

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-07-015
- vs -	:	<u>OPINION</u> 3/12/2012
JOY MAJOR HOOP,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 1997-2065

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PIPER, J.

{¶ 1} Defendant-appellant, Joy Major Hoop, appeals the decision of the Brown County Court of Common Pleas, denying her motion for a new trial. We affirm the decision of the trial court.

{¶ 2} Hoop was convicted in 1998 of conspiracy and complicity in the aggravated murder of her husband, Donald Ray Hoop. Since that time, this court has considered Hoop's

multiple appeals, all of which center around the following pertinent facts.

{¶ 3} At approximately 1:30 a.m. on February 10, 1997, Deputy Buddy Moore of the Brown County Sheriff's Office was patrolling the area near Slammers Bar in Mt. Orab, Ohio. Moore observed a pickup truck in Slammers parking lot, and felt that the truck was suspicious because there was a silhouette of someone sitting in the vehicle with only the parking lights on. Moore observed the truck until he passed Slammers, and then continued to monitor the truck in his rear-view mirror. When Moore saw the truck leave Slammers, he turned his cruiser around and began to follow the truck. Moore then saw the truck turn into the first driveway of a trailer court located across the street from Slammers. After Moore observed a man exit the truck, and go to the front of the trailer, he continued driving southbound on State Route 68.

{¶ 4} Within a few minutes, the Brown County 911 dispatcher received a telephone call that a shooting occurred in the parking lot of Slammers, and Moore was dispatched to the scene. There, he found Hoop, who was an owner of Slammers, crying and bending over the body of her husband. Moore called for assistance and then determined that Donald's body had no pulse.

{¶ 5} Trooper Shelly Walden arrived on the scene, and Moore asked her to go to the trailer where he had observed the truck park moments before receiving the 911 dispatch. Walden located the truck, and then knocked on the front door of the trailer after Moore yelled from the parking lot of Slammers that he had seen the man go inside the trailer. The homeowner, Kathy Kerr, answered and confirmed that the driver of the truck was in her home. Moore then joined Walden, and Kerr led the officers to the bathroom where Carl G. Lindsey was discovered washing himself. His clothes were soaking in bloody water in the bathtub, and a pocketknife and a box of ammunition were on the sink vanity. Moore then arrested Lindsey, seized his clothes, and found Donald Hoop's empty wallet in the bathroom

garbage can.¹ Officers also found a gun behind the bathroom door that had blood on it, and forensic testing later determined that the blood came from Donald.

{¶ 6} Hoop was taken to the sheriff's office for questioning, and admitted that she, Kerr, Lindsey, and Kenneth Swinford had been talking about killing her husband that night. Hoop maintained that the conversation was only a joke, and that she had not intended for Donald to be harmed. Hoop was indicted on four counts, alleging her participation in aggravated murder with accompanying death specifications specific to murder for hire and murder during the commission of, or in flight from, an aggravated robbery.

{¶ 7} During the jury trial, the state presented testimony from Kerr, Swinford, as well as another Slammers patron who all testified that they heard Hoop conversing about killing Donald. All three admitted during cross-examination that at the time of the conversation, they believed that Hoop was not serious about having Donald killed, but also stated that they had since become unsure about Hoop's intent that night. Kerr also testified that Hoop gave Lindsey the murder weapon just before the killing. The state also presented testimony from the investigating officers who explained the details of their investigations and findings, as well as several forensic experts who established the physical details of the crime scene.

{¶ 8} Hoop called a number of witnesses, some to impeach the credibility of Kerr as the only witness to expressly state that Hoop possessed the murder weapon. Hoop's other witnesses were called to demonstrate that Lindsey was violent, had his own motives for killing Donald, and was seen with a pistol prior to the killing.

{¶ 9} The jury found Hoop guilty, but did not recommend a death sentence. The trial court accepted the jury's recommendation, and sentenced Hoop to life with the possibility of parole after 25 years. Hoop appealed her conviction and sentence and this court affirmed in

1. Lindsey was later found guilty and sentenced to death, and the Ohio Supreme Court affirmed Lindsey's conviction and sentence. *State v. Lindsey*, 87 Ohio St.3d 479, 2000-Ohio-465.

part, and reversed in part, finding that the trial court should have determined whether an in camera review was necessary regarding possible exculpatory evidence that Lindsey had been seen before the night of the murder with a gun. *State v. Hoop*, 134 Ohio App.3d 627 (12th Dist.1999). On remand, the trial court determined that an in camera review was not necessary and that Hoop was not entitled to a new trial based on the possible exculpatory evidence. This court affirmed the trial court's decision denying Hoop's motion for a new trial. *State v. Hoop*, 12th Dist. No. CA2000-11-034 (Aug. 6, 2001). The Ohio Supreme Court declined to exercise jurisdiction over the case. *State v. Hoop*, 93 Ohio St.3d 1484 (2001).

{¶ 10} Hoop then petitioned the trial court for postconviction relief, which the trial court denied. This court affirmed the decision of the trial court denying postconviction relief, *State v. Hoop*, 12th Dist. No CA2004-02-003, 2005-Ohio-1407, and the Ohio Supreme Court declined jurisdiction once more. *State v. Hoop*, 106 Ohio St.3d 1506, 2005-Ohio-4605. Hoop filed a petition in the federal courts for habeas corpus relief, and the court ordered that she be given access to discovery, including police and prosecutorial files. Although Hoop received 1450 pages of documents, 24 CDs with information, the prosecutorial files from the Brown County Prosecutor's Office, and other evidentiary materials, the Brown County Sherriff's Department was unable to locate the investigatory file on Donald's murder. Based on the discovery materials, Hoop filed an amended habeas petition, raising six claims for relief. The court then ordered that the habeas proceedings be held in abeyance so that Hoop could present claims to the Brown County Court of Common Pleas that had not yet been exhausted.

{¶ 11} Hoop requested leave of court to file a motion for a new trial because her newest motion was not filed within the time constraints of Crim.R. 33(B). The trial court granted leave, and Hoop submitted her motion for a new trial. The trial court held a hearing on the matter before denying the motion. Hoop now appeals the decision of the trial court to

deny her motion for a new trial, raising the following assignments of error.

{¶ 12} Assignment of Error No. 1:

{¶ 13} THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S FIRST CLAIM FOR RELIEF.

{¶ 14} Hoop argues in her first assignment of error that the trial court erred by denying her motion for a new trial because the state suppressed nine pieces of favorable, material, exculpatory evidence.

{¶ 15} The decision to grant or deny a motion for a new trial pursuant to Crim.R. 33 rests within the sound discretion of the trial court. *State v. Schiebel*, 55 Ohio St.3d 71, 76 (1990). An appellate court may not disturb a trial court's decision denying a motion for a new trial absent an abuse of discretion. *State v. Blankenship*, 102 Ohio App.3d 534, 556 (12th Dist.1995). Rather than a mere error of law or judgment, an abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160.

{¶ 16} Hoop argues that a new trial is warranted based on nine pieces of newly discovered evidence that the state suppressed before her jury trial. Hoop asserts that the state's suppression constituted a violation of the Fourteenth Amendment based on the United States Supreme Court decision, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). As stated by the Ohio Supreme Court,

Suppression by the prosecution of evidence that is favorable to the accused and "material either to guilt or to punishment" is a violation of due process. Evidence suppressed by the prosecution is "material" within the meaning of *Brady* only if there exists a "reasonable probability" that the result of the trial would have been different had the evidence been disclosed to the defense. As the United States Supreme Court has stressed, "the adjective ['reasonable'] is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict

worthy of confidence." (Internal citations omitted.)

State v. LaMar, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 27, quoting *Kyles v. Whitley*, 514 U.S. 419, 433–434, 115 S.Ct. 1555 (1995).

{¶ 17} During the hearing on Hoop's motion for a new trial, the state conceded that the nine pieces of evidence were not available to the defense at the time of her trial. Therefore, at most times, we will focus our analysis on whether the following pieces of evidence are favorable to Hoop, and whether or not the evidence is material within the meaning of *Brady*.

{¶ 18} First, Hoop argues that the state suppressed statements from Donald Barnett, who police interviewed two days after the murder. Barnett was at his mother's residence across the street from Slammers on the night of the murder, and heard an individual tell another individual "come on, lets go get out of here" [sic]. Hoop claims that this statement demonstrates that a second individual was involved in the commission of the murder. Hoop then suggests that other possible participants "could have been" Kathy Kerr or Kenny Swinford.

{¶ 19} Even if we were to assume that Barnett's statement is somehow favorable to Hoop, we do not agree with her that such evidence is material. The record indicates that Barnett heard the individual say "come on, lets go get out of here" [sic] between 12:30 a.m. and 12:45 a.m. when he was coming from the garage. He further stated that he was awake until around 1:00 a.m. and that, "I didn't see nothing after that." Barnett also did not hear any gunshots or anyone yelling after 1:00 a.m. The record is clear that the shooting occurred at approximately 1:30 a.m., when the Brown County Sherriff's Office dispatcher received a 911 call that a shooting had occurred at Slammers. Therefore, even if Barnett had testified at trial to what he heard, the evidence would have only adduced that almost an hour before the shooting, an individual was heard stating, "come on, lets go get out of here" [sic]. This

statement does not in any way establish that a second individual, separate from Hoop, was involved in the commission of the murder, and was not suppressed in violation of *Brady*.

{¶ 20} Hoop next argues that the state suppressed material evidence regarding an initial statement made by Kathy Kerr. On the night of the murder, officers went to Kerr's residence because that is where Deputy Moore saw the suspicious truck park. When Deputy Moore and the trooper arrived at Kerr's home, they asked her who Lindsey was, and Kerr apparently responded that he was her husband, and then changed her statement and told officers that Lindsey was her boyfriend. Hoop now theorizes that Kerr's statement demonstrates that she was protecting Lindsey and that Kerr had no motive to lie about her relationship with Lindsey unless she was somehow involved in the commission of the murder.

{¶ 21} If we first assume that Kerr's statement characterizing her relationship with Lindsey was somehow beneficial to Hoop, we do not find the statement material evidence. The inherent favor to Hoop of Kerr's statement is that Kerr was being either dishonest with police, or that she was being inconsistent in her statements. If Kerr had been presented to the jury as a witness beyond reproach, perhaps this statement would have raised questions in the jurors' minds about Kerr's ability to be consistent. However, Kerr's testimony was riddled with inconsistent statements, and as stated by the trial court, "the jury was well aware of Kathy Kerr's initial lack of forthrightness." We simply cannot say that not having Kerr's statement regarding her relationship with Lindsey denied Hoop a fair trial or that the result of her trial would have been different with its use.

{¶ 22} Hoop next argues that the state suppressed favorable and material evidence that on the night of the murder, Deputy Moore saw a vehicle passing at a high rate of speed coming from the direction of Slammers. After being dispatched to Slammers, Moore traveled to the scene and noticed a speeding automobile coming from the direction of Slammers. Another officer was then instructed to watch for the speeding car. Hoop now argues that the

existence of a speeding car contradicts the state's theory that she was one of the two assailants because she never left Slammers. Hoop thereby insinuates that the driver of the speeding car was the true second assailant.

{¶ 23} Although evidence that a second vehicle was seen fleeing the scene of Slammers may have been favorable to Hoop, such evidence was not suppressed by the state. The only evidence deduced from Moore's statement is that a speeding car passed him, coming north on State Route 68. However, no one ever saw the car coming specifically from Slammers, and there was no indication as to where the car was actually coming from or going to. Moreover, Moore appeared at trial as a witness and was cross-examined as to the events in question and his observations before and after being dispatched to Slammers. Moore also testified that he reported his observations regarding the car to dispatch. Therefore, this information was readily available to the defense during discovery. Notwithstanding the availability of the evidence, we do not find the evidence material.

{¶ 24} Hoop next argues that the state suppressed three pieces of favorable and material evidence concerning steps police officers took to investigate the murder. Specifically, Hoop argues that the Ohio Bureau of Criminal Investigation processed Kenny Swinford's vehicle, communicated with local hospitals about the possibility of an injured fleeing suspect, and that officers directed the dispatcher to collect information on Norman Fisher who had left Slammers around the time of the shooting. Essentially, Hoop argues that these investigatory measures demonstrate that the police believed someone else was involved in the murder.

{¶ 25} While evidence that Hoop was not the initial suspect may, at first blush, seem favorable to her, evidence that police employed several techniques during their investigation of the murder is not material. The police are charged with the duty to investigate crimes, and as such, must explore several avenues when determining facts and circumstances and

identifying possible suspects. During the investigation, officers searched Swinford's vehicle, asked local hospitals to report any suspicious injuries, and also gathered information on a patron who was present at Slammers around the time of the shooting. The steps taken during the investigation are not favorable or material to Hoop's defense because they actually tend to prove that the police narrowed the list of suspects to only Lindsey and Hoop after they had first investigated other people and came to the conclusion that none were involved in the murder. The jury heard testimony from the police officers who were subjected to cross-examination regarding their observations, actions, and techniques employed during the murder investigation. Testimony that police searched but found nothing incriminating in Swinford's vehicle, that no one sought medical attention for suspicious injuries, or that other Slammers' patrons were ruled out as suspects would not have changed the jury's verdict.

{¶ 26} Hoop next argues that the state suppressed favorable and material evidence regarding the crime scene. During the federal discovery process, Hoop received information that a detective testified before the grand jury that the crime scene indicated that Lindsey and Donald Hoop had been involved in a physical altercation before the shooting occurred. Therefore, Hoop argues that the detective's testimony establishes that Donald's murder was committed during the course of a robbery, rather than a planned or premeditated murder for hire. Hoop asserts that this evidence is inconsistent with the state's theory of the case.

{¶ 27} Even if we were to assume that this evidence is favorable to Hoop, we cannot say that it is material. The indictment charging Hoop included specifications as to not only murder for hire, but also aggravated murder during the commission of a robbery. The state itself, therefore, asserted the theory that a robbery had occurred or was being commissioned when Donald Hoop was murdered. Furthermore, during the state's opening statement, the prosecutor stated, "I think the evidence will show when [Donald] was shot * * * the first time [sic] but there must have been a struggling [sic] because of the blood all around the area.

And then finally another contact shot, contact meaning about a half inch or less to the position where he was shot in the forehead." Therefore, the jury was well aware that a possible struggle may have ensued before Donald died. Moreover, defense counsel was permitted to inquire into this robbery theory, and was able to cross-examine on the subject. Evidence of the specific testimony elicited before the grand jury, however, would not have produced a different result at Hoop's trial. Nor can we say that the absence of such testimony deprived Hoop of a fair trial in any way.

{¶ 28} Hoop argues that the prosecution suppressed favorable and material forensic evidence. The latent print examiner did not find any fingerprints on the murder weapon, but did find a fingerprint on one of the bills recovered from Kerr's residence that had been stolen from Donald Hoop. The print did not belong to Hoop.

{¶ 29} The fact that Hoop's fingerprints were not the same as those located on the money is neither favorable to Hoop, nor material. The state proceeded under the theory that Hoop commissioned and participated in the planning of her husband's murder. The state, however, did not assert that Hoop *actually* stole the money from Donald Hoop's wallet. The evidence overwhelmingly demonstrated that Lindsey *actually* shot Donald and stole the wallet that contained the money in question. The fact that Hoop's fingerprints were not recovered from the money does not prove that she did not have an involvement in the planning of the murder, as was charged by the state and found by the jury.

{¶ 30} Hoop argues that the prosecution suppressed favorable and material evidence regarding the fact that Carl Lindsey had been the subject of an active investigation by the Brown County Sheriff's Office regarding a recent string of burglaries in the area. Hoop asserts that this evidence is material because it demonstrates that Donald's murder was the product of a theft offense rather than a planned murder for hire.

{¶ 31} Even if we were to assume that this evidence is favorable to Hoop, we cannot

say that it is material. First, Lindsey was merely a suspect in the burglary investigation, and no charges had been brought against him. Even if charges had been brought or convictions obtained, the fact that Lindsey had broken into people's homes is not the same as carrying out a robbery in the parking lot of a bar and shooting the victim after planning such events during the preceding evening. Besides the obvious evidentiary issues associated with trying to prove conduct in conformance with past activities, this evidence would not have changed the outcome of the case.

{¶ 32} The nine pieces of evidence asserted by Hoop as being both favorable and material do not rise to the level of *Brady* violations. The absence of this evidence, both individually and collectively, did not deprive Hoop of a fair trial, and we cannot say that the result of her trial would have been different had the evidence been produced before trial. Having found no violation, Hoop's first assignment of error is overruled.

{¶ 33} Assignment of Error No. 2:

{¶ 34} THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S SECOND CLAIM FOR RELIEF.

{¶ 35} In Hoop's second assignment of error, she argues that the trial court erred by not granting her motion for a new trial because the state destroyed evidence.

{¶ 36} In holding that the state's failure to preserve potentially useful evidence does not violate a defendant's due process rights absent a showing that the state acted in bad faith, the Ohio Supreme Court, in *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, ¶ 9-10, observed that,

The Supreme Court of the United States addressed this issue in *Arizona v. Youngblood* (1988), 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281. In that case, the court stated: "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." In that situation, the court held, "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." A clear distinction is drawn by *Youngblood* between materially exculpatory evidence and potentially useful evidence. If the evidence in question is not materially exculpatory, but only potentially useful, the defendant must show bad faith on the part of the state in order to demonstrate a due process violation.

{¶ 37} Based on the precedent of both the Ohio and United States Supreme Courts, the state has an obligation to disclose evidence favorable to the accused, which is material to his guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963). "Favorable evidence is material * * * 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433-434, 115 S.Ct. 1555 (1995), quoting *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375 (1985). "A 'reasonable probability' of a different result is * * * shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* at 434, quoting *Bagley*, 473 U.S. at 678.

{¶ 38} However, the rule in *Brady* does not apply to evidence that is merely "potentially useful." *Geeslin*, 2007-Ohio-5239 at ¶ 9-10. "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." *Id.* at ¶ 9, quoting *Youngblood*, 488 U.S. at 58.

{¶ 39} Hoop now argues that the investigatory file contained favorable material because it would have contained laboratory reports, reports memorializing communication between officers and witnesses, as well as information regarding the evidence mentioned in Hoop's first assignment of error. However, Hoop's argument is based on mere speculation as to what was in the file. She is unable to delineate what specific information the file held,

and is unable to state with any degree of certainty that such evidence, if it existed, was materially exculpatory in nature.

{¶ 40} The police investigation file would offer, at best, potentially useful evidence. Even if the file contained laboratory reports, communication from witnesses, or information regarding the evidence set forth in Hoop's first assignment of error, we cannot say that this file would have produced evidence of Hoop's innocence. As discussed within Hoop's first assignment of error, the state's theory of the case was that she was involved in the planning stages of her husband's murder. The jury considered physical evidence, was presented with the contradictory statements of the state's witnesses, and observed the cross-examination of the police officials who participated in the murder investigation. Given the jury's verdict, it chose to believe that Hoop took part in the planning of the murder, and the information that may have been in the police investigatory file would not have undermined the jury's verdict.

{¶ 41} Even if we were to assume that the evidence may have proved useful in supporting Hoop's defense that she did not participate in the murder, we cannot say that Hoop is able to show any bad faith on behalf of the police investigating the murder. While it is undisputed that the investigatory file was not found, the records keeper for the Brown County Sheriff's Department testified that the records were unable to be found. However, there was no evidence that the state or police destroyed any potentially useful evidence from the file or secreted the file away in any manner.

{¶ 42} Moreover, Hoop was provided with 1,450 pages of law enforcement records, 24 CDs of information, as well as the files from the prosecutor's office. Had the state wished to destroy evidence, we find it incredulous that so much information and evidentiary materials would have remained. Furthermore, these evidentiary materials contained enough information that Hoop was able to present several claims for relief when she moved the court for a new trial.

{¶ 43} As stated by the Ohio Supreme Court, the mere fact that evidence is lost or destroyed by the state does not constitute a *per se* violation of a defendant's due process rights. *Geeslin*, 2007-Ohio-5239. While Hoop argues that the police file would have contained exculpatory evidence, the fact remains that Hoop's argument is based solely on speculation and we cannot say she is entitled to a new trial. There is no indication from the record that the file held any exculpatory evidence, and at best *may* have contained "potentially useful" evidence regarding Hoop's involvement in her husband's murder. However, absent a showing of bad faith on behalf of the state, the fact that the file is missing or has been destroyed has not violated Hoop's due process rights, nor does it entitle her to a new trial. Having found that the state did not act in bad faith in losing or destroying the police file and that Hoop is not entitled to a new trial because the state lost or destroyed the police file, Hoop's second assignment of error is overruled.

{¶ 44} Assignment of Error No. 3:

{¶ 45} THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S THIRD CLAIM FOR RELIEF.

{¶ 46} Hoop argues in her third assignment of error that the trial court erred when it denied her motion for a new trial based on ineffective assistance of counsel.

{¶ 47} The Sixth Amendment pronounces an accused's right to effective assistance of counsel. Warning against the temptation to view counsel's actions in hindsight, the United States Supreme Court has stated that judicial scrutiny of an ineffective assistance claim must be "highly deferential * * *". Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged actions 'might be considered sound trial strategy.'" *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984), quoting

Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶ 48} Also within *Strickland*, the Supreme Court established a two-part test which requires an appellant to establish that first, "his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial." *State v. Myers*, 12th Dist. No. CA2005-12-035, 2007-Ohio-915, ¶ 33, citing *Strickland*.

{¶ 49} Regarding the first prong, an appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S at 688. The second prong requires the appellant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694. Because the appellant must prove both prongs, a reviewing court need not address the deficiency issue if appellant was not sufficiently prejudiced by counsel's performance. *Id.* at 697.

{¶ 50} Hoop argues that her trial counsel was ineffective because he failed to conduct a reasonable pretrial investigation. Hoop asserts that her trial counsel stated that he had retained the services of a private investigator to aid in the investigation, but that the investigator was never retained. Essentially, Hoop argues that had counsel retained the services of the investigator, such investigation would have uncovered the evidence discussed in Hoop's first assignment of error. Hoop states that absent the services of an investigator, her trial counsel did not interview Donald Barnett, the witness who heard someone say "come on, lets go get out of here" [sic] on the night of the murder. Counsel did not inquire into Deputy's Moore's call to dispatch regarding the speeding car on State Route 68, or that officers contacted the hospitals to request information on any suspicious injuries. Hoop also argues that her counsel failed to adequately pursue the theory that Swinford or Kerr were possibly the second assailants, and that Lindsay was already a suspect in a series of

burglaries. Counsel did not interview the detective who testified before the grand jury regarding the crime scene, and did not interview the technicians who performed the forensic testing.

{¶ 51} However, and as already discussed within Hoop's first assignment of error, these issues were not material to Hoop's defense, and we cannot say that the result of her trial would have been different had an investigation uncovered these specific issues or had they been presented to the jury.

{¶ 52} Hoop also asserts that her counsel did not adequately prepare a defense witness whom she believes would have offered favorable evidence to her defense. Hoop claims that had the witness been properly prepared, he would have testified that he saw Lindsey threatening to shoot Donald Hoop with a small firearm prior to the night of the murder. According to the witness' affidavit, "prior to February 10, 1997, [I] saw Carl Lindsey with a small black hand gun and heard him say he was going to take [Donald Hoop] out." However, even if the jury had heard this specific testimony from the witness, the statement does not prove that Hoop was not involved in the crime, or even that she had not provided the gun to Lindsey at some previous time.

{¶ 53} While the statement may have called into question the timing of Hoop giving Lindsay the gun, the statement does not demonstrate that the gun Lindsey had prior to February 10, 1997 was the same gun that killed Donald. In fact, there is nothing in the witness' statement that demonstrates that he saw Lindsay with *the* gun that killed Donald, only a gun. Even if Hoop's trial counsel had prepared the witness to make the statements contained in his affidavit, there is no reasonable probability that, but for counsel's failure to prepare the witness, the result of the proceedings would have been different.

{¶ 54} After reviewing the record, we cannot say that the results of Hoop's trial would have been different had the foregoing evidence or information been presented to the jury.

Having found that Hoop did not receive ineffective assistance of counsel, her third assignment of error is overruled.

{¶ 55} Assignment of Error No. 4:

{¶ 56} THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S FOURTH CLAIM FOR RELIEF.

{¶ 57} In Hoop's final assignment of error, she claims that the trial court erred in denying her motion for a new trial because the cumulative effect of errors deprived her of a fair trial.

{¶ 58} According to the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168.

{¶ 59} This doctrine is not applicable to the case at bar because we have not found that the trial court erred, that there were multiple instances of harmless error, or that Hoop suffered any constitutional violations. Therefore, Hoop's final assignment of error is overruled.

{¶ 60} Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, J., concur.