No. SC88373

In the
Supreme Court of Missouri

OSCAR GLOVER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Taney County Circuit Court
Thirty-Eighth Judicial Circuit
The Honorable John R. Hutcherson, Judge

RESPONDENT'S SUBSTITUTE BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

ROGER W. JOHNSON
Assistant Attorney General
Missouri Bar No. 57628

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
roger.johnson@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

JURISDICTIONAL STATEMENT 5

STATEMENT OF FACTS 6

ARGUMENT 12

POINT I: There is jurisdiction for this appeal in that, though Appellant did not originally sign his *pro se* Rule 29.15 motion, he corrected the error promptly by filing a signed copy in the circuit court seventeen days after the error was brought to his attention. 12

POINT II: Direct appeal counsel was not ineffective for not challenging the trial court's ruling that the fact a tape found with the drugs showed Appellant having sex was relevant because the personal nature of the video connected Appellant with the drugs. 18

POINT III: Trial counsel was not ineffective for not objecting to the prosecutor's statements that Nathaniel Meadows was telling the truth because the argument was not not improper vouching, and Appellant has not shown that a successful objection would have changed the outcome of trial. 26

CONCLUSION 36

CERTIFICATE OF COMPLIANCE 37

APPENDIX 38

TABLE OF AUTHORITIES

Cases

Bucklew v. State, 38 S.W.3d 395 (Mo. banc 2001) 31, 34

Denny v. State, 179 S.W.3d 381 (Mo.App., W.D. 2005) 15

Lawn v. U.S., 355 U.S. 339, 78 S.Ct. 311 (1958) 32

Middleton v. State, 200 S.W.3d 140 (Mo.App., W.D. 2006) 12

State v. Collins, 150 S.W.3d 340 (Mo.App., S.D. 2004)..... 31, 32

State v. Dowell, 25 S.W.3d 594 (Mo.App., W.D. 2000) 22

State v. Foulks, 72 S.W.3d 322 (Mo.App., S.D. 2002) 23

State v. Hayes, 88 S.W.3d 47 (Mo.App., W.D. 2002).....23

State v. Kreutzer, 928 S.W.2d 854 (Mo. banc 1996)..... 22, 34

State v. Nunley, 980 S.W.2d 290 (Mo. banc 1998) 31

State v. Purlee, 839 S.W.2d 584 (Mo. banc 1992) 23

State v. Sanderson, 169 S.W.3d 158 (Mo.App., S.D. 2005) 23

State v. Vaughn, 32 S.W.3d 798 (Mo.App., S.D. 2000).....32

State v. Wolfe, 13 S.W.3d 248 (Mo. banc 2000).....32

Storey v. State, 175 S.W.3d 116 (Mo. banc 2005)..... 18, 19, 22, 26, 27, 31

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) 31

Tisius v. State, 183 S.W.3d 207 (Mo. banc 2006) 22

Rules, Statutes, and Other Authorities

Article V, § 10, Missouri Constitution (as amended 1982).....5

Supreme Court Rule 24.035.....13

Supreme Court Rule 29.15..... 13, 19, 26

JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of Taney County. The conviction sought to be vacated was for possession of cocaine with intent to distribute, § 195.211, RSMo 2000[1], and possession of more than thirty-five grams of marijuana with intent to distribute, § 195.211. Appellant was sentenced to consecutive terms of twenty years and ten years respectively in the Missouri Department of Corrections.

On March 6, 2007, the Missouri Court of Appeals, Southern District, issued its opinion stating that it would affirm the judgment, but because of the general interest and importance of the issue regarding jurisdiction where the *pro se* motion for post-conviction relief was originally unsigned but corrected on appeal, and for the purpose of reexamining existing law, transferred the case to the Missouri Supreme Court pursuant to Rule 83.02. Therefore, jurisdiction lies in the Missouri Supreme Court. *See* Article V, § 10, Missouri Constitution (as amended 1982).

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

STATEMENT OF FACTS

Appellant was charged as a prior drug offender with possession of cocaine with intent to distribute and possession of more than thirty-five grams of marijuana with intent to distribute. (D.A. L.F. 23-24). The evidence presented at trial, in the light most favorable to the verdict, was as follows:

In July of 1999, an investigator with the Branson Police Department was surveilling Appellant's two-bedroom apartment after complaints of heavy traffic going into and out of the unit. (D.A. Tr. 108-109, 144). Appellant lived in the apartment with a roommate, Nathaniel Meadows. (D.A. Tr. 110, 243-244, 272-75, 277-278, 287-288).

At around 10:00 in the morning on August 5, 1999, several members of the local drug task force executed a search warrant at the apartment. (D.A. Tr. 116-117, 144, 211-212). Meadows answered the door, and Appellant was sleeping on a couch in the living room. (Tr. 117, 140, 182, 212, 250).

During the search, police found a shoebox containing six baggies of marijuana, weighing a total of 833.79 grams, in the closet of the master bedroom. (D.A. Tr. 120, 147, 155, 195-196). Also in the shoebox were pieces of paper with names and telephone or pager numbers on them, various documents with Appellant's name on them, and an "owe list," a list indicating people who owed money for drugs. (D.A. Tr. 166-68, 172, 180-181, 183-186, 243-253). The owe list specified that "Nate" owed a

"QP," which was an abbreviation for a quarter pound of drugs. (Tr. 169, 171, 254). The officers found $3,460 inside a shoe in another shoebox. (Tr. 133, 146-147, 228-229, 255).

Officers also found a small measuring scale and three plastic baggies of crack cocaine in the pocket of a red jacket that was hanging in the closet. (D.A. Tr. 120, 135, 136, 148, 154, 157-159, 172, 186-187, 221-224, 257, 258). Together, the three baggies of crack weighed 79.26 grams. (D.A. Tr. 198). Inside another jacket pocket were some personal documents with Appellant's name, Appellant's social security card, another "owe list," and a videotape of Appellant engaged in sexual intercourse. (Tr. 164-168, 172-173, 224).

Various personal items belonging to Appellant were found in the master bedroom. (Tr. 120). The officers also found a photo ID with Appellant's picture (though it had the name of "Marcus Hadaway" on it). (Tr. 124, 131, 216-217, 237).

In the smaller, front bedroom, officers found a small bag of marijuana out in the open and a baggie of crack cocaine in a camera case that was hanging from a mirror. (Tr. 123, 131-133, 150, 152-153, 156-157, 182, 234, 235-236). Nathaniel Meadows's driver's license was found in the night stand of the front bedroom. (Tr. 232, 234-35, 237).

Appellant and Meadows were both arrested. (Tr. 250). When he dressed to leave with the arresting officers, Appellant put on the same size shoes as the one

containing the $3,460 in hidden cash. (Tr. 250). Meadows wore a different size shoe. (D.A. Tr. 238, 319).

During trial, the prosecutor wanted to present testimony that the videotape found inside the red jacket in the master bedroom closet depicted Appellant engaging in sexual intercourse. (D.A. Tr. 173). Defense counsel objected that the prejudice would outweigh the probative value of the evidence. (D.A. Tr. 173-174). The trial court allowed testimony about the video but limited it to the fact that the tape showed Appellant engaged in sexual intercourse. (D.A. Tr. 177-179).

At trial, Nathaniel Meadows testified that he was staying in the small room in the front of the apartment. (D.A. Tr. 307). He testified that he used drugs and had been selling them to support his habit. (D.A. Tr. 300-301, 303, 326). He said he got his drugs from Appellant and that he and Appellant were selling drugs out of the apartment. (D.A. Tr. 303-304, 318, 325-326).

The jury found Appellant guilty of possession of cocaine with intent to distribute and possession of more than thirty-five grams of marijuana with intent to distribute. (D.A. Tr. 378-379; D.A. L.F. 46-47). The trial court sentenced him as a prior drug offender to consecutive terms of twenty years and ten years of imprisonment respectively. (D.A. Tr. 430-431; D.A. L.F. 64-66, 67-68). Appellant appealed, and the Southern District affirmed the conviction and sentence in *State v. Glover*, 98 S.W.3d 917 (Mo.App., S.D. 2003).

Subsequently Appellant filed a timely *pro se* motion to amend or vacate the judgment and sentence under Rule 29.15, which motion was later amended by counsel. (PCR L.F. 1, 3, 14). In his *pro se* motion, Appellant signed the *in forma pauperis* affidavit, but he did not sign the motion itself. (PCR L.F. 7-8).

Among the claims in the amended motion were allegations that Appellant's direct appeal counsel was ineffective for not asserting on appeal that the trial court erred in overruling his relevancy objection regarding the videotape found in the red jacket and that Appellant's trial counsel was ineffective for not objecting during closing argument when the prosecutor stated that Nathaniel Meadows was telling the truth. (PCR L.F. 25-26, 27).

After an evidentiary hearing, the court entered findings of fact and conclusions of law denying Appellant's motion. (PCR L.F. 2, 34). It found that appellate counsel's decision not to appeal regarding the relevancy of the videotape was trial strategy and that counsel correctly believed that the evidence was properly admissible. (PCR L.F. 38-39). Regarding the alleged failure to object during closing argument, the motion court found that it was trial strategy, that the prosecutor's statements were consistent with repetition of Meadows's trial testimony, and that Appellant had failed to show that the result would have been different if counsel had objected. (PCR L.F. 39-40).

Appellant filed a timely notice of appeal. (PCR L.F. 2, 43). In its brief, filed with the Southern District on September 29, 2006, Respondent pointed out that Appellant had not signed his *pro se* or amended motions (only counsel signed the amended motion). (Resp. Br. 8, 10-11, PCR L.F. 7, 33). On October 16, 2006, Appellant filed a signed copy of his *pro se* motion with the circuit court. (App. Sub. Br. Append. 11-12, 16); *Glover v. State*; No. 27441 S.D. slip op. at 1 (Mo.App., S.D. March 6, 2007).

The Southern District issued an opinion affirming the motion court's but remanding for correction of a clerical error. *Glover v. State*; No. 27441 S.D. slip op. at 11 (Mo.App., S.D. March 6, 2007).[2] It held that Appellant's failure to sign his *pro se* motion was governed by Rule 55.03 rather than a jurisdictional analysis. *Id*. at 7. It determined that Appellant had promptly corrected the error by filing a signed motion with the circuit court, and so the Southern District decided Appellant's claims on the merits. *Id*. at 7. Regarding Appellant's claim that the sex tape was unfairly prejudicial, the Southern District held that the claim was not meritorious, so Appellant's counsel was not ineffective for not raising it on direct appeal. *Id*. at 9.

---

[2] The court noted that the trial judge in the criminal case had neglected to indicate in the written judgment that Appellant had been convicted as a prior and persistent offender.

The court also held that trial counsel was not ineffective for not objecting when the prosecutor argued that Nathaniel Meadows had told the truth because the argument was not improper vouching. *Id*. at 10-11.

After issuing its opinion, the Southern District transferred the case to this Court.

ARGUMENT

I

This Court should decide Appellant's claims on the merits because there is jurisdiction for the appeal in that, though Appellant did not originally sign his *pro se* Rule 29.15 motion, he corrected the error by filing a signed copy in the circuit court seventeen days after the error was brought to his attention.

In his first point, Appellant argues that this Court should decide his claim on the merits rather than dismissing it for lack of jurisdiction. (App. Sub. Br. 20, 22, 30). Respondent concedes that the recent opinions of this Court indicate that there would be jurisdiction to consider Appellant's claims on the merits.

Standard of Review

The question of whether the motion court had jurisdiction is reviewed *de novo*. *Middleton v. State*, 200 S.W.3d 140, 143 (Mo.App., W.D. 2006).

Analysis

Under this Court's recent decisions, an appellate court has jurisdiction to consider Appellant's claims and should resolve them on the merits. Older cases from this Court held that an unsigned *pro se* motion for post-conviction relief was a nullity that failed to invoke the jurisdiction of the circuit court. *See, e.g., Kilgore v. State*, 791 S.W.2d 393 (Mo. banc 1990); *Malone v. State*, 798 S.W.2d 149, 151 (Mo. banc 1990). That was in part because the pre-1996 version of Rules 24.035 and 29.15

required the *pro se* motion to be verified by the movant. *See Malone*, 798 S.W.2d 151. It was also because the Rules required the motion to be substantially in the form of Criminal Procedure Form 40, which included a signature line for the movant. *See Id*. Based on the rule that failing to verify the *pro se* motion was not a "mere formality" but rather an "an essential element" required to invoke the court's jurisdiction, this Court specifically held that a movant could not fix a missing verification by filing a verified motion once the claim was pending on appeal. *See Kilgore v. State*, 791 S.W.2d 395.

This Court relaxed the verification requirement in *State v. White*, 873 S.W.2d 590, 594 (Mo. banc 1994). It held that to expedite resolution of death penalty cases and to alleviate the difficulties obtaining notaries in prison, a movant's signature would be sufficient to comply with the verification requirement. *Id*. Subsequently, Rules 24.035 and 29.15 were amended to remove the verification requirement and now simply require a declaration by the movant.[3]

---

[3] Both rules now read, "[t]he movant shall declare in the motion that the movant has listed all claims for relief known to the movant and acknowledging the movant's understanding that the movant waives any claim for relief known to the movant that is not listed in the motion." Missouri Supreme Court Rule 29.15(d); 24.035(d).

Following the changes in the post-conviction rules, the first case to address an unsigned motion was *Tooley v. State*, 20 S.W.3d 519, 520 (Mo. banc 2000). In *Tooley*, the movant had filed an unsigned *pro se* motion, and the circuit court dismissed it before expiration of the ninety-day deadline for filing a motion. This Court stated, consistent with prior cases, that the movant's signature was not a hollow technicality but rather a mandatory element required for jurisdiction to attach. *Id*. at 520. However, the Court went on to hold that Rule 55.03(a) applies to motions for post-conviction relief. *Id*. Rule 55.03(a) requires signatures on all civil pleadings, but it also provides parties an opportunity to fix an unsigned motion if they do so promptly after the mistake is called to attention. Thus, this Court held, the motion court should have allowed the movant to correct the missing signature rather than dismissing the motion. *Id*.

Subsequently, this Court has held that where the unsigned motion was otherwise timely, Rule 55.03(a) gives a movant the chance to fix an unsigned *pro se* motion even after the deadline for filing the motion has passed. *See Wallingford v. State*, 131 S.W.3d 781, 782 (Mo. banc 2004); *Carter v. State*, 181 S.W.3d 78, 79-80 (Mo. banc 2006).

Based on this Court's opinions in *Tooley*, *Wallingford*, and *Carter*, this Court has jurisdiction to decide Appellant's claims on the merits. Appellant filed his *pro se* motion within the time prescribed in Rule 29.15. (PCR L.F. 1, 3). While he did not

sign the motion at that time, he corrected the error seventeen days after being notified of the omission. (App. Sub. Br. Append. 11-12, 16); *Glover v. State*; No. 27441 S.D. slip op. at 1 (Mo.App., S.D. March 6, 2007). Thus, Appellant promptly corrected the error pursuant to Rule 55.03(a). *See Hensel v. American Air Network, Inc.*, 189 S.W.3d 582, 584 (Mo. banc 2006) (holding that correction of omitted signature within two months was prompt under Rule 55.03(a)).

Also, this Court need not remand the case to the circuit court for Appellant to correct the error. Under Rule 55.03(a), as interpreted by *Wallingford* and its progeny, a prompt correction of an unsigned *pro se* motion would seem to require treating the *pro se* motion as if it had been signed originally. Otherwise, contrary to the holding in *Wallingford*, the movant would be unable to correct the error after the 90-day deadline for filing a *pro se* motion (because treating it as a new motion would mean it was filed out of time). [4, 5]

---

[4] The Western District reached a different conclusion in *Denny v. State*, 179 S.W.3d 381, 383 (Mo.App., W.D. 2005). It remanded the case, noting that failure to sign the *pro se* motion is jurisdictional. *Id*. It said if the movant corrected his error on remand "the motion court will have jurisdiction to rule on the motion." *Id*. *Denny*, though, was somewhat different from the present case because in *Denny* the movant had not corrected the mistake while the appeal was still pending.

As Appellant points out, there is an alternative analysis, which would hold that failure to sign the *pro se* motion is not jurisdictional but rather a matter for analysis under Rule 55.03(a). That is because, while *Tooley*, *Wallingford*, and *Carter* did not explicitly overrule prior cases that applied a jurisdictional analysis (in fact, they included jurisdictional language), they were decided based on Rule 55.03(a). As such, the jurisdictional language in *Tooley* and its successor cases could be read as not essential to the holding and therefore as non-binding *dicta*. *See State ex rel. Anderson v. Hostetter*, 346 Mo. 249, 256-257, 140 S.W.2d 21,24 (Mo banc 1940) (noting that *dicta* is not controlling authority).

---

[5] Generally, the circuit court loses jurisdiction when a notice of appeal is filed. *State ex rel. Delgado v. Merrell*, 86 S.W.3d 468, 470 (Mo.App., S.D. 2002). "The trial court may, however, exercise functions of a purely ministerial or executive nature." *State v. Bibb*, 922 S.W.2d 798, 803 (Mo.App., E.D. 1996). In light of *Tooley* and *Wallingford*, accepting the corrected filing was likely a ministerial act. *See Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo.App., W.D. 1998)("A ministerial act is defined as an act that law directs the official to perform upon a given set of facts, independent of what the officer may think of the propriety or impropriety of doing the act in a particular case."). Thus the trial court could accept Appellant's corrected *pro se* motion.

The result – deciding cases of unsigned *pro se* motions by application of Rule 55.03(a) rather than on jurisdictional grounds – has much to recommend it. It would result in a final judgment on the merits rather than allowing collateral attacks alleging that the motion court's ruling is void. It would promote judicial economy by avoiding remands solely to sign the *pro se* motion despite the motion court already having issued findings and conclusions. It would also promote clarity and consistency regarding the definition of jurisdiction. *See In re Marriage of Hendrix*, 183 S.W.3d 582, 590 (Mo. banc 2006) ("The tendency to call matters 'jurisdictional' that are really only assertions of legal error greatly confuses the notion of jurisdiction in civil cases.").

In short, based on this Court's recent decisions, failure to sign the *pro se* motion did not deprive the motion court of jurisdiction because Appellant fixed the error promptly after it was called to his attention. Also, this Court could decide that failure to sign the *pro se* motion is not a jurisdictional defect but rather governed by analysis under Rule 55.03(a). Either way, this Court has jurisdiction to resolve Appellant's claims on the merits.

II

The motion court did not clearly err in denying Appellant's Rule 29.15 motion claiming that his appellate counsel was ineffective for not appealing the trial court's decision to allow testimony that a videotape found near the drugs depicted Appellant engaged in sexual intercourse. The prosecutor did not play the video, and the fact that it showed Appellant having sex was relevant because the personal nature of the video connected Appellant with the drugs.

Appellant claims that his direct appeal counsel was ineffective for not asserting that the trial court erred in overruling his relevancy objection to testimony that a video tape in the pocket of a jacket containing drugs showed Appellant "engaged in sexual intercourse." (App. Br. 17, D.A. Tr. 179). He claims that the testimony was more prejudicial than probative and that overruling the objection was error so obvious that competent and effective counsel would have recognized and asserted it on appeal. (App. Br. 20). Since the testimony was relevant, however, the trial court did not abuse its discretion in admitting it, and counsel was not ineffective for not appealing the issue.

Standard of Review

The standard of review for the denial of post-conviction relief is whether the motion court was clearly erroneous. *Storey v. State*, 175 S.W.3d 116, 125 (Mo. banc

2005); Supreme Court Rule 29.15(k). On appeal, the motion court's findings and conclusions are presumed correct. *Storey*, 175 S.W.3d at 125. Its decision is clearly erroneous only if, in light of the whole record, the reviewing court is left with a definite and firm impression that a mistake has been made. *Id.* The facts from trial are viewed the same as in a direct appeal – in the light most favorable to the verdict. *Id.* at 579.

Relevant Facts

During a search of Appellant's two-bedroom apartment, police found drugs, drug paraphernalia, and money in the master bedroom closet. (D.A. Tr. 120, 133, 146-147, 155, 195-196, 228-229, 255). There were several baggies of marijuana in a shoebox near the top of the closet, $3,460 in cash hidden inside a shoe, and two bags of crack cocaine with a set of scales in the pockets of a red jacket that was hanging in the closet. (D.A. Tr. 120, 133, 146-147, 155, 195-196, 228-229, 255).

Also in a pocket of the red jacket was a videotape. (D.A. Tr. 172-173). When the prosecutor asked one of the investigating officers whether Appellant appeared on the tape, defense counsel objected. (D.A. Tr. 173). The prosecutor argued that Appellant's appearance on the tape was relevant to show that Appellant had knowledge and ownership of the drugs. (D.A. Tr. 173). Counsel responded that the tape was not relevant because, he urged, it was "just as relevant as if some – if I left a

photograph of, oh, let's say a wedding picture or something laying around and somebody stuck it in a coat pocket." (D.A. Tr. 174).

The prosecutor responded that because of the nature of the tape, only Appellant would have possession of it. (D.A. Tr. 174). The video contained scenes of Appellant masturbating, smoking marijuana, and having sex with a woman. (D.A. Tr. 175). The prosecutor only wanted to present testimony that the tape depicted Appellant having sex. (D.A. Tr. 174-175). He did not want to play the tape or to present a detailed description of its contents. (D.A. Tr. 174-175). Defense counsel persisted in objecting, arguing that evidence Appellant was having sexual relations on the video would be more prejudicial than probative. (D.A. Tr. 177). Counsel, however, would not acknowledge that the red jacket belonged to Appellant. (D.A. Tr. 177).

After hearing counsel's arguments, the trial court ruled that testimony about the video would be limited to asking whether it depicted Appellant engaged in sexual intercourse to show that the tape was so personal that no one but Appellant would have had custody of it. (D.A. Tr. 178-179). The direct examination by the prosecutor proceeded as follows:

> Q. Officer Fryman . . . I asked you, did you view that tape as part of your duties as evidence officer to determine its contents?
>
> A. Yes.

Q. And can you tell me, does that videotape depict the Defendant, Mr. Glover, engaged in sexual intercourse?

A. Yes.

(D.A. Tr. 179).

During closing argument, defense counsel urged the jury to find reasonable doubt because, he argued, the drugs in the master bedroom were hidden, Appellant was sleeping on the couch when police arrived (rather than in the master bedroom), and the only testimony linking Appellant to the master bedroom was Nathaniel Meadows (who counsel said was a liar). (D.A. Tr. 353-354). In response, the prosecutor argued that the personal nature of the videotape showed that only Appellant would have had it. (D.A. Tr. 363, 367, 368). He argued that its presence with the drugs in the bedroom closet along with numerous other personal items belonging to Appellant in the room supported the conclusion that Appellant occupied the master bedroom and possessed the drugs. (D.A. Tr. 363, 367, 368).

At the evidentiary hearing on Appellant's Rule 29.15 motion, Appellant's direct appeal counsel testified that he did not brief a claim that the trial court erred in overruling the relevancy objection to testimony about the videotape because he thought the evidence was admissible and that the objection was properly overruled. (PCR Tr. 8-10).

Analysis

a. Standards for Ineffective Assistance of Appellate Counsel.

"A defendant is entitled to effective assistance of appellate counsel." *Storey v. State*, 175 S.W.3d 116, 148 (Mo. banc 2005). "To prevail on a claim of ineffective assistance of appellate counsel, the movant must establish that counsel failed to raise a claim of error that was so obvious that a competent and effective lawyer would have recognized and asserted it. The claimed error must have been sufficiently serious to create a reasonable probability that, if it was raised, the outcome of the appeal would have been different." *Tisius v. State*, 183 S.W.3d 207, 215 (Mo. banc 2006).

b. Standards for Relevancy.

Appellant claims that the fact that he was having sex on the videotape was legally irrelevant. (App. Br. 17, 20). There are two types of relevance - logical relevance and legal relevance. *Tisius*, 92 S.W.3d at 760. Evidence is logically relevant if it tends to make any fact at issue more or less probable or tends to corroborate other relevant evidence. *Id*. Legal relevance is a determination of the balance between the probative value and prejudicial effect of the evidence. *Id*. "Any incriminating evidence offered against the defendant is prejudicial." *State v. Kreutzer*, 928 S.W.2d 854, 867 (Mo. banc 1996). The prejudice is only unfair if evidence would cause a jury to convict without regard to its probative value. *State v. Dowell*, 25 S.W.3d 594, 602 (Mo.App., W.D. 2000). Balancing the probative value and

prejudicial effect of evidence rests within the sound discretion of the trial court. *State v. Hayes*, 88 S.W.3d 47, 60 (Mo.App., W.D. 2002).

c. The fact that Appellant was engaged in sexual intercourse on the videotape was logically and legally relevant.

Evidence that a videotape found hidden with the drugs showed Appellant having sex was relevant to prove Appellant's ownership, knowledge, and control of the drugs. Appellant was charged with two counts of possession with intent to distribute. (D.A. L.F. 23-24). Conviction of possession with intent to distribute, requires proof of "(1) conscious and intentional possession . . . , either actual[] or constructive[]; (2) awareness of the presence and nature of the substance; and (3) intent to distribute it." *State v. Sanderson*, 169 S.W.3d 158, 164 (Mo.App., S.D. 2005). To show constructive possession, the State must show, "at a minimum, evidence that defendant had access to and control over the premises where the substance was found." *State v. Purlee*, 839 S.W.2d 584, 588 (Mo. banc 1992).

Constructive possession may be inferred where a defendant's control over an area is exclusive. *Purlee*, 839 S.W.2d at 588. Where there is only joint control, something additional is required to connect the accused to the drugs. *Id*. For example, presence of a defendant's personal belongings in close proximity to the drugs may support an inference that he possessed the drugs. *State v. Foulks*, 72 S.W.3d 322,

326 (Mo.App., S.D. 2002) (finding that drugs hidden in a box together with the defendant's driver's license provided evidence of constructive possession).

In the present case, the trial court did not abuse its discretion in admitting evidence that Appellant was shown having sex on the videotape found in the closet because it was relevant to prove constructive possession. Appellant suggests that any description of the video other than the fact that Appellant appeared on the tape was "unnecessary for the [S]tate's declared purpose of showing [A]ppellant's ownership of the coat in which the tape was found." (App. Br. 20). But, as defense counsel noted at trial, evidence that Appellant appeared on the tape would not necessarily show that he owned the jacket. (D.A. Tr. 174). It was the very personal nature of a sex tape that suggested only Appellant would have had access and control over the area where it was hidden. Thus, the fact that Appellant was engaged in sexual intercourse (and not just that he appeared on the tape) gave the evidence its compelling probative force.

The trial court did not abuse its discretion in finding that the probative force outweighed any prejudice the tape might have had to Appellant's character. The trial court did not allow the prosecutor to play the tape or make a detailed description of its contents. (Tr. 178-179). It only allowed testimony that the tape showed Appellant engaged in sexual intercourse, which was highly relevant. (Tr. 179). Consequently, the prejudicial effect of the evidence did not outweigh its probative value. Not only was there no error so obvious that reasonable appellate counsel would have presented

it, there was no error in admitting the testimony at all. Appellant's direct appeal counsel was not ineffective for not briefing such a claim, and the motion court was not clearly erroneous to deny Appellant's motion. Appellant's point should be denied.

III

The motion court did not clearly err in denying Appellant's Rule 29.15 motion in which Appellant claimed that his trial counsel was ineffective for not objecting during a portion of closing argument. The prosecutor's statements that Nathaniel Meadows was telling the truth were not improper vouching, and Appellant has not shown that a successful objection would have changed the outcome of trial.

Appellant claims that his trial counsel was ineffective for not objecting that the prosecutor improperly vouched for Nathaniel Meadows by saying that Meadows told the truth at trial. (App. Br. 22, 24). Because the prosecutor's comments summarized Meadows's trial testimony (where Meadows said he was telling the truth), the prosecutor did not imply knowledge of facts not before the jury, and there was no improper vouching.

Standard of Review

The standard of review for the denial of post-conviction relief is whether the motion court was clearly erroneous. *Storey v. State*, 175 S.W.3d 116, 125 (Mo. banc 2005); Supreme Court Rule 29.15(k). On appeal, the motion court's findings and conclusions are presumed correct. *Storey*, 175 S.W.3d at 125. Its decision is clearly erroneous only if, in light of the whole record, the reviewing court is left with a definite and firm impression that a mistake has been made. *Id.* The facts from trial

are viewed the same as in a direct appeal – in the light most favorable to the verdict. *Id.* at 579.

Relevant Facts

Appellant's theory of defense at trial was that his roommate, Nathaniel Meadows, owned the drugs found in the apartment and that Appellant did not know they were there. (D.A. Tr. 106, 350-354). To support his claim, he called Meadows during his case in chief in order to present evidence that Meadows had initially written a statement saying that he, and not Appellant, owned all the drugs in the apartment. (D.A. Tr. 289-291). Meadows had also made a second statement where he admitted that the drugs in the small bedroom were his, admitted that he had sold drugs, but said the drugs in the master bedroom were not his. (D.A. Tr. 291, 292-293, 295, 317). Meadows explained that he lied in his first statement after Appellant asked him to "take the rap for him" (because Appellant told Meadows that he had a daughter entering school, was on probation, and that Meadows would not be sent to prison because it would be his first conviction). (D.A. Tr. 310-313).

During direct examination, Meadows testified that his second statement was the true one:

> Q. [Defense Counsel]: In that second statement, you made a different sort of confession, didn't you?
>
> A. Yes. I told the truth.

(D.A. Tr. 291).

On cross examination by the prosecutor, Meadows also said that his second statement was the truth: ". . . I didn't want to speak with the officer at first, but then I decided to go speak with the officer. And that's when I made my second statement, and that's when I told the truth." (D.A. Tr. 315).

On redirect, Meadows again testified that his trial testimony was true:

> Q. [Defense Counsel]: But instead, you backed up and said, "No, wait. I was lying the first time I gave a sworn statement. This second sworn statement is the real truth," right?
>
> A. Yes.
>
> Q. Okay.
>
> A. And the second statement is.
>
> Q. And today you're sitting here saying, "Hey, listen. What I'm saying today is the truth," right?
>
> A. Yes.

(D.A. Tr. 325). Meadows said that his testimony was truthful yet again during further re-direct:

> Q. [Defense Counsel]: Mr. Meadows, are you aware that perjury is also a crime?
>
> A. Yes.

Q. To testify falsely under oath?

A. Yes.

Q. And you're still willing to hold out to the jurors that your testimony today is true; is that correct?

A. Yes.

(D.A. Tr. 328).

Later, during the first portion of closing argument, the prosecutor referred to Meadows's testimony about telling the truth: "Nathaniel also sat in that chair and told you, quote, I told the truth, end quote, with regard to his second statement . . ." (D.A. Tr. 343)

During his portion of closing argument, defense counsel argued that the only testimony linking Appellant to the drugs hidden in the master bedroom was from Mr. Meadows. (D.A. Tr. 354). He argued that Meadows could not be believed because he was a "self-proclaimed liar." (D.A. Tr. 354).

In his amended motion, Appellant claimed that his trial counsel was ineffective for not objecting during the following portions of the prosecutor's rebuttal argument:

> Much has been made of – of Nate, and I've covered that a little bit. The defense wants you to believe that Nate is lying; however, Nate took responsibility for the marijuana and cocaine that was in his room. *Yes, he had an agreement with the State, but that makes no difference because Nate told you the truth. He sat there and told you.*

(D.A. Tr. 366) (emphasis added to portion cited in Appellant's motion). Appellant also alleged that counsel should have objected to a second statement where the prosecutor said, "Nate did, however, come back in and did tell the truth, and he told you the truth in court today." (PCR L.F. 27, D.A. Tr. 367-368). Appellant claimed that the statements were "improper vouching." (PCR L.F. 27).

At the evidentiary hearing on Appellant's Rule 29.15 motion, trial counsel testified regarding his strategy, saying that he tries not to object during closing, if he can avoid it, because of how it looks to the jury. (PCR Tr. 77-78). Counsel also thought it was possible that he did not object to the statements about Meadows telling the truth because the argument would have been a proper response to counsel's own closing argument and that it was a proper summary of Meadows's testimony from trial. (PCR Tr. 83-85).

Analysis

a. Standards for ineffective assistance of counsel.

The standard for a claim of ineffective assistance of counsel is whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). To establish such a claim, the movant must prove that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would have used and that counsel's performance resulted in prejudice. *Bucklew v. State*, 38 S.W.3d 395, 397 (Mo. banc 2001); *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Failure to prove either prejudice or faulty performance is fatal to the claim, and the court need not consider the other element. *State v. Nunley*, 980 S.W.2d 290, 292 (Mo. banc 1998).

Counsel is not ineffective for failing to make a non-meritorious objection. *Storey*, 175 S.W.3d at 132.

b. An objection that the prosecutor's argument was improper vouching would not have had merit.

While the prosecutor may comment about the credibility of evidence, he may not vouch for a witness. *State v. Collins*, 150 S.W.3d 340, 351-52 (Mo.App., S.D. 2004). "Vouching - sometimes called 'personal vouching' - occurs when a prosecutor

implies that he or she has facts that are not before the jury for their consideration." *State v. Wolfe*, 13 S.W.3d 248, 256 (Mo. banc 2000).

Stating that a witness is telling the truth does not constitute vouching as long as the prosecutor does not imply that the statement is based in evidence not before the jury. *See, e.g., Lawn v. U.S.*, 355 U.S. 339, 359, 78 S.Ct. 311, 323 n. 15 (1958)(noting that statement, "We vouch for [the witnesses] because we think they are telling the truth" did not constitute improper vouching because the prosecutor did not suggest that the statement was based on personal knowledge or evidence not before the jury); *State v. Vaughn*, 32 S.W.3d 798, 800 (Mo.App., S.D. 2000)(holding that prosecutor's statement that victim's story had never changed "because that [was] the truth" was not improper vouching because it was an expression of opinion fairly drawn from the evidence); *Collins*, 150 S.W.3d at 351-52 (holding that prosecutor's statement that inconsistencies in children's testimony did not show that they were lying and that the prosecutor was seeking "truth and justice" did not constitute personal vouching and were opinions fairly drawn from the evidence).

In the present case, the prosecutor's statements that Mr. Meadows was telling the truth did not refer to facts outside the evidence. They referred to Meadows's trial testimony where he explicitly and repeatedly testified that he was telling the truth. Meadows explained that his first statement (that he owned all the drugs in the apartment) was a lie designed to help Appellant, and his second statement (in which

he admitted owning the drugs in the front room but not in the master bedroom) was the truth. (D.A. Tr. 291, 315). In response to defense counsel's questions, Meadows also said that his testimony at trial was the truth. (D.A. Tr. 328, 328). It was Meadows's testimony to which the prosecutor referred when he said that Meadows was being truthful: ". . . Nate told you the truth. *He sat there and told you*." (D.A. Tr. 366) (emphasis added). The prosecutor never suggested that his statements about Meadows were based on evidence not before the jury. In fact, during the first portion of closing argument, the prosecutor made it explicit that he was referring to Meadows's trial testimony: "Nathaniel also sat in that chair and told you, quote, I told the truth, end quote . . ." (D.A. Tr. 343). Since the prosecutor did not refer to facts not in evidence, his argument that Meadows was telling the truth was not improper vouching. As such, no meritorious objection to the statement on that basis could have been made, and Appellant's trial counsel was not ineffective for not objecting. The motion court did not clearly err in denying Appellant's motion, and his point on appeal should be denied.

c. There was no reasonable likelihood that an objection would have changed the outcome of trial.

The motion court also did not clearly err in finding that there was no reasonable likelihood that excluding the prosecutor's comments would have changed the outcome of trial. To show ineffective assistance of counsel, a movant must show both faulty

performance and prejudice. *Bucklew*, 38 S.W.3d at 397. To show prejudice, a movant must show a reasonable probability that but for counsel's errors, the result would have been different. *Id*. Where a movant does not show prejudice, the claim fails, and the court need not consider the reasonableness of counsel's performance. *See Nunley*, 980 S.W.2d at 292.

In the present case, there was substantial evidence other than Mr. Meadows's testimony connecting Appellant to the drugs hidden in the master bedroom closet. Contrary to Appellant's claims, the jury's decision did not turn on whether or not they should believe Meadows. (App. Br. 24-25).

The State proved Appellant's connection to the bedroom not through Meadows's testimony but through the presence of Appellant's personal items there. (D.A. Tr. 366). The State did not even call Meadows as a witness; he was called by Appellant. (D.A. Tr. 286). Instead, the State presented evidence of Appellant's personal notes, credit cards, receipts, medical bills, prescriptions, social security card, bank statements, pay stubs, fake identification, and sex tape found in the master bedroom and closet with the drugs. (D.A. Tr. 121, 123-124, 131, 146, 173, 179, 216-218, 224, 243, 246-249). Also, the $3,460 in cash was found in shoes that fit Appellant's, but not Meadows's, feet. (D.A. Tr. 133, 146-147, 228-229, 255). There was also an "owe list" found with the drugs, showing that "Nate" owed for a quarter pound of drugs (suggesting that Nathaniel Meadows owed Appellant for drugs).

(D.A. Tr. 166-168, 172, 180-181, 183-186, 254). In short, even without Meadows's testimony, there was tremendous evidence showing that Appellant occupied the master bedroom and possessed the drugs hidden in the closet there. As such, there is no reasonable likelihood that omitting the prosecutor's statements about Meadows during closing argument would have resulted in a different outcome of trial. Thus the motion court did not clearly err in finding that there was no prejudice and in denying Appellant's motion. Appellant's point on appeal should be denied also.

CONCLUSION

For the foregoing reasons, the denial of Appellant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

_____

ROGER W. JOHNSON
Assistant Attorney General
Missouri Bar No. 57628

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-332l
Fax: (573) 751-5391
roger.johnson@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 6,936 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 16th day of April, 2007, to:

Mark A. Grothoff
3402 Buttonwood Drive
Columbia, Missouri 65201-3724
(573) 882-9855
Attorney for Appellant

_____

ROGER W. JOHNSON
Assistant Attorney General
Missouri Bar No. 57628

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

APPENDIX

Findings of Fact, Conclusions of Law and Judgment.....A1