

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 17, 2013

JEFFERY BOYD TRUSTY v. STATE OF TENNESSEE

Appeal from the Circuit Court for Smith County
No. 06-130 John D. Wootten, Jr., Judge

No. M2012-01128-CCA-R3-PC Filed October 31, 2013

Petitioner, Jeffrey Boyd Trusty, was convicted of first degree premeditated murder, first degree felony murder, especially aggravated kidnapping, and theft over \$1,000 by a Smith County jury. The trial court merged the murder convictions and sentenced Petitioner to an effective sentence of life imprisonment. Petitioner's sentence and convictions were affirmed on appeal. *State v. Trusty*, 326 S.W.3d 582, 585 (Tenn. Crim. App. 2010). Petitioner filed a petition for post-conviction relief in which he alleged that he received ineffective assistance of counsel at trial and various violations of due process. After an evidentiary hearing, the post-conviction court denied post-conviction relief. Petitioner appeals. After a review of the record and applicable authorities, we affirm the judgment of the post-conviction court denying post-conviction relief.

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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, Jr. and ROBERT W. WEDEMEYER, JJ., joined.

Kimberly S. Hodde, Nashville, Tennessee, for the appellant, Jeffrey Boyd Trusty.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Smith, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Katrin Novak Miller, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In *State v. Trusty*, 326 S.W.3d 582, 585 (Tenn. Crim. App. 2010), this Court affirmed Petitioner's convictions of murder, especially aggravated kidnapping, and theft of property

over \$1,000. The factual basis for the convictions, summarized in that opinion, in which Petitioner is referred to as “the defendant,” is as follows:

This case arises out of the kidnapping and murder of the defendant’s former fiancée, Christina Hunt, whose partially decomposed body, covered with lime, was found buried in rural Smith County on land adjacent to the defendant’s. According to the State’s proof at trial, in late May 2005, the victim, who had been in a volatile romantic relationship with the defendant, broke off her engagement and fled the state to stay with relatives in Indiana and Texas. The victim returned to Nashville on June 22, 2005, and, in an effort to avoid detection by the defendant, borrowed a friend’s vehicle and spent the night at her brother’s home. The next day, the victim not only failed to return her friend’s car but also missed a scheduled breakfast with her son. A massive search for the victim eventually resulted in the August 4, 2005, discovery of her body in Smith County.

Id. at 586. In order to better understand the issues presented herein, additional facts from this Court’s opinion on appeal, in pertinent part, are as follows:

At the defendant’s November 2007 trial, John Beckett, an area supervisor for McDonald’s Restaurants, identified a surveillance videotape that showed that the victim purchased three large cups of coffee at 4:45 a.m. on June 23, 2005 from the drive-through window of a McDonald’s Restaurant located on Interstate 440 in Davidson County.

....

Loretta Warren, the victim’s friend and former sister-in-law, testified that the victim showed up at her Nashville apartment between 9:00 and 10:00 p.m. on June 22, 2005, where the two discussed how the victim would spend the night at the home of her brother, John Warren, who was the witness’s ex-husband and lived across the street from the victim’s Nashville home. Warren said she suggested that the victim borrow her 1999 Pontiac Sunfire because she believed the victim would be safer driving a vehicle other than her own. The victim agreed and made plans to pick up Warren in time for work the next morning.

The victim had habitually met Warren in the early morning for coffee and cigarettes, and she called Warren between 4:15 and 4:20 a.m. the next day to let her know that she would bring coffee to her home. Warren explained

that it would not have been unusual for the victim to purchase three cups, as she and the victim usually drank one cup each and split a third. The victim, however, failed to show up as planned and her cell phone went directly to voice mail each time Warren attempted to reach her that day.

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The victim's twenty-year-old son, Andrew Clinton, testified that the victim and the defendant had a turbulent, on-again, off-again relationship. The defendant gave the victim an engagement ring approximately six months before she disappeared and at one point in the couple's relationship the victim, Clinton, and Clinton's younger brother, Austin Hunt, lived with the defendant at his Smith County home. At the time of her disappearance, however, the victim had her own residence in Nashville and Clinton's uncle, John Warren, had returned the victim's engagement ring to the defendant.

Clinton testified that the victim returned to Nashville on June 22, 2005, and spent the night at John Warren's house, where Clinton lived in a basement apartment. Clinton said that he and the victim argued because he knew she had gone to Texas to get away from the defendant and he was upset with her decision to return to Nashville. He stated that the victim was driving his aunt's white Pontiac Sunfire in an attempt to "throw [the defendant] off" and was gone by the time he awakened the next day. During the time the victim was out of the state, the defendant came several times to the restaurant where Clinton worked to try to find out the victim's whereabouts, but each time Clinton told him that he did not know where the victim was.

....

Austin Hunt, the victim's fifteen-year-old son, testified that on June 23, 2005, he drove with his stepmother from Clarksville to Nashville to meet the victim for breakfast, but the victim never showed up.

....

Homer Webb testified that in June 2005, he lived in a farmhouse on Cedar Lane in Smith County, which was owned by the defendant's brother, William Trusty. The defendant showed up at the property at approximately 8:00 a.m. on June 23, 2005, driving a Ford dually pickup truck, told him that he was looking for a set of ramps to use to move a shed, searched in a garage,

and left after ten or fifteen minutes. Webb saw the defendant's truck at an outlying barn on the property later that afternoon but could not tell who was driving, as it departed when he walked outside into the yard.

John Lindberg, an employee of Roadway Express, testified that the defendant called him on June 23, 2005, to ask him to go to lunch. When he met the defendant shortly before noon in the employee parking lot, he noticed scratches on the defendant's face, which the defendant explained as the result of his having fallen off a horse into some briars. The defendant covered his face as they walked past the garage, and when he asked him why, told him that he had called in sick that day and did not want anyone to see him. They left for lunch in Lindberg's vehicle and, en route, the defendant suggested that they drive to the Burger King on Bell Road, telling him that his jeep had broken down there. However, when they reached the restaurant and Lindberg started to take out his jumper cables, the defendant told him that he had already repaired the jeep, that he had a lot of things to do, and that he did not want to eat lunch after all.

Lindberg testified that when he learned on Friday of the victim's disappearance, he called a tip line to report what he knew to the police. The next day, the defendant came to his house and asked him not to tell the police that he had given him a ride to his jeep, but to instead lie and say that he had helped him unload his motorcycle off his trailer. On July 4, the defendant showed up at his house again and told him that if anyone testified against him and he was in jail, he had friends who would "take care of that." Lindberg testified that two or three weeks before the victim disappeared, he and the defendant were at a bar when the defendant told him that he would kill the victim and himself if the victim ever left him because the victim was "the best piece of ass" he had ever had and he loved her.

The defendant's brother, William Trusty, testified that he was an employee of the Smith County Sheriff's Department and lived on Rome Road in Smith County, where the defendant, his mother, and his grandmother also lived in 2005. He said the defendant came to his house at approximately 7:00 a.m. on June 23, 2005, to find out where the ramps to his trailer were. Trusty testified that the trailer to which the defendant referred was his sixteen-foot ball hitch trailer, which he normally kept beside his grandmother's house on Rome Road, and that the ramps, which were used to load vehicles on the trailer, were kept in a garage located on the family farm on Cedar Lane.

Trusty testified that he was on his way to Goodlettsville at about 5:00 that afternoon when he saw the defendant driving toward Carthage in his Ford pickup truck while towing the trailer. At approximately 7:30 or 8:00 that same evening, he spotted a vehicle “down in the bottom” below his grandmother’s house, investigated, and discovered the defendant beside his truck, which was no longer towing the trailer. The defendant told him that he was deer hunting, but Trusty did not see any weapon.

Trusty testified that after he had returned home, he received a call from Sergeant Mark West of the Smith County Sheriff’s Department, who asked him to find out if the defendant knew where the victim was. He said he first checked the defendant’s home and then drove to the back of the defendant’s property to see if the defendant was still hunting. Not seeing anyone, he turned around, saw lights near the garage, and found the defendant near an old road that led to the property of a neighbor, Walter Beasley. He asked the defendant what he was doing, and the defendant told him that he was coyote hunting. He then asked the defendant if he knew where the victim was, and the defendant said he did not. Trusty identified various photographs of the area, including the old road beside the defendant’s house that led to Walter Beasley’s property and a parcel of land behind the defendant’s property that belonged to Jimmy Joe Boze.

Tammy Self, the defendant’s ex-wife, testified that sometime in the early afternoon of June 23, 2005, the defendant stopped at the end of her mother’s driveway to give a birthday card and gift to their younger son. The defendant was driving his Ford extended cab, dually pickup truck and towing a trailer, and she saw him only from a distance. The next day, which was Friday, he came uninvited to their son’s birthday party and asked her to rent a storage building in Lafayette for him, telling her that he needed to store his belongings where no one would know about it except for himself, his brother, and the witness. Self said that she refused to do so, both on Friday and again the next day when the defendant repeated his request. The defendant had red finger marks on his face when she saw him on Friday, and the following day he was wearing the same clothes and had dirt on the back of his shirt.

Tyler Trusty, the defendant’s sixteen-year-old son, testified that on Saturday, June 25, 2005, he noticed red marks on the defendant’s face and overheard him saying that he had fallen off an ATV. He said the defendant took him and his brother to his house on Rome Road that day, where he had them wash his mud-covered ATV while he took a shower. He saw the

defendant when he got out of the shower and noticed that he also had red marks or scratches on his shoulders and chest.

Paul Garrett, a long-time friend of the defendant's, testified that the defendant came to his Lafayette home at about 9:30 a.m. on June 23, 2005, towing a trailer that was carrying a white-colored, tarp-covered vehicle. He said that the defendant asked him to rent a storage unit for him, telling him that the car was a Saturn that he planned to repair in the storage unit and give to his son, but that he did not want Tammy Self to learn of the project. Garrett stated that the defendant gave him money and went with him to a storage facility in Lafayette, where Garrett rented the storage unit for the defendant in Garrett's name.

Garrett testified that he grew suspicious the following Sunday when he learned that the defendant had also asked Tammy Self to rent a storage unit for him. He, therefore, went to the rented storage unit with a friend, cut the lock, and found inside a suitcase, a large purse, and a vehicle that was not a Saturn. Believing that the vehicle was stolen, he called the defendant and demanded that he remove it from the storage unit. He and his friend remained in town, and a little after midnight on Monday, June 27, they saw the defendant at a service station, trailer in tow, getting fuel for his truck. After circling around town, they drove back by the storage facility and saw the defendant pulling in behind the storage unit. When Garrett checked the next morning, the unit was empty.

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Officer Erik Nash of the Metropolitan Nashville Police Department, who was a trainee at the Metropolitan Police Academy in August 2005, testified that on August 4, 2005, he and the other members of his class were searching for the victim's remains in a wooded area in Smith County when he noticed a rotting smell, saw an unnatural looking pile of rocks covered with a blue-green powder, moved one of the rocks, and discovered a blackish-colored human finger sticking up out of the middle of some powder.

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On the afternoon of Monday, June 27, 2005, Detective Corcoran, Tennessee Bureau of Investigation ("TBI") Agent Jason Winkler, and Investigator Joe Jones of the Fifteenth District interviewed the defendant in

person at his home on Rome Road in Smith County. During that conversation, the defendant said that the victim was supposed to marry him on June 4 but left his house unannounced on May 26 and refused to discuss their marriage plans during the last phone conversation he had with her on June 13. The defendant reported that he had arrived home from work at 1:30 or 2:00 a.m. on June 23, 2005, completed some chores, was bucked off a horse and injured, worked on his four-wheeler, retrieved some ramps from his brother's house, and transported his motorcycle to a motorcycle shop. The defendant additionally stated that his relationship with the victim had been rocky, that the victim had accused him of domestic violence in Wilson County, and that the victim had taken out two orders of protection against him but that he had paid her \$500 each to drop them. Finally, the defendant explained the visible scratches on his arms, neck, and face as the result of the horseback riding incident.

Detective Corcoran testified that after interviewing Paul Garrett, he went to the storage unit in Lafayette in Macon County, where he discovered some charred debris, including a piece of plastic that was consistent with a tarp. He said that the investigation eventually changed from a missing person to a homicide case and that he obtained search warrants for the three parcels of land on Rome Road owned by the Trusty family and consent from the owners of thirty to forty neighboring tracts in order to conduct a ground search of the area. The military performed a preliminary search on [August] 2, 2005, to identify the type of terrain and the best methods to be employed in the search, and on [August] 3, 2005, a large, systematic search involving over 300 military and police personnel began.

....

Detective Corcoran testified that the victim's body was clothed in capri-style, blue-jean overalls and a pink pullover top, which was consistent with the pink top the victim was wearing in the McDonald's surveillance videotape. He said that the victim's body was not wearing any socks and that a small, partially burned white sock was recovered from a fire pit on the defendant's property on August 3, 2005. . . .

[A]t the time the defendant was being booked for the victim's murder, he made a spontaneous statement that "he didn't mean for this to happen" and that "[h]e just didn't know what to do." He said that on November 30, 2005, he received a call from defense counsel's office informing him that Loretta Warren's vehicle was located on the square in Lebanon adjacent to counsel's office. He

then went to that location and recovered the vehicle, which was missing its tags.

On cross-examination, Detective Corcoran acknowledged that the first indictment returned against the defendant charged him with the crimes in Davidson County. He further acknowledged that he did not know if or where the victim had been killed or kidnapped. On redirect examination, he testified that evidence that the victim was kidnapped, murdered, and her car stolen was presented to both the grand jury of Davidson County and to the grand jury of Smith County, and he clarified his cross-examination testimony by stating that he did, in fact, know that the victim had been killed. On recross-examination, he acknowledged that he did not know where the victim was killed or how she was killed and that he had no eyewitness or photographic proof that she had been abducted.

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TBI Special Agent Jason Wilkerson testified that the defendant consented to a search of his home on June 27, 2005, and told him, when asked, that he had guns but had moved them to his mother's home because he did not want the officers to find them at his residence. He said there was no evidence that any of the guns were involved in the victim's disappearance.

Defendant's Proof

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The defendant testified that his relationship with the victim had been turbulent, explaining that he and the victim sometimes got along but also had issues that at times led to heated arguments. He related their series of breakups and reconciliations and testified that in April 2005, the victim was living in her own apartment in Nashville but that the two had reconciled and were engaged to be married. He stated that he thought their relationship was still going well when he dropped the victim off at her apartment after she had spent the night at his home, and became worried when she would not answer his subsequent telephone calls. The victim's mother and son could not tell him her whereabouts, but the victim's brother finally informed him that the victim was uncertain about the marriage and that the brother was sending the engagement ring back to the defendant. The defendant said the next time he heard from the victim was when she called him on June 13 while he was on the road.

The defendant testified that he drove a load to Memphis on June 22, 2005, and returned to Nashville, clocking out at five or ten minutes after midnight on June 23. He then hung out in the driver's lounge for a couple of hours before carrying his gear out to his jeep, where he found a note from the victim asking him to meet her at the Waffle House on Old Hickory Boulevard at 5:00 a.m. After stopping to purchase fuel, a soda, and cigarettes, he drove to the Waffle House, located next door to the Burger King, and parked his vehicle. A few minutes later, the victim pulled up in Loretta Warren's vehicle, motioned him into the vehicle, and handed him a cup of coffee. She then drove to the BP station, parked the vehicle, and began talking.

The defendant testified that the victim told him that she had left to clear her head and returned because she intended to go to school. The victim then asked him to give her \$700, telling him that she needed some money to get her started. He refused, and the victim became enraged, called him "a sorry SOB," threw her cup of hot coffee in his face, and began hitting and scratching him and pulling his hair. The defendant stated that he pushed forward to get the victim off him and ended up on top of her in the backseat. At that point, he noticed that she was no longer moving. He described the episode:

She just started screaming at me and took her hot coffee and threw it on me in my face, and it blinded me, and I grabbed my shirt that I had on and pulled it up over my face and was trying to wipe my eyes out, and at that time, she started hitting on me and pulling my hair and scratching me, and she just wouldn't stop hitting me, and I had nowhere to go. I was backed up against the back of the door with my back, and she was on top of me pretty much holding my head and my hair, and I couldn't get her to quit and took and pushed forward on her, pushed forward and tried to knock her off of me, and I just pushed real hard, and we flew between the seats and landed up in the back of the back seat, and I was on top of her looking up at the roof, and I noticed that she had quit moving. She was just limp there. I took and got up off her and got situated around and tried to see what was wrong with her, and she wasn't moving.

The defendant testified that he attempted CPR on the victim but was unable to get any response. In a state of shock, he initially began walking down the road, but, unable to leave the victim "there like that," he returned to the vehicle, covered the victim with a quilt, and began driving to his home in

Smith County, following the shortest route. The vehicle began to run out of gas as he was driving through Hartsville, so he pulled behind an old tobacco barn, raised the hood, locked the doors, and hitched a ride home. Once there, he retrieved his truck, the trailer ramps, the trailer, and five gallons of fuel, returned to the vehicle, filled its tank, and drove it onto his trailer. He then carried the vehicle on the trailer to Lafayette, where Garrett rented the storage unit for him.

The defendant testified that he put the vehicle in the storage unit, moved the victim to the backseat of his truck, drove home, and placed the victim on a bed in his house. He then drove to the Roadway Express parking lot, obtained a ride from Lindberg to the Waffle House where he had left his jeep, and drove back to Roadway Express, where he discovered that his jeep was too large to fit on the trailer. He, therefore, drove his jeep home, rode his motorcycle back to Roadway Express, loaded the motorcycle onto the trailer, and dropped off the motorcycle at the motorcycle shop. Next, he drove the truck and trailer back to Carthage, dropped the trailer at his grandmother's rental house, returned to his home, placed the victim's body in his truck, drove to the back of his property, and carried the victim down to the area where her body was found.

The defendant testified that he did not call the police because he panicked. He said he had made some bad choices, but he did not kidnap the victim and never intended to kill her. On cross-examination, he testified that Hartsville is in Trousdale County and that he therefore never crossed the county line into Smith County with Warren's vehicle. He said that he used a five-gallon bucket and his four-wheeler to place lime on the victim's body on June 24, 2005, removing a couple of rocks from the pile he had placed on the victim the previous day and then replacing them afterwards. He stated that when he was covering the victim's body with rocks, a large one slipped from his hands and fell onto her face.

Id. at 586-94.

Post-Conviction Issues Raised on Appeal

In his brief on appeal, Petitioner asserts that trial counsel rendered ineffective assistance of counsel as follows: (1) trial counsel failed to move for a mistrial after two law enforcement witnesses "repeatedly sensationalized" evidence; (2) trial counsel failed to move for a mistrial when the State elicited a legal conclusion from a law enforcement officer

regarding the death of the victim and the venue of the trial; (3) trial counsel failed to move for a mistrial after a courtroom outburst from the victim's sons during Petitioner's testimony; (4) trial counsel failed to move for recusal of the trial court; (5) trial counsel failed to object and seek a mistrial when the State asked the jury to give the victim's son a birthday gift by convicting Petitioner of the crimes; (6) the State committed prosecutorial misconduct during closing argument; (7) the State committed prosecutorial misconduct by eliciting improper testimony from law enforcement officials; and (8) the State committed prosecutorial misconduct by allowing a law enforcement officer to make a legal conclusion regarding the commission of the crimes and the venue.

Proof at Post-Conviction Hearing

At the post-conviction hearing, trial counsel testified that he had been practicing law since 1962. His entire legal career had been spent performing criminal defense work. Trial counsel was part of a small law firm that also employed his son and another attorney, both of whom worked on Petitioner's case. The members at the firm took this approach with most larger cases that they handled.

Trial counsel described Petitioner as cooperative and punctual but could tell that Petitioner was under a lot of stress. Trial counsel was retained by Petitioner; Petitioner actually surrendered to law enforcement officials at trial counsel's office. Petitioner came to the office multiple times to meet with trial counsel in preparation for trial. There were also meetings among the attorneys at the firm without Petitioner being present.

Trial counsel explained that their initial strategy was to look into venue to see if the case was in the proper location. Petitioner was initially indicted in Davidson County. The case was then nolle prossed, and Petitioner was later indicted in Smith County where the victim's body was located. After reviewing the evidence, trial counsel was of the opinion that pursuit of a venue defense could potentially yield a not guilty verdict.

Trial counsel explained that he also met with Petitioner's family members as well as the assistant district attorney prior to trial. In preparation for trial, Petitioner was taken to a witness box in an unoccupied courtroom in order to rehearse his testimony in anticipation for trial. Trial counsel also recalled plea discussions. While he was unable to recall with specificity any offers, he was sure that none the offers were acceptable to Petitioner.

Trial counsel testified that there was a partially burned sock, along with several guns, found at or near Petitioner's house. He deemed this evidence highly prejudicial especially in light of a law enforcement officer's testimony that the victim was found without a sock. Further, Petitioner was a felon in North Carolina, and his mere possession of a gun was a

separate crime. Trial counsel recalled objecting to discussion of the gun at trial. Another officer testified about the sock. Trial counsel stated that he made a number of objections during the testimony of the officer and was disappointed when the evidence related to the guns was admitted. Trial counsel testified that he made a tactical decision not to seek a mistrial with respect to both instances. He was concerned that if a mistrial was ordered, the State could again dismiss the case in Smith County and seek a reindictment in Davidson County, especially in light of Petitioner's testimony at trial that the victim actually died in Davidson County.

Trial counsel explained that he made a number of objections at trial. These objections were related to photographs of the crime scene, helicopter evidence from the search, and other items. Trial counsel also specifically recalled objecting to an officer's testimony regarding proper venue. Trial counsel explained that he objected to this statement because it was a legal conclusion that the jury should have determined from the evidence presented at trial.

At one point during a jury-out hearing regarding an evidentiary objection, trial counsel even moved for the trial judge to recuse himself from the case. Trial counsel sought recusal because he thought that the defense team was being treated unfairly. Trial counsel eventually withdrew the request for recusal. Despite the withdrawal, the trial court denied the request and made specific findings with regard to the request.

Trial counsel testified at the hearing about Petitioner's decision to testify at trial. In preparation for trial, trial counsel tried to prepare Petitioner by simulating a trial experience. At trial, Petitioner testified that the interaction between Petitioner and the victim took place in Davidson County and that the victim died of a heart attack or other medical event in his car. Petitioner claimed that he panicked after the victim died, took her body to Smith County, and buried her in the ground near his property.

In retrospect, trial counsel stated that it was probably not the best decision for Petitioner to testify at trial. However, he acknowledged that the decision ultimately belonged to Petitioner. Trial counsel opined that if had a chance to try the case again, he would recommend that the Petitioner choose not to testify.

Trial counsel remembered that during Petitioner's testimony, the victim's sons started yelling at Petitioner from the gallery, even threatening his life at one point. The outburst occurred during Petitioner's explanation of the events leading up to the victim's death. As a result of the outburst, the judge cleared the courtroom and brought in law enforcement personnel for the remainder of the trial. Trial counsel did not seek a mistrial but expressed concern to the trial court over the presence of security during the remainder of the trial. Trial

counsel explained that the outburst more than likely had a negative impact on the jury and also affected Petitioner's ability to testify.

Trial counsel also recalled a reference to the victim's son's birthday during closing argument. He did not recall making an objection and agreed that the argument was probably improper.

Assistant trial counsel, son of trial counsel, also testified at the hearing. He has been practicing law with his father since 1998. Assistant trial counsel was primarily responsible for legal research, witness interviews, and working in a supporting role in Petitioner's case. He explained that the other attorney in the firm also worked in a supporting role in preparation for Petitioner's trial.

Assistant trial counsel testified that he remembered a reference to a burned sock in the discovery materials that were received from the State. Assistant trial counsel chose not to file a pretrial motion to exclude testimony regarding the sock because he did not think that there was a connection between the sock and the victim.

Assistant trial counsel expressed his opinion prior to trial that Petitioner should not testify at trial. Additionally, assistant trial counsel explained that the defense strategy was to question the venue of the case as a defense. However, the defense team approach was to keep the matter in Smith County because there were issues with the State's proving venue in Smith County that were potentially beneficial to Petitioner. According to assistant trial counsel, this defense strategy most likely played into the decision not to seek a mistrial.

Assistant trial counsel was of the opinion that the courtroom outburst by the victim's sons was emotionally disturbing to Petitioner during Petitioner's testimony. He recalled an objection to the additional courtroom security and explained that the defense team was afraid that the additional security would make the jury uncomfortable.

Assistant trial counsel was able to recall the State's statements during closing argument about the victim's son's birthday. Counsel for the State asked the jury to give the victim's son a birthday present by convicting Petitioner. Assistant trial counsel explained that during trial, it is sometimes a strategic move to "get past" certain issues rather than drawing attention to them by objecting. He was unable to state whether an objection would have been warranted under the circumstances.

Petitioner testified at the post-conviction hearing. He claimed that he suffered from and had been treated for anxiety and depression and that he took prescription medication for the conditions. After the victim's death but before trial, Petitioner stopped taking his

medication and began drinking heavily. Petitioner explained that his anxiety manifested itself in an inability to speak in public, hot flashes, shortness of breath, and a sensation of becoming overwhelmed in intense situations. Petitioner explained that he has attempted suicide twice and suffers from occasional panic attacks.

Petitioner admitted that he had some prior experience with the legal system, including a conviction for driving under the influence but explained that this was the first time he had ever testified in his own defense. Petitioner recalled a plea offer for twenty-five years prior to trial but thought that he would have a better chance at trial.

Petitioner claimed that he did not want to testify even after several practice sessions. Petitioner stated that he did not want to put himself in the position of talking in front of other people. He explained his anxiety to trial counsel, and trial counsel recommended that he choose not to testify at trial.

Petitioner also recalled seeing evidence about a burned sock in discovery materials. Petitioner told trial counsel that the sock had nothing to do with the victim; trial counsel told Petitioner that he would object if the sock came up at trial. Petitioner was shocked when a detective testified that a burned sock was found in a fire pit at his home and the detective was able to give an opinion over trial counsel's objection. This was one thing that happened at trial that influenced Petitioner's decision to testify.

Petitioner also stated that he did not understand the defense strategy of challenging venue of the case. In fact, Petitioner stated that he thought it was somehow an admission of wrongdoing.

Petitioner complained about several things that occurred during trial. Petitioner felt that the trial judge was rather hostile toward the defense and recalled asking trial counsel if a new judge could be appointed. Petitioner also discussed the outburst during his testimony. He explained that he became very emotional after the outburst, burying his head in his hands and crying. After the outburst, Petitioner stated that it appeared the jury was no longer paying attention to his testimony.

Trial Court's Ruling on Post-conviction Petition

At the conclusion of the proof at the post-conviction hearing, the post-conviction court denied relief. The court accredited the testimony of trial counsel noting that trial counsel was "aggressive" and "vigorous" in his defense of Petitioner. The post-conviction court noted that the decision not to seek a mistrial was a tactical decision made by trial counsel after a review of the case in light of Petitioner's testimony that the victim actually died in Davidson

County and trial counsel's desire to keep the case in Smith County. The post-conviction court noted that the trial court gave a curative instruction after the courtroom outburst. The post-conviction court also accredited trial counsel's testimony about venue, noting trial counsel's strategy would be successful if he could convince "one or twelve [members of the jury] that the State did not prove by the weight of the evidence that this crime occurred in Smith County, Tennessee." The post-conviction court pointed out that the jury obviously did not believe Petitioner's testimony with regard to the victim's death. The court also noted:

[I]f matters are previously determined, they're not to be considered and there are a variety of thing[s] that are contained in the petition that go straight to the opinion [on appeal] and the affirmation of [Petitioner's] conviction by the Court of Criminal Appeals.

....

[The issues with respect to] a half burned sock and relocating firearms, and I have to obviously look to the Court of Criminal Appeals opinion in this case, and the Court of Criminal Appeals opinion addressed those issues and found them without merit.

....

[T]he Court of Criminal Appeals also addressed [opinion testimony by law enforcement personnel] in its opinion and affirmed this Court's ruling with regard to whether or not the door was opened or not.

[Trial counsel] made tactical decisions in this case. In many respects, I would assume and I would agree if I were in the petitioner's shoes, I would like to have something done differently because the result might have been different, in his mind, in the petitioner's mind, but was [trial counsel] ineffective? No. Indeed, he was a strong advocate for his client. He understood the dynamics of being tried in Smith county versus Davidson County. He did not want a mistrial for fear that all of a sudden he would find himself and [Petitioner] down in Nashville, especially after the defendant's statement from the witness stand with regard to where the events arguably occurred.

So all in all, after hearing this case, after hearing this case, judging the credibility and the believability of the witnesses, I believe what [trial counsel and assistant trial counsel] said. I find their testimony to be credible, believable. I find their decisions to be competent and effective. I find their

representation to be competent and effective. I find that the decisions they made were tactical decisions, well-founded in the law, and based upon the facts of this case.

I also find that the petitioner has failed, considerably failed, to carry his burden of proof by a clear and convincing evidence that he's entitled to post-conviction relief.

As an aside, I also find that with the exception of a very few of these grounds and the suggestion that they forced him to testify, that most, if not a great overwhelming number of these allegations have been previously determined by the Court of Criminal Appeals in this case, and so obviously, they should be denied, and even if not denied, the petitioner has failed to establish by a clear and convincing evidence that he's entitled to relief.

Petitioner filed a timely notice of appeal.

Analysis

In order to be granted post-conviction relief, a petitioner must prove the factual allegations supporting relief by clear and convincing evidence at an evidentiary hearing. T.C.A. § 40-30-110(f); *Ward v. State*, 315 S.W.3d 461, 465 (Tenn. 2010). The trial court's factual findings in its ruling in a post-conviction proceeding "are conclusive on appeal unless the evidence preponderates against those findings." *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Appellate review of legal issues, or of mixed questions of fact and law, such as in a claim of ineffective assistance of counsel, is de novo with no presumption of correctness. *Pylant v. State*, 263 S.W.3d 854, 867-68 (Tenn. 2008). A petitioner must satisfy both prongs of the two-prong test to prove ineffective assistance of counsel which is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009). These prongs are (1) deficient performance of counsel, defined as "counsel's representation fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 687-88, and (2) prejudice to the defendant, defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Dellinger*, 279 S.W.3d at 293. If the petitioner fails to establish either one of the prongs, that is a sufficient basis to deny relief, and the other prong does not need to be addressed. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004). If a petitioner alleges that trial counsel rendered ineffective assistance of counsel by failing to do an act such as call a witness, present tangible documents for evidence, and/or file a motion to suppress, among other actions, the petitioner is generally obliged to present the witness or the other evidence at the post-conviction hearing in order to satisfy the *Strickland* prejudice prong. *See Pylant*,

263 S.W.3d at 869. In other words, it is incumbent upon a petitioner to prove that what he says trial counsel should have done would have had merit and produced admissible, relevant evidence.

Petitioner has presented his issues on appeal under two primary categories, with several specific examples of why he is entitled to relief. First, Petitioner asserts that his trial counsel rendered ineffective assistance of counsel. Second, he argues that the State engaged in prosecutorial misconduct that violated his rights under the United States Constitution and the Tennessee Constitution. We will address the issues in the order they were presented in Petitioner's brief.

Ineffective Assistance of Counsel

Under this category, Petitioner has set forth five sub-categories of examples of the ineffective assistance of trial counsel. We will set forth these sub-issues as written in Petitioner's brief.

(1) First, trial counsel failed to move for a mistrial when [two] of the State's law enforcement witnesses (Corcoran and Wilkerson) repeatedly sensationalized benign pieces of evidence to augment their circumstantial case, disregarded limitations and rulings by the Court, and testified regarding matters which were clearly improper.

In his first example in support of this issue, Petitioner references Detective Corcoran's testimony at trial that, "originally this was a missing person's case. It became quite clear that [the victim] was not to be found. It did not appear that the victim left on her own accord, did not -" Petitioner asserts that trial counsel should have moved for a mistrial, even though he admits that trial counsel objected to the testimony, the trial court sustained the objection, and the trial court gave a curative instruction to the jury. Petitioner asserts that a mistrial should have been requested "based upon the misconduct by law enforcement." Petitioner next claims that when trial counsel's objection to testimony regarding a partially burned sock was overruled, again, a mistrial should have been requested. Similarly, Petitioner argues trial counsel should have moved for a mistrial as a result of improper testimony by TBI Agent Wilkerson concerning information about Petitioner moving guns.

Whether to grant a mistrial is a determination within the sound discretion of the trial court. *State v. McKinney*, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). "Generally a mistrial will be declared in a criminal case only when there is a 'manifest necessity' requiring such action by the trial judge." *State v. Millbrooks*, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). The burden of establishing the necessity for mistrial lies with the party seeking it.

State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). In the direct appeal from the convictions, this Court held that evidence of the partially burned sock was admissible. *Trusty*, 326 S.W.3d at 605. We also concluded that admission of the evidence of Petitioner's moving the firearms was harmless error. *Id.*, at 607. As to the cited testimony of Detective Corcoran regarding his conclusions on how the victim left the Nashville area, Petitioner has not shown that a mistrial would have been granted if requested, or that his convictions would have been reversed on appeal if the mistrial motion had been made and denied.

(2) Second, trial counsel failed to move for a mistrial when the State deliberately elicited testimony from a law enforcement officer (Corcoran) drawing a legal conclusion that Christina Hunt was the victim of the crimes charged in the Indictment and that venue from the prosecution was proper in Smith County.

This asserted ground for post-conviction relief fails to entitle Petitioner to relief because this Court held that the challenged evidence was admissible at trial. *Trusty*, at 606. Petitioner has not presented any proof that a motion for a mistrial would have been granted if requested. In fact, the trial court overruled trial counsel's objection to at least some of the testimony, indicating a mistrial would not have been granted. Clearly, this Court's ruling in the direct appeal shows that if a mistrial had been requested but denied, this Court would not have held such was error.

(3) Trial counsel were ineffective for failing to move for a mistrial after the victim's sons stood up, moved forward in the courtroom and yelled threats and obscenities at Petitioner [] in the midst of his testimony explaining how the victim's death was an unintended accident.

In this issue, Petitioner refers to the following portion of the trial transcript which Petitioner quoted in his brief. According to Petitioner, the incident occurred during Petitioner's testimony at the trial.

[One of the victim's sons]: You son-of-a-bitch.

THE COURT: Out-Out. Out.

[One of the victim's sons]: F*** you.

THE COURT: Take them out. Clear this courtroom now. Everybody out. Take the jury out right now.

[One of the victim's sons]: I'll kill him.

THE COURT: Take the jury out now.

Petitioner acknowledges that the trial court instructed the jury when it returned to the courtroom “to disregard the outburst from the [two] emotional young men.” As to this outburst, the judge at the post-conviction hearing, who also presided at the trial, noted that he immediately cleared the courtroom and gave a curative instruction to the jury to remedy any potential prejudice. This clearly indicates the trial court would not have granted a motion for mistrial if one had been made. *See State v. Adkins*, 786 S.W.2d 642, 644 (Tenn. 1990) (a mistrial is not required following a witness's outburst when the trial judge took immediate action to dispel prejudice). Petitioner has failed to show that an appellate court would have found reversible error in the trial court's decision to deny a motion for a mistrial if one had been made.

(4) Trial counsel were ineffective for failing to persist in a request that the trial judge recuse himself when the court's tone and actions suggested the inability to be fair to the defense.

In his argument in his brief, Petitioner makes only general accusations as examples of unfairness exhibited by the trial judge toward Petitioner at his trial. Trial counsel made a detailed oral request for the trial court to recuse itself during the trial but later withdrew it. Petitioner's most specific allegation of bias and/or impartiality by the trial court is set forth as follows in his brief:

During the course of the trial after a series of rulings adverse [to] Petitioner Trusty and what appeared to be the Court assisting the State to the disadvantage of Petitioner Trusty (by suggesting special requests for jury instructions, approaches, etc.), the defense made an oral motion for the Court to recuse itself based on those grounds. Defense counsel stated that the Court's tone toward the defense was different than that used with the State and that the Court was being helpful to the State with suggestions during the trial, essentially acting as an additional prosecutor. Ultimately, the defense withdrew its motion, and the trial court continued to preside over the trial.

In the argument section of his brief, Petitioner declined to provide any citations to either the trial transcript or the post-conviction transcript in support of his assertion that trial counsel should have pursued his effort to have the trial court recuse itself. This is not surprising in light of Petitioner's post-conviction counsel's inability, in answering direct

questions from the trial court at the post-conviction hearing, to specify any example of the trial court's "tone" or actions detrimental to Petitioner which were done in the presence of the jury. At the post-conviction hearing, the following transpired between the trial court and Petitioner's attorney:

THE COURT: So I'm just kind of wondering, can you cite one instance in the record where these arguments or this tone of mine were in the presence of the jury?

[POST-CONVICTION COUNSEL]: Your Honor, I don't cite specific instances because it's impossible. The record obviously doesn't reflect those things. It just reflects that there was an exchange, an objection and a ruling, or some type of debate. Sometimes it happened at the bench, sometimes not.

THE COURT: Right.

[POST-CONVICTION COUNSEL]: I mean, I can tell that from the record. I know that there were dozens of exchanges that were not at the bench throughout the course of the trial, and what I can't speak to is, you know, what the tone was, obviously, at each of those interactions. I know that [PETITIONER'S] you know, is that that's the overall sense of the trial, and I think that trial counsel's argument to the Court was not specific on the recusal either as to some specific instances.

THE COURT: But that was, in fact, outside the presence of the jury, no question?

[POST-CONVICTION COUNSEL]: Oh, absolutely. That was at a jury-out hearing, no question.

Petitioner failed to show deficient performance by trial counsel and also failed to show prejudice, even if trial counsel had rendered deficient performance.

(5) Trial counsel were ineffective for failing to object and seek a mistrial when the State suggested in closing argument that the jury return a guilty verdict as a birthday gift to the victim's son, [] and by drawing the jury's attention back to his outburst at the trial.

We have carefully reviewed the portion of the State's closing argument at trial quoted in Petitioner's brief and submitted in support of this argument. The prosecutor did not explicitly state that the jury should "return a guilty verdict as a birthday gift to the victim's son." The prosecutor stated that he had anticipated giving his closing argument on the immediately preceding day, which was the 21st birthday of the victim's older son. The prosecutor expressed his opinion of how "fitting" it would be for this son to obtain "closure" on his 21st birthday. The prosecutor described as "ridiculous," Petitioner's testimony regarding how the victim had died and why and how Petitioner stated he transported her body and ultimately buried her body. The prosecutor linked this to the older son by saying that the son did not expect to hear such a ridiculous story. It was during that trial testimony by Petitioner when the victim's two sons interrupted the trial in an angry outburst described above. However, the prosecutor did not mention the outburst.

Petitioner supports his argument that trial counsel should have objected to this line of argument and sought a mistrial because the prosecutor committed prosecutorial misconduct. The State acknowledges that the prosecutor's argument was "dramatic and arguably improper," but asserts that Petitioner failed to show either deficient performance in failing to object and seek a mistrial, or prejudice in failing to do so. We agree with the State. Petitioner has failed to show how he was prejudiced by the remarks. The prosecutor did not specifically ask the jury to base its decision on any improper basis.

Petitioner is not entitled to relief in this appeal upon any of his claims of ineffective assistance of counsel.

Prosecutorial Misconduct

Petitioner argues that he is entitled to post-conviction relief due to multiple acts of prosecutorial misconduct. The examples of prosecutorial misconduct cited by Petitioner are three of the actions of the State which Petitioner also asserts in this case should have been objected to by trial counsel and/or trial counsel should have used as a basis for a request for a mistrial. We agree with the State's argument that Petitioner "has waived his freestanding due process claims by failing to present them on direct appeal."

There was nothing that prevented Petitioner or his trial counsel from raising the due process claims regarding prosecutorial misconduct during the trial and on direct appeal of the convictions. Tennessee Code Annotated section 40-30-106(g) provides as follows:

- (g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:
 - (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or
 - (2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

These freestanding claims of prosecutorial misconduct are therefore waived in this post-conviction proceeding.

In conclusion, we affirm the judgment of the trial court's dismissing the petition for post-conviction relief.

THOMAS T. WOODALL, JUDGE