IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1995 SESSION

FILED

December 19, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

JESSIE LAFRANTZ JACKSON,	)	
	)	**C.C.A. NO. 01-C-01-9412-CR-00427**
Appellant,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. ANN LACY JOHNS,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-Conviction)

FOR THE APPELLANT:

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(On Appeal)

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(At Hearing)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

At his trial, the defendant was convicted by a jury of first-degree murder and sentenced to life imprisonment. He was found not guilty of a second charge of receiving stolen property. The defendant timely filed a notice of appeal which he later dismissed. He then filed a petition for post-conviction relief which was denied after a hearing. He is appealing from that decision and alleging that the lower court erred in three respects:

1. by denying his claim of ineffective assistance of counsel;
2. by finding that there was sufficient evidence of premeditation and deliberation to support his conviction of first-degree murder; and
3. by refusing to reopen the proof to hear evidence from a witness not present at the defendant's trial.

We find that the lower court did not err as claimed by the defendant and affirm the denial of the defendant's petition for post-conviction relief.

FACTS

On February 2, 1986, Sharon Bryant and her boyfriend, the victim James Crawley, hosted a party at the apartment they shared at the University Court housing project in Nashville, Tennessee. The purpose of the party was to raise money via a card game called "Tonk." The victim needed the money for car repairs. Numerous people had been invited to the party, including the defendant, who was a friend of the victim.

The party was already in progress when the defendant arrived with the victim at some time between 9:00 and 10:45 p.m. After arriving, the defendant alternated between playing cards and going upstairs with the victim. Ms. Bryant testified that she

had heard arguing the last time the defendant was upstairs with the victim, and that she had told them to come back downstairs. When they did, the defendant resumed playing cards. Bryant also testified that the defendant and the victim had both been "high." The defendant denied that he had been arguing with the victim.

After the defendant had resumed playing cards, three more male guests arrived and wanted to play dice. The victim then left, telling Bryant that he was going to get some dice. He also told her, "I have the money to get my car fixed," and patted one of his pockets. The defendant testified that the real reason the victim left was to sell some cocaine. Bryant testified that if the victim had had the money, it had come from some source other than the card game.[1] Shortly thereafter, the defendant asked Bryant where the victim had gone. She told him that he had gone to get some dice. The defendant then left, leaving some money on the card table. A few minutes later, the victim's cousin came by and told Bryant that her boyfriend had been shot.

The victim's body was lying in front of a long, rectangular apartment building in University Court. The building was located on a corner, with its long side facing one street and running parallel with it ("A Street"), and running perpendicular to the intersecting street ("B Street").[2] The victim had been shot in front of the far end of the building, looking down A Street from the corner. This building was several buildings away from the one in which Bryant's apartment was located. There was testimony that the area where the victim was shot was known for quick and numerous drug transactions. There was a streetlight nearby.

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[1]After the victim had been taken to the hospital, his clothing was searched and twenty-five dollars ($25) cash was found. Bryant testified that the victim had needed one hundred dollars ($100) for the car repairs.

[2]The actual names of the streets were not discernable from the record. These arbitrary names are designated in an effort to lend clarity to the description of the murder scene.

Bryant testified that on arriving at the place where her boyfriend was lying, she had seen the victim's aunt, Freddie Davis, Jonathan Hughes and "another guy" there. Then numerous other people arrived. She testified that the defendant had arrived at about the same time as the ambulance. At that point, she testified, the defendant had tried to comfort her. She further testified that she had spoken with the defendant after she got back from the hospital and that he had mumbled something that she had thought was, "I didn't mean to do it." She testified that when she had questioned him about this, he said, "They didn't have to do it. They didn't have to kill him. He was too little to get shot. They could have beat him up." She testified that she had then asked him who did it, and he had replied, "They said, Frankenberry did it" and "you know they got into an argument," to which she had replied, "I heard." Bryant also testified that later in the evening she had asked the defendant if the victim had been killed over drugs or money and that he had replied, "No, [it] wasn't about drugs and it wasn't about any money." She had then asked what it was about and he replied, "I'm too upset. I can't talk. I'll come back tomorrow and tell you." Bryant testified that the defendant had not later explained why the victim had been shot, but did deny shooting him.

Jonathan Hughes testified that he had been sitting on a car parked along B Street when he saw the victim walking down the sidewalk. Hughes testified that the defendant had been walking down the street behind the victim, telling him to "Come here and let me holler at you for a minute." Hughes testified that the victim had responded that he didn't have time, he was looking for his money. According to Hughes, the defendant had continued to follow the victim. Paul Ray Jones, Hughes' cousin, testified that he had been with Hughes and had also seen the defendant and the victim walking down the street.

Hughes testified that Jones had then told him that his girlfriend, Melissa Gooch, wanted to talk to him. At this, Hughes had started down B Street to meet his girlfriend, walking on the opposite sidewalk and somewhat behind the victim and the defendant, but going in the same direction. A short distance later, where B Street intersected A Street, Hughes testified that he and his girlfriend had turned left while the defendant and the victim turned right. He further testified that he and Gooch had then heard two shots, at which they had turned around, looked up A Street, and saw the defendant fire two shots at the victim. Hughes testified that he had then seen the defendant bend down, roll the victim over, and run around the far corner of the building. Hughes testified that he had then gone to where the victim was lying, arriving there after ten or fifteen others had.

Two other witnesses testified that they had seen the defendant running at some distance from the body, but in a direction away from the body, and that he had been trying to hide his face behind his jacket. These sightings were immediately after the shooting, at about 12:30 a.m. The defendant denied taking any such actions.

Melissa Gooch was not called to testify by either the defendant or the State.

The defendant denied shooting the victim. He testified that he and the victim had not had an argument that night and that the victim was trying to sell some cocaine. He testified that he had brought a small amount of cocaine to the party as a gift to the host and hostess, but that the victim had wanted to add it to some cocaine he already had and sell the entire amount to a third party. The defendant testified that he had been agreeable to this so long as the victim repaid him a previous ten dollar ($10)

loan out of the proceeds. The victim was reluctant to do this because he needed the money for his car.

The defendant testified that he had left the party because two of the three newcomers had "appeared to be gangster[s]," so he had gone to his pickup truck to get his pistol for protection.[3] On the way back to the apartment from his truck, the defendant testified, he had met the same three men who then told him that the victim had been shot. At that point, the defendant testified, he had walked down to the murder scene, hiding his pistol under a fence on the way. The defendant denied that he had been on the street where Hughes claimed to have seen him.

Freddie Davis testified that he had been walking from his mother's apartment to his sister's apartment when he saw the victim and someone else he couldn't identify walk up to a brown and beige car on A Street. Davis testified that "they was talking for a minute and then the next thing I know the dude just come out of his car and just started shooting." Davis testified that he had then run to his sister's apartment to tell her, and had then gone down to where the victim was lying. The angle of Mr. Davis' view was approximately perpendicular to that of Hughes but, from a review of the exhibits, the jury could reasonably have concluded that the distance of each witness from the scene of the shooting was roughly about the same. Davis testified that the car had taken off and that he was with the victim when he died. Davis also testified that "everybody [had been] saying that Frankenberry had shot" the victim. Davis reported this information to the police, who then put a "pick-up" out on the vehicle. Detective Wynn testified that they had investigated a car that matched the description given and had tried to develop information on a Frankenberry, but that they had not come up with any other indication

[3]The pistol that the defendant had and which was recovered by the police during a consensual search was not the murder weapon.

that Frankenberry had been involved, and had not tied the vehicle to the crime.

Davis also testified that he had not seen Jonathan Hughes at the scene and that the other person who had been with the victim when he was shot had run off. Davis testified that this person had been wearing blue jeans and a gray jacket. The defendant had been wearing red pants on the night in question. Davis admitted on cross-examination that he had drunk two to four half-pints that night prior to the shooting.

The victim had been shot with a .25 caliber gun and three .25 caliber bullets were recovered from his body. The murder weapon was never found. However, John Crawford testified that he had seen the defendant pull a pistol out from under a car seat nine to ten months before the shooting and that, although he could only see a portion of the pistol because the defendant had had it "cuffed up," he thought it was a .25 caliber pistol. Terry Merrill testified that, after the shooting, he had seen the defendant retrieve a gun from under a fence between two buildings and put it in his pants. The defendant testified that this had been the .22 caliber pistol that he had hidden after learning of the victim's death. The defendant testified that he had never had a .25 caliber gun.

PROCEDURAL HISTORY

The jury trial of this matter began on Wednesday, March 11, 1987, before the Hon. A. A. Birch. On Monday, March 16, 1987, the jury pronounced the defendant guilty of murder in the first degree. The defendant was sentenced to life imprisonment. The jury found the defendant not guilty of the second charge of concealing stolen property.

On April 15, 1987, the defendant's new counsel filed a motion for new trial alleging that "the evidence introduced at the trial is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt." This motion for new trial was overruled after a hearing.

The defendant next filed his Notice of Appeal on August 25, 1987. This appeal was dismissed in May 1988 "at the request of the [defendant] and his counsel."

On March 29, 1989, the defendant filed his Petition for Post Conviction Relief, claiming ineffective assistance of counsel. The Hon. Ann Lacy Johns was designated to hear the post-conviction petition.

On July 26, 1990, Judge Johns heard a portion of the proof concerning the defendant's ineffective assistance of counsel claim. Specifically, the defendant's trial counsel, Doug Love, testified about his representation of the defendant in preparation for and at trial. The evidentiary hearing was then continued to a later date.

On February 19, 1991, the defendant filed an "Amendment to Petition for Post Conviction Relief." The stated purpose of this amendment was to "clarify and amplify upon the contention that ineffective assistance of counsel was provided." No additional grounds for relief were asserted.

On May 30, 1991, the lower court heard additional evidence on the post-conviction petition and then took the petition under advisement.[4]

[4]The record contains minutes indicating that the defendant's post-conviction petition was dismissed by the lower court on February 28, 1991, apparently because of the defendant's counsel's failure to appear. However, the lower court subsequently heard additional proof in the continued evidentiary hearing and later issued an order denying relief.

On January 26, 1993, approximately one and one-half years later, but before the lower court had issued its order denying the defendant's petition, the defendant filed his Amended Petition for Post Conviction Relief. In this pleading, the defendant added as a ground for relief that his conviction was "unconstitutional and otherwise . . . void under state law" because the State had failed to carry its burden of proving both premeditation and deliberation sufficient to support a finding of first-degree murder. Accordingly, the defendant alleged, his conviction must be reduced to second-degree murder. The defendant also alleged in this pleading that the jury instructions regarding the elements of premeditation and deliberation were constitutionally infirm. The State opposed the defendant's Amended Petition on the merits.

On July 28, 1994, the lower court entered an order denying post- conviction relief. With respect to the defendant's claim of insufficient evidence of premeditation and deliberation, the order states, "this Court's review of the evidence presented at trial fully supports the jury's finding of premeditation and deliberation." The lower court further found that the jury instructions were "a correct recitation of the law as it existed at the time of Petitioner's trial." As to the defendant's claim of ineffective assistance of counsel, the lower court found "as a matter of law that any arguable deficiency on the part of Mr. Love would not have resulted in a different outcome in this case [sic]. The Court affirmatively finds that Petitioner was well represented by Mr. Love, who[se] services were within the range of competence demanded of attorneys in criminal cases." Accordingly, the lower court denied the defendant's petition.

On August 8, 1994, the defendant filed his Notice of Appeal with regard to the lower court's denial of his Petition for Post Conviction Relief. On the same date, he

filed a "Motion for Hearing in Nature of Motion for New Trial," alleging newly discovered evidence requiring an evidentiary hearing and a reopening of the proof. The newly discovered evidence consisted of Melissa Gooch, described in this pleading as a "missing" witness. No affidavit from this witness was filed. The lower court summarily denied this motion on August 15, 1994.

We first address the defendant's contention that the lower court erred by refusing to reopen the proof to allow testimony by a witness not present at the defendant's trial.

In support of his effort to reopen the proof in this matter more than seven years after the jury verdict was delivered, the defendant filed a pleading styled "Motion for Hearing in Nature of Motion for New Trial." In this motion, the defendant claimed that a "missing witness, Melissa Gooch, [who] has only recently been found in this case" would testify that, contrary to Hughes' testimony, she was not with him on the night the victim was shot. No affidavit was filed in support of this motion. Hughes had testified as to this witness' name at the defendant's trial.

Not surprisingly, the defendant cites no authority supporting the efficacy of such a novel pleading. The defendant did timely file a motion for new trial, which was denied after a hearing. The defendant does not get two bites at this particular apple.

Construing the pleading as a writ of error coram nobis does not assist the defendant, either. First, it is not timely filed. T.C.A. § 27-7-103 provides "[t]he writ of error coram nobis may be had within one (1) year after the judgment becomes final." The defendant's pleading was filed more than seven years after his conviction and more

than six years after he dismissed his appeal. Moreover, even if the filing were timely, the defendant has failed to satisfy the requirements of the writ:

> A petition for the writ of error coram nobis in a criminal case, which seeks relief on the ground of subsequently or newly discovered evidence, should recite: (a) the grounds and the nature of the newly discovered evidence, (b) why the admissibility of the newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial, (c) the petitioner "was without fault in failing to present" the newly discovered evidence at the appropriate time, and (d) the relief sought by the petitioner. Affidavits should be filed in support of the petition either as exhibits or attachments to the petition or at some point in time prior to the hearing.

Teague v. State, 772 S.W.2d 915, 921 (Tenn. Crim. App. 1988) (citations omitted) (emphasis added). No affidavit from Melissa Gooch was ever filed in this matter. Moreover, there is no satisfactory reason given for the defendant's failure to locate this witness years ago. Nor is there an adequate explanation of why Ms. Gooch's testimony may have resulted in an acquittal. Since all the defendant tells us about Gooch is that she denies having been with Hughes at the time of the shooting, she is in no position to contradict what he claims to have seen. Her proposed testimony would serve merely to impeach Hughes' memory about having seen her that night. This type of rebuttal evidence does not lead to the conclusion that the jury would have decided the case differently had it heard Gooch testify. Finally, "[t]he decision to grant or deny a petition for the writ of error coram nobis on the ground of subsequently or newly discovered evidence rests within the sound discretion of the trial court." Teague, 772 S.W.2d at 921. Even if the pleading is properly considered a writ of error coram nobis, there has been no abuse of discretion shown.

The defendant argues that, notwithstanding his failure to conform to any of the relevant procedural requirements for setting aside the jury's verdict on the basis

of newly discovered evidence, due process entitles him to a new trial. What the defendant apparently fails to recognize is that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citation omitted) (emphasis added). This defendant has had no less than two opportunities to be heard on this matter: his motion for a new trial and his petition for post-conviction relief which included two amendments and evidence heard on two occasions. The defendant will not now be heard to complain that he has not had the opportunity to be heard on the issue of newly discovered evidence, particularly when the "missing" witness' name was adduced at trial. We find this issue to be without merit.

We next address the defendant's complaint that there was insufficient evidence of the elements of premeditation and deliberation to convict him of first-degree murder, and that his conviction should therefore be reduced to second-degree murder. The State argues that the defendant has waived this objection because he did not pursue it in his direct appeal. The defendant argues that the State cannot assert waiver against him because the State did not argue waiver in opposition to the defendant's amended petition and is therefore precluded from doing so now.

When the defendant sought to amend his post-conviction petition so as to raise the sufficiency of the evidence and jury instruction issues, the State argued against the amendment on the merits. The State did not then allege that the defendant had waived these issues when he dismissed his direct appeal. Rather, the State is now raising this waiver argument for the first time on appeal. Because the post-conviction court did not have the opportunity to determine this waiver issue, this Court is precluded from considering it. See, e.g., Lawrence v. Stanford, 655 S.W.2d

927, 929 (Tenn. 1983) ("It has long been the general rule that questions not raised in the trial court will not be entertained on appeal . . . .")

Given that the State's waiver argument is ineffective for the purposes of this appeal, it is appropriate to consider the defendant's insufficiency of evidence argument in this post-conviction proceeding. Slate v. State, No. 03C01-9201-CR-00014, Sevier County (Tenn. Crim. App. filed April 27, 1994, at Knoxville) ("a conviction based upon insufficient evidence violates due process, is constitutionally void and may be attacked in a post-conviction proceeding unless it has been waived or previously determined." Slip op. at 11).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

To support a conviction for first-degree murder, the State must prove the elements of premeditation and deliberation beyond a reasonable doubt. State v. Brown, 836 S.W.2d 530 (Tenn. 1992). These two elements are different and each must be supported by adequate proof. Id. While thoroughly analyzing these two elements, our Supreme Court has said:

It is not easy to give a meaningful definition of the words 'premedi-

> tate' and 'deliberate' as they are used in connection with first-degree murder. Perhaps the best that can be said of 'deliberation' is that it requires a cool mind that is capable of reflection, and of 'premeditation' that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing.

Brown, 836 S.W.2d at 541 (quoting 2 W. LaFave and A. Scott, Substantive Criminal Law § 7.7 (1986) with approval). Proof of these two elements may be established by circumstantial evidence.

The State adduced testimony at trial that a short time before the victim was shot, he had had an argument with the defendant; that the defendant had brought some cocaine to the party with the intent of supplying it to the victim; that the victim owed the defendant some money; that the victim was reluctant to repay this money on the night he was shot; that some period of time passed between the argument and the shooting during which the defendant resumed playing a card game; and that the defendant followed the victim for some distance and had further conversation with the victim before the shooting occurred. The jury could have reasonably and legitimately inferred from this evidence that the defendant, after arguing with the victim and realizing that his debt was not going to be paid that night, developed the intent to kill the victim. The jury could also have reasonably and legitimately inferred from the defendant's conduct in returning to the card game, following the victim and attempting to speak with him again, that any passion ignited during the argument had cooled off, that the defendant had had a "cool mind" that was capable of reflecting on his intent to kill the victim, and that the defendant did in fact reflect prior to shooting the victim. There was no evidence adduced at trial that the defendant and the victim were arguing or fighting immediately prior to the shooting.

The evidence in this case was sufficient to establish the elements of

premeditation and deliberation necessary to the conviction of first-degree murder. This issue is without merit.

In conjunction with his argument that there was insufficient evidence of premeditation and deliberation, the defendant complains that the trial court's jury instruction on these elements was constitutionally infirm. In support of his position, the defendant relies on our Supreme Court's conclusion that it would be "prudent to abandon an instruction that tells the jury that 'premeditation may be formed in an instant.' " Brown, 836 S.W.2d at 543. Because the jury charge in the defendant's trial contained this language, he argues that the jury was disabled from properly determining that he possessed the requisite state of mind.

As this Court has repeatedly held, Brown did not announce a new constitutional principle requiring retroactive application of the preferred jury instruction. See, e.g., Lofton v. State, 898 S.W.2d 246, 250 (Tenn. Crim. App. 1994). Accordingly, we agree with the lower court that the jury instruction given in this case was "a correct recitation of the law as it existed at the time of Petitioner's trial," and that the defendant is not thereby entitled to have his conviction reduced to second degree murder. This issue is without merit.

Finally, we will address the defendant's contention that he was denied effective assistance of counsel at his trial. Specifically, the defendant alleges that his trial counsel was ineffective because he failed to interview several witnesses prior to the trial; he waived the defendant's preliminary hearing; he failed to file a request for discovery and inspection; he failed to discover one of the investigating officer's reports containing information about another suspect; he made no request for Jencks material after the

State's witnesses testified; he failed to properly prepare the defendant for his testimony; and he conducted ineffective cross-examinations at trial.

The lower court conducted a bifurcated evidentiary hearing on the defendant's claim on two different days separated by approximately ten months. On the first day, the State offered the testimony of Mr. Douglas Love, the defendant's trial counsel. On the subsequent hearing day, the defendant offered testimony from Mr. Love; Detective Terry McElroy; Jonathan Hughes; Sharon Bryant; Ethel Robertson; and himself.

Mr. Love testified that he had been licensed to practice in the State of Tennessee in 1979 and that he had been practicing primarily criminal law in this state since that time. The defendant hired Mr. Love to represent him in the trial of this matter. Mr. Love testified that he had met with the defendant in his office "at least a half a dozen" times, discussing matters for fifteen to thirty minutes on each occasion. Mr. Love also went out with the defendant to University Court at least twice where Mr. Love viewed the relevant area and drew two diagrams. The defendant told Mr. Love the names of several witnesses, which Mr. Love wrote down, including Freddie Davis and Sharon Bryant. Although the record is clear that Mr. Love spoke with Davis prior to the trial, it is unclear whether he spoke with Bryant. Mr. Love also testified that he and the defendant had discussed the defendant's own testimony and the nature of anticipated cross-examination, although they did not go through a "formal rehearsal." Mr. Love testified that he had felt adequately prepared when they went to trial.

Mr. Love explained that he had not filed a request for discovery and inspection because he had discussed the case with the State's attorney at least twice and had had an opportunity to review the State's file which, apparently, contained transcripts

of the statements made to the police by Hughes, Bryant, Mark Crawford and Bryant's sister. Although he admitted that he had not spoken with Hughes prior to the trial, he testified that he felt that he had gotten what information he needed about Hughes' anticipated testimony from the State.

Although Mr. Love could not remember specifically why the preliminary hearing was not had in this matter, he testified that he assumed it had been waived to get a favorable bond reduction, and that he thought there were ways other than a preliminary hearing to "get the information necessary to try a case." There is no proof in the record that Mr. Love would have obtained information at the preliminary hearing that he could have used to the defendant's advantage at trial.

To succeed on a claim of ineffective assistance of counsel, the defendant must prove two things: first, that his lawyer's performance was deficient and second, that his lawyer's deficient performance adversely affected the defense. That is, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 697, 694, 104 (1984).

In a post-conviction proceeding, the defendant has the burden of proving his allegations by a preponderance of the evidence. On appeal of a post-conviction petition, the trial court's findings are conclusive and will not be disturbed unless the evidence in the record preponderates against them. Taylor v. State, 875 S.W.2d 684 (Tenn. Crim. App. 1993). In the lower court's order denying the defendant's petition for post-conviction relief, the court "accredit[ed] the testimony of Mr. Love that he was adequately prepared for trial

and that he fully investigated the matter prior to trial" and that "[the curing of] any arguable deficiency on the part of Mr. Love would not have resulted in a different outcome in this case."

The main thrust of the defendant's complaints about his trial counsel is that Mr. Love did not adequately investigate the case prior to trial. The defendant's argument appears to be that, had Mr. Love interviewed all of the potential witnesses prior to trial, he would have either discovered (1) how to destroy Hughes' credibility and/or (2) the real killer. However, there was not a shred of evidence introduced on either day of the bifurcated post-petition hearing that, had he interviewed Hughes prior to the trial, Mr. Love would have discovered information that he could have used effectively against Hughes at the trial. The only impeachment "evidence" ever attempted to be put before the lower court came in the form of an unsubstantiated pleading filed after the court had already ruled on the defendant's petition. This pleading stated only that Melissa Gooch, the woman that Hughes testified had been with him at the time of the shooting, denied having been with Hughes at the time. Although such testimony might have affected Hughes' credibility in some minimum way, it in no way rises to the level of contradicting what Hughes claims to have seen. On the basis of the record before this Court, it is asking too much that we draw the inference that the jury would not have believed Hughes at all had Melissa Gooch testified. "It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness's testimony might have been if introduced by defense counsel." Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).

Even if, arguendo, Mr. Love was negligent in failing to interview Hughes and Gooch prior to trial, the defendant has not carried his burden of proving that this

"negligence" prejudiced him.

> [I]f a petitioner is able to establish that defense counsel was deficient in the investigation of the facts or calling a known witness, the petitioner is not entitled to relief from his conviction on this ground unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called. Otherwise, the petitioner fails to establish the prejudice requirement mandated by Strickland v. Washington.

Black, 794 S.W.2d at 757-58 (footnote omitted) (emphasis added). Melissa Gooch was never effectively produced, nor has there been any showing on the record of favorable testimony that would have been elicited had Mr. Love been more diligent.[5] See also Cone v. State, 747 S.W.2d 353, 356 (Tenn. Crim. App. 1987) (Where there was no showing that the State's witness would have testified differently had the defendant's lawyer talked with her before trial or that his failure to interview her prejudiced the defendant in any way, there was no ineffective assistance of counsel.)

Simply put, the case against the defendant hinged on whether the jury chose to believe Hughes' account of who shot the victim (which was bolstered by two witnesses who claimed to have seen the defendant running from the scene), or the defendant's and Davis' accounts. Mr. Love was effective in presenting the defendant and

[5]This is not to imply that Mr. Love should have been more diligent.

Davis' version of the facts surrounding the shooting. In order to have presented a more effective defense, Mr. Love would have had to have countered Hughes' testimony through either effective impeachment or through introduction of additional proof that there was a more likely suspect. As set forth above, there is no cognizable proof in the record of any impeaching material. As to the more likely suspect, the investigating officers testified that they had been unable to tie either the described vehicle or Mr. Wayne "Frankenberry" Curry to the crime. When the police failed to apprehend another suspect, it did not become Mr. Love's responsibility to do so.

With respect to the defendant's claim that Mr. Love did a poor job of cross-examining the State's witnesses, "there has been absolutely no evidence introduced that the petitioner was prejudiced by inadequate cross-examination, and cross-examination is a strategic and tactical decision of trial counsel, which is not to be measured by hindsight." State v. Kerley, 820 S.W.2d 753, 756 (Tenn. Crim. App. 1991). The defendant has not proved ineffective assistance of counsel on this basis.

In summary, even if the defendant has shown that his trial counsel made errors both before and during his trial in satisfaction of the first prong of the Strickland test, he has failed to carry his burden of proving that the outcome of the trial would probably have been different but for those errors. Thus, we find that the defendant's ineffective assistance of counsel claim is without merit, and affirm the decision of the lower court.

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JOHN H. PEAY, Judge

CONCUR:

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PAUL G. SUMMERS, Judge

_____
DAVID H. WELLES, Judge