

No. SC93118

IN THE
Supreme Court of Missouri

RODNEY P. MCINTOSH,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St. Louis City Circuit Court
Twenty-second Judicial Circuit
The Honorable Angela T. Quigless, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. McIntosh appeals the denial of his Rule 29.15 motion, in which he alleged three claims of ineffective assistance of trial counsel and one claim of prosecutorial misconduct (PCR L.F. 18, 23, 26, 32). Mr. McIntosh's motion was denied without an evidentiary hearing (PCR L.F. 1-2, 39-45).

* * *

A jury found Mr. McIntosh guilty of statutory sodomy in the first degree, § 566.062, RSMo 2000. *See State v. McIntosh*, 231 S.W.3d 255 (Mo.App. E.D. 2007) (per curiam order). The evidence presented at trial, in a light favorable to the verdict, can be summarized as follows.

In November 2004, Mr. McIntosh met C.P. (Tr. 208). C.P. was going through some hard times, and appellant often helped her out with various things (Tr. 208). They became "very close," and on three occasions when C.P. needed a babysitter, she left her three-year-old daughter, H.P., in Mr. McIntosh's care (Tr. 210).

The second and third time that he babysat H.P., Mr. McIntosh touched H.P.'s vagina with his hand (Tr. 196, 215, 222). On the third occasion, on the night of January 5, 2005, Mr. McIntosh and H.P. played a "tickling" game (Tr. 217). Mr. McIntosh then told H.P. to lie down on the couch (they were at C.P.'s residence) (Tr. 217). He pulled down H.P.'s pants and touched her vagina (H.P. referred to her vagina as her "tee-tee") (Tr. 217). He then took

H.P. downstairs to a vending machine and bought her some Starburst candies (Tr. 218).

Later that night (in the early morning hours of January 6, 2005), after C.P. had returned from work, C.P. heard H.P. whimpering in her bedroom (Tr. 213). She asked H.P. if she needed to “go potty,” and H.P. went into the bathroom (Tr. 213). H.P. started to urinate, but then H.P. started to cry (Tr. 213). H.P. said, “My tee-tee hurts” (Tr. 214). H.P. then disclosed that Mr. McIntosh had touched her vagina (Tr. 217-218).

C.P. called her father and they started to devise a plan to kill Mr. McIntosh (Tr. 219). C.P. intended to lure Mr. McIntosh to a secluded place and shoot him in the head, but, after praying and reading her Bible, C.P. felt inspired by the Holy Spirit to call the police; the Spirit said, “If you do this who will she have?” (Tr. 220). C.P. then called the police, but she told the 911 operator that the police had better arrive at her house before Mr. McIntosh arrived, because if Mr. McIntosh arrived first, C.P. intended to kill him (Tr. 220). An officer arrived a few minutes before Mr. McIntosh; the officer arrested Mr. McIntosh (Tr. 220).

C.P. took H.P. to Cardinal Glennon Hospital, and an examination revealed some redness on H.P.’s vagina “at the lips on the left side” (Tr. 223, 240). H.P. reported what had happened to law enforcement, and she reported the incident at a child advocacy center (Tr. 221, 256, 260-263, 285, 292).

At trial, in June 2006, Mr. McIntosh denied touching H.P.'s vagina (Tr. 301, 306). The jury found Mr. McIntosh guilty of statutory sodomy in the first degree, and, on July 12, 2006, the court sentenced Mr. McIntosh to twenty-five years' imprisonment (Tr. 351; Sent.Tr. 7). *See State v. McIntosh*, 231 S.W.3d at 255. Mr. McIntosh appealed. *Id.*

On June 19, 2007, the Court of Appeals affirmed Mr. McIntosh's conviction and sentence. *Id.* The Court of Appeals issued its mandate on September 25, 2007.

On December 13, 2007, Mr. McIntosh filed a *pro se* motion pursuant to Rule 29.15 (PCR L.F. 2-3). On June 18, 2008, Mr. McIntosh filed an amended motion (PCR L.F. 2, 17). The amended motion alleged that counsel was ineffective for failing to present the testimony of Angelo Veal, that counsel was ineffective for failing to object to questions during voir dire that allegedly sought a commitment from the jurors, and that counsel was ineffective for failing to present evidence of a prior allegation of sexual abuse made by H.P. (PCR L.F. 18, 23, 26). The motion also alleged that the prosecutor "engaged in misconduct by arguing matters the Court had excluded at the state's request" (PCR L.F. 32).

On February 8, 2012, the motion court denied Mr. McIntosh's post-conviction motion without an evidentiary hearing (PCR L.F. 39-45). The motion court found that the record showed that counsel had made a strategic

decision not to call Mr. Veal, that the prosecutor's questions during voir dire were permissible, that Mr. McIntosh had failed to allege facts showing that a prior allegation of sexual abuse would have been admissible, and that the prosecutor's closing argument was not misconduct (PCR L.F. 40-45).

Mr. McIntosh appealed, and the Court of Appeals affirmed by per curiam order. This Court granted Mr. McIntosh's application for transfer.

ARGUMENT

I.

The motion court did not clearly err in denying Mr. McIntosh's claim that trial counsel was ineffective for failing to present the testimony of Angelo Veal.

In his first point, Mr. McIntosh asserts that the motion court clearly erred in denying his claim that trial counsel was ineffective for failing to present the testimony of Angelo Veal (App.Sub.Br. 18). He asserts that Mr. Veal would have testified that Mr. McIntosh “did not sexually touch H.P. when the three were together in Jennings rebutting the prior uncharged conduct and impeaching H.P. and her mother's believability” (App.Sub.Br. 18). He argues that “counsel's meager comments from the 29.07 inquiry” were not sufficient to refute his claim (App.Sub.Br. 18).

A. The standard of review

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). “Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.” *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts,

not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. banc 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id.*

B. Mr. McIntosh failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, a movant must “show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also demonstrate prejudice, namely, that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

At trial, the victim’s mother testified that she allowed Mr. McIntosh to babysit H.P. on three occasions (Tr. 209). She testified that she was introduced to Mr. McIntosh by Angelo Veal, “a very good friend” of hers, who was also the victim’s godfather (Tr. 207, 230). She testified that Mr. McIntosh was living with Mr. Veal, and that Mr. McIntosh became “very close,” “like family” (Tr. 207-208). She testified that Mr. McIntosh babysat H.P. one night at Mr. Veal’s house on McPherson (Tr. 209). She testified that Mr. McIntosh babysat H.P. a second time at Mr. Veal’s new house in Jennings (Tr. 210). She testified that Mr. McIntosh babysat H.P. a third time at her residence on North Tucker (Tr. 210).

The victim's mother testified that H.P. told her that the first time Mr. McIntosh touched her vagina was "at Angelo's new house" (Tr. 222). H.P. said that they were in his room, and that Mr. McIntosh taught her a "game," and the "game was he touched her tee-tee and then he gave her some ice cream and some cake" (Tr. 222). The victim's mother testified that Mr. Veal never babysat H.P., and that Mr. Veal had told her that "he was always in his room" (Tr. 230).

In his amended motion, Mr. McIntosh alleged that trial counsel knew about Angelo Veal, and that counsel should have called him at trial to refute testimony about the uncharged incident at Mr. Veal's home in Jennings (PCR L.F. 21-22). (Mr. McIntosh's conviction was based on the subsequent touching of H.P.'s vagina that occurred on the third night that he babysat H.P. at C.P.'s home.) Mr. McIntosh alleged that Mr. Veal would have testified that Mr. McIntosh "never touched H.P. at all" on the night that H.P. was at Mr. McIntosh's residence in Jennings (PCR L.F. 22).

In denying this claim, the motion court found that the record refuted Mr. McIntosh's claim (PCR L.F. 41). The motion court observed that trial counsel had stated, "on the record, he was aware of Mr. Veal's existence, he had talked to Mr. Veal, but that Mr. Veal would not have provided a viable defense" for Mr. McIntosh (PCR L.F. 41). The motion court quoted the part of the record (at sentencing) where trial counsel had stated that he "did not like

some of [the] things [Mr. Veal] said, so [counsel] didn't want to use him as a witness" (PCR L.F. 41). Further, the motion court found that the record showed that trial counsel confirmed that "based on [his] professional opinion [his] assessment of [his] defense at trial, [he] decided that [Mr. Veal and other witnesses] would not best suit any defense on behalf of [Mr. McIntosh]" (PCR L.F. 41). The motion court did not clearly err.

An attorney's choice of witnesses is a matter of trial strategy and will not support a claim of ineffective assistance of counsel. *State v. Westcott*, 857 S.W.2d 393, 397 (Mo.App. W.D. 1993). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Id.* (citing *Strickland*, 466 U.S. at 690). "If a potential witness's testimony would not unqualifiedly support [the defense], the failure to call such a witness does not constitute ineffective assistance.'" *Rios v. State*, 368 S.W.3d 301, 307 (Mo.App. W.D. 2012) (quoting *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. banc 2005)).

Here, at sentencing, Mr. McIntosh testified that he wanted counsel to depose some potential witnesses, and he specifically named Angelo Veal as a potential witness (Sent.Tr. 10). Trial counsel informed the court that he had "spoke[n] to Angelo Veal and [counsel] did not like some of the things [Mr. Veal] said, so [counsel] didn't want to use him as a witness" (Sent.Tr. 10). Counsel confirmed that, in his professional judgment, he decided that Mr.

Veal would not aid the defense (Sent.Tr. 10-11).

Based on this record, the motion court did not clearly err in concluding that Mr. McIntosh failed to allege facts warranting relief. Trial counsel had investigated the possibility of calling Mr. Veal, counsel spoke personally to Mr. Veal, and counsel concluded that Mr. Veal would not be a beneficial witness at least in part because Mr. Veal said some things that counsel did not like (Sent.Tr. 10). Strategic choices made by counsel after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *McLaughlin v. State*, 378 S.W.3d 328, 342 (Mo. banc 2012) (quoting *Strickland*, 466 U.S. at 691).

Additionally, “[w]hen an attorney chooses not to call a particular witness because the attorney fears that the testimony would harm his client's case, his choice not to call the witness is a proper strategic and tactical decision that will not support a claim of ineffective assistance of counsel.” *State v. Gilpin*, 954 S.W.2d 570, 576 (Mo.App. W.D. 1997). “Missouri courts have repeatedly held that an attorney is not ineffective for deciding not to introduce evidence that is harmful to the defense as well as helpful.” *Rothman v. State*, 353 S.W.3d 400, 403 (Mo.App. S.D. 2011).

Mr. McIntosh cites *Schmedeke v. State*, 136 S.W.3d 532 (Mo.App. E.D. 2004), in support of his claim that the record made at trial was not sufficient to refute his claim (App.Sub.Br. 21). But *Schmedeke* is distinguishable. In

that case, counsel stated pre-trial that she had thoroughly investigated the case and had decided not to call certain unnamed witnesses as a matter of trial strategy. *Id.* Counsel stated that she did not “want to get into anything specifically” because she thought it would harm the defendant’s case. *Id.* The defendant later named several witnesses in his post-conviction motion, and he set forth testimony that the witnesses would have provided that would have given him a viable defense. *Id.* at 533. Based on that record—where counsel’s only statement was “trial strategy,” and where no specific witnesses were named pre-trial—the Court of Appeals concluded that the defendant’s post-conviction claim was not conclusively refuted by the record. *Id.* at 534.

Here, however, trial counsel specifically responded to Mr. McIntosh’s claim that he wanted him to depose Mr. Veal, and counsel stated that he had personally spoken to Mr. Veal and concluded that he would not be a favorable witness for the defense because Mr. Veal had said some things that counsel did not like (Sent.Tr. 10-11). It was, thus, apparent from the record that counsel actually investigated Mr. Veal, that counsel did not like some of Mr. Veal’s potential testimony, and that counsel made a strategic choice not to call him at trial.

Mr. McIntosh’s reliance on *State v. Sublett*, 887 S.W.2d 618 (Mo.App. W.D. 1994), is also misplaced (App.Sub.Br. 22). In that case, the defendant alleged in his post-conviction motion that counsel was ineffective for failing to

call an alibi witness who would have testified that the defendant, “at the time of the robbery, was at work . . . about a mile from the site of the robbery.” *Id.* at 621. The post-conviction motion also alleged that, before trial, counsel “learned that there was evidence defendant had been at work during the time when the robbery occurred.” *Id.*

In considering whether the defendant’s post-conviction claim was conclusively refuted by the record, the Court of Appeals observed that defense counsel had, after trial, filed an untimely, supplemental motion for new trial, alleging that “defendant had learned about these alibi witnesses after the trial, and that he could not have known about them before trial.” *Id.* But because the supplemental motion for new trial was untimely, it was not considered by the trial court. *Id.* Additionally, because the supplemental motion for new trial referred to *defendant’s* knowledge of the alibi witness (as opposed to *counsel’s* knowledge), the allegations in the supplemental motion for new trial only tended to contradict the allegations of the Rule 29.15 motion, but they did not conclusively refute those allegations. *Id.*

Here, by contrast, the record made at trial was specific as to counsel’s efforts in investigating Mr. Veal and deciding not to call him at trial, and it was relied on by the trial court in making its initial determination that Mr. McIntosh did not receive ineffective assistance of counsel (Sent.Tr. 11-15). An additional evidentiary hearing might disclose more particularly counsel’s

reasons for deciding that Mr. Veal would not aid the defense, but it would not change the fact that counsel investigated Mr. Veal by personally speaking to Mr. Veal, and that Mr. Veal said things that counsel believed would harm the defense.¹ See *Matthews v. State*, 175 S.W.3d 110, 115 (Mo. banc 2005) (where the record showed that counsel knew about certain evidence but decided not to present it, there was no need for an evidentiary hearing to ascertain counsel's reasons for not presenting the evidence).

In *Matthews v. State*, where the defendant had been charged with drug offenses, the defendant alleged in his Rule 29.15 motion that trial counsel was ineffective for failing to play a surveillance tape of the drug transactions. *Id.* at 112, 115. The record showed that the defendant and trial counsel had “had a long discussion about whether or not to play the tape.” *Id.* The record also showed that “[d]espite strong encouragement from [the defendant] and his family, trial counsel decided not to play the tape.” *Id.* The motion court

¹ It is not surprising that trial counsel's investigation revealed that Mr. Veal would be unfavorable to the defense, as the record showed that Mr. Veal was a close friend to the victim's mother, that he was the victim's godfather, and that he told the victim's mother that “he was always in his room” (*i.e.*, that he was not in a position to see whether there was any inappropriate touching) (Tr. 207-208, 230).

denied the claim without an evidentiary hearing. *Id.* at 112.

This Court affirmed the motion court’s judgment, pointing out that “[w]hile . . . trial counsel did not state a reason for his decision not to play the surveillance tape, he did indicate that he made the decision only after discussing the matter at length with his client.” *Id.* at 115. The Court observed that “[g]enerally, choices regarding the introduction of evidence are considered trial strategy and are virtually unchallengeable.” *Id.* The Court observed that “[i]t is not within the province of the courts . . . to second-guess every decision of . . . trial counsel.” *Id.* “There is a strong presumption that the trial counsel’s strategy was reasonable.” *Id.*

Here, Mr. McIntosh asserts that his case is distinguishable because in his case “[t]here is no record whether counsel discussed his decision with [Mr. McIntosh] or what it was about Angelo Veal that made him a bad witness” (App.Sub.Br. 23). But there was likewise nothing in *Matthews* that revealed why trial counsel thought the surveillance tape would not be useful to the defense, and there is no requirement that counsel discuss whether to call a particular witness (or present certain evidence) with the defendant. The decision to call a particular witness is a decision that belongs to counsel. *See Anderson v. State*, 196 S.W.3d 28, 37 (Mo. banc 2006) (“The selection of witnesses and evidence are matters of trial strategy[.]”) And, here, where the record showed both that counsel investigated the witness by personally

talking to the witness, and that counsel was not satisfied that the witness would be helpful to the defense, the motion court was correct not to second-guess counsel's strategic decision.

Mr. McIntosh also argues that “[t]here is no means, except through speculation, to determine the reasonableness of counsel’s strategy” (App.Sub.Br. 23). He argues: “The motion court could not conclusively say trial counsel’s aversion to what Mr. Veal said was reasonable under the circumstances except by conjecture that counsel *must have had* a good reason not to call the witness” (App.Sub.Br. 23).

But the motion court did not have to be able to discern trial counsel’s reasons. “There is a strong presumption that the trial counsel’s strategy was reasonable.” *Matthews*, 175 S.W.3d at 115. It was, therefore, Mr. McIntosh’s burden to allege facts showing that counsel’s decision was unreasonable. *Id.* (“In order to rebut this presumption, Movant was required to allege facts showing that his trial counsel’s performance was not reasonable and that he was thereby prejudiced.”). And, here, while the amended motion outlined reasons why it might have been reasonable to present Mr. Veal’s testimony, the motion did not allege that counsel’s stated concerns about the negative aspects of Mr. Veal’s testimony were unreasonable (*see* PCR L.F. 19, 21-22). “It is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy.” *Anderson v.*

State, 196 S.W.3d at 33.

In short, the record in this case was sufficient to refute the allegation that trial counsel was ineffective for failing to call Mr. Veal to testify. The post-conviction motion failed to allege facts showing either that counsel failed to investigate, or that counsel's evaluation of Mr. Veal's potential testimony was unreasonable. This point should be denied.

C. Mr. McIntosh also failed to allege facts showing prejudice

In addition, Mr. McIntosh failed to allege facts showing prejudice. The mere fact that Mr. Veal did not see Mr. McIntosh touch the victim's vagina at his house in Jennings did not provide a viable defense to the charged offense. The charged offense was based on Mr. McIntosh's touching the victim's vagina at another time at the victim's residence. *See Kelley v. State*, 24 S.W.3d 228, 234 (Mo.App. S.D. 2000) (a witness's "testimony that he had not seen blood on the victim's sheet on an earlier date in no way disproves that Movant raped the victim on the date charged").

Moreover, testimony from a witness who does not see an act is of questionable value, especially when the act that the witness did not see is an act that can be accomplished quickly or surreptitiously. *See generally Ursery v. State*, 119 S.W.3d 165, 167 (Mo.App. E.D. 2003) (counsel was not ineffective for failing to call alleged alibi witnesses because "the fact that three witnesses who were 'in the vicinity' did not see Movant does not prove

he was not there”); *State v. Westcott*, 857 S.W.2d 393, 397 (Mo.App. W.D. 1993) (where witnesses did not see the defendant touch the victim, defense counsel reasonably decided not to call them because they could not say that the sexual contact did not occur); *Davis v. State*, 657 S.W.2d 677, 678 (Mo.App. E.D. 1983) (“Since the jury might well believe Harris that he did not see the movant, and yet find that the movant was present, we fail to see how the absence of this testimony was prejudicial.”).

Here, the victim did not testify that the incident in Jennings was of any great duration, or that she or Mr. McIntosh was wholly or even partially unclothed. Rather, the victim simply reported that Mr. McIntosh had touched her vagina and then given her cake and ice cream (Tr. 222). Mr. McIntosh could have accomplished such an act when Mr. Veal was not looking at them, or while Mr. Veal was present in the house but not in the same room. (The amended motion alleged in general terms that Mr. Veal “would have testified that on that particular evening, [Mr. McIntosh] could not have touched H.P. as [Mr. Veal] was there with them the entire time” (PCR L.F. 19).)

Finally, even if Mr. Veal could have inferentially proved that Mr. McIntosh did not touch the victim’s vagina at his house in Jennings, such testimony would have merely impeached the victim’s testimony about the first instance that she recalled. “When the testimony of a witness will only impeach the State’s witness, ‘relief on a claim of ineffective assistance of

counsel is not warranted.” ’ ’ ” *Rios v. State*, 368 S.W.3d at 309. See *Baumruk v. State*, 364 S.W.3d 518, 533 (Mo. banc 2012) (“The failure to impeach a witness does not ‘constitute ineffective assistance of counsel unless such action would have provided a viable defense or changed the outcome of trial.’ ”).

In short, because Mr. Veal could not refute the victim’s testimony about the touching that occurred at the victim’s house (the charged offense), and because Mr. Veal’s testimony was of questionable value and merely impeached the victim’s report about the first instance of touching (at Mr. Veal’s home), there is no reasonable probability that Mr. Veal’s testimony would have affected the outcome of trial. This point should be denied.

II.

The motion court did not clearly err in denying Mr. McIntosh's claim that trial counsel was ineffective for failing to object to various questions asked by the prosecutor during voir dire.

In his second point, Mr. McIntosh asserts that the motion court clearly erred in denying his claim that trial counsel was ineffective for failing “to object to extensive State questioning of the venire panel which sought commitment as to how prospective jurors would treat certain evidence” (App.Sub.Br. 25). Mr. McIntosh asserts that he was prejudiced because “the State was allowed to identify (and remove) normally scrupled jurors,” and because “the State’s questions of the venire panel suggested there was some minimal ‘legal’ amount or type of evidence required” (App.Sub.Br. 28). Mr. McIntosh argues that “[t]he State was not searching for potential jurors with odd, dogmatic prejudices, but rather sought to exclude jurors who might have problems with the paucity of evidence” (App.Sub.Br. 28). He argues that the state was trying its case and “seeking commitments from the jury to ‘return a verdict’ ” (App.Sub.Br. 28).

A. The standard of review

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” *Moss v. State*, 10 S.W.3d 510, 511 (Mo.

banc 2000). “Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.” *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. banc 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id.*

B. Mr. McIntosh failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, a movant must “show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also demonstrate prejudice, namely, that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “The movant must show that the failure to object to improper jury selection procedures affected the fairness of a criminal trial.” *See Boyd v. State*, 86 S.W.3d 153, 158 (Mo.App. E.D. 2002).

Here, the record shows that there was no meritorious basis for counsel to object to the prosecutor’s questions during voir dire. The prosecutor began the allegedly improper series of questions by asking whether there were any

potential jurors who did not believe that witness testimony constituted evidence (Tr. 94-95). The prosecutor then followed up by asking whether there were any members of the venire who would require physical evidence (as opposed to witness testimony) to reach a verdict (*see* Tr. 95-97). The prosecutor then asked if there were any venire members who would require the testimony of more than one eyewitness to reach a verdict (Tr. 100). The prosecutor then stated that the victim was three years old at the time of the alleged crime, and the prosecutor asked whether the victim's age would preclude the venire members from reaching a verdict if they were convinced beyond a reasonable doubt (*see* Tr. 102-110).

Later, the prosecutor inquired about attitudes toward police officers' credibility (Tr. 113-116), and whether a delay in reporting would affect the venire members' consideration of the victim's credibility (Tr. 116). The prosecutor also asked whether any jurors would require a police report to reach a verdict (Tr. 116-117). The prosecutor also mentioned briefly that the case involved sodomy, which includes touching the genitals, and the prosecutor asked if anyone would require proof of physical injury before believing that a touch occurred (Tr. 118-119).

In his amended motion, Mr. McIntosh asserted that trial counsel should have objected "to all the state's efforts to delve into the facts of the case and seek a commitment on the part of jurors to ignore problems with the

state's case" (PCR L.F. 24). The motion alleged that the state "tried its case to the venire panel so to identify potential jurors with qualms about the quantum and weight of the state's evidence" (PCR L.F. 24-25). He asserted that "the state's questions suggested numerous deficiencies were of no legal consequence and no bar to a guilty verdict" (PCR L.F. 25).

In denying Mr. McIntosh's claim, the motion court found that all of the state's questions were permissible, and the motion court cited cases where similar questions had been found permissible (PCR L.F. 42). The motion court also observed that inquiry about relevant facts is "essential to the search for bias" (PCR L.F. 42). The motion court acknowledged that questions should not seek a commitment, and the court concluded that "[t]here was nothing, prejudicial or otherwise inappropriate about the State's questions during voir dire" (PCR L.F. 43). The motion court did not clearly err.

The prosecutor's questions fell into two general categories: first, questions that were designed to probe whether the jurors would properly apply the governing legal standard ("beyond a reasonable doubt"); and second, questions about facts that could give rise to impermissible bias in the minds of the jurors. It was within the trial court's discretion to permit both types of questions.

First, in asking whether the potential jurors could accept a witness's testimony if they believed the testimony beyond a reasonable doubt, or

whether, rather, they would require a special kind of evidence (e.g., physical evidence, physical injury, a corroborating eyewitness, or a police report), the prosecutor was merely probing whether the jurors would properly apply the beyond-a-reasonable-doubt standard of proof. It is well settled that, during voir dire, “it is necessary for the prosecutor to establish exactly what the potential jurors associate with the prosecutor’s burden of proof.” *State v. McCain*, 845 S.W.2d 99, 101 (Mo.App. E.D. 1993) (citing *Clemmons v. State*, 785 S.W.2d 524, 529 (Mo. banc 1990)). Thus, for example, Missouri courts have held that it is proper for the prosecutor to inquire whether “the jurors anticipated more than just witness testimony,” *State v. McCain*, 845 S.W.2d at 101, whether “the venire persons could make a decision on guilt or innocence based on the testimony of one witness,” *State v. Thomas*, 70 S.W.3d 496, 505-506 (Mo.App. E.D. 2002), whether “any of you have hesitation to return a verdict of guilty if you believed beyond a reasonable doubt the defendant is guilty but the only evidence was the testimony of the child without any other corroborative evidence,” *State v. Spidle*, 967 S.W.2d 289, 291 (Mo.App. W.D. 1998) (reviewing for plain error), and whether “anyone here think[s] that DNA evidence alone could never be enough to prove the [s]tate’s case[.]” *State v. Dunn*, 7 S.W.3d 427, 432 (Mo.App. W.D. 1999). See *State v. Taylor*, 317 S.W.3d 89, 94-95 (Mo.App. E.D. 2010) (“Given the prevalence of television shows such as CSI and Law and Order, a trend exists

wherein juries expect the State to present physical evidence on every issue. The trial court does not err in allowing the State to ferret out such juror biases during voir dire.”).

It is well established that the parties are afforded much latitude in probing the venire panel to determine preconceived prejudices which would prevent the potential jurors from following the court’s instructions. *State v. Taylor*, 317 S.W.3d at 95. Here, “[t]he transcript clearly reveals that the prosecutor aimed to establish that the jury could follow the court’s instruction to determine whether Defendant was guilty beyond a reasonable doubt, regardless of the form of evidence presented.” *Id.* “Established principles permit such questioning.” *Id.* As such, the motion court did not clearly err in concluding that counsel was not ineffective for failing to object to the prosecutor’s questions. “‘Counsel is not required to make non-meritorious objections, and ‘counsel is not ineffective for failing to make nonmeritorious objections.’”’” *Johnson v. State*, 369 S.W.3d 87, 92 (Mo.App. W.D. 2012) (quoting *Williams v. State*, 205 S.W.3d 300, 305 (Mo.App. W.D.2006)).

Second, in inquiring about certain facts (*e.g.*, the victim’s age, police officer involvement in the case, and delay in reporting sexual offenses), the prosecutor was permissibly probing whether any of the jurors held preconceived notions about certain facts that would preclude them from fairly considering the case. “The purpose of voir dire is to discover potential juror

bias or prejudice.” *State v. Scott*, 298 S.W.3d 913, 915 (Mo.App. E.D. 2009). General fairness and follow-the-law questions alone are insufficient to reveal juror bias; thus, some facts must be revealed during voir dire to ensure an impartial jury. *Id.* Of course, “not every fact must be revealed, and a party is not allowed to try his case during voir dire.” *Id.* “Instead, only critical facts must be disclosed.” *Id.* “A critical fact is a fact which has ‘substantial potential for disqualifying bias.’” *Id.*

For instance, in *State v. Clark*, 981 S.W.2d 143, 147 (Mo. banc 1998), the Court held that the defendant should have been allowed to ask potential jurors about the age of the three-year-old murder victim. The Court observed that “[a] case involving a child victim can implicate personal bias and disqualify prospective jurors.” *Id.* Here, similarly, many people have strong feelings about sex cases involving child victims—either because they feel sympathy for victimized children or because they harbor skepticism that such crimes occur as alleged (especially when a child is not initially forthcoming). It was, thus, permissible for the prosecutor to ask whether that fact would affect the potential jurors’ ability to consider the case and follow the court’s instructions. Likewise, it was permissible to inquire about delay in reporting such crimes. *See State v. Spidle*, 967 S.W.2d at 291 (it was not plain error for the prosecutor to ask whether anyone felt that “a child deserves less protection under the law than an adult,” and whether anyone felt “that the

burden of proof in this case should be higher because it involves the rape of a child as compared to some other sort of a crime”); *State v. Lottmann*, 762 S.W.2d 539, 540 (Mo.App. E.D. 1988) (the state had a “legitimate interest” to determine “whether any prospective jurors harbored any prejudice against the witness E.B. because of her delay in reporting the incident of sexual abuse to her mother such that they would not fairly and impartially consider her testimony when offered”).

Mr. McIntosh acknowledges these cases, but he asserts that the prosecutor sought a commitment when she asked questions along the lines of “Would you be able to listen to her and if you believed her beyond a reasonable doubt, convict the defendant of what he’s been charged with?” (App.Br. 27-28). But in asking the potential jurors whether they would be able to reach a verdict or convict if they believed the state’s evidence beyond a reasonable doubt, the prosecutor was permissibly seeking to ensure that the eventual “jury could follow the court’s instruction to determine whether Defendant was guilty beyond a reasonable doubt, regardless of the form of evidence presented.” *State v. Taylor*, 317 S.W.3d at 95. This was permissible, and it must be noted that the prosecutor’s questions ultimately identified three potential jurors (who were struck for cause) who held views that were inconsistent with the court’s instruction to find the defendant guilty if they believed the state’s evidence beyond a reasonable doubt (*see* Tr. 180).

In short, the prosecutor's questions were designed to ensure that the jury would follow the court's instructions and to ferret out biases and preconceived notions that could hinder the potential jurors' ability to fairly consider the case. The prosecutor's questions did not lay out explicit facts and try the case beforehand; rather, the prosecutor's questions properly ensured that the jurors would apply the correct standard. Both sides were still free to argue the facts and the evidence as they saw fit, and, partly as a result of the prosecutor's questions, the jurors who sat on the case were qualified and willing to follow the court's instructions. There is no reasonable probability that an objection by defense counsel would have affected the outcome of trial. This point should be denied.

III.

The motion court did not clearly err in denying Mr. McIntosh's claim that trial counsel was ineffective for failing to present evidence that H.P. had previously made another allegation of sexual abuse coming from a source other than Mr. McIntosh.

In his third point, Mr. McIntosh asserts that the motion court clearly erred in denying his claim that counsel was ineffective for failing to present evidence that H.P. had previously made another allegation of sexual abuse coming from a source other than Mr. McIntosh (App.Sub.Br. 30). He asserts that such evidence could have been put to "many uses," including rebutting comments made by the state in closing argument (App.Sub.Br. 30).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. banc 2003). The alleged facts must raise matters not

refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id.*

B. Mr. McIntosh failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, a movant must “show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also demonstrate prejudice, namely, that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

“To establish an ineffective assistance of counsel claim based on an inadequate offer of proof, the Movant must prove that the evidence offered would have been admissible if an adequate offer of proof had been made.” *Barnes v. State*, 334 S.W.3d 717, 722 (Mo.App. E.D. 2011). “Failure to do so is fatal.” *Id.* “Counsel is not ineffective for failure to obtain and introduce evidence . . . that would not be admissible.” *Zink v. State*, 278 S.W.3d 170, 180 (Mo. banc 2009).

Before trial, the state moved in limine to exclude any questions about a previous accusation by the victim (Tr. 5). The prosecutor argued that it was not relevant, and that there was no proof that the prior accusation was false (Tr. 5). Defense counsel agreed that there was no proof that the accusation was false (Tr. 5). The trial court ascertained that the parties were referring to

“the fact that she made an accusation in ’03” (Tr. 5-6). Defense counsel then referred to an unspecified opinion from the Court of Appeals, Western District, that he believed precluded him from presenting the evidence (Tr. 6). There was no offer of proof or further disclosure about the circumstances surrounding the accusation or its content.

In his amended motion, Mr. McIntosh alleged that trial counsel gave in to the state’s motion in limine to exclude evidence of H.P.’s prior allegation “without an offer of proof or further explanation” (PCR L.F. 27). In alleging how such evidence might have been admissible at trial, Mr. McIntosh first alleged that “if the prior allegation was false . . . then it would have been useful to impeach the believability of H.P. and, by extension, the persons to whom she disclosed” (PCR L.F. 29-30). Second, he alleged that “if the allegation was unsubstantiated because [C.P.] had not followed up, then it would have refuted the state’s later argument that [C.P.] was believable because of her over-reaction” (PCR L.F. 30). Third, he alleged that if the prior allegation was true, “it would have explained why a three-year old might come up with such an allegation; because it had happened before” (PCR L.F. 30). Fourth, he alleged that if it was true, it might have cast reasonable doubt whether the incident H.P. . . . blamed [Mr. McIntosh] for was one he actually committed or one that had occurred with some other person” (PCR L.F. 30). Finally, he alleged that “regardless whether it was true or false, the fact was

that she had made a complaint which presumably was investigated”—a fact that would have undercut the state’s claims that H.P. was spontaneous in her interview at the child advocacy center (PCR L.F. 30).

In light of these conditional allegations, the motion court did not clearly err in denying Mr. McIntosh’s claim. It is not apparent from Mr. McIntosh’s amended motion that the victim’s prior allegation (even if potentially useful in some way) was *admissible* on any grounds.

It is apparent from the record that the victim made a prior allegation of some sort of sexual activity, but prior sexual conduct of the victim would not have been admissible at trial, except in certain limited circumstances. *See* § 491.015.1, RSMo 2000; *State v. Sales*, 58 S.W.3d 554, 559 (Mo.App. W.D. 2001) (“The trial court correctly excluded evidence of [the victim’s] previous abuse because it did not fall within any of the four exceptions under the rape shield statute [§ 491.015], and it was not relevant or material to any issue in the case.”).

Under § 491.015, “[i]n prosecutions under chapter 566 . . . evidence of specific instances of the complaining witness’ prior sexual conduct . . . is inadmissible,” except in certain circumstances. Thus, contrary to Mr. McIntosh’s speculative allegations, evidence of the victim’s prior sexual conduct would not have been admissible to suggest that the victim fabricated the charge against Mr. McIntosh. A prior instance of telling the truth about

sexual conduct would not permit Mr. McIntosh to impeach the victim with her prior sexual conduct.² In short, absent specific factual allegations about the accusation and its admissibility, it cannot be said that trial counsel's conclusion that the accusation was inadmissible fell below an objective standard of reasonableness.

It is, of course, true that evidence of prior sexual conduct can be admitted to show an "alternative source" for injury. *See* § 491.015.1(2), RSMo 2000. But there is no basis for Mr. McIntosh to suggest that the victim's prior sexual conduct might have accounted for the redness on her vagina. There was no allegation in the amended motion regarding when the prior sexual conduct occurred, but the trial transcript indicates that the victim made the accusation in 2003 (Tr. 4-5). It is not possible that the earlier sexual activity caused the redness observed on the victim's vagina shortly after she was in Mr. McIntosh's care in January, 2005.

² Even if prior conduct could be used to impeach, it is pure speculation for Mr. McIntosh to suggest that the victim might have substituted Mr. McIntosh for some other person who subjected the victim to sexual conduct at some previous, unspecified time. Indeed, because the timing and nature of the prior sexual conduct is not known, it is not apparent that there is any basis to think that the victim might have confused the two events.

Also, as the motion court concluded, the victim's prior sexual conduct was not admissible to explain the victim's "precocious" sexual knowledge (PCR L.F. 43-45). The evidence in this case did not suggest that the victim was precocious in her sexual knowledge; to the contrary, the state's evidence showed that the victim was quite childish in her sexual knowledge, as she referred to her vagina as her "tee-tee" and reported merely that Mr. McIntosh had touched her "tee-tee" with his fingers. H.P. did not describe any other sexual acts or display unusual or mature knowledge of sexual activity.

H.P.'s testimony in this case stands in stark contrast, for example, to the testimony offered by one of the victims in *State v. Samuels*, 88 S.W.3d 71 (Mo.App. W.D. 2002). There, one of the victims (who was nine years old) testified that she put her mouth on the defendant's "front part," that the defendant would then "go pee," and that something would come out in her mouth and she would spit it out. *Id.* at 76. The victim also said that the defendant touched the inside of her behind with his "front part." *Id.* The victim testified that the defendant would go "up and down" and put grease on his "private." *Id.* The victim also testified that the defendant put his "front part" in her "front part." *Id.* Though she employed childish terms, the victim in *Samuels* displayed a precocious knowledge of sexual acts. By contrast, the victim here did not display the same sort of precocious sexual knowledge.

Additionally, in *Samuels*, the state highlighted the precocious and

unusual nature of the victim's sexual knowledge. In opening statement, the state said that the victim's ability "to draw some explicit genitalia and explicitly state what they are" is "unusual" for a child who was nine years old. *Id.* at 79. Then, in closing argument, the state again highlighted the unexpected sexual knowledge held by the victims; the prosecutor stated: "When you're talking to little girls who are six years old, nine years old, and 14 years old and you talk to them about what's going on in their lives, you [don't] expect to hear things like: ... their dad peeing in their mouth." *Id.* The state highlighted the explicit sexual acts the victims described and stated, "This is not how it should be." *Id.* The state further stated that the nine-year-old victim's drawings were "unusual pictures for a nine-year-old to be drawing." *Id.* The prosecutor concluded:

We know that these children are not lying because these children cannot make up this type of story. Look at the acts that they described the detail that they gave. She talks about lubricant. She talks about gel. She talks about hair grease. She talks about condoms. This detail, a child who is between seven and nine years old could not make up.

Id. Ultimately, because the state had highlighted the victim's precocious knowledge and used it to draw an inference that the victim's knowledge came as a result of the defendant's actions, the Court concluded that, as a matter of

due process, the defendant should have been permitted to elicit evidence of prior sexual conduct of the victim with some else. *Id.* at 82-83.

The Court indicated, though, that such evidence of prior sexual conduct is not always admissible, particularly in light of the rape shield statute. The Court observed that “[t]ypically, in a case of this nature, young victims will describe inappropriate experiences in words they should not know.” *Id.* at 82. Thus, “[t]he State has no choice but to present the victim’s description of the events.” *Id.* But “for purposes of considering a defendant’s due process rights . . . , there is an important distinction between evidence that is offered as part of presenting the facts of the case, i.e., an essential part of the State’s case in chief, and evidence or comments by the State that go the extra step to highlight the testimony to suggest that the defendant is . . . the sole source of the precocious sexual knowledge.” *Id.* Only if the state takes that “extra step” do “basic principles of fairness entitle the defendant to counter with evidence that there are other potential sources of the . . . knowledge.” *Id.* Here, the state did not present evidence that the victim’s knowledge was precocious.

Mr. McIntosh points out that “[t]he state implicitly and explicitly tried to show that [Mr. McIntosh] was the only possible abuser of H.P.” (App.Br. 32). But while the state certainly sought to prove that Mr. McIntosh was the person who touched the victim’s vagina (as charged in this case), the state did not take the extra step of suggesting that the victim possessed precocious

sexual knowledge that she could have gained only from Mr. McIntosh.

Mr. McIntosh highlights various aspects of the state's evidence (App.Sub.Br. 33-35), but most of them have nothing to do with the victim having precocious sexual knowledge. The victim's mother's concern over the victim's pain, the victim's mother's fear (and even disbelief) that a close family friend may have harmed her child sexually, and the victim's mother's anger and desire to kill Mr. McIntosh were not facts that showed the victim's precocious sexual knowledge, and they were not facts that suggested that the victim had never been harmed sexually in the past. Indeed, one would reasonably expect a mother to be concerned and angry *every time* something like that happened to her child. Thus, the fact that C.P. was concerned and angry did not make the victim's prior allegation admissible.³

³ Mr. McIntosh attempts to strengthen the force of his argument by asserting for the first time that the state was “[f]reed from having to deal with any issue of H.P.’s *or* [C.P.’s] prior allegations about another person” (App.Sub.Br. 33) (emphasis added). But there is nothing in the record and no allegation in the amended motion about any allegations by C.P. There is nothing showing that C.P. knew about the earlier sexual conduct or allegation at the time it occurred. Thus, it is possible that the allegations made against Mr. McIntosh were C.P.’s first personal encounter with such issues.

Mr. McIntosh points out that one of the state's witnesses, Dr. Sterni, testified about the redness on the victim's vagina and stated that it was "consistent" with sexual abuse (App.Sub.Br. 34). But that was merely evidence that legitimately tended to prove Mr. McIntosh's guilt; it had nothing to do with the victim's allegedly precocious knowledge. (And, as stated above, there were no facts alleged in the amended motion to suggest that the victim's prior sexual conduct was an alternative cause of the redness.) Mr. McIntosh also points out that Luzette Wood (of the child advocacy center) testified that it did not appear that H.P. had been coached, and that H.P.'s answers seemed "genuine" (App.Sub.Br. 34). But, again, Ms. Woods's testimony along those lines did not suggest that H.P. had any precocious sexual knowledge; rather, it merely suggested that H.P. did not show signs of being coached to tell her story.

In short, contrary to Mr. McIntosh's argument, none of this testimony suggested that H.P. had precocious knowledge or that she had "never been abused previously" (App.Sub.Br. 34). Rather, all of this testimony merely presented the state's case against Mr. McIntosh.

Mr. McIntosh also points out that, in closing argument, the prosecutor argued that Mr. McIntosh had violated the victim's mother's trust and the victim "in the most unthinkable unimaginable way" (App.Sub.Br. 34, citing Tr. 328). But this was part of general statement describing how Mr. McIntosh

gained the family's trust and then violated it in a horrible way. The comment was not designed to imply that H.P. had never been abused by anyone else; rather, it merely described the general notion that it is "unthinkable" or "unimaginable" to find out that a close family friend has sexually molested a child in the family.

Mr. McIntosh also points out that the prosecutor highlighted the victim's age (three years old) and argued that "[s]he can't fabricate or come up with something so horrible, unless it happened" (App.Sub.Br. 34, citing Tr. 347). This comment did state that the victim had "horrible" knowledge that only could have come from experience, but the prosecutor was merely arguing the victim's credibility based on the evidence, and the prosecutor did not characterize the knowledge as "unusual" or outline explicit sexual knowledge that a child would not have (as in *Samuels*).

Moreover, because there is nothing in the record describing the nature of the previous sexual conduct (the record discloses only that the victim made some sort of "accusation"), there is no basis for Mr. McIntosh to suggest that the prior incident could have informed the accusations she made against Mr. McIntosh. But even if the prosecutor's comment in closing argument did imply that H.P.'s "horrible" knowledge would be unexpected among three-year-old children, this single comment in closing argument (or any other comments in closing argument) cannot be relied on by Mr. McIntosh to argue

that trial counsel was ineffective in failing to present evidence of the victim's prior sexual conduct.

As with any claim of ineffective assistance of counsel, counsel's conduct must be viewed in light of the circumstances as they existed at the time counsel acted or failed to act. *Strickland*, 466 U.S. at 690 ("a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"). Here, if trial counsel had wanted to present evidence of the victim's prior sexual conduct, he would have had to articulate during the presentation of evidence a basis for doing so. Counsel did not know what comments the state would make in closing argument; thus, the state's specific comments in closing argument could not have been relied on by counsel to admit evidence during trial. Indeed, if counsel had cited the possibility of such comments in closing argument, the state could have simply agreed to refrain from such comments. In short, while the state's comments in closing argument might have some bearing on determining whether the trial court erred prejudicially in refusing to permit a defendant to present evidence at trial, they have little or no bearing on whether counsel was ineffective at some earlier point in the trial.

Lastly, to the extent that Mr. McIntosh suggests that H.P.'s prior allegation of sexual abuse might have been false and, thus, admissible to

impeach H.P., Mr. McIntosh failed to allege that the prior allegation was, in fact, false, or that he could have laid the foundation for proving that it was false. *See State v. Couch*, 256 S.W.3d 64, 66 (Mo. banc 2008) (“the defendant did not show that the allegation was false, that the victim knew it was false”), *abrogated in part by Mitchell v. Kardesch*, 313 S.W.3d 667 (Mo. banc 2010).

Mr. McIntosh also did not allege, for instance, that the victim had a motive to fabricate allegations, or that the victim had engaged in a pattern of false allegations as a means of obtaining some benefit. *See State v. Samuels*, 88 S.W.3d at 83-84 (upholding the exclusion of prior allegations of sexual abuse because there was no showing that the victims had a motive to fabricate allegations); *cf. State v. Montgomery*, 901 S.W.2d 255, 256-257 (Mo.App. E.D. 1995) (concluding that prior allegations of sexual abuse were relevant to the victim’s credibility because the victim had made prior allegations against multiple people as a means of gaining her mother’s attention); *State v. Lampley*, 859 S.W.2d 909, 910-911 (Mo.App. E.D. 1993) (victim’s motive in making allegations was to have the defendant removed from her home).

In short, the conditional and speculative allegations in Mr. McIntosh’s amended motion failed to allege facts showing that trial counsel could have successfully admitted the victim’s prior accusation of sexual abuse. Moreover, because he failed to allege whether the prior allegation was true or false, it is

not apparent what effect (if any) the prior allegation would have had on the evidentiary picture presented to the jury. Mr. McIntosh failed to allege facts showing that counsel's performance was deficient or that he was prejudiced. This point should be denied.

IV.

The motion court did not clearly err in denying Mr. McIntosh's claim of prosecutorial misconduct in closing argument.

In his fourth point, Mr. McIntosh asserts that the motion court clearly erred in denying his claim that “the state engaged in misconduct by arguing matters [in closing argument] the trial court had excluded at the state’s request” (App.Sub.Br. 36). He asserts that the state “successfully sought to prohibit any mention of a prior allegation made by H.P. directed to another perpetrator,” but that, “later, in arguing its case to the jury the State argued the non-existence of the very evidence it moved to keep from the jury” (App.Sub.Br. 35).

A. The standard of review

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). “Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.” *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. banc 2003). The alleged facts must raise matters not

refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id.*

B. Mr. McIntosh's claim is not cognizable in this proceeding

“As a general rule, a post-conviction motion for relief cannot be used as a substitute for a direct or second appeal.” *Glaviano v. State*, 298 S.W.3d 112, 114 (Mo.App. W.D. 2009) (citing *Zink v. State*, 278 S.W.3d 170, 191 (Mo. banc 2009)). “‘Issues that could have been raised on direct appeal—even if constitutional claims—may not be raised in postconviction motions, except where fundamental fairness requires otherwise and only in rare and exceptional circumstances.’” *Id.* (quoting *State v. Tolliver*, 839 S.W.2d 296, 298 (Mo. banc 1992)).

“A freestanding claim of prosecutorial misconduct is generally not cognizable in a Rule 29.15 proceeding.” *Tisius v. State*, 183 S.W.3d 207, 212 (Mo. banc 2006). “If the alleged misconduct was apparent at trial, then it is an issue for direct appeal, not a Rule 29.15 proceeding.” *Id.*

Here, Mr. McIntosh was aware of the alleged prosecutorial misconduct at trial, as it occurred during closing argument, when the prosecutor argued the victim's credibility by stating, “She's three years old. She can't fabricate or come up with something so horrible, unless it happened, and, ladies and gentlemen, she came in here and told you a year and a half later the same thing” (Tr. 347). Mr. McIntosh had the trial transcript on direct appeal, and,

thus, he could have raised this claim of alleged prosecutorial misconduct on direct appeal. In short, because the alleged misconduct occurred at trial, and because the record was available on direct appeal, Mr. McIntosh's claim of prosecutorial misconduct is not cognizable here. See *Tisius v. State*, 183 S.W.3d at 212-213 ("Unlike a claim of withheld evidence, which would not be known to a movant during trial or direct appeal, a claim involving allegedly improper argument was apparent at trial and could have been raised on direct appeal); *Wilson v. State*, 383 S.W.3d 51, 57-58 (Mo.App. E.D. 2012) (declining to review a claim that the prosecutor interfered with the defendant's right to present a defense, including securing evidence and calling defense witnesses). See also *McLaughlin v. State*, 378 S.W.3d 328, 357 (Mo. banc 2012) ("Claims challenging the constitutionality of the death penalty are for direct appeal and are not cognizable on a motion for post-conviction relief."); *State v. Tolliver*, 839 S.W.2d at 298 ("The double jeopardy claim was not cognizable in the Rule 29.15 proceedings . . ."); *Rupert v. State*, 250 S.W.3d 442, 446-447 (Mo.App. E.D. 2008) (refusing to review a claim that the information was "fatally defective in that it does not charge a criminal offense"); *Phillips v. State*, 214 S.W.3d 361, 364-365 (Mo.App. S.D. 2007) ("A claim of denial of the right to self-representation and due process is not cognizable in a post-conviction proceeding where it could have been raised on direct appeal.").

Although the motion court reviewed Mr. McIntosh's claim on its merits and did not cite this rule in denying Mr. McIntosh's claim, this Court should affirm the motion court's correct result. "We should not reverse if the motion court reached the right result, even if it was for the wrong reason." *Branson v. State*, 145 S.W.3d 57, 58 (Mo.App. S.D. 2004).

The motion court also did not clearly err in denying Mr. McIntosh's claim on the merits, as it was permissible for the prosecutor to argue the victim's credibility based on the evidence. And, contrary to Mr. McIntosh's claim, the prosecutor did not argue that the victim had never made any prior allegations of sexual abuse; rather, the prosecutor merely argued "unless it happened" with Mr. McIntosh, the victim could not have made up the horrible thing that he had done to her.

Such argument did not imply precocious sexual knowledge or unfairly enhance C.P.'s credibility (as discussed above in Point III), and because there is nothing in the record showing that the victim's prior accusation involved a similar touching, it cannot be said that the prosecutor excluded, and then commented upon, evidence that could have shown another basis for the victim's stating that Mr. McIntosh touched her vagina. *Cf. State v. Weiss*, 24 S.W.3d 198, 202 (Mo.App. W.D. 2000) (the prosecutor successfully excluded certain documents and then expressly argued in closing argument that the documents had not been presented at trial); *State v. Luleff*, 729 S.W.2d 530,

555 (Mo.App. E.D. 1987) (the prosecutor successfully objected to a receipt and then argued in closing, “Where’s the receipt”); *State v. Price*, 541 S.W.2d 777, 778 (Mo.App. E.D. 1976) (the prosecutor successfully excluded witnesses and then argued in closing argument that the defendant had failed to produce the witnesses).

In sum, Mr. McIntosh’s claim was not cognizable, and, thus, the motion court’s judgment should be affirmed. But in any event, the prosecutor did not engage in misconduct in closing argument, and the prosecutor’s comment was not plain error resulting in manifest injustice. This point should be denied.

CONCLUSION

The Court should affirm the denial of Mr. McIntosh's Rule 29.15 motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 10,898 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System this 5th day of August, 2013, to:

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