

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
MAY 1999 SESSION

FILED

November 19, 1999
Cecil CROWS ON, Jr.
Appellate Court Clerk

DAVID EARL MILLER,
9805-CR-00188

*

C.C.A. # 03C01-

Appellant,

*

KNOX COUNTY

VS.

*

Honorable Ray L. Jenkins, Judge

STATE OF TENNESSEE,

*

(Post-Conviction--Death Penalty--First
Degree Murder)

Appellee.

*

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRM

JOHN EVERETT WILLIAMS,
Judge

OPINION

The petitioner, David Earl Miller, appeals the Knox County Criminal Court's dismissal of his post-conviction relief petition. In March of 1982, the petitioner was found guilty of first degree murder and sentenced to death by a

Knox County jury. The petitioner's direct appeal resulted in the Tennessee Supreme Court affirming his conviction, but reversing his death sentence and remanding the case for a new sentencing trial. See State v. Miller, 674 S.W.2d 279 (Tenn. 1984). In February of 1987, a resentencing trial was conducted. At its conclusion, the jury sentenced the petitioner to death based upon a finding that the murder was heinous, atrocious, and cruel. On direct appeal of the re-sentencing, the Tennessee Supreme Court affirmed the sentence of death. See State v. Miller, 771 S.W.2d 401 (Tenn. 1989). A rehearing was denied on June 19, 1989.

Exactly three years after the date of the denial of rehearing, the petitioner filed the post-conviction relief petition at issue in this appeal. The Knox County Criminal Court dismissed the petition after a hearing, holding that the proposed grounds for relief were previously determined, waived, or insufficiently supported. The petitioner appeals eight issues from that dismissal:

1. That the jury instruction on malice at the trial unconstitutionally shifted the burden of proof from the state to the defendant;
2. That the jury instructions relieved the state of its burdens to prove deliberation and the lack of heat of passion beyond a reasonable doubt;
3. That the evidence was insufficient for any rational trier of fact to find deliberation, premeditation, and the lack of heat of passion beyond a reasonable doubt;
4. That the petitioner received ineffective assistance of counsel at the guilt and penalty phases of his trial;
5. That the applied aggravating factor was unconstitutionally vague;
6. That the jury instruction in the second penalty phase was unconstitutional because it would lead a reasonable jury to require unanimity on mitigating factors;
7. That the definition of reasonable doubt issued to the jury at the guilt and the penalty phases of the trial reduced the state's burden; and
8. That the jury instruction on implied malice was unconstitutionally vague.

We AFFIRM the post-conviction court's judgment.

BACKGROUND

In July 1979, Calvin Thomas picked up a hitchhiker, the petitioner, and their subsequent friendship included Thomas's aiding the petitioner's entering a training program at a Manpower Center, helping the petitioner pay rent, and dining with the petitioner. Although Thomas and the petitioner briefly entered a

homosexual relationship in the fall of 1979, the relationship was of a “father/son” nature by March, 1980, when the petitioner moved into Thomas’s residence.

On May 20, 1981, the petitioner met the victim at the YWCA for their date. The victim’s mother, Helen T. Standifer, testified that the victim was twenty-three years old, resided at the downtown Knoxville YWCA, was mildly retarded, drank little or no alcohol, and vigorously opposed drug use.

Carol Sharp, a resident of the YWCA in Knoxville, Tennessee, was with the victim when the petitioner arrived for his date with the victim. Sharp testified that she observed the petitioner walk one block to her and the victim. He walked normally both during the approach and as he and the victim left. After his approaching, Sharp stood approximately five feet from the petitioner. She testified that he appeared clean and neat, that she detected no odor of alcohol about his person, and that he remained silent but smiled and nodded at Sharp on meeting her.

The petitioner had spent some time at the Hideaway Lounge in Knoxville preceding his date. Charlotte Campbell testified that she observed the petitioner purchase and ingest LSD, a powerful hallucinogen, at the Lounge at 3:00 or 4:00 p.m., and she further testified that the LSD she had purchased and ingested at that same place and time induced a “trip” of approximately 12 hours. Campbell could not determine if the petitioner was intoxicated, but she did not recall his being boisterous or loud or acting strangely at the Lounge. The state attacked Campbell’s credibility by introducing evidence of several convictions.

The petitioner and the victim stopped at a public library between 8:00 and 8:45 p.m. Three librarians testified. One librarian testified that he saw the petitioner stagger. Another testified that the petitioner was loud and boisterous but spoke coherently. The remaining librarian testified that the petitioner successfully navigated through the “stacks” of the library.

Carolyn Gann, a friend and former coworker of the petitioner, testified that the petitioner and the victim had coffee between 8:00 and 8:30 p.m. at the

Trailways bus station. Gann, an employee at the station, testified that she thought the petitioner was drunk: He swayed and spilled coffee. At approximately 9:30 p.m., a taxi driver and a security officer saw the couple enter the bus station. The officer and the driver noticed that Standifer was disoriented and had apparently urinated in her pants. The petitioner negotiated a taxi ride for the couple to Thomas's house, and the driver returned to the bus station at approximately 9:45 p.m.

Although the security officer detected a faint odor of alcohol, he and the cab driver testified that the petitioner was sober and spoke normally. The cab driver further testified that the petitioner directed him to the residence and correctly counted bills and change for fare.

That same night, Thomas returned home between 10:00 and 10:15 p.m. from his regular weekly Wednesday night church activities, and he noticed that the garage floor was wet. The petitioner, shirtless on the steps, said that he had hosed the floor. The kitchen floor was covered with pinkish water, and the living room carpet had two heavy streaks of blood. The petitioner explained that he had received a bloody nose in a fight. Thomas requested the petitioner to move out the following morning.

Thomas testified that during the conversation the petitioner appeared sober, although he may have consumed a beer. He further testified that the petitioner acted normally, spoke clearly, and watched television from the sofa.

The petitioner moved out as requested. The next evening, on March 21, 1981, Thomas observed the petitioner's blue tee-shirt hanging from a tree. He noted blood on the shirt and then saw the victim's nude and bloody body, with rope around her wrists and neck. Thomas immediately called the police.

The petitioner was apprehended in Ohio, where he gave a statement to the Knoxville Police Department detectives who extradited the petitioner to Knoxville. The petitioner later gave a second statement in Knoxville to investigators. The petitioner alleged that he punched the victim in the face after

she took his arm upon his telling her that he was moving to Houston. The petitioner claimed little recollection of the subsequent events.

Dr. Evans, who conducted the autopsy, testified that he noted two major wounds in the victim's face. The pattern of these wounds, either sufficient to cause death, matched a poker from the fireplace of the residence. Apparently, the impact on the victim bent the poker. The victim had been stabbed completely through the neck, into and shattering the jaw. She had also been stabbed through the roof of her mouth. Multiple stab wounds perforated her torso, including one wound through her heart and very nearly through her whole body. The stab wounds occurred either after death or as her blood pressure fell. Dr. Evans also testified as to severe, large bruises on her body that he opined were antemortem.

Dr. Gee, a psychiatrist, testified that he had examined the petitioner on two separate occasions. Dr. Gee opined that the petitioner was sane at the time of the offense.

Considering the above and other evidence, a jury returned a guilty verdict of first degree murder, and a death sentence was subsequently imposed at the penalty phase of the trial. The Tennessee Supreme Court affirmed the conviction but vacated the death sentence and remanded for sentencing. See Miller v. State, 674 S.W.2d 279 (Tenn. 1984). The petitioner was resentenced to death, and this sentence was affirmed. See State v. Miller, 771 S.W.2d 401 (Tenn. 1989).

Three years after his petition to rehear was denied, the petitioner filed for post-conviction relief. After granting the petitioner numerous continuances, the post-conviction court found that the issues raised were either previously determined or waived or contained allegations insufficient to warrant further proceedings. That court therefore dismissed the petition, but on a motion by the Attorney General of Tennessee, a panel of this Court remanded the case for a post-conviction relief hearing.

At the hearing, the petitioner did not testify and presented no testimony in support of his allegations. The post-conviction court again dismissed the petition on a finding that all issues had been previously determined, waived, or were not sufficiently supported. The petitioner appeals eight issues to this Court.

ANALYSIS

The petitioner asserts eight bases of alleged error. For post-conviction relief, the petitioner bore the burden of proving his factual allegations by a preponderance of the evidence. See Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988). This Court is bound by the post-conviction court's findings of fact, unless we conclude that the evidence contained in the record preponderates against those findings. See Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). With the exception of the alleged ineffective assistance of counsel, we address the issues in their presented order. Our discussion of the other issues disposes of portions of that alleged basis for relief.

I. Alleged shifting of the burden of proof by the malice instruction.

The petitioner first argues that the jury instruction unconstitutionally shifted the burden of proof for malice from the state to the defendant at the guilt phase of the trial. The state agrees that an instruction which allows a jury to presume malice, an element of the charged offense, is unconstitutional, see Sandstrom v. Montana, 442 U.S. 510 (1979), and further agrees that the petitioner may assert this issue, previously disposed of in favor of the state on the petitioner's direct appeal, as a new constitutional right meriting retroactive application. See State v. Bolin, 678 S.W.2d 40 (Tenn. 1984) (Tennessee Supreme Court adopts the Sandstrom ruling); State v. Martin, 702 S.W.2d 560 (Tenn. 1985) (Sandstrom ruling constitutes a new constitutional right); Sands v. State, 903 S.W.2d 297 (Tenn. 1995) (the Sandstrom ruling applies retroactively); see also Pruett v. State, 501 S.W.2d 807 (Tenn. 1973) (An issue rejected on direct appeal and subsequently established as a retroactive constitutional right may be raised on a petition for post-conviction relief.). Sandstrom errors, however, are subject to harmless error analysis by this Court. See Adkins v. State, 911 S.W.2d 334, 344 (Tenn. Crim. App. 1994).

The instruction in question, addressing second degree murder, could induce a jury to presume malice:

If the State proves beyond a reasonable doubt that a killing has occurred, it is presumed to be malicious unless rebutted by other facts and circumstances to the contrary. . . . A deadly weapon is an instrument, which from the use made of it at the time, is likely to produce death or do great bodily harm. The use of a deadly weapon by the party killing, when shown, raises a presumption of malice sufficient to sustain a charge of second degree murder unless it is rebutted by other facts and circumstances to the contrary.

The defendant submits three concerns regarding the Sandstrom error:

1. No ill will indicating malice, either of a general nature or specifically toward Standifer, was present;
2. Evidence of intoxicants negated the specific intent of express malice; and
3. Evidence of insanity raised a jury question about specific intent.

However, the Sandstrom error does not compel our reversing the post-conviction court's judgment in this case. On the petitioner's previous direct appeal to our state's Supreme Court, that Court found "no evidence was introduced by either the State or the defendant sufficient to raise a reasonable doubt as to defendant's sanity, unless it be said that atrocious, brutal acts inflicted upon Standifer [the victim], in and of themselves, were sufficient to do so." State v. Miller, 674 S.W.2d 279, 282 (Tenn. 1984). Further, the trial court approved the jury verdict rejecting intoxication as negating premeditation, and the Supreme Court found no reason to overturn that finding. See id. at 282-83.

We are also not persuaded by the petitioner's assertion regarding ill will. "Malice has been defined as an intent to do harm or cause injury to another," Welch v. State, 836 S.W.2d 586, 591 (Tenn. Crim. App. 1992), and the evidence clearly supports finding of such intent. The proof shows that the petitioner killed the victim by striking her twice with great force with a fire poker and indicates those blows were so hard they bent the poker. Prior to this, the petitioner had handled the victim with sufficient roughness to bruise her arms and legs. Further, the petitioner inflicted multiple lacerations of great force on the victim. The evidence clearly supports a finding of "ill will." We find no reversible error based on this issue.

II. Jury instruction allegedly relieving the burden to prove deliberation and lack of heat of passion.

For his second issue, the petitioner asserts that the jury instructions erroneously relieved the state of proving, beyond a reasonable doubt, deliberation and the lack of heat of passion. The instruction allegedly deprived the jury of the opportunity to decide the questions of deliberation and heat of passion because that instruction misstated the law.

Notably, the guilt phase of the trial occurred in 1982, prior to State v. Brown, 836 S.W.2d 530 (Tenn. 1992), and that decision's holding that a homicide elevated to the level of first degree murder must be done deliberately, with coolness and reflection. See id at 539.

The petitioner did not challenge the jury instructions on direct appeal and has waived the issue. Further, the Brown holding did not create a new constitutional right and is not retroactively applied. See Harris v. State, 947 S.W.2d 156, 174 (Tenn. Crim. App. 1996); Lofton v. State, 898 S.W.2d 246, 259-60 (Tenn. Crim. App. 1994).

III. Insufficient evidence of deliberation, premeditation, and lack of heat of passion.

The petitioner asserts that no rational trier of fact could have found deliberation, premeditation, and the lack of heat of passion beyond a reasonable doubt from the evidence presented at trial. The issue of sufficiency of the evidence, disposed of in favor of the state on direct appeal, see Miller, 674 S.W.2d at 282-285 (Tenn. 1984), was previously determined. Nonetheless, the defendant proposes that the Brown ruling constitutes "a new rule of constitutional law which goes to the sufficiency of the evidence," thereby entitling him to again raise the issue "to have it properly determined under the new standard of review."

We disagree. The petitioner's own authority for raising sufficiency of evidence on a post-conviction petition, John Wayne Slate v. State, No. 03001-9201-CR-00014 (Tenn. Crim. App. filed April 27, 1994, at Knoxville), qualifies

such pursuit: The issue may be asserted in a petition for post-conviction relief “unless it has been waived or previously determined.” *Id.* (emphasis added). In *Slate*, the sufficiency issue was not addressed on direct appeal. In the instant case, that issue has been previously determined. Further, the *Brown* ruling does not receive retroactive application. *See Harris*, 947 S.W.2d at 174; *Lofton*, 898 S.W.2d at 249-50.

IV. The vagueness of the aggravating factor.

The sole aggravating factor invoking the death penalty was that the murder was especially heinous, atrocious or cruel, in that it involved torture or depravity of mind. The petitioner objects that the pertinent jury instruction was unconstitutionally vague.

We disagree with the petitioner’s assertion. The trial court elaborated and defined the discrete terms within the instructions:

The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

You are instructed that the word:

“Heinous” means grossly wicked or reprehensible; abominable; odious; vile.

“Atrocious” means extremely evil or cruel; monstrous; exceptionally bad; abominable.

“Cruel” means disposed to inflict pain or suffering; causing suffering; painful.

“Torture” means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious.

“Depravity” means moral corruption; wicked or perverse act.

Our state’s highest court has upheld the constitutionality of such language in instructions. The petitioner supports his assertion, however, with case law developed after the petitioner’s 1987 sentencing. *See State v. Black*, 815 S.W.2d 166, 181 (Tenn. 1991); *State v. Williams*, 690 S.W.2d 517, 526-530 (Tenn. 1985); *cf. Houston v. Dutton*, 50 F.3d 381, 387 (6th Cir. 1995) (The jury instruction did not elaborate regarding aggravating circumstances of “heinous, atrocious or cruel” and was therefore unconstitutionally vague.). Further, on his direct appeal from the death sentence, the petitioner failed to challenge this language for vagueness. *See State v. Miller*, 771 S.W.2d 401, 405 (Tenn. 1989). Therefore, the petitioner waived this issue for post-conviction relief.

V. Unanimity of jurors on mitigating factors.

The petitioner argues that the instructions in the second penalty phase unconstitutionally infer a unanimity requirement on mitigating factors. The contested instructions required unanimous findings regarding aggravating factors and then instructed the jury to “consider as heretofore indicated any mitigating circumstances” The defendant asserts that this phase refers jurors back to the aggravating factors language. However, the instruction actually referred to earlier language:

In arriving at this determination, you are authorized to consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the course of th[e] trial.

The petitioner argues “that there is a substantial probability that reasonable jurors . . . well may have thought that they were precluded from considering any mitigating evidence unless all twelve jurors agreed on the existence of a particular such circumstances.” Mills v. Maryland, 486 U.S. 367 (1988).

We disagree. Read as a whole, the instructions fairly and accurately inform the jury of the pertinent law. The phrasing does not operate to preclude consideration of any relevant mitigating factors. We further note that the petitioner waived this issue by failing to pursue it on direct appeal. See Miller, 771 S.W.2d at 401, 404 (Tenn. 1989).

VI. Jury instructions allegedly reducing the state’s burden.

The defendant next asserts that the jury instructions at both the guilt and the penalty phases of the trial violated due process by reducing the state’s burden to something less than reasonable doubt. The contested guilt phase instructions stated:

The law presumes the innocence of the defendant and that presumption stands as a witness for the defendant and maintains until it is overcome by satisfactory evidence of his guilt, and before he can be convicted his guilt must be established beyond a reasonable doubt. Not a captious, possible or imaginary doubt, but an honest doubt engendered after an investigation of the entire evidence and an inability after such investigation to let the mind rest easily to the certainty of guilt.

At sentencing the instruction stated:

The burden of proof is on the State to prove any statutory aggravating circumstances or circumstances beyond a reasonable doubt to a moral certainty.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of your verdict. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdict. The law makes you the jury the sole and exclusive judge of the credibility of the witnesses and the weight to be given to the evidence.

The defendant concedes that the Tennessee Supreme Court has held such instructions constitutional. See State v. Bush, 942 S.W.2d 489 (Tenn. 1997); State v. Nichols, 877 S.W.2d 722 (Tenn. 1994). However, the petitioner cites a 1994 Federal District Court case for his proposition that the instruction violated the due process clause. See Rickman v. Dutton, 864 F. Supp. 686 (M.D. Tenn. 1994); but see Austin v. Bell, 126 F.3d 843 (6th Cir. 1997) (the Sixth Circuit Court of Appeals upholds a similar instruction.). Given that our state's highest Court has consistently upheld such instructions and that the Austin holding weakens any persuasive value of the Rickman decision, we are not convinced by the petitioner's argument.

We further note that the petitioner cites no authority for his assumption that his cited case law establishes a new rule of constitutional law requiring retroactive application. See Rickman, 846 F. Supp. 686, see also Victor v. Nebraska, 114 S.Ct. 1239 (1994). Therefore, the petitioner waived this issue by failing to challenge the instructions on direct appeal. See Jonas Rome Cole v. State, No. 01C01-959-CC-00294 (Tenn. Crim. App. filed May 14, 1998, at Nashville).

VII. Alleged vagueness of the jury instruction regarding implied malice.

The petitioner asserts that the trial court issued an unconstitutionally vague jury instruction regarding implied malice:

Implied malice is malice not against the slain but malice in general or that condition of mind which indicates a wicked, depraved, and malignant spirit and a heart regardless of social duty and fatally bent on mischief.

The petitioner proposes that analysis regarding an instruction reviewed by the United States Supreme Court applies to the instant case: “[T]he word heinous means extremely wicked or shockingly evil; atrociously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to or even enjoyment of the suffering of others.” Shell v. Mississippi, 498 U.S. 1 (1990) (per curiam). In Shell, the instruction addressed an aggravating factor for a death penalty sentence, and the United States Supreme Court cited Godfrey v. Georgia, 446 U.S. 420 (1980), in holding that the instruction did not sufficiently limit the class of persons eligible for the death penalty. See id.

In the instant case, the contested language differs: It involves an element of the crime of first degree murder. Further, the petitioner did not challenge this instruction on direct appeal. See Miller, 674 S.W.2d 279 (Tenn. 1984). Finally, the petitioner does not persuade us that the Shell holding created a new constitutional rule of law meriting retroactive application. In fact, the case relied on by the Shell Court per curiam opinion predated the petitioner’s trial. That argument was available for the petitioner at direct appeal. We further note that the instruction practically duplicates the “implied malice” portion of the jury instruction in Willie Bacon, Jr. v. State, No. 03C01-9605-CR-00203 (Tenn. Crim. App. filed April 23, 1998, at Knoxville), an instruction that a panel of this Court upheld as properly stating the element of first degree murder.

VIII. Allegedly ineffective assistance of counsel.

The petitioner alleges 20 separate bases for ineffective assistance of counsel. A defendant seeking relief because of ineffective assistance of counsel must first establish that the services rendered or the advice given was below “the range of competence demanded of attorneys in criminal cases.” Baxter v. Rose, 523 S.W. 2d 930, 936 (Tenn. 1975); see also Strickland v. Washington, 466 U.S. at 668 (1984). The defendant must then demonstrate that the deficiencies “actually had an adverse effect on the defense.” Strickland, 466 U.S. at 693. A reasonable probability must exist that but for counsel’s error the result of the proceeding would have been different. Id. at 694. The defendant must establish both factors. Moreover, on appeal the findings of fact established by the trial court are conclusive, and this Court will not disturb these findings unless the

evidence contained in the record preponderates against them. See Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). The defendant must show by a preponderance of the evidence that the findings were incorrect. See Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978). Further, failure of a particular strategy or tactic pursued by defense counsel does not establish ineffective assistance of counsel. This Court must defer to trial strategy and tactical choices based on adequate preparation. See Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). In the instant case, the trial court determined that the petitioner failed to satisfy the requisite prongs of the applicable standard. We concur.

Defense strategy and failing to present lack of deliberateness and presence of heat of passion.

The petitioner states at least seven separate issues regarding the trial counsel's strategy. Our review of the record indicates that the counsel pursued a defense strategy consistent with the law and vigorously sought to either gain acquittal of his client or, in the alternative, to reduce the severity of his sentence. We note that the petitioner did not examine his trial counsel during his evidentiary hearing for post-conviction relief.

We addressed the failure to object to jury instructions in the preceding analysis. We also reject the petitioner's assertions of ineffective assistance of counsel based on failure to object to jury instructions at the penalty phase. However, we further note that trial counsel can not be ineffective in failing to protest instructions consistent with the law at that time. See State v. Edward E. Jesperson, No. 03C01-9602-CC-00058 (Tenn Crim. App. filed January 28, 1997, at Knoxville).

Speculative testimony regarding the hammer used for the stab wounds.

The coroner testified that a hammer, found near the victim's body, could have been used by the defendant to drive a knife into the victim's bone, and the defense counsel did not object to this evidence at the guilt phase of the trial. The evidence was excluded from the resentencing hearing. Thus, any possible

unfair prejudice to the petitioner accrued at the guilt phase, and the petitioner has not demonstrated that this statement prejudiced the jury.

Other errors in the guilt phase.

The petitioner protests the trial counsel's failing to object to evidence regarding homosexual activities between the petitioner and Thomas constitutes reversible error. We disagree. The record does not support the petitioner's conclusion that homosexual behavior unfairly prejudiced the jury.

We are not persuaded that trial counsel's failure to move for an expert psychopharmacologist regarding effects of alcohol and LSD was either ineffective or prejudicial. We note that the petitioner actually presented evidence of the potential effects of the LSD to the jury through the testimony of the state's own witness. Further, the petitioner did not establish at the post-conviction hearing what an expert on alcohol or LSD could have contributed to his defense.

Regarding the victim's reduced mental capacity, the petitioner has not shown by a preponderance that the reference to her mental state on closing argument was unfairly prejudicial. For the same reason, we are not persuaded that what the petitioner expressed about his church, his illegitimacy, and his mother unfairly prejudiced the jury and deprived him of a fair trial.

Thomas gave recorded statements to investigators. The petitioner asserts that his trial counsel "probably" did not impeach Thomas with the actual tapes of these statements because that counsel did not request a continuance for examining the statements. Trial counsel, however, did impeach Thomas with the actual statements. The petitioner does not establish that the trial counsel's strategy resulted in prejudice. Further, he did not support his assertion with any testimony from trial counsel regarding their strategy on cross-examination, at his post-conviction hearing.

The security officer testified as to the petitioner's sobriety, and trial counsel unsuccessfully attempted to cross-examine the officer regarding pending indictments against him. The petitioner asserts that, if pursued properly, trial

counsel could have cross-examined on this subject and implied a cooperative effort between the state and the witness, a *quid pro quo* of favorable testimony in return for favorable treatment on the indictments.

The Knoxville investigators took two statements from the petitioner, one in Ohio and one in Knoxville. One detective testified that the first statement yielded a low-quality recording. After the state entered the second statement, the trial counsel did not offer portions of the first statement to attack the investigation. The petitioner fails to establish the requisite prejudice for this claim to merit reversal. Further, during closing argument the trial counsel used the failure to admit the first statement to attack the investigation.

The victim was not tested for drugs or alcohol, and her clothes were not tested for urine. Although trial counsel did not establish lack of testimony at the guilt phase, the petitioner does not show that he was prejudiced.

Penalty Phase

(Reference to Homosexual Behavior)

The petitioner again asserts that the trial counsel's introducing testimony of Miller's homosexual experiences constituted ineffective assistance of counsel. However, the evidence was introduced to show that the petitioner was a victim of predatory behavior by Thomas, thereby attempting to establish a non-statutory mitigating circumstance. Although apparently unsuccessful, this was a reasonable strategy based on preparation.

Closing Argument and Comment On Not Testifying

The petitioner alleges that trial counsel erred by commenting on his failure to testify. That counsel was emphasizing to the jury that the state had the burden of proof in answering questions relevant to the penalty phase of the trial. The petitioner further argues that the state then improperly commented on the petitioner's failure to testify and that his trial counsel erred by not objecting to that comment. The prosecution did not comment on the petitioner's failure to testify but rather on the petitioner's avoiding responsibility for his actions.

*Failure To Elicit Testimony Through Cross-Examination of Favorable
Information From First Statement To Police*

The petitioner asserts that trial counsel failed to elicit testimony of favorable portions, negating premeditation and deliberation, of his first statement to investigators, including his calling the victim a ‘good person.’ The petitioner does not sufficiently establish prejudice on this asserted issue.

Cumulative Penalty Phase Errors

The petitioner asserts that the trial counsel was ineffective for failing to voir dire whether the jury could find the ingestion of drugs and alcohol to be mitigating. However, counsel questioned prospective jurors whether they would be prejudiced against Miller based on his alleged use of alcohol and drugs prior to the murder. Further, Miller’s assertion that a substantial number of jury prospects would not find intoxication as mitigating is speculative and does not establish prejudice.

CONCLUSION

Having reviewed the petitioner’s presented issues in this appeal, we concur with the post-conviction court’s conclusion that these issues were either waived, previously determined, or insufficiently supported. We therefore AFFIRM the post-conviction court’s denial of relief.

JOHN EVERETT WILLIAMS, Judge

CONCUR:

JAMES CURWOOD WITT, JR., Judge

ALAN E. GLENN, Judge

