IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 19, 2015 Session

EDWARD THOMAS KENDRICK III v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hamilton County
No. 220622 Don W. Poole, Judge

No. E2011-02367-CCA-R3-PC – Filed November 5, 2015

This case presents an appeal to this court after remand by order of the Tennessee Supreme Court. The Petitioner, Edward Thomas Kendrick III,[1] was convicted by a jury of the first degree premeditated murder of his wife. Subsequently, the Petitioner filed for post-conviction relief, raising, inter alia, numerous claims of ineffective assistance of counsel. After a hearing, the post-conviction court denied relief, and the Petitioner appealed. On appeal, a panel of this court granted the Petitioner post-conviction relief, concluding that he had established that he received the ineffective assistance of counsel at trial due to (1) trial counsel's failure to offer expert proof about the trigger mechanism in the rifle, which was known to cause accidental shootings; and (2) trial counsel's failure to seek to admit, as excited utterances, out-of-court statements by a crime-scene investigator made to his fellow officers after he shot himself in the foot with the Petitioner's rifle. Our supreme court disagreed, reversing our conclusion that the Petitioner received ineffective assistance from his trial counsel with regard to these two issues. The case has now been remanded to us for consideration of the issues that were pretermitted by this court after finding the two issues to be meritorious. Those pretermitted issues are as follows: (1) whether trial counsel erred by waiving the Petitioner's attorney-client privilege with his divorce attorney and, in so doing, allowed the State to insinuate adultery as a motive for the shooting; (2) whether trial counsel was ineffective for failing to call the Petitioner's cousin, Randall Leftwich, to testify about the Petitioner's activities on the day of the shooting and about his discovery of cabbage simmering on the Petitioner's stove immediately following the shooting; (3) whether trial counsel was ineffective when he "opened the door" on direct examination of the Petitioner for the State to inquire about additional misdemeanor convictions on cross-examination that had not been previously admissible; (4) whether trial counsel and appellate counsel were ineffective for failing to adequately challenge Lennell Shepheard's testimony that the

[1] The Petitioner identifies himself as "Edward Thomas Kendrick III" in his petition for post-conviction relief filed on April 15, 1998. We note that this court's opinion addressing the Petitioner's direct appeal from his conviction identifies the Petitioner as "Edward Thomas Kendricks III, alias Edward Thomas Kendrick III."

Petitioner stood over the victim's body and said "I told you so" six times; (5) whether trial counsel was ineffective for failing to call Officer William Lapoint to testify about the Petitioner's "very distraught" demeanor at the airport just after the shooting; (6) whether trial counsel and appellate counsel were ineffective when they did not object or raise on appeal the issue of Detective Mark Rawlston's volunteered testimony that the Petitioner never told him that the gun accidentally discharged when interviewed in the back of a patrol car at the airport; (7) whether trial counsel's failure to seek curative measures for a security officer's, Ms. Martha Maston, surprise testimony about the Petitioner's daughter's statement at the airport was ineffective; and (8) whether the cumulative impact of counsels' errors entitle him to relief.[2] After consideration of these remaining issues, we affirm the judgment of the post-conviction court denying post-conviction relief.

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

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL, P.J., and CAMILLE R. MCMULLEN, J., joined.

Ann C. Short (on appeal), Knoxville, Tennessee; and Jeffrey Schaarschmidt and Jason Demastus (at post-conviction hearing), Chattanooga, Tennessee, for the appellant, Edward Thomas Kendrick III.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; William H. Cox III, District Attorney General; and Lance Pope, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

1. Procedural Background. This case presents a protracted procedural history, which began over twenty years ago when the Petitioner shot and killed his wife on March 6, 1994. A Hamilton County jury subsequently convicted the Petitioner of first degree premeditated murder, which carried an automatic life sentence. This court affirmed the Petitioner's conviction on direct appeal. See State v. Kendricks, 947 S.W.2d 875, 886 (Tenn. Crim. App. 1996).[3]

After the direct appeal, the Petitioner, pro se, timely filed a petition for post-conviction relief in April 1998, raising, among other things, multiple grounds of

[2] For the sake of clarity, we have reordered two of the issues as presented by the Defendant in his appellate brief.

[3] The Tennessee Supreme Court denied the Petitioner's application for permission to appeal from this court's decision on May 5, 1997.

ineffective assistance of counsel. The post-conviction court summarily dismissed the petition on the basis that all of the issues raised in the petition were either waived or previously determined. See Kendricks v. State, 13 S.W.3d 401, 403 (Tenn. Crim. App. 1999). The post-conviction court concluded, "Since the petitioner had separate counsel on the appeal than he had during the course of the trial, the issues as to the ineffective assistance of counsel either were or could have been raised on appeal." Id. at 404. On appeal, this court held that, regardless of the fact that the Petitioner had successor counsel for the motion for new trial proceedings and on direct appeal, "the post-conviction court erred in holding that the [P]etitioner's ineffective assistance of counsel claims were barred for failure to raise them on direct appeal[,]" as the Petitioner was not required to do so and which was a practice, in fact, discouraged by the law. Id. at 404-05. Accordingly, this court reversed the post-conviction court in part and remanded the case for further proceedings, noting specifically that the Petitioner should be allowed the opportunity to amend his petition. Id.

On March 16, 2000, the Petitioner, aided by counsel, filed an amended petition for post-conviction relief. The Petitioner also filed multiple amended petitions with and without the assistance of counsel. At a series of hearings in February and March 2011[4]—almost sixteen years after his original trial—the Petitioner raised forty-three claims of ineffective assistance of trial counsel, twenty-two claims of ineffective assistance of appellate counsel on direct appeal, and twelve claims of prosecutorial misconduct. He supported these claims with a 631-page memorandum of law.

The post-conviction court declined to grant the Petitioner relief in a sixty-six-page order filed on October 13, 2011. In the Petitioner's second post-conviction appeal, this court reversed the post-conviction court's denial of the petition, addressing only two of the multiple claims of ineffective assistance of trial and appellate counsel presented by the Petitioner in his appellate brief. See Edward Thomas Kendrick III v. State, No. E2011-02367-CCA-R3-PC, 2013 WL 3306655 (Tenn. Crim. App. June 27, 2013), rev'd, Kendrick v. State, 454 S.W.3d 450 (Tenn. 2015), reh'g denied (Tenn. Feb. 6, 2015), cert. denied, Edward Thomas Kendrick, III v. Tennessee, --- U.S. ---, No. 15-5772, 2015 WL

[4] Tennessee Code Annotated section 40-30-109 provides for a prompt evidentiary hearing. Section 40-30-109(a) states that, if the petition for post-conviction relief is not dismissed, the post-conviction court "shall enter an order setting an evidentiary hearing . . . no later than thirty (30) days after the filing of the [S]tate's response[,]" and the evidentiary hearing shall be within four (4) calendar months of the entry of the court's order[.]" Any "extension shall not exceed sixty (60) days." It is unclear from the record why over ten years elapsed between this court's prior opinion and the hearing on the Petitioner's amended petitions. Such a lengthy delay is inexcusable and has caused much of the confusion surrounding this case. We note that trial judges have an obligation to manage their dockets in a timely manner, see Tennessee Supreme Court Rule 10, Rule of Judicial Conduct 2.5, and defense lawyers and prosecutors have an ethical obligation to make reasonable efforts to expedite litigation, see Tennessee Supreme Court Rule 8, Rule of Professional Conduct 3.2.

5032354 (U.S. Oct. 13, 2015). This court determined that trial counsel's performance had fallen below an objective standard of reasonableness (1) when counsel failed to adduce expert testimony about the Petitioner's rifle's defective trigger mechanism, which was known to cause accidental shootings, to rebut the State's expert's testimony that the rifle could only be fired by pulling the trigger; and (2) when counsel failed to attempt to introduce hearsay evidence, as excited utterances, of a crime-scene investigator's initial explanation to his fellow officers about how he came to be shot in the foot by the Petitioner's rifle. See id. at *13-14. Furthermore, we held that these errors prejudiced the Petitioner because had the jury heard such evidence, "it [was] reasonably likely the jury would have accredited the Petitioner's version of events and convicted him of a lesser degree of homicide." Id. at *17. Based on these conclusions, we pretermitted consideration of all of the Petitioner's remaining claims. Id. at *18.

However, our supreme court granted the State's application to appeal, reversed our decision, and reinstated the Petitioner's conviction. See Kendrick, 454 S.W.3d at 455. Addressing the Petitioner's claim that trial counsel was ineffective for failing to seek a countervailing firearms expert, our supreme court found no deficiency in trial counsel's performance, concluding that "trial counsel made a reasonable tactical decision to construct his 'accidental firing' defense around [the crime-scene investigator's] mishap with [the Petitioner's] rifle." Id. at 476-77. The court reasoned, "The best evidence that [the Petitioner's] Model 7400 was capable of misfiring is the undisputed fact that [the crime-scene investigator] was shot in the foot by the very same rifle." Id. at 477. The court continued that "[t]his was not a case that hinged on expert testimony" and that "[t]he bulk of the State's case consisted of eyewitnesses." In conclusion, our supreme court stated that it was not objectively unreasonable for trial counsel to fail to consult with a firearms expert before trial. Id. (citing Harrington v. Richter, 562 U.S. 86, 106 (2011)).

Our supreme court also found that trial counsel's performance was not deficient when counsel failed to attempt to introduce hearsay evidence, as excited utterances, of the crime-scene investigator's initial explanation to his fellow officers about how he came to be shot in the foot by the Petitioner's rifle. The court assumed the statements were admissible exceptions to the hearsay rule but, nonetheless, concluded that the Petitioner had failed to establish deficient performance because "trial counsel did almost everything at his disposal to prove that [the crime-scene investigator] had not pulled the trigger, with the exception that he did not offer the statements as substantive evidence under Tenn. R. Evid. 803(2)." Kendrick, 454 S.W.3d at 480-81. In summary, the court reasoned that "trial counsel took great pains to inform the jury that the weapon apparently misfired for [the crime-scene investigator]" and that "[t]his was the best evidence that the trigger mechanism on [the Petitioner's] rifle might have been defective." Id. at 481. Additionally, the court determined that "[e]ven if . . . trial counsel's representation was

deficient," there was "other 'ample evidence' . . . [that] would mitigate against finding that [the Petitioner] was prejudiced[,]" noting that "the jury heard evidence to support [the defense] theory, [which] include[ed] [the crime-scene investigator's] cross-examination and [the Petitioner's] statement that he was 'almost positive' his finger was not on the trigger." Id.

The case was remanded to us, and we were instructed to address the remainder of the Petitioner's claims that had been pretermitted in our previous post-conviction opinion. Kendrick, 454 S.W.3d at 481. This post-conviction case is now before us again for a third time. While it is true that the Petitioner raised an additional forty-one issues of ineffective assistance of trial counsel, twenty-two claims of ineffective assistance of appellate counsel on direct appeal, and twelve claims of prosecutorial misconduct, many of these claims have been abandoned on appeal. Accordingly, we will focus only on those issues raised by the Petitioner in his appellate brief. See Tenn. R. App. P. 13(b) ("Review generally will extend only to those issues presented for review.")[5]

2. The Petitioner's trial. To assist in the resolution of this proceeding, we repeat here the summary of the facts set forth in our supreme court's opinion addressing the Petitioner's two claims of ineffective assistance by his trial counsel. Our supreme court provided "a careful review" of the Petitioner's November 1994 trial:

> Each side clearly presented their theory of the case in their opening statements to the jury. The State told the jury:
>
> > It's the State's theory that [the Petitioner] escorted his wife outside [of the gas station where she worked] to execute her and that's what he did. He took her outside, removed his Remington 7400 .30–06 hunting rifle from the back of his car and in front of his two small children, leveled the weapon, pointed it at his wife and shot her at point-blank range one time, dead center in the chest.

[5] Moreover, we note that the Petitioner arguably raises additional issues of ineffectiveness in his reply brief by "itemizing and grouping his claims in a fashion that may be easier to follow than the order in which he presented his claims at post-conviction and the order in which the post-conviction court analyzed the claims." He also raises as a specific issue, not previously addressed—trial counsel's failure "to file a pretrial request for an instruction on the range of punishment, including parole eligibility, as well as lesser-included offenses." As this court has made clear,

> A reply brief is limited in scope to a rebuttal of the argument advanced in the appellee's brief. An appellant cannot abandon an argument advanced in his brief and advance a new argument to support an issue in the reply brief. Such a practice would be fundamentally unfair as the appellee may not respond to a reply brief.

Caruthers v. State, 814 S.W.2d 64, 69 (Tenn. Crim. App. 1991). Accordingly, we will address only those issues properly raised in the Petitioner's opening brief.

In his opening statement, [the Petitioner's] trial counsel told the jury the State would not be able to prove "intent" or "premeditation":

> Lisa Kendrick was killed but not by [the Petitioner]. Lisa Kendrick was killed by a faulty rifle that was being transferred from the front of [their station wagon] to the back, . . . and the gun went off. The State would have you believe there is no merit . . . to that defense, but because [a crime-scene investigator] picked up this gun at the scene they are going to have to put him on. You can ask yourself . . . why [that crime-scene investigator] was shot in the foot with his hand nowhere near the trigger with the very same weapon. I'll ask him that for you.

The State's first witnesses were persons who were at the gas station when Ms. Kendrick was shot. Timothy Benton, the person who followed [the Petitioner] from the gas station to the airport following the shooting, testified that he heard an explosion as he was pulling out of the gas station and that when he turned around, he saw [the Petitioner] holding a rifle with the barrel pointed straight up in the air. He stated that [the Petitioner's] "right hand was on the pistol grip area around the trigger and [his] left hand was up near the stock." Mr. Benton also testified that [the Petitioner] was standing over Ms. Kendrick's motionless body.

The State then called Lennell Shepheard, a friend of Ms. Kendrick who was talking with Ms. Kendrick in the gas station when [the Petitioner] arrived. Mr. Shepheard testified that [the Petitioner] asked his wife to come outside because he had something to show her. He also testified that when he heard the shot, he walked from the counter to the door of the gas station and, when he opened the door, he saw [the Petitioner] standing over his wife's body. Mr. Shepheard testified that he heard [the Petitioner] "yelling 'I told you so' . . . about six times." He also stated that he went back inside the gas station after he and [the Petitioner] made eye contact.

On cross-examination, [the Petitioner] suggested that Mr. Shepheard had not mentioned in his earlier statements that he heard [the Petitioner] say "I told you so" and insinuated that Mr. Shepheard had fabricated this portion of his testimony. Mr. Shepheard responded that he had reported [the Petitioner's] statement to an officer at the scene and later to one of the district attorney's investigators. The lead investigator, Detective Mark Rawlston, later testified that an audio recording of Mr. Shepheard's

statement at the scene contained no reference to [the Petitioner's] saying "I told you so."

The jury heard the 9-1-1 telephone calls made by two witnesses at the scene, as well as the call [the Petitioner] made from the airport. "I want to turn myself in," [the Petitioner] said, "My wife, I just shot my wife . . . I'm parked at the airport." When the 9-1-1 operator asked, "Why did you shoot her?" [The Petitioner] only responded, "Yes." Thereafter, the conversation turned to where [the Petitioner] was located at the airport.

[The Petitioner's] trial counsel made sure that the jury heard early and often that Sergeant [Steve] Miller, one of the crime scene investigators, had been shot in the foot while handling [the Petitioner's] rifle. During cross-examination by [the Petitioner's] lawyer, Detective Rawlston testified that he did not consider the possibility that [the Petitioner's] rifle had accidentally discharged. This answer prompted [the Petitioner's] lawyer to ask, "What about when the crime scene technician lifted the gun out of the trunk of his car and shot himself in the foot with it, saying all the time that his finger was nowhere near the trigger, what about that, that wasn't an issue you thought worthy of investigation?" Detective Rawlston responded that he did not consider the possibility of an accidental discharge because when he first interviewed [the Petitioner] following his arrest, [the Petitioner] "never at any time indicated to me that this was an accidental discharge." To the contrary, [the Petitioner] told him, "I hope this is only a dream."

Testifying after Detective Rawlston, Sergeant Miller explained that after he retrieved the rifle from the side of the road and drove it to the police service center, "the weapon discharged and it struck [him] in the left foot" as he was removing it from the trunk of his automobile. Sergeant Miller said that he was holding a coat in his left hand and that he picked up the weapon with his right hand with the barrel "pointed down towards the pavement." He also testified that he had "no recollection of how the weapon discharged."

When asked to demonstrate for the jury how he was holding the rifle when it fired, Sergeant Miller held the weapon without putting his finger on the trigger. However, when the prosecutor specifically asked him if he remembered whether his finger was on the trigger when the rifle discharged, Sergeant Miller stated that he did not remember.

[The Petitioner's] trial counsel continued this line of questioning when he cross-examined Sergeant Miller, even though Sergeant Miller insisted that he did not recall whether his finger touched the trigger when the rifle discharged. The following colloquy took place:

> Q: Did you ever have your finger on the trigger when it discharged?
> A: I don't recall.
> Q: Well, didn't you, in fact, tell—there is an investigation and review of any time an officer is shot, is that correct?
> A: I don't remember anybody coming, you know, the people that generally do that, I don't believe they came.
> Q: You never made any statement to those people that your finger was not on the trigger?
> A: Not that I recall because most of my statement was made when I was in the hospital and what we do is fill out what's called an EOF, if something that happens to you on duty and when you get injured. And that was made when I was in the hospital.
> Q: Well, you wouldn't shoot yourself in the foot intentionally, would you?
> A: No, sir.
> Q: How long have you been a police officer?
> A: Going on 22 years.
> Q: When you picked up the gun and you showed the jury how you turned, you had your hand just like that?
> A: Right.
> Q: You don't put your finger on the trigger, do you?
> A: No, sir.
> Q: Okay. So when you turned the gun around is when it went off?
> A: That's what I've described.
> Q: As you swung around the gun swung around with you and your hand just like that and the gun went off, is that correct?
> A: But I can't say that night that was the exact position of my hand, is what I'm saying.
> Q: Well, in 22 years as a police officer, have you ever discharged a gun before accidentally into your foot?
> A: No, sir.
> Q: Okay. Or in any other part of your body?
> A: No, sir.

Q: Or any other way?
A: No, sir.
Q: And you've been [a crime scene investigator] since 1988, some six years. Have you ever had a gun accidentally discharge as you—at the crime scene or anything else?
A: No, sir.
Q: Okay. How many times a day is it drilled into you at the police academy don't ever put your hand on the trigger unless you're going to shoot the gun, that's pretty standard, isn't it?
A: Yes, sir.
Q: Would you ever put your finger on the trigger of a gun you're lifting out of your car, especially when, as you say, you knew the gun was loaded?
A: Not knowingly, no.
Q: Well, now come on, you're waffling aren't you?
A: No.
Q: Well, you told them that you never had your finger on the trigger, you didn't shoot the gun, did you not tell them that?
A: I didn't intentionally shoot the gun, no.
Q: Okay. And you know not to put your finger on the trigger of a loaded gun unless you want to shoot it, don't you?
A: That's correct.
Q: And you've practiced that rule for the past 22 years, have you not?
A: Yes.

During his recross-examination of Sergeant Miller, [the Petitioner's] trial counsel returned to the manner in which Sergeant Miller picked up and carried the rifle:

Q: So [to] the best of your recollection your finger was not on the trigger?
A: That night I can't say, I showed you how I thought I took it out.
Q: Well, you just said to the best of your recollection you showed us how you took it out of the trunk of the car.
A: Right.
Q: And to the best of your recollection, since you showed us, when you showed us, you showed us having the gun like this, finger off the trigger.
A: Right.

Q: To the best of your recollection, your finger was not on the trigger was it?
A: I might—
Q: Did you show us to the best of your recollection?
A: Yes, I did.
Q: Was your finger on the trigger when you showed us?
A: Not in this courtroom, no.
Q: Is that to the best of your recollection how it happened?
A: Yes.
Q: Thank you.

The Kendricks' four-year-old daughter testified on direct examination that she saw Ms. Kendrick "standing with her hands up." She also demonstrated how [the Petitioner] was holding his rifle and testified that she saw [the Petitioner] shoot Ms. Kendrick. During cross-examination, the child was questioned closely about whether her maternal grandparents had coached her to say "bad things" about [the Petitioner]. Thereafter, she gave ambiguous answers regarding whether she had seen her mother with her hands up or whether she had "actually see[n] what happened."

Following the child's testimony, the State called the Hamilton County Medical Examiner who gave an opinion about how Ms. Kendrick was standing at the time she was shot. The medical examiner testified (1) that Ms. Kendrick sustained a high velocity, fatal gunshot wound in the left chest that caused massive internal injuries, (2) that Ms. Kendrick's wound was a "near gunshot wound" which meant that [the Petitioner's] rifle was close enough to Ms. Kendrick that the muzzle blast contacted Ms. Kendrick's body causing stipple injuries on the back of both of her forearms, (3) that Ms. Kendrick was leaning slightly away from [the Petitioner] when she was shot, and (4) that the stipple injuries on the back of Ms. Kendrick's forearms indicated that Ms. Kendrick's forearms were raised and facing the direction of fire when she was shot.

The State then called Kelly Fite, a firearms examiner employed by the Georgia Bureau of Investigation who had examined [the Petitioner's] rifle at the request of the Chattanooga Police Department. Agent Fite explained how the rifle's firing mechanism worked. He also testified that he had performed tests, including drop tests, to determine whether the rifle could fire without the trigger being pulled and that he had been unable to make the rifle fire without the safety being disengaged and pulling the

trigger. When asked to give an opinion regarding whether the Remington Model 7400 was "susceptible to accidental misfire," Agent Fite stated: "The only way that you can fire this rifle without breaking it is by pulling the trigger."

[The Petitioner's] counsel requested a jury-out hearing regarding the scope of his cross-examination of Agent Fite. He asked the trial court whether he could question Agent Fite about the Remington Model 742 rifle, a precursor to the Model 7400 rifle. In response to the State's objection, the trial court held that this line of questioning was irrelevant because it concerned a model of rifle that was different from [the Petitioner's] rifle.

During the same jury-out hearing, [the Petitioner's] trial counsel asked the trial court to permit him to use an official incident report relating to Sergeant Miller's injury prepared by Detective Glenn Sims to refresh Sergeant Miller's memory. This report attributed a statement to Sergeant Miller that "he picked the gun up with both hands and that his finger was not near the trigger[.] [A]s he lifted the weapon out [of the trunk], the rifle went off." When Sergeant Miller was recalled to the stand, he stated that he had never seen Detective Sims's report before and that he did not recall speaking to Detective Sims about the incident. The jury did not hear the contents of Detective Sims's report.[6]

After the State completed its case-in-chief, [the Petitioner's] lawyer called Detective Sims. In response to the State's objection to this witness, [the Petitioner's] lawyer explained that he was attempting to impeach Sergeant Miller with Detective Sims's report in accordance with Tenn. R. Evid. 613(b). However, the trial court sustained the State's objection, and Detective Sims did not take the stand.[7]

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[6] During closing arguments, the State characterized Sergeant Miller's accident as the only "accidental discharge" in the case:

> An accidental discharge of a weapon is when you take it out of the trunk of your car, it's late at night, you are overworked, you might get a little bit sloppy, and you shoot yourself in the foot. Okay? That's accidental discharge. That's what we had in this case. It wasn't the weapon that was an accident, it was the officer . . . .

[7] On direct appeal, this court held that the trial court erred by refusing to permit Detective Sims to testify regarding the substance of the statements Sergeant Miller gave to the officers investigating his injury. However, we also decided that this error was harmless because the Petitioner's lawyer had elicited testimony from Sergeant Miller during cross-examination that would have permitted the jury to conclude that Sergeant Miller's memory at the time of trial was faulty and that Sergeant Miller knew the Petitioner had not caused the rifle to fire by pulling the trigger. Kendricks, 947 S.W.2d at 881-82.

> The attorney who had been representing [the Petitioner] in the Kendricks' divorce proceeding testified that [the Petitioner] suspected that his wife was having an affair and that he was "angry and discouraged" about it. However, the attorney also testified that [the Petitioner] appeared to harbor no "aggressive feelings" toward Ms. Kendrick. Thereafter, two character witnesses testified on [the Petitioner's] behalf.
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> At this point, [the Petitioner] took the stand. He explained that he had owned the Remington Model 7400 rifle for eleven years and that it had never malfunctioned before. He explained that Ms. Kendrick carried a handgun and that he often kept a rifle with him because the Kendricks had a side job cleaning apartments at night in an area where they felt unsafe. He testified that he was moving the rifle to the back of the automobile at his wife's request when it discharged and that he was "almost positive" that he did not pull the trigger.
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> With reference to his conduct after Ms. Kendrick was shot, [the Petitioner] stated that he did not attempt to assist his wife because he knew she was already dead. He explained that he left the gas station because "he wanted to get the kids away." He also testified that he threw the rifle out of the front passenger window because he was scared and that he "just wanted to get it out of the car." [The Petitioner] denied saying "I told you so" as he watched his wife die.
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> In rebuttal, the State called Officer Martha Ma[st]on, a security officer working at the airport on the night of the incident who removed the Kendricks' children from their car seats. Invoking the excited utterance exception to the hearsay rule in Tenn. R. Evid. 803(2), the trial court permitted Officer Ma[st]on to testify that "[t]he little girl, when I got her out of the car, she just put her arms around me and she stated that she had told daddy not to shoot mommy but he did and she fell."

Kendrick, 454 S.W.3d at 459-63 (footnotes in original).

3. Post-conviction hearing. Because this post-conviction case has been before this court on two prior occasions, we will restate the facts as dictated by this court in the Petitioner's second post-conviction opinion. If additional information is needed to

address the Petitioner's pretermitted issues,[8] we will detail those facts in the analysis section of the opinion.

> Henry Jackson Belk, Jr., a gunsmith, testified that, earlier that morning in the clerk's office, he examined the gun, a Remington Model 7400 30.06 autoloading rifle, that shot and killed the victim. He stated that he was familiar with the trigger mechanism inside the rifle, describing it as "a common trigger mechanism that is contained within a wide variety of firearms, shotguns, rim fires and center fire rifles." He added, "Generally speaking, all pumps and automatics manufactured after 1948 by Remington contain this trigger mechanism." Belk testified that the trigger mechanism is referred to as the "Remington Common Fire Control" ("the Common Fire Control").
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> Belk stated that the Common Fire Control was first used in the automatic shotgun in 1948, then in the pump shotgun in 1950, and then in the automatic rifle in 1951. The Common Fire Control is currently used in 23 million firearms. Because the Common Fire Control is used in different firearms, any "issue" with the trigger mechanism would not be limited to one specific type of firearm. According to Belk, the Common Fire Control is a "defective mechanism."
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> As to the rifle in this case, Belk stated that it had "the normal dirt, dried oil and residue common to a gun that has not been cleaned." After removing the trigger mechanism while he was on the witness stand, Belk examined the rifle and stated that "the action spring is sticky." He explained that the "action spring . . . supplie[d] the energy for the bolt to return back forward." Because the action spring was "sticky," the bolt was "not going forward as freely as it should." Belk explained that the action spring's condition was consistent with a firearm that had not been cleaned.
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> Turning his attention to the trigger mechanism, Belk testified about how it could malfunction:
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> > The general description here is this is a swing hammer mechanism; in other words, it fires by a hammer going forward and hitting a firing pin that's contained in the bolt inside the housing. The sear is the part that retains the

[8] This court noted that, "[a]lthough there was a great deal of testimony adduced at the post-conviction hearing, it was limiting the "recitation of the evidence to that which [was] necessary for [] resolution of" the two issues dealt with in that opinion. Kendrick, 2013 WL 3306655, at *3 n.4.

> hammer. The sear is what holds the hammer back, does not fire. On this particular mechanism, on all these Remington mechanisms, that sear is an independent part, is right here. That is an independent part, not on the end of the trigger like a Browning design is.
>
> For that reason, and the fact that the safety only blocks the trigger, it does not block the action of the sear or the hammer, it only blocks the trigger, any debris that is captured between the sear and the slot that it is housed in, which is the housing, any debris that is caught between the bottom or the tail of the sear and the stock surface inside the housing, any debris that gathers there, any debris that gathers between the trigger yoke and the rear pivot pin and the trigger pusher arm and the bottom of the sear, any debris in any of those places, alone or in concert, can cause an insecure engagement between the hammer and the sear itself.
>
> So even with a gun on safe, which it is now, it can still fire, which it just did. Without pulling the trigger, on safe.

Responding to questions by the court, Belk clarified: "I can pull the trigger and make it fire, just like that (indicating), or I can put it on safe without the trigger being pulled and fire it just by manipulation of the sear."

Belk continued:

> The notch in the hammer determines how much debris it takes to make it fail. The notch in the hammer is about 18,000[ths] of an inch deep, about the thickness of a matchbook cover . . . . [A]nything that totals that amount of distance can make a gun fail.
>
> . . . .
>
> Any of those other locations, it takes about 18,000ths in order to interfere with the secure engagement of the hammer and the sear.

Belk clarified that there were five locations in the trigger mechanism that made the mechanism "weak" and that could collect the requisite amount of debris to cause a misfire. Moreover, of the five "weak spots," "the clearance between the sear and the housing itself is usually about 4,000ths, so it would take less debris captured between those places to retard the

proper motion of the sear and would also cause it to fail. So it wouldn't necessarily take as much as 18,000ths."

Belk also testified that "[t]he Remington Common Fire Control has a history of firing under outside influences other than a manual pull of the trigger. Vibration is one way that can happen. Impact. Even in one case the simple act of grabbing the gun by [the forward part of the stock] caused it to fire." Belk reiterated that the Common Fire Control "fires without the control of the trigger. It can fire out of the control of the shooter. It can discharge without any hand being on the stock."

Belk stated that, if debris caused the gun to fire unintentionally, the debris could be dislodged during the discharge. He added,

> On this semi-automatic, each time the gun is fired, the hammer goes forward, and then under great pressure and speed, the hammer is forced back again into position. So there's a lot of cycling going on.
>
> There's also the disconnector here, there's a lot of movement in the mechanism itself during firing and during manipulation after firing. And that movement, many times, dislodges the debris that actually was the causation.

Belk acknowledged that debris also can be dislodged through a gun being dropped or "banged around." He acknowledged that a drop test "many times [] destroys any evidence that was there." He explained that the standardized tests of dropping a firearm "on a hundred durometer rubber pad from a certain distance in certain orientations . . . does nothing whatsoever to analyze the mechanism and how it can fail. So the . . . drop test in itself can be destructive [by dislodging debris] without actually showing anything." He added, "[T]his particular mechanism has what is called a recapture angle. So, impact, as in dropping it on the floor, will actually recapture the sear engagement rather than dislodge it. So the . . . drop test on this particular gun is pretty much useless."

Belk opined that the rifle which shot and killed the victim "is capable of firing without a pull of the trigger, whether the safety is on or off."

Belk testified that he was first hired to work on a case involving the Common Fire Control in 1994, and he agreed that, "if someone had done

some research, they would have potentially been able to find [him]." He also testified that problems with Remington firearms could be reported to the manufacturer, which maintained "some" records of complaints. According to Belk, people were complaining prior to his initial involvement. He testified that he "first identified the problem with the Remington Common Fire Control in 1970." When a "co-shooter" on a skeet-range complained of trigger problems, Belk disassembled the trigger mechanism and "found a section of lead shot debris stuck in the sear notch of the hammer." He added, "That was the first identification that [he] had of a bad mechanism, that it could fire without a trigger being pulled." Since then, he had consulted with "many, many attorneys." One case involved a Remington 7400 that fired while it was being cleaned with an air hose. The safety on that gun had been engaged. Another gun fired while being wiped with a rag. Another gun fired when the butt-end of the stock was placed on the floor.

On cross-examination, Belk admitted that, while the trigger assembly was in the Petitioner's rifle, the rifle had not misfired during Belk's handling of it. He also admitted that he could not opine about the cleanliness of the gun in March 1994. He stated that he testified in a case involving a Remington 7400 in 1997 or 1998.

On redirect examination, Belk testified that he was familiar with a case in which a Remington shotgun containing the Common Fire Control fired while it was in a locked case and with the safety engaged. The gun was strapped to the handlebars of an ATV that had been left idling. The vibrations caused the gun to fire. Belk stated that he had been consulted on "probably two dozen" cases involving the Common Fire Control in which the gun discharged and injured someone.

On re-cross examination, Belk maintained that he had previously been able to induce a misfire by "artificially introducing" debris in "any" of the previously identified "weak spots." He clarified that he induced these misfires in "cutaway" guns.

Sergeant Steve Miller of the Chattanooga Police Department ("CPD") testified that, on the night the victim was killed, he was assigned to the case as a crime scene investigator. He testified that the firearm was not located at the scene of the shooting. When a "[c]all came across the police radio that a gun had been located down Airport Road," Sgt. Miller went to locate the firearm. He located the rifle on the side of Airport Road

and noted that there was no clip in it. He photographed the rifle and collected it for evidence, placing it in the trunk of his patrol car. Sgt. Miller transported the rifle back to the police service center on Amnicola Highway.

Sgt. Miller agreed that he was handling the rifle carefully in order to preserve fingerprints. He also acknowledged that he testified at trial that he had a jacket in his left hand and that he "grabbed" the rifle from the trunk of his patrol car with his right hand and "pointed it in a downward motion" towards the pavement. When Sgt. Miller pointed it in the downward motion, the rifle discharged, injuring his left foot. Sgt. Miller testified that he "can't say with a hundred percent accuracy" whether his fingers were anywhere near the trigger but stated that "[t]hey shouldn't have been."

Sgt. Miller acknowledged his signature on the bottom of a report prepared by Michael Taylor on March 7, 1994 ("the Taylor report"). The Taylor report, admitted into evidence, reflected that James Gann was the first officer to respond to Sgt. Miller's injury, and Sgt. Miller's recollection at the post-conviction hearing was consistent: that Officer James Gann came out of the service building to see what had happened after Sgt. Miller shot himself. Sgt. Miller also acknowledged that the Taylor report indicated that he told the "initial officer that he had both hands on the rifle and did not have his finger near the trigger." Sgt. Miller testified that he suffered "a massive foot injury" that was "extremely painful." Sgt. Miller agreed that the wound also was stressful.

On cross-examination, Sgt. Miller agreed that he was called by the State as a witness at the Petitioner's trial. He agreed that defense counsel questioned him at the trial and asked questions about where his fingers were with respect to the trigger when he shot himself. He also remembered that defense counsel's cross-examination was "tough."

On redirect examination, Sgt. Miller testified that defense counsel did not interview him prior to the trial.

Glenn Sims, retired from the CPD, acknowledged that he prepared a police report in connection with Sgt. Miller's incident, but he did not recall speaking with Sgt. Miller. He acknowledged that, according to his report, Sgt. Miller "was taking the firearm . . . that he had collected into evidence, out of the truck of the vehicle [and] it discharged[.]" The report further reflected that "the rifle swung down, [Sgt. Miller] wasn't sure if it hit his

foot or the ground, but it went off, hitting Miller in the left inside foot." Sims agreed that the report reflected that the rifle "just went off."

James A. Gann testified that he was employed by the CPD in 1994 and that he was one of the officers who investigated Sgt. Miller's incident. He stated that he was in the office when he heard "a loud recoil of a gun." Gann went outside to investigate and saw that Sgt. Miller was shot in the foot. Gann radioed for an ambulance and alerted the appropriate people who "had to be advised on a shooting." Gann stated that Sgt. Miller was "in a lot of pain, bleeding, and starting to go into shock." Gann could not recall whether he spoke to Sgt. Miller about what had happened, explaining that he "was more concerned with his foot, he was bleeding." Referring to a police report that Sgt. Glenn Sims had prepared, Gann acknowledged that Sgt. Miller had told Gann that, while Sgt. Miller was taking the rifle out of the trunk, the gun "just went off." Gann also testified that he was not contacted by anyone from the public defender's office before the Petitioner's trial.

Officer Michael Holbrook of the CPD testified that he was dispatched to Erlanger Hospital to respond to an accident involving Sgt. Miller. Officer Holbrook spoke to Sgt. Miller at the hospital and prepared a report regarding their conversation. Officer Holbrook testified that Sgt. Miller told him that "as he was taking the rifle out of the trunk of his patrol car, the rifle went off and shot him in the foot." Sgt. Miller also told Officer Holbrook that his hands were not on the rifle's trigger. Officer Holbrook's report was consistent with his testimony and contained the following narrative: "As he was lifting out the rifle, the weapon went off and struck him in the left foot. [Sgt.] Miller states that he picked it up with both hands and his finger was not near the trigger." Officer Holbrook's report, dated March 7, 1994, was admitted as an exhibit.

The Petitioner's trial lawyer ("Trial Counsel") testified that he worked for the public defender's office in 1994 and represented the Petitioner at trial. He stated that two investigators assisted him in investigating the case. Trial Counsel agreed that the Petitioner's appointed counsel in general sessions waived the preliminary hearing in exchange for "an open file policy."

Trial Counsel testified that, from the beginning, the Petitioner maintained that the rifle accidentally discharged. He also testified that Sgt. Miller had made statements indicating that "he was not holding the gun

anywhere near the trigger housing and it discharged, shooting him in the foot." Trial Counsel stated that he never looked for an expert witness to support the Petitioner's accidental discharge claim. He testified that the public defender's office informally consulted with a gunsmith who was a former Red Bank police officer, but he did not remember whether he spoke to him about this case. Trial Counsel also agreed that he performed no research regarding the trigger mechanism in the Remington 7400 rifle. He added, "[a]s a matter of fact, when I heard on NPR, a year or so ago, that the Remington trigger mechanism was faulty and [there had] been several apparent accidental deaths as a result of it, you're the first person I contacted, because I thought, I remembered it was a Remington and I thought it was something very important." Trial Counsel generally recalled that the State's expert, Kelly Fite, performed a "drop test" on the rifle. He agreed that Fite's report did not indicate that Fite inspected the trigger mechanism.

Asked whether it would have been beneficial for an expert to testify on the Petitioner's behalf about the trigger mechanism, Trial Counsel answered, "In hindsight, especially with the knowledge now that there have been so many problems with the Remington trigger mechanism, yeah." Asked about his knowledge of any discussions in the industry regarding the trigger mechanism misfiring, Trial Counsel responded:

> I wasn't aware of any. And I will point out, at the time, I was the only public defender in Division II, and in that period of time in little over four years, I probably tried, literally, 40 first degree murder cases, settled another 40 to 50, and I will concede I didn't put nearly as much time in on his case or any other cases that I tried as I do now in my private practice, because I've got a lot more time. My average caseload every Thursday for settlement day was between 20 and 30 defendants. My average month included at least 2 if not 3 trials. So I wasn't aware of the issue with the trigger pull.

Trial counsel also added that, although he had "a fundamental knowledge of firearms, [he] was not aware of it and . . . [he] didn't know it and [he] didn't get an expert." He also explained,

> I thought [Sgt.] Miller would testify consistently with what I knew to be his statements, and I thought that would

> come in and I thought that when that did come in, I could use that very effectively to say, okay, if [the Petitioner] can't accidentally have that gun [go] off, neither can [Sgt.] Miller, so, therefore, you got to presume that [Sgt.] Miller shot himself in the foot on purpose. That was my whole line of reasoning in this case.

Trial Counsel testified that he "was not prepared for [Sgt.] Miller to say he couldn't remember, because there was not any doubt in [Trial Counsel's] mind, at least, when [they] started trying this case, that he was going to stick to his prior statements." Accordingly, Trial Counsel had no "backup plan" to call other officers to testify about what Sgt. Miller had told them after he shot himself. Trial counsel felt "sandbagged" by Sgt. Miller's trial testimony. He recalled the trial court refusing to allow him to introduce one of the reports generated about Sgt. Miller's injury in which Sgt. Miller reported that his hands had not been near the rifle's trigger when it misfired. He did not request to make an offer of proof. He also did not attempt to introduce Sgt. Miller's statements as excited utterances, explaining, "[i]n the heat of the trial, I didn't see that."

Trial Counsel agreed that both Lennell Shepheard and Sgt. Miller's testimony at trial differed from their statements that the State provided the defense during discovery. Trial Counsel stated that the first time he heard Shepheard claim the Petitioner stated "I told you so" was during Shepheard's testimony. Trial Counsel agreed that he was never provided notice by the State prior to these two witnesses testifying that the substance of their pretrial statements had changed materially. Trial counsel also stated that, although he was not the Petitioner's counsel at the preliminary hearing stage, he would expect "in exchange for the waiver of a preliminary hearing, especially in a first degree murder case, that there would be some extra benefit to come to the defendant through the discovery process." He added, "if [Sgt.] Miller was going to change his story, we should have been made aware of that, if Mr. Shepheard was going to add to his story, we should have been made aware of that."

On cross-examination, Trial Counsel stated that he began practicing law in Tennessee in April 1978 and had been in continuous practice since that time. At the time of the Petitioner's trial, Trial Counsel had been practicing law for sixteen years, primarily in criminal defense. Trial Counsel also stated that he was employed at the public defender's office at the time of the Petitioner's trial and had worked in that capacity for

approximately five years. Trial Counsel had tried at least sixty to seventy cases by 1994, including murder cases, less-serious cases, and death penalty cases. He stated that he tried in excess of forty murder cases prior to this case. Trial Counsel testified that he was assigned this case at arraignment.

Before meeting with the Petitioner, Trial Counsel stated that the Petitioner completed an "intake sheet" wherein he wrote out his "side of the story." Trial Counsel testified that the Petitioner was on bond when he was assigned to the Petitioner's case and that he remained on bond throughout his representation of him. The offense occurred in March 1994, and the Petitioner's trial was in November 1994. Trial Counsel agreed that this was a "little quick." Trial Counsel could not recall whether the Petitioner had desired that the case proceed to trial quickly.

Trial Counsel acknowledged that he and the Petitioner discussed the strategy in the case. He stated, again, that the Petitioner maintained from the beginning that the rifle accidentally discharged and that there was "no real animosity" between him and the victim. Trial Counsel also stated that, in his preparation for the trial, he reviewed documents provided to the defense by the State. Trial Counsel testified that he typically would meet at the district attorney's office to review documents the State provided him in a case. He could not recall particularly whether he had a meeting in the district attorney's office in this case but stated that was his "standard operating procedure." He added, "I'm sure we met on it several times, not just one time." Trial Counsel stated that he was "confident" that the standard discovery motions were filed in this case although he could not specifically recall filing them. He stated that he filed the "standard motions" with every appointment he received. Pursuant to those discovery motions, Trial Counsel stated that he received documents from the State in this case and that he reviewed them to prepare for the trial. He also stated that the documents included the names of witnesses, and he agreed that the documents also included witness statements "in theory."

Trial Counsel recalled discussing the Petitioner's testimony with him prior to trial. He was "pretty confident" that he and the Petitioner "went through sit-downs where [Trial Counsel] cross-examined" the Petitioner. He added that, for every trial in which the defendant was going to testify, he would "sit down and grill them" so that they could anticipate what cross-examination would be like.

Trial Counsel did not recall specifically "familiarizing [him]self with the schematic of the [rifle]" prior to the trial, but stated that he was "relatively familiar with guns." Although Trial Counsel could not recall specifically looking at the rifle before the trial, he stated, "I'm sure I did . . . . I'm sure I looked at it in your office too." Trial Counsel also could not recall specifically his cross-examination of Sgt. Miller. However, he stated, "I try to be vigorous [in cross-examination] especially when I think somebody's not telling the truth, and I thought that he wasn't telling the truth." He also recalled calling Sgt. Miller to testify during the defense's proof. He acknowledged that he recalled Sgt. Miller with the purpose of trying to impeach him with prior inconsistent statements.

Richard Mabee testified that, as of the time of the post-conviction hearing, he had been an assistant public defender for approximately nineteen years. He represented the Petitioner at the Petitioner's preliminary hearing. Mabee testified regarding the "one-time sheet" for the Petitioner's case, which was admitted as an exhibit at the hearing. According to Mabee, a one-time sheet lists basic information about the defendant, identifies the judge and the charges, and the disposition of the case at the general sessions level. According to Mabee, the disposition on the Petitioner's one-time sheet provided, "waived to grand jury, $50,000 bond. DA agreed to show everything." Mabee testified that this latter notation indicated that he had talked to the district attorney assigned to the case, and the district attorney had said, "[I]f you'll waive preliminary hearing, we'll show you everything in our file." Mabee stated that he then would have presented this information to the Petitioner and that it would have been up to the Petitioner to decide whether to waive the preliminary hearing.

On cross-examination, Mabee agreed that the notations on the Petitioner's one-time sheet appeared to be his handwriting. Mabee explained that, when public defenders get appointed in general sessions, they "open up a one-time sheet" which means that the public defender represented that defendant one time at the preliminary hearing. Mabee also clarified that the judge previously would have signed the order of appointment at the bottom of the one-time sheet prior to the public defender's notations regarding the disposition of the case.

On re-direct examination, Mabee stated that he made the notation, "[W]e'll show you everything in our file," because "that's exactly the words the [district attorney] said to [him]." Mabee added that, after his representation of someone, he would take the one-time sheet back to the

public defender's office where it was placed in a "big drawer of one-time sheets." He stated, "[A]fter someone [was] appointed in a higher court, they may or may not get that one-time sheet."

The Petitioner testified that the first time Trial Counsel met with him was at the county jail. During this initial meeting, the Petitioner completed an "intake sheet" and told Trial Counsel that the rifle had "accidentally discharged." Trial Counsel informed the Petitioner that Sgt. Miller had shot himself with the Petitioner's rifle and told the Petitioner that Sgt. Miller's incident supported the Petitioner's account of what had occurred.

The Petitioner recalled only two meetings with Trial Counsel after he was released on bond: one meeting occurred on or around June 1, 1994, and the second meeting occurred two or three months before trial. The Petitioner agreed that they discussed "trial strategy" during these meetings and their defense that the rifle accidentally discharged. During one of their meetings, Trial Counsel asked the Petitioner what had happened on the day of the incident, and the Petitioner informed him what he did that day. The Petitioner denied that Trial Counsel ever told him "that any evidence in this case would be damning to [him]," including the fact that he threw the rifle out of his car window. He also did not recall that Trial Counsel "went through a cross-examination of [him]."

The Petitioner stated that he got the rifle at least ten years before the killing and that he had shot it numerous times. The Petitioner testified that, although he wiped down the outside of the rifle, he never did "any maintenance in regards to the inside" of it because he did not know he was supposed to. He agreed that he testified at trial that he had never had a problem with the rifle accidentally discharging during the time he owned it.

The State asked the Petitioner whether it was Trial Counsel's "idea to use accidental discharge as the theory of the case[.]" The Petitioner responded, "I mean he's the lawyer, I mean he makes the ultimate decision, so I guess I have to say so, yes, based upon . . . his investigation and everything, yeah, I'd say it was."

Kendrick, 2013 WL 3306655, at *3-11.

ANALYSIS

Post-conviction relief is available when a "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of

Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. Dellinger v. State, 279 S.W.3d 282, 293 (Tenn. 2009) (citing U.S. Const. amend. VI; Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)). When a claim of ineffective assistance of counsel is made under the Sixth Amendment to the United States Constitution, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72 (1993). "Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996). The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

Deficient performance requires a showing that "counsel's representation fell below an objective standard of reasonableness," despite the fact that reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. When a court reviews a lawyer's performance, it "must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from the perspective of counsel at that time." Howell v. State, 185 S.W.3d 319, 326 (Tenn. 2006) (citing Strickland, 466 U.S. at 689). Additionally, a reviewing court "must be highly deferential and 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" State v. Honeycutt, 54 S.W.3d 762, 767 (Tenn. 2001) (quoting Strickland, 466 U.S. at 689). We will not deem counsel to have been ineffective merely because a different strategy or procedure might have produced a more favorable result. Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). We recognize, however, that "deference to tactical choices only applies if the choices are informed ones based upon adequate preparation." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992) (citing Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982)).

As to the prejudice prong, the petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Vaughn v. State, 202 S.W.3d 106, 116 (Tenn. 2006) (citing Strickland, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "That is, the petitioner must establish that his counsel's deficient performance was of such a degree that it deprived him of a fair trial and called into question the reliability of the outcome." Pylant v. State, 263 S.W.3d 854, 869 (Tenn. 2008) (citing State v. Burns, 6 S.W.3d 453, 463 (Tenn.

1999)). "A reasonable probability of being found guilty of a lesser charge . . . satisfies the second prong of Strickland." Id.

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. Tenn. Code Ann. § 40-30-110(f); see Dellinger, 279 S.W.3d at 293-94. On appeal, we are bound by the post-conviction court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Additionally, "questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved" by the post-conviction court. Id. Because they relate to mixed questions of law and fact, we review the post-conviction court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

I. Standard of Review

Initially, the Petitioner argued that the post-conviction court utilized an erroneous legal analysis in determining that he failed to establish that he received ineffective assistance of counsel at trial. We have previously agreed with the Petitioner. See Kendrick, 2013 WL 3306655, at *15-16. This conclusion was not disturbed by our supreme court on appeal. See Kendrick, 454 S.W.3d 466-68.

A petitioner's burden to prove his allegations of fact by clear and convincing evidence and the Strickland analysis are two separate inquires. Dellinger, 279 S.W.3d at 293. As such, a post-conviction petitioner is required to first "prove the fact of counsel's alleged error by clear and convincing evidence," and if that burden is met, the post-conviction court is then required to perform the Strickland analysis. Id. at 294; see also Brandon Mobley v. State, No. E2014-00481-CCA-R3-PC, 2015 WL 2438878, at *17-18 (Tenn. Crim. App. May 21, 2015) (citing Thomas T. Nicholson v. State, No. E2009-00213-CCA-R3-PC, 2010 WL 1980190, at *22-23 (Tenn. Crim. App. May 12, 2010)) (noting our supreme court's clarification of "the correct standard for evaluating a post-conviction claim of ineffective assistance of counsel"), perm. app. denied (Tenn. Oct. 15, 2015). However, the distinction that the clear and convincing evidence standard applies only to a petitioner's allegations of fact and not to the Strickland analysis is one that is sometimes overlooked. Typically, statements that a petitioner has the burden to prove or failed to prove deficiency or prejudice by clear and convincing evidence are viewed as merely imprecise rather than a misapplication of the law when the correct standard is referenced earlier in the decision. See Dellinger, 279 S.W.3d at 294; Fields, 40 S.W.3d at 458.

Here, in holding the post-conviction court failed to apply the correct analysis to the Petitioner's claims, we have made the following observations:

> Significantly, it is not the petitioner's burden to establish by clear and convincing evidence that his lawyer's deficient performance actually had an effect on the verdict. See [Pylant, 263 S.W.3d at] 875 n.30. Nor, contrary to the post-conviction court's approach in this case, should the post-conviction court analyze this prejudice prong through an inquiry into the sufficiency of the evidence adduced at trial. Id. at 875. Rather, as our supreme court has recognized, "'[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.'" Id. (quoting Strickland, 466 U.S. at 694).

Kendrick, 2013 WL 3306655, at *16. Regardless, following our de novo review in this case, we affirm the post-conviction court's denial of the petition. See Mobley, 2015 WL 2438878, at *18.

II. Ineffective Assistance Claims

We will now address the claims of ineffective assistance of counsel raised by the Petitioner in his opening brief and which were pretermitted by this court in our prior opinion. The following claims are currently before us for review: (1) whether trial counsel erred by waiving the Petitioner's attorney-client privilege with his divorce attorney, which allowed the State to insinuate adultery as a motive for the shooting; (2) whether trial counsel was ineffective for failing to call the Petitioner's cousin, Randall Leftwich, to testify about the Petitioner's activities on the day of the shooting and about his discovery of cabbage simmering on the Petitioner's stove following the shooting; (3) whether trial counsel was ineffective when he "opened the door" for the State to ask the Petitioner about prior misdemeanor convictions, not previously admissible; (4) whether trial counsel and appellate counsel were ineffective for failing to adequately challenge Mr. Shepheard's "I told you so" testimony; (5) whether trial counsel was ineffective for failing to call Officer William Lapoint to testify about the Petitioner's demeanor immediately after the shooting; (6) whether trial counsel and appellate counsel were ineffective when they did not object or raise on appeal this issue of Det. Rawlston's volunteered testimony that the Petitioner never told him that the gun accidentally discharged; (7) whether trial counsel's failure to seek curative measures for Ms. Maston's surprise testimony was ineffective; and (8) whether the cumulative impact of counsels' errors entitle him to relief. We will address each in turn.

A. Waiver of Attorney-Client Privilege. First, the Petitioner contends that trial counsel erred by waiving his attorney-client privilege with the couple's divorce attorney, Mr. Ken Lawson, without first consulting the Petitioner and that this allowed Mr. Lawson

to testify that the Petitioner suspected the victim of adultery, thereby, establishing a motive for the shooting. The Petitioner maintains that trial counsel was not prepared to deal with Mr. Lawson's testimony on the subject and that Mr. Lawson's assertion of the attorney-client privilege "gave the appearance that he was hiding something detrimental to [the Petitioner]." The Petitioner asserts that "[i]t would have been better to bring out the information with [the Petitioner] on direct examination" and that he would have been able to "place[] the matter in context, all the while keeping alive the argument that murdering his wife could only lead to loss of custody of the children, loss of child support, and emotional devastation for his two small children who witnessed the shooting."

At trial, Mr. Lawson testified that he represented the Petitioner in the couple's divorce, although he spoke with both the Petitioner and the victim during the proceedings. Mr. Lawson said that both parties "wanted the divorce[,]" that "they both came in to get the divorce," and that the basis for the divorce was "irreconcilable differences." Mr. Lawson's testimony established that, pursuant to the terms of the divorce, the Petitioner would get custody of the couple's two children and that he would receive child support from his wife. Furthermore, Mr. Lawson said that he had developed a "friendship" with the Petitioner while working on the couple's divorce and that he believed the Petitioner to be a "truthful and honest" person. The Divorce Complaint and the Marital Dissolution Agreement, reflecting a filing date of February 4, 1994, were entered as an exhibit to Mr. Lawson's testimony.

On cross-examination, the State asked if Mr. Lawson had talked with the couple about other grounds for divorce, specifically, adultery. Mr. Lawson thereafter asserted the attorney-client privilege existing between himself and the Petitioner and stated that he could not disclose such information. A bench conference was then held, where the following colloquy took place:

> THE COURT: Yes, how is it relevant?
>
> [PROSECUTOR]: The defense has put on the attorney, the domestic relations attorney of the [Petitioner], to say they had irreconcilable differences and that they did not have—essentially there's not a problem between the parties. I just specifically asked this man if there were—that's something he frequently did or that's something very specific to the type of filings that he made. He volunteered that he would not file irreconcilable differences if he had talked to them and if there were other grounds like abuse or adultery. If I have a good faith basis to suggest in fact there was adultery in the marriage, that I should be able to raise that. That's a separate question from his privilege. If you rule that his privilege prevents him from going into that, well then obviously I can't ask those questions.

[TRIAL COUNSEL]: I'll make this easy for everybody. As long as I can do it in front of the jury, we'll waive the privilege. As long as I can announce it when counsel does it.

THE COURT: In open court?

[TRIAL COUNSEL]: Yes, sir.

THE COURT: I think it ought to be done in—

[TRIAL COUNSEL]: I had conferred with [the Petitioner] and that's the reason I can say I'm comfortable I can do that.

THE COURT: Okay, that solves the problem.

[TRIAL COUNSEL]: Yes, sir.

That concluded the bench conference. Immediately thereafter, in the presence of the jury, trial counsel made the following statement:

> Your Honor, after conferring with [the Petitioner], we don't have any problem waiving the privilege of Mr. Lawson, any privilege that there might be, any privileged communication.

Mr. Lawson then testified that he discussed adultery during conversations with the Petitioner and that the Petitioner "had suspicions that his wife was involved in an affair." Mr. Lawson could not recall any specifics about the adultery allegations, but he did remember that the Petitioner appeared "to be quite upset" during their first conversation about the topic. The Petitioner's mood at that time was "more of a combination of anger and discouragement[,]" according to Mr. Lawson. Mr. Lawson testified that, after these discussions, he was informed that the couple was reconciling, although that never came to pass. Mr. Lawson also qualified his testimony, stating that there was never "any expression of any fear[.]"

When the couple was unable to reconcile, they "made the decision to go ahead and file on irreconcilable differences." Mr. Lawson stated that "[h]er affair [had] nothing to do with it at that point[,] and [he did not] think it would have been fair to either one of them to try to make a bigger issue of it than they had chosen to make it[,]" when neither party wanted to stay married anymore. However, the Petitioner still fostered suspicions that the victim was having an affair, according to Mr. Lawson, but at the time, the Petitioner "seemed more resigned to it and didn't seem to be angry at all[,]" in Mr. Lawson's opinion.

On redirect examination, Mr. Lawson stated that the Petitioner specifically refused Mr. Lawson's advice to file for divorce on grounds of adultery. Moreover, the Petitioner indicated to Mr. Lawson that "he didn't have any aggressive feelings towards" the victim once the reconciliation fell through. Mr. Lawson stated further that the Petitioner received "the bulk of the marital property" under the dissolution agreement.

The Petitioner's trial testimony also painted a picture of an amicable divorce between the parties, reflecting that the couple was still living together and sharing vehicles. According to the Petitioner, the victim did intend on moving out of the marital residence, however, and he would continue to reside in the residence. When the Petitioner was asked if he was "mad that [the victim] had a boyfriend[,]" the Petitioner replied, "No. If [the victim] had a boyfriend, no, I wouldn't have been angry about it. I'd only tell [her], . . . if she found someone, I hope it was someone that was . . . good towards her and that would treat her right and that would love the kids[.]" According to the Petitioner, "[he] had custody of [his] kids and that was the main thing in [his] life was the children and their happiness."

The Petitioner submitted at the post-conviction hearing that trial counsel never consulted with him before calling Mr. Lawson as a witness and that "apparently trial counsel had not anticipated the problem" of testimony by Mr. Lawson about suspected adultery. According to the Petitioner, trial counsel could have introduced the divorce paperwork, which was based on irreconcilable differences and included favorable terms for the Petitioner, instead of calling Mr. Lawson as a witness or inquired about the divorce proceedings during the direct examination of the Petitioner. The Petitioner argued that he was prejudiced by Mr. Lawson's testimony because, otherwise, the State's case was very weak as to a motive for the shooting.

The Petitioner appears to be contending that somehow his testimony alone on the subject of the divorce proceedings and suspected adultery would have been less prejudicial in the eyes of the jury. Ironically, in these post-conviction proceedings in the post-conviction court, the Petitioner raised as an additional claim of ineffective assistance that trial counsel did not accurately advise him of his right to testify at trial and that, upon proper advice, he would not have chosen to testify in his own defense. The post-conviction court, addressing that issue, noted that the Petitioner's testimony was "critical to the defense[.]"

Irrespective, Mr. Lawson's testimony corroborated the Petitioner's recount of an amicable divorce and that the death of the Petitioner's wife was certain to cause more troubles for the Petitioner than he faced under the terms of the couple's divorce agreement. Contrary to the Petitioner's contention, Mr. Lawson's testimony buttressed the Petitioner's position that he lacked a sufficient motive to murder his wife. The fact that the jury may have believed the less than favorable testimony about the Petitioner

provided through Mr. Lawson is no reason to second-guess trial counsel's reasonable strategy in calling Mr. Lawson as a witness.

Moreover, trial counsel testified at the post-conviction hearing that the Petitioner was fully aware that Mr. Lawson would be called as a witness at trial, that they had discussions about the defense strategy, and that it was the Petitioner who wished for Mr. Lawson to testify. The trial record also reflects that trial counsel did in fact consult with the Petitioner during Mr. Lawson's testimony and that, only after consulting with the Petitioner, did trial counsel waive the Petitioner's attorney-client privilege. The Petitioner has failed to show either deficient performance or prejudice in this regard.

B. Failure to Interview and Call Randall Leftwich. The Petitioner also argues that trial counsel was ineffective for failing to interview his first cousin, Randall Leftwich,[9] or subpoena him to testify about the Petitioner's activities on the day of the shooting. At the post-conviction hearing, Randall testified that his parents owned the residence that the Petitioner and the victim lived in and that, although the couple had divorced, they still lived together at the residence and shared vehicles. Everything seemed normal between the couple, according to Randall.

On the day of the shooting, the Petitioner's car broke down, and he phoned Randall for assistance. Randall proceeded to the Petitioner's location, and they worked on the car on the roadside. When the Petitioner needed additional parts, he called the victim, and she went and bought the parts and brought them to the roadside. According to Randall, there was no indication of a problem between the couple that day.

When Randall learned of the shooting, he was "very surprised[,]" in part, based upon his interactions with the couple earlier in the day. Thereafter, upon request from his mother, Randall went to the couple's residence to secure it, and once inside, he noticed that cabbage had been left simmering on the stove. Randall testified that he did not recall ever speaking with trial counsel or an investigator, that he was present at the Petitioner's trial, and that he was willing to testify if he had been called. Also, Randall said that he possibly told his father and the Petitioner's uncle, Hilliard Leftwich, who testified as a character witness at the Petitioner's trial, that he had been with the Petitioner earlier in the day before the shooting happened.

Due to the lapse of time, trial counsel could not recall Randall and was unsure if he or his investigator ever interviewed Randall. However, trial counsel said that the Petitioner was "very actively involved in this trial and the preparation of the trial" and

[9] Because Randall and Hilliard Leftwich share a surname, and both have testified in this case, we will refer to them by their first names for clarity in this section of the opinion. We mean no disrespect to these individuals.

that he consulted with the Petitioner throughout the trial on which witnesses to call to the stand. If the Petitioner wanted Randall to testify at trial, then, according to trial counsel, the Petitioner had "ample opportunity" to inform him of Randall's presence at trial and willingness to testify. The Petitioner stated at the post-conviction hearing that he informed trial counsel of all of his activities on the day of the shooting and, thus, Randall logically should have been interviewed, in the Petitioner's opinion.

On appeal, the Petitioner argues that Randall was "a key witness" whose testimony would have corroborated the Petitioner's story of an amicable divorce and showed a lack of any premeditation on the Petitioner's part. He continues that the "most compelling testimony [Randall] could have added to the defense case" concerned Randall's discovery of cabbage simmering on the stove after the shooting. According to the Petitioner, "any reasonable juror, armed with [this] information [from Randall], could certainly question why a man planning a premeditated homicide—an 'execution' in the words of the [S]tate—would leave food cooking on the stove, indicating that he did not plan to be gone long." Thus, there are two facets to the Petitioner's ineffective claim regarding Randall's testimony—one, it would have provided additional corroboration of the Petitioner's "activities on the day of the shooting[,]" including evidence of the good-natured relationship between the Petitioner and the victim despite their divorce; and two, evidence of Randall's discovery of cabbage simmering on the stove following the shooting, which, based upon the Petitioner's assessment, corroborated his accidental shooting defense and showed a lack of premeditation.

First, we do not disagree with the Petitioner that Randall's testimony could have provided additional corroboration of the Petitioner's version of events on the day of the shooting and the friendly nature of the couple's relationship. However, we cannot concur with the Petitioner's assertion that trial counsel was deficient by failing to locate, interview, and call Randall as a corroborating witness. The Petitioner testified at trial about the victim's assistance with the couple's car on the roadside that day and about the cordiality of their divorce. Somewhat contrary to Randall's testimony, the Petitioner testified at trial that the victim was "upset that she had to get up" to go get the car part, but he clarified that "she did" it and that it "wasn't anything major." Furthermore, it appears from trial counsel's testimony that the Petitioner was very involved in the preparation of his case, even expressing his desire to trial counsel for his divorce attorney, Mr. Lawson, to testify about the amicability of the couple's divorce. As recounted above, Mr. Lawson, a non-relative, did so testify, thereby corroborating the Petitioner's assertion at trial that he was on friendly terms with the victim despite their divorce. Trial counsel also called several character witnesses on the Petitioner's behalf, including Hilliard.

It is true that, normally, the decision of which witnesses to call is a strategic one best left to trial counsel's informed judgment. See State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983). However, trial counsel testified at the post-conviction hearing that the Petitioner was "very actively involved in this trial and the preparation of the trial" and that he frequently consulted with the Petitioner on which witnesses to call. This is a case where the client was extremely participatory in his own defense, including making decisions about which witnesses to call to establish certain facts. Again, trial counsel stated that it was the Petitioner who wished for his divorce attorney to testify.

"Defendants who insist on being their own co-counsel often must suffer their decisions." Demetrius K. Holmes v. State, No. E2003-02306-CCA-R3-PC, 2004 WL 2253991, at *6 (Tenn. Crim. App. Oct. 7, 2004). We agree with trial counsel that the Petitioner could have also informed him of any desire for Randall to testify in corroboration as he did with other witnesses. Additionally, Randall's testimony was largely cumulative in nature. Thus, the Petitioner has failed to show that trial counsel's performance was deficient in this regard and has failed to meet the burden of showing that "the decision reached [by the jury] would reasonably likely have been different" had trial counsel presented this additional corroborating evidence. See Pylant, 263 S.W.3d at 874 (quoting Strickland, 466 U.S. at 696) (emphasis added in Pylant).

Furthermore, regarding the discovery of cabbage on the stove, the Petitioner himself knew that he left food on the stove when he went to the see the victim at the gas station before the shooting. He testified at trial that he cooked "some stew and made some chicken, potatoes" that evening. The Petitioner further said in front of the jury that he called the victim and asked her if she wanted him to bring her some to the gas station. However, there was no evidence presented at the post-conviction hearing regarding when the Petitioner knew of Randall's discovery of cabbage simmering on the stove—if the Petitioner knew prior to trial or only sometime thereafter. Both Hilliard and Randall were relatives of the Petitioner's, and Hilliard did testify at trial. Randall said that he possibly told his father that he had been with the Petitioner earlier in the day before the shooting happened, although he could not recall relaying any specific details to his father.

Notably, at the post-conviction hearing, the Petitioner did not make any claim that knowledge of Randall's cabbage discovery was newly discovered evidence or that, if it was known to him at trial, he ever communicated information of said discovery to trial counsel. Thus, it was possible that the Petitioner knew of the information at trial but failed to inform his trial counsel of such. It was the Petitioner's burden to establish his factual allegations by clear and convincing evidence at the post-conviction hearing. See Tenn. Code Ann. § 40-30-110(f). Because the Petitioner offered no evidence as to when he found out Randall saw the cabbage simmering on the stove, the Petitioner did not

prove the fact of counsel's alleged error by clear and convincing evidence. He, therefore, cannot demonstrate ineffective assistance.

C. Opening the Door to Misdemeanor Convictions. Next, the Petitioner argues that trial counsel was ineffective for "opening the door" to otherwise inadmissible misdemeanor convictions. On direct examination at trial, trial counsel asked the Petitioner the following questions:

> Q. Do you have any history of violent crime?
> A. No, sir.
> Q. I almost forgot—do you have any history of any convictions for any kind of crime?
> A. Returned checks.

It was then established that the Petitioner had made restitution for three returned checks and had also paid his court costs associated with those convictions. Questioning continued, establishing the Petitioner's non-violent and peaceful character. No mention was made on direct examination about any other convictions.

On cross-examination, the State inquired about an additional conviction for driving under the influence ("DUI"), which the Petitioner admitted. In conjunction with this testimony, the Petitioner further divulged that he was charged with possession of marijuana at the same time he was charged with DUI and that he was ultimately convicted of the possession offense as well. The Petitioner claimed at trial that the marijuana found in the car on that occasion "was something that someone else left in the car." It was also established for the jury that the Petitioner was driving without a valid driver's license on the evening of the shooting. This line of questioning occurred after vigorous objection from trial counsel, including a request for a mistrial, which the trial court overruled.

On direct appeal, the Petitioner argued that the trial court erred in allowing the State to introduce evidence of these additional misdemeanor convictions. However, this court disagreed, concluding that the Petitioner "opened the door" to this evidence when he testified about only some of his prior convictions in response to trial counsel's question about "any" convictions for "any" type of crime. This court reasoned that the Petitioner's less than candid response left the clear impression with the jury that the bad check convictions comprised the total of his prior criminal history and that evidence of his prior misdemeanor convictions was, therefore, admissible to "impeach[] the [Petitioner's] testimony on direct[.]" Kendricks, 947 S.W.2d at 882-83.

At the post-conviction hearing, trial counsel agreed that the form of the question posed to the Petitioner at trial allowed the State to elicit otherwise inadmissible

misdemeanor convictions and that, while he objected and asked for a mistrial, he did not request a limiting instruction. The post-conviction court noted that final jury instructions did not include such a limiting instruction either.

The Petitioner contends on appeal that admission of these convictions caused "incurable harm" to his credibility: "If [the Petitioner] would lie about his easily proven criminal past, it is more probable than not that he would lie about how the shooting occurred." The post-conviction court acquiesced to this assertion to some extent, concluding that "[i]t is reasonably probable that the verdict reflects in part the jury's assessment of the [P]etitioner's credibility." The post-conviction court continued, finding that no prejudice resulted from trial counsel's performance: "The jury, however, was not deciding between the [P]etitioner's account and another person's account so much as deciding between the [P]etitioner's account and the [P]etitioner's own prior accounts and actions and another person's account." Somewhat contradictory, the post-conviction court found in the preceding paragraph of its ruling regarding trial counsel's advice to the Petitioner about his decision to testify at trial that "the [P]etitioner's trial testimony was critical to the defense, it being the only direct evidence supporting the theory of accident."

While we acknowledge that trial counsel was deficient in the form of the question posed and should have asked for a limiting instruction with respect to the admissibility of the Petitioner's prior convictions, we agree with the post-conviction court that the Petitioner has failed to establish prejudice. During closing argument, trial counsel attempted to minimize the harm done by admission of the additional misdemeanors:

> Now, [the Petitioner] told you he had a DUI one time and a marijuana charge. I didn't ask him about those because they don't involve moral turpitude. I submit to you they are not relevant in this case because they don't go to his honesty and his truth, his capacity to tell the truth. But he admitted very candidly to you, even without being asked if he had any other charge, yes, I had one other charge. Again I don't think it's relevant but he answered it. At the same time I was charged with the DUI, I was charged with possession of marijuana.

Importantly, we clarify that the Petitioner's accidental shooting defense did not rest solely on the credibility of his testimony; in fact, as noted by our supreme court, "[t]he best evidence that [the Petitioner's] Model 7400 was capable of misfiring is the undisputed fact that Sergeant Miller was shot in the foot by the very same rifle." Kendrick, 454 S.W.3d at 477. The court continued that "trial counsel took great pains to inform the jury that the weapon apparently misfired for Sergeant Miller" and that "[t]his was the best evidence that the trigger mechanism on [the Petitioner's] rifle might have been defective." Id. at 481. In addressing prejudice, our supreme court held that, "[e]ven

if . . . trial counsel's representation was deficient," there was "other 'ample evidence' . . . [that] would mitigate against finding that [the Petitioner] was prejudiced[,]" noting that "the jury heard evidence to support [the defense] theory, [which] includ[ed] Sergeant Miller's cross-examination and [the Petitioner's] statement that he was 'almost positive' his finger was not on the trigger." See Kendrick, 454 S.W.3d at 481.

Moreover, there were other witnesses at the gas station that belied the Petitioner's claim of an accidental shooting. See id. at 478 ("The bulk of the State's case consisted of eyewitnesses."). At trial, Timothy Benton testified that, after he heard an explosion, he saw the Petitioner's "right hand was on the pistol grip area around the trigger and the left hand was up near the stock[,]" and the Petitioner was standing over the victim's motionless body. Other evidence suggested a premeditated murder—the Petitioner's flight from the scene; his failure to give or ask for assistance; the fact that he discarded the weapon; the testimony of his daughter, Lennell Shepheard, and Ms. Maston; and the medical examiner's testimony that the stipple injuries on the back of the victim's forearms indicated that her forearms were raised and facing the direction of fire when the Petitioner claimed that he was simply moving the rifle from the front of the car to the back at the request of the victim and was not intentionally pointing the weapon at her. See Kendrick, 454 S.W.3d at 463, 481.

What the post-conviction court's ruling seemingly implied was that the Petitioner's account was also contradicted to some extent by the Petitioner's own prior statements. In the 9-1-1 recording of the Petitioner at the airport, he simply stated that he had shot his wife. When asked why he had shot her, he stated only "Yes." Det. Rawlston testified that, when he first interviewed the Petitioner following his arrest, the Petitioner "never at any time indicated . . . that this was an accidental discharge[,]" but instead said, "I hope this is only a dream." As such, the jury had reason to believe that the Petitioner later fabricated his story of an accidental firing once Sgt. Miller shot himself in the foot. These prior accounts of the Petitioner's not mentioning an accidental discharge of the weapon also impacted the Petitioner's credibility.

We likewise, on this issue, cannot conclude that there was a reasonable possibility that, but for counsel's error opening the door to these otherwise inadmissible misdemeanor convictions and failure to request a limiting instruction, the result of the proceeding would have been different. Again, the Petitioner has not met his burden of showing that the decision reached by the jury "would reasonably likely have been different absent the errors." Pylant, 263 S.W.3d at 874 (quoting Strickland, 466 U.S. at 969) (emphasis added in Pylant).

D. Failure to Challenge Lennell Shepheard's "I Told You So" Testimony. The Petitioner makes several allegations regarding Mr. Shepheard's testimony: (1) trial counsel's failure to lodge an objection to Mr. Shepheard's testimony on direct

examination was a violation of the "open file" discovery agreement; (2) trial counsel's failure to seek introduction of Det. Mathis's interview with Mr. Shepheard by calling Det. Mathis to testify; and (3) trial counsel's failure to object to testimony of Mr. Shepheard's statements to the district attorney's investigator made a week before trial. For the sake of clarity, we will address each allegation separately.

Initially, we feel constrained to provide additional facts relevant to these issues in addition to those outlined in the factual background above. Mr. Shepheard testified on direct examination that his work required him to clean and "gas up" company cars. He said he frequently went to the gas station where the victim worked and that they had become friends, although he had never seen the victim "outside of work[.]"

After hearing the Petitioner say "I told you so" to the victim while standing over the victim's motionless body, and upon Mr. Shepheard's making eye contact with the Petitioner and seeing the Petitioner reach for the rear passenger-side car door possibly going for the rifle inside, Mr. Shepheard reacted as follows:

> I ran to the other side of the store, because I didn't—at that time when he went to reach for the door, I wasn't going to make no sudden movements and run out the door when all he had to do was just run around the side and catch me.

At trial, the Petitioner denied saying "I told you so" to his dying wife.

Trial counsel questioned Mr. Shepheard on cross-examination about a phone conversation they had prior to trial. Mr. Shepheard agreed that, during that phone conversation, he said to trial counsel that there were never any threats made that day, that the Petitioner exhibited no aggressive behavior, that the victim did not appear to be in fear of the Petitioner, and that he did not hear any "loud talking" between the victim and the Petitioner.

1. Discovery violation. The Petitioner argues that trial counsel was ineffective for failing to object to the "I told you so" statements attributed to the Petitioner by Mr. Shepheard on direct examination, which were not made known to the Petitioner prior to trial. He notes that his counsel at the general sessions court level waived a preliminary hearing in exchange for "open file" discovery from the State and that nowhere in the State's file was Mr. Shepheard attributed to stating that the Petitioner yelled "I told you so" six times while he stood over the victim's body. The Petitioner continues that trial counsel should have sought curative measures for the State's violation of their "open-file discovery[,]" such as asking for a jury-out hearing, moving for a continuance to investigate the statements further, or moving for a mistrial. Moreover, in the Petitioner's opinion, appellate counsel should have raised "bad faith in connection with the open-file

agreement" in this context on appeal. He further notes that, although appellate counsel claimed at the post-conviction hearing that he did raise the issue on appeal, the direct appeal record belies that assertion.

At the post-conviction hearing, trial counsel acknowledged that the first time he heard Mr. Shepheard claim that the Petitioner stated "I told you so" was during Mr. Shepheard's testimony on direct examination by the State. Trial counsel further agreed that he had not been provided notice by the State that the substance of Mr. Shepheard's pretrial statements had changed materially and opined that, "if Mr. Shepheard was going to add to his story, we should have been made aware of that." Trial counsel also stated that he would expect, "in exchange for the waiver of a preliminary hearing, especially in a first degree murder case, that there would be some extra benefit to come to the [Petitioner] through the discovery process." The Petitioner's counsel at the general sessions court level, Mr. Mabee, testified that the district attorney said to him, "[I]f you'll waive preliminary hearing, we'll show you everything in our file." Mr. Mabee further stated that it would have been the Petitioner's decision ultimately on whether to waive the preliminary hearing. Mr. Mabee's testimony was corroborated by his "one-time sheet" where he wrote, "[W]aived to grand jury, $50,000 bond. DA agreed to show everything."

The Petitioner does not cite to any legal authority in support of his argument that the State's violation of the "open-file" discovery policy required sanctions and that, therefore, trial counsel erred. However, we believe Tennessee Rule of Criminal Procedure 16 to be applicable. Subsection (d)(2) of Rule 16 provides that, when a party, in this case allegedly the State, fails to fully comply with the rules of discovery, the trial court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. Tenn. R. Crim. P. 16(d)(2). First of all, curative measures for discovery violations under this section are discretionary with the trial court. Importantly, Rule 16 does not "authorize discovery of statements made by state witnesses or prospective state witnesses." Tenn. R. Crim. P. 16(a)(2).

In Matrin Becton v. State, the prosecutor said in open court that the substance of a particular witness's expected trial testimony would be provided to trial counsel prior to that witness's testimony, but the prosecutor never did so. No. W2014-00177-CCA-R3-PC, 2015 WL 1912924, at *15 (Tenn. Crim. App. Apr. 28, 2015), reh'g denied (Sept. 3, 2015). This court concluded, however, that while "[t]he prosecutor's ultimate decision not to provide what had been promised, [although] perhaps a breach of decorum by an attorney, was a matter not within the purview of the rules of procedure governing the practice of criminal law in Tennessee." Id. The same reasoning holds true here. Even if

trial counsel had objected to Mr. Shepheard's testimony on direct examination, there was no guarantee that the trial court would have issued any curative measures at all.

Additionally, we concur with the post-conviction court's determination that trial counsel thoroughly cross-examined Mr. Shepheard at trial. The Petitioner has failed to demonstrate how having these statements prior to trial would have assisted in further discrediting Mr. Shepheard on cross-examination or in preparation of his defense of an accidental misfire, other than a bare assertion that trial counsel did not prepare the jury for this damaging testimony of the Petitioner's intent in his opening statement. As discussed below, the jury was clearly aware of the omission of the "I told you so" language in any of Mr. Shepheard's statements made prior to one week before trial, and trial counsel brought this fact out amply during closing argument. Accordingly, the Petitioner has not shown deficient performance from any error by trial counsel.

Regarding the ineffectiveness of appellate counsel in this regard, the Petitioner argues that appellate counsel should have raised "bad faith in connection with the open-file agreement" on appeal. The Petitioner asserts that, contrary to appellate counsel's testimony at the post-conviction hearing, appellate counsel did not raise this issue on appeal.

However, appellate counsel did raise this issue on appeal, but only in the context of Martha Maston's testimony, arguing that the trial court erred by allowing undisclosed witness Ms. Maston, the airport security officer, to testify. See Kendrick, 947 S.W.2d at 883. The court concluded that the Petitioner had "simply failed to show how he was prejudiced by the late notice of [Ms.] Maston's identity[,]" reasoning that "trial counsel ably cross-examined [Ms.] Maston" and that the Petitioner had "failed to show what more he could or would have done had he known about [Ms.] Maston earlier." This court continued,

> Nor has the [Petitioner] demonstrated bad faith or undue advantage on the State's part. Rather, it appears that the State was somewhat less than diligent in following up on all of its investigatory leads. [Det.] Rawlston knew about [Ms.] Maston and her encounter with Endia[10] within a week of the incident, and apparently failed to bring it to the prosecuting attorneys' attention. We do not think that this rises to the level of bad faith. Nor do we think that the State deliberately withheld [Ms.] Maston's identity in an effort to gain undue advantage. Rather, we suspect that the assistant district attorneys would have liked to have known about [Ms.] Maston's testimony far sooner than they did. We see no abuse of discretion by the trial judge in ruling [Ms.] Maston qualified to testify.

[10] This is the first name of the Petitioner's daughter.

Id. at 883-84. A similar rationale applies to Mr. Shepheard's "I told you so" testimony.

The post-conviction court also noted that Mr. Shepheard's prior inconsistent statement was disclosed at trial and that, therefore, the Petitioner had failed to establish prejudice. We likewise find no ineffectiveness in appellate counsel's performance and will not fault appellate counsel for failing to raise every possible issue on appeal. See Carpenter v. State, 126 S.W.3d 879, 887 (Tenn. Crim. App. 2004) (citing King v. State, 989 S.W.2d 319, 334 (Tenn. 1999); Campbell v. State, 904 S.W.2d 594, 596-97 (Tenn. 1995)).

The Petitioner also takes umbrage with Mr. Mabee's decision at the general sessions court level to waive the Petitioner's preliminary hearing in return for open-file discovery. However, it was a reasonable tactical decision not to pursue a preliminary hearing in exchange for an open-file discovery policy. See, e.g., Robert Faulkner v. State, No. W2012-00612-CCA-R3-PD, 2014 WL 4267460, at *91 (Tenn. Crim. App. Aug. 29, 2014) (holding that lead trial counsel made a reasonable tactical decision to waive the hearing in order to obtain discovery materials); Jamie Bailey v. State, No. W2008-00983-CCA-R3-PC, 2010 WL 1730011, at *6 (Tenn. Crim. App. Apr. 29, 2010) (concluding that trial counsel "offered a reasonable explanation for his decision not to pursue a preliminary hearing, testifying that . . . the State had an open-file discovery"). The Petitioner has not shown that counsel was deficient for failing to request a preliminary hearing.

2. Det. Mathis's transcribed interview. On cross-examination at the Petitioner's trial, Mr. Shepheard recalled speaking with Detective Michael Mathis about an hour and a half after the shooting. Trial counsel inquired about the details of that statement: "Do you remember telling [Det.] Mathis, 'I stood up and walked to the door. I looked out, she was laying [sic] on the ground and he was standing there at the car throwing something in and shutting the door?'"

The State objected, arguing that the transcribed interview was "consistent" with Mr. Shepheard's trial testimony and was, therefore, not usable for impeachment purposes. During this colloquy, more of the statement by Mr. Shepheard to Det. Mathis was read.[11] Trial counsel continued reading for the court:

> Did you see what he was throwing in? No. By the time he threw it in, I guess he was—I guess he was—I guess it was already out of his hand and shut the door. And he was standing there looking at me, like going to, you know, he was going to reach for the door, open it up—

[11] There is no indication from the transcript that this colloquy occurred outside of the jury's hearing or that counsel approached the bench.

Trial counsel then stated that he was "not impeaching him with . . . previous consistent testimony" but simply trying to remind Mr. Shepheard of his statement to Det. Mathis by reading it aloud. The trial court made no ruling, and thereafter, questioning continued.

Trial counsel asked Mr. Shepheard if he ever told Det. Mathis about the Petitioner saying "I told you so" to the dying victim. Mr. Shepheard claimed that he did inform Det. Mathis of the Petitioner's declarations that day. Trial counsel then asked,

> Well, did you not say to [Det. Mathis], "You know he's going to reach for the door, open it up and get whatever he throwed [sic] back out. So I ran to the other end of the . . . store going out. I was looking to see what he was going to do because if he was going to come forward to that door or come in I was going to go out. But he didn't. He got in the car, he pulled out. There was a Mustang there. A guy in a Mustang that was there earlier."

The State then renewed its objection that it was improper to impeach a witness with "consistent testimony." Trial counsel replied that he was trying to impeach Mr. Shepheard regarding the fact that he "never once mentioned this thing about [the Petitioner] standing over the body" and that trial counsel was attempting to "merely refresh[] his memory from the statement on page [four] with Detective Mathis that he never said." The State countered that Mr. Shepheard said he told Det. Mathis about the Petitioner's statements and that trial counsel "cannot impeach him through previous consistent testimony of that document."

At that time, the parties approached the bench and had a conference out of the hearing of the jury. The following discussion ensued:

> [PROSECUTOR]: Mr. Shepheard didn't say he forg[o]t anything from the statement. I think that he's—I think counsel's stuck with his answer.
>
> THE COURT: I think that's right. The law is—let me see if any rules deal with it, but—
>
> [TRIAL COUNSEL]: An inconsistent statement—
>
> THE COURT: If he denies an inconsistent statement, then the problem arises—
>
> [TRIAL COUNSEL]: (Interposing) There would be no sense to that because I can always call Detective Mathis and ask him about this.

> [PROSECUTOR]: And that's what you have to do if he gives you that answer.
>
> THE COURT: That's not the universal rule, but I think that's the rule in Tennessee. I just wanted to check and see. In some jurisdictions you're just stuck with the answer. It's not inconsistent, a failure to make a statement on one occasion, is not inconsistent with making a statement on another occasion.
>
> . . . .
>
> THE COURT: He says he did make it. . . . Then I think the only thing you can do if you can, is to call on the witness to whom this statement was made.
>
> . . . .
>
> [TRIAL COUNSEL]: That's fine, if that's what we have to do, that's fine. That's what I'm going to do.

This ended the bench conference. Mr. Shepheard again testified that he specifically recalled telling Det. Mathis that the Petitioner stood over the victim's body and said "I told you so" several times. Det. Mathis was never called.

At the post-conviction hearing, the Petitioner argued, in addition, that trial counsel failed to review the Chattanooga Police Department files, wherein he would have discovered a "Chattanooga Police Supplemental Report" authored by Det. Mathis.[12] In that report, Det. Mathis recounted his interviews with several eyewitnesses: Charles Fredrick Mowrer, Mr. Shepheard, and Timothy Benton. Det. Mathis did not attribute any "I told you so" statements to the Petitioner in the report following his interview with Mr. Shepheard. The issue was again raised that the State violated the open-file agreement by not providing Det. Mathis's supplemental report to the defense.

We note that from our review of the trial transcript it appears that trial counsel did attempt to impeach Mr. Shepheard with his omission from the prior statement he made to Det. Mathis, but the trial court prohibited him from do so.[13] The Petitioner seemingly

[12] This document was entered into evidence in Collective Exhibit 11.

[13] We note that the propriety of this ruling was not challenged on direct appeal. In Johnson v. State, 596 S.W.2d 97, 103 (Tenn. Crim. App. 1979), overruled on other grounds, State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984), this court stated the rule to be, whether the trier of fact might reasonably find that a witness testifying sincerely would have been unlikely to have made a prior statement containing such an omission. Here we are concerned with only the appropriateness of trial counsel's actions.

argues that trial counsel should have called Det. Mathis "as part of the defense in the case" and that, because trial counsel lacked any sufficient explanation at the post-conviction hearing for his decision not to do so, he rendered ineffective assistance to the Petitioner. However, while Det. Mathis's supplemental report was entered as an exhibit to the post-conviction hearing, Det. Mathis was not called as witness at the post-conviction hearing. We cannot speculate what his testimony might have been or that it would have been favorable to the Petitioner. See Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) (concluding that a post-conviction petitioner generally fails to establish his claim that counsel did not properly investigate or call a witness if the petitioner did not present the witness to the post-conviction court because "neither a trial judge nor an appellate court can speculate or guess [about] what a witness's testimony might have been if introduced"). The Petitioner has again failed to establish his factual allegations by clear and convincing evidence.

Moreover, we note that, while the trial court did rule that the defense was "stuck with" Mr. Shepheard's answer, trial counsel did read relevant portions of Mr. Shepheard's statement to Det. Mathis aloud in front of the jury. The trial court never instructed the jury not to consider this evidence, although ultimately ruling in favor of the State outside of the jury's hearing. Trial counsel also asked Mr. Shepheard about a previous phone conversation where Mr. Shepheard did not mention several details to trial counsel that he testified to at trial.

The Petitioner again notes that the State violated the open-file agreement by not providing Det. Mathis's supplemental report, which was only discovered in the post-conviction case, according to the Petitioner. The post-conviction court ruled that "Det. Rawlston's trial testimony about Mr. Shepheard's statement makes Det. Mathis['s] supplemental report redundant." On cross-examination of Det. Rawlston, trial counsel asked Det. Rawlston if Mr. Shepheard had ever made such statements to him at the scene, and Det. Rawlston replied that Mr. Shepheard did not. Trial counsel also asked Det. Rawlston if he was familiar with the transcribed interview of Mr. Shepheard conducted by Det. Mathis, and Det. Rawlston replied that he was. The following line of questioning then took place:

> Q. Did he ever mention anything about . . . hearing [the Petitioner] saying [to the victim] I told you so six times?
> A. Not during the time frame between 1:00 and 1:18 which is when that statement was taken.
> Q. Okay. He never made that statement to [Det.] Mathis as far as—
> A. (Interposing) As far as that tape recorded statement is made, no, sir.

Despite the Petitioner's allegation that Det. Rawlston was "quite cagey with his response to trial counsel's questions[,]" we agree with the post-conviction court that Det. Mathis's supplemental report was redundant to Det. Rawlston's own testimony that Mr. Shepheard never mentioned the "I told you so" statements that evening and to Det. Rawlston's testimony regarding the omission of such statements from Det. Mathis's transcribed interview. Also, as pointed out above, trial counsel's cross-examination of Mr. Shepheard provided fertile ground for trial counsel to imply that Mr. Shepheard never told Det. Mathis about any "I told you so" by the Petitioner and had only recently concocted this version despite the trial court's somewhat unclear evidentiary ruling.

The Petitioner submits that, in light of trial counsel's failures, Mr. Shepheard "emerged unscathed, and the damage he inflicted on the defense theory of accidental shooting was consequential and lasting." We disagree. The post-conviction was correct: "The transcript of the trial reflects that counsel's cross-examination of Mr. Shepheard was thorough and explored what Mr. Shepheard could and could not see or hear, did and did not see or hear, and had and had not said." Additionally, during closing argument, trial counsel pointed out the absence of these "I told you so" statements by Mr. Shepheard until a week before trial "to help out [the victim], his friend[.]" Trial counsel referenced both Det. Rawlston's testimony and Det. Mathis's report, characterizing Mr. Shepheard as "a liar":

> When was the first time we ever heard this, six times, [to the victim], I told you so . . . ? When was the first time? He never said that to anybody. He lied to you, he lied to your faces, he lied to you under oath when he said, yeah, I told them in my statement that he was standing over her and said, [to the victim], I told you so six times. Well, whoops, he forgot the statement was printed, was recorded, transcribed and, whoops, he forgot that Mark Rawlston hadn't testified yet. Mark Rawlston, not just me, but a witness right there in that witness chair told that [the Petitioner] was a liar because it ain't in here, he didn't say it.
>
> . . . .
>
> I asked [Det. Rawlston] about the statement from Lennell Shepheard. Mr. Shepheard is the man upon whom the State wants to pin the power of its case, did he ever say anything to you about [the Petitioner] standing over the body saying, [to the victim], I told you so? Did he ever say it happened once? Did he ever say it happened six times? No, to both

> questions. You know why? Because it ain't in here. That's why. It's not in the statement of Lennell Shepheard.[14]

Additional statements concerning Mr. Shepheard's credibility were made during other portions of trial counsel's closing argument. The Petitioner has failed to prove any deficiency on the part of trial counsel regarding his cross-examination of Mr. Shepheard.

3. Prior statement to investigator. On redirect examination, Mr. Shepheard testified that he spoke with Gary Legg, an investigator from the district attorney's office, approximately one week before trial.[15] According to Mr. Shepheard, Inv. Legg came to his place of employment for the interview, and during that interview, Mr. Shepheard told Inv. Legg about the Petitioner's "I told you so" remarks. Trial counsel lodged a Jencks Act[16] objection based upon the State's failure to provide the statement to the defense, and the trial court permitted the prosecutor to continue with questioning before ruling on the objection. Mr. Shepheard testified that he was unsure if Inv. Legg ever reduced the statement to writing but also said, at times during his testimony, that Inv. Legg took notes during the interview.

Later, after the trial court had excused the jury for the day, trial counsel renewed his Jencks Act objection and asked for "any notes from Mr. Shepheard's conversations with [Inv.] Legg[.]" Trial counsel requested that, "[i]f there are none, I'd like that to be affirmatively asserted on the record." Inv. Legg was called to the stand and stated that he did not take any written notations of "any sort" during his interview with Mr. Shepheard and that the conversation was not recorded. That ended the discussion on the matter, presumably because there was no Jencks Act material to disclose.

Inv. Legg did not testify at the Petitioner's trial, and there was no statement to enter into evidence. During closing argument, trial counsel argued,

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[14] We feel compelled to note that, like for prosecutors, it is unprofessional conduct for defense counsel to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of a defendant See State v. Goltz, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003) (quoting Standards Relating To The Prosecution Function And The Defense Function §§ 5.8–5.9 Commentary (ABA Project on Standards for Criminal Justice, Approved Draft 1971) (internal citations omitted)). Outright calling the witness a liar multiple times amounted to misconduct. However, here, we are only concerned with any deficiency on the part of trial counsel and any prejudice resulting to the Petitioner therefrom.

[15] Apparently, Inv. Legg was present in the courtroom and stood up at the prosecutor's request.

[16] Tennessee Rule of Criminal Procedure 26.2, commonly known as the codification of the Jencks Act, emanates from the United States Supreme Court's decision in Jencks v. United States, 353 U.S. 657, 668 (1957), which gave the defendant a right to inspect prior statements of government witnesses which were related to the witnesses' testimony on direct examination.

> Then [Mr. Shepheard] also told you that when [Inv.] Legg came out to talk with him a week ago, a week before his testimony anyway, that [Inv.] Legg took notes about all of it. Did you see any notes? Huh uh. Did you hear any testimony about notes being taken or anything else? Huh uh. You think if they didn't have notes of him saying that, they'd have shown them to you? Uh huh.

Relating to this ground of ineffectiveness, the Petitioner states in his appellate brief that "[t]rial counsel never requested a limiting instruction that the week-old statement could only be used in connection with credibility and never objected that the week-old statement clearly did not qualify as a 'prior consistent' statement." "[P]rior consistent statements may be admissible . . . to rehabilitate a witness when insinuations of recent fabrication have been made, or when deliberate falsehood has been implied." State v. Benton, 759 S.W.2d 427, 433 (Tenn. Crim. App. 1988); see State v. Hodge, 989 S.W.2d 717, 725 (Tenn. Crim. App. 1998). In order to be admissible, the witness's "testimony must have been assailed or attacked to the extent that the . . . testimony needs rehabilitating." Hodge, 989 S.W.2d at 725. The impeaching attack on the witness's credibility need not be successful in order to admit the prior consistent statement, and wide latitude is given when determining whether the witness's credibility has been sufficiently assailed or attacked. State v. Albert R. Neese, No. M2005-00752-CCA-R3-CD, 2006 WL 3831387, at *6 (Tenn. Crim. App. Dec. 15, 2006).

If admitted for the purpose of rehabilitating a witness, the statement is not hearsay because it is not admitted to prove the truth of the matter asserted. Neil P. Cohen et al., Tennessee Law of Evidence § 8.01[9] (6th ed. 2011). Prior statements of witnesses, however, may not be admitted as substantive evidence. See Sutton v. State, 291 S.W. 1069, 1071 (Tenn. 1926); State v. Carpenter, 773 S.W.2d 1, 11 (Tenn. Crim. App. 1989); see also State v. Braggs, 604 S.W.2d 883, 885 (Tenn. Crim. App. 1980). Additionally, a trial court must instruct the jury that the prior consistent statement cannot be used for the truth of the matters contained therein. State v. Rogery Wayne Henry, Jr., No. M2013-02490-CCA-R3-CD, 2015 WL 226113, at *15 (Tenn. Crim. App. Jan. 16, 2015) (citing State v. Meeks, 867 S.W.2d 361, 374 (Tenn. Crim. App. 1993); Braggs, 604 S.W.2d at 885).

Mr. Shepheard's credibility had been seriously impeached on cross-examination regardless of the Petitioner's contention otherwise. Trial counsel pointed out that the "I told you so" remarks were not mentioned in Mr. Shepheard's earlier statements and insinuated that Mr. Shepheard had fabricated this portion of his testimony. The omission from Det. Mathis's report was made clear to the jury on cross-examination, although Mr. Shepheard claimed that he told Det. Mathis about the Petitioner's statements. Det. Rawlston later testified that he never heard Mr. Shepheard make such statements while

on the scene and that there was no mention of the statements in the transcribed interview with Det. Mathis. Thus, Mr. Shepheard's testimony that he made a similar statement to Inv. Legg was admissible for rehabilitation purposes as a prior consistent statement, but its questionable nature, occurring only one week before trial, was also made plain to the jury.

While true that no request for a limiting instruction was made during Mr. Shepheard's testimony about his prior consistent statement to Inv. Legg, the following instructions were included in the final jury charge on impeachment of witnesses:

> Another way is to show that the witness had, at different times, made conflicting statements as to the material facts of the case to which he or she testified. However, proof of such prior inconsistent statements may be considered by you only for the purpose of testing the witness' credibility and not as substantive evidence of the truth of the matter asserted in such statements.
>
> . . . .
>
> It is for the jury to determine whether and how far the testimony of any impeached witness has been impaired. When a witness is impeached, the jury has the right to disregard his or her testimony, and treat it as untrue, except where it is corroborated by other credible testimony, or by the facts and circumstance proved on the trial.

See T.P.I.—Crim. 42.06. We acknowledge that the jury was instructed on the proper use of inconsistent statements specifically, and not consistent statements. Nonetheless, the jury was instructed on how to use prior statements to some extent.

Importantly, this issue is raised in the post-conviction context and not on direct appeal; thus, the Petitioner must show that trial counsel's failure to request a separate limiting instruction fell below an objective standard of reasonableness. The Petitioner is now judging trial counsel's representation in hindsight. Under the facts presented here, we cannot say that trial counsel's failure to request a limiting instruction on the jury's proper use of the consistent statement to Inv. Legg amounted to deficient performance.

First, trial counsel's requesting such an instruction would have merely emphasized the testimony to the jury, and the nature of the testimony itself served only to rehabilitate Mr. Shepheard's credibility. Additionally, no further details were provided about Mr. Shepheard's statements made during the interview; no notes were taken by Inv. Legg to admit into evidence; and Inv. Legg did not testify. Trial counsel had also elicited similar testimony on cross-examination of Mr. Shepheard to the Petitioner's benefit, i.e., that Mr.

Shepheard said he had made the same "I told you so" remarks to Det. Mathis. Trial counsel did so in an effort to discredit Mr. Shepheard because those statements were absent from any recount by Det. Mathis of the Petitioner's on-the-scene interview. Det. Rawlston was also called to contradict Mr. Shepheard's testimony about his inclusion of "I told you so" statements to Det. Mathis. Again, the Petitioner has failed to establish deficient performance on behalf of trial counsel. He is not entitled to relief on this issue.

E. Failure to Seek Curative Measures for Ms. Maston's Surprise Testimony. As detailed previously, Martha Maston, a security officer working at the airport on the night of the incident, removed the Kendricks' children from their car seats. Ms. Maston testified at trial that, as she did so, the Petitioner's daughter "just put her arms" around Ms. Maston and said "that she had told daddy not to shoot mommy but he did and she fell." The Petitioner first notes that "[t]he defense at trial and on direct appeal justifiably complained that [Ms.] Maston, a witness not disclosed to the defense or part of the [S]tate's open-file agreement, was allowed to testify as a rebuttal witness." He then notes that this court agreed that "error had occurred but prejudice had not been shown." As his assignment of error for post-conviction relief, he complains,

> [T]rial counsel did not object to the continuing problems with the [S]tate's breach of its open-file agreement, request a continuance, or move for a mistrial when the [S]tate offered what was obviously not rebuttal testimony. Knowing that prejudice would have to be established, trial counsel failed to take any action to do so, including requesting an order that the [S]tate renew its plea offer of 22 years.

According to the Petitioner, he rejected the plea offer believing that the State had provided open-file discovery and that "had he been supplied accurate information, particularly about [Ms.] Maston's testimony, he would have accepted the plea offer or been prepared to testify in surrebuttal."

As discussed in the section above regarding the open-file breach of Mr. Shepheard's "I told you so" testimony, trial counsel and appellate counsel did challenge the State's failure to disclose Martha Maston on their witness list prior to trial and call her as a "surprise witness," but this court found neither prejudice by the late notice of Ms. Maston's identity nor bad faith or undue advantage on the State's part. See Kendrick, 947 S.W.2d at 883-84. The defense also complained that the trial court erred by allowing Ms. Maston to be called as a rebuttal witness, and this court agreed that Ms. Maston's testimony should have been introduced during the State's case in chief but that the Petitioner was not prejudiced by the order in which Ms. Maston's testimony was adduced. Id. at 884. This court continued, addressing a related issue, "regardless of the State's arguments at trial as to why this evidence was properly considered 'rebuttal,' [Ms.] Maston's testimony should have been tendered as part of the State's case in

chief[,]" and "[a]s such, Endia's statement was properly considered as substantive evidence of the [Petitioner's] state of mind at the time he shot his wife"; thus "[n]o limiting instruction was therefore necessary." Id. at 84-85.

The defense also challenged the State's discovery violation of Ms. Maston's testimony. On appeal, this court determined as follows regarding the issue:

> We also find without merit the [Petitioner's] contention that [Ms.] Maston's testimony contained a component of exculpatory information and that the State violated Brady v. Maryland, 373 U.S. 83 (1963), when it failed to inform him about Endia's statement before trial. Specifically, the [Petitioner] argues that Endia's statement to [Ms.] Maston is exculpatory because it includes no mention of having seen her mother's arms in a raised position at the time of the shooting. We disagree that an hysterical four-year-old's silence to a complete stranger on the exact position in which her mother was standing at the time she was shot is "exculpatory."
>
> Moreover, before the State has any duty to disclose exculpatory evidence to [a] defendant under Brady, the evidence must be material in the sense that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). Clearly, Endia's silence to [Ms.] Maston on the position of her mother's arms does not meet this test.

Kendrick, 947 S.W.2d at 885. All of the Petitioner's problems with Ms. Maston's testimony have been previously addressed by this court on direct appeal. Generally, "[a] matter previously determined is not a proper subject for post-conviction relief." Forrest v. State, 535 S.W.2d 166, 167 (Tenn. Crim. App. 1976).

The Petitioner also argues that trial counsel failed to advocate for specific performance of the plea agreement for the State's open-file breach. This court has used the post-conviction procedure to redress a denial of the right to counsel, in proper cases, by ordering "[s]pecific performance of a plea agreement [as] a constitutionally permissible remedy." Goosby v. State, 917 S.W.2d 700, 708 (Tenn. Crim. App. 1995) (citing Santobello v. New York, 404 U.S. 257 (1971); Turner v. State, 858 F.2d 1201, 1208 (6th Cir.1988)). However, we can find no case, and the Petitioner points to none, where specific performance of a rejected plea offer was ordered following a breach of the prosecution's open-file discovery agreement.

Regardless, the post-conviction court, accrediting trial counsel's testimony "that the [P]etitioner was adamant that the victim's death was an accident," doubted the "plea-

affecting nature of the testimony." The post-conviction court also noted that the Petitioner's daughter's excited utterance at the airport "was ambiguous and not necessarily inconsistent with a theory of accident[.]" The post-conviction court endorsed trial counsel's testimony in this regard, and we will not reweigh or reevaluate credibility determinations on appeal. See Fields, 40 S.W.3d at 456. Accordingly, the Petitioner has failed to show that trial counsel was deficient.

The Petitioner also asserted throughout the post-conviction hearing that, after his daughter told him "not to shoot mommy," he responded, "sweetheart, daddy's not gonna shoot mommy." From the testimony at the post-conviction hearing, we discern the Petitioner to be arguing that trial counsel should have called the Petitioner to testify in surrebuttal to Ms. Maston's testimony to "minimize the effect of" his daughter's statement. Trial counsel stated that he was provided with this statement by the Petitioner "early on" in the representation.

However, at trial, the Petitioner denied that the victim's arms were raised and claimed that, from where his daughter was sitting inside the vehicle, "she would not have been able to see anything." He had already contradicted his daughter's testimony in large part, and she was discredited on cross-examination when she gave ambiguous answers regarding whether she had seen her mother with her hands up or whether she had "actually see[n] what happened." Moreover, according to Ms. Maston on cross-examination, the Petitioner was already out of the car and talking on the telephone when she arrived. She was asked if the Petitioner was still present when she removed the children from the car, and Ms. Maston replied, "As he came around to the other patrol car, the city had arrived at that time." Based upon the trial testimony and the already questionable nature of the child's testimony, we cannot say that trial counsel rendered deficient performance in failing to call the Petitioner to testify to this fairly innocuous statement in surrebuttal. In fact, it may have done more harm than good to have the Petitioner offer additional, and somewhat inconsistent, information in response. The Petitioner has failed to establish his entitlement to relief on this issue.

F. Failure to Call William Lapoint. The Petitioner argues that Officer William Lapoint should have been called by trial counsel to testify about the Petitioner's emotional state immediately after the shooting and that Ofc. Lapoint's testimony was important to show the Petitioner's demeanor following the shooting. The Petitioner notes that this court "on direct appeal cited [the Petitioner's] calmness as indicative of premeditation and deliberation."

Ofc. Lapoint testified at the post-conviction hearing that, when he arrived at the airport, he went to the patrol car where the Petitioner was seated and spoke with him. Ofc. Lapoint described the Petitioner as "very distraught" at that time. According to Ofc. Lapoint, the Petitioner "was crying and kept bending over forward and back and side to

side, not sitting still, and crying." The Petitioner stated to Ofc. Lapoint, "I can't believe I did that."

Ofc. Lapoint also testified that he put a "small mini tape recorder" in the back of the patrol car to record the Petitioner. When the recorder was later returned to Ofc. Lapoint, it did not function, and he was told by other officers that there was nothing on the tape.[17] Ofc. Lapoint said that he did not check to make sure it was working when he placed the Petitioner in the back of the patrol car that day.

At trial, the Petitioner, on cross-examination, referenced that a tape recorder was placed in the patrol car with him but that the State failed to play it. The prosecutor then asked, "What statement did you make on that?" The Petitioner replied, "I don't know. But I notice—evidently must have been something because you didn't play it, but you played the other one." Trial counsel also discussed the lack of any recording during closing argument.

At the post-conviction hearing, trial counsel did not recall ever speaking with Ofc. Lapoint prior to the Petitioner's trial and did not remember "ever hearing anything about a tape recorder in the back deck of whatever patrol car it was in[.]" Appellate counsel, in the Petitioner's motion for new trial, raised the State's failure to turn over Ofc. Lapoint's tape recording as an assignment of error in accordance with Brady v. Maryland, 373 U.S. 87 (1964). That motion was denied, and appellate counsel chose not to raise the issue on appeal. According to appellate counsel, he remembered "some discussion" about the statement and that there was an issue of it being "a self-serving statement."[18]

First, we agree with the State that the jury heard testimony from Ms. Maston that the Petitioner was crying when he was at the airport, indicating that he was upset, although she also said that "[h]e was not hysterical like the child was." Importantly, the jury was also able to hear the Petitioner himself on the 9-1-1 call, from which they could judge the Petitioner's demeanor as the trier of fact. Also, the Petitioner was asked at trial what statements he made to Ofc. Lapoint in the back of the patrol car, and he could not

[17] The tape was no longer in the recorder, according to Ofc. Lapoint, and it has never been located.

[18] Our supreme court has stated as follows regarding a defendant's self-serving statements:

> A self-serving declaration is excluded because there is nothing to guarantee its testimonial trustworthiness. If such evidence were admissible, the door would be thrown open to obvious abuse: an accused could create evidence for himself by making statements in his favor for subsequent use at his trial to show his innocence.

State v. King,694 S.W.2d 941, 945 (Tenn.1985) (quoting Hall v. State, 552 S.W.2d 417, 418 (Tenn. Crim. App. 1977)). However, "no general rule of evidence excludes statements merely because they are self-serving. Instead, most self-serving statements are excluded . . . because they constitute inadmissible hearsay." Tony A. Phipps v. State, No. E2008-01784-CCA-R3-PC, 2010 WL 3947496 (Tenn. Crim. App. Oct. 11, 2010) (internal citations omitted).

recall any at that time. Moreover, while the Petitioner correctly notes that this court "on direct appeal cited [the Petitioner's] calmness as indicative of premeditation and deliberation[,]" it did so in the context of his calmness prior to the shooting:

> The [Petitioner's] driving around all day with a loaded gun in his car, the calm with which he approached his wife at her place of employment, and the fact that he requested her to leave her work station and come outside, certainly give rise to the inference that the [Petitioner] had thought about killing his wife and that he had done so while in a "cool" state of mind.

Kendrick, 947 S.W.2d at 880. Again, the Petitioner has failed to show either deficient performance or prejudice in this regard.

G. Failure to Object to Det. Rawlston's Statement that the Petitioner Did Not Mention Any Accidental Discharge. The Petitioner argues that trial counsel was ineffective by "fail[ing] to object when Detective Rawlston volunteered during cross-examination that [the Petitioner] never indicated to him that the shooting was an accidental discharge and the prosecution later capitalized on that testimony." The Petitioner asserts that Det. Rawlston's testimony "was intended to suggest that [he] fabricated the accidental-discharge scenario." According to the Petitioner, the State repeatedly referred to his post-arrest silence as being evidence of guilt in violation of Doyle v. Ohio, 426 U.S. 610 (1976), which "recognizes a strict due process prohibition to use 'for impeachment purposes' . . . a defendant's post-arrest silence after receiving Miranda[19] warnings." (Footnote added). Moreover, the Petitioner notes that he had not yet testified when Det. Rawlston volunteered these statements and, therefore, had not "subject[ed] himself to impeachment of that type."[20]

At the Petitioner's trial, trial counsel asked Det. Rawlston the following questions on cross-examination:

> Q. Was there ever an issue of whether or not this weapon was fired by someone, or went off accidentally?
> A. No, sir.
> Q. Never an issue in your mind?
> A. No, sir.
> Q. What about when the crime scene technician lifted the gun out of the trunk of his car and shot himself in the foot with it, saying all the time that

[19] See Miranda v. Arizona, 384 U.S. 436 (1966).

[20] We disagree. Whether the shooting was intentional or accidental was an issue that the Petitioner had placed before the jury well before he testified. Moreover, the Petitioner would not be able to demonstrate any prejudice to the defense by reason of the order of proof which was followed.

his finger was nowhere near the trigger, what about that, that wasn't an issue you though worthy of investigation?
A. It has been investigated.
. . . .
Q. And there was never an issue as to whether or not the gun—that nobody fired the gun, that it went off accidentally?
A. No, sir.
. . . .
Q. Okay. Had you had your mind—you had your mind made up out there that night what happened, didn't you?
A. I had, from the investigation received on the scene and from my investigation, had concluded what occurred, yes, sir.
Q. Okay. On the scene?
A. One the scene, the airport, forensics.
Q. So by the airport your mind was made up?
A. At that point, yes, sir.

Then on redirect examination, the State asked, "Since [trial counsel] opened the door, well, tell us, what are the factors that went in to making that decision[, i.e., that the shooting was not accidental]?" Det. Rawlston replied, "The witnesses, the witness[es'] statements that had been given to me, [the Petitioner's] response . . . in the case after advising him of his rights[.]"

Trial counsel objected and argued that the State should not be allowed "to bring in some kind of statement, [the defense has] never been made aware of . . . ." The prosecutor responded that the defense was "aware of all statements" and that it was anticipated Det. Rawlston would "say something to the effect of I hope this is a dream or something like that." Trial counsel responded that he was aware of such statement.

Det. Rawlston testified that he advised the Petitioner of his rights, that the Petitioner indicated that he understood those rights, and that the Petitioner then agreed to speak with him in the back of the patrol car. Det. Rawlston testified that he based his decision that the shooting was not accidental, in part, on the following: "When I spoke with [the Petitioner], in the car, after advising him of his rights, he stated to me as close as I can state verbatim, is I hope this is only a dream. He never at any time indicated to me that this was an accidental discharge." Det. Rawlston's testimony continued, and he cited additional factors from his investigation in support of his conclusion that the Petitioner intentionally shot his wife, including his observations of the victim's body, the type of weapon involved, and the circumstances surrounding the shooting.

The Petitioner testified at trial that he spoke with Det. Rawlston in the back of the patrol car at the airport, who informed him of his rights. According to the Petitioner, they left for the police service center but "didn't discuss anything." The Petitioner then admitted that he possibly said to Det. Rawlston "I hope this is only a dream" there at the airport, although the Petitioner believed he made this statement at the police service center. He further acknowledged that he never told Det. Rawlston or anyone at the airport that the shooting was an accident. He later clarified that he "never said anything to anybody as far as anything." He blamed this poor communication on "racial tension" between himself and the Caucasian officers.

During closing arguments, the State made the following comments about the Petitioner's omission of statements of accident:

> Given the opportunity, did he tell anybody that it was an accident? He makes the [9-1-1] call late. I think the testimony came in it's four minutes later. . . . Four minutes after there has been an event, a shooting, is a long time. In the jury room, go ahead and clock it off for yourself. Four minutes at least, maybe longer, before the [Petitioner] calls anybody. But when he does, what's the first communication? He knows he has been caught. I want to turn myself in, I just shot my wife. That's consistent with guilt. When asked why did you shoot your wife, finally, he didn't say it was an accident.
>
> Mark Rawlston, talked to Mark Rawlston, he said he hoped it was only a dream. It definitely wasn't a dream. Didn't say an accident. He didn't tell anybody it was an accident, didn't present it.

The defense made the following argument concerning Det. Rawlston's testimony:

> You heard [Det.] Rawlston concede that once—that before he even left the airport he knew what happened. Didn't talk to a single witness and before he left the airport he knew what happened and that's where his investigation ended at least as far as trying to prove anything other than what he had made up his mind to prove.
>
> . . . .
>
> Then last but not least in his beginning phase of his closing argument, [the prosecutor] said did you ever hear him say it was an accident. Well, did you ever hear him say it was not? Did you ever hear any single police officer, other than [Det.] Rawlston said, I sad [sic] what happened and he said, God, tell me it's a dream. Did you hear [Det.]

> Rawlston say, well, we went back to the service[] center and I tried to question him and he didn't tell me anything? Or did you hear [Det.] Rawlston say, we went back to the service center, [Det.] Mathis and I . . . tried to question him and he wouldn't tell us what happened? Huh uh. They didn't question him. . . .
>
> . . . .
>
> Through [Det.] Rawlston, I want to remind you, and he asked [the Petitioner] what happened. [The Petitioner's] response was I hope this is all a dream. I submit to you that's not—especially after you've heard this 9-1-1 tape, that's not an unreasonable answer because he can't believe what's happened.

At the post-conviction hearing, trial counsel said, "Well, what [Det. Rawlston] says is that he read you your rights, asked if you wanted to make a statement and what you said is I hope this is only a dream." Trial counsel explained his decision to ask Det. Ralwston such questions, "I think it was equally important to the jury to let the jury realize that [Det. Rawlston] had made up his mind as to exactly what had happened by the time he got to the airport. That's the point I was making in my original question[.]"

As a general matter, the exercise of the constitutional right to remain silent after arrest may not be exploited by the prosecution at trial. Doyle v. Ohio, 426 U.S. at 618. However, we can quickly dispense with the Petitioner's argument because he has failed to establish an important factual allegation in this regard by clear and convincing evidence—that he invoked his right to remain silent after he was issued his Miranda warnings. While we agree with the Petitioner that he was under arrest at this time,[21] Det. Rawlston testified that the Petitioner voluntarily agreed to speak with him in the back of the patrol car. Consequently, Det. Rawlston's testimony was not a comment on the Petitioner's right to remain silent but on the Petitioner's omission from a voluntary statement. See, e.g., State v. Emoe Zakiaya Mosi Bakari, No. M2010-01819-CCA-R3-CD, 2012 WL 538950, at *10 (Tenn. Crim. App. Feb. 15, 2012) (concluding same where appellant voluntarily met with the detective for two interviews and was not under arrest when he spoke with the detective); State v. Joseph Pollard, W2008-02436-CCA-R3-CD, 2010 WL 1874641, at *6 (Tenn. Crim. App. May 11, 2010) ("In light of the fact that the defendant did not remain silent, but rather gave an inculpatory oral statement to the investigating officers, the defendant's argument fails.") (citing State v. Newsome, 744

[21] We disagree with the post-conviction court, citing to State v. Chris Haire, No. E2000-01636-CCA-R3-CD, 2002 WL 83604, at *15 (Tenn. Crim. App. Jan. 22, 2002), that the Petitioner's statements, or omission therefrom, were "pre-arrest, pre-caution" silence.

S.W.2d 911, 918 (Tenn. Crim. App. 1987)). Accordingly, because no error by trial counsel has been shown, the Petitioner's claim of deficient performance must fail.

Moreover, the jury also had the Petitioner's 9-1-1 call where he likewise failed to mention any accidental discharge. The State did not overly emphasize Det. Rawlston's testimony about the Petitioner's omission in closing argument. The Petitioner has also failed to establish prejudice.

The Petitioner, in addition, takes exception to appellate counsel's failure to "raise prosecutorial misconduct in connection with the [S]tate using that [the Petitioner] never mentioned that the shooting was an accidental discharge." Finding no merit to the Petitioner's issue, we will not fault appellate counsel for failing to raise every possible issue on appeal. See Carpenter, 126 S.W.3d at 887 (citation omitted); Campbell, 904 S.W.2d at 596-97.

H. Cumulative Impact of Counsel's Errors. Finally, the Petitioner argues that the cumulative effect of trial and appellate counsels' errors denied him a fair trial and entitle him to relief. The cumulative error doctrine recognizes that in some cases there may be multiple errors committed during the trial proceedings, which standing alone constitute harmless error; however, considered in the aggregate, these errors undermined the fairness of the trial and require a reversal. State v. Hester, 324 S.W.3d 1, 76 (Tenn. 2010). However, the cumulative error doctrine properly applies only where there has been more than one actual error. Id. Because the Petitioner has failed to prove deficient representation on more than one issue,[22] he cannot successfully claim that the cumulative effect of counsels' performances violated his constitutional rights. See, e.g., Steven Ray Thacker v. State, No. W2010-01637-CCA-R3-PD, 2012 WL 1020227, at *60 (Tenn. Crim. App. Mar. 23, 2012) (concluding that trial counsel was only deficient in one way and that, therefore, the petitioner was not entitled to relief via the cumulative error doctrine). The Petitioner is not entitled to relief.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

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D. KELLY THOMAS, JR., JUDGE

[22] We have only found deficient performance once in this opinion—trial counsel's opening the door to the Petitioner's prior misdemeanor convictions. Moreover, our supreme court found no deficient performance in either of the issues it addressed before remanding this case back to us.