

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**IVAN B. JOHNSON**

**APPELLANT,**

**v.  
STATE OF MISSOURI**

**RESPONDENT.**

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DOCKET NUMBER WD73862

DATE: June 26, 2012

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Appeal From:

Boone County Circuit Court  
The Honorable Sanford F. Conley IV, Judge

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Appellate Judges:

Division Four: Lisa White Hardwick, Chief Judge, Presiding, James E. Welsh, Judge and  
Cynthia L. Martin, Judge

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Attorneys:

Mark A. Grothoff, Columbia, MO, for appellant.

Shaun J. Mackelprang and Evan J. Buchhein, Jefferson City, MO, for respondent.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

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Before Division Four: Lisa White Hardwick, Chief Judge, Presiding, James E. Welsh, Judge and Cynthia L. Martin, Judge

Johnson was convicted in 2005 following a jury trial of first-degree murder and first-degree robbery in connection with the 2003 robbery and murder of John Wolff. After the court of appeals affirmed his conviction, Johnson filed a Rule 29.15 motion, arguing that his counsel was ineffective for failing to object to hearsay testimony. After an evidentiary hearing, the motion court denied Johnson's motion finding that trial counsel cannot be deemed ineffective for failing to make a non-meritorious objection. The motion court also concluded that Johnson failed to establish error so prejudicial that had an objection been made, the outcome of his trial would have been different.

Johnson appeals.

**AFFIRMED.**

1. A post-conviction claim on appeal that materially differs from that alleged in a post-conviction motion preserves nothing for appellate review and is waived. Johnson's specific claim in his post-conviction motion that trial counsel ineffectively failed to register a hearsay objection to a witness's testimony that another person said that Johnson reported "beating" the victim is materially different from Johnson's claim on appeal that trial counsel ineffectively failed to register a hearsay objection to a witness's testimony that another person reported driving Johnson to the victim's home.

2. The record made at Johnson's motion hearing makes it impossible to discern whether the motion court considered the specific claim of ineffective assistance of counsel Johnson asserted in his motion or the claim now asserted on appeal.

3. Even if Johnson's claim on appeal is viewed as not having been waived, the claim is without merit. The motion court did not clearly error in concluding that trial counsel is not ineffective for failing to register a non-meritorious objection. The testimony about which Johnson complains on appeal was facially offered to explain the witness's subsequent conduct. Thus, had a hearsay objection been made, there is little doubt the State would have so responded,

resulting in the objection being overruled. In-court testimony relating to an out-of-court statement offered to explain the conduct of the witness does not constitute hearsay.

4. In any event, the motion court did not clearly error in concluding that Johnson failed to establish prejudice, in light of other substantial evidence of Johnson's guilt, including his admission to the same witness that he beat and robbed the victim.

Opinion by Cynthia L. Martin, Judge

June 26, 2012

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