

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs September 1, 2020

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Clerk of the  
Appellate Courts

**BRYAN AUSTIN DEMEZA v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Tipton County**  
**No. 7807      Joseph H. Walker, III, Judge**

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**No. W2019-01658-CCA-R3-PC**

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A Tipton County jury convicted the Petitioner, Bryan Austin Demeza, of one count of aggravated child neglect, three counts of aggravated child abuse, and one count of felony murder. On direct appeal, this court reduced one of the Petitioner's convictions from aggravated child neglect to child neglect. *State v. Bryan Austin Demeza*, W2016-02086-CCA-R3-CD, 2018 WL 1040145, at \*1 (Tenn. Crim. App., at Jackson, Nov. 7, 2017), *perm. app. denied* (Tenn. June 8, 2018). The Petitioner subsequently filed a petition for post-conviction relief, claiming that he had received the ineffective assistance of counsel, which the post-conviction court denied after a hearing. After review, we affirm the post-conviction court's judgment.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which JOHN EVERETT WILLIAMS, P.J., and ROBERT L. HOLLOWAY, JR., J., joined.

Jeremy T. Armstrong, Covington, Tennessee, for the appellant, Bryan Austin Demeza.

Herbert H. Slatery III, Attorney General and Reporter; Clark B. Thornton, Senior Assistant Attorney General; Mark E. Davidson, District Attorney General; and W. Erik Haas, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Facts and Background**

**A. Trial**

This case arises from the death of a nineteen-day-old boy, Zayne DeMeza. For his death, a Tipton County grand jury indicted the victim's stepfather, the Petitioner, with one count of aggravated child neglect, three counts of aggravated child abuse, and one count of felony murder. *State v. Bryan Austin DeMeza*, No. W2016-02086-CCA-R3-CD, 2018 WL 1040145, at \*1 (Tenn. Cri. App., at Jackson, Nov. 7, 2017), *perm. app. denied* (Tenn. June 8, 2018). The jury convicted him as charged, and, on appeal, this court provided a lengthy summary of the facts presented at his trial. *Id.* We will summarize the facts presented against the Petitioner.

On December 6, 2012, at around 3:00 a.m., the Petitioner's neighbor heard a loud noise like a door slamming five or six times coming from where the Petitioner resided. The slamming was followed by a large squeal. Shortly thereafter, paramedics arrived to find the victim not breathing, bluish pale, and having what appeared to be a ligature mark around his neck. The victim's parents, Chelsea and the Petitioner, were "nonchalant." The paramedic noted that the victim had bruises on his shoulder and buttock area. She unsuccessfully performed CPR. The Petitioner told the paramedic that he had gotten up to feed the infant victim and had been lying with him on the living room couch. He said that, on his way to put the victim back to bed, he tripped over the carpet and fell on the victim. He said he got up and put the victim back to bed. He said that he went to check on him a short time later and found the victim not breathing.

Medical testimony included that the victim came to the Emergency Room ("ER") "cold" with no pulse. ER attendants also noticed the victim's bruising. The medical examiner who conducted the autopsy of the victim's body found that, at the time of the victim's death, he weighed twelve percent less than he did at his birth. The weight loss raised concern for abuse or neglect. The medical examiner observed a red mark around the victim's neck and injury to his buttock area. The autopsy report revealed that "[t]here were fractures of the left first and right first to fourth ribs[,] which were "acute" or fresh. The autopsy report also noted that the victim sustained "calluses of the left third and fourth ribs, which mean[t] that those [we]re old[,] on the posterior side of those ribs. The older rib fractures occurred between the victim's birth and nine or ten days of age. The medical examiner testified that the victim's "rib fractures in various stages of healing" were "a very, very, very high indicator of abuse" and that the fact that the victim's injuries were at various stages of healing indicated that he had been in multiple incidents of injury.

The victim's autopsy also revealed bleeding under the scalp and spots of bleeding in the temporo-occipital area of the brain. These injuries appeared to be seven to ten days old and could have been caused three ways: blunt force trauma from birth, lack of blood flow from birth, or temporary suffocation. The medical examiner opined that the injuries were caused by temporary suffocation. The victim was also diagnosed with focal axonal

spheroids of the brainstem; “[an] injury that you would see possibly from shaking or lack of blood flow or some type of force.” The victim sustained bleeding under the skin at the back of his neck and bleeding in the epidural area of the thoracic region of the spine, and fat in his liver, either “residual from birth” or from malnutrition. The medical examiner testified that he believed that the victim’s injuries were non-accidental.

A doctor specializing in child abuse also reviewed the medical evidence. Her findings corroborated those of the medical examiner. Both determined that there were no indicators at the victim’s birth that he would suffer an unexplained death. She additionally noted that the victim’s autopsy report showed several findings of skin trauma. She explained that the victim’s “bottom was raw and red [due to] really bad diaper rash. There was a history that he had some diarrhea, which is pretty common with malnutrition.” However, she believed that the bad diaper rash was unrelated to the victim’s other skin trauma. She noted that the victim had “a couple of bruises on his forehead on either side of his forehead[,]” “a bruise in front of his left ear[,]” and “bruising all the way around his neck.” The doctor observed that the bruising was “more prominent” on the right side of the victim’s head, that the bruising “went down over his collar bone on the right side[,]” and that “there was a larger distinct bruise in the very back of his neck underneath the hairline.” She explained that the victim suffered bleeding in the brain, brain damage, deep bruising in the back of his neck, and bleeding and bruising in his spinal cord.

Regarding the victim’s rib fractures, the doctor stated:

[T]he first rib is in the neck, and it’s really difficult to break the first rib because it’s protected by pretty much everything. And so the medical literature is very clear that when you have a first rib fracture, . . . you have to be worried about very significant high impact trauma, things like major car wreck, falling out of a multiple story window, major, major trauma. First rib fractures are pretty unusual.

And so [the victim] had first rib fractures on both sides, and then he had fractures of the number two, three, and four ribs on the right side. And if you remember what I said earlier, the bruising was deeper and more prominent on the right side, and so that’s not surprising that the rib fractures were more on that side.

2018 WL 1040145, at \*6-7.

The doctor noted that there were no indications from the birth records that would support the assertion that the victim’s older rib fractures occurred during his birth. The

doctor said that the victim's rib fractures were consistent with squeezing "[b]ecause the shaking itself doesn't cause rib fractures, but holding the baby and squeezing and holding the baby while shaking causes rib fractures." The victim's injuries were not consistent with an accidental fall because a fall "doesn't cause bruises all the way around your neck and on both sides of your head and neck. And a simple fall is not going to cause these very high impact rib fractures [that] [the victim] had." The doctor concluded that the victim "was severely abused, likely on multiple occasions, and the final incident of abuse resulted in his death." She stated that "the shaking of his neck and body caused his spinal cord injury, the brain injury, and the bleeding" and explained that an individual stops breathing when their brain stem and spinal cord are injured, which resulted in the victim's brain damage and eventual death.

At the time of the victim's death, the Petitioner, the victim's mother, Chelsea, and her other minor child were living with a couple named Billy and Donna. Billy explained that the Petitioner and Chelsea began dating after Chelsea was pregnant with the victim. The two were married prior to the victim's birth. Billy said that he was aware that the Petitioner and Chelsea were treating the victim's diaper rash, but Chelsea did not seek medical attention because they did not have health insurance. Billy said that, on the night of December 5, 2012, he went to sleep around 9:00 p.m. Around 9:30 p.m., he heard the victim crying, so he got up and took the victim into the living room. The Petitioner prepared a bottle for the victim and came into the living room. Chelsea and Donna were asleep in their rooms. Billy fed the victim and then the victim fell asleep while Billy and the Petitioner watched television and talked. Billy did not see any red marks around the victim's neck. Around 11:00 p.m., Billy gave the victim to the Petitioner and went to bed. Shortly before 3:00 a.m., Billy heard a knock on his bedroom door. The Petitioner came into the room carrying the victim and told Billy and Donna that he had fallen and that he did not think the victim was alive. The Petitioner was "fairly calm" while he spoke with Billy and Donna. Billy called 911 while Donna performed CPR on the victim. Billy stated that the Petitioner had a cellular telephone and also noted that the Petitioner walked past the landline in the residence to get to Billy's bedroom. Billy testified that, at that time, he was not aware of any prior incidents of the Petitioner dropping the victim or falling with the victim. He stated that he did not hear a loud knocking noise or a squeal that night.

Chelsea testified that she met the Petitioner in August 2012, the Petitioner moved in with her at the end of September or beginning of October, and they were married on November 5, 2012. In October 2012, Chelsea had an ultrasound and confirmed that she was pregnant with the victim. The Petitioner accompanied Chelsea to her doctor on this visit and "was a little upset" that Chelsea was expecting a baby. After the victim's birth, Chelsea was not aware of any health problems that the victim experienced besides diaper rash. At some point between the victim's birth and death, Chelsea noticed a bruise on his

forehead and asked the Petitioner about it. At first, the Petitioner told Chelsea that he “couldn’t remember” what happened. Later, the Petitioner told Chelsea that he was holding the victim while he walked through a door and that the victim’s head hit the door frame.

On December 5, 2012, Chelsea went to bed between 10:00 and 11:00 p.m.; the victim was in the living room with the Petitioner and Billy. Around 2:30 a.m., Chelsea woke up to the sound of the Petitioner talking with Billy and Donna. She heard the Petitioner say “Call 911. I think [the victim is] dead.” Chelsea went into Billy and Donna’s room where she saw Donna performing CPR on the victim. Billy had already called 911, so Chelsea “ran outside to flag the ambulance down.” After the emergency responders left with the victim, Chelsea and the Petitioner followed the ambulance to the hospital, and Chelsea asked the Petitioner how the victim was injured. The Petitioner told her that he had fallen. Up until the Petitioner’s arrest, the Petitioner lived with Chelsea. During that time he told her of another incident during which the victim had “slipped” out of his arms and hit his knee and then hit the kitchen floor.

Special Agent Johnson testified that she worked as a Special Agent and Criminal Investigator with the Tennessee Bureau of Investigation. She took the Petitioner’s statement, which was as follows:

On December 5, 2012, I woke up at 6:50 a.m. I called in to work at FedEx. [The victim] w[oke] up so I change[d] his diaper. Then I took [the victim] with me into the kitchen. I began to feed [the victim] in the bedroom and realized the time and hand[ed] him to Chelsea. At 7:40 a.m. or 8:00 a.m.[,] I started to get ready. I left the house at 8:30 a.m. and [went] to work. At 4:30 p.m. I [went] to Walmart to pick up baby wipes and drinks. I got home at 4:50 p.m. and put the pizza in the oven. [Chelsea’s other minor child] was walking across the floor as Billy was mopping them. I took two pieces of pizza back to Chelsea in our bedroom. Then I went to Dollar General to get V8 smoothie, Hawaiian Punch, and Sunkist drinks. I returned to the house in about 30 minutes. Chelsea was preparing the water for [her other child’s] bath. I was in the kitchen eating pizza. Billy gave [Chelsea’s minor child] a bath. Chelsea had [the victim] in her arms and was walking around doing things. Then Chelsea and I sat on the bed watching TV. Then five minutes later Billy walk[ed] in with [Chelsea’s other minor child]. I help[ed] Billy get [the child] dressed. It was about 7:00 p.m. or 8:00 p.m. Billy took [the child] to living room to watch TV[,] and Chelsea and I were in the room watching TV. [The victim] was asleep in the bassinet. Then at 8:30 p.m. or 9:00 p.m., [the victim] woke up. I took him into the kitchen[,] and as I was feeding [the

victim], Billy walk[ed] in. When I got done feeding him[,] Billy took [the victim] into the living room and then I followed. We talked for about 45 minutes to two hours. Billy said he was going to bed. Then I took [the victim] back to the bassinet at 11:00 p.m. or 11:30 p.m. [The victim] slept for about an hour and a half to two hours. [The victim] started crying. I fed him and changed his diaper twice. It was about 1:30 a.m., and [I] put [the victim] back into his bassinet, and he was asleep. He slept for [thirty] to [forty] minutes. [The victim] woke up about 2:00 a.m. or 2:10 a.m. I took [the victim] back into the living room and made a bottle and f[ed] him. I had [the victim] in my arms holding him in my left arm, face down with my palm to brace his head so it [was] not bobbing around. [The victim] fell asleep, and I was walking to take [the victim] to his bassinet and I tripped. I tripped over the recliner chair. I fell onto the floor, and I pulled my other hand back underneath. My right was covering the face and my left hand was covering his throat and head. I did CPR on the floor of the living room next to the chair. I did [thirty] pumps, which was [thirty] compressions with two fingers with my right hand. I also did two breaths and I covered his mouth and nose with my mouth. I did not count how many times. I kept going until I realized he was not coming back. [The victim] was not doing anything. He was dead. I checked for his artery to see if his blood was pulsing to see if his heart was beating. I also put my face to his face to check for his breath. I took [the victim] back to my room, and I put [the victim] in the bassinet and got my phone off the bed. Then I picked [the victim] back up and took him into Billy's room. I told them[,] ["I don't think he's alive.]" Billy called 911. I just sat there and watched. I did not know what to do. Then me and Chelsea went outside to the porch and waited for the ambulance to arrive.

2018 WL 1040145, at \*9.

The Petitioner gave a second statement about how the victim sustained injuries to his body:

On Thursday, December 6, 2012, I was walking to the back room. I had [the victim] in my left arm with his legs tucked underneath his stomach and his butt was in the air. When we fell I had my left arm covering his face and neck. I brought my right arm towards his face and slid my left arm down, towards his chest. The base of my palm was mid-chest. On impact of falling on the ground I heard a double crack. I don't know where the crack came from, I did not feel it. I guess it came from his neck. I got up as fast as I could and checked to see if he was breathing and alive. I

pulled my arms from up under him and push[ed] my body up off of him . I put my right hand on [the victim's] back and my left hand under his body and turned him over to have his face facing in the air. I saw [the victim's] head drop down as I was turning him over. That's when I knew something was wrong. Last week when I was holding [the victim] in my left arm in a side cradle position[,] I was walking out of the bedroom door and Chelsea called me. I turned around and hit his head on the door frame. [The victim] did not bruise right away. It was the next [day] that [I] and Chelsea noticed bruising in the mid-forehead to the left forehead area. [The victim] cried badly after hitting his head. It happened around 11:00 p.m. I can't remember what day it was.

*Id.* At \*10.

On August 7, 2013, Special Agent Johnson discussed the autopsy report with the Petitioner, and he gave his third statement:

On December 6, 2012, . . . me and Billy were sitting in the living room after work . . . I was feeding [the victim] in the kitchen and Billy asked me to give [the victim] to him[,] and we sat in the living room talking. We were talking about random things. I don't know how long we were talking. I don't remember what happened after that. I can't remember if he was saying he was going to bed because he worked in the morning or because he was just going to bed. [Billy] gave [the victim] back to me.

I went back to the bedroom and put him in the bassinet. [The victim] was asleep at this point. I laid down in the bed until he cried again. I don't remember what time it was. I got back up with him. And I tried getting him back to sleep. Nothing would work. I was just standing in the room and rocking him.

I went to get a bottle of food and came back and sat in the floor with him. In the bedroom. I am not sure how long he laid down for that time. It was a little while later he started crying again so I picked him up and went to get another bottle. [I] sat on the couch with him[,] feeding him [ ] [u]ntil he fell asleep. I don't know how long that took. When he fell asleep[,] I just sat there watching TV, and he was on my chest sleeping. His head was facing my chest.

I saw the black. I remember [ ] rolling a little bit towards the right and coffee table[,] and he just rolled onto my right arm and bicep. Last

thing I remember was opening my eyes and being on the floor with him underneath me. His body was under my body on my left side with [his] head towards the collar bone. I leaned back and noticed he wasn't moving or crying. He was not crying or moving.

I shook him towards my body and away from my body [eight] to [ten] times. I was on my knees with my back [against] the table and [my] buttocks on my heels. He was at my lower chest area while I was shaking him to get a response. I got nothing. There was no heartbeat. I didn't even check. His head was all the way back.

Midway to the end of shaking[,] I heard a thud. I didn't know what that was. I panic[k]ed and started to run back to the bedroom with [the victim] . . . I hit something and fell next to the chair. He was underneath my left chest and side. I had [my] left arm underneath his butt and [my] right arm under his back. I fell and he was in same position but underneath me. His head was at my collar bone, and all I could see [wa]s the top of his head. I remembered that I knew how to do CPR. I panicked and thought that it might help. He wasn't breathing and there was no heartbeat.

The CPR was [one] finger pushing on his chest[,] doing compressions and breathing into him to push air through his lungs. I am not sure how many times I did that. His eyes were closed. It wasn't working so I stopped. I thought I had a heartbeat, but it wasn't a heartbeat.

So I picked him up quickly and picked up underneath his armpits and put his head on my shoulder. I ran to the back. I set him in the bassinet and grabbed my phone. Chelsea was sleeping the whole time. After I grabbed my phone[,] I grabbed [the victim] out of the bassinet and ran to Donna's room. Donna did CPR and we called 911. We both called, but she got through first. The ambulance arrived[,] and I went outside and I cried. I didn't know what happened at that time. I was in shock.

Friday, November 23, 2012, around midnight I was in the kitchen with [the victim] in my arms. I went to tighten the bottle[,] and he slid from my arms. On the way down[,] he hit my knee. Then he hit the cabinet and then the floor. He cried very loudly. He didn't cry very long because I started rocking him. I stayed in the kitchen and rocked him. I was wearing shorts. I didn't notice any red marks on me or him. I was more concerned with him being okay. I didn't tell anyone about this because I was afraid of being yelled at.



Wednesday, November 28, 2012, I had [the victim] in my arms walking out of our bedroom door. I had him cradled[,] [a]nd Chelsea called my name[,] and when I turned around[,] he bumped his head on the door frame. He cried a little bit. Chelsea was right there. She yelled at me for it. She didn't take him from me. I saw a light pink area on his right forehead. It was pink and bruised the next day. We watched the bruising, and it went away like [two] days later. She was going to take him to the hospital if it didn't go away. The same day we used cornstarch to dry up the rash on his anal section.

I feel a lot better than when I came in here.

The Petitioner offered expert testimony and other evidence. Based upon the evidence presented, the jury convicted the Petitioner of one count of aggravated child neglect, three counts of aggravated child abuse, and one count of felony murder. *Id.* at \*1.

The Petitioner appealed his convictions alleging that he was not properly interviewed by police, that the trial court made an evidentiary ruling error, and that the evidence was insufficient to sustain his convictions. This court affirmed all the convictions except his conviction for aggravated child neglect, which we reduced to a conviction for child neglect. *Id.* The court also concluded that the trial court erred when it merged the aggravated child abuse charges into the aggravated child neglect charge, and we remanded for the trial court to resentence the Petitioner in accordance with our holding. *Id.* The Petitioner appealed our decision to the Tennessee Supreme Court, which denied him permission to appeal. *Id.*

## **B. Post-Conviction Facts**

The Petitioner filed a timely petition for post-conviction relief. In it, as relevant here, he contended that he had received the ineffective assistance of counsel at trial because his trial counsel, Counsel, failed to consult with the Petitioner or to allow him to participate in his own defense. The trial court held a hearing during which the parties presented the following evidence: The Petitioner testified that he “[v]ery rarely, if at all” had conversations with Counsel about his case. He said that, when he met with Counsel, Counsel would inform him that nothing had changed and ask him how he was doing. The Petitioner did not recall Counsel reviewing discovery with him. The Petitioner said that Counsel told him about experts that he intended to retain, but that he did not tell him anything other than that. The Petitioner testified that he and Counsel discussed Counsel “raising severance” and “changing venue” but that Counsel never raised these issues.

The Petitioner said that he wanted the venue issue pursued because he felt it was “wrong” to hold the trial in an area where the offense occurred because the offense had received so much publicity. He presented multiple news articles that had detailed the events surrounding the victim’s death. The Petitioner described the articles as “saying [the killing] was more brutal than what it actually was.” He opined that, based upon these articles, it was not possible for him to get a fair trial in Tipton County.

The Petitioner then described his request that Counsel file a motion to “sever” the counts against him. He indicated that each charge against him “don’t stand alone” and the charges have to be “together in order to say [he] did anything.” Based upon this he asked Counsel to file a motion to sever the charges against him. The Petitioner said that Counsel said that he would do so, but he never did.

The Petitioner said that he wanted to testify on his own behalf at trial, but that Counsel told him that doing so would not be in his best interest. The Petitioner also expressed concern that the jurors in his case were not sequestered but could go home each night.

During cross-examination, the Petitioner testified that the two attorneys who had been appointed to represent him did not do their job in explaining anything to him. When he asked a question, they would respond “we will have to get back with you,” but they never responded. The Petitioner agreed that he had two attorneys at trial, Counsel and Co-counsel, and that they both participated in his defense.

The Petitioner maintained that the charges against him should have been severed. He said that the other incidents of abuse “did not have any correspondence with the final incident.”

The Petitioner said he did not recall whether there were any cameras or news reporters in the courtroom during his trial. He said that his attorneys asked the potential jurors about the news coverage during voir dire, but he still felt prejudiced by their failure to request a change of venue.

Counsel testified that he represented the Petitioner in his felony murder trial. He said that the Petitioner may have asked him to request a change of venue. He discussed this with Co-counsel and the two, who were familiar with Tipton County juries as opposed to juries from the surrounding counties, decided it was not in the Petitioner’s best interest. He said that there were news stories around the time of the Petitioner’s arrest but that the case took two or three years to go to trial and that there was not anything in the newspaper at the time of the trial. Counsel said he was unaware of any sort of publicity surrounding the trial.

Counsel said that he did not request sequestration of the jury. He explained that based upon one of their expert's schedules, it would have required that the jury be sequestered for two or three days without hearing evidence.

Counsel said that he reviewed discovery with the Petitioner. He said that he tried to help the Petitioner understand the discovery. Counsel said that he felt it was not in the Petitioner's best interest to testify. He explained that the Petitioner had made three statements to police that were not consistent. He said that he went over the statements with the Petitioner and explained the concerns but that it was the Petitioner's decision not to testify.

Counsel said that he recalled them discussing severance, but he was unsure why they did not pursue the motion.

During cross-examination, Counsel testified that the theory of defense was that the incident leading to the victim's death was an accident. He said that they presented a medical expert, Dr. Ross, who opined that this was an accident. The defense posited that this was a case where law enforcement rushed to judgment.

Counsel recalled that he filed a motion to suppress the Petitioner's statements to law enforcement but the motion was denied.

Based upon this evidence, the post-conviction court denied the Petitioner's petition for post-conviction relief. It found that the Petitioner had failed to show that Counsel and Co-counsel were ineffective or that he was prejudiced. It is from this judgment that the Petitioner now appeals.

## **II. Analysis**

On appeal, the Petitioner contends that the post-conviction court erred when it denied his petition because he received the ineffective assistance of counsel. He asserts that his attorneys failed to consult with him regarding the evidence and to allow him to participate in his own defense. He further contends that the charges against him should have been severed because the charges involved multiple instances against the same victim, which could each be viewed as accidental in the absence of other events. The State responds that the post-conviction court properly denied relief to the Petitioner on his claims of ineffective assistance of counsel. It asserts that the Petitioner's trial counsels effectively communicated with the Petitioner. Further, the State asserts that the trial court correctly found that the offenses were mandatorily joined. We agree with the State.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2018). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2018). The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates against it. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). Upon review, this court will not re-weigh or re-evaluate the evidence below; all 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 trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's conclusions of law, however, are subject to a purely de novo review by this court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland*, 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). "The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation." *House*, 44 S.W.3d at 515 (quoting *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)).

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is 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; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

The Petitioner in the case under submission first contends that his counsels did not allow him to effectively participate in his own defense. He asserts that they did not "discuss possible defenses or the weaknesses in the evidence proffered by the prosecution." Counsel testified that they met with the Petitioner on several occasions and that he reviewed the discovery with the Petitioner and specifically discussed whether the Petitioner should testify. Counsel noted that the Petitioner had made three incriminating statements but that they presented a theory that this killing occurred by accident. They supported this theory with expert testimony. We conclude, as did the post-conviction court, that the Petitioner has not proven that Counsel was ineffective in this regard or that Counsel's representation prejudiced the Petitioner.

The Petitioner next contends that Counsel was ineffective for failing to file a motion to sever the counts against him for separate trials. The post-conviction court found:

[The] Petitioner testified he requested of his attorneys the charges be severed, because they could not stand alone, and the state needed each to prove the others.

The [Petitioner] was indicted for first degree murder in the perpetration of or attempt to perpetrated aggravated child abuse. Those charges were not subject to severance.

These offenses are indicted together due to Rule 8 mandatory joinder, as they are based on the same conduct or arose from the same criminal episode.

The [P]etitioner has not shown ineffective assistance of counsel since he has not shown severance appropriate to promote a fair determination of the defendant's guilt or innocence of each offense.

Tennessee Rules of Criminal Procedure (8)(1)(A) sets forth the rule for mandatory joinder of offenses. The Rule states that:

Two or more offenses shall be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or the offenses consolidated pursuant to Rule 13, if the offenses are:

(A) based on the same conduct or arising from the same criminal episode;

(B) within the jurisdiction of a single court; and

(C) known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s).

Rule 8(b) governs permissive joinder of offenses. It provides that:

Two or more offenses may be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13, if:

(1) the offenses constitute parts of a common scheme or plan, or

(2) they are of the same or similar character.

Tenn. R. Crim. P. 8(b)(1)-(2). Rule 14, which controls severance, is also relevant to our analysis. It provides that

(b) Severance of Offenses-

(1) Involving Permissive Joinder of Offenses—If two or more offenses are joined or consolidated for trial pursuant to Rule 8(b), the defendant has the right to a severance of the offenses unless the offenses were part of a common scheme or plan and the evidence of one would be admissible in the trial of the other and:

(2) Involving Mandatory Joinder of Offenses—If two or more offenses are joined or consolidated for trial pursuant to Rule 8(a), the court shall grant a severance of offenses in any of the following situations:

(A) Before Trial—Before trial on the motion of the state or the defendant when the court finds a severance appropriate to provide a fair determination of the defendant’s guilt or innocence of each offense.

The post-conviction court found that these cases were mandatorily joined because they arose out of the same criminal episode. Importantly, a trial judge’s decision with respect to a motion for severance of offenses is one entrusted to the sound discretion of the judge and will not be reversed on appeal absent an abuse of that discretion. *State v. Shirley*, 6 S.W.3d 243, 245 (Tenn. 1999). Additionally, “a trial court’s refusal to sever offenses will be reversed only when ‘the trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice for the party complaining.’” *Id.* at 247 (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). The Tennessee Supreme Court has opined that:

[B]ecause the trial court’s decision of whether to consolidate offenses is determined from the evidence presented at the hearing, appellate courts should usually only look to that evidence, along with the trial court’s findings of fact and conclusions of law, to determine whether the trial court abused its discretion by improperly joining the offenses.

*Spicer v. State*, 12 S.W.3d 438, 445 (Tenn. 2000). The post-conviction court in this case found that the joinder of offenses was required by Rule 8(a), which means that in order to obtain a severance, the Petitioner would have had to show that severance was “necessary to achieve a fair determination of the defendant’s guilt or innocence of each offense.” *See* Tenn. R. Crim. P. 14 (b) (ii). We conclude that the Petitioner could not do so. The victim was alive less than three weeks and, over the short duration of his life, the

Petitioner repeatedly abused him, either “accidentally” or, as the jury found, intentionally. We conclude, as did the post-conviction court, that these incidents were part of a single continuing episode of repeated abuse that involved multiple instances of squeezing, shaking, and dropping the infant victim over the course of nineteen days. The Petitioner is not entitled to relief on this issue.

### **III. Conclusion**

After a thorough review of the record and the applicable law, we conclude that the post-conviction court properly denied the Petitioner’s petition for post-conviction relief. In accordance with the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court.

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ROBERT W. WEDEMEYER, JUDGE