

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

OCTOBER SESSION, 1996

FILED

March 20, 1997

Cecil Crowson, Jr.

Appellate Court Clerk

ROBERT LLOYD WIGGINS,) C.C.A. NO. 03C01-9603-CC-00191
)
 Appellant,)
)
) MCMINN COUNTY
VS.)
) HON. R. STEVEN BEBB
STATE OF TENNESSEE,) JUDGE
)
 Appellee.) (Post-Conviction)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF MCMINN COUNTY

FOR THE APPELLANT:

TONY MCGUIRE
108 Sherway Road
Knoxville, TN 37922

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

ROBIN L. HARRIS
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

JERRY N. ESTES
District Attorney General
10th Judicial Circuit
Washington Avenue
Athens, TN 37303

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Petitioner, Robert Lloyd Wiggins, appeals from the trial court's denial of his petition for post-conviction relief. On November 19, 1991, he was found guilty by a McMinn County jury of second degree murder, burglary, and two counts of theft. His convictions were affirmed by this Court on direct appeal.¹ On May 15, 1995, the Petitioner filed a pro se petition for post-conviction relief, which was supplemented with the assistance of counsel on December 19, 1995. After conducting an evidentiary hearing, the trial court denied the petition by an order entered on March 14, 1996. In this appeal, the Petitioner raises the following nine issues² for review:

- (1) whether trial counsel rendered ineffective assistance by failing to investigate the circumstances surrounding a knife found in the Petitioner's car and a steak knife allegedly located at the scene of the crime;
- (2) whether trial counsel rendered ineffective assistance by failing to communicate effectively with the Petitioner and his family;
- (3) whether trial counsel rendered ineffective assistance by following a strategy unsupported by direct evidence;
- (4) whether trial counsel rendered ineffective assistance due to a conflict of interest with the codefendants' attorneys;
- (5) whether trial counsel rendered ineffective assistance by failing to request that the trial judge perform his duties as thirteenth juror;
- (6) whether the trial judge erred by failing to perform his duties as thirteenth juror;
- (7) whether the State committed prosecutorial misconduct by failing to investigate the results of scientific tests performed on the knife

¹See State v. Russell David Farmer, Robert Loyd Wiggins, and Larry Cocaine Gregory, Jr., C.C.A. No. 03C01-9206-CR-00196, McMinn County (Tenn. Crim. App., Knoxville, July 8, 1993). The Petitioner was originally sentenced to an effective term of thirty-seven years imprisonment. On direct appeal, this Court affirmed his convictions but remanded for resentencing. It is unclear from the record what sentence was imposed after remand, but it appears the Petitioner received an effective term of twenty years.

² The Petitioner's brief contains ten issues. The tenth issue, however, is a summary issue contending only that the trial court erred in denying the petition for the reasons stated in the other nine issues. As a result, we will address only the nine substantive issues.

recovered from the Petitioner's car or by misrepresenting the results of those tests;

(8) whether the State committed prosecutorial misconduct by failing to conduct scientific testing on the steak knife allegedly located at the scene of the crime; and

(9) whether the verdict should be set aside because the steak knife had not been preserved and was therefore unavailable for inspection by the Petitioner.

After a careful review of the record and the issues, we affirm the judgment of the trial court.

Initially, we note that the evidence presented at trial was complex and often confusing. The testimony of various witnesses was contradictory, and several witnesses were effectively impeached with prior inconsistent statements. For the sake of clarity, we begin our discussion with a very brief summary of the general facts surrounding the offenses as set forth in this Court's opinion on direct appeal:

On the evening of September 6, 1990, Russell David Farmer, age twenty-two, Robert Loyd Wiggins, age nineteen, and Larry Cocaine Gregory, Jr., age seventeen, were in the home of Bill White, the deceased. White, who was thirty-six years old, provided the three defendants with alcoholic beverages and showed them X-rated movies during the evening. White had the reputation of being a homosexual who engaged in activities with young men and had been convicted previously of a sex offense with a young male.

In the back bedroom of the small house where White lived alone, he was beaten to death with a metal tipped black jack and his throat was cut. The defendants sharply dispute what occurred at the residence.

Wiggins and Gregory testified that White followed Farmer to the back bedroom to make a telephone call. When White made homosexual advances to Farmer, a struggle ensued. According to Wiggins and Gregory, Farmer beat White to death with a black jack and then slit his throat with a knife that was lying on the nightstand in the bedroom. Wiggins testified that when he and Gregory entered the bedroom, White was on the bed, his throat cut, and Farmer was beating him savagely about the head. Both Gregory and Wiggins testified that Gregory tried to pull Farmer off of White. Gregory testified that he saw Farmer beat White and cut his throat.

Farmer testified that Gregory made the telephone call from the bedroom and beat White to death. Farmer further testified that Wiggins went to his car, entered the bedroom, and returned stating that he had cut White's throat to make sure that he could not identify Wiggins to the police. Farmer did not, according to his testimony, actually see Gregory beat White although he heard the sounds of the struggle. Farmer did not see Wiggins slit White's throat.

After White was killed, the three defendants removed his body from the house, placed it in the trunk of Wiggins' car, and dumped it in a creek not far from White's house. After the killing, the three defendants took some of White's personal possessions from the house, including television sets and a video cassette recorder, and burglarized his pawn shop.

In the early morning hours of September 7, 1990, the defendants fled to Birmingham, Alabama, where Farmer's estranged wife was living. The next day Wiggins and Gregory hitch-hiked back to Tennessee and voluntarily turned themselves in to the sheriff of Meigs County. They gave statements detailing their version of the crime and identifying Farmer as the murderer. They assisted the police in locating some of the physical evidence of the crime including the weapon. Farmer called the Meigs County sheriff from Birmingham and was picked up at his motel room by Birmingham authorities where he was also arrested for possession of cocaine. Farmer made a statement to the police accusing Gregory of beating White and Wiggins of cutting White's throat.

Police recovered some of the stolen items in the motel room where Farmer was arrested. All three defendants' fingerprints were found on the stolen items. White's vehicle was located in Birmingham where the defendants had abandoned it.

State v. Russell David Farmer, Robert Loyd Wiggins, and Larry Cocaine Gregory, Jr., C.C.A. No. 03C01-9206-CR-00196, McMinn County (Tenn. Crim. App., Knoxville, July 8, 1993). We will recount other specific pertinent facts as we address each issue.

Through his first five issues, the Petitioner argues that his trial counsel was ineffective for a number of reasons. In determining whether or not counsel provided effective assistance at trial, the court must decide whether or not counsel's performance was within the range of competence demanded of

attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). To succeed on a claim that his counsel was ineffective at trial, a petitioner bears the burden of showing that his counsel made errors so serious that he was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the petitioner resulting in a failure to produce a reliable result. Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984); Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). To satisfy this second prong the petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

When reviewing trial counsel's actions, this court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel's alleged errors should be judged at the time they were made in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper, 849 S.W.2d at 746.

In his first issue, the Petitioner argues that his trial counsel was ineffective for failing to investigate the circumstances surrounding a knife discovered in his car and a steak knife allegedly located at the scene of the crime. With regard to the knife discovered in his car, the Petitioner's argument focuses on the presence of human blood on the knife. With regard to the steak knife, the Petitioner's argument focuses on the very existence of the knife.

In order to address this issue, it is necessary to delve into the specific facts surrounding the knives in question. Several hours after the killing of the victim, police officers searched the car which had been driven by the Petitioner on the night of the killing; a Pinto owned by the Petitioner's father.³ They discovered a knife in plain view on or near the console between the driver and passenger seats, which we will hereafter refer to as the "Pinto knife." Shortly after its discovery, the Pinto knife was sent to the Tennessee Bureau of Investigation (TBI) Crime Lab for forensic testing, as were numerous other items such as clothing alleged to have been worn by the defendants and the Pinto itself. A report detailing the results of those tests was sent to the District Attorney's office and was disclosed to the defendants' attorneys. With regard to the Pinto knife, the report stated the following:

<u>EXAMINATION</u>	<u>RESULTS</u>
BLOOD TYPE	
IS STAIN BLOOD?	INCONCLUSIVE
HAIR ANALYSIS	
REMARKS	
EXAMINATION OF EXHIBIT DID NOT REVEAL THE PRESENCE OF HAIR FOR COMPARISON.	

Based on this report, the assistant district attorney who tried the case believed that the TBI Crime Lab was unable to determine what substance was on the Pinto knife.⁴

³ After disposing of the body of the victim and taking the victim's personal possessions, the Petitioner and the codefendants parked the Pinto in a parking lot. The Petitioner called his father in the early morning hours of September 7, 1990, and informed him of the location of the car. The Petitioner and the codefendants then drove to Alabama in the victim's truck. The Petitioner's father, upon discovering blood in the Pinto later that day, called police officers to investigate the blood in the car.

⁴ The assistant district attorney testified concerning his interpretation of the lab report at the post-conviction hearing.

Given the inconclusive results of the forensic testing, the assistant district attorney decided not to call the TBI agent who had performed the tests as a witness at trial. Instead, he relied solely upon the lay testimony of the police officers who had searched the Pinto. Two officers testified on direct examination that the knife appeared to be saturated with blood or had apparent blood staining, and the knife itself was introduced into evidence. No witness for the State testified on direct examination that the Pinto knife had been subjected to forensic testing, nor did any witness relate the results of the testing.

The Petitioner's trial counsel testified at the post-conviction hearing concerning his interpretation of the lab results. He believed that the inconclusive test results indicated that the TBI Crime Lab could not match the blood on the Pinto knife to the victim's blood. With this information, the Petitioner's trial counsel cross-examined the State's witnesses, chiefly Detective Bill Matthews, about the inconclusive forensic testing, as the following passage demonstrates:

Q. Now, this knife that was found in the floorboard or the passenger side of Mr. Wiggins' car, were there any fingerprints of anybody taken from the knife to your knowledge?

A. No.

Q. Or any blood matching of any kind from it?

A. The blood was tried but I don't think they were able, it was inconclusive on the blood.

Q. So that knife is just sort of neutral as to who had been handling it --

A. Correct.

Q. And whose blood, if any, was on it.

A. Correct.

On cross-examination, the State's other witnesses deferred to Detective Matthews when asked about the forensic testing performed on the Pinto knife.

With regard to the steak knife allegedly located at the scene of the crime, no State witness testified on direct examination concerning such a knife. On cross-examination by codefendant Farmer's attorney, however, Detective Captain Charles Ziegler stated, "[t]o the best of my recollection there was a, maybe a steak knife, some sort of knife that was in the bedroom that I believe we collected as evidence. Again I believe Mr. Matthews might be able to answer that." The Petitioner's trial counsel cross-examined Captain Ziegler concerning the steak knife as follows:

Q. And you mentioned that there was a knife found in the bedroom?

A. It seems like that there was a steak knife type with serrated edge knife found in the bedroom.

Q. Do you recall specifically where it was found?

A. To the best of my recollection it was on the right hand side, the upper side of the bed.

...

Q. Was there a nightstand there?

A. Yes, sir, there was a nightstand also.

Q. Was it on the nightstand as best you remember?

A. I believe it was.

Q. Okay. Was that the only knife you found in the bedroom?

A. To the best of my recollection it was.

Detective Matthews, who testified after Captain Ziegler, was not questioned about the steak knife allegedly located in the bedroom. There is no record of a steak knife having been collected as evidence or submitted to the TBI Crime Lab for forensic testing.

The Petitioner testified in his own behalf at trial. He stated that there was indeed a knife in his car. He explained, however, that the knife was there because he and his father had used it while installing a stereo a week before the killing of the victim. He testified further that his father had cut himself during the installation and his blood was therefore on some of the interior panels of the

Pinto. The Petitioner was effectively cross-examined about the presence of blood on his knife as testified to by the police officers who had searched the car, for which the Petitioner had no explanation.

Having set forth the pertinent facts concerning the knives as adduced at trial, we turn now to the additional facts concerning the knives which arose during the post-conviction hearing. Constance Howard, the TBI agent who conducted the forensic testing of the Pinto knife, testified concerning the meaning of “inconclusive” on the lab report. Howard testified that the Pinto knife had actually tested negative for the presence of human blood.⁵ She explained that the testing procedure involved several steps. The first step was a visual examination to determine if there was staining on the Pinto knife consistent with blood staining, and this test was positive. The next step was a preliminary chemical test to determine if the stain had the properties of blood, and this test was positive. The next step was to determine if the stain was blood of human origin, and this test was negative. After this step, Howard did not have enough of a sample of the stain to complete further testing. Howard testified that the lab report stated simply “inconclusive” rather than “negative for human blood” because of the structure of the computer program used by the TBI for their lab reports.

With regard to the steak knife allegedly located in the victim’s bedroom, Captain Ziegler recalled at the post-conviction hearing that he had testified at trial about his recollection of seeing a steak knife on the nightstand beside the victim’s

⁵ The State’s brief asserts that Agent Howard testified that there was blood on the knife, but not enough blood to make any determinations of the origin of the blood. In actuality, there was enough staining on the knife to rule out blood of human origin, and Howard testified to that fact. The State’s brief, given its assumptions regarding Howard’s testimony about the Pinto knife, is of limited usefulness in addressing several issues raised by the Petitioner.

bed. Captain Ziegler explained that, according to standard police procedure, the knife would have been collected as evidence and submitted to the TBI Crime Lab if it was suspected of being involved in the crime. Ziegler testified further that he did not know where the steak knife currently was and that he did not recall discussing the steak knife with any member of the district attorney's office.

Detective Matthews also testified at the post-conviction hearing. He stated that he remembered that there were knives and other utensils in the victim's kitchen, but he did not recall ever having seen a steak knife in the bedroom. Matthews testified that he did not know where the steak knife in question currently was, nor did he know why it was not listed as evidence. Matthews testified further that he did not recall discussing the steak knife with any member of the district attorney's office.

Steve Hawkins, the assistant district attorney who tried the case, testified at the post-conviction hearing that he did not recall anything about a steak knife having been found in the victim's bedroom. Hawkins stated that, to the best of his recollection, there were several utensils discovered in the victim's home, but none of them appeared to have been used in the killing. He also testified that if a knife with a blood-like stain had been found at the crime scene, it would have been submitted to the TBI Crime Lab for forensic testing.

The Petitioner's trial counsel, Conrad Finnell, testified at the post-conviction hearing that he recalled that a steak knife had been seen on a nightstand in the victim's bedroom. Finnell recalled that the steak knife was unavailable for inspection or testing prior to trial but did not recall exactly what

had happened to it. Finnell explained his trial strategy with regard to the steak knife as follows:

I intended to use the presence of that knife, and if you have read the transcript of this trial I think you will find there was quite a bit of cross-examination about that knife and why it wasn't available. It could have been used as the murder weapon which would have corroborated Lloyd's [the Petitioner] version of what happened. I was content that the state hadn't produced it and they didn't have any physical evidence to connect it one way or the other. In fact the inference was that maybe the state was concealing something favorable to the defendant. That's the use that was made of that knife. I was more or less content when I understood that the knife would not be introduced in evidence.

Finnell testified that he did not seek forensic testing of the steak knife⁶ because "if the law enforcement people said and the DA told me it wasn't available and they didn't know what had happened to it there wasn't much chance of my finding it."

Having set forth the relevant facts, we turn now to the Petitioner's argument. The Petitioner contends that his trial counsel rendered ineffective assistance by failing to follow up on the "inconclusive" forensic testing of the Pinto knife and the lack of testing of the steak knife. With regard to the first prong of the Strickland standard, the Petitioner contends that the inconclusive lab results for the Pinto knife demanded at the very least a telephone call by trial counsel to the TBI agent who had performed the testing in order to confirm the specific testing done and the particular results therefrom. The Petitioner asserts that the differing lab results between the Pinto knife and other items tested, such as clothing and the Pinto itself, should have led trial counsel to question his belief

⁶ The record does not contain the pleadings, or technical record, from the Petitioner's trial. As a result, we cannot determine what motions trial counsel filed concerning the steak knife. Of course, it is the appellant's duty to ensure that the record on appeal conveys a fair, accurate and complete account of what transpired in the court below with respect to the issues presented for review. See State v. Boling, 840 S.W.2d 944 (Tenn. Crim. App. 1992); State v. Oody, 823 S.W.2d 554 (Tenn. Crim. App. 1991).

that the lab report indicated that the TBI agent could not match blood on the knife to the victim's blood. The failure of trial counsel to investigate the results further, coupled with the failure to seek testing of the steak knife, amounted to deficient representation according to the Petitioner.

Although the Petitioner makes an effective argument, we must disagree with his conclusion. It is true that the lab report results for the Pinto knife differ from the results for the clothing and the Pinto itself. As we stated above, the lab report stated the following results from testing on the Pinto knife:

<u>EXAMINATION</u>	<u>RESULTS</u>
BLOOD TYPE	
IS STAIN BLOOD?	INCONCLUSIVE
HAIR ANALYSIS	
REMARKS	
	EXAMINATION OF EXHIBIT DID NOT REVEAL THE PRESENCE OF HAIR FOR COMPARISON.

The typical lab results for some of the other items tested mirrored the following results for the blood sample from the front fender of the Pinto itself:

<u>EXAMINATION</u>	<u>RESULTS</u>
BLOOD TYPE	
IS STAIN BLOOD?	YES
IS STAIN OF HUMAN ORIGIN?	YES
EAP TYPE	INCONCLUSIVE
ESD TYPE	INCONCLUSIVE
PGM TYPE	INCONCLUSIVE
HP TYPE	INCONCLUSIVE

While it may have been prudent for trial counsel to call the TBI Crime Lab concerning the differing results, we do not believe that the failure to do so amounted to deficient representation.

Although the "inconclusive" lab results for the Pinto knife are ambiguous in hindsight, it is important to remember that the results were not ambiguous

either to trial counsel or to the assistant district attorney at the time of trial. Both attorneys believed they knew exactly what the lab results indicated. Of course, the testimony of TBI agent Howard at the post-conviction proceeding reveals that trial counsel's beliefs were incorrect. Given that this Court evaluates trial counsel's errors in light of the circumstances at the time of the error and does not use hindsight, we cannot conclude that counsel's errors were so serious that he was not functioning as counsel as guaranteed by the Sixth Amendment. In our view, trial counsel's decision not to call the TBI agent who conducted the forensic testing was reasonable under the facts and circumstances of this case.

Even when coupled with the failure to seek testing of the steak knife, we believe that trial counsel's conduct did not amount to deficient representation. It is clear from the record that the police officers and the assistant district attorney involved in the case did not know where the steak knife was at the time of trial. The Petitioner's trial counsel testified that, in light of the unavailability of the steak knife, he did not seek to have the knife tested forensically. Trial counsel did, however, use the absence of the steak knife to the Petitioner's benefit at trial. Trial counsel cross-examined the police officers concerning the steak knife's absence and effectively suggested that the steak knife was the murder weapon, all without the assistant district attorney being able to respond to the allegations given the unavailability of the knife. From the circumstances at the time of trial, we cannot conclude that trial counsel's strategy was unreasonable or constitutionally deficient.

After reviewing the record, we conclude that the Petitioner has failed to satisfy the first prong of the Strickland standard, that his trial counsel provided

deficient representation. Although in hindsight trial counsel's conclusions regarding the meaning of the lab results for the Pinto knife were incorrect, his error was not so serious that he was not functioning as counsel as guaranteed by the Sixth Amendment.

Even if we were to conclude that the Petitioner had satisfied the first prong of the Strickland standard, we believe that the Petitioner has failed to establish sufficient prejudice to support the second prong of the Strickland standard. The Petitioner argues that trial counsel's erroneous interpretation of the Pinto knife lab results prejudiced him by allowing the "bloody" Pinto knife to corroborate codefendant Farmer's testimony. According to the Petitioner's argument, the only evidence presented at trial linking him to the actual killing of the victim was the testimony of codefendant Farmer. As we stated above, codefendant Farmer testified that after codefendant Gregory beat the victim, the Petitioner stated that he could not take the chance on the victim's being alive to identify him, walked to his car and retrieved something from the front seat area, went inside the victim's home, and upon exiting the house announced that he had cut the victim's throat.

The Petitioner asserts that the knife found near the console in his car, saturated with blood according to the testimony of police officers, was the sole corroboration of codefendant Farmer's testimony. As was demonstrated at the post-conviction hearing though, the Pinto knife actually tested negative for the presence of human blood. The Petitioner argues that if his trial counsel had discovered this fact and presented it to the jury, the Pinto knife would no longer have corroborated codefendant Farmer's testimony. As a result, the Petitioner

claims he could not have been convicted of second degree murder because the only evidence linking him to the killing, the accomplice testimony of Farmer, stood wholly uncorroborated.

Furthermore, the Petitioner contends that definitive proof that the Pinto knife tested negative for human blood would have dramatically lessened the impact of the assistant district attorney's cross-examination of him at trial. As we recounted above, the assistant district attorney questioned the validity of the Petitioner's explanation of the killing of the victim upon cross-examination. The assistant district attorney's key point focused on the Petitioner's inability to explain how blood happened to be found on his knife by the officers who searched the Pinto. If the Petitioner's trial counsel had presented the forensic evidence that the Pinto knife tested negative for human blood, the cross-examination would not have called his credibility into question.

Once again, we believe that the Petitioner presents a sound argument, but we must disagree with his conclusion that his trial counsel's representation, assuming it was constitutionally deficient, satisfied the prejudice prong of Strickland. The Petitioner asserts that the only evidence corroborating codefendant Farmer's testimony implicating him in the killing was the "bloody" Pinto knife. We believe, however, that there is ample other evidence in the record which corroborates Farmer's testimony.

We note that in Tennessee adequate corroboration of accomplice testimony requires a fact testified to, entirely independent of the accomplice testimony, which leads to an inference that a crime has been committed and that

the accused was implicated in the crime. See Clapp v. State, 94 Tenn. 186, 30 S.W. 214, 217 (1895). The corroboration need only be slight circumstances and need not be sufficient to support a conviction by itself. See State v. Copeland, 677 S.W.2d 471, 475 (Tenn. Crim. App. 1984). Adequate corroborating evidence need only fairly and legitimately tend to connect the accused with the commission of the crime. Id.

This Court has held that evidence placing a defendant at the scene of the crime as described by the accomplice is sufficient corroboration. See State v. Barnard, 899 S.W.2d 617, 626 (Tenn. Crim. App. 1994); State v. Webb, 625 S.W.2d 281, 284 (Tenn. Crim. App. 1980). In the present case, the Petitioner admitted that he was present in the house at the time of the killing of the victim. Moreover, it is clear from the record that the Petitioner drove himself and codefendants Farmer and Gregory to the victim's home. After the killing, the Petitioner, driving alone with the victim's body in the trunk of his car, helped to dispose of the corpse. He also admitted to participating in the theft of some of the victim's personal possessions. All three defendants then fled to Alabama together. Multiple witnesses testified that the defendants appeared to be "getting along" well and that there was no animosity among them. The Petitioner's Pinto had blood stains of human origin on its body panels and in its trunk. The Petitioner's fingerprints were identified on the victim's personal possessions later recovered by police.

Discounting the blood on the Pinto knife altogether, we believe that the above facts provide sufficient corroboration of codefendant Farmer's testimony. It is well settled that the question of sufficient corroboration is one for the jury to

decide. See Copeland, 677 S.W.2d at 475. Certainly the jury could have concluded that codefendant Farmer's testimony was neither credible nor adequately corroborated, but they did not. Instead, the jury rejected the Petitioner's claim that he was not involved in the killing of the victim. This Court may not substitute its inferences for the legitimate, reasonable inferences drawn by the jury. Id. (citing Hawkins v. State, 469 S.W.2d 515 (Tenn. Crim. App. 1971)). We therefore believe that, in the absence of blood on the Pinto knife, there is other adequate corroboration of codefendant Farmer's testimony upon which the jury could have properly relied. Accordingly, we must disagree with the Petitioner's contention that the absence of blood on the Pinto knife would leave his murder conviction resting solely on uncorroborated accomplice testimony.

In addition, the Petitioner fails to realize that the absence of human blood on the Pinto knife posed the possibility of damaging his credibility at trial. As the Petitioner argues, evidence that the Pinto knife tested negative for human blood would indeed have limited the effectiveness of the assistant district attorney's cross-examination as it occurred at trial. Yet the same test results might also have called into question the credibility of the Petitioner's testimony that his father had cut himself with the knife while installing a stereo the week before the crime. Thus, the Petitioner had both something to gain and something to lose with regard to his credibility by presenting evidence that the Pinto knife tested negative for the presence of human blood.

After reviewing the entire record, we conclude that the Petitioner failed to establish prejudice sufficient to satisfy the second Strickland prong. Considering the totality of the evidence presented at trial, the fact that the Pinto knife tested

negative for human blood, even when coupled with the unavailability of the steak knife allegedly located at the crime scene, is not sufficient to undermine our confidence in the outcome of the trial. See Harris, 875 S.W.2d at 665. The Petitioner has failed to show a reasonable probability that, but for his trial counsel's erroneous interpretation of the Pinto knife lab results, the jury would have had reasonable doubt regarding his guilt. For the reasons set out above, we conclude that the Petitioner has not satisfied either Strickland prong. His first issue lacks merit.

In his second issue, the Petitioner argues that his trial counsel rendered ineffective assistance by failing to communicate effectively with him and his family. Although the Petitioner did not testify at the post-conviction hearing, his father, James Wiggins, did testify concerning several instances of what he deemed poor communication by trial counsel, Conrad Finnell. James Wiggins testified that Finnell never discussed trial strategy with him, nor did Finnell inform him about the presence of a steak knife at the crime scene. In addition, Finnell told James Wiggins that he would mail the TBI lab report to him, but never did so. James Wiggins also testified that Finnell assured him that the Petitioner "wasn't going to get no time."

Conrad Finnell testified at the post-conviction hearing that he believed he kept the Petitioner and his family informed of the developments in the case. He recalled discussing the codefendants' statements with the Petitioner and was almost certain that he discussed the steak knife with him. Finnell testified further that he had communicated with the Petitioner's parents even more than with the Petitioner. Finnell also testified that he never told James Wiggins that the

Petitioner would "get no time." On cross-examination, Finnell revealed that he had practiced law for thirty-four years and had represented more than seventy murder defendants through trial.

At the conclusion of the hearing, the trial court specifically found Finnell's testimony to be credible. After considering all of the testimony, the trial court found further there had been no lack of communication between Finnell, the Petitioner, and the Petitioner's family. As a result, the trial court concluded that Finnell had provided effective assistance of counsel.

In post-conviction proceedings the petitioner has "the burden of proving the allegations of fact by clear and convincing evidence." Tenn. Code Ann. § 40-30-210(f)(1996 Supp.). Furthermore, the factual findings of the trial court in post-conviction hearings are presumptively correct on appeal and will be upheld unless the evidence preponderates against them. State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983); see also State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); State v. Tate, 615 S.W.2d 161, 162 (Tenn. Crim. App. 1981). In the case sub judice, James Wiggins testified that the Petitioner's trial counsel did not communicate effectively with either the Petitioner or his family. Contrary to Wiggins' testimony, the Petitioner's trial counsel testified that he did communicate effectively. The trial judge was in a far better position to evaluate credibility than we are, and he resolved the issue against the Petitioner. From the record before us, we cannot conclude that the evidence preponderates against the finding of the trial court that the Petitioner's trial counsel provided adequate communication. Thus, the Petitioner has failed to satisfy the first prong of Strickland, namely that

trial counsel provided deficient representation. The Petitioner's second issue lacks merit.

In his third issue, the Petitioner argues that his trial counsel was ineffective in following a strategy unsupported by direct evidence. More specifically, the Petitioner contends that his trial counsel's main strategy of defense against the murder charge was a theory that the attack upon the victim resulted from rage provoked by a homosexual advance. The Petitioner asserts that there was no direct evidence to support that theory, and his trial counsel was therefore ineffective in choosing to rely upon it.

Although the proof regarding a homosexual advance upon any of the three defendants is contradictory, we do not agree with the Petitioner's assertion regarding the lack of evidence to support trial counsel's choice to pursue the theory. It is true that each of the three defendants denied that the victim made an overt homosexual advance toward them individually. Codefendant Farmer, however, testified that as codefendant Gregory was walking to the bedroom to use the telephone, the victim put his arm around Gregory in such a manner as to suggest more than a "male bonding type hug." In addition, the Petitioner testified at trial that once the victim had accompanied codefendant Farmer to the bedroom to use the telephone, he "heard somebody holler, 'Oh, my God.' I just thought that Bill [the victim] had tried something with him [Farmer] because I had heard, you know, that Bill was that way." Furthermore, codefendant Gregory testified that once codefendant Farmer and the victim were in the bedroom, he heard Farmer say, "Hell, no, you faggot" and a struggle or fight ensued.

Moreover, Michael Shelton, a friend of the Petitioner, testified that the victim had paid him to pose in bikini underwear while the victim took photographs of him. Additionally, as this Court stated in its opinion on direct appeal, the victim, who was significantly older than the three defendants, “provided the three defendants with alcoholic beverages and showed them X-rated movies during the evening. White [the victim] had the reputation of being a homosexual who engaged in activities with young men” On direct appeal, this Court found that the trial court had properly admitted “testimony indicative of the victim’s general reputation as a homosexual.” We believe the record contains ample proof concerning the victim’s reputation, and there is some evidence, albeit contradictory, of a homosexual advance during the evening. Accordingly, we conclude that there was evidence to support trial counsel’s advancement of that theory at trial to refute proof that the killing of the victim was a planned endeavor.

Even more important, however, is that trial counsel did not rely solely on that theory. Instead, as was detailed during testimony at the post-conviction hearing, trial counsel’s strategy was three-fold. Trial counsel’s three defense theories were: (1) to separate the Petitioner from his codefendants; (2) to excuse the Petitioner’s conduct after the killing, namely helping to dispose of the body and stealing the victim’s possessions; and (3) to avoid a first degree murder conviction by showing the homicide to have been a rage killing provoked by a homosexual advance. In effect, then, the “rage killing” theory represented an effort by trial counsel to hedge against a possible first degree murder conviction. Although hoping to persuade the jury that the Petitioner was not a participant in the killing of the victim, trial counsel advanced the “rage killing” theory as a

cautionary measure in an effort to attack the mens rea required for first degree murder.

After reviewing the record, we conclude that there was evidence to support trial counsel's choice of strategy. The Petitioner has failed to demonstrate that his trial counsel provided deficient representation. Thus, his third issue on appeal lacks merit.

In his fourth issue, the Petitioner argues that his trial counsel rendered ineffective assistance due to a conflict of interest with the other defense attorneys involved in the case. The Petitioner focuses on trial counsel's statement at the post-conviction hearing that "Mr. Rogers [codefendant Farmer's attorney] and Mr. Logan [codefendant Gregory's attorney] and I have been affiliated before and we talked freely back and forth about this case and we shared information on the case." The Petitioner contends that because of the close relationship between the defense attorneys, his trial counsel did not function as a proper advocate for him individually.

Initially we note that the Petitioner did not raise this issue in his petition for post-conviction relief. As a result, the trial court was unable to rule on the issue at the post-conviction proceeding. We believe, therefore, that the Petitioner has waived consideration of this issue on appeal. See Tenn. Code Ann. § 16-5-108(a)(2). Cf. State v. Matthews, 805 S.W.2d 776, 781 (Tenn. Crim. App. 1990); State v. Aucoin, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988); State v. Clinton, 754 S.W.2d 100, 103 (Tenn. Crim. App. 1988).

Even if we were to consider the issue, however, we would conclude that it has no merit. The record is replete with examples of trial counsel's direct and cross-examination of the codefendants to their detriment and to the Petitioner's benefit. It appears that trial counsel made great efforts to achieve his strategy of distinguishing the Petitioner from the codefendants. As we stated above, in post-conviction relief cases the Petitioner has "the burden of proving the allegations by clear and convincing evidence." Tenn. Code Ann. § 40-30-210(f)(1996 Supp.). The Petitioner has not established that there was an actual conflict of interest nor that the relationship among the defense attorneys had an adverse effect on his trial counsel's performance. From the record before us, we cannot conclude that the Petitioner's trial counsel provided inadequate representation due to a conflict of interest with the other defense attorneys. The Petitioner has failed to carry his burden of demonstrating that his trial counsel's representation was deficient. His fourth issue is without merit.

The Petitioner's fifth and sixth issues are closely related and both generally concern the trial court's function as thirteenth juror.⁷ In his fifth issue, the Petitioner argues that his trial counsel rendered ineffective assistance by failing to request that the trial judge perform his duty as thirteenth juror. In his sixth issue, the Petitioner argues that the trial judge erred by failing to perform his thirteenth juror duty. Because of the close relationship between the two issues, we choose to address them together.

In framing these two issues, the Petitioner focuses heavily on the following comments made by the trial judge at the post-conviction hearing:

⁷ See Tenn. R. Crim. P. 33(f).

Mr. McGuire pointed out that I said at some point that I didn't think Mr. Wiggins committed the murder, and I do not believe Mr. Wiggins committed the murder. I didn't believe it at trial, I do not believe it today. But I believe Mr. Wiggins was an aider and abettor and I feel that all three of them could properly have been convicted of first degree murder.

The Petitioner contends that these comments reveal that the trial judge did not perform his duty as thirteenth juror or misconceived that duty. As a result, the Petitioner argues that the trial court erred with regard to his thirteenth juror duty and that trial counsel was ineffective in failing to assure that the trial judge performed his duty. The Petitioner cites primarily this court's unpublished opinion in State v. Andrew Lee Moats, C.C.A. No. 03C01-9302-CR-00038, Knox County (Tenn. Crim. App., Knoxville, May 2, 1994), which was affirmed by our supreme court. See State v. Moats, 906 S.W.2d 431 (Tenn. 1995).

At the conclusion of the trial in the case sub judice, the trial judge accepted and approved the jury's verdict without making detailed comments. At the sentencing hearing, the trial judge, commenting about letters he had received on behalf of the Petitioner expressing the belief that he had been unjustly convicted, stated "I don't agree with that, and the jury did not agree with that, but I certainly understand your feeling."

After reviewing the statements made by the trial judge, we believe that the Petitioner's reliance upon Moats is misplaced. In Moats, our supreme court reversed and remanded for a new trial where the trial judge's comments reflected that he had failed to fulfill his duty as thirteenth juror. The trial court performed a "sufficiency of the evidence" type of review rather than an independent evaluation of the weight of the evidence, thereby misconceiving the thirteenth

juror duty. Moats, 906 S.W.2d at 435. We agree that if the trial court expresses dissatisfaction with or disagrees with the verdict, it is error for the trial court to fail to grant a new trial pursuant to Rule 33(f) of the Tennessee Rules of Criminal Procedure. See Helton v. State, 547 S.W.2d 564, 566 (Tenn. 1977). In the present case, however, there is nothing in the record to suggest that the trial judge misconceived his thirteenth juror duty by performing a “sufficiency of the evidence” type of review. Instead, it is clear that the trial judge performed an independent evaluation of the proof and found the verdict supported by the weight of the evidence.

Contrary to the Petitioner’s contention, the trial judge’s comments do not reflect disapproval of or dissatisfaction with the jury’s verdict. From the verdict, neither the trial judge nor we know if the jury specifically found that the Petitioner beat the victim or cut his throat. The trial judge, in reviewing the evidence presented at trial, did not believe that the Petitioner had beaten the victim or had cut his throat. Yet the trial judge did believe that the Petitioner had aided and abetted the killing, thereby making him criminally responsible for the conduct of his codefendants. See Tenn. Code. Ann. § 39-11-402 (1991). Thus, the trial judge found that the weight of the evidence supported the jury verdict. We conclude that the record demonstrates that the trial judge fulfilled his duty as thirteenth juror. As a result, the Petitioner has failed to establish that his trial counsel provided deficient representation by failing to request that the trial judge, as thirteenth juror, set aside the verdict. Accordingly, the Petitioner’s fifth and sixth issues lack merit.

In his seventh issue, the Petitioner argues that the State committed prosecutorial misconduct either by failing to investigate the results of scientific tests performed on the Petitioner's knife or by misrepresenting those results. The Petitioner contends that the assistant district attorney who tried the case should have telephoned the TBI Crime Lab to confirm the specific meaning of the "inconclusive" lab results for the Pinto knife. By failing to perform an adequate investigation on such an important piece of evidence, he argues that the assistant district attorney committed prosecutorial misconduct. In the alternative, if the assistant district attorney did adequately investigate the lab results, the Petitioner contends that the prosecutor misrepresented the lab results that the Pinto knife tested negative for the presence of human blood. The Petitioner asserts that it was prosecutorial misconduct for the assistant district attorney to elicit lay testimony from police officers about the Pinto knife being saturated in blood and to cross-examine the Petitioner about the presence of blood on the knife, all the while knowing that the Pinto knife had tested negative for human blood. In support of his argument, the Petitioner cites primarily to State v. Spurlock, 874 S.W.2d 602 (Tenn. Crim. App. 1993).

Spurlock, however, is quite different from the case at bar. Generally speaking, Spurlock involved a number of problems. Witness statements helpful to the defense were not properly disclosed, in violation of the tenets of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Spurlock, 874 S.W.2d at 613. Audio tapes reflecting improper police pressure on a key prosecution witness were also not disclosed. Id. at 616. Furthermore, the State knowingly allowed false testimony to be presented at trial uncorrected. Id. at 616-

18. From those circumstances, this Court concluded that the defendant had established prosecutorial misconduct.

However, in the case sub judice, there is no such indication of prosecutorial misconduct with regard to the Pinto knife evidence. The assistant district attorney testified at the post-conviction hearing that he did not call the TBI Crime Lab about the Pinto knife test results because he believed he knew what the lab report meant, namely that the forensic testing was unable to determine what the substance on the knife was. As a result, the prosecutor decided that calling the TBI agent who had performed the tests would add nothing to the case. Instead, he relied solely on lay testimony which was not inconsistent with the lab results as he understood them. Moreover, the lab report was disclosed to the Petitioner to conduct whatever investigation was deemed necessary. Finally, there is no evidence in the record suggesting that the assistant district attorney intentionally misrepresented the test results detailed in the lab report. In short, the circumstances of this case are far different from those of Spurlock, and we cannot conclude that the Petitioner has shown proof of prosecutorial misconduct with regard to the Pinto knife evidence. His seventh issue is without merit.

The Petitioner's eighth and ninth issues are closely related, and we will address them together. In his eighth issue, the Petitioner argues that the State committed prosecutorial misconduct by failing to conduct forensic tests on the steak knife allegedly located on the nightstand in the victim's bedroom. In his ninth issue, he argues that the second degree murder verdict should be set aside because of the failure of the State to preserve the steak knife, thereby rendering it unavailable for forensic testing by the defense. The Petitioner contends that

the steak knife was an important piece of evidence which would have corroborated codefendant Gregory's testimony that codefendant Farmer stabbed the victim with a knife that he picked up from a nightstand by the victim's bed. In addition, scientific testing of the steak knife could possibly have demonstrated that it, rather than the Pinto knife, was the murder weapon. As a result, the Petitioner asserts that the State's failure either to test the steak knife or to preserve it as evidence for possible testing by the defense requires a reversal of his murder conviction.

In the context of this case, we believe that the Petitioner's arguments turn on the lack of preservation of the steak knife. As we recounted above, Captain Ziegler testified at trial that, to the best of his recollection, there was a steak-type knife in the bedroom that he believed was collected as evidence. Ziegler, however, also stated that Detective Matthews might be able to answer questions concerning that knife better than he could. Matthews was not questioned at trial concerning the steak knife. There is no record of a steak knife having been tagged as evidence or submitted to the TBI Crime Lab for scientific testing.

At the post-conviction proceeding, Captain Ziegler recalled that he had testified at trial about the steak knife, but stated that he did not know where the steak knife currently was. Detective Matthews testified that he did not remember seeing a steak knife in the victim's bedroom, but did remember seeing knives and other utensils in the kitchen. Matthews testified further that he did not know where the alleged steak knife currently was. Neither Ziegler nor Matthews recalled discussing the steak knife with the district attorney's office. The assistant district attorney who tried the case did not recall anything about a steak

knife having been found in the bedroom. He did recall that there were several utensils discovered in the victim's home, none of which appeared to have been used in the crime.

From these circumstances, it is unclear whether the steak knife allegedly seen on the nightstand in the victim's bedroom ever existed. It is clear that no such knife was tagged as evidence, nor was it submitted for forensic testing. Of course, it is also clear that no such knife was available for testing by the Petitioner. Given these circumstances, the Petitioner's trial counsel made the best of the situation by eliciting Captain Ziegler's testimony about his recollection of the steak knife and by suggesting to the jury that the steak knife was the actual murder weapon.

The Petitioner cites Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) in support of his argument, and we find it to be persuasive authority in the context of the present case. Youngblood involved a young boy who had been sexually assaulted. Shortly after the assault, physicians examined the victim using a standard sexual assault kit to gather potential evidence. After the examination, police collected this kit and the victim's clothing. The assault kit was refrigerated but the victim's clothing was not. Police later conducted testing on the samples in the assault kit and were able to determine that a sexual assault had occurred, but were unable to determine blood groups of the assailant. The victim's clothing was later examined for the first time, and police were able to detect two semen stains, but were again unable to determine blood groups of the assailant. Youngblood, 488 U.S. at 52-54, 109 S.Ct. at 334-35.

At trial and on appeal, the defendant complained that the police had failed to preserve the evidence on the victim's clothing properly, thereby denying him the opportunity to test potentially exculpatory evidence. Expert testimony was offered concerning the possible results of tests performed on the semen samples from the clothing had the clothing been refrigerated. The defendant argued that the failure to preserve the victim's clothing denied him access to potentially exculpatory evidence and constituted a violation of due process. Youngblood, 488 U.S. at 54, 109 S.Ct. at 335.

In affirming the defendant's convictions, the United States Supreme Court stated that the Youngblood situation was slightly different from the traditional Brady problem.

The Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.

Youngblood, 488 U.S. at 57, 109 S.Ct. at 337. Drawing on this distinction, the Court went on to hold that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Youngblood, 488 U.S. at 58, 109 S.Ct. at 337 (emphasis added). Because there was no implication of bad faith on the part of police in not refrigerating the victim's clothing, the Court found no due process violation. Youngblood, 488 U.S. at 58, 109 S.Ct. at 337-38.

Similarly, in the case sub judice, we are faced with the apparent failure to preserve potentially exculpatory evidence, assuming that the steak knife existed as testified to by Captain Ziegler. There is nothing in the record, however, which suggests that the State suppressed or purposefully lost the steak knife. Furthermore, the Petitioner has not demonstrated bad faith on the part of the State in its failure to have preserved the steak knife for testing by the TBI Crime Lab or the defense. We therefore conclude that the failure of the police to preserve the alleged steak knife and its subsequent unavailability for testing by the Petitioner did not amount to a violation of due process. See Youngblood, 488 U.S. at 58, 109 S.Ct. at 337. Accordingly, the Petitioner's eighth and ninth issues lack merit.

For the reasons set forth in the discussion above, we conclude that the Petitioner has failed to demonstrate that the trial court erred in denying his petition for post-conviction relief. We therefore affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

(SEE SEPARATE CONCURRING OPINION)
GARY R. WADE, JUDGE

JERRY L. SMITH, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1996

FILED

March 20, 1997

ROBERT LLOYD WIGGINS,)	C.C.A. NO. 03C01-9605-CC-00191
)	Cecil Crowson, Jr.
Appellant,)	Appellate Court Clerk
)	
)	MCMINN COUNTY
VS.)	
)	HON. R. STEVEN BEBB
STATE OF TENNESSEE,)	JUDGE
)	
Appellee.)	(Post-Conviction)

SEPARATE CONCURRING OPINION

I concur in the results reached by my colleagues. My only concern has to do with the failure of trial counsel to further investigate a lab report which, on its face, is ambiguous. On the other hand, the defendant's argument that he was prejudiced by his trial counsel's failure to further investigate does not withstand close scrutiny. The defendant's credibility had been impeached long before he was successfully cross-examined about the knife. Because the defendant had originally made a false statement to police, he had to repeatedly admit during the cross-examination that he had lied to the police. The defendant and both of his codefendants were convicted at the original trial. The second degree murder verdicts suggested that the jury rejected the testimony of all three defendants. In summary, I would have found deficient performance on the part of trial counsel but that deficiency, in the context of the trial, neither affected the verdicts nor undermined our confidence therein.

Gary R. Wade, Judge