

No. SC87852

IN THE
Missouri Supreme Court

TRAVIS GLASS,

Appellant/Cross-Respondent,

v.

STATE OF MISSOURI,

Respondent/Cross-Appellant.

Appeal from the Callaway County Circuit Court
Thirteenth Judicial Circuit
The Honorable Gary Oxenhandler, Judge

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

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ARGUMENT

XII. (alleged ineffective assistance regarding Instruction No. 17)

The appellant/cross-respondent apparently agrees (or he does not contest) that the motion court clearly erred¹ in determining that Instruction No. 17 should have required the jury to find that appellant actually “committed” a particular felony. Appellant’s implicit concession makes perfect sense, of course, because the definition of kidnapping only requires that the defendant have “the *purpose* of . . . Facilitating the commission of any felony . . .” § 565.110.1.(4), RSMo 2000 (emphasis added).

Appellant argues, however, that the aggravator was crafted “Contrary to the MAI,” because, ordinarily, when a court submits the offense of kidnapping to the jury, the appropriate MAI requires a specific felony to be named in the verdict director (Cr-Resp.Br. 59-61, citing MAI-CR 3d 319.24). But that is not the issue in this case. When kidnapping is included as part of a statutory aggravator, the MAI does not require the definition of kidnapping to include a specific felony; rather, the MAI directs that the instruction include the definition of kidnapping from MAI-CR 3d 333.00. *See* MAI-CR 3d 313.40, Notes on Use 6 (“If paragraph 11A or 11B are

¹ Appellant faults the State for failing to repeat the standard of review in this point. But, consistent with Rule 84.04(e), the standard of review applicable to each point was set forth on page 14 of the “Argument” section of the State’s opening brief.

submitted, and the crime involved is . . . ‘kidnapping,’ then the definition of that crime contained in MAI-CR 3d 333.00 must be added to the paragraph.”). And, consistent with the MAI, that is precisely how Instruction No. 17 was drafted.

Appellant does not address this aspect of the MAI, but he suggests in a footnote that “a similar argument” was rejected in *State v. Storey*, 986 S.W.2d 462, 463-465 (Mo. banc 1999), and *State v. Mayes*, 63 S.W.3d 615 (Mo. banc 2002), where the Court determined that it was reversible error to omit the no-adverse-inference instruction during penalty phase after it had been requested by the defendant (*see* Cr.-Resp.Br. 61, n.9). But these cases did not involve a similar argument. First, here, a requested instruction was not *omitted* contrary to the directives of MAI. And, second, as the Court observed in *Mayes*, the MAI expressly states that the no-adverse-inference instruction is a guilt phase instruction that *should* be appropriately modified and submitted in penalty phase if requested by the defense. *See id.* at 635 n.9 (“If any such instructions [from the first stage] are appropriate, they should be modified to properly reflect the law and circumstances as they exist in the second stage proceedings. Among the instructions that might be applicable with necessary modifications are: ‘Missouri Approved Instructions Criminal 3d 308.14’ ” [the no-adverse-inference instruction]). Thus, here, unlike *Storey* and *Mayes*, the instruction was drafted in compliance with the applicable MAI.

Appellant next argues that “Since aggravators are facts necessary to increase

punishment, more scrutiny, not less should occur in penalty phase” (Cr.-Resp.Br. 61). But this argument misses the point. An aggravator, and the evidence to support it, should, of course, be carefully scrutinized. But the Court’s scrutiny should only extend to the relevant, legally required aspects of the aggravator. In other words, an aggravator should not be invalidated on the grounds that it failed to include a fact when that fact is not legally required to be included.

Of course, appellant argues that the underlying felony for kidnapping is a necessary fact that must be included (else the jury has failed to find all necessary facts to warrant an increased range of punishment) (Cr.-Resp.Br. 62-66). But this is not correct. The aggravator in this case was concerned with determining whether the murder was committed during a kidnapping, which kidnapping (according to the jury’s finding) was committed with the *purpose* to facilitate the commission of a felony. Thus, the relevant jury finding was not what felony appellant had in mind when he kidnapped the child (his subsequent felonious actions included a sexual offense, an assault, and a murder), but the fact that appellant had the *purpose* to facilitate the commission of a felony when he unlawfully removed or confined the child. And, here, the jury unanimously made that finding.

Appellant questions, “But, what felony did Glass purposely try to commit?” (Cr.Resp.Br. 62). But, of course, the jury did not have to find that appellant *tried* to commit any felony. It is precisely this focus on the commission or attempted

commission of a felony that misled the motion court. Indeed, by focusing on the underlying felony (to support the finding of kidnapping), appellant overlooks that it was his *purpose* – his intent to commit a felony – that was relevant to determining whether he committed the kidnapping.

Moreover, inasmuch as the evidence supported the conclusion that appellant committed multiple felonies after kidnapping the child, it is apparent that the jury was not misled (or inadequately instructed) by the instruction, even if the instruction should have named a particular felony or felonies. The instruction required the jury to determine unanimously that appellant had the purpose to commit a felony. And, while the term “felony” potentially encompasses many acts, the jury would have confined its deliberations to the evidence presented. And, here, it was plain that the potential felonies appellant intended to commit included the vicious sexual and physical assault and murder of the victim. Thus, regardless of which felony the jury believed appellant had in mind, the jury found that appellant engaged in a multiple-crime event, and, accordingly, it cannot be said that appellant was prejudiced. *See State v. Smith*, 32 S.W.3d 532, 555-556 (Mo. banc 2000) (no prejudice from failure to specify intended crime for burglary aggravator, because the intended crime was obviously murder).

Appellant takes issue with the State’s argument that the jury’s finding need not be unanimous as to which underlying felony appellant had in mind. He argues

that absent agreement regarding the underlying felony for kidnapping, the jury has not unanimously found the aggravating circumstance beyond a reasonable doubt (Cr.-Resp.Br. 66-68). But that is not correct. The gravamen of the aggravator is that the defendant has committed the murder during a multiple-crime event. Thus, here, the instruction required the jury to conclude that appellant committed the murder during a kidnapping. And, with regard to the kidnapping, the instruction required the jury to conclude that appellant, when he removed or confined the child, had the *purpose* to facilitate the commission of another felony. All twelve jurors agreed on these findings. All twelve jurors agreed that appellant unlawfully kidnapped the victim, and all twelve jurors agreed that when appellant kidnapped the child, it was done with the *purpose* of facilitating another felony. These were the essential and necessary factual findings, and it is immaterial what particular felony appellant had in mind, so long as he had a felony in mind. (It would not be improper for example, to list various alternative felonies under appropriate circumstances, even though the jurors might not agree on which felony appellant had in mind.) In short, as to each relevant aspect of the aggravator, the jury *was*, in fact, unanimous.

The motion court also clearly erred in determining that counsel should have challenged the instruction on the grounds that it allegedly failed to genuinely narrow the class of persons eligible for the death penalty and because it allegedly was not support by sufficient evidence. With regard to these alleged errors,

appellant seems not to understand the state's arguments.

In its opening brief, despite the fact that the jury declined to find that the murder involved "depravity of mind" stemming from a sexual assault, the State argued that the jury still could have concluded that appellant had the purpose of facilitating the commission of a sexual assault when he kidnapped the victim (Cr.-App.Br. 84). In response, appellant asserts that "The State never explains why the narrowing requirement only applies to half the aggravator – the 'depravity of mind' half, and not the 'outrageously and wantonly vile, horrible or inhuman' half" (Cr.-Resp.Br. 68). But that is not what the state argued.

While it is true that the jury ultimately did not find "depravity of mind," the simple fact remains that the jury still could have concluded that appellant had the purpose to facilitate a sexual assault when he kidnapped the victim (and that appellant actually committed the assault). The absence of a finding of "depravity of mind" simply reveals that the jury was not convinced beyond a reasonable doubt that the sexual assault evinced the degree of depravity described in the instruction, namely, "outrageously and wantonly vile, horrible, and inhuman."

Appellant next asserts that another of the state's arguments – that appellant may have kidnapped the victim with the purpose of murdering her – is "circular" (Cr.-Resp.Br. 69). He argues that "Under this circular argument, any defendant convicted of first degree murder would be eligible for the death penalty because he

had the purpose to commit the murder” (Cr.-Resp.Br. 69). (Along similar lines, the motion court concluded that allowing murder to be the intended felony for the contemporaneous kidnapping was improper because it resulted in “double counting” of the murder (PCR L.F. 49).) But the fallacy of appellant’s argument is plainly evident. It is not merely the purpose to commit murder that renders the defendant eligible for death, it is the attendant kidnapping (of which that purpose is only an element). Thus, the murder is not double counted to aggravate the murder; rather, the murder itself is aggravated by the fact that it occurred during the kidnapping.

So, with regard to Instruction No. 17, counsel were not ineffective for failing to object or challenge the sufficiency of the evidence. The instruction followed the MAI, and it properly instructed the jury; the aggravator was supported by sufficient evidence; and, even if the instruction should have named a particular felony or felonies, appellant was not prejudiced.

XIII. (alleged ineffective assistance for failing to call witnesses).

Appellant faults the state for failing to address each and every finding of the motion court (Cr.Resp.Br. 73-74). But, to examine whether the motion court clearly erred in concluding that trial counsels' mitigation theory (and their concomitant efforts to present that theory to the jury) fell below an objective standard of reasonableness, it is not necessary to engage in a specific review of each of the alleged deficiencies outlined by the motion court.²

The overarching problem with the motion court's findings and conclusions is that they generally ignore the reasonableness of counsel's extensive efforts to investigate and present a mitigation case. Indeed, instead of evaluating appellant's post-conviction claims in the broader context of counsel's extensive efforts, the motion court focused on what counsel could or might have done *more*. Indeed, in discussing one witness after another, the motion court simply observed that the

² Appellant also faults the state for failing to provide sufficient citations to the record. Appellant's complaint stems from his concern that the state did not detail the motion court's findings, that the state did not specifically reference each post-conviction witness and provide details of their testimony, and that the state did not provide a more detailed recitation of counsels' post-conviction testimony (Cr.-Resp.Br. 73). But appellant's desire to rely on *different* portions of the record does not render the State's citations to the record inadequate.

omitted witness had relevant mitigating evidence to offer, and that counsel was deficient for failing to investigate or call that witness to testify.

But that is not the proper framework for evaluating counsel's performance. In arguing that counsel was ineffective, a defendant must first "show that counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*

Here, as more fully outlined in the State's opening brief, counsels' efforts in preparing a mitigation case were extensive and comprehensive (even if counsel did not contact *every* possible witness). And, as the record shows, counsel ultimately presented ten witnesses in support of appellant's mitigation case (*see* Tr. 1225-1352). Such efforts can hardly be deemed "deficient" as contemplated by *Strickland*, and the mere fact that additional (and in some respects different) mitigation evidence was *available* should not lead to the conclusion that counsel's efforts were unreasonable. Indeed, just because a different mitigation theory, e.g., impaired intellectual functioning, *could* be presented does not mean that counsel's chosen theory was unreasonable. *See Clayton v. State*, 63 S.W.3d 201, 207-208 (Mo. banc 2001) ("It is not ineffective assistance of counsel for an attorney to pursue one reasonable trial strategy to the exclusion of another, even if the latter would also be a reasonable strategy."); *see also Strickland v. Washington*, 466 U.S. at 689 ("There are

countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”).

A post-conviction evidentiary hearing is not, and should not be viewed as, an opportunity to present a different or more extensive mitigation case in hopes of convincing a subsequent court that counsel was ineffective for failing to investigate and call various other witnesses. “Judicial scrutiny of counsel’s performance must be highly deferential,” *id.* at 689, and, as the Court explained in *Strickland*, there are good reasons for holding that a post-trial inquiry into counsel’s performance should not consist of a “second trial” designed to grade counsel’s performance:

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel’s unsuccessful defense. Counsel’s performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

466 U.S. at 690. Here, the post-conviction inquiry into counsel’s performance was

essentially a second trial, and counsel's objectively reasonable efforts to present a compelling mitigation case were ignored in favor of gauging whether appellant's new mitigation theory would have swayed the jury. But, again, that should not be the framework for evaluating counsel's performance.

With regard to the reasonableness of counsel's efforts, appellant faults the State for failing to discuss *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). But these cases are distinctly different from appellant's case.

In *Williams v. Taylor*, for example, the defense did not begin preparing for penalty phase until a week before trial. 529 U.S. at 395. The attorneys failed to conduct an investigation that would have uncovered the defendant's "nightmarish childhood," including the fact that the defendant's parents had been imprisoned for the criminal neglect of the defendant and his siblings, that the defendant had been severely and repeatedly beaten by his father, that the defendant had been committed to the custody of social services for two years, that the defendant had been placed in an abusive foster home, that the defendant was "borderline mentally retarded" and did not advance beyond sixth grade, and that appellant had aided the police in breaking up a drug ring in prison. *Id.* at 395-396. The defense attorneys also failed to return the telephone call of a favorable witness who offered to testify on appellant's behalf. *Id.* at 396.

Moreover, at trial, the only mitigating argument that was advanced by counsel was that the defendant “turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that.” *Id.* at 398. There were also a few other bits of purportedly mitigating evidence presented in *Williams*, including evidence from the defendant’s mother, two neighbors, and a psychiatrist, but this evidence was extremely limited. The defendant’s mother and two neighbors (one of which was pulled from the court audience without ever being interviewed beforehand) testified that the defendant was a “nice boy” and not violent. *Id.* at 369. The “psychiatric” evidence consisted of a tape-recorded excerpt of a psychiatrist relating how the defendant had told him that “in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone.” *Id.* These poor efforts, of course, stand in stark contrast to the extensive efforts put forth by appellant’s attorneys.

In *Wiggins v. Smith*, similarly, counsel failed to engage in a thorough reasonable investigation. Instead, counsel’s investigation was limited to three sources: a psychologist who tested the defendant, but who provided no background history; a PSI report; and records kept by the Baltimore City Department of Social Services. 539 U.S. at 523-524. Counsel did not expand their investigation based on information seen in the reports, and, at trial, it was apparent that counsel had not

prepared adequately for penalty phase. *Id.* at 524-527 (“counsel put on a halfhearted mitigation case, taking precisely the type of ‘ “shotgun” ’ approach the Maryland Court of Appeals concluded counsel sought to avoid.”). But, here, by contrast, counsel engaged in an extensive investigation. Moreover, rather than taking a “shotgun” approach, counsel had a well-defined and cohesive mitigation case.

Finally, in *Rompilla v. Beard*, while counsel interviewed the defendant, some of his family members, and three mental health experts, “None of the[se] sources proved particularly helpful,” in producing any mitigation evidence. 545 U.S. at 381. The defendant was uninterested in providing information, and he said that his childhood was “normal, save for quitting school in the ninth grade.” *Id.* (citations omitted). The defendant’s family members stated that they did not know Rompilla very well because Rompilla had spent most of his adult years and some of his childhood years in custody. *Id.* at 381-382. The experts’ reports provided “nothing useful,” and counsel “did not go to any other historical source that might have cast light on Rompilla's mental condition.” *Id.* at 382. Indeed, having consulted these sources, counsel apparently went no further, for counsel did not review school records or any records of the defendant’s adult or juvenile incarcerations.

But, more importantly, having failed to find any substantial mitigating evidence, counsel also failed to investigate the basis for the state’s aggravating circumstance, namely, appellant’s prior conviction for rape and assault. *Id.* at 383.

Indeed, counsel failed to even review the prior conviction until the day before the penalty phase. *Id.* at 383-385. Additionally, even after counsel reviewed the prior conviction, counsel failed to review the other material in the file. *Id.* at 385.

Under such circumstances, where the investigation had not turned up much mitigating evidence, the Court stated that “it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation.” *Id.* at 385. In other words, because counsel’s efforts in finding mitigating evidence had not produced much fruit, counsel was obligated to attempt to undermine the state’s evidence in aggravation. For, “Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim.” *Id.* at 386.³

In the present case, by contrast, counsel’s extensive efforts in developing a

³ In discussing the prejudice prong, the Court went on to point out that a review of the prior conviction file would have turned up abundant mitigating information that could have been investigated and prepared for trial. *Id.* at 390 (with regard to the prejudice prong, the Court stated, “it is uncontested they would have found a range of mitigation leads that no other source had opened.”). This aspect of the Court’s holding should not be confused with the analysis on the performance prong.

mitigation case were not fruitless: counsel uncovered substantial mitigating evidence, and presented a cohesive mitigation case at trial. Thus, counsel was not in the position that Rompilla's attorneys found themselves in – that of having to focus their efforts on undermining the aggravating evidence that the state was seeking to present. In other words, unlike Rompilla's attorneys, counsel did not ignore a critical avenue of preparation. To the contrary, while counsels' efforts ultimately went in a direction somewhat different from the direction taken at the post-conviction evidentiary hearing, counsels' efforts did not fall below an objective standard of reasonableness.

Appellant also faults the state for failing to discuss *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Hutchison v. State*, 150 S.W.3d 292 (Mo. banc 2004) – cases he relies on for the proposition that impaired intellectual functioning is “inherently mitigating” and “critical to the jury's assessment of whether to impose the death penalty” (Cr.Resp.Br. 74). But these cases do not stand for the proposition that such evidence must be presented if it is available, or that counsel is ineffective if he or she chooses some other reasonable strategy.

In *Tennard*, the issue was not whether counsel was ineffective; the issue was whether the jury had been allowed to consider and give effect to the defendant's evidence that he suffered from impaired intellectual functioning. *See* 542 U.S. at 285. The Court held, of course, that impaired intellectual functioning is relevant, and that

the jury must be allowed to consider it. *Id.* at 288-289. This does not mean, however, that counsel must always present such evidence if it is available.

In *Hutchinson v. State*, much like *Wiggins* and *Williams*, discussed above, this Court held that counsels' efforts in preparing a mitigation case fell below an objective standard of reasonableness. To summarize, this Court first observed that counsel were "overwhelmed, under-prepared and under-funded by the time they arrived at the penalty phase." 150 S.W.3d at 302. They did not spend adequate time to prepare for penalty phase, they "did not investigate Hutchison's life history," and they neglected to follow up on numerous important leads, including evidence of impaired intellectual functioning. *Id.* at 297, 302-308. The same, however, cannot be said of counsels' performance in this case. Indeed, while the motion court certainly agreed with movant that counsel could have done *more* along various lines of investigation (and such a conclusion will virtually always be true), it cannot be said that the extensive efforts in this case – and the choice of mitigation strategies – fell below an objective standard of reasonableness.

XIV. (alleged ineffective assistance for failing to call expert witnesses)

Appellant apparently concedes that the motion court clearly erred in determining that counsel was ineffective for failing to call Dr. Robert Smith; he states, “counsel investigated and consulted with Dr. Smith, a psychologist, and provided a reasonable strategy for not calling him” (Cr.Resp.Br. 95).

With regard to Dr. Michael Gelbort, in its opening brief, the State pointed out that counsel had decided not to call Gelbort based on their concern that this would open the door to highly damaging evidence of appellant’s involvement with child pornography and fetishism (Cr.App.Br. 113-114). In response, appellant points out that the motion court concluded that Gelbort’s testimony would not have opened the door (Cr.Resp.Br. 97). But this is simply a hindsight observation that fails to give proper deference to counsel’s strategic decision. *See Strickland v. Washington*, 466 U.S. at 689 (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel's perspective at the time.”). And, as such, the motion court’s findings and conclusions were clearly erroneous.

With regard to Teri Burns, as the State pointed out in its opening brief, while counsel did not consider hiring a “learning disability expert,” counsel did hire a child development expert in investigating appellant’s mitigation case (Cr.-App.Br.

116). In responding to this aspect of the State's argument, appellant focuses on the fact that the State also pointed out that counsel had not heard of Burns (Cr.Resp.Br. 100-101). But this lack of familiarity with Burns was only part of the State's argument, and it was the lesser part. The primary problem with the motion court's findings were their lack of regard for the investigation that was actually done. After all, counsel had hired a child development expert (in addition to consulting with another expert), and counsel is not ineffective for failing to shop for a different, better witness. *See Winfield v. State*, 93 S.W.3d 732, 741 (Mo. banc 2002).

Finally, with regard to Terry Martinez, appellant addresses only the state's argument on the prejudice prong (Cr.-Resp.Br.102-103). But, as explained in the State's opening brief, it was counsels' strategic decision, after consulting with Martinez, not to call Martinez (Cr-App.Br. 119). That the strategy ultimately did not come to fruition is irrelevant - except in hindsight, of course. But, as discussed above, hindsight is not the proper gauge for determining whether counsel was ineffective. *Strickland*, 466 U.S. at 689; *see also Clayton v. State*, 63 S.W.3d 201, 206 (Mo. banc 2001) ("Reasonable choices of trial strategy, no matter how ill fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance.").

CONCLUSION

The denial of post-conviction relief as to guilt phase and all other issues denied by the motion court should be affirmed, and the judgment granting appellant a new penalty phase should be reversed.

Respectfully submitted,

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APPENDIX

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The motion court's findings and conclusions

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Rule 84.06(b) and contains 4,417 words, excluding the cover, this certification, the signature block, and the appendix, as determined by Microsoft Word 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, postage prepaid, this ____ day of April, 2007, to:

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