoke around 5:00 a.m. and took the family's dog with him to work. Ms. Fleming said she spoke with the [Petitioner] throughout the day because they were discussing that their daughter did not feel well and that they needed to make arrangements to go to her father's house that evening or the next evening. Ms. Fleming said that the [Petitioner] did not sound like he had used drugs or drank alcohol that day.

Ms. Fleming said that the men who died in the accident were like brothers to her husband. She worked with one of their wives, and all of their families were close.

Ms. Fleming described the events at the hospital. She said that there was a trooper in the [Petitioner]'s room when she arrived. She said that, when she approached the [Petitioner], she could not smell alcohol and smelled only blood. Ms. Fleming recalled the [Petitioner]'s injuries when she saw him, saying that his eye was cut and that he was having trouble moving and there were cuts and glass all over him. Ms. Fleming recalled three troopers coming into the room later.

During cross-examination, Ms. Fleming testified that she and the [Petitioner] took their daughter to the beach a few weeks after the accident. She said that they had planned the trip before the accident and did not want to "lose all [their] money" by not going. She said, however, the [Petitioner] was not completely well. She agreed that they went to Disney World during their trip.

Ms. Fleming said that the [Petitioner] often drank one or two beers a day but that she never saw him drunk. She said that she had never seen him use cocaine in their fourteen-year relationship. She said she was "truly surprised" by the blood test results. She said that when the two spoke on the phone that day, the [Petitioner] gave no indication that he was impaired by either drugs or alcohol.

Ms. Fleming said that when she was at the hospital with the [Petitioner], he was able to speak with her coherently from "time to time." The [Petitioner] told her that something had darted out in front of him and that he had tried to not hit it. He told her that his wheels went off the side of the road and then back onto the roadway and that the rest was a blur. Ms.

Fleming agreed that she did not mention the animal during her testimony at the preliminary hearing.

At this point in the bifurcated trial, the jury convicted the [Petitioner] of one count of DUI and three counts of vehicular homicide.

The State then presented evidence in the second phase of the trial. Michael Heatherly, a trooper with the THP, testified and identified certified copies of the [Petitioner]'s three prior DUI convictions. The jury deliberated again and convicted the [Petitioner] of DUI, fourth offense, and three counts of aggravated vehicular homicide.

Fleming, 2018 WL 1433503, at *3-9.

The Petitioner received an effective sentence of forty-two years. *Id.* at *1. On direct appeal from his convictions, a panel of this court affirmed the Petitioner's convictions. *Id.* The Petitioner filed a timely petition for post-conviction relief alleging that trial counsel was ineffective by (1) failing to rely upon the Petitioner's medical records at the suppression hearing and the trial, which reflected that he was twice given fentanyl and suffered momentary losses of consciousness prior to giving his consent for a blood draw, (2) failing to use an expert in pharmacology at trial to challenge findings regarding the Petitioner's impairment, (3) failing to object at trial to the presence of drugs in the Petitioner's blood, without stating a specific quantity, as being irrelevant under Tennessee Rules of Evidence 401, 402, and 403, (4) failing to object at trial to the reliability of the methods or science used by the Highway Patrol accident investigator who stated that speed was a factor in causing the accident, (5) failing to call an expert in the field of accident reconstruction at trial, (6) failing to request *Brady/Johnson*¹ and *Jencks*² information at trial, (7) failing to object to a violation of the Confrontation Clause when an expert report was entered as an exhibit at trial, and (8) failing to make a contemporaneous objection to the State's improper closing argument. The Petitioner also alleged that the cumulative effect of trial counsel's alleged deficiencies entitled him to post-conviction relief.

B. Post-Conviction Hearing

At the February 10, 2022 post-conviction hearing, trial counsel testified that he represented the Petitioner at the trial. He said that there was an issue regarding whether

¹ *Brady v. Maryland*, 373 U.S. 83 (1963); *Johnson v. State*, 38 S.W.3d 52 (Tenn. 2001).

² *Jencks v. United States*, 353 U.S. 657 (1957); see also Tenn. Code Ann. § 40-17-120; Tenn. R. Crim. P. 26.2.

the Petitioner consented to the warrantless blood draw taken after the car wreck. Trial counsel said that he filed a pretrial motion to suppress the results of the blood draw test. Trial counsel explained that following the vehicle accident, emergency responders transported the Petitioner by helicopter to the hospital, where a blood sample was taken. Trial counsel said that he reviewed the chain of custody for the blood sample from the moment it was taken from the Petitioner to testing at the lab. He said that he also had the blood sample tested independently.

Trial counsel identified a copy of the report related to the Petitioner's helicopter evacuation, which indicated that the Petitioner temporarily lost consciousness, that he received two doses of fentanyl, and that he was disoriented when he arrived at the hospital. Trial counsel said that he did not recall discussing the Petitioner's lack of consciousness or disorientation at the suppression hearing but said that he introduced additional medical records as exhibits at the hearing. Trial counsel explained that he consulted with Dr. Glen Farr, an expert pharmacologist, Dr. Tucker Montgomery, a medical doctor and lawyer who specialized in medical malpractice, and the TBI about the Petitioner's fentanyl level and its effects on the body. Trial counsel said that he decided it would not benefit the Petitioner to discuss the fentanyl at the suppression hearing. Trial counsel explained that there was a photograph of the Petitioner's eye "hanging out" of the eye socket and that he decided that focusing on the Petitioner's trauma and lack of concentration was the most effective strategy at the suppression hearing. Trial counsel said that he did not call a medical witness at the suppression hearing to testify about the Petitioner's change in consciousness and that he did not call an expert to testify about the progressive nature of a head injury.

Trial counsel stated that Trooper Fillers did not testify at the suppression hearing that speed was a factor in causing the collision. Trooper Fillers also wrote a report about the collision and similarly did not attribute speed as a factor in the collision. Trial counsel said that at trial, contrary to testimony at the suppression hearing and information in the report, Trooper Fillers testified that speed was a factor in causing the collision. However, Trooper Fillers did not testify as to a specific speed at which the Petitioner's truck was traveling. Trial counsel objected on the basis that Trooper Fillers' testimony was different from his previous testimony but did not raise a *Daubert/McDaniel*³ challenge to the testimony. At trial, the court overruled the objection and allowed Trooper Fillers to testify. Trial counsel explained that there had been an earlier *Daubert/McDaniel* hearing, where the trial court determined that Trooper Fillers was competent to testify as an accident reconstructionist. Trial counsel acknowledged that on direct appeal, this court ruled that the Petitioner had waived review of whether the trial court erred by determining that Trooper Fillers had an adequate scientific foundation for his testimony relating to speed.

³ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997).

On cross-examination, trial counsel testified that he reviewed the Petitioner's medical records and found that the Petitioner admitted to drinking an average of two to four beers a day, and sometimes up to six beers a day, for the past fifteen years. Trial counsel said that there was an extensive hearing with Dr. Davis to determine whether he would be qualified as an expert to testify at the trial. Following the hearing, the trial court determined that Dr. Davis was qualified to testify as an expert in "back extrapolation" regarding the Petitioner's alcohol tolerance. Trial counsel agreed that Dr. Davis testified that the Petitioner would be considered a "heavy drinker" based on the number of alcoholic drinks he consumed and that the Petitioner had a high alcohol tolerance.

Trial counsel explained that he discussed his defense theory with Dr. Farr. Trial counsel decided that admitting the Petitioner's medical records would have hurt the Petitioner's case. Trial counsel explained he believed that using the Petitioner's medical records was contrary to their defense theory that the Petitioner was traumatized and confused after the accident and that he had other evidence that was "a lot more powerful" than the medical records. Trial counsel said that the medical records included the Petitioner's admissions that he had taken hydrocodone, that he had used marijuana, that he was "conscious, alert and oriented[,] and that he was involved in a "high energy" crash. Trial counsel said that admitting the medical records would have "killed" the Petitioner.

Trial counsel testified that he consulted with Dr. Farr, a pharmacologist. He explained that he discussed the Petitioner's case and Dr. Davis' testimony with Dr. Farr. Trial counsel said that Dr. Farr's testimony would have been consistent with Dr. Davis' testimony, which would not have benefited the Petitioner because it would have been cumulative.

Regarding the Petitioner's claim that trial counsel was ineffective for failing to challenge the reliability of Trooper Fillers' methods, trial counsel explained that he filed a pretrial motion challenging whether Trooper Fillers could testify as an accident reconstruction expert and that the trial court ruled that Trooper Fillers would be allowed to testify as an expert at the trial. Trial counsel was surprised, however, when Trooper Fillers testified as to speed at trial, and trial counsel objected to this portion of his testimony. Trial counsel said that he hired an accident reconstructionist, Alan Parham, early in the Petitioner's case. Trial counsel's investigator and one of Mr. Parham's associates inspected the truck involved in the accident. Trial counsel explained that after the initial inspection of the truck, he did not retain Mr. Parham's expert services because he did not believe the court would approve payment of Mr. Parham as a court-appointed expert. Moreover, according to trial counsel, the Petitioner chose not to hire Mr. Parham because the Petitioner did not wish to pay for Mr. Parham's services.

Trial counsel testified that he represented the Petitioner to the best of his abilities. He said that he engaged in guilty plea negotiations with the State but that the Petitioner decided to proceed to trial.

Mr. James Alan Parham testified as an expert in engineering and vehicular accident reconstruction. He explained that forensic engineering was the science of determining a cause of failure and was also referred to as reverse engineering. Mr. Parham said that he was first contacted by trial counsel before the Petitioner's trial. Regarding the Petitioner's case, Mr. Parham reviewed the police report, the THP's Critical Incident Response Team ("CIRT") report, scene photographs, and survey data. Mr. Parham performed a preliminary evaluation of the Petitioner's case, but he was not retained to conduct a full accident reconstruction. Mr. Parham said that trial counsel and the Petitioner were unable to obtain funding to pay for his services.

Mr. Parham testified that post-conviction counsel contacted him and asked him to complete a full accident reconstruction related to the Petitioner's case. Mr. Parham stated that he utilized the CIRT survey data and conducted an accident site survey, which included reestablishing tire mark locations. He also surveyed approximately 800 feet of road and several hundred feet of hill area where the truck landed following the accident. The survey allowed Mr. Parham to examine the curvature and slope of the road. Mr. Parham explained that vertical curve referred to up and down or "hill" and "valley" movement and that horizontal curve referred to side-to-side movement or the way one turned a steering wheel to navigate a vehicle. At the accident site, Mr. Parham reviewed the vertical and horizontal curve, took photographs, and measured pavement edge drop-off height. He merged his findings with the CIRT report, which aligned. Mr. Parham reviewed the design speed of the road and attempted to determine the speed the Petitioner's truck was traveling. Mr. Parham used his findings to create two diagrams of the accident scene, which were entered as exhibits.

Mr. Parham testified regarding his survey findings. He said that the width of the two-way road was approximately eleven feet. The area where the truck left the roadway was 10.6 feet wide. Mr. Parham explained that roads typically have at least eleven-foot lanes, so the road he reviewed was "basically a one-lane road" with "very sharp" curves. Mr. Parham did not find any signs indicating a speed limit for the road; however, Trooper Fillers' report indicated the speed limit was thirty-five miles per hour. Mr. Parham said that based on this road's vertical and horizontal curve, it was not safe to drive thirty-five miles per hour on the portion of the road where the accident occurred. Mr. Parham said that at the location where the truck first went off the road, the ditch drop-off height was 4.9 inches from the pavement to the bottom of the ditch along the edge of the road. The CIRT

report indicated that the Petitioner's truck returned to the road and that the ditch drop-off height was 13.7 inches where the truck reentered the road.

Mr. Parham testified that he examined the Petitioner's truck. He explained that the tires were in good condition and had adequate tread depth. There was some "scuffing" underneath the truck and on the right front and right rear tires and rims, which was consistent with a "pavement edge drop-off and re-entry." Mr. Parham said that the truck's leaving and reentering the road was a "classic example" of a driver's overcorrecting from a pavement drop-off reentry. He explained that the narrowness of the road and the steep embankment on the side of the road were the "flipping" mechanisms that caused the truck to flip and rotate. Mr. Parham said that these road conditions posed a hazard to a sober driver. He explained that the loss of control of the vehicle happened as quickly as "one tire revolution."

Mr. Parham testified that the Department of Transportation had guidelines regarding how to properly construct a road. He explained that the section of road where the accident happened failed to meet these guidelines in multiple ways: the lane widths and the road's curvature were inadequate. For a road with a thirty-five mile per hour speed limit, it was "woefully under[-]designed." The road should have had a shoulder, and the ditch was not properly designed because it caused erosion on the side of the road. Mr. Parham said that the erosion helped develop the drop-off condition.

Mr. Parham testified that the inadequate road width significantly contributed to the truck's wheel dropping into the ditch. He explained that the narrowness of the road, the ditch erosion, an accumulation of debris and leaves on the road, and the steep slope on the edge of the road created hazardous conditions. Moreover, there were no hazard markers to warn drivers of dangerous road conditions. Mr. Parham said that these factors were all unrelated to a driver's impairment. Mr. Parham also concluded that based on tire mark striations, it appeared that the Petitioner was neither accelerating nor braking at the accident site. Mr. Parham explained that it is not unexpected to see neither accelerating nor braking in the type of accident in which the driver drives a wheel off the edge of the road.

Mr. Parham testified that he reviewed Trooper Fillers' findings regarding the Petitioner's case. He said that he was aware that Trooper Fillers testified that speed was a factor in this case despite the fact that Trooper Fillers was not able to calculate the speed at which the Petitioner's truck was traveling. Mr. Parham opined that Trooper Fillers' testimony was problematic. He explained that despite the hazardous road conditions at the accident site, the legal speed limit was thirty-five miles per hour, which meant that the government endorsed this as a safe speed at which to travel on this road. Mr. Parham said that for speed to be a factor in the Petitioner's accident, the speed at which his truck traveled

would needed to have been above the legal speed limit. Mr. Parham said that given the other road conditions, speed was not a factor in the Petitioner's accident. He did not find any tire marks to indicate that the Petitioner dramatically accelerated. The Petitioner's truck was a diesel truck and built for "power" and "pulling" and not for accelerating.

Mr. Parham testified that he concluded the overall cause of the accident was a poorly designed and maintained road. The pavement edge drop-off was also a major factor in this accident. Mr. Parham's report prepared for the Petitioner's case was entered as an exhibit.

On cross-examination, Mr. Parham was asked if it would have affected his report to know that the Petitioner was driving under the influence of cocaine, alcohol, and hydrocodone. He responded that he was not a qualified toxicologist and the "massive drop-off" on the edge of the road was a hazard. Mr. Parham then agreed that the Petitioner's intoxication level would be a factor he would consider.

The post-conviction court issued both oral and written findings wherein it addressed each of the Petitioner's claims contained within his petition. Regarding the Petitioner's claim that trial counsel was ineffective by failing to utilize the Petitioner's medical records, the court found that trial counsel was not deficient. The court reasoned that trial counsel made a strategic decision not to use the records because they contained problematic information about the Petitioner.

Regarding the Petitioner's claim that trial counsel was ineffective by failing to make use of an expert in pharmacology to challenge findings of the Petitioner's impairment, the court found that trial counsel was not ineffective. The court reasoned that trial counsel made a strategic determination not to call the expert.

Regarding the Petitioner's claim that trial counsel was ineffective by failing to argue the quantity of drugs present in the Petitioner's blood, the court found that the Petitioner presented no proof regarding this issue.

Regarding the Petitioner's claim that counsel was ineffective by failing to challenge the reliability of Trooper Fillers' trial testimony regarding speed and by failing to request a *Daubert/McDaniel* hearing on that issue, the court found that trial counsel was not ineffective. The court acknowledged that there was a pretrial *Daubert/McDaniel* hearing regarding Trooper Fillers' testimony about the Petitioner's accident, however the speed at which the truck was traveling was not mentioned during the hearing. The court found that trial counsel cross-examined Trooper Fillers at trial about his prior testimony and that trial counsel made a strategic decision not to emphasize speed. The court reasoned that trial counsel "gauged . . . properly" Trooper Fillers' unexpected testimony about speed, "acted

appropriately,” and was not deficient by failing to request an additional *Daubert/McDaniel* hearing addressing speed.

Regarding the Petitioner’s claim that trial counsel was ineffective by failing to utilize an expert in accident reconstruction, the court credited trial counsel’s testimony that after meeting with Mr. Parham, the Petitioner decided not to retain his services. The court reasoned that the Petitioner would not have been entitled to funding because of the Petitioner’s income and the fact that he was able to retain trial counsel, a well-known criminal defense trial attorney. The court found that trial counsel was not deficient for failing to ask the court for funding to pay for Mr. Parham’s services. Regarding Mr. Parham’s testimony and report, the court reasoned that it would not have allowed his testimony at the trial because Mr. Parham did not factor in the Petitioner’s potential impairment in his analysis. The court explained that the road condition was relevant but not to the exclusion of the Petitioner’s possible impairment. The court acknowledged that during cross-examination, Mr. Parham agreed that impairment would be a consideration, but the court reasoned that Mr. Parham’s conclusion that the accident was caused by a poorly maintained road was “a stretch.” The court determined that trial counsel was not ineffective for failing to present Mr. Parham’s testimony at the trial.

Regarding the Petitioner’s claim that trial counsel was ineffective by failing to request *Brady/Johnson* and *Jencks* material, the court found that the Petitioner failed to prove his claim because he presented no proof regarding this issue.

Regarding the Petitioner’s claim that counsel was ineffective by failing to object to Dr. Davis’ report being entered as an exhibit in violation of the Confrontation Clause, the court found that the issue was not within the scope of the post-conviction proceeding because the Petitioner presented no proof regarding this issue. Moreover, the court reasoned that this court had already ruled on this issue and denied the Petitioner relief in its direct appeal opinion. The court declined to grant the Petitioner relief on this issue.

Regarding the Petitioner’s claim that trial counsel was ineffective by failing to make a contemporaneous objection during the State’s closing argument, the court found that the Petitioner failed to prove his claim because he presented no proof regarding this issue.

Finally, regarding the Petitioner’s claim that he was entitled to relief based upon the cumulative prejudicial effect of trial counsel’s alleged deficiencies, the court found that there were no errors and that the Petitioner was not entitled to cumulative error relief.

This timely appeal followed.

II. ANALYSIS

A. Ineffective Assistance of Counsel

Post-conviction relief is available when a “conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103. The burden in a post-conviction proceeding is on the petitioner to prove allegations of fact by clear and convincing evidence. *Id.* § 40-30-110(1); *see Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). “Questions concerning the credibility of 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 v. State*, 40 S.W.3d 450, 456 (Tenn. 2001). On appeal, we are bound by the post-conviction court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Id.* Because they relate to mixed questions of law and fact, we review the post-conviction court’s conclusions as to whether counsel’s performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. *Id.* at 457.

Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *see Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *Dellinger*, 279 S.W.3d at 293. When a claim of ineffective assistance of counsel is made under the Sixth Amendment to the United States Constitution, 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). “Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.” *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). The *Strickland* standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

Deficient performance requires a showing that “counsel’s representation fell below an objective standard of reasonableness,” despite the fact that reviewing courts “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 688-89. When a court reviews a lawyer’s performance, it “must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s conduct, and to evaluate the conduct from the perspective of counsel at that time.” *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 689). We will not deem counsel to have been ineffective merely because a different strategy or procedure might have produced a

more favorable result. *Rhoden v. State*, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). We recognize, however, that “deference to tactical choices only applies if the choices are informed ones based upon adequate preparation.” *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992) (citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)).

As to the prejudice prong, the petitioner must establish “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *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.” *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008) (citing *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999)).

1. Medical Records

The Petitioner argues that the post-conviction court erred in denying relief on the Petitioner’s claim that he received the ineffective assistance of trial counsel because trial counsel failed to rely upon the Petitioner’s medical records at the suppression hearing and trial. Specifically, the Petitioner contends that trial counsel failed to rely upon and make use of the Petitioner’s medical records to prove that the Petitioner’s consent for a blood draw was not freely given, noting that those records indicated that the Petitioner suffered momentary losses of consciousness and that he received two doses of fentanyl prior to his giving consent. The State responds that the Petitioner did not receive the ineffective assistance of trial counsel because trial counsel’s decision not to use medical records at the suppression hearing was strategic.

Initially, we observe that trial counsel filed a motion to suppress the results of the Petitioner’s blood draw and that an extensive motion to suppress hearing took place. *See Fleming*, 2018 WL 1433503, at *1-3. At the suppression hearing, trial counsel challenged the blood draw by arguing that the Petitioner did not actually consent to the blood draw and that he could not consent to the blood draw because of his medical state after the accident. *Id.* at *1. On direct appeal, this court affirmed that trial court’s decision to admit the blood draw, concluding that the evidence did “not preponderate against the trial court’s finding that the [Petitioner] had the capacity to consent and that he did in fact consent to the blood draw.” *Id.* at *14.

At the post-conviction hearing, trial counsel testified that he deliberately chose not to use the Petitioner's medical records. Trial counsel said that he arrived at this decision after reviewing the Petitioner's medical records, which indicated that the Petitioner drank up to six beers a day for the past fifteen years, that the Petitioner took hydrocodone, that the Petitioner used marijuana daily, that the Petitioner admitted he was "conscious, alert and oriented" following the crash, and that the Petitioner knew he was involved in a "high energy" accident. Trial counsel explained that all of these factors were contrary to the defense theory that the Petitioner was traumatized and confused after the accident, and trial counsel believed that using the Petitioner's records at trial would have "killed" the Petitioner. The post-conviction court found that trial counsel made a strategic decision not to use the records because they contained problematic information about the Petitioner and that trial counsel was not deficient. *See Rhoden*, 816 S.W.2d at 60. The record supports the lower court's conclusion.

Additionally, we note that the only medical record admitted as an exhibit at the post-conviction hearing was the helicopter evacuation report. The Petitioner did not testify at the post-conviction hearing or dispute trial counsel's testimony in any way. "[T]he Post-Conviction Procedure Act requires a petitioner to testify at the post-conviction hearing 'if the petition raises substantial questions of fact as to events in which the petitioner participated.'" *Timothy Evans v. State*, No. E2017-00400-CCA-R3-PC, 2018 WL 1433396, at *4 (Tenn. Crim. App. Mar. 22, 2018) (quoting Tenn. Code Ann. § 40-30-110(a) and citing Tenn. Sup. Ct. R. 28, § 8(C)(1)(b)). Certainly, the Petitioner's ability to consent based upon his medical condition at the time raised substantial questions of fact as to the events in which the Petitioner participated. The Petitioner also failed to prove prejudice. Accordingly, the Petitioner is not entitled to relief regarding this issue.

2. Expert Witness in Pharmacology

The Petitioner argues that the post-conviction erred by denying relief on the Petitioner's claim that he received the ineffective assistance of trial counsel because trial counsel failed to use an expert in pharmacology at trial to challenge findings regarding the Petitioner's impairment. The State responds that the Petitioner did not receive the ineffective assistance of trial counsel because trial counsel's decision not to call an expert in pharmacology was strategic.

Trial counsel testified that he consulted Dr. Farr, an expert pharmacologist; Dr. Montgomery, a medical doctor and lawyer who specialized in medical malpractice; and the TBI regarding the fentanyl level found in the Petitioner's blood and fentanyl's effects on the body. After speaking with these individuals, trial counsel determined that it would not be beneficial to discuss the effects of fentanyl at the suppression on hearing. Additionally,

trial counsel explained that Dr. Farr's testimony regarding the Petitioner's alcohol consumption would have been consistent with Dr. Davis' testimony, who concluded that the Petitioner was a "heavy drinker" and had a "high alcohol tolerance." Trial counsel decided, as a matter of trial strategy, that Dr. Farr's testimony would have not benefited the defense and could have been detrimental to the Petitioner. The post-conviction court determined that trial counsel was not deficient because he made a strategic determination not to call the expert. *See Rhoden*, 816 S.W.2d at 60. The record supports this conclusion.

Moreover, the Petitioner failed to present Dr. Farr or another expert in pharmacology at the post-conviction hearing. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) (holding that an appellate court cannot "speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness's testimony might have been if introduced by defense counsel"). The Petitioner likewise failed to establish prejudice, and he is not entitled to relief regarding this issue

3. Relevant Evidence

The Petitioner argues that the post-conviction court erred in denying relief on the Petitioner's claim that he received the ineffective assistance of counsel because trial counsel failed to object to the presence of drugs in the Petitioner's blood, without stating a specific quantity, as being irrelevant under Tennessee Rules of Evidence 401, 402, and 403. The State responds that the Petitioner did not present any proof related to this issue at the post-conviction hearing and that the Petitioner failed to meet his burden of establishing either deficiency or prejudice. The State also argues that any objection to the presence of drugs in the Petitioner's blood would have been overruled because it was relevant under Tennessee Rule of Evidence 401.

We conclude that the record supports the post-conviction court's determination that the Petitioner has waived review of this issue by failing to present proof at the post-conviction hearing related to relevancy of the presence of drugs in the Petitioner's blood. *See Brimmer v. State*, 29 S.W.3d 497, 530 (Tenn. Crim. App. 1998) (holding the petitioner waived appellate review of issues because of a failure to present proof at the post-conviction hearing concerning these allegations and this court could not speculate as to the substance of those claims). Accordingly, the Petitioner is not entitled to relief regarding this issue.

4. *McDaniel* Challenge to Expert Testimony

The Petitioner argues that the post-conviction court erred in denying relief on the Petitioner's claim that he received the ineffective assistance of counsel because trial

counsel failed to object to the reliability of the methods or science used by Trooper Fillers in concluding that speed was a factor in causing the wreck. The State responds that trial counsel was not ineffective because his decision on this point was strategic.

The admission of expert testimony is governed by Tennessee Rules of Evidence 702 and 703. *State v. Copeland*, 226 S.W.3d 287, 301 (Tenn. 2007) (citing *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 273 (Tenn. 2005)). Rule 702 provides, “If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.” Tenn. R. Evid. 702. Rule 703 provides,

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

Tenn. R. Evid. 703. It is well-settled that “the allowance of expert testimony, the qualifications of expert witnesses, and the relevancy and competency of expert testimony are matters which rest within the sound discretion of the trial court.” *State v. Rhoden*, 739 S.W.2d 6, 13 (Tenn. Crim. App. 1987); *see Brown*, 181 S.W.3d at 275; *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002) (citations omitted).

In *Daubert*, the United States Supreme Court held that Federal Rule of Evidence 702 requires that a trial court “ensure that any and all scientific testimony . . . is not only relevant, but reliable.” 509 U.S. at 589. Our supreme court, in *McDaniel*, set forth the following list of factors for determining the reliability of scientific evidence:

- (1) whether scientific evidence has been tested and the methodology with which it has been tested;
- (2) whether the evidence has been subjected to peer review or publication;
- (3) whether a potential rate of error is known;
- (4) whether . . . the evidence is generally accepted in the scientific community;

and (5) whether the expert's research in the field has been conducted independent of litigation.

955 S.W.2d at 265. Rigid application of these factors is unnecessary. *Copeland*, 226 S.W.3d at 302. Not all expert testimony will “fit” with these factors; thus, the exact considerations that may be appropriate will vary depending upon “the nature of the issue, the witness’s particular expertise, and the subject of the expert’s testimony.” *Brown*, 181 S.W.3d at 277.

Here, the trial court held a pretrial *McDaniel* hearing to determine whether Trooper Fillers could testify as an expert in accident reconstruction, and the trial court found that he was qualified to testify. At the trial, Trooper Fillers testified that speed was a factor in the accident, a point that was not elicited during his testimony at the *McDaniel* hearing. Trial counsel objected on the basis that Trooper Fillers’ testimony was different from his previous testimony but did not raise a *McDaniel* objection. The post-conviction court acknowledged that the speed at which the truck was traveling was not mentioned during the *McDaniel* hearing. However, the post-conviction court reasoned that trial counsel made a strategic decision and “gauged . . . properly” Trooper Fillers’ unexpected testimony about speed, “acted appropriately,” and was not deficient by failing to request an additional *McDaniel* hearing addressing speed. *See Rhoden*, 816 S.W.2d at 60. The record supports the post-conviction court’s determination that the Petitioner failed to establish that trial counsel was deficient because trial counsel made a strategic decision not to emphasize speed and cross-examined Trooper Fillers regarding his previous testimony.

At the trial, Trooper Brown testified that the Petitioner’s truck appeared to be traveling “fast,” and the medical examiner, Dr. Mileusnic-Polchan, testified that Mr. Daugherty’s injuries were consistent with a “high speed motor crash” or caused by “high velocity force.” *Fleming*, 2018 WL 1433503, at *1, *7. Because the jury heard additional testimony regarding the speed of the truck, it is not likely that Trooper Filler’s testimony that speed was a contributing factor affected the outcome of the trial. The record supports the post-conviction court’s determination that the Petitioner was not prejudiced by trial counsel’s failure to request a second *McDaniel* hearing. The Petitioner is not entitled to relief regarding this issue.

5. Accident Reconstruction Expert Testimony

The Petitioner argues that the post-conviction court erred in denying relief on the Petitioner’s claim that he received the ineffective assistance of trial counsel because trial counsel failed to call an expert in the field of accident reconstruction at trial. The State responds that post-conviction court did not err in determining that trial counsel was not

ineffective because trial counsel consulted an expert and the Petitioner refused to pay for the expert.

Trial counsel testified that before the trial, he hired Mr. Parham to conduct a preliminary review. Trial counsel said that following this review, the Petitioner did not wish to pay for Mr. Parham to conduct a complete accident site reconstruction. Trial counsel explained that the Petitioner had retained trial counsel's services and that he believed it was unlikely the trial court would approve a request for funding for an expert.

The post-conviction court found that Mr. Parham's conclusions regarding dangerous road conditions were relevant but not to the exclusion of the Petitioner's impairment. Mr. Parham agreed on cross-examination that the Petitioner's impairment would have been a consideration, and the court found Mr. Parham's conclusion that the accident was caused by a poorly maintained road was "a stretch." The post-conviction court concluded that Mr. Parham's testimony would not have been reliable enough to allow him to testify at the trial, reasoning that it would not have allowed Mr. Parham's testimony or his report to be entered at the trial because Mr. Parham did not analyze the Petitioner's possible impairment as a possible contributing factor to the accident. *See Copeland*, 226 S.W.3d at 302; *Brown*, 181 S.W.3d at 277; *see also McDaniel*, 955 S.W.2d at 265.

Moreover, the post-conviction court credited trial counsel's testimony that after he hired Mr. Parham to conduct an initial pretrial accident reconstruction analysis, the Petitioner refused to retain Mr. Parham's services for a full accident reconstruction analysis. Again, we note that the Petitioner did not testify at the post-conviction hearing or dispute trial counsel's testimony regarding the Petitioner's decision not to pay in any way. As provided above, "[t]he Post-Conviction Procedure Act requires a petitioner to testify at the post-conviction hearing 'if the petition raises substantial questions of fact as to events in which the petitioner participated.'" *Evans*, 2018 WL 1433396, at *4 (quoting Tenn. Code Ann. § 40-30-110(a) and citing Tenn. R. Sup. Ct. 28, § 8(C)(1)(b)). The post-conviction court also found that it would not have approved the Petitioner's request for expert funding because the Petitioner had the funds to retain private counsel.

The record supports the post-conviction court's determination that trial counsel was not deficient for failing to utilize Mr. Parham at trial. The Petitioner also failed to establish that trial counsel's failure to call Mr. Parham as a witness, whose findings did not include consideration for the Petitioner's potential intoxication, was prejudicial. The Petitioner is not entitled to relief regarding this issue.

6. Exculpatory Evidence

The Petitioner argues that the post-conviction court erred in denying relief on the Petitioner's claim that he received the ineffective assistance of trial counsel by trial counsel's failing to request *Brady/Johnson* and *Jencks* information at the trial. The State responds that the Petitioner did not present any proof related to this issue at the post-conviction hearing and that the Petitioner failed to meet his burden of establishing either deficiency or prejudice. The State also argues that the Petitioner's claim regarding *Brady/Johnson* and *Jencks* material requires this court to speculate whether a request would have yielded a production of documents or evidence.

The record supports the post-conviction court's determination that the Petitioner has waived review of this issue by failing to present proof at the post-conviction hearing related to exculpatory evidence. *See Brimmer*, 29 S.W.3d at 530. Accordingly, the post-conviction court did not err in denying relief regarding this issue.

7. Confrontation Clause

The Petitioner argues that the post-conviction court erred in denying the Petitioner's claim that he received the ineffective assistance of trial counsel because trial counsel failed to object to a violation of the Confrontation Clause when Dr. Davis' expert report was entered as an exhibit. The State responds that the post-conviction court properly determined that the Petitioner did not receive the ineffective assistance of counsel because this court has already held that the Petitioner's Confrontation Clause rights were not violated because the Petitioner had the opportunity to confront and cross-examine Dr. Davis.

The post-conviction court found that the Petitioner waived review of this issue by failing to present proof at the post-conviction hearing related to a Confrontation Clause objection. *See Brimmer*, 29 S.W.3d at 530. This court already concluded that the Confrontation Clause was not violated by the admission of Dr. Davis' report because the Petitioner "was afforded the right and opportunity to confront and cross-examine Dr. Davis during the trial." *Fleming*, 2018 WL 1433503, at *24. Accordingly, the record supports the post-conviction court's denial of relief regarding this issue.

8. Closing Argument

The Petitioner argues that the post-conviction court erred in denying relief on the Petitioner's claim that he received the ineffective assistance of trial counsel by trial counsel's failure to make a contemporaneous objection to the State's improper closing argument during which the prosecutor referenced the Petitioner's trip to Disney World. The State responds that the Petitioner did not present any proof related to this issue at the post-conviction hearing and that the Petitioner failed to meet his burden of establishing

either deficiency or prejudice. The State also notes that this court has already held that there was no error in the prosecutor's referencing the Petitioner's trip to Disney World during closing argument.

The record supports the post-conviction court's determination that the Petitioner has waived review of this issue by failing to present proof at the post-conviction hearing related to the State's closing argument. *See Brimmer*, 29 S.W.3d at 530. Regardless, this court has already concluded that the prosecutor's closing argument was not improper. *Fleming*, 2018 WL 1433503, at *20. Accordingly, the post-conviction court did not err in denying relief regarding this issue.

B. Cumulative Error

The Petitioner argues that the post-conviction court erred in denying relief based upon the cumulative effect of trial counsel's deficiencies of performance. The State responds that the Petitioner is not entitled to relief because the record does not indicate that trial counsel committed multiple instances of deficient performance.

In the trial context, the cumulative error doctrine applies to circumstances in which there have been "multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but 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). However, circumstances which would warrant reversal of a conviction under the cumulative error doctrine "remain rare" and require that there has "been more than one actual error committed in the trial proceedings." *Id.* at 76-77.

In the post-conviction context, "a petitioner cannot successfully claim he was prejudiced by counsel's cumulative error when the petitioner failed to show counsel's performance was deficient." *James Allen Gooch v. State*, No. M2014-00454-CCA-R3-PC, 2015 WL 498724, at *10 (Tenn. Crim. App. Feb. 4, 2015) (citations omitted). The record supports the post-conviction court's determination that there were no errors in trial counsel's representation of the Petitioner. Accordingly, the Petitioner is not entitled to relief.

III. CONCLUSION

Based upon the foregoing and the record as a whole, we affirm the judgment of the post-conviction court.

KYLE A. HIXSON, JUDGE