[Cite as *State v. Jeffers*, 2011-Ohio-3555.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-1112
v.	:	(C.P.C. No. 04CR-8037)
Dwayne A. Jeffers,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 19, 2011

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Timothy Young, Ohio Public Defender, and *Claire R. Cahoon*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, Dwayne A. Jeffers ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas dismissing his petition for post-conviction relief requesting an evidentiary hearing on his petition and a new trial on the criminal charges of which he was previously convicted.

{¶2} This court considered appellant's direct appeal from his criminal conviction in *State v. Jeffers*, 10th Dist. No. 06AP-358, 2007-Ohio-3213. In that decision, we affirmed appellant's conviction of aggravated murder with firearm specifications I and II and, pursuant to a guilty plea, having a weapon while under disability. Id. at ¶1. We

sustained in part one of appellant's assignments of error challenging the imposition of consecutive sentences and remanded to the trial court for resentencing. Id. at ¶48. Our prior decision includes this description of the events leading to appellant's arrest:

> On December 3, 2004, at approximately 4:00 a.m., John Sims and his wife, Sonia Sims, who lived on Willamont Avenue in Columbus, Ohio, were roused from sleep by noises outside their bedroom window. From the bedroom window, Mr. Sims saw a group of males beating up another male, later identified as Larry Hylton, in the yard across the street, and he called 911. Mrs. Sims then reported to her husband that the male being assaulted had been shot, prompting Mr. Sims to call 911 again. Mrs. Sims stated one of the men had been beating up the victim and then had gotten into a white sport utility vehicle ("SUV"). This man retrieved a gun and returned to the victim and shot him several times. The shooter then returned to the white SUV and got in the driver's side. Mr. Sims saw the white SUV, along with one or possibly two other vehicles, depart the scene.
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> City of Columbus Police Officer Jack Adkins responded to the 911 call and, en route, saw a white SUV and a green SUV parked on the side of a road. The vehicles drove several hundred yards until the officer effectuated a stop on the vehicles, which were less than two miles from the crime scene. Fernando Anderson and Larry Moore were in the green SUV, and appellant and Antjuan Brisco were in the white SUV. Officer Adkins noticed that the passenger of the white SUV, appellant, had the window rolled down and had his arm outside the window. A revolver was later found near where the vehicle had been stopped. The revolver was determined to be the same one used to shoot the victim.

Jeffers at ¶2-3.

{¶3} On November 27, 2006, appellant filed a petition to vacate or set aside the trial court's judgment and sentence. In this petition, appellant asserted that he was denied effective assistance of counsel when his trial counsel (1) failed to object to testimony provided by the state's expert witness on gunshot residue and failed to fully

cross-examine that witness; (2) failed to call as a witness an individual who could offer potentially exculpatory evidence; and (3) failed to obtain admission of evidence of Antjuan Brisco's ("Briscoe"), prior convictions for carrying a concealed weapon.[1] In support of his petition, appellant provided affidavits from Keith Massey ("Massey"), an individual who allegedly could have provided exculpatory testimony; Dennis Pusateri ("Attorney Pusateri"), who served as appellant's trial counsel; and Kathy Koch ("Koch"), an investigator retained by appellant's appellate counsel. On September 8, 2010,[2] the trial court filed an order denying appellant's request for an evidentiary hearing and denying his petition for post-conviction relief.

{¶4} Appellant appeals from the trial court's order dismissing his petition for post-conviction relief, setting forth three assignments of error:

> ASSIGNMENT OF ERROR I: The trial court erred in dismissing Mr. Jeffers' postconviction petition, because Mr. Jeffers presented a substantive ground for relief in offering sufficient evidence that he was denied the effective assistance of counsel when counsel failed to call an exculpatory eyewitness.
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> ASSIGNMENT OF ERROR II: The trial court erred in dismissing Mr. Jeffers' postconviction petition, because Mr. Jeffers presented a substantive ground for relief in offering sufficient evidence that he was denied the effective assistance of counsel when counsel failed to object to crucial evidence.

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[1] In the present appeal, appellant does not assert that he presented sufficient evidence to establish ineffective assistance of counsel for failure to obtain admission of the evidence regarding Brisco's prior convictions. Thus, we need not address this issue. See *Guernsey Bank v. Milano Sports Ents., L.L.C.*, 177 Ohio App.3d 314, 2008-Ohio-2420, ¶40. Moreover, we note that appellant raised this issue in his direct appeal of the conviction, *Jeffers* at ¶42-43, and it would be barred by the doctrine of res judicata. *State v. Bethel*, 10th Dist. No. 07AP-810, 2008-Ohio-2697, ¶18, citing *State v. Cole* (1982), 2 Ohio St.3d 112, 113.

[2] In its order, the trial court noted that the decision on the petition for post-conviction relief was written in early December 2007 but that the decision was not filed at that time.

> ASSIGNMENT OF ERROR III: The trial court erred in dismissing Mr. Jeffers' postconviction petition without an evidentiary hearing when the petition demonstrated sufficient operative facts to establish substantive grounds for relief.

{¶5} Ohio's process for seeking post-conviction relief from a criminal conviction is set forth in R.C. 2953.21. R.C. 2953.21(A)(1)(a) provides that "[a]ny person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed the sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief." A petitioner is entitled to file a supporting affidavit and other documentary evidence in support of his claim for relief. Id. We review a trial court's ruling on a petition for post-conviction relief under an abuse of discretion standard. *State v. Banks*, 10th Dist. No. 10AP-1065, 2011-Ohio-2749, ¶11, citing *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679. An abuse of discretion occurs where a trial court is "unreasonable, arbitrary or unconscionable" in reaching its decision. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶6} Initially, we note that appellee asserts that appellant's post-conviction petition is barred by the doctrine of res judicata. "In any proceeding except a direct appeal from that judgment, the doctrine of res judicata bars convicted defendants who were represented by counsel from raising or litigating any defense or alleged due process violation resulting in a conviction, where that defense or error was previously raised (or could have been raised) on direct appeal." *State v. Bethel*, 10th Dist. No. 07AP-810,

2008-Ohio-2697, ¶18, citing *State v. Cole* (1982), 2 Ohio St.3d 112, 113. Appellant raised the issue of ineffective assistance of counsel in his direct appeal, arguing that his trial counsel was ineffective in failing to present evidence of Brisco's prior convictions to the jury. *Jeffers* at ¶43. This court found that appellant's trial counsel was not ineffective on that basis. Id. Appellee argues that appellant also could have raised on direct appeal the other ineffective assistance of counsel claims contained in his post-conviction petition and that these claims are therefore barred by the doctrine of res judicata.

{¶7} "A petition for post-conviction relief which alleges that the petitioner received ineffective assistance of counsel at trial is subject to dismissal on res judicata grounds where the petitioner had new counsel on direct appeal and where the ineffective assistance of counsel claim could otherwise have been raised and fairly determined on direct appeal without resort to evidence outside the record." *State v. Young*, 10th Dist. No. 05AP-641, 2006-Ohio-1165, ¶20, citing *State v. Lentz* (1994), 70 Ohio St.3d 527, 529-30. "[T]o overcome the res judicata bar, the evidence offered outside the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original trial record." Id. Here, appellant was represented by new counsel for his appeal. However, the claims in appellant's post-conviction petition rely on evidence outside the trial record, specifically the affidavits of Massey, Attorney Pusateri, and Koch. Therefore, res judicata does not bar the claims asserted in this appeal.

{¶8} In his first assignment of error, appellant argues that the trial court erred in finding that he was not denied effective assistance of counsel when his trial counsel failed to call Massey as a witness at trial. The Sixth Amendment to the United States

Constitution guarantees a criminal defendant the right to the effective assistance of counsel. *Banks* at ¶12, citing *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts use a two-part test to evaluate claims of ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-42. "First, the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. "Second, the defendant must show that the deficient performance prejudiced the defense." Id. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id., 466 U.S. at 686, 104 S.Ct. at 2064.

{¶9} In performing the first part of the ineffective assistance of counsel analysis, "[t]he defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy." *Banks* at ¶13, citing *State v. Smith* (1985), 17 Ohio St.3d 98, 100. "Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4.

{¶10} In his affidavit, Attorney Pusateri admitted that he spoke with Massey and felt he had important testimony that could help establish that appellant did not shoot Hylton. Attorney Pusateri also stated that at the time of trial he was dealing with family and health issues and expressed his concern that the need to complete the trial and attend to personal matters affected his decision not to call Massey as a witness.

{¶11} "[I]n reviewing a petition for postconviction relief filed pursuant to R.C. 2953.21, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge their credibility in determining whether to accept the affidavits as true statements of fact." *State v. Calhoun*, 86 Ohio St.3d 279, 284, 1999-Ohio-102. We do not take lightly the statements contained in Attorney Pusateri's affidavit, particularly given his position as a member of the bar. See *In re B.C.S.*, 4th Dist. No. 07CA60, 2008-Ohio-5771, ¶40 (holding that "the affidavit of a defense attorney, who is an officer of the court and has no personal interest in the success of a defendant's petition, is entitled to greater weight than a defendant's self-serving affidavit"). However, after reviewing Massey's affidavit and the other evidence presented at trial, we cannot conclude that appellant's trial counsel performed deficiently by not calling Massey to testify.

{¶12} Attorney Pusateri performed due diligence by investigating Massey's potential testimony prior to trial. Cf. *State v. Biggers* (1997), 118 Ohio App.3d 788, 791 (holding that defendant received ineffective assistance of counsel where trial counsel admitted that he did not prepare for trial). As the trial court noted in denying the petition, there were several issues with Massey's potential testimony that may have affected Attorney Pusateri's decision not to call Massey as a witness. Specifically, Massey stated that he had been drinking at several bars with appellant and others on the night of the crime, suggesting that Massey may have been intoxicated at the time of the events in question. Massey stated that Brisco pulled someone out of the backseat of the white sport utility vehicle ("SUV") and assaulted the individual, presumably Larry Hylton ("Hylton"). Massey does not mention any other individuals participating in the beating.

However, this is inconsistent with the testimony of other eyewitnesses who testified that between five and seven individuals participated in the assault. The statements in Massey's affidavit also suggest that he was not present when the shooting occurred, thus potentially weakening the persuasiveness of his testimony because he could not testify as to what occurred after he left the area. Finally, Massey stated that he learned the following day that appellant had been arrested and charged with murder, but there is no indication that Massey contacted police or prosecutors to offer his account of events.

{¶13} In his affidavit, Attorney Pusateri asserted that his personal issues may have been a factor in not calling Massey as a witness, but he also expressly stated that he "weigh[ed] the merits of Massey's testimony." (Pusateri affidavit, 1-2.) Weighing the advantages and disadvantages of calling a particular witness is an aspect of trial strategy that we will not second-guess upon review. See *State v. Matthews*, 10th Dist. No. 03AP-140, 2003-Ohio-6307 ("[F]ailure to call a witness is not ineffective assistance if calling that witness opens the door to unfavorable testimony that counsel might reasonably conclude would likely outweigh the value of any favorable testimony the witness might offer."). Id. at ¶31, citing *State v. Reynolds*, 148 Ohio App.3d 578, 2002-Ohio-3811, ¶74. Based on Attorney Pusateri's affidavit, it is impossible to determine whether his personal considerations or the potential weaknesses in Massey's testimony were the deciding factor in choosing not to call Massey as a witness. The evidence appellant presented is insufficient to overcome the presumption that trial counsel's performance was adequate.

{¶14} Moreover, even if trial counsel's performance was deficient in failing to call Massey as a witness, appellant cannot demonstrate that he was prejudiced by this decision. "To show that a defendant has been prejudiced by counsel's deficient

performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley*, paragraph three of the syllabus. Massey's affidavit suggests that he would have offered four primary assertions relevant to appellant's guilt or innocence: (1) appellant was very intoxicated on the evening of the shooting; (2) appellant was seated in the passenger seat of the white SUV; (3) Brisco was fighting with and beating the victim; and (4) appellant wore a black leather jacket without a hood on the night of the shooting. However, there was other evidence before the jury establishing appellant's intoxication and location in the car and the appearance of appellant's clothing. Columbus Police Officer Jack Adkins ("Officer Adkins") testified that there was a strong odor of alcohol on appellant. He also testified that appellant had difficulty standing and nearly fell over while being searched. Both Officer Adkins and Officer Smith Weir testified that appellant was located in the front passenger seat of that vehicle. The jury was shown the jacket appellant was wearing when he was arrested. Thus, Massey's testimony would be largely cumulative of the evidence already before the jury.

{¶15} Moreover, there was other evidence implicating appellant that would not have been refuted or discredited by Massey's testimony. The victim's blood was on appellant's pants. Gunshot residue was found on both of appellant's hands, while one of the other three individuals detained had gunshot residue on only one hand and the other two individuals had no gunshot residue on their hands. Officer Adkins testified that appellant's arm was hanging out of the passenger side window when he stopped the white SUV. Officer Adkins found this unusual because it was a cold night. Officer Adkins further testified that he located a revolver, which was later determined to be the weapon

used to kill Hylton, approximately 10 to 15 yards from the passenger side of the white SUV. There was also testimony suggesting that appellant and Hylton had a verbal confrontation earlier that same evening. Given this evidence, and the fact that Massey was apparently not present when the shooting occurred and would not identify the shooter as someone other than appellant, appellant has not demonstrated a reasonable probability that the result of the trial would have been different if trial counsel had called Massey as a witness at trial.

{¶16} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶17} Appellant's second assignment of error asserts that the trial court erred in finding that he was not denied effective assistance of counsel when trial counsel failed to object to the testimony of an expert witness regarding gunshot residue testing and failed to effectively cross-examine the witness about that testimony. To establish ineffective assistance of counsel, appellant must prove that trial counsel's failure to object or his cross-examination of the expert witness was deficient and that appellant's defense was prejudiced by that deficient performance. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Bradley* at 141-42. At trial, Daniel Davison ("Davison"), a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation, testified regarding the results of gunshot residue (sometimes abbreviated as "GSR") tests performed on appellant, Brisco, Fernando Anderson, and Larry Moore ("Moore"). On direct examination, Davison testified that the test for gunshot residue was a quantitative test—i.e., the test subject is either positive or negative for gunshot residue, and the number of gunshot residue particles found on a test subject does not have any particular meaning. However, in response to

the prosecutor's query, Davison then testified that the test identified one particle of gunshot residue on Moore's right hand, six particles of gunshot residue on appellant's left hand, and three particles of gunshot residue on appellant's right hand. Appellant's trial counsel did not object to this testimony. Appellant argues that the failure to object constituted ineffective assistance because the testimony created an impression on the jury that the gunshot residue test was qualitative, rather than quantitative, and that appellant was more likely the shooter because he had the most gunshot residue particles on his hands. Appellant also claims that trial counsel failed to adequately cross-examine Davison to inform the jury of other potential sources of gunshot residue.

{¶18} Generally, the "scope of cross-examination falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101, citing *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, ¶45; *State v. Campbell* (2000), 90 Ohio St.3d 320, 339. Trial counsel's cross-examination of Davison covers nine pages of the trial transcript. Trial counsel questioned Davison extensively about the nature of the gunshot residue test, as well as other potential sources of gunshot residue. The cross-examination included the following exchange:

> Q: And the first note [on Davison's report] indicates that it essentially says that because someone has GSR on their hands doesn't necessarily mean that they fired a gun; correct?
>
> A: Correct. There are two other ways that an individual could get GSR on their hands.
>
> Q: One would have been to have been in the vicinity of the firearm when discharged; correct?

> A: Correct.
>
> Q: And the other would be having handled an item, any item with gunshot residue on it?
>
> A: Yes, sir.
>
> Q: So let's say — hypothetically let's say that someone shoots a firearm and they have a long sleeve garment on. It's quite possible, is it not, that there would be gunshot residue on the sleeve of the garment?
>
> A: Yes, sir.
>
> Q: And if I were to then grab that garment, toss it or grab that garment for any reason, it's quite possible I would have gunshot residue on my hands; correct?
>
> A: At that point there would have been an opportunity for GSR to be deposited on the garment and there would be a subsequent opportunity for the GSR to be deposited or transferred from the garment to the individual that grabbed it.

(Tr. Vol. IV, 35-36.)

Contrary to appellant's assertion, trial counsel did cross-examine Davison regarding other potential sources for the gunshot residue on appellant's hands. Attorney Pusateri's affidavit notes that he did not question Davison regarding other potential ways that gunshot residue could have been transferred onto appellant's hands, such as from police officers, the police cruiser, or the police station or holding cell. Although trial counsel may not have exhausted every potential source, his cross-examination clearly elicited testimony establishing that gunshot residue could be transferred to an individual who had not fired a gun. Trial counsel's cross-examination of Davison was not deficient and, therefore, did not constitute ineffective assistance of counsel.

{¶19} In his affidavit, Attorney Pusateri also notes that he was distracted at the time Davison testified regarding the number of gunshot residue particles found on appellant's hands. The affidavit states that his failure to object to this testimony was not trial strategy. Attorney Pusateri further states his belief that a timely objection would have prevented this testimony from being presented to the jury. However, "the failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel." *Conway* at ¶103, citing *State v. Holloway* (1988), 38 Ohio St.3d 239, 244; *State v. Gumm* (1995), 73 Ohio St.3d 413, 428. Therefore, trial counsel's failure to object to Davison's testimony likely did not constitute deficient performance.

{¶20} Assuming for the sake of analysis that trial counsel performed deficiently in failing to object to this testimony, appellant was not prejudiced by the failure to object. Testimony regarding gunshot residue analysis is routinely admitted into evidence at trial. See, e.g., *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶58-60; *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶53. Appellant has not established that a timely objection would have been granted and would have prevented the jury from hearing Davison's testimony regarding the number of gunshot residue particles found on each test subject. Moreover, on cross-examination, trial counsel prodded Davison to clarify the difference between a quantitative and a qualitative test:

> Q: You had indicated that the GSR test is a qualitative and not a quantitative test. Can you explain the difference?
>
> A: In a qualitative test the number matters. In a qualitative test — excuse me. I said that backwards. In a quantitative test it's the quantity, the number that matters. In a quantitative test 75 might mean more than 50. Three might mean more than one.

> In a qualitative test, it's the quality, not the number that we look for. It is either yes or no. It's either positive or negative.
>
> Q: Does that mean that someone with three particles of GSR on their hands cannot be said to be any more likely to have fired a firearm than a person with one particle of GSR on their hands?
>
> A: I cannot tell the difference between three and one on how they got there.

(Tr. Vol. IV, 29-30.) Thus, trial counsel elicited testimony from Davison to eliminate any confusion about the difference between a quantitative and a qualitative test. Appellant has failed to demonstrate a reasonable probability that the result of the trial would have been different if trial counsel had objected to Davison's testimony regarding the number of gunshot residue particles found on appellant.

{¶21} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶22} Appellant's third assignment of error claims that the trial court erred in dismissing appellant's petition for post-conviction relief without conducting an evidentiary hearing. Under R.C. 2953.21(C), "[b]efore granting a hearing on a petition filed under [R.C. 2953.21(A)], the court shall determine whether there are substantive grounds for relief." In making its determination, the court is required to consider the petition, any supporting affidavits and documentary evidence, and all files and records pertaining to the proceedings against the petitioner. Id. "Therefore, before a hearing is granted 'the petitioner bears the initial burden to submit evidentiary documents containing *sufficient operative facts* to demonstrate the lack of competent counsel *and* that the *defense was prejudiced* by counsel's ineffectiveness.' " (Emphasis sic.) *Calhoun* at 283, quoting *State*

v. Jackson (1980), 64 Ohio St.2d 107, syllabus. We review the trial court's dismissal of a post-conviction petition without a hearing for abuse of discretion. *Banks* at ¶11.

{¶23} In addition to the affidavits of Massey and Attorney Pusateri, appellant's petition also contains an affidavit from Koch, the investigator retained by his appellate counsel. Koch interviewed the jury foreperson from appellant's trial. According to Koch's affidavit, the juror stated that the jury struggled with several issues, including the fact that some of the men detained by the police tested positive for gunshot residue, while others did not. Appellant asserts that the juror's statements prove that he was prejudiced by trial counsel's performance. Appellant argues that in light of the affidavits of Massey, Attorney Pusateri, and Koch, his petition presented sufficient grounds to warrant an evidentiary hearing.

{¶24} Evidentiary hearings under R.C. 2953.21 are subject to the rules of evidence. *State v. Morgan* (Nov. 21, 1995), 10th Dist. No. 95APA03-382; *State v. Harris*, 8th Dist. No. 89156, 2008-Ohio-934, ¶38. Evid.R. 606(B) provides that "[u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith." In *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, this court upheld a trial court's exclusion of a juror's affidavit in an evidentiary hearing on a petition for post-conviction relief. Id. at ¶50. The post-conviction petition in *Hessler* involved multiple claims, including an assertion that defense counsel was ineffective for failing to introduce additional evidence of the defendant's military record during the

mitigation phase of his murder trial. Id. at ¶40. The juror attested that such evidence would have made a difference in the jury's sentencing deliberations. Id. at ¶41. As this court explained in affirming the trial court's exclusion of the juror's affidavit, "Evid.R. 606(B) embodies Ohio's version of the aliunde doctrine, which provides that '[t]he verdict of a jury may not be impeached by the testimony or affidavits of a member of that jury unless there is evidence *aliunde* impeaching the verdict * * * [and] thus, before a juror may testify as to his own verdict, a foundation for that testimony must be acquired by the court, other than by testimony volunteered by the jurors themselves.' " Id. at ¶52 (omitted and bracketed language sic.), quoting *State v. Mills* (Mar. 15, 1995), 1st Dist. No. C-930817 (internal citations omitted).[3] The juror's affidavit was excluded because the defendant had not "established a foundation for the testimony other than that offered by the juror." Id. See also *State v. McKnight*, 4th Dist. No. 07CA665, 2008-Ohio-2435, ¶44-53. Similarly, in this case, appellant has not established a foundation for the juror's testimony and, thus, would be barred under Evid.R. 606(B). The investigator would be prohibited from testifying about the juror's statements at an evidentiary hearing under Evid.R. 606(B), which also prohibits "evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying," and under the hearsay rule.

{¶25} As set forth above, the affidavits of Massey and Attorney Pusateri do not establish that appellant was denied the effective assistance of counsel when considered in light of the record of the trial. Even if the trial court had granted an evidentiary hearing, the jury foreperson's statements would have been inadmissible to prove that appellant

[3] "Aliunde" is a Latin term meaning "from another source." Black's Law Dictionary (9th ed. 2009).

was prejudiced by trial counsel's performance. Therefore, the trial court did not abuse its discretion in concluding that appellant's petition did not present sufficient facts to warrant an evidentiary hearing and dismissing the petition without a hearing.

{¶26} Accordingly, appellant's third assignment of error is without merit and is overruled.

{¶27} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN and SADLER, JJ., concur.

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