NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1783

STATE OF LOUISIANA

VERSUS

PATRICK EUGENE HOLDEN

Judgment rendered May 2, 2012.

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 02-10-0982
Honorable Richard "Chip" Moore, Judge

* * * * * *

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PATRICK EUGENE HOLDEN

* * * * * *

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

PETTIGREW, J.

The defendant, Patrick Eugene Holden, was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1, and pled not guilty. Following a jury trial, he was found guilty as charged. He moved for a new trial, but the motion was denied. He was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. He now appeals, contending: (1) the evidence was only sufficient to support a conviction of manslaughter; (2) trial defense counsel rendered ineffective assistance of counsel; and (3) the trial court erred in denying the motion for new trial. For the following reasons, we affirm the conviction and sentence.

FACTS

Virginia Lee Benton and the defendant were involved in a relationship for three years. According to Benton, on January 17, 2010, the couple had been "broken up" for three days, and, for approximately three months prior to that time, had been "on again, off again."

Benton spent January 16, 2010, and the early morning of January 17, 2010, with the victim, Robbie Payne. She watched a football game with him at her boss's house, and then they went to T & T Liquors on the way back to her home in Zachary, Louisiana. At the bar, Benton became "incredibly intoxicated, sloppy drunk." She left the bar after some people yelled "ugly words" at her due to "the situation with [the defendant] and [Benton]." She walked home alone because the victim had the keys to her car, and he was not ready to leave. When she arrived at her home, her niece, Ashley St. Germain, and St. Germain's boyfriend, Jonathan David Veillion, told her the victim had already been there, looking for her. Thereafter, Veillion drove Benton back to the bar to look for the victim. Benton did not find the victim at the bar, but talked to the defendant while she was there. Benton then returned to her home with Veillion and fell asleep.

On January 17, 2010, at approximately 5:00 a.m., Benton retrieved a message left on her phone by the defendant the previous night. Although the recorded phone message was played for the jury at trial, it was never formally marked as an exhibit and

introduced into evidence. Pursuant to an order of this court, the record was supplemented with a compact disc containing this recorded phone message. Our review of the recorded phone message reflects the defendant stated, "You trying to get that dude killed cause you need to f_____ leave cause it's sure about to f_____ happen. I don't give a f___ about no jail." On cross-examination, Benton stated she and the victim were drinking for over twelve hours prior to the incident. She indicated that at the time of the incident, she had three weapons in her bedroom and they were still there after the incident. She also indicated the defendant routinely carried a knife on his job as a carpenter.

St. Germain testified she watched TV at Benton's house during the early hours of January 17, 2010. The victim was asleep on the love seat, snoring. Suddenly, the defendant slammed-open the front door of the home, entered the home, jumped on top of the victim, and began punching him in the head. The victim woke up, "threw his arm up," but did not fight back. St. Germain began screaming, and Veillion pulled the defendant off the victim. St. Germain subsequently went to her room. At that time, the defendant was still trying to get back to the victim to punch him. The police arrived at Benton's house at 2:59 a.m. Thereafter, the defendant called the victim a "pussy," and told him to come out and fight him. When asked if the victim was treated by EMS, St. Germain indicated she thought he denied treatment and said he was fine.

Veillion testified he saw the defendant at T & T Liquors when he went there with Benton early on January 17, 2010. After the bar closed, Veillion took Benton to her home, and she sat in her truck, texting on her phone and crying. Approximately thirty minutes later, Veillion saw the defendant jogging across the yard toward the front door. The defendant went into Benton's home, and Veillion heard St. Germain scream. Veillion rushed into the house and saw the defendant hitting the victim in the face and on the head. The victim was on a sofa, and the defendant was on top of him. Veillion pulled the defendant off the victim, but the defendant went straight back to him and began punching him again. The victim did not defend himself from either attack. Veillion again pulled the defendant off the victim. Veillion tried to calm the defendant, and the

defendant started walking around, looking for something. Veillion grabbed the victim's shoes and told him, "We just needed to get out of there." While Veillion helped the victim with his shoes, the defendant screamed for the victim to come out in the yard and fight. Thereafter, Veillion helped the victim outside, and he started walking toward Benton's truck. The defendant began hitting the victim again as he was getting into the truck. The defendant told the victim to get out of the truck and come fight him in the yard. The victim lost consciousness, and Veillion placed himself between the defendant and the victim to protect him from the defendant's blows. Veillion told the defendant, "[The victim is] useless right now. He has no self defense. He can't do nothing for himself. ... He's bleeding." Veillion indicated the defendant started to calm down, "realizing that [the victim was] defenseless and [the defendant was] just punching, pretty much, at a dead body bag." The defendant told Veillion that he did not know everything "about them," and "[The victim was] trying to steal [the defendant's] life." Veillion indicated, when the police arrived at 2:59 a.m., the victim refused treatment.

Zachary Police Department Officer Timothy Duncan testified he was dispatched to Benton's home on January 17, 2010, at approximately 4:16 a.m. He knocked on the door, but no one answered. He heard moaning inside, and went to the rear door to see if anyone would answer there. No one came to that door either, so he entered the home through an open window. The victim was on the couch. His face was "mostly covered in blood." He had bruising to the left side of his face in the temple area. Officer Duncan had known the victim for approximately twenty years, but did not recognize him until he found his driver's license on the table.

Officer Duncan located the defendant at approximately 12:15 p.m. He handcuffed the defendant's hands behind his back and advised him of his **Miranda**[1] rights. The defendant's hands were "swollen tremendously." He asked to be handcuffed with his hands in front of him because he "broke them hitting [the victim] in the head."

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[1] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Dr. Eric Oberlander was qualified as an expert in the field of neurosurgery. He indicated the Glasgow Coma Score is a neurological scale from two to fifteen, with fifteen being normal. Dr. Oberlander examined the victim in the emergency room of Our Lady of the Lake Hospital on January 17, 2010. At that time, the victim had a Glasgow Coma Score of approximately four. That was an extremely low score, indicating a very bad neurological state, and would predict "a typically bad outcome for the patient." The victim could not open his eyes, could not breathe on his own, and had no significant motor movement. His face and the side of his head were swollen. He had "blown pupils," i.e., his pupils were fixed and dilated, indicating very high intracranial pressure. A CAT scan of his brain indicated he had an epidural hematoma, or large bleed, on the surface of his brain. Dr. Oberlander operated on the victim to remove the epidural hematoma and to reduce the pressure on his brain. The victim had a fracture of his skull bone and a blood clot or epidural hematoma immediately under the skull. Dr. Oberlander stated a swung fist could have caused the fracture. He repaired a laceration to the victim's middle meningeal artery. Dr. Oberlander indicated the victim's brain "didn't look very good." He testified, "a brain has a certain look when it's not doing well[,] when it doesn't have blood supply to it, it dies and it starts to swell and that was the situation here." Dr. Oberlander stated the victim's brain was so swollen that, after he had completed the surgery, he was unable to replace the part of the skull that he had sawed out. When asked how long it would take for someone with the victim's injury to become aware of what was happening to them, Dr. Oberlander indicated epidurals were known to have lucid or normal intervals when the blood clot was still small. Eventually, however, the blood clot would increase and the intracranial pressure would go up. Dr. Oberlander stated that if the victim suffered severe trauma at 3:00 a.m., he could have had a lucid interval for an hour.

On cross-examination, defense counsel asked Dr. Oberlander if the victim's injury was recoverable over time. Dr. Oberlander replied the victim's brain was swollen because it had stroked "and it's a dead brain." He indicated the amount of swelling present in the victim's brain indicated he would likely never be normal. Dr. Oberlander conceded it was possible to recover from an epidural hematoma and relearn to walk and speak, but "every

case is different." He conceded the victim survived surgery and was discharged from ICU on January 26. He also conceded the victim was discharged to a long-term rehabilitation hospital. Dr. Oberlander indicated, however, the only thing available to predict the outcome was the initial exam, and when "they present with ... one foot in heaven[,] with the lowest neurological exam there is[,] the chances of them having a happy ending is remote."

Dr. Michael DeFatta, forensic pathologist and St. Tammany Parish Chief Deputy Coroner, performed an autopsy on the victim in February 2010. There was a missing portion of the left side of the victim's head as a result of surgery. A portion of his brain was still protruding from the area due to cerebral edema or swelling. Areas of the actual midbrain had swollen and pushed through the bottom portion of the skull. Dr. DeFatta indicated the portion of the midbrain at the bottom of the brain contains respiratory centers, as well as cardiac centers, to allow the body to breathe properly and to allow the heart to beat properly. When those areas are pushed or squeezed, that portion of the brain is compromised, and death can result. Dr. DeFatta stated, based on the autopsy, and within the bounds of reasonable medical certainty, the cause of the victim's death was complications from the original trauma he suffered.

On cross-examination, Dr. DeFatta conceded that if the victim breathed on his own, that would indicate the portion of his brain controlling breathing was not compromised. Dr. DeFatta also conceded the victim was removed from life support and sustained life without life support for a period of time. Additionally, Dr. DeFatta conceded that people had come out of comas after a year. Defense counsel asked Dr. DeFatta to explain his conclusion about the cause of the victim's death, given that the victim was removed from life support and sustained life for a period of time. Dr. DeFatta responded as follows:

> [DeFatta]: I think still, over the period, the sequela of events that started with the blunt force trauma up through the portion of death regardless of the interval and how things occurred, we still have to go back to the inside of the event that started the whole sequela of events.
>
> [Defense]: But wouldn't that supersede something else because he was able to sustain life?

> [DeFatta]: At that point in time, more than likely, the brain had reached, because of swelling prior to that, a point of what we call "a point of no return" and by that, I mean, this portion of the brain undergo ascheming changes. Doesn't necessarily mean that the respiratory centers have undergone those changes or the cardiac centers but portions of the brain are still under the influence of compression or edema[,] and as the brain pushes against those parts of the skull that have no give to them, it can cause further compression and in this particular case herniation.

Robert J. Payne, the victim's father, testified that following the victim's surgery he was transferred to "Promise," an Ochsner hospital, and after consulting with the victim's doctors and the rest of his family, the family decided to "let the Lord have [the victim]."

The defendant testified at trial. He conceded he had been convicted of possession of Xanax. He indicated he saw Benton with the victim at T & T Liquors on January 17, 2010. He claimed he left the phone message for Benton when he was very frustrated that Benton was with another man and wanted to know why Benton and the victim "continued to show up where I'm at over and over again when they know they're not welcome around me and my friends." He denied running across the yard to Benton's house, and stated he could not run because he was a smoker. He claimed he tried to call out the victim to have "the old fashion boy's brawl." He testified he was aware of the weapons in the house, but never armed himself. He claimed he hit the victim no more than ten times inside the house. He indicated, thereafter, he and the victim passed a few licks in the yard, and the victim got into Benton's truck. He testified he did not know that the victim was at Benton's house when he went there. He denied jumping on the victim and hitting him while he was sleeping. He also denied hitting the victim while Veillion was helping him into Benton's truck. He conceded that his hands were swollen after he hit the victim. He also conceded he asked the police to handcuff his hands in front of him. He stated he was very sorry to the victim's family "if they think that it's my fault."

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, the defendant argues the evidence supported a conviction of manslaughter, rather than second degree murder, because he only wanted to fight the victim, and he never introduced "any weapons of death" into the altercation. He further argues the circumstantial proof of causation presented at trial failed to exclude

every reasonable hypothesis of innocence because when he left the victim, the victim did not appear to be seriously injured and refused medical treatment. Additionally, he argues there is "unopposable" testimony the victim had been drinking for approximately twelve hours prior to the altercation, and thus, it is just as likely his injuries resulted from a fall in the bathroom than from the defendant beating him. Lastly, he argues "it is quite likely that the combination of a prior severe head injury, large amounts of alcohol, and 'beta[]blockers' in [the victim's] system could have caused the blood clot, rather than the fists of [the defendant]."

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601, p. 2 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 98-0601 at 3, 730 So.2d at 487.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1(A)(1). Specific criminal intent is that "state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or

failure to act." La. R.S. 14:10(1). Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. **State v. Buchanon**, 95-0625, p. 4 (La. App. 1 Cir. 5/10/96), 673 So.2d 663, 665, writ denied, 96-1411 (La. 12/6/96), 684 So.2d 923.

In a prosecution for murder, the criminal agency of the defendant as the cause of the victim's death must be established beyond a reasonable doubt. It is not essential, however, that the act of the defendant should have been the sole cause of the death; if it hastened the termination of life, or contributed, mediately or immediately, to the death, in a degree sufficient to be a clearly contributing cause, that is sufficient. **State v. Matthews**, 450 So.2d 644, 646 (La. 1984).

Manslaughter is a homicide which would be either first or second degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed. La. R.S. 14:31(A)(1). "Sudden passion" and "heat of blood" are not elements of the offense of manslaughter; rather, they are mitigatory factors in the nature of a defense that exhibit a degree of culpability less than that present when the homicide is committed without them. The State does not bear the burden of proving the absence of these mitigatory factors. A defendant who establishes by a preponderance of the evidence that he acted in a "sudden passion" or "heat of blood" is entitled to a manslaughter verdict. In reviewing the claim, this court must determine if a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the mitigatory factors were not established by a preponderance of the evidence. **State v. Huls**, 95-0541, p. 27 (La. App. 1 Cir. 5/29/96), 676 So.2d 160, 177, writ denied, 96-1734 (La. 1/6/97), 685 So.2d 126.

After a thorough review of the record, we are convinced that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of those reasonable hypotheses of innocence raised by the defendant at trial, all of the elements of second degree murder and the defendant's identity as the perpetrator of that offense against the victim. Any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have also found that the mitigatory factors required to support manslaughter were not established by a preponderance of the evidence. Any rational trier of fact could have concluded that the victim's spending time with Benton was insufficient provocation for the defendant beating him, or that the defendant's blood cooled between the time he saw the victim and Benton together and the time he went to Benton's home. Further, the threatening message left on Benton's telephone by the defendant was inconsistent with his acting in sudden passion. Additionally, the verdict rendered indicates the jury accepted the testimony that the defendant visciously punched the defenseless victim in the head, and rejected the defendant's testimony that he and the victim exchanged blows.

As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-0385, p. 9 (La. App. 1 Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332, p. 32 (La. App. 1 Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. The fact the defendant used his fists, rather than a gun or a knife, to attack the victim, did not preclude a finding of the requisite intent to support second degree murder. See **Buchanon**, 95-0625 at 8, 673 So.2d at 667. Moreover, the fact the victim initially refused medical treatment did not defeat the State's proof of causation in this matter. The jury apparently credited the testimony indicating the victim may not have realized the extent of his injuries at the time he refused treatment. Contrary to the defendant's argument, it was not just as likely that the victim's head injury resulted from a fall in the

bathroom as from being beaten by the defendant. There was no evidence the victim injured his head by falling in the bathroom; there was evidence, however, the defendant viciously punched the victim while he was sleeping. Finally, any rational trier of fact, viewing the evidence under the appropriate standard, could have concluded that the defendant's beating the victim contributed to his death in a degree sufficient to be a clearly contributing cause of his death. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 2006-0207, pp. 14-15 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In assignment of error number 2, the defendant argues trial defense counsel was ineffective: (a) because he failed to argue the defendant's conduct was manslaughter; (b) because he failed to investigate, discover, and present to the jury that the victim had a prior serious head injury; (c) because he failed to investigate, discover, and present to the jury that the victim was taking beta blockers.

A claim of ineffective assistance of counsel is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal. **State v. Miller**, 99-0192, p. 24 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).

A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant

must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that the defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 859-860 (La. App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

Allegations of ineffectiveness relating to the choice made by counsel to pursue one line of defense as opposed to another constitute an attack upon a strategy decision made by trial counsel. **State v. Allen**, 94-1941, p. 8 (La. App. 1 Cir. 11/9/95), 664 So.2d 1264, 1271, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. The investigation of strategy decisions requires an evidentiary hearing[2] and, therefore, cannot possibly be reviewed on appeal. Further, under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Folse**, 623 So.2d 59, 71 (La. App. 1 Cir. 1993). In the instant case, if the jury had accepted trial defense counsel's theory of insufficient evidence of causation, the defendant would have been released on this charge. However, if the defendant had pled guilty to manslaughter (assuming the State would have been willing to accept such a plea from a convicted felon and presumably forgo habitual offender proceedings), he would have been exposed to a sentence of forty years at hard labor. See La. R.S. 14:31(B). We also note, the defendant voiced no objection to trial defense counsel's strategy at

[2] The defendant would have to satisfy the requirements of La. Code Crim. P. art. 924, et seq., in order to receive such a hearing.

trial, and to the contrary, testified consistent with that strategy, questioning his responsibility for the death of the victim. In regard to the defendant's additional claims of ineffective assistance of counsel, we note decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. **State v. Lockhart**, 629 So.2d 1195, 1208 (La. App. 1 Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132.

This assignment of error is without merit or otherwise not subject to appellate review.

MOTION FOR NEW TRIAL

In assignment of error number 3, the defendant argues the trial court erred in denying his motion for new trial because the new evidence he discovered after trial, i.e., the fact the victim had a prior head injury and was taking beta blockers, and trial defense counsel's failure to investigate, pursue, and present evidence for a manslaughter verdict, warranted a new trial.

Louisiana Code of Criminal Procedure article 851, in pertinent part, provides:

> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> The court, on motion of the defendant, shall grant a new trial whenever:
>
> . . . .
>
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty[.]

In order to obtain a new trial based on newly discovered evidence, the defendant has the burden of showing: (1) the new evidence was discovered after trial, (2) the failure to discover the evidence at the time of trial was not caused by lack of diligence, (3) the evidence is material to the issues at trial, and (4) the evidence is of such a nature that it would probably have produced a different verdict. **State v. Smith**, 96-0961, p. 7 (La. App. 1 Cir. 6/20/97), 697 So.2d 39, 43. In evaluating whether the newly discovered evidence warrants a new trial, the test to be employed is not simply whether another jury

might bring in a different verdict, but whether the new evidence is so material that it ought to produce a verdict different from that rendered at trial. The trial court's denial of a motion for new trial will not be disturbed absent a clear abuse of discretion. **State v. Maize**, 94-0736, pp. 27-28 (La. App. 1 Cir. 5/5/95), 655 So.2d 500, 517, writ denied, 95-1894 (La. 12/15/95), 664 So.2d 451.

Following the conviction, the defendant, with new defense counsel, moved for a new trial arguing, inter alia, new evidence he discovered after trial, i.e., the victim had a prior serious head injury and was taking beta blockers, and trial defense counsel's failure to investigate "the ingredients" of manslaughter, warranted a new trial. The State argued there was no new or material evidence that notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial. The State argued, Benton, who had no medical training, had testified at the hearing that the victim had a dent in his skull that he got from a fight years earlier, but no evidence had been presented as to the consequences of that injury. The State also argued the fact the victim was on beta blockers did not justify a new trial because "You kind of take your victims as you find them." The State argued, "If you beat someone into a coma and they die from that coma, much like you cannot hide behind the fact that the parents pulled the plug, you also cannot hide behind the fact that this individual may have been taking a particular medication or may have been in a fight 10 years ago." The State argued the alleged new evidence, even if introduced at trial, would not have changed the verdict. The State noted the jury had been presented with the intervening cause, i.e., "the pulling of the plug," and still found the defendant guilty. The trial court denied the motion for new trial, and the defense objected to the court's ruling.

There was no clear abuse of discretion in denying the motion for new trial based on newly discovered evidence. The alleged new evidence was available to the defense at the time of trial and was not of such a nature that it would probably have produced a different verdict.

There was also no abuse of discretion in refusing to grant a new trial on the basis of ineffective assistance of counsel, and thus relegating that issue to post-conviction

relief. On post-conviction relief, the quality of the attorney's assistance can be fully developed and explored. See **State v. Prudholm**, 446 So.2d 729, 737 (La. 1984). While the defense presented testimony from the defendant in support of his claims of ineffective assistance of counsel, no testimony was presented from trial defense counsel. See **State v. Seay**, 521 So.2d 1206, 1213 (La. App. 2 Cir. 1988) (insufficient record to address claims of ineffective assistance of counsel where allegedly ineffective counsel was not called to testify at hearing on motion for new trial).

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.