In the Missouri Court of Appeals
Eastern District

DIVISION TWO

DAVID A. McNEAL,	)	No. ED96796
	)	
Appellant,	)	Appeal from the Circuit Court of
	)	the City of St. Louis
v.	)	Cause No. 0922-CC09606
	)	Honorable Michael Mullen
STATE OF MISSOURI	)	
	)	
Respondent.	)	Filed: April 10, 2012

David A. McNeal (Movant), appeals the motion court's denial of his Rule 29.15 motion for post-conviction relief. Movant argues the motion court erred in denying his motion in that he alleged facts that were not refuted by the record that his trial counsel was ineffective for failing to request a jury instruction on a lesser included offense. We affirm.

Background and Procedural History

A jury convicted Movant of one count of burglary in the second degree, Section 569.170, and one count of stealing, Section 570.030 as a result of incidents which occurred on 8 May 2008.[1] On that day Movant was visiting the mother of his child, when he decided to check if a neighbor who owed him money was home. He knocked on the

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[1] All statutory references are to RSMo (2000) unless otherwise noted.

neighbor's door, and when he received no reply, entered the apartment. Upon entering, Movant found the apartment empty save for some construction equipment that was being used to install a new floor. Movant stole a drill he found inside and sold it to an acquaintance. A surveillance camera in the hallway captured the Movant exiting the apartment with the drill. This video was shown to the jury.

At trial, Movant admitted to the stealing, but consistently maintained that he had no intent to commit burglary. Movant testified:

> I went in there looking for [the neighbor]. I opened the door up, "Hey, [neighbor]," but now I'm in shock. It's empty. I step in there and I look over and see the radio playing, you know, because it's a shock to me. I didn't have any idea that the lady had moved and so I'm standing there. And not to confuse the jurors, yes, I stole the drill. I'm not denying that, but I didn't go over there burglarously to steal anything. I went looking for [the neighbor]. Now, I'll give you for stealing the drill. I'm being honest with you.

In his closing statement, defense counsel continued with this strategy when he stated:

> Now, this is also important to Mr. Harrison and obviously I think my client's not going to walk out of here without some kind of a conviction, but you have two separate counts. You've got Count I, which is the burglary, and Count II, which is the stealing. So I don't know if Mr. Harrison will be satisfied or not, but if you decide based on the evidence that you've seen and heard here, you'll find him not guilty on Count I and you'll find him guilty on Count II.
>
> . . .
>
> You know, the fact that Mr. McNeal went into that apartment and he found out when he got in there that the lady he was looking for wasn't in there, well, that means he couldn't have had the intent to steal when he went in there. He couldn't have knowingly gone in there thinking, well, you know, these guys are in there laying floor, you know, and the state hasn't shown you that they were using those tools.

Despite this approach, the jury convicted Movant of both stealing and burglary.

This Court affirmed Movant's conviction on direct appeal. *State v. McNeal*, 292 S.W.3d 609 (Mo. App. E.D. 2009).

Movant then filed this timely motion for post-conviction relief claiming his trial

counsel was ineffective for failing to request a jury instruction on the lesser-including offense of trespassing with the burglary count. The motion court denied the motion without a hearing, finding that trial counsel's "failure" to submit a trespass instruction could have been part of a reasonable trial strategy, and that even if counsel had submitted the instruction, based on the defense presented, Movant would not have been entitled to receive it.

Standard of Review

A motion court's decision regarding a motion for post-conviction relief is reviewed for clear error. Rule 29.15(k); *Hall v. State*, 16 S.W.3d 582, 585 (Mo. banc 2000). The motion court's decision is clearly erroneous only if, after viewing the entire record, this Court is left with a firm and definite impression that the motion court made a mistake. *Id.*

Discussion

Movant's counsel on appeal contends the motion court erred in denying his motion in that he alleged facts not refuted by the record which would entitle him to relief in that his trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of first-degree trespass.[2]

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[2] First-degree trespass is instructed as follows:

(As to Count , if) (If) you find and believe from the evidence beyond a reasonable doubt:

That (on) (on or about) [date], in the (City) (County) of , State of Missouri, the defendant knowingly (entered) (remained) unlawfully (in) (a building) (an inhabitable structure) located at [Briefly describe the location.] and (owned) (possessed) by [name of owner or possessor],

then you will find the defendant guilty (under Count) of trespass in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR 3d 323.60 (10-1-98).

As the motion court held, this instruction was inconsistent with Movant's testimony.

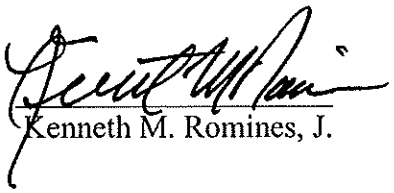
A Movant is entitled to an evidentiary hearing on a Rule 29.15 motion only if he: 1) alleges facts, not conclusions, warranting relief; 2) the alleged facts are not refuted by the record; and 3) the matter complained of resulted in prejudice against the movant. Rule 29.15(h); *Dickerson v. State*, 269 S.W.3d 889, 892 (Mo. banc 2008). To entitled to relief based on a claim of ineffective assistance of counsel, Movant must establish both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure to prove either prong is fatal to the claim. *Childs v. State*, 314 S.W.3d 862, 866 (Mo. App. W.D. 2010). To establish deficient performance, Movant must overcome the strong presumption that counsel acted professionally and that all decisions were based on sound trial strategy. *Id.* To establish prejudice, Movant "must show that, but for counsel's poor performance, there is a reasonable probability that the outcome of the court proceeding would have been different." *Id.* (internal citation omitted).

In his amended motion, Movant alleged that his trial counsel's "failure" to request an instruction on the offense of first-degree trespass was not part of a deliberate trial strategy. However, contrary to Movant's claims, a review of the entire record leaves this Court with a firm and distinct impression that counsel was not ineffective but was advancing a conscious choice made by the Movant himself as to the theory of defense. It is apparent from Movant's testimony, the only evidence presented by Movant in his defense, and his counsel's closing argument, as cited above that, a conscious decision was made to pursue an all or nothing strategy in regard to the burglary charge, and admit guilt on the misdemeanor stealing charge. Although this strategy turned out to be a poor one, such poor choices do not provide a basis for post-conviction relief.

As a final matter, this Court notes that its decision in this case was highly fact-

dependent. However given Movant's testimony, he failed to overcome the presumption that his and his trial counsel's decisions were not based on sound strategy.

This decision of the motion court is affirmed.



Kenneth M. Romines, J.

Kathianne Knaup Crane, P.J. concurs.
Lawrence E. Mooney, J. dissents

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DISSENT

The majority, having independently reviewed the record, surmises that the defense counsel must have made a reasonable strategic choice to forego a lesser-included offense instruction on trespass. Although I admire the majority's clairvoyance, I cannot accept its reasoning.

Movant alleged that counsel had no strategic reason for not requesting a trespass instruction as an alternative to the burglary instruction. Contrary to the majority's summary conclusion, the record does not conclusively refute movant's claim. Counsel made no mention of foregoing the trespass instruction at the instruction conference; indeed, the record is completely silent as to counsel's reasoning. But, significantly, movant's counsel did astutely

question the officer if conduct such as movant's, although charged as a burglary, could actually be a trespass.

Further, a trespass instruction presents no conflict with the defense's theory of the case. Movant conceded at trial that he did not have a key to the victim's apartment and that his name was not on the lease. Movant's knowing entry into an apartment where he had no lawful right to be is trespass. Section 569.140.1.

And the record certainly does not indicate that movant suffered no prejudice from the failure to request a trespass instruction. The jury had difficulty interpreting the burglary verdict-directing instruction. It sent a question to the judge, asking whether the intent to commit the burglary could occur after the movant opened the door. Movant argues that the note signals the jury's doubt, and that he might well have been convicted of misdemeanor trespass if only such an instruction had been offered.

Moreover, it must be noted, the movant was no stranger to the criminal justice system. He was a persistent offender, confined at the time of trial. As a persistent offender, he had much to fear from a felony burglary conviction, but precious little to fear from a misdemeanor trespass conviction. After trial, the movant was sentenced to ten years' imprisonment for this burglary.

Finally, the State acknowledges in its brief that "it is not apparent from the record what strategic reasoning counsel employed (if any) in deciding not to request an instruction for the lesser-included offense of trespassing." The State concedes that the question of whether movant's counsel had a strategic reason for not requesting a lesser-included offense instruction on trespass would more appropriately be resolved after an evidentiary hearing. I quite agree.

I respectfully dissent.

Lawrence E. Mooney

LAWRENCE E. MOONEY, JUDGE