

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
FEBRUARY SESSION, 1995

**FILED**

September 5,  
1995

Cecil Crowson, Jr.  
Appellate Court Clerk

**JACK J. SHUTTLE,**

Appellant

vs.

**STATE OF TENNESSEE,**

Appellee

No. 03C01-9410-CR-00358

**SULLIVAN COUNTY**

Hon. **Edgar R. Calhoun**, Judge

(Post-Conviction)

For the Appellant:

**Raymond C. Conkin, Jr.**  
B.P.R. #15429  
152 Broad Street, Suite 207  
Kingsport, TN 37660

For the Appellee:

**Charles W. Burson**  
Attorney General and Reporter

**Ruth A. Thompson**  
Assistant Attorney General  
Criminal Justice Division  
450 James Robertson Parkway  
Nashville, TN 37243-0493

**H. Greeley Wells, Jr.**  
District Attorney General  
Blountville, TN 37617

OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**David G. Hayes**  
Judge

## OPINION

The appellant, Jack J. Shuttle, appeals from an order entered by the Criminal Court for Sullivan County dismissing his petition for post-conviction relief. The appellant raises one issue for our review. Shuttle contends that his conviction for first-degree murder should be reversed because he received the ineffective assistance of counsel, both at trial and on appeal.

After reviewing the record, we affirm the post-conviction court's judgment.

### I. Factual Background

The appellant was convicted of first degree murder for the death of his former girlfriend, Brandi Sims. At the time of this offense, the appellant was 20 years of age and the victim was 15 years of age. The record at trial revealed that the two encountered each other at a local skating rink, at which time a heated argument ensued over the break-up of their relationship. The argument led to a physical altercation between the two, ultimately resulting in the appellant grabbing the victim's throat and choking her to death.

During his initial contact with appointed counsel, the appellant denied committing the murder. As a result, counsel began an investigation in an attempt to discover other potential suspects. Approximately five weeks before trial, the appellant recanted his previous story and admitted to counsel that he committed the murder.<sup>1</sup> He then asked counsel to request a continuance in order to have additional time to prepare a defense. Counsel did not make such a request.

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<sup>1</sup>At the post conviction hearing, the appellant testified that approximately five weeks prior to his trial date, he changed his story admitting he killed the victim; his trial counsel testified that he recalled it being two to three weeks prior to trial.

At trial, the State presented witnesses who testified that in the months prior to Miss Sims' death, they had heard the appellant make numerous threats against Miss Sims' life. One witness quoted the appellant as saying, ". . . if you break up with me, I'll kill you and you'll take your last breath in front of my face." Two of these witnesses were not cross-examined by the defense.

After the State rested its case at trial, defense counsel asked the appellant to testify on his own behalf. The appellant voiced reservations about taking the stand. Counsel then requested and received a ten minute recess to confer with the appellant. After court reconvened, the appellant took the stand and gave testimony concerning events leading up to and following the murder.

In his closing argument, defense counsel argued to the jury that the murder occurred in the heat of passion and was not premeditated. In spite of this argument, the jury convicted the appellant of first-degree murder. As a result, counsel filed a direct appeal to this court.

On direct appeal, counsel argued that the evidence presented at trial was insufficient to support a conviction for first-degree murder. This court, however, disagreed, holding that the State had indeed presented sufficient evidence to obtain a conviction for first degree murder. We noted that the jury could have inferred, from the appellant's numerous threats, that he had formed the intent to kill far in advance of the murder.

On June 29, 1994, the appellant filed a petition for post-conviction relief seeking to overturn his conviction for first-degree murder. The petition alleged ineffective assistance of counsel as grounds for relief. The petition cites six instances where the appellant believes counsel rendered ineffective assistance. First, counsel coerced the appellant into testifying at trial. Second, counsel's

failure to request a continuance resulted in an improperly prepared defense. Third, counsel failed to interview all potential witnesses prior to trial. Fourth, counsel failed to cross-examine two of the state's witnesses. Fifth, counsel failed to persuasively argue the "premeditation" element of first-degree murder in his closing argument. And sixth, counsel failed to adequately argue premeditation within the sufficiency of evidence issue on appeal.

During the post-conviction hearing, the appellant testified that trial counsel had failed to interview all of the prosecution's witnesses prior to their testifying at trial. However, of the state's witnesses who testified, the appellant could only remember one witness, Robert Salyers, that counsel failed to interview. At trial, Mr. Salyers testified that he witnessed the hostilities between the appellant and the victim on the night of the murder. The appellant offered no opinion as to what benefit would have been gained by interviewing Mr. Salyers prior to trial.

Later in the proceedings, trial counsel testified as to why he did not cross-examine two of the state's witnesses, Kenneth Frye and Michelle Clark. Both Frye and Clark testified that the appellant had threatened the victim's life prior to the night of the murder. Counsel stated that he did not conduct cross-examination because both witnesses had already admitted that they had not taken the threats seriously. He testified that he believed cross-examination could not have elicited more helpful testimony, but could have brought out more damaging evidence.

Trial counsel admitted that he made no request to seek a continuance for the trial date as he felt he had adequate time left to prepare a defense and furthermore, no legitimate grounds existed for such continuance.

At the close of the evidentiary hearing, the post-conviction court dismissed

the appellant's petition. In arriving at its conclusion, the court rendered the following findings of fact and conclusions of law: (1) the appellant failed to show that trial counsel inadequately prepared for trial; (2) trial counsel interviewed all prosecution witnesses that could have offered testimony relevant to the defense's strategy; (3) trial counsel made an informed tactical decision not to cross-examine Michelle Clark and Kenneth Frye; and (4) counsel adequately argued the premeditation issue both at trial and on direct appeal. The appellant now seeks our review of this ruling.

## **II. Ineffective Assistance of Counsel**

In determining whether the appellant received effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution and Art. I Sect. IX of the Tennessee Constitution, the reviewing court must look to whether the performance of trial counsel was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To reverse a conviction on these grounds, the appellant must show that counsel's representation was deficient and that there was prejudice resulting from that deficiency. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). Counsel's representation is deficient if the errors were so serious as to deprive the appellant of representation guaranteed him by the Sixth Amendment. Cox v. State, 880 S.W.2d 713, 717 (Tenn. Crim. App. 1994). The deficient representation becomes prejudicial when the appellant is deprived of a fair trial with a reliable result. Id.

In determining whether counsel was effective, this court will not "use the benefit of hindsight to second-guess trial strategy by counsel and criticize counsel's tactics." Cox, 880 S.W.2d at 718 (citing State v. Martin, 627 S.W.2d

139, 142 (Tenn. Crim. App. 1981). Additionally, this court's review may first look at the prejudice prong of Strickland. If the court finds that the defendant suffered no prejudice, a deficiency if any, is considered harmless. Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. Therefore, even if there are attorney errors, the appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 693, 104 S.Ct. at 2068. In a post-conviction relief proceeding, the burden is on the petitioner to prove by a preponderance of the evidence the allegations in the petition. Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978). We conclude that the appellant has not met this burden.

The appellant has failed to demonstrate that he suffered prejudice from his testimony at trial. The appellant points to nothing elicited on either direct or cross-examination that served to incriminate him before the jury. In State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991), this court listed certain factors that tend to indicate ineffectiveness when a defendant does not testify.

These factors include:

- (1) only the victim and the defendant were present when the offense was committed;
- (2) only the defendant could present a full version of his theory of the facts;
- (3) the defendant's testimony could not be impeached by prior criminal convictions;
- (4) the defendant could give an account of the relationship with the victim; and
- (5) the attorney let in objectionable testimony with the intention of clarifying it with the testimony of the defendant.

State v. Zimmerman, 823 S.W.2d at 227. The facts and circumstances of the present case satisfy these conditions: only the defendant and the victim were at the murder scene, the defendant had no other witness to express his state of mind at the time of the crime, the defendant had no prior criminal convictions, and only the defendant could explain the past threats made against the victim's life. As such, counsel would have invited an ineffective claim had he not called

the appellant to the stand. Additionally, the appellant has not made any effort to show how he was prejudiced by his trial testimony.

The appellant argues that counsel was ineffective for failing to request a continuance prior to trial. However, the appellant cannot show how additional preparation would have resulted in a more favorable outcome. The record contains no indication that trial counsel could have discovered additional evidence with more time to prepare. The appellant cannot meet his burden of proof without some evidence to show what additional preparation would have revealed. Moreover, we note that the appellant may not claim error for circumstances which he himself created.

As to trial counsel's failure to interview "all" prosecution witnesses, the record is utterly devoid of any evidence to suggest that interviews would have revealed exculpatory evidence. The record shows that defense counsel interviewed all but two of the state's nineteen witnesses. The appellant alludes only to one of these in his brief, Robert Salyers. Salyers testified to the heated altercation occurring between the appellant and the victim immediately before the murder. This testimony could only bolster the defense's theory that the murder occurred in the heat of passion. We cannot conclude that testimony supporting the defense's theory of the case prejudiced the appellant.

Likewise, the appellant suffered no prejudice as a result of trial counsel's failure to cross-examine Michelle Clark and Kenneth Frye. The post-conviction court found that trial counsel made an informed, tactical decision not to question these two witnesses. Such a finding has the weight of a jury verdict if supported by the record. Janow v. State, 470 S.W.2d 19, 20 (Tenn. Crim. App. 1971). The record, in the present case, amply supports the post-conviction court's finding. Both witnesses had already testified to the information that trial counsel planned

to elicit on cross-examination. Further questioning would not have advanced the appellant's case, and therefore was not prejudicial.

The appellant contends that a more "precise and persuasive" closing argument involving an explanation of the element of premeditation would likely have resulted in the appellant being convicted of a lesser charge. In his closing argument, counsel did argue that premeditation was not present in the facts of this case due to the brief time frame that occurred between the argument of the parties and death of the victim. The State's proof as to the element of premeditation was replete. We also are mindful of the fact that the "argument" of counsel to a jury does not constitute evidence and irrespective of how forceful or persuasive an attorney's argument may be, it cannot erase the proof in the case. Moreover, no trial counsel should be held to such a standard. This contention is without merit.

Finally, the appellant argues that counsel was ineffective by "failing to adequately argue" to this court the absence of premeditation from the facts presented. In presenting this argument, the appellant ignores this court's ruling on direct appeal which found "overwhelming evidence" of the defendant's guilt and "that the killing of the victim was intentional, premeditated and deliberate." The appellant has failed to present any evidence explaining how a different argument could have persuaded this court to rule otherwise. This issue is without merit.

### **III. Conclusion**

Accordingly, we conclude that the appellant has not demonstrated that he is entitled to post-conviction relief due to the ineffective assistance of counsel at trial or on appeal.



The decision of the post-conviction court is affirmed.

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**David G. Hayes, Judge**

CONCUR:

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**Paul G. Summers, Judge**

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**William M. Barker**