

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
August 29, 2023 Session

**FILED**  
10/10/2023  
Clerk of the  
Appellate Courts

**PAUL JEROME JOHNSON, JR. v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Knox County  
No. 108913 Kyle A. Hixson, Judge**

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**No. E2022-00295-CCA-R3-PC**

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Petitioner, Paul Jerome Johnson, Jr., appeals the denial of his post-conviction petition, arguing that the post-conviction court erred by dismissing his claim of alleged bias by the trial court and in finding that he received the effective assistance of counsel at trial. Following our review of the entire record, oral arguments, and the briefs of the parties, we affirm the judgment of the post-conviction court.

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

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

Terrell Tooten, Cordova, Tennessee, for the appellant, Paul Jerome Johnson, Jr..

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Charme P. Allen, District Attorney General; and Nate Ogle and Joanie Stewart, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

**Factual and Procedural Background**

Petitioner was convicted of felony murder in perpetration of aggravated child abuse and aggravated child abuse of the eighteen-month old victim. He received concurrent sentences of life imprisonment for the felony murder conviction and nineteen years for the aggravated child abuse conviction. *State v. Johnson*, No. E2013-02437-CCA-R3-CD, 2015 WL 1579873 (Tenn. Crim. App. Apr. 6, 2015).

The facts of this case as set forth by this court on direct appeal are as follows:

This case arose after the eighteen-month-old victim was admitted to East Tennessee Children's Hospital and later passed away due to his injuries. The victim's mother, Aja McBayne, testified that the victim was born on January 14, 2007, and that he did not suffer from any health problems. She met [Petitioner] while both were attending Pellissippi State Community College, and they became friends. This friendship progressed briefly to a sexual relationship. After the sexual relationship "tapered off," the relationship returned to a friendship. In July of 2008, the sexual relationship was over, and the two "h[u]ng out" as friends. [Petitioner] would occasionally "hang out" at the victim's mother's residence, and he would provide her with transportation when she needed rides.

In July of 2008, the victim's mother's apartment complex discovered that she had been convicted of a felony, and they gave her ten days to vacate the premises. At the time of the incident, she still had access to her apartment and was in the process of moving. She was convicted of conspiracy to counterfeit currency and was awaiting sentencing in July of 2008. [Petitioner] offered to let the victim's mother and her two children stay with him until they found a permanent residence, and she accepted this offer. When she began staying with [Petitioner], she and [Petitioner] slept on the couch, and her children slept in the front bedroom of the house.

[Petitioner] was frequently around the victim and his brother, and he initially treated them well. However, around the beginning of July, [Petitioner]'s attitude toward the children began to change. He told the victim's mother that she "bab[ied]" her children too much and needed to discipline them. He said that the children "were too sensitive" and "whine[d] too much." He would say these things both to the victim's mother privately and in front of the children. He would insult the children, calling them "b\* \* \* \*es and p\* \* \* \*ies and say they were going to be f\*\*\*\*ts when they grew up." The victim's mother recalled that during the time period right before the victim died, the name-calling "seemed to happen all the time." She would confront [Petitioner] about his language, but she felt that at the time she did not "have too many other options" in terms of residency. Her mother and two sisters lived in Knoxville, but none of her relatives had room to take in both herself and her children on a permanent

basis. Several of her friends and the victim's paternal grandmother would watch the children.

[Petitioner] was "sometimes" alone with the children, but these periods were brief and occurred only when the victim's mother would "take a shower" or if she "had to run across the street to the store for something."

The week of July 18th, the victim's mother recalled that the victim had been behaving as though he had a cold. While nothing appeared physically wrong with the victim, she observed that the victim, who was typically "full of energy," now only had "bursts of energy." The victim became tired "quicker than normal," would sleep for longer periods than normal, and did not display much of an appetite. The victim's mother gave the victim Tylenol, which seemed to dissipate the cold symptoms, but the victim still appeared "lethargic." Initially, she believed that the victim was simply "going through a growth spurt."

On July 18th, the victim's mother dropped her oldest son off at her mother's house and then went to see a movie with [Petitioner] and the victim. After the movie, the three returned to the victim's mother's apartment, where [Petitioner] sat on the porch while the victim played on the porch. The victim was within his mother's eyesight while he was on the porch, and she witnessed him fall while starting to walk down the porch steps. She went to check on the victim, and she observed that the skin on his back was slightly red but not broken. Later that evening, the victim's mother placed an ice pack on the victim. When a friend of hers visited the apartment to see the victim, [Petitioner] went to the porch "and kind of had an attitude."

The victim's mother, the victim, and [Petitioner] left her apartment and returned to [Petitioner]'s residence, where she prepared dinner. She placed the victim on the couch next to [Petitioner] while she cooked. She prepared a plate for herself and one for the victim, and she sat down on the couch between the victim and [Petitioner]. [Petitioner] made a comment about the victim's mother "babying" the victim by giving him food off of her plate that caused her to lose her appetite. When the victim finished his dinner, he laid his head down on his mother's lap and fell asleep, and she soon fell asleep herself. [Petitioner] was still on the couch when the victim and his mother went to sleep, and his mother recalled [Petitioner] waking

her up to tell her that he was taking the victim to the bedroom so that she could “stretch out” on the couch. The victim’s mother assumed [Petitioner] was taking the victim to the front bedroom, but she did not see [Petitioner] after he walked around the couch. The victim appeared normal at this point, and she fell back asleep after [Petitioner] exited the room with the victim.

Sometime later, [Petitioner] woke the victim’s mother and was holding the victim. The victim’s mother could not remember exactly what time [Petitioner] woke her or how long she had been asleep. She recalled that the victim appeared “limp” and that [Petitioner] was asking her what was wrong with the victim because he was not breathing. [Petitioner] was “hysterical,” “pacing back and forth” and telling her “not to let [the victim] die.” The victim’s mother began questioning [Petitioner] and asking what he had done because there was nothing wrong with the victim when [Petitioner] took him. The victim was “gasping for air,” and his eyes were “half open, but his pupils were dilated.” She felt the victim’s chest and discovered that his “heart was beating so fast, but it wasn’t strong.” She breathed into the victim’s mouth, believing that he may have been choking on something. When she saw the victim’s chest fill with air, she realized that the victim was not choking.

The victim’s mother used [Petitioner]’s phone to call her mother, who told her to call 911. She informed [Petitioner] that they needed to take the victim to the hospital, and she called 911 from [Petitioner]’s vehicle while he drove to the hospital. During the ride to the hospital, the victim was “gasping” and his lips were “turning dry.”

Dr. Robert Dickson was the treating physician in the emergency room when the victim was admitted to the hospital. Dr. Dickson testified that the victim arrived around 1:30 a.m. on July 19th “in full cardiopulmonary arrest,” which meant that the victim was not breathing and did not have a pulse or heart rate. The victim’s pupils were fixed and dilated, which was a sign of severe neurologic injury. When the victim was first admitted, Dr. Dickson did not notice any visible signs of trauma on the victim’s body. As Dr. Dickson continued to treat the victim, he noticed that “some bruising” began to appear, and he recalled that there was a large retinal hemorrhage in the victim’s right eye. He testified that retinal hemorrhaging was often caused by trauma. Doctors performed a neurological exam, which revealed no neurological activity and that the victim was

brain-dead. Dr. Dickson was not able to establish how the victim was injured, but he believed that the victim's prognosis was "bleak" based on his neurologic exam.

Debra Nuchols testified that she was an investigator in the family crimes unit of the Knoxville Police Department. She arrived at East Tennessee Children's Hospital around 4:30 or 4:45 a.m. on July 19th after receiving a call of suspected child abuse. Investigator Nuchols went to the victim's hospital room in the Intensive Care Unit ("ICU"), and she observed several "bruises or marks" visible on the victim's face. Shortly after she arrived, she contacted the crime lab to take photographs of the victim. She identified photographs of the injuries of the victim and confirmed that she was present when the photographs were taken.

The victim's mother and [Petitioner] were in the hospital room with the victim after he was admitted, and the victim's mother recalled [Petitioner] talking loudly. He would alternate between telling medical personnel to ensure that the victim was treated and telling the victim that "he can come out of it, he's going to be okay." [Petitioner] paced around the room, appearing "frantic" and "panicked." Doctors transferred the victim to the ICU and informed his mother that the victim was brain-dead and needed to be placed on life support. After the victim was transported to the ICU, his mother left the hospital around 7:00 a.m. to return to her apartment to take a shower and change her clothes. [Petitioner] drove her to her apartment.

The victim's mother returned to the hospital later that morning, and [Petitioner] was with her. Upon her return, she voluntarily spoke with the Department of Child Services ("DCS") and the Knoxville Police Department, who showed her photographs of bruises on the victim's body. She did not recognize the bruises or know how the victim became bruised. She stated that she did not hit the victim or cause the bruises. When she gave the victim a bath on the evening of July 18th, she did not observe any bruises on the victim's body. She recalled that he had a scratch above his eye that he received after crawling to retrieve a ball and a mark under his eye from hitting the corner of a table. She observed "a whole lot more marks" on the victim in the photographs than the two cuts above and below his eye. The last time that she saw [Petitioner], he was in the hospital room with herself and the victim. [Petitioner] exited the room after the victim's godfather instructed him to leave.

Before he left the hospital, [Petitioner] spoke with Investigator Nuchols. Investigator Nuchols recalled that [Petitioner] “seemed very nervous, almost on edge.” In his statement to Investigator Nuchols, [Petitioner] said that he returned to his apartment with the victim and his mother around 10:00 p.m. on July 18th and that the three fell asleep on the couch about an hour later. Investigator Nuchols testified that [Petitioner] told her that after the victim and his mother fell asleep, he took the victim to the bedroom to give her more room on the couch. He returned to the couch and received a page from a friend, and he went to pick up the victim. When he picked up the victim, the victim appeared “lifeless,” and [Petitioner] heard the victim making “some noise.” [Petitioner] went to wake the victim’s mother and inform her that “there was something wrong with” the victim. [Petitioner] did not offer an explanation for the victim’s injuries, but he recalled seeing a small bruise on the victim earlier in the day, and he mentioned the incident where the victim fell down the stairs at his mother’s apartment.

On cross-examination, Investigator Nuchols agreed that her written report of [Petitioner]’s statement did not say that [Petitioner] took the victim to the bedroom and later picked him up off of the bed. She testified that her report stated that [Petitioner] informed her that he picked the victim up from the couch after receiving a page from a friend.

Dr. Matthew Hill testified that he was assigned to the victim’s case around 8:00 or 9:00 a.m. the morning of July 19th. Dr. Hill performed a neurological exam, which “showed no evidence of neuro[logical] function.” At the time of the exam, the victim’s body temperature had dropped to ninety-two degrees. The low body temperature indicated that the victim could not regulate his own body temperature, so doctors warmed his body over the course of the day in order to conduct a second neurological exam in the afternoon.

Dr. Hill also conducted a physical examination of the victim, and he testified that the exam revealed retinal hemorrhaging on the victim’s eye. He stated that retinal hemorrhaging was “a sign of shaken baby or some sort of excessive trauma.” He also observed that the victim began “putting out a lot of urine” around twelve or one p.m., which indicated that “the area of the brain that controls urine output was shut down.”

Doctors were able to raise the victim's body temperature to a sufficient level to conduct a second neurological exam, and the victim did not respond to any of the tests. Doctors also conducted an apnea test to assess the victim's ability to breathe on his own. Doctors "preoxygenated" the victim and then removed him from the ventilator, recording the length of time that it took for the victim to breathe on his own. After the victim went seven minutes without taking a breath, doctors placed him back on the ventilator. Dr. Hill testified that the results of the apnea test indicated that the victim was legally brain dead.

Along with the second neurological test, doctors performed a second "head CT scan" in the afternoon. The victim had received an initial "head CT scan" when he arrived at the hospital "that was read essentially as normal." The second CT scan was performed about twelve hours later, and Dr. Hill testified that the scan "showed marked edema on the brain." Dr. Hill said that the second scan revealed swelling "everywhere" in the victim's brain, which indicated a "lack of oxygen and perfusion for an extended period of time." Dr. Hill stated that the test also revealed a "relatively small" subdural hematoma on the left side of the victim's brain.

Around 1:00 a.m. on the morning of July 20th, the victim began to show signs that he was not receiving an adequate flow of blood to his heart. The victim went into cardiac arrest, and doctors continuously applied epinephrine and CPR for "20-some-odd minutes," and they were unable to restore the victim's heart rate. His mother was in the hospital room while doctors attempted to resuscitate the victim. Dr. Hill told her that because neurological exams indicated that the victim was brain-dead, further efforts to resuscitate him were not likely to restore his brain function. He offered to stop the CPR treatments so that the victim's mother could hold the victim, and she indicated that she wished for the treatments to stop. The victim did not regain a heartbeat, and he was pronounced dead at 2:12 a.m. Dr. Hill stated that the likely cause of the victim's death was a brain injury, and he estimated that the degree of edema that the victim displayed indicated that he received his injuries ten to twelve hours before Dr. Hill arrived at the hospital.

The victim's mother attempted to contact [Petitioner] to inform him that the victim had died and to tell him the date of the funeral. [Petitioner] did not answer, and he did not attend the funeral. He contacted her later in the summer from a blocked phone number and

told her that she needed “to keep [her] mouth shut, that [she] was trying to throw him under the bus by telling people that he killed” the victim.

Dr. Mary Palmer testified as an expert in child abuse pediatrics. She stated that on July 19th, she received a call from Dr. Hill regarding the potential maltreatment of the victim. Upon hearing that while a CT scan of the victim’s brain “had not shown anything remarkable,” the victim was not showing any brain activity, Dr. Palmer posited that the victim may have been strangled. She believed strangulation may have been used to abuse the victim because it would have stopped the victim’s heartbeat and normal brain function without directly causing an injury to the brain that would have been visible on the first CT scan.

Dr. Palmer examined the victim around 5:00 on the evening of July 19th. As part of her examination, Dr. Palmer attempted to view and document the bruises on the victim’s body. Dr. Palmer used eight photographs taken while the victim was in the ICU to assist her in explaining the victim’s injuries. The photographs showed the victim in his hospital bed, along with bruises on his neck, chin, jawline, lower back, buttocks, and leg. Although she did not take the photographs herself, Dr. Palmer testified that the photographs were an accurate depiction of the victim at the time he was in the ICU. She identified petechiae in the photographs of the bruises on the victim’s neck, which she testified was consistent with choking. She agreed that the victim’s injuries to his chin and jawline were consistent with choking. Dr. Palmer testified that the injuries were of the type where the bruising may not have been immediately apparent. She believed that because the color pattern of the bruises on the victim’s lower back, buttocks, and leg were consistent, the injuries were inflicted at the same time as the injuries to his neck and jaw area as part of one episode of injury. Dr. Palmer estimated that the injuries had been inflicted within twenty-four hours of her examination of the victim. She testified that the bruises were not consistent with those that a child would receive during a normal course of play. She also testified that she believed that to a medical degree of certainty that blunt force trauma to the victim’s body and strangulation caused the victim’s injuries and that the injuries were not accidental.

Dr. Darinka Mileusnic–Polchan testified that she was the medical examiner who performed the autopsy on the victim. Thirty-one



pictures from the autopsy were admitted into evidence. Dr. Mileusnic–Polchan testified that the photographs would be beneficial in explaining the victim’s injuries to the jury, primarily because the victim suffered from multiple injuries that would be difficult to verbalize to the jury. She stated that the primary cause of the victim’s death was strangulation and that blunt head trauma due to child abuse was a significant contributing condition in his death.

[Petitioner] testified that he never had discussions with the victim’s mother regarding her parenting and that he was never critical of her for “babying” her children. He stated that he fell asleep on his couch on the evening of the incident with the victim and his mother. He awoke to the sound of his phone beeping, and the victim’s mother was beside him on the couch with the victim in her lap. He picked the victim up and noticed that “he was breathing heavy, like something was wrong with him.” He told the victim’s mother to call 911, and she insisted that they take the victim to the hospital instead. He drove the victim to the hospital, and he recalled that the victim’s mother was performing chest compressions on the victim as they drove. He testified that he never told Investigator Nuchols that he took the victim from the couch and placed him in the bedroom. He stated that he spoke with the victim’s mother on the telephone after he left the hospital and that he saw her “random[ly]” a day after the victim’s death.

*Id.* at \*1-5. On September 2, 2016, Petitioner filed a *pro se* petition for post-conviction relief alleging numerous claims of ineffective assistance of trial counsel, prosecutorial misconduct, and other claims. Counsel was retained, and an amended petition was filed on March 22, 2019. In the amended petition, Petitioner raised the additional claim that he was denied the right to a fair and impartial trial due to trial court’s bias toward the victim’s family, specifically that the trial judge interacted with the victim’s mother and grandfather and held the victim’s mother’s baby, that the trial court placed caution tape around Petitioner’s family and supporters at trial, and that the trial judge shook the prosecutor’s hand and told her “good job” prior to the hearing on the motion for new trial. On appeal, Petitioner has limited his issues to the denial of due process based on the alleged bias of the trial court and trial counsel’s handling of the testimony of the victim’s mother and the medical experts.

### *Post-Conviction Hearing*

Petitioner did not testify at the post-conviction hearing. Trial counsel testified that he initially began representing Petitioner at his first trial in this matter for the sentencing

hearing and motion for new trial. He said that Petitioner's motion for new trial was granted, and he represented Petitioner throughout his second trial. As relevant to the claims that Petitioner raises on appeal, trial counsel testified he did not recall if Petitioner's family and friends were separated in the courtroom by caution tape, and no one brought this to his attention. He was unaware of any conversations between the trial judge and the victim's mother or other family members. Trial counsel testified:

Specifically I remember it being Rudy Dirl because I remember Mr. Dirl coming up and speaking with - - attempting to speak with [trial judge], and as I understand it, it was largely about basketball.

[Trial judge] disclosed that fact to us in the morning because I do remember [Petitioner's] family reporting that it looked like somebody from [the victim's mother's] side was trying to converse with the judge. And we had a chambers meeting with [trial judge]. He explained what was said.

He cautioned all the parties not to speak with him about anything anymore, and it really amounted to what we believe to be a non-issue after [trial court's] disclosure.

Trial counsel testified that he reviewed the transcripts from Petitioner's first trial in preparation for the second trial. He did not recall whether he asked the victim's mother at the second trial if she had any other children. At the time, trial counsel was aware that she "did in fact have other children." When asked why he did not cross-examine the victim's mother about her other children, particularly a child in the custody of the Department of Children's Services ("DCS"), trial counsel replied:

Well, I remember that we successfully subpoenaed to the judge's chambers a DCS file that was given to [trial judge] for in camera review. That he did in fact review it. We were looking for exactly what you're suggesting, whether there were problems with her other children, and the DCS file gave no indication per [trial judge's] in camera review that there in fact had been any other problems with children that would be relevant or admissible in this case.

When asked if he was aware that one of the victim's mother's other children went to DCS custody, trial counsel testified:

At this point I can't tell. I, I don't have a recollection of that now. I may have at the time, but I know that we explored through seeking the DCS files on [the victim's mother] and all of her children, any

issues that might be relevant to the defense of [Petitioner] in the instant case.

When asked if he would have used this information at trial if he had known about it, trial counsel asserted that he was not sure of its relevance but it was possible. He agreed that the victim's mother could have opened the door to admit this evidence if she had testified that she was a loving, caring mother who would never harm her children.

When asked if he recalled testimony from Petitioner's first trial by Dr. Mileusnic-Polchan indicating that the victim appeared to have been "whooped regularly," trial counsel testified: "I do remember some discussion about prior injuries, and I know that was part of our trial strategy, of course, that the injuries that were inflicted were either accidental or inflicted by the victim's mother." Trial counsel remembered an issue about the timing of the victim's injuries and tried to argue that the victim had prior injuries which occurred before the victim's death. He agreed that the victim's mother testified at the second trial that she spanked her children. Trial counsel specifically recalled questioning the victim's mother on cross-examination about the victim's prior injuries or a "healing injury." He had reviewed the transcript from Petitioner's first trial but did not specifically recall testimony from the first trial indicating that the victim had no food in his stomach at the time of death. Trial counsel testified that the "operating theory was that the child had other injuries and that either through accident or by the hand of [the victim's mother], that our theory was that's how the child died or at least there was a reasonable doubt as to [Petitioner's] involvement in the death of this child." He said that this was "exactly what we explored and exactly what we argued and exactly what we attempted to question on."

When asked if he questioned the victim's mother about speaking to the police after the victim's funeral and whether that would have opened the door and allowed him to question her about initially being charged in the case, trial counsel said that he made a tactical decision to not seek admission of that evidence because it would have allowed the State to give the reasons why they dismissed the charges against her. He noted that the issue was litigated "quite thoroughly pretrial." When asked if Dr. Mileusnic-Polchan's testimony that the victim looked well taken care of or Dr. Wisinewski's testimony that the victim appeared to be healthy at his last office visit would have opened the door to proof that the victim's mother's oldest child had been placed in DCS custody or any past child abuse, trial counsel said that he did not know if that would have been relevant. He further testified:

Again, I can't recall specifically what, specifically - - if that testimony even occurred, and what tactical decisions were made at that time as it relates to, again, opening the door with Dr. Mileusnic[-Polchan] - - that's who you refer to as Dr. Polchan - - it could of, but it's safe to say that one must handle Dr. Mileusnic[-Polchan] very carefully on cross-examination from a number of experiences.

When asked why he did not request a mistrial when Debra Lamb, a hospital worker, testified at trial that boyfriends have a history of causing “these type of problems,” trial counsel replied: “I very well may have made a request for mistrial at the bench, I don’t recall. But I do recall that becoming an issue and making a timely objection and asking for a limiting instruction.” He did not feel that this would have opened the door to testimony about the victim’s mother’s oldest child being placed in DCS custody, and “if the [c]ourt gave a limiting instruction, I think that is the curative measure and at that point there’s not a door opens.”

Trial counsel recalled Dr. Palmer<sup>1</sup> crying during her trial testimony. He believed that it was addressed “slightly” or that they asked for a recess at that point, and he “noted it” and was concerned. However, trial counsel testified that he did not want to draw any further attention to the issue in front of the jury. He remembered a recess “very near in time to that event, and she regained her composure and we went on, or her testimony was in fact concluded.” Trial counsel testified:

And I remember speaking about it with [co-counsel], my partner, tried the case with me. And we decided we did not want to draw any more attention to it to the jury. It was not - - I would not describe it as sobbing or wailing but she was, she was obviously upset.

On cross-examination, trial counsel testified that when he began representing Petitioner in 2013, he had practiced law for approximately twenty-five years “almost exclusively criminal defense.” He was also assisted by co-counsel who was a senior associate and had been practicing law for forty years. Trial counsel testified that when they learned Mr. Dirl had approached the trial judge, they were very concerned and “brought it up immediately.” He said that they notified the State that night to “say that we have a report of someone speaking with the judge from the other side so to speak, and we need to raise this with the Court and make an inquiry.” All parties met with the trial judge the following morning, and “he disclosed to us after we brought it up, very clearly what had happened.” Trial counsel testified that the trial judge “disclosed it in open court, and I recall him saying, ‘Please folks, you know, do not approach me from either side during the course of this trial.’”

Concerning his cross-examination of the victim’s mother, trial counsel testified that his strategy was “that at least there was a reasonable doubt as to whether [Petitioner] would have committed this crime and either through accident or intent of another, was the reason for the death of this child but not [Petitioner].” He filed pretrial motions that were litigated

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<sup>1</sup> At the post-conviction hearing, post-conviction counsel referred to Dr. Mileusnic-Polchan as being emotional at trial; however, it appears from the transcripts of the second trial that he is actually referring to Dr. Palmer.

in preparation for cross-examination of the child's mother. Trial counsel testified that victim's mother "was at some degree a negligent mother." He further said:

I thought it would be difficult for the jury to believe that [the victim's mother] may have intentionally inflicted these injuries on the child, but that it could be a possibility, but it was more likely that she was, she was on occasion inattentive and the child - - I know that there was a fall down some steps that there was some testimony about previously, but the child had been hurt and as a result there was a traumatic head injury that it would at least explain the brain trauma that occurred.

We always had difficulty trying to explain the strangulation evidence and things of that nature, but again, with [Petitioner] testifying that he really wasn't in a position to inflict any kind of such injuries, we had an overall strategy that at least there was a reasonable doubt as to whether [Petitioner] would have committed this crime and either through accident or intent of another, was the reason for the death of this child but not [Petitioner].

Trial counsel was unaware of any "gentlemen's agreement" between the prosecutor and the victim's mother to dismiss the charges against her in exchange for her trial testimony. He believed it was a "conscious decision" by the prosecutor because the "evidence was lacking to prove the mother guilty beyond a reasonable doubt of any culpability in this case[.]" Trial counsel testified that he "clearly" made a tactical decision not to introduce proof at trial that the charges against the victim's mother had been dismissed because "the State was going to be allowed to enter testimony and proof as to why it was dismissed to include the fact that she passed a polygraph." Although trial counsel thought that the trial court was incorrect about admitting the polygraph, he did not want that information in front of the jury, and he explained that to Petitioner.

Jennifer Cain, Petitioner's cousin, testified that she was present for Petitioner's second trial and was seated with Petitioner's family. She said that they were seated in the middle of the courtroom, and there "was yellow caution tape along the, the benches," and no other area of the courtroom was taped off. Ms. Cain described the trial judge as "an elderly white guy with glasses. He was tall, slim, bald-headed." Ms. Cain testified that she witnessed the trial judge talking with Rudy Dirl, the victim's mother's grandfather. She also claimed that the trial judge was in a room with the victim's mother and holding her baby. Ms. Cain testified that she reported the contact to Petitioner's father, and she took some pictures with her cell phone of the trial judge talking to Mr. Dirl and of him inside the room with the victim's mother and holding her baby.

Ms. Cain identified one picture as being taken on March 15, 2013, at 10:51 a.m. which depicted the trial judge holding the victim's mother's baby. She identified a second picture as being taken on March 13, 2013, at 5:08 p.m. of the trial judge and Mr. Dirl talking to one another. Ms. Cain then identified a collage of pictures, with a date of March 15, 2013, that included another picture of the trial judge walking out of the room where he had been holding the baby and one of him walking down a staircase. She identified a second collage of pictures with a date of March 14, 2013, that included pictures of Mr. Dirl having a conversation with the bailiff outside the courtroom. Ms. Cain clarified that although the pictures reflect that the trial judge was talking with Mr. Dirl on March 13, 2013, she witnessed a second conversation between the two men on March 15, 2013, but did not take any photographs. Ms. Cain testified that her mother, Joyce Preston, was present when the improper contact with the trial judge occurred. She said that she also saw the trial judge "coming down the stairs and talking to people."

Ms. Preston testified that she was present during Petitioner's second trial and directed Ms. Cain to take the pictures of the trial judge holding the victim's mother's baby. She claimed that she could clearly see the trial judge holding the baby in a room, and she could see the other individuals in the room with him, and she recognized them. On cross-examination, Ms. Preston agreed that the picture of the trial judge holding the baby was not clear and that the photograph was taken on March 15, 2013. Ms. Cain was not aware that there was no testimony taken and that the verdict was rendered that day. She said that they were on "recess" at the time.

The prosecutor testified and identified the room in Ms. Cain's photographs as an area in the District Attorney General's Office "which is the reception area as well as what we call the victim/witness waiting room." She did not see the trial judge enter that room at any time during the course of the trial, and she did not see him interact with any witnesses or hold a baby. She noted that the trial judge entered the room after the verdict was rendered on March 15, 2013, shook her hand, patted her on the back, and said that she did a good job on the trial. He then left. The prosecutor looked at photographs purportedly showing the trial judge leaving the victim/witness waiting room and noted that he was actually in a public area of the building that led to the outside area and "into the downstairs of the building." He was not in the office in any of the photographs. In a photograph that purportedly showed the trial judge holding the victim's mother's baby, the prosecutor described the photo as blurry, and the windows to the room were slightly tinted and covered with blinds that were generally kept closed. She did not see the trial judge inside the room in the photograph, she could "just see the reflection from the window on the other side of the - - what we call the non-smoking area outside." The prosecutor testified that she did not see the trial judge interact with the victim's mother or her child during the course of the trial, "he interacted with counsel."

The prosecutor identified the trial judge in a picture of the stairwell, which she said would have been taken after court had recessed for the day on March 13, 2013. She looked

at the photographs described as being taken on March 14, 2013, and testified that there were no photographs that clearly depicted the trial judge discussing the case with any material witness. The prosecutor testified:

During the course of the trial [the trial judge] did address with [the parties] that he had a brief interaction with someone that he did not realize was with the victim's family. He took that up in chambers. It may have also been taken up on the record, but other than that there were no other issues.

The prosecutor also identified a photograph of a bailiff speaking with another individual. Although she could not tell from the photograph, she believed that the person was Mr. Dirl. The prosecutor noted that although Mr. Dirl was associated with the victim's family, he was not a witness in the case.

On cross-examination, the prosecutor was asked why caution tape was used in the courtroom where Petitioner's family was seated. She replied:

I believe because of the number of people - - I can't be for certain - - everything was taken up on the record. I believe we had sectioned off - - when I saw "we," the Court had sectioned off areas so people would know exactly where to sit at the time.

When we do jury selection in particular, the number of jurors that were brought in, at least back when [the trial court] was on the bench, the jurors would have taken up at least one side of the courtroom for jury selection. So that also helps define where people can sit and not interact with the jurors.

The prosecutor agreed that caution tape was routinely used in other trials to block off areas of the courtroom, and she was unaware of it being limited to where a defendant's family was located.

The victim's mother testified that she and her baby and other family members were in the victim/witness waiting area during the course of the trial. She said that the trial judge never came into the area and never interacted with her or held her baby. The victim's mother testified that she never discussed the case with the trial judge.

## ANALYSIS

### *I. Trial Judge's Bias Toward the Victim's Family*

Petitioner argues that he did not receive “[d]ue [p]rocess [u]nder the law” because the trial judge showed bias toward the victim’s family during trial by interacting with the victim’s mother and the victim’s maternal grandfather and by holding the victim’s mother’s baby. He further contends that bias was shown by caution tape being placed around the area where his family and supporters were sitting during trial and that the trial judge shook the prosecutor’s hand after trial and told her “good job,” which occurred before any hearing on the motion for new trial. The State asserts that this issue is waived because Petitioner failed to raise it at trial or in his motion for new trial.

Concerning this issue, the post-conviction court found:

Any concerns with the trial judge or the conduct of the trial should have been raised during trial or, if not feasible then, at the motion for new trial and on direct appeal. Every issue raised by the [P]etitioner under this claim was known or discovered by a member of the [P]etitioner’s family contemporaneously with its alleged occurrence. Nothing prevented the [P]etitioner from raising these issues on direct appeal. Because he did not, he is now barred from addressing them on post-conviction review. The issues are waived.

The record does not preponderate against the post-conviction court’s findings. Under the Post-Conviction Act, previously determined or waived claims shall be dismissed. T.C.A. § 40-30-106(f). A ground for post-conviction is waived if:

the petitioner personally through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

- (1) [t]he claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or
- (2) [t]he failure to present the ground was the result of state action in violation of the federal or state constitution.

T.C.A. § 40-30-106(g). “Waiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney.” *House v. State*, 911 S.W.2d 705, 714 (Tenn. 1995). Petitioner has not



demonstrated that his claims of bias are based upon a new constitutional right requiring retroactive application or that his failure to present this ground at trial, at the motion for new trial, or on direct appeal was the result of State action. Therefore, this issue is waived.

We note that even if not waived, Petitioner has not shown by clear and convincing evidence that the trial judge was biased or that Petitioner was prejudiced by any alleged bias. Petitioner is not entitled to relief on this issue.

## II. *Ineffective Assistance of Counsel*

Petitioner contends that the post-conviction court erred in finding that he received the effective assistance of counsel when trial counsel failed to cross-examine the victim's mother as to whether her oldest child was in DCS custody. He further contends that trial counsel should have questioned the victim's mother about speaking with police after the victim's funeral which would have allowed him to question her about the dismissal of the charges against her, the victim's prior injuries, how she disciplined her children, and that the victim had no food in his stomach at the time of death. Petitioner also alleges that trial counsel was ineffective in his handling of the testimony by the State's expert witnesses. The State responds that the post-conviction court properly concluded that Petitioner failed to demonstrate that trial counsel was ineffective as to the cross-examination of the victim's mother about her oldest child being in DCS custody. The State further argues that the remaining claims concerning trial counsel's cross-examination of the victim's mother are waived because they were not raised in the post-conviction petition or at the post-conviction hearing. The State did not address Petitioner's claims concerning expert witness testimony.

Under the Post-Conviction Procedure Act, a criminal defendant may seek relief from a conviction or sentence that is "void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. When a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). Failure to satisfy either prong results in the denial of relief. *Strickland*, 466 U.S. at 697. Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). The burden in a post-conviction proceeding is on the petitioner to prove his allegations of fact supporting his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f); *see Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). The factual findings of the post-conviction court are binding on an appellate court unless the evidence in the record preponderates against those findings. *Dellinger*, 279 S.W.3d at 294.

The post-conviction court's application of law to its factual findings is reviewed de novo with no presumption of correctness. *Calvert v. State*, 342 S.W.3d 477, 485 (Tenn. 2011). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to de novo review with no presumption of correctness. *Id.*; *Dellinger*, 279 S.W.3d at 294; *Pylant v. State*, 263 S.W.3d 854, 867 (Tenn. 2008).

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

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome" of the trial. *Id.* The stronger the proof of guilt presented at trial, the more difficult it is to prove the prejudice prong of *Strickland*.

The State argues that some of Petitioner's claims on this matter are waived for failure to raise them in the post-conviction petition. However, we find that while they were not raised in the petition, they were raised and addressed at the post-conviction hearing and argued in Petitioner's closing argument. Therefore we will address the claims.

Concerning Petitioner's claims of ineffective cross-examination of the victim's mother by trial counsel about the dismissed charges against her, the post-conviction court found:

To the extent that the [P]etitioner claims that trial counsel was nevertheless ineffective for failing to pursue this line of cross-examination even in light of the trial court's ruling, the court finds this to be a strategic decision made by trial counsel that should not be second-guessed on post-conviction review. Trial counsel [and co-counsel] were clearly well-prepared to conduct the litigation in this case based upon their extensive research and investigation. The decision not to question [the victim's mother] on this point was a

reasonable one because it likely would have allowed a flood of evidence into the record which only would have served to bolster [the victim's mother's] status as a non-criminal actor in this incident. The [P]etitioner has failed to demonstrate deficient performance.

As to whether trial counsel was ineffective for failing to cross-examine the victim's mother about custody of her oldest son, the post-conviction court found:

The [P]etitioner also claims that trial counsel was deficient for failing to elicit from [the victim's mother] that she lost custody of her oldest son to DCS as a result of the death of the victim in this case. This issue was not pled in either the pro se or amended petitions in this case. Nevertheless, the [P]etitioner elicited proof on this issue and argued it post-hearing without objection from the State. The court will therefore address the claim on the merits. *See generally Holland v. State*, 610 S.W.3d 450 (Tenn. 2020).

Tennessee allows for impeachment of a witness' character for truthfulness through the introduction of prior specific instances of conduct under certain circumstances. *See* Tenn. R. Evid. 608(b). Here, the [P]etitioner does not argue that [the victim's mother's] custody proceedings reflect on her character for truthfulness but seems to argue instead that these proceedings would have been proof of her role in the death of her son. The court is unable to properly address this claim because there is not proof of her role in the death of her son. The court is unable to properly address this claim because there is no proof in the post-conviction record of these DCS proceedings other than [the victim's mother's] brief reference to them at the sentencing hearing following the first trial. Specifically, the post-conviction record does not indicate *why* [the victim's mother] lost custody of her son or the precise facts underlying this action by the agency. Without this knowledge, it is impossible for the court [to] determine whether trial counsel was deficient for failing to raise this in the proof at the second trial. In this regard, the [P]etitioner has failed to carry his burden of demonstrating to the court by clear and convincing evidence that trial counsel was deficient for failing to pursue this line of cross-examination.

In the abstract, it is worth noting that any line of cross-examination along these lines would have faced evidentiary hurdles before it would have been allowed by the trial court. As stated, the facts of the DCS proceedings would not have been relevant as a prior specific conduct bearing on the witness' credibility pursuant to Rule

608(b). As [trial counsel] intimated, any such evidence might have been deemed irrelevant under general relevancy principles. *See, e.g.,* Tenn. R. Evid. 403 (requiring exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury). Without knowledge of the facts underlying the agency's action, it is impossible for the court to accurately analyze the issue under the appropriate evidentiary rules. If, for instance, [the victim's mother] lost custody of her son due to the neglect of the decedent, that fact does nothing to absolve the [P]etitioner of his role as the primary, abusive aggressor in this case. If, on the other hand, the DCS proceedings demonstrated that the decedent died as a result of [the victim's mother's] abusive actions, the analysis changes entirely. It is the [P]etitioner's burden on post-conviction to prove factual issues such as this through clear and convincing evidence, and he has failed to do so. He is not entitled to relief.

*(Emphasis in original).*

The post-conviction court also concluded that Petitioner failed to demonstrate prejudice during the cross-examination of the victim's mother, and found:

The [P]etitioner has likewise failed to demonstrate prejudice on this issue. Due to the trial court's ruling, a line of questioning regarding [the victim's mother's] prior status as a co-defendant would have likely done more harm than good to [P]etitioner's case. As stated, this would have given the State an opportunity to submit evidence as to the reasons why it determined [the victim's mother] was neither abusive nor neglectful as it pertained to the death of her son. Further, the State's initial theory regarding [the victim's mother] was not that she actually abused her son but that she was criminally neglectful in allowing the abusive conduct of another to cause his death. This theory does nothing to exclude [P]etitioner as the primary abusive actor and, in fact, could have served to strengthen the conclusion that he was the one who actually abused the child causing his death.

Ultimately, the State had the sole discretion as to whether to pursue criminal charges against [the victim's mother]. It made the decision not to do so. The reasons underlying its decision not to prosecute [the victim's mother] were entirely irrelevant in the trial on [Petitioner's] guilt, especially in light of a) the State's initial theory that she was neglectful, not abusive, and b) the fact that her dismissal was unconditional based upon the State's lack of proof of her

culpability and not contingent on her testimony against the [P]etitioner. If trial counsel opened the door to otherwise irrelevant testimony by eliciting this evidence, it would not have changed the outcome of the trial in [P]etitioner's favor and likely would only have served to his detriment. [P]etitioner has failed to show prejudice.

Regarding the issue of [the victim's mother] losing custody of her eldest son, [P]etitioner has failed to demonstrate prejudice by clear and convincing evidence for the reasons set forth *supra* under the court's performance analysis.

The record does not preponderate against the post-conviction court's findings. First, as for Petitioner's claim that trial counsel was ineffective for failing to question the victim's mother as to whether she spoke to police after the victim's funeral, which would have opened the door and allowed him to question her about initially being charged in the case, trial counsel said that he made a tactical decision to not seek admission of evidence because it would have allowed the State to give the reasons why they dismissed the charges against her, which would have bolstered her credibility. Trial counsel believed that this would have included the fact that the victim's mother passed a polygraph test. Although trial counsel thought that the results of the polygraph were inadmissible, he did not want that information, along with other information about why the charges were dismissed, in front of the jury. He further asserted that the issue was litigated "quite thoroughly pretrial." The post-conviction court specifically accredited trial counsel's testimony concerning this claim. We note that the victim's mother was initially charged with aggravated child abuse and felony murder under a theory of neglect based on her failure to protect the victim. The charges were later dismissed because the prosecutor "became pretty convinced" that the victim's mother had no knowledge of his injuries that would cause her to be guilty of neglect. "The prosecutor explicitly stated that the charges were not being dropped against the victim's mother in exchange for her testimony at trial." *Johnson*, 2015 WL 1579873, at \*9. We find that trial counsel clearly made a tactical decision not to question the victim's mother about speaking with police and about the dismissed charges against her. Strategic or tactical decisions are given deference on appeal if the choices are informed and based upon adequate preparation. *See Goad*, 938 S.W.2d at 369; *see also Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). Petitioner is not entitled to relief on this claim.

Next, as to Petitioner's claim that trial counsel was ineffective for failing to cross-examine the victim's mother about her oldest child being in DCS custody, trial counsel testified that he successfully subpoenaed the DCS file to the trial judge's chambers to determine whether there were issues with the victim's mother's other children. The file was given to the trial judge for in camera review. Trial counsel testified that "the DCS file gave no indication per [trial judge's] in camera review that there in fact had been any other problems with children that would be relevant or admissible in this case." Petitioner did

not present any other evidence at the post-conviction hearing concerning the DCS files or any other proceedings concerning custody of the other children. Therefore, Petitioner has not proven this claim by clear and convincing evidence, and he can show no prejudice. Petitioner is not entitled to relief on this claim.

Although Petitioner's claims that trial counsel was ineffective for failing to cross-examine the victim's mother about the victim's prior injuries, how she disciplined her children, and that the victim had no food in his stomach at the time of death were briefly addressed during the post-conviction hearing and argued by post-conviction counsel in closing argument, they were not specifically addressed by the post-conviction court in its order denying relief.

At the post-conviction hearing, trial counsel recalled questioning the victim's mother on cross-examination about the victim's prior injuries or a "healing injury." He did not recall testimony from Petitioner's first trial indicating that the victim had no food in his stomach at the time of death which contradicted the victim's mother's testimony that the victim had recently eaten. When asked if he recalled testimony from Petitioner's first trial indicating that the victim appeared to have been "whooped regularly," trial counsel testified: "I do remember some discussion about prior injuries, and I know that was part of our trial strategy, of course, that the injuries that were inflicted were either accidental or inflicted by [the victim's mother]." Trial counsel remembered an issue about the timing of the victim's injuries and tried to argue that some occurred before the victim's death. He agreed that the victim's mother testified at the second trial that she spanked her children. However, trial counsel testified that the "operating theory was that the child had other injuries and that either through accident or by the hand of [the victim's mother], that our theory was that's how the child died or at least there was a reasonable doubt as to [Petitioner's] involvement in the death of this child." Trial counsel further asserted that this was "exactly what we explored and exactly what we argued and exactly what we attempted to question on."

We again find that Petitioner has failed to prove his claims that trial counsel was ineffective during the cross-examination of the victim's mother by clear and convincing evidence or that he was prejudiced by trial counsel's performance. Trial counsel clearly testified that the defense strategy was to show that the victim's fatal injuries were either accidental or inflicted by the victim's mother, and that strategy was argued to the jury. Other than trial counsel's testimony, Petitioner did not present any further proof at the post-conviction hearing concerning these claims; he relied on testimony from Petitioner's first trial in his closing argument at the post-conviction hearing. Although Petitioner repeatedly argues that trial counsel should have questioned the victim's mother about certain specific issues during cross-examination, he does not explain how such questioning would have affected/undermined the outcome of the trial nor has he shown that such testimony would even have been admissible. A petitioner should provide "specifics regarding what questions trial counsel should have asked" the witness. *McDonald v. State*, No. E2016-

02565-CCA-R3-PC, 2017 WL 4349453, at \*4 (Tenn. Crim. App. Sept. 29, 2017). Additionally, Petitioner must also present that witness at the post-conviction evidentiary hearing to show how the witness would have responded to trial counsel's questioning. See *Brown v. State*, No. W2021-01331-CCA-R3-PC, 2022 WL 16919956, at \*8 (Tenn. Crim. App. Nov. 14, 2022), *perm. app. denied* (Tenn. Mar. 9, 2023); *Britt v. State*, No. W2016-00928-CCA-R3-PC, 2017 WL 1508186, at \*7 (Tenn. Crim. App. Apr. 25, 2017). Petitioner is not entitled to relief on these claims.

Finally, Petitioner contends that trial counsel was ineffective in his handling of several expert witnesses. He argues that trial counsel failed to request a mistrial when Ms. Lamb testified that boyfriends have a "history of causing these types of problems." Although not addressed by the trial court, we find that Petitioner has not proven this claim by clear and convincing evidence, nor has he demonstrated prejudice by trial counsel's failure to request a mistrial. At the post-conviction hearing, trial counsel was asked why he did not request a mistrial, and he replied: "I very well may have made a request for mistrial at the bench, I don't recall. But I do recall that becoming an issue and making a timely objection and asking for a limiting instruction." He did not feel that this would have opened the door to testimony about the victim's oldest child being placed in DCS custody, and "if the [c]ourt gave a limiting instruction, I think that is the curative measure and at that point there's not a door opens." Petitioner has not demonstrated that a request for a mistrial by trial counsel would have been granted, and he has not shown that any curative instruction issued by the trial court was insufficient. Petitioner is not entitled to relief on this claim.

Petitioner argues that trial counsel was also ineffective for failing to request a mistrial when Dr. Palmer became emotional during her trial testimony, nor did trial counsel request that the trial court instruct the jury to disregard Dr. Palmer's reaction. Concerning this claim, the post-conviction court found:

Trial counsel testified that Dr. Palmer cried at one point during her testimony but that she was not sobbing or wailing. After consulting with co-counsel, [trial counsel] made the strategic decision not to pursue further action so as not to emphasize the incident to the jury. His strategic decision on this point should not be second-guessed on post-conviction. [Petitioner] has failed to demonstrate deficient performance of counsel.

The record does not preponderate against the post-conviction court's findings concerning this claim. Petitioner has not shown that a mistrial would have likely been granted if trial counsel had requested one. The transcript from Petitioner's second trial does not reflect an emotional outburst by Dr. Palmer during her testimony that disrupted the trial, only that she may have become emotional.

As pointed out by the post-conviction court, “[t]here is no constitutional guarantee, nor is it realistic to expect, that trials be conducted completely devoid of displays of emotion.” See *State v. Adkins*, 786 S.W.2d 642, 644 (Tenn. 1990) (mistrial not required where the trial court took immediate action to dispel prejudice following a witness’ outburst); *State v. McCray*, No. W2005-00479-CCA-R3-CD, 2006 WL 2567483, at \*6-8 (Tenn. Crim. App. Feb. 7, 2002) (no error in trial court’s denial of a request for mistrial after an emotional display by the victim’s aunt, who had fallen on the floor; the jurors were led from the courtroom; and a curative instruction was given upon their return). Here, trial counsel clearly made a strategic decision not to bring more attention to Dr. Palmer’s testimony which will not be second-guessed by this court. See *Goad*, 938 S.W.2d at 369; see also *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). Petitioner is not entitled to relief on this claim.

Petitioner briefly asserts that trial counsel was ineffective for failing to impeach Dr. Mileusnic–Polchan’s testimony at the second trial, that the victim’s “main caretaker took good care of this child,” with her previous testimony from the first trial indicating that the victim appeared to have been “whooped regularly, had injuries from 2-30 days old and that all the injuries contributed to the child’s death.” Petitioner argues that this “would have clearly shown that the witness was either biased, had credibility issues, or was not accurate with her findings, any of which would have been beneficial to Petitioner.” Again, Petitioner has not proven this claim by clear and convincing evidence. He has not alleged how Dr. Mileusnic–Polchan should have been questioned concerning this discrepancy and what her testimony would have been, as she was not called as a witness at the post-conviction hearing. See *McDonald*, 2017 WL 4349453, at \*4; *Brown*, 2022 WL 16919956, at \*8; and *Britt*, 2017 WL 1508186, \*4. Petitioner is not entitled to relief on this claim.

## CONCLUSION

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

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JILL BARTEE AYERS, JUDGE