

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2000-KA-1106**
VERSUS * **COURT OF APPEAL**
TROY ANDREWS * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 381-449, SECTION "B"
Honorable Patrick G. Quinlan, Judge
* * * * *
Chief Judge William H. Byrnes III
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(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, Judge Dennis R. Bagneris Sr.)

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CONVICTION AND SENTENCE AFFIRMED

STATEMENT OF THE CASE

On November 17, 1998, defendant, Troy Andrews, was found guilty as charged by a twelve-person jury of first degree murder, a violation of La. R.S. 14:30. The jury deadlocked during the penalty phase of the trial. On January 12, 1999, the trial court denied defendant's motion for new trial. After waiving all legal delays, defendant was sentenced to life imprisonment at hard labor, without benefit of parole, probation or suspension of sentence, with credit for time served. The trial court granted defendant's motion for appeal.

FACTS

Dr. Richard Tracey, qualified by stipulation as an expert in the field of forensic pathology, performed an autopsy on the body of the victim, Jody Harris. The victim was shot four, perhaps five times, and had four cuts to his scalp. Dr. Tracey said these cuts were consistent with being struck with

a gun or club-like object. The fatal gunshot wound was one of two to the back. Three bullets were recovered from the body. Bodily fluids taken from the victim tested positive for heroin and marijuana.

Zindell Harris, the victim's wife, testified that she and the victim had lived at 6343 Baccich Street, approximately one block from the corner of Mexico Street, where the victim was shot to death. She said the victim had recently received some insurance money from a disability-related settlement. Mrs. Harris said Terry West had been a groomsman in her and the victim's 1995 wedding. He was a friend of the victim's, and she had had known him since she started dating the victim five years before her marriage. On the night of December 23, 1995, she and her husband were celebrating her 29th birthday at their home with family and friends. Jamie Espadron, a friend of the victim, was there, as was Kim Ford, and Shazell Keyes, Mrs. Harris' sister. Jamie and the victim left the party about 10:00 or 10:30 p.m. to go to Terry West's residence to get some things for the party. Kim Ford told her that Terry West had paged the victim. Later, Jamie Espadron's girlfriend telephoned to inform her that "they" had kidnapped the victim. Terry West came to the door a few minutes later and told her that "they" kidnapped the victim, and that if she did not give "them" the money "they" were going to kill him. West also at one point said give "us" the money. When Mrs.

Harris replied that she did not know where the money was, West said to check on top of the bed. She found the money there, and gave it to West, who then left. After West left, Mrs. Harris' aunt telephoned police. Shazell Keyes and Kim Ford told her they heard two shots after West left. As Mrs. Harris and the others prepared to walk outside, West reappeared. He was unharmed, and did not give Mrs. Harris the money back. Mrs. Harris found the victim lying on the curb on Mexico Street. He was still alive and said, "love you" to her several times before an ambulance arrived. She rode in the ambulance with him to the hospital, where he died later that night. Terry West was arrested that night. Mrs. Harris said that Kenyatta Packnett was a friend of her late husband's. She learned that he was present when her husband was kidnapped. He was afraid to come forward at first, but eventually talked to police. Mrs. Harris admitted on cross examination that in February 1998, she testified at the trial of Terry West that she believed the cash she gave West had been drug money. She claimed that since that trial she learned that it had been insurance money. Mrs. Harris also admitted that her husband sold marijuana.

New Orleans Police Crime Lab Officer James Gehagan processed the scene where the victim was found, as well as a second scene, an apartment at 3819 Gibson Street, where he collected spent casings, live cartridges, and

bullet fragments.

New Orleans Crime Lab Officer Karl Palmer processed a Nissan Maxima after it was relocated to the police evidence cage. He took numerous photographs of the vehicle, and collected blood samples and lifted twelve fingerprints from it. He said fingerprint number four was lifted from the exterior driver's door of the vehicle.

New Orleans Police Officer Glenn Burmaster was qualified by stipulation as an expert in the identification and classification of fingerprints. He matched fingerprint number four to defendant. The other eleven fingerprints were not suitable for identification.

New Orleans Police Crime Lab Officer Joseph Tafaro analyzed six blood specimens collected by Officer Palmer from a blue four-door Nissan Maxima, temporary license number 4483249. Specimen number one, from the exterior rear left fender of the Nissan Maxima, was positive for group O blood, while the other five specimens could not be typed. Officer Tafaro also examined five blood specimens collected by Officer Gehagan from the apartment at 3819 Gibson Street, and determined that all were group O blood. He said the victim had group O blood.

New Orleans Police Department Detective Joe Waguespack handled the investigation of Jody Harris' murder. He arrested Terry West that night,

who was the leaseholder of the apartment at 3819 Gibson Street, one of the two locations involved. Det. Waguespack did not recover any of the “ransom money” in connection with arrest of Terry West. Within two days after the murder, Larry Packnett contacted him and told him that he had been inside of Terry West’s apartment with Jody Harris, Jamie Espadron, Kenyatta Packnett and John Brown [sic], when Gentry Sylvester and someone he knew only as Troy entered. Det. Waguespack later obtained an arrest warrant for Gentry Sylvester, along with search warrants for Sylvester’s home at 4911 Kendall Street, and his car. Sylvester was arrested at his home. The residence was searched, but no money was found. Det. Waguespack learned Troy’s last name, Andrews. He prepared a photographic lineup and presented it to Larry Packnett, who identified defendant, Troy Andrews, as one of the perpetrators. An arrest warrant was put out for defendant on January 1, 1996, and he turned himself in three days later.

Det. Waguespack testified on cross examination that he obtained a physical description of the person who shot Jody Harris at Baccich and Mexico Streets as a tall thin black male wearing a Saints starter jacket, who had a severe limp and dragged one arm. That description was given by Willie Chester, whose residence was on a corner at the intersection, nearest

to the location where the victim was discovered shot. Mr. Chester had just driven up to his residence, and was in his parked vehicle, when he heard two shots coming from Baccich Street. He then saw the victim run around the corner and fall in front of his Mexico Street residence, where more shots were fired. Det. Waguespack stated that when he showed the lineup to John Thomas, Mr. Thomas could not positively identify anyone, as he had been hit in the head and knocked unconscious shortly after the two armed men had entered Terry West's apartment. Det. Waguespack said that the Nissan Maxima from which evidence was recovered belonged to Jamie Espadron's girlfriend.

Russell Plummer testified that he was spending the weekend at his friend Terry West's apartment, and he was there on December 23, 1995. He was sleeping in a bedroom, when he heard a knock on the front door. He looked through the peephole, and saw Terry West. Mr. Plummer opened the door, and turned and immediately walked back into the bedroom to go back to sleep. Ten to fifteen minutes later, he heard someone saying, "Bitch, lay down," and heard a lot of yelling. He looked out of the bedroom door and saw someone going out of the back door. He closed the bedroom door and locked it. The yelling went on for ten to fifteen minutes, and then suddenly stopped. After waiting a while, he left the bedroom, and found two people

unconscious with the front and back doors open. He locked both doors, and was getting dressed, when someone began shooting into the back of the apartment, into the kitchen. He sought refuge in the closet. The shooting stopped, only to resume at the front door. He telephoned police, and the shooting stopped. Then someone began shooting into the front window of the apartment. When police arrived he, Terry West and another individual were taken to police headquarters for questioning. He and the other individual were later taken home, but Terry West was detained. Mr. Plummer said he had not seen anyone come inside with Terry West, and did not recognize any of the voices. He had met Terry West in the Desire Housing Project, and also knew defendant from the project. He had seen the victim before, but did not know him. Mr. Plummer testified on cross examination that he had never known Terry West to traffic in marijuana, and had never seen marijuana in West's apartment.

James Espadron grew up with the victim. On the night of the murder, he attended the party for the victim's wife at their home. He was driving a blue Nissan Maxima, registered to the mother of his then girlfriend, who at the time of trial was his wife. He and the victim left the party at about 10:30 p.m., intending to go to a liquor store and to Terry West's apartment in the St. Bernard Housing Project. The victim was driving the Nissan Maxima at

that time, and was in possession of the keys to it when they went to Terry West's apartment. Terry West let them into his apartment. The victim's cousin, Kenyatta, was there, and someone was sleeping in the bedroom. Mr. Espadron went into the kitchen to get a glass of water and while there, heard a knock on the front door. This happened within two minutes of entering the apartment. Terry West answered the door, and someone unknown to him burst in yelling "get on the floor." At that point James Espadron ran out of the back door and went to a friend's nearby apartment in the project. He notified police, and then telephoned the victim's wife and told her what had happened. Mrs. Harris told him that Terry West was there asking for money. Mr. Espadron testified that prior to going to Terry West's apartment there had been no blood in the Nissan Maxima. He did not know defendant, and could not say that the defendant had been in Terry West's apartment that night. Mr. Espadron testified on cross examination that he had been to Terry West's apartment four or five times before that night, and said he had never seen any marijuana there. He also said he had never seen the victim in possession of marijuana. He said there was someone else in Terry West's apartment, who was with Kenyatta.

Cindy Mitchell Espadron, Jamie's wife, testified that she owned a blue 1991 Nissan Maxima, which Jamie borrowed on December 23, 1995.

She did not know defendant, and said he had never been inside of her car.

She also said her mother did not know defendant.

Kenyatta Packnett testified that on the night of December 23, 1995, he and John Thomas met the victim and Jamie Espadron, who were in Jamie's car, and they all went to Terry West's apartment. Terry let them inside.

Jamie Espadron went into the kitchen to get a glass of water, and while he was there,

someone knocked on the door. Terry West opened the door, and Gentry Sylvester and defendant entered, each holding a gun. The two gunmen made him, Terry West, the victim, and John Thomas, all get on the ground. Jamie Espadron ran. Defendant grabbed the victim and repeatedly struck him with a gun. Gentry Sylvester held a gun on the rest of them. Defendant then pistol-whipped him and John Thomas, knocking Thomas out. Defendant forced the victim to walk out of the front door. Terry West followed them out, followed by Gentry Sylvester. Before leaving, Gentry Sylvester, whom he knew, told him that they were going to kill the victim. Terry West's cousin came from the back of the apartment, and the two of them tried to revive John Thomas. Then someone started shooting. Kenyatta said he tried to call police on a cellular telephone. He talked to police that night at Terry West's house, but they apparently were unaware that he had been in the

house at the time of the invasion, and he did not give a statement until a day or two later. Mr. Packnett did not know defendant's name that night, but later identified his photograph in a lineup presented to him by police.

Kenyatta Packnett stated on cross examination that the victim was his cousin. He said he would not know if the victim sold marijuana, and said he had never seen him sell any. He knew Terry West before that night, but had never seen any marijuana in his apartment. He recalled the gunmen saying "Bitch, get down, Bitch." Kenyatta said that at the time he went to police he knew defendant's first name was Troy, because Gentry Sylvester had told him. He admitted originally describing defendant to police as a tall black male with a beard, but acknowledged that none of the individuals in the photographic lineup had beards. Kenyatta acknowledged that Terry West's arm and leg on one side were handicapped. He did not remember what defendant was wearing that night. He said the individual in the bedroom never tried to telephone police. Kenyatta said that Gentry Sylvester came to his home early on the morning after the incident, wanting to know if he had told police anything, and that was when he mentioned that the other individual was named Troy.

Det. Waguespack was recalled as a witness, and testified that in Kenyatta Packnett's December 26, 1995 statement Packnett said that the

person who had been with Gentry Sylvester was supposed to be named Troy.

Patricia Andrews, defendant's aunt, testified that defendant was living with her at 3503 Pleasure Street in December 1995. She said that she went to a church service on December 23, which began at 7:45 p.m. She said the service ended sometime around 9:30 or 10:00 p.m. She was washing her hair, rushing to say her nightly prayers, when defendant and his friend, Stephen Singleton, left. She said that was at approximately 12:05 a.m., on December 24. However, on cross examination, Ms. Andrews twice testified that the Tabernacle and Deliverance church service she attended had been on Friday night, which would have been December 22. She said her church did not have services on Saturday, which would have been December 23, the night of the events culminating in the murder. Ms. Andrews was unaware of the dates, but knew it had been Friday night when she washed her hair and defendant and his friend were at her home. Contradicting that testimony, however, she testified on re-direct examination that she washed her hair the night before she had to go to church on Sunday because she sang in the church choir and wanted to have clean hair. On re-cross examination, Ms. Andrews again said she washed her hair after the Deliverance service, and that the deliverance service was on Friday. Ms. Andrews also first said that defendant did not have a beard, but after being shown photographs of him,

acknowledged that he had a goatee and a moustache.

Joycelyn Mason, defendant's friend, testified that defendant came to her home at approximately 10:30 p.m. on December 23, and stayed until 11:25 p.m. Ms. Mason said she lived at 3611 Pleasure Street. She said defendant later telephoned her from his aunt's home, to let her know he had gotten inside. He told her he was going to a restaurant, and he telephoned her from the restaurant at approximately 12:30 p.m. Ms. Mason said she remembered the dates because her telephone caller identification system recorded them. She learned of defendant's arrest several days later, from his aunt. Ms. Mason said she knew that the night defendant was at her home was the same night defendant's aunt was at home washing her hair. She recalled that defendant only had a moustache, not any hair on his chin.

Stephen Singleton admitted to two prior convictions for possession of cocaine and, on cross examination, to one for possession of a sawed-off rifle. He testified that late December 23, and early December 24, 1995, he was with defendant. They left his aunt's residence and drove, in her car, to a restaurant at Bullard and the I-10 Service Road. Mr. Singleton drove, and he and defendant did not leave the restaurant until 1:00 a.m. He said defendant was at his aunt's home at approximately 11:35 p.m. Defendant's aunt had just gotten back from a Deliverance service at her church and was washing

her hair. He said this had been on a Friday night. On redirect examination, however, he indicated that this had been a Saturday night, and suggested on recross examination that defendant's aunt could have been mistaken if she said it had been a Friday night.

Orleans Parish District Attorney's investigator Keith Arnold, a retired police officer, testified that he went to 1713 Gallier Street in an effort to locate Stephen Singleton, but was unable to do so.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NO. 1

In his sole assignment of error, defendant claims that his trial counsel was ineffective in failing to object to hearsay evidence and in failing to prepare witnesses to present a legitimate alibi defense.

“As a general rule, claims of ineffective assistance of counsel are more properly raised by application for post conviction relief in the trial court where a full evidentiary hearing may be conducted if warranted.” State v. Howard, 98-0064, p. 15 (La. 4/23/99), 751 So.2d 783, 802, cert. denied, Howard v. Louisiana, 528 U.S. 974, 120 S.Ct. 420, 145 L.Ed.2d 328 (1999). However, where the record is sufficient, the claims may be addressed on appeal. State v. Wessinger, 98-1234, p. 43 (La. 5/28/99), 736

So.2d 162, 195, cert. denied, Wessinger v. Louisiana, 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999); State v. Bordes, 98-0086, p. 7 (La. App. 4 Cir. 6/16/99), 738 So. 2d 143, 147. Ineffective assistance of counsel claims are reviewed under the two-part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). State v. Brooks, 94-2438, p. 6 (La.10/16/95), 661 So.2d 1333, 1337 (on rehearing); State v. Robinson, 98-1606, p. 10 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 126. In order to prevail, the defendant must show both that: (1) counsel's performance was deficient; and (2) he was prejudiced by the deficiency. Brooks, supra; State v. Jackson, 97-2220, p. 8 (La. App. 4 Cir. 5/12/99), 733 So.2d 736, 741.

Counsel's performance is ineffective when it is shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland at 686, 104 S.Ct. at 2064; State v. Ash, 97-2061, p. 9 (La. App. 4 Cir. 2/10/99), 729 So. 2d 664, 669, writ denied, 99-0721 (La. 7/2/99), 747 So.2d 15. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance the result of the proceeding would have been different; "[a] reasonable probability is a probability sufficient to undermine confidence in

the outcome." Strickland, at 693, 104 S.Ct. at 2068; State v. Guy, 97-1387, p. 7 (La. App. 4 Cir. 5/19/99), 737 So.2d 231, 236, writ denied, 99-1982 (La. 1/7/00), 752 So. 2d 175.

This court has previously recognized that if an alleged error falls "within the ambit of trial strategy" it does not "establish ineffective assistance of counsel." State v. Bordes, 98-0086, p. 8 (La. App. 4 Cir. 6/16/99), 738 So.2d 143, 147, quoting State v. Bienemy, 483 So.2d 1105, 1107 (La. App. 4 Cir. 1986). Moreover, as "opinions may differ on the advisability of a tactic, hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy is successful." Id. quoting State v. Brooks, 505 So.2d 714, 724 (La. 1987), cert. denied, Brooks v. Louisiana, 484 U.S. 947, 108 S.Ct. 337, 98 L.Ed.2d 363 (1987).

The record shows several hearsay objections by defense counsel, evidencing that counsel was familiar with the rules of evidence governing hearsay. Therefore, it must be assumed that defense counsel made a strategic decision not to object to other purported hearsay testimony. This cannot be considered ineffective assistance of counsel.

Further, the erroneous admission of hearsay evidence is subject to the

harmless error analysis. See State v. West, 95-0411, p. 8 (La. App. 4 Cir. 1/31/96), 669 So. 2d 545, 549-550, writ denied, 96-0502 (La. 5/10/96), 672 So. 2d 920. The introduction of statements objected to as hearsay which are merely corroborative and cumulative of other testimony presented by the state is harmless error. State v. Jones, 99-0861 (La. App. 4 Cir. 6/21/00), 769 So. 2d 28. That is, the error is harmless when it can be said that the verdict was surely unattributable to the error. State v. Vale, 96-2953, p. 2 (La. 9/19/97), 699 So.2d 876, 877.

Defendant first complains of statements by the victim's wife, Zindell Harris, who testified that she knew the victim and Jamie Espadron left the party to go to Terry West's apartment because "he told me when he left." Jamie Espadron testified at trial as to his leaving the party with the victim to go to Terry West's apartment. Kenyatta Packnett testified that he met Espadron and the victim and that they went to Terry West's apartment. Thus, Mrs. Harris' testimony was cumulative. Mrs. Harris also said "Kim" told her that Terry West had paged the victim. Although there was no other testimony as to this fact, defendant fails to show that there is a reasonable probability that, but for counsel's failure to object to this statement, the result of the proceeding would have been different. The victim's wife also stated that Jamie Espadron's girlfriend told her that "they" had kidnapped the

victim. However, in the same paragraph the victim's wife also testified that a few minutes after this, Terry West came knocking at the door saying that "they" had kidnapped the victim. Defendant does not complain on appeal as to what Terry West said to the victim's wife. Thus, the alleged hearsay as to what Jamie Espadron's girlfriend said was purely cumulative. Moreover, Kenyatta Packnett testified that defendant had forced the victim out of Terry West's apartment, followed by West and Gentry Sylvester. The evidence indicates that the jury's verdict was surely unattributable to these alleged hearsay statements. Defendant has failed to show that but for counsel's failure to object to this testimony, that there is a reasonable probability that the outcome of the trial would have been different.

Defendant also complains of testimony by Det. Waguespack that Kenyatta Packnett told him that he and another young man had been in the apartment at the time the victim was abducted, and that the two people who came running into the apartment were Gentry Sylvester and someone known to him as "Troy." Mr. Packnett testified to these facts at trial. Thus, Det. Waguespack's testimony is purely cumulative in this regard. To the extent that the detective's testimony may have served to buttress Mr. Packnett's credibility, it nevertheless cannot be said that but for such testimony, there is a reasonable probability that the outcome of the case would have been

different, and the evidence indicates that the verdict was surely unattributable to any such cumulative hearsay evidence. Defendant complains that counsel failed to object when Det. Waguespack was asked if he had obtained “Troy’s” last name before he left Gentry Sylvester’s residence, and he replied that he had, and that the name was Andrews. Det. Waguespack did not say how he got the name, only that he learned that the name was Andrews. He could have seen the name written on something in Gentry Sylvester’s residence. Defendant fails to show that this was hearsay, or that a hearsay objection was called for. Finally, Kenyatta Packnett positively identified defendant as one of the gunmen who entered Troy West’s apartment.

Defendant next cites defense counsel’s failure to object when Det. Waguespack testified during redirect examination by the State that John Thomas told him that he had been inside of Terry West’s apartment with Kenyatta Packnett and the victim, that Terry West allowed two armed men to enter the apartment, and that he had been knocked out by one of the gunmen almost immediately after the gunmen entered. This testimony was given after defense counsel cross examined Det. Waguespack about John Thomas’ inability to identify anyone in a photographic lineup, emphasizing that John Thomas had been present in Terry West’s apartment at the same

time as Kenyatta Packnett. Det. Waguespack had also explained on cross examination that John Thomas had been unable to identify anyone because he had been knocked unconscious. Kenyatta Packnett testified that John Thomas had been present in Terry West's apartment and had been pistol-whipped into unconsciousness. Thus, no additional evidence came out through this alleged hearsay testimony by Det. Waguespack. Moreover, defense counsel's trial strategy was not that two gunmen did not enter Terry West's apartment, only that defendant had been misidentified as one of those gunmen. Thus, defense counsel apparently did not object to this testimony concerning John Thomas either because he had just elicited the substance of that testimony from Det. Waguespack on cross examination, and Kenyatta Packnett had testified to much of it, or he did not feel it was necessary to his trial strategy.

Defendant further attacks counsel's performance in failing to object to Det. Waguespack's testimony that Mr. Chester, the eyewitness at the scene, heard two shots, and then saw the victim run to Mexico Street, where he fell and was shot again. Defendant fails to suggest how this hearsay testimony prejudiced him. Dr. Tracey autopsied the victim and testified that Jody Harris was shot either four or five times, and died from gunshot wounds. This hearsay testimony does not place defendant at the scene. The verdict

was surely unattributable to this testimony, and it cannot be said that there is a reasonable probability that but for counsel's failure to object to this testimony the outcome of the trial would have been different.

Failure to prepare witnesses:

Defendant claims that the trial transcript reflects that counsel failed to verify the alibi or prepare defense witnesses for trial, and that it appears from the transcript that counsel failed to even speak with the witnesses before putting them on the stand. Defendant claims that presenting defendant's aunt, defendant's female friend, Joycelyn Mason, and his friend Stephen Singleton under these circumstances was worse than presenting no defense at all.

This argument is rooted in the discrepancies in those witnesses' testimony concerning whether certain alibi evidence pertained to the night/morning of December 23-24, Saturday and Sunday, versus December 22-23, Friday and Saturday. The events surrounding the homicide occurred on the night/morning of December 23-24. Defendant's aunt, Ms. Andrews, first testified that she went to church on Saturday evening, came home, and was washing her hair, when

defendant and his friend, Stephen Singleton, left to go out. However, on

cross examination, she testified that this particular church service was not held on Saturday nights, but on Friday nights. Nevertheless, she also said she washed her hair for Sunday church services because she sang in the choir on Sundays. Ms. Mason testified that defendant had been with her on the evening of December 23, and then went home to Ms. Andrew's apartment, where he telephoned her. She said her telephone caller identification reflected that this call was made on December 23. However, she also testified under cross examination that this had been the same night that Ms. Andrews had been washing her hair. Stephen Singleton testified that he and defendant left Ms. Andrews residence on the night of December 23. However, he also testified that this had been the same night that Ms. Andrews had been to the church service and washed her hair.

It is apparent that defendant's aunt became confused on the witness stand as to what day she went to church and washed her hair. This does not prove that counsel failed to adequately interview or prepare the witnesses. The testimony of these witnesses suggested that defendant was at his aunt's apartment on the night of the murder. Considering that defendant was positively identified by Kenyatta Packnett as one of the gunmen who entered Terry West's apartment and forced the victim outside, that defendant's fingerprint was found on Jamie Espadron's vehicle, which the victim had

been driving, and that shortly after the kidnapping the victim was found shot to death, it cannot be said that the inconclusive alibi defense presented was worse than no defense at all.

There is no merit to this assignment of error.

DECREE

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED