

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs November 5, 2019

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Appellate Courts

GERALD MCEWEN v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 07-00466 Paula L. Skahan, Judge

No. W2019-00560-CCA-R3-PC

The Petitioner, Gerald McEwen, appeals the Shelby County Criminal Court's denial of post-conviction relief from his convictions for first degree premeditated murder and attempted first degree murder, for which he received an effective sentence of life without parole. In this appeal, the Petitioner argues that trial counsel was ineffective in failing to adequately cross-examine an eyewitness and in failing to formally move for a mistrial following alleged improper conduct by the prosecutrix.¹ Upon review, we affirm the judgment of the post-conviction court.

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

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, P.J., and ROBERT L. HOLLOWAY, JR., J., joined.

Josie S. Holland, Memphis, Tennessee, for the Petitioner, Gerald McEwen.

Herbert H. Slatery III, Attorney General and Reporter; Samantha L. Simpson, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Jennifer Nichols and Betsy Carnesale Wiseman, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

This case stems from a 2004 shooting in a parking lot nearby a nightclub in Memphis, Tennessee, which resulted in the death of victim, Nicholas Harris, and serious bodily injury to victim, Darren Champion. Harris was shot in the neck and paralyzed from the neck down. He was moved to a nursing home where he remained until July 22,

¹ The Petitioner raised several other issues in his petition for post-conviction relief and before the post-conviction court. Because these are the only issues raised on appeal, the remaining issues are waived.

2005, when he passed away. Champion eventually recovered from his injuries. Two eyewitnesses, Ladarius Weathersby and Robert Wordlow, identified the Petitioner at trial as the perpetrator of the offenses. The Petitioner was indicted, his case proceeded to trial, and he was convicted as charged. State v. Gerald McEwen, No. W2009-00309-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 841, at *1 (Jackson, Sept. 24, 2010) (Gerald McEwen I) no perm. app. filed. His conviction was affirmed by this court on appeal. Id. Following a successful petition for post-conviction relief alleging that counsel was ineffective in failing to secure an alibi witness, the Petitioner received a new trial.² At the Petitioner's second trial, he was again convicted as charged. State v. Gerald McEwen, No. W2013-02692-CCA-R3-CD, 2015 WL 1932322, at *1, (Tenn. Crim. App. April 29, 2015) (Gerald McEwen II) no perm. app. filed.

In his direct appeal, the Petitioner argued that the evidence was insufficient to support his convictions. As relevant here, the Petitioner claimed that the testimony of Weathersby, one of the eyewitnesses to the shooting, was "shaky" and that he had "every motive to lie regarding [his] actions . . . to deflect the suspicion onto someone else[.]" particularly in light of the Petitioner's alibi. He further claimed that the testimony of his expert in eyewitness identification, Dr. Jeffrey Neuschatz, was more reliable. The Petitioner also argued that the trial court erred in denying his motion for a mistrial. Similar to the issues raised herein, the Petitioner specifically argued that the State's attempt to impeach him by questioning his failure to inform the police of his alibi violated his right to a fair trial under the Fourteenth Amendment of the United States Constitution.

In affirming his convictions, this court concluded that the Petitioner was essentially challenging the credibility of the eyewitness, which was in the province of the jury, not this court. Gerald McEwen II, 2015 WL 1932322, at * 9-10. In regard to the trial court's failure to grant a mistrial, this court concluded as follows:

Initially, we note that the State correctly asserts that the [Petitioner] did not move for a mistrial. In response to the State's questions, the [Petitioner's] counsel objected and said that the State's questioning might force him to request a mistrial; however, such a request was never made. Instead of requesting a mistrial, defense counsel asked for a curative instruction. The trial court sustained the objection and gave the curative instruction. See State v. Thomas Lee Hutchison, No. E2012-02671-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 346, at *98-99, 2014 WL 1423240 (Knoxville, Apr. 11, 2014), perm. to appeal granted, (Tenn., Oct. 20, 2014). The

² The State did not appeal the post-conviction court's determination that the Petitioner was entitled to a new trial.

[Petitioner] appeared to be satisfied with the instruction. Therefore, we conclude that the appellant has waived this issue. See Tenn. R. App. P. 36(a).

Nevertheless, we note that the trial court's statements indicated that the State's line of questioning deserved admonishment and a curative instruction but did not warrant a mistrial. We agree and conclude that the trial court did not abuse its discretion by giving a curative instruction, not granting a mistrial.

Gerald McEwen II, 2015 WL 1932322, at *12.

Because the Petitioner argues in this appeal that trial counsel was ineffective in failing to adequately cross-examine Ladarius Weathersby, one of the two eyewitnesses to the shooting, it is necessary to recount the following facts as outlined by this court in Gerald McEwen II to place this issue in context.

Ladarius Weathersby testified that in 2004, he was eighteen years old, he lived in the Frayser area, and he was friends with Darren Champion, Corry Selmon, Christopher Williams, Robert Wordlow, and Kevin Swannigan. Around 9:00 or 10:00 p.m. on June 12, 2004, Weathersby, who was in a black, four-door Maxima, drove Wordlow and Swannigan to Club Flippers, which was located on Hollywood Street. Weathersby did not want to go in the club, so he went to his girlfriend's house.

Later that night, Wordlow called Weathersby and asked for a ride home. Weathersby agreed and drove to the club. However, because there were fights in the parking lot, security and police officers would not let him enter the lot, and he parked in First Tennessee Bank's lot across the street. Weathersby's car was the first one in the exit lane so that he could easily turn onto the street. After he parked, he called and informed Wordlow of his location.

Weathersby saw Wordlow and Swannigan exit the club and walk across the street to the bank. When they reached the bank's parking lot, Swannigan got into the backseat of Weathersby's car, and Wordlow began talking loudly to someone who was standing approximately three cars behind Weathersby. The windows of Weathersby's car were up, and he could not hear what was said. A few seconds later, Weathersby heard a gunshot. He looked behind him and saw the shooter, whom he identified in court as the [Petitioner] repeatedly firing toward the Mapco gasoline station located

beside the bank. At the time of the shooting, Weathersby did not know the [Petitioner's] name. Weathersby said that after the third or fourth shot, Wordlow got into Weathersby's car, and they drove away. Weathersby estimated that he heard seven to ten shots.

Weathersby said that he drove Wordlow and Swannigan to Wordlow's mother's house; the men did not talk during the drive. Weathersby did not go directly home but continued to drive to calm his nerves. While he was driving around, a friend called and informed him that Darren Champion, a friend with whom Weathersby attended school, had been shot. Weathersby went to the hospital to check on Champion and learned that he was in critical condition. Thereafter, Weathersby discovered that Champion had recovered. Later, Weathersby saw Champion at school, and they talked about the incident.

Sometime after the shooting, Weathersby asked Wordlow who the shooter was. Wordlow responded that it was "his god brother or his brother, as he called him." Wordlow said that the shooter's nickname was "Q."

In August 2005, the police contacted Weathersby. At that time, he learned that Harris, whom he had not known prior to the incident, had been injured. Upon looking at a photograph lineup, Weathersby immediately identified the [Petitioner] as the shooter, stating that he was certain of the identification. Weathersby told the police that at the time of the shooting, the [Petitioner] was standing near a green Dodge Stratus. Sometime after the shooting, Weathersby learned that on the Saturday prior to the shooting, Wordlow had been "jumped" at a pool party in Raleigh; however, neither Weathersby nor Wordlow knew the identity of the assailant.

On cross-examination, Weathersby said that he left Wordlow and Swannigan at the club around 10:00 p.m. and that Wordlow called around midnight to request a ride home.

Weathersby said that he gave a statement to the police on August 10, 2005. He acknowledged that in his statement, he said that he picked up Wordlow and Swannigan at the club, dropped them off at Mapco, then parked at First Tennessee Bank as Wordlow had instructed. However, at trial Weathersby asserted that he told Wordlow that he could not pick them up at Mapco and that he was already parked at the bank. Weathersby also said that he did not want to go to Mapco because of the fights. Weathersby recalled that Wordlow got into the car after the shooting started. Weathersby said that

although the shooting occurred around midnight, the area was well-lit, and he could see clearly.

Weathersby acknowledged that he spoke with an investigator employed by the [Petitioner] but denied telling the investigator that he was drunk when he spoke with the police or that he would not recognize the shooter if he saw him on the street. Weathersby told the investigator that he did not know anything because he did not want to be involved and did not like talking about the shooting.

Robert Wordlow³ testified that he graduated from high school in 2004 and that he had attended school with Weathersby, Swannigan, Champion, and Selmon. Wordlow knew the [Petitioner], who was older than he, from the neighborhood, and they would sometimes “hang out” together. He did not believe the [Petitioner] knew Weathersby, Swannigan, Champion, Selmon, or Harris. Wordlow did not know Harris until after the shooting.

Wordlow said that sometime between the end of school and the second week in June 2004, he and his friend Mike attended a pool party hosted by a girl named Georgina. After Wordlow arrived, a fist fight began on the street. Wordlow tried to break up the fight because some of the people attending the party, one of whom was Champion, surrounded Mike’s car and tried to pull Mike out of the car. While trying to stop the fight, Wordlow was hit in the head twice. After the altercation, Wordlow got back into Mike’s car, and they left. Wordlow did not recall whether he told the [Petitioner] about the altercation but asserted that the [Petitioner] knew of the incident. After the pool party, Wordlow and Champion exchanged messages via Karen Minor. Wordlow said that he and Champion were not fighting, but “there was a little bit of something going on between” them.

Wordlow said that on June 12, 2004, Weathersby, who was driving a light green car, drove Wordlow and Swannigan to Club Flippers; however, Weathersby did not go inside with them. Wordlow explained that the club was located on Hollywood Street behind a strip mall directly across the street from First Tennessee Bank and Mapco. Wordlow recalled that it was dark and “kind of late” when they arrived at the club. Wordlow saw Champion inside the club, but they did not argue.

³ Robert Wordlow, the second eyewitness to the shooting, did not testify at the Petitioner’s first trial.

Wordlow recalled that the club closed early and that he called Weathersby, who agreed to give them a ride home. When Wordlow exited the club, he saw the [Petitioner] in the club's parking lot. He told the [Petitioner] he was going to the bank's parking lot to "get to the bottom of everything that happened" with Champion at the pool party. The [Petitioner] said that he would go with Wordlow and Swannigan, and they walked across the street. Wordlow gave conflicting statements about where Weathersby was parked. He initially stated that he could not recall, then that Weathersby's car was the first one parked in the exit lane of the bank's parking lot, and finally that Weathersby was parked at Club Flippers. Wordlow also stated that at some point, he, Weathersby, and Swannigan drove to Mapco, but his testimony was unclear as to when.

Wordlow said that Weathersby's car was parked facing the street and that the [Petitioner] was behind them, standing beside a dark green car. Champion was in the bank's parking lot, walking away from the Mapco and toward Wordlow. Wordlow was sitting on the front passenger side window of Weathersby's car, half in and half out of the car. Wordlow heard angry "words being exchanged" between the [Petitioner] and Champion but could not make out what they said. The [Petitioner] then fired a weapon toward Champion. Wordlow could not recall how many shots were fired but knew it was more than three. When the shooting started, Wordlow slid inside the car. Weathersby turned right onto the street and drove Wordlow and Swannigan to Wordlow's mother's house.

Wordlow said that he started getting telephone calls from various people who thought he was the shooter. He told them he was not involved. Wordlow learned that Champion had been shot; however, he did not know about Harris's injuries until later.

Wordlow said that the police did not contact him immediately after the shooting. He said that he did not contact the police because he feared that some type of physical harm would befall him. After the shooting, the [Petitioner] told Wordlow that he shot Champion because Champion "had got smart with him. Something of that nature." Wordlow said that he felt responsible for the shooting because he thought it occurred as a result of his altercation with Champion at the pool party. Wordlow lived with the [Petitioner] for a while after the shooting when Wordlow did not "have anywhere else to go."

Wordlow said that on August 10, 2005, thirteen months after the shooting, he was contacted by the police. Afterward, he went to the police station and gave a statement. He asserted that the statement was truthful and that he did not lie to avoid going to jail. While at the police station, he also looked at a photograph lineup, from which he identified the [Petitioner] as the shooter.

Wordlow acknowledged that “[l]ong after” he gave his statement, he was indicted for facilitation to commit first degree murder. He later pled guilty to the lesser-included offense of attempted aggravated assault and received a two-year sentence. He was granted judicial diversion, which he successfully completed, and the conviction was expunged.

On cross-examination, Wordlow said that he had consistently maintained that the [Petitioner] was the shooter.

....

Wordlow said that after Weathersby picked up him and Swannigan, they first drove to Mapco then, because Wordlow saw Champion in the bank’s parking lot, they drove to First Tennessee. Wordlow rolled down the window on the passenger’s side and sat half in, half out of the car. Wordlow “yelled something over to [the Petitioner,] and he just up and start[ed] shooting.” After the shooting began, Weathersby drove Wordlow home. Wordlow did not contact the police because he feared the [Petitioner] would harm him. He acknowledged that one or two months later, he moved in with the [Petitioner]. He explained, “There was no bad blood between us at that time.”

....

Christopher Williams testified that he graduated from high school in 2004. That summer, he, Selmon, and Harris attended a pool party at Georgina Parker’s house. At the end of the party, an altercation occurred; Williams did not know who was involved in the altercation.

Williams said that one or two weeks after the party, Selmon drove Williams, Mosby, Harris, and Champion in his “silver/gray” Dodge Stratus to Club Flippers. They arrived around 9:00 or 10:00 p.m. and parked at the club. When they left the club, they drove across the street, parked in First Tennessee Bank’s parking lot, and walked to Mapco. Upon leaving the store, they began walking back to Selmon’s car. Williams saw a man

standing behind a green Plymouth Breeze that was parked beside Selmon's car. Williams said that a Plymouth Breeze and a Dodge Stratus looked "[j]ust alike." Williams also saw Weathersby's black Maxima parked on the street. The man standing beside the Plymouth asked, "[A]in't your name Champ," and lifted a handgun. Champion began running toward the gas station, and the man fired one shot. Wordlow, who was in Weathersby's car, said, "[K]eep busting, cuz," and the man continued shooting, firing eight or nine times.

....

Williams said that while he was still at the parking lot, Wordlow called him "out of the blue and said [he] didn't have nothing to do with that." Williams responded, "I know you had something to do with it. Don't call me no more." Williams then hung up on Wordlow.

Gerald McEwen II, 2015 WL 1932322, at * 2-6.

On April 27, 2016, the Petitioner filed a pro se petition for post-conviction relief, he was appointed counsel on May 27, 2016, and an amended petition incorporating the issues raised in the Petitioner's pro se petition was filed on October 27, 2016. The Petitioner alleged inter alia that trial counsel was ineffective in failing to request a mistrial after an alleged improper comment by the prosecutrix. The Petitioner did not explicitly raise the ineffectiveness of counsel in failing to adequately cross-examine Weathersby based on his prior inconsistent statement in either his pro se or amended petition for post-conviction relief. Instead, in the pro se petition, the Petitioner argued that trial counsel was ineffective in failing to challenge certain factual inconsistencies in the testimony of Weathersby, which would have made it impossible for him to identify the Petitioner as the shooter. The pro se petition further alleged that "Wordlow [implicated] the [Petitioner] and Weathersby didn't [implicate] the [Petitioner] until Wordlow requested Weathersby to do so."

On May 30, 2018, the post-conviction court conducted an evidentiary hearing during which trial counsel and a private investigator testified on behalf of the Petitioner. Although the record reflects that the parties intended for the Petitioner to testify at a later hearing, no such hearing transcript is included on appeal. Nevertheless, because the petition does not raise substantial questions of fact as to events in which the Petitioner participated, we do not believe this omission precludes our review. See Tenn. Code Ann. § 40-30-110(a); Donald Ragland v. State, No. W2012-00743-CCA-R3-PC, 2013 WL 967769, at *3 (Tenn. Crim. App. Mar. 8, 2013).

Trial counsel, a veteran criminal defense attorney, did not represent the Petitioner at his first trial. At the time of the Petitioner's second trial, trial counsel had defended roughly 40 murder cases, including capital offenses, and he was very familiar with the two prosecutrix responsible for the Petitioner's trials. He said there was "probably 200 murder trials of experience" between all three attorneys. Trial counsel reviewed the trial transcript from the first trial as part of his trial preparation, which was a "big benefit" because the witnesses were "locked in," and trial counsel knew what they were going to say. Because the Petitioner had an alibi defense in his second trial, trial counsel said the issue was identity.

As part of his investigation, trial counsel hired a private investigator with whom he had previously worked. At some point prior to the second trial, the investigator contacted trial counsel regarding an interview he had with Weathersby, one of the eyewitnesses to the shooting. The investigator advised trial counsel that Weathersby had "recant[ed] his story." Upon hearing this, trial counsel wanted to personally meet with Weathersby. Trial counsel and the investigator then went to Weathersby's home, at which time Weathersby told them, "I don't know who it was. I identified anybody to get out of there." Trial counsel said that within 45 minutes of this conversation, the investigator called him and told him that Weathersby called him back. The investigator told trial counsel that Weathersby told him he was not going to cooperate, he was staying out of it, and that he had lied to them. Trial counsel was aware that the investigator had recorded the recanted statement from Weathersby, which he had previously provided to post-conviction counsel.

Trial counsel confirmed that Weathersby eventually testified against the Petitioner at trial, and that Weathersby identified the Petitioner as the shooter on the night of the offenses. Trial counsel did not use the recorded statement of Weathersby denying that he knew who the shooter was as impeachment at trial. Trial counsel explained his reasoning as follows:

I clearly made an error in judgment. . . . And if I had to do it over again, I would have impeached him. . . . But at the time when I listened to the tape, I came away with the very strong feeling that it sounded like [the investigator] was putting words into [Weathersby's] mouth on the phone. And number one, I didn't think that would play well. And I know the two prosecutors that were prosecuting it, that was not their first trial.

...

So, I knew that if it came across to me that way – and I actually had a colleague come in and listen to it too – and I can just remember her shaking her head saying I wouldn't. And I felt like it would have hurt his chances instead of helped his chances.

Trial counsel described the Petitioner's trial as a "brawl" that was "hotly contested by both sides." He recalled the prosecutrix questioned the Petitioner at trial as to "why [the Petitioner] didn't tell the police about his alibi" prior to trial. Trial counsel requested a sidebar and advised the trial court that he felt that the improper conduct of the prosecutrix was forcing him to request a mistrial. Trial counsel believed he was duty-bound to request a mistrial based on caselaw at the time, but he did not want a mistrial. He thought the defense was winning the case, and a mistrial would have put them in a worse position if they had to retry the case again. [III, 14]. He believed that the trial judge was doing a good job managing the trial and that the aggressiveness of the prosecutrix was playing poorly to the jury. [III, 15]. In hindsight, trial counsel testified that he would have been more aggressive in his representation, but he reiterated that his defensive strategy was a conscious decision not to waste what he considered to be a competitive edge in this case. [III, 28].

The private investigator who recorded Weathersby's recantation also testified at the evidentiary hearing. Although post-conviction counsel played three audio recordings that the investigator had made of his conversations with Weathersby and admitted them as exhibits to the hearing, none of these recordings are included in the record on appeal.

On February 27, 2019, the post-conviction court denied relief by written order. The post-conviction court interpreted the Petitioner's issues as ineffective assistance based on trial counsel's failure to "demonstrate the Petitioner's innocence to the jury" and trial counsel's failure to request a mistrial. After a thorough analysis, the post-conviction court determined that trial counsel had made a "tactical decision not to use [Weathersby's] prior inconsistent statement," which did not fall below reasonable standards. The post-conviction court further found that his decision to request "a curative instruction rather than a mistrial did not fall below the objective standard of reasonableness under prevailing professional norms." It is from this order that the Petitioner timely appeals.

ANALYSIS

On appeal, the Petitioner alleges that trial counsel was ineffective in failing to impeach Weathersby with his prior inconsistent statements denying that he could identify the shooter, and in failing to move for a mistrial when the State improperly referenced the

Petitioner's exercise of his 5th Amendment right to remain silent. In response, the State argues that trial counsel's decisions were tactical in nature and entitled to deference. We agree with the State.

Post-conviction relief is only warranted when a petitioner establishes that his or her conviction is void or voidable because of an abridgement of a constitutional right. T.C.A. § 40-30-103 (2006). The Tennessee Supreme Court has held:

A post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. When reviewing factual issues, the appellate court will not re-weigh or re-evaluate the evidence; moreover, factual questions involving the credibility of witnesses or the weight of their testimony are matters for the trial court to resolve. The appellate court's review of a legal issue, or of a mixed question of law or fact such as a claim of ineffective assistance of counsel, is de novo with no presumption of correctness.

Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006) (internal quotation and citations omitted). "The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence." Id. (citing T.C.A. § 40-30-110(f); Wiley v. State, 183 S.W.3d 317, 325 (Tenn. 2006)). Evidence is considered clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from it. Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998) (citing Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n. 3 (Tenn. 1992)).

Vaughn further repeated well-settled principles applicable to claims of ineffective assistance of counsel:

The right of a person accused of a crime to representation by counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. Both the United States Supreme Court and this Court have recognized that this right to representation encompasses the right to reasonably effective assistance, that is, within the range of competence demanded of attorneys in criminal cases.

Vaughn, 202 S.W.3d at 116 (internal quotations and citations omitted).

In order to prevail on an ineffective assistance of counsel claim, the petitioner must establish that (1) his lawyer's performance was deficient and (2) the deficient performance prejudiced the defense. Id. (citing Strickland v. Washington, 466 U.S. 668,

687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn.1975)). “[A] failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.” Goad v. State, 938 S.W.2d 363, 370 (Tenn.1996) (citing Strickland, 466 U.S. at 697).

We note that “[i]n evaluating an attorney’s performance, a reviewing court must be highly deferential and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” State v. Burns, 6 S.W.3d 453, 462 (Tenn. 1999) (citing Strickland, 466 U.S. at 689). Moreover, “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” Strickland, 466 U.S. at 688-89. However, we note that this “deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.” House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (quoting Goad, 938 S.W.2d at 369).

The Petitioner first argues that trial counsel was ineffective in failing to impeach Weathersby with recordings of his prior inconsistent statements. However, as pointed out by the State, the Petitioner has failed to provide the audio recordings on appeal. Accordingly, this issue is waived. See Tenn. R. App. P. 24. To the extent that the Petitioner presents his ground of relief based on the testimony of trial counsel and his investigator from the post-conviction hearing, we conclude that he is likewise not entitled to relief. The record shows that trial counsel, a veteran criminal defense attorney, engaged in extensive preparation for the Petitioner’s trial. He had reviewed the transcript from the Petitioner’s first trial and knew what the witnesses were going to say. He had also employed the services of a private investigator, who ultimately obtained a recorded recantation from Weathersby. Based on trial counsel’s assessment of Weathersby’s recorded recantation, the investigator was putting words in Weathersby’s mouth. Trial counsel had another attorney listen to the tape who agreed with his assessment. Trial counsel said that this recording would not have played well to the jury. Moreover, after Weathersby testified, trial counsel believed the defense was winning the trial and thought that introducing the tape would have run the risk of strengthening Weathersby’s credibility or “blowing up.” Based on this testimony, we agree with the post-conviction court, and conclude that trial counsel made an informed, strategic decision not to impeach Weathersby with his statement denying that he knew the identity of the shooter in this case.

We also conclude that the Petitioner has failed to show that impeaching Weathersby with his recanted statement would have changed the outcome of the

Petitioner's trial. Significantly, Wordlow, the second eyewitness to the shooting, admitted to his involvement in the offense, and he also identified the Petitioner as the shooter. Accordingly, the Petitioner has failed to carry his burden of establishing that trial counsel rendered deficient performance or prejudice to his case.

Next, the Petitioner argues that trial counsel was ineffective in failing to formally move for a mistrial after the State commented on his exercise of his 5th Amendment right to remain silent. Following the inquiry by the prosecutrix, trial counsel believed that the defense was winning the trial, and he did not want to lose that advantage. Had trial counsel been granted a mistrial, the Petitioner would have been forced to endure a third trial with no promise of a better outcome. Trial counsel said the aggressive posture of the prosecutrix made the State's case appear weak and petty, which he intended to exploit. Trial counsel also thought the curative instruction from the trial court was sufficient to correct the error and highlight the weakness of the State's case. While this strategy was ultimately unsuccessful, the record shows that it was a reasonable and calculated decision. Accordingly, we agree with the post-conviction court, and conclude that the decision of trial counsel to request a curative instruction rather than a mistrial was strategic in nature, and therefore entitled to deference by this court. Because the Petitioner has failed to establish deficient performance or prejudice arising therefrom, he is not entitled to relief on this issue.

CONCLUSION

Based on the above authority and analysis, the judgment of the post-conviction court is affirmed.

CAMILLE R. McMULLEN, JUDGE