No. SC92250

IN THE

Supreme Court of Missouri

ROLLAN WILLIAMS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of the City of St. Louis
Twenty-second Judicial Circuit
The Honorable Bryan L. Hettenbach, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

JURISDICTIONAL STATEMENT

Appellant, Rollan Williams, appeals from a judgment of the Circuit Court of the City of St. Louis denying his Rule 29.15 motion without an evidentiary hearing. On April 3, 2012, this Court ordered transfer of the cause from the Missouri Court of Appeals, Eastern District, after that Court had issued an opinion on November 15, 2011, reversing and remanding for an evidentiary hearing. Therefore, this Court has jurisdiction over the cause. Mo. Const. art. V, § 10 (as amended 1982).

STATEMENT OF FACTS

Appellant, Rollan Williams, appeals from the denial of his Rule 29.15 motion without an evidentiary hearing.

Appellant was charged with robbery in the first degree (Count I), armed criminal action (Count II), unlawful use of a weapon (Count III), and domestic assault in the third degree (Count IV) (L.F. 18-19).[1] This cause went to a trial by jury in the Circuit Court of the City of St. Louis, the Honorable Bryan L. Hettenbach presiding (L.F. 8; Tr. 1).

The incidents.

D.W. married Appellant in August 1995, but by June 2006, they were no longer living together (Tr. 187, 189, 237). Appellant wanted to come back and live with D.W., but she told him "no" (Tr. 189).

On June 21, 2006, Appellant came to D.W.'s residence in the afternoon (Tr. 189-90). They had an altercation on the porch, and Appellant initially blocked D.W., but then let her leave (Tr. 190-92).

Appellant returned later that evening, while D.W. was home, to retrieve some of his belongings (Tr. 192-93). Appellant and D.W. got into an argument, and Appellant became enraged (Tr. 197-98). Appellant pulled a gun and held it against D.W.'s head (Tr. 198). D.W. was so scared that she was unable to stand, and she slid to the floor (Tr. 199).

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[1] The record on appeal will be cited as: ED91998 Direct Appeal Legal File (L.F.); ED 91998 Direct Appeal Transcript (Tr.); and Post-Conviction Legal File (PCR L.F.).

D.W.'s son, Bryan, came in and asked what it would take for Appellant not to kill D.W. (Tr. 199-200). Appellant said, "Give me a bill," meaning $100 (Tr. 200). D.W.'s other son, Tim Russo, came in with a baseball bat (Tr. 200, 222).[2] Appellant pointed the gun at him (Tr. 200). Bryan gave $100 to Appellant (Tr. 201). Appellant had Bryan empty D.W.'s purse on the table, looking for Appellant's EBT card, but they could not find it (Tr. 201-03, 247-49). Appellant left, but stated that he was going to kill D.W. and she would not know when it was coming (Tr. 203).

At trial, D.W., Russo, and Bryan all testified as to the incident (Tr. 186-234, 238-50). In closing argument, the Assistant Circuit Attorney argued that the witnesses had no motive to lie and that the testimony of the witnesses was consistent with one another and uncontroverted (Tr. 286, 290). She argued that D.W. did not make up a story, and that "Bryan and Tim have nothing. They're good boys who work hard and try to protect their mom and pay the bills as best they can, in a really difficult family" (Tr. 290-91).

The underlying case and direct appeal.

The jury found Appellant guilty of robbery in the first degree, armed criminal action, and unlawful use of a weapon, but not guilty of domestic assault (L.F 74-77). The trial court sentenced Appellant to concurrent sentences of thirty years in the custody of the Missouri Department of Corrections on Count I, thirty years on Count II, and seven years on Count III (L.F. 88-91; Tr.).

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[2] Appellant identifies him as Timothy Russo/Smith, but he identified himself in the trial transcript as Tim Russo (Tr. 222).

Appellant appealed the convictions to the Missouri Court of Appeals, Eastern District, which affirmed via a *per curiam* order pursuant to Supreme Court Rule 30.25(b). *State v. Williams*, 291 S.W.3d 373 (Mo. App. E.D. 2009). On September 24, 2009, the Eastern District issued its mandate on the direct appeal.

The motions for postconviction relief.

On October 13, 2009, Appellant filed a *pro se* motion for post-conviction relief under Supreme Court Rule 29.15 (PCR L.F. 2-22). Post-conviction counsel was appointed on December 18, 2009 (PCR L.F. 2). The motion court granted a thirty-day extension of time for filing an amended motion (PCR L.F. 24).

On March 18, 2010, appointed post-conviction counsel filed an amended motion for post-conviction relief under Supreme Court Rule 29.15, asserting, among other grounds, that trial counsel was ineffective in failing to impeach Russo with evidence of an arrest and a fine, both for marijuana possession (PCR L.F. 1, 25-30).

The amended motion also asserted that:

> Count III was unlawful use of a weapon. The third element is that the gun was readily capable of lethal use. No evidence was adduced at trial on this issue, as the weapon was never recovered, e.g., a ballistics expert to testify as to the testing that the weapon underwent. This issue was not raised on appeal. A reasonably competent appellate attorney would have raised this issue on appeal as it is plain from the record. There is a reasonable probability that had appellate counsel done so, the result of Movant's appeal would have been different.

(PCR L.F. 31).

On July 13, 2010, the motion court issued its Conclusions of Law and Order denying the amended Rule 29.15 motion without an evidentiary hearing (PCR L.F. 59-67). The motion court found that the impeachment evidence would not have changed the outcome of the trial and that there was no testimony that would have opened the door to the impeachment evidence (PCR L.F. 60-61).

The motion court also found that the movant had claimed that there was insufficient evidence that the gun was readily capable of lethal use, which was an element of unlawful use of a weapon (PCR L.F. 65). The motion court found that this claim was without merit (PCR L.F. 65). The motion court found:

> The Court does not believe that in the case of a firearm, that is used in the manner movant used the gun, the State must prove the gun was "readily capable of lethal use" to make a submissible case. Rather, this language makes it clear the State does not have to prove the gun was loaded.

(PCR L.F. 65-66).

This appeal followed.

ARGUMENT

The standard of review.

This Court reviews the denial of a Rule 29.15 motion for post-conviction relief only to determine whether the motion court's findings of fact or conclusions of law are "clearly erroneous." Supreme Court Rule 29.15(k); *Zink v. State*, 278 S.W.3d 170, 175 (Mo. banc 2009). The motion court's findings are presumed correct and will only be overturned if the ruling leaves the appellate court with a "definite and firm impression that a mistake has been made." *Zink*, 278 S.W.3d at 175.

I. (ineffective assistance of trial counsel: failure to call Earnest Basic as a witness)

The motion court did not clearly err in finding that trial counsel was not ineffective for failing to call Earnest Basic as a witness to impeach Tim Russo, as Appellant has not alleged facts showing that Basic's testimony would have been admissible, and Basic's testimony would not have affected the outcome of the trial.

Appellant asserts that trial counsel was ineffective for failing to call Earnest Basic as a witness, as Basic allegedly would have impeached Russo by testifying that Basic was arrested with Russo for a felony marijuana case and that Basic also knew of an incident involving a fine for possession of marijuana when Russo was caught by a park ranger in a van with drugs (L.F. 28). Notably, Appellant raises no claim that trial counsel failed to investigate and failed to discover Basic, but only that trial counsel failed to call Basic as a witness. However, Basic's testimony would have been inadmissible and would not have affected the outcome of the trial even if it were admissible.

An evidentiary hearing shall not be held if "the motion and files and records of the case conclusively show that the movant is entitled to no relief." Rule 29.15(h). The motion court will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief. *Hill v. State*, 181 S.W.3d 611, 617-18 (Mo. App. W.D. 2006). An evidentiary hearing is required only if (1) the motion alleges facts, not conclusions, warranting relief; (2) the facts alleged raise matters not refuted by the files and records in the case; and (3) the matters complained of resulted in prejudice. *Id.*

Specifically, to obtain an evidentiary hearing for claims related to ineffective assistance of counsel, a movant must allege facts, not refuted by the record, showing that

counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney and that the movant was prejudiced thereby. *Id.*; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To satisfy the performance prong of the *Strickland* test, a movant must overcome a strong presumption that counsel's conduct was reasonable. *Zink*, 278 S.W.3d at 176. This presumption is overcome only by a movant's identification of "specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of professional competent assistance." *Id.* To demonstrate prejudice, the facts alleged must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Hill*, 181 S.W.3d at 618.

In order to raise a claim of ineffective assistance of counsel for failing to investigate and call witnesses, the movant must plead that: "(1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense." *Glass v. State*, 227 S.W.3d 463, 468 (Mo. banc 2007) (quoting *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004)). Trial counsel's decision not to call a witness to testify is presumptively a matter of trial strategy and will not support a movant's claim of ineffective assistance of counsel unless the movant clearly establishes otherwise. *Whited v. State*, 196 S.W.3d 79, 82 (Mo. App. E.D. 2006).

Appellant asserts that Basic would have impeached Russo by testifying that Basic was arrested with Russo for a felony marijuana case and that Basic also knew of an incident involving a fine for possession of marijuana when a park ranger caught Russo in a van with

drugs (L.F. 28). Appellant contends that he was prejudiced because the Assistant Circuit Attorney argued that the witnesses had no motive to lie and that Bryan and Russo were good boys who worked hard (Tr. 286, 290-91). However, as to the alleged arrest, "[a]s a general rule, a witness may not be impeached with a mere arrest, investigation, or criminal charge not yet resulting in a conviction." *State v. Moore*, 252 S.W.3d 272, 276 (Mo. App. S.D. 2008). "This rule exists because such evidence is generally considered inadmissible character evidence, lacking the necessary relevance to proving the case at hand, as well as not being a reliable gauge of the witness's credibility." *Id*. There are exceptions "(1) where the inquiry would demonstrate a specific interest of the witness; (2) where the inquiry would demonstrate a witness's motivation to testify favorably for the State; or (3) where the inquiry would demonstrate that the witness testified with an expectation of leniency from the State." *Id*. Appellant does not assert that any of these exceptions would have applied.

Appellant also asserts that Basic should have been called as a witness to testify that Russo had paid a fine for possession of marijuana. A witness's convictions can be used to impeach his or her own testimony. Section 491.050, RSMo 2000; *State v. Talley*, 258 S.W.3d 899, 912 (Mo. App. S.D. 2008). Proof of prior convictions can be admitted for purposes of impeachment "either by the record or by his own cross-examination." Section 491.050, RSMo 2000; *see also Talley*, 258 S.W.3d at 912. Assuming that Russo paid a fine for possession of marijuana and had a conviction, Basic's testimony would not have been proper proof of the conviction and would have been improper impeachment. Assuming that Basic had personal knowledge of an incident with drugs in a van, a prior bad act would not

have been admissible for purposes of impeachment. *State v. Wolfe*, 13 S.W.3d 248, 258 (Mo. banc 2000).

Further, "[w]hen the testimony of the witness would only impeach the [S]tate's witnesses, relief on a claim of ineffective assistance of counsel is not warranted." *Collis v. State*, 334 S.W.3d 459, 464 (Mo. App. S.D. 2011) (quoting *Whited*, 196 S.W.3d at 82); *see also Wren v. State*, 313 S.W.3d 211, 219 (Mo. App. E.D. 2010) ("[f]ailure to impeach a witness does not generally warrant relief for ineffective assistance of counsel where the facts, even if true, do not establish a defense"). "The decision to impeach is presumed to be a matter of trial strategy, and to overcome such presumption, a movant must demonstrate that the decision was not a matter of trial strategy and that the impeachment would have provided him with a defense or would have changed the outcome of the trial." *Wren*, 313 S.W.3d at 219. "[W]hen the testimony of the witness would also negate an element of the crime for which a movant was convicted, the testimony provides the movant with a viable defense." *Whited*, 196 S.W.3d at 82.

At trial, D.W., Russo, and Bryan all testified consistently as to the incident (Tr. 186-234, 238-50), which was very straightforward and uncomplicated. Because Russo's testimony was cumulative to D.W.'s and Bryan's accounts of the incident, impeachment of Russo would not have provided Appellant with a defense and would not have affected the outcome of the trial. Trial counsel was not ineffective for failing to call Basic as a witness. Appellant's claim satisfies neither the performance prong nor the prejudice prong of the *Strickland* test. *Zink*, 278 S.W.3d at 176; *Hill*, 181 S.W.3d at 618. Appellant has failed to

state facts which, if true, would warrant relief. *Hill*, 181 S.W.2d 3d at 618. Therefore, the motion court did not clearly err in denying Appellant's claim without an evidentiary hearing.

Appellant's point should be denied.

II. (ineffective assistance of appellate counsel: failure to raise a sufficiency of the evidence claim as to unlawful use of a weapon)

The motion court did not clearly err in finding that appellate counsel was not ineffective in failing to raise a claim that the State failed to prove that the gun was readily capable of lethal use, as appellate counsel's performance was not deficient and there was no reasonable probability that the outcome of the appeal would have been different if counsel had raised the claim.

Appellant argues that appellate counsel was ineffective in failing to raise a challenge to the sufficiency of the evidence supporting Appellant's conviction for unlawful use of a weapon. There was sufficient evidence to support the submission of the charge to the jury. Appellant has not alleged facts showing that appellate counsel's performance was deficient or that there was a reasonable probability that a challenge to the sufficiency of the evidence would have been successful if it had been raised on direct appeal. The motion court did not err in denying Appellant's amended motion without an evidentiary hearing.

An evidentiary hearing shall not be held if "the motion and files and records of the case conclusively show that the movant is entitled to no relief." Rule 29.15(h). The motion court will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief. *Hill*, 181 S.W.3d at 617-18. An evidentiary hearing is required only if (1) the motion alleges facts, not conclusions, warranting relief; (2) the facts alleged raise matters not refuted by the files and records in the case; and (3) the matters complained of resulted in prejudice. *Id*. Specifically, to obtain an evidentiary hearing for claims related to ineffective assistance of counsel, a movant must allege facts, not refuted by

the record, showing that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney and that the movant was prejudiced thereby. *Id*.; *Strickland*, 466 U.S. at 687.

A. The standard for ineffective assistance of appellate counsel.

"[I]t is only where the defendant in a criminal case wishes to appeal and his attorney either refuses or negligently fails to pursue the appeal that the question of ineffective assistance of counsel arises." *McCain v. State*, 317 S.W.3d 657, 660 (Mo. App. S.D. 2010) (quoting *Chastain v. State*, 688 S.W.2d 58, 61 (Mo. App. S.D. 1985)). The test for ineffective assistance of appellate counsel is "essentially the same as that employed for trial counsel . . . the movant must show deficient performance of counsel and resulting prejudice." *Id*. (quoting *Evans v. State*, 70 S.W.3d 483, 485 (Mo. App. W.D. 2002). The standard for proving claims of ineffective assistance of appellate counsel is high. *Middleton v. State*, 80 S.W.3d 799, 808 (Mo. banc 2002). There is a strong presumption that appellate counsel provided adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *McCain* , 317 S.W.3d at 660-61.

"To prevail on a claim of ineffective assistance of appellate counsel, the [m]ovant 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." *Taylor v. State*, 262 S.W.3d 231, 253 (Mo. banc 2008)(*quoting Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005)). Movant must demonstrate that had appellate counsel raised this claim on appeal, there is a reasonable probability that the outcome of the appeal would have been different. *Id*.

B. The State presented sufficient evidence to make a submissible case for the crime of unlawful use of a weapon.

Appellant claims that appellate counsel was ineffective in failing to raise a claim that the State failed to prove that the gun was readily capable of lethal use because the gun was never recovered. Due process requires the State to prove each element of a crime beyond a reasonable doubt. *State v. Vernon*, 337 S.W.3d 88, 92 (Mo. App. W.D. 2011). Section 571.030.1(4), RSMo Supp. 2005, provides that a person commits the crime of unlawful use of a weapon if he or she knowingly exhibits, in the presence of one or more persons, "any weapon readily capable of lethal use in an angry or threatening manner[.]"

If a challenge to the sufficiency of the evidence as to Count III were raised on direct appeal, the reviewing court would review to determine if the State presented sufficient evidence from which a reasonable juror may have found the defendant guilty beyond a reasonable doubt. *State v. Olten*, 326 S.W.3d 137, 139 (Mo. App. W.D. 2010). The reviewing court would accept as true all evidence and inferences in a light most favorable to the verdict and disregard all evidence and inferences to the contrary. *Id*. The reviewing court would not reweigh the evidence. *State v. Johnson*, 316 S.W.3d 491, 495 (Mo. App. W.D. 2010). "The question of sufficiency arises before the case is put to the jury and is really an issue of whether the case should have been submitted to the jury." *Id*. at 498 (quoting *State v. Beggs*, 186 S.W.3d 306, 312 (Mo. W.D. App.2005)).

In light of the prevailing case law involving the exhibition of a weapon readily capable of lethal use, a challenge to the sufficiency of the evidence as to Count III would not

have been successful on direct appeal, and appellate counsel was not ineffective in failing to raise it.

In *State v. Richardson*, 886 S.W.2d 175, 176 (Mo. App. E.D. 1994), the defendant said, "I'm going to get a gun. . . I'll shoot you all." The defendant ran to his house and returned with a .12 gauge shotgun. *Id.* He aimed the gun at a crowd of people and said that he was going to shoot everyone. *Id.* He threatened to "blow [people] away." Upon hearing police sirens, the defendant fled the scene. *Id.* Although the defendant was apprehended, the gun was never recovered. *Id.* In *Richardson*, the Court rejected the defendant's argument that the gun must be loaded in order to be readily capable of lethal use. *Id.* The Court also held that, considering the defendant's threats, "substantial circumstantial evidence was presented that the shotgun was loaded." *Id.*[3]

In *State v. Geary*, 884 S.W.2d 41, 44-45 (S.D. 1994), one of the defendants challenged the sufficiency of the evidence to support his conviction for unlawful use of a weapon. The Court cited evidence that the defendants had pointed shotguns at individuals, and held that this was sufficient for the jury to find the defendant guilty of the charge. *Id.* at 45. The Court also held that "[i]t was not necessary for the state to prove that the shotguns were loaded to prove the offense charged." *Id.* There was no indication in *Geary* as to whether the shotguns were recovered.

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[3] A construction contrary to the Court's holding in *Richardson* would encourage suspects to escape conviction under § 571.030.1(4), RSMo Supp. 2005, by simply ensuring that the weapon is discarded or destroyed.

In *State v. Lutjen*, 661 S.W.2d 845, 847 (Mo. App. W.D. 1983), the Court also rejected the defendant's argument that in order to prove the crime of unlawful use of a weapon under § 571.030.1(4), RSMo, the prosecution had to establish that the gun was loaded. In that case, the defendant stated, "Don't come any close or I'll shoot," and the Court held that this was an assertion that the gun was loaded and lethal. *Id*. at 846. The Court in *Lutjen* relied on the definition of "readily capable of lethal use" in MAI-CR 2d 333.01 as "readily capable of causing death." *Id*. at 847. The Court stated:

> We reject, however, the premise that to convict under § 571.030 the prosecution must prove that the firearm was loaded. That is because . . . :
>
> > 'To hold that it is incumbent upon the state to prove affirmatively that a pistol . . . which is exhibited in a rude, angry, and threatening manner, is loaded, as a condition precedent to a conviction would be practically to render the statute unenforceable.'

Id. (quoting *State v. Riles*, 204 S.W. 1, 2 (Mo. 1918); *see also State v. Larkin*, 512 S.W.2d 911, 912 (Mo. App. St.L. Dist. 1974) (under predecessor statute prohibiting exhibition of a "deadly weapon" in a rude, angry, or threatening manner, § 564.010, RSMo 1969, State was not required to prove that the gun was in working condition and capable of being discharged).

Appellant contends that *Lutjen* is distinguishable because the gun in the present case was never recovered. *Richardson*, however, is not distinguishable on that basis. Here, as in *Richardson*, the gun was never recovered, but recovery of the weapon was not an element of

the State's case. As *Lutjen* established, the State need not prove that the gun is loaded in order to establish that the defendant exhibited a weapon readily capable of lethal use. Thus, it naturally follows, contrary to Appellant's suggestion in the present case, that the State need not present "a ballistics expert to testify as to the testing that the weapon underwent" (PCR L.F. 31). The element that the weapon was readily capable of lethal use may be established, as it was in *Richardson*, *Geary*, and *Lutjen*, by evidence that the defendant threatened the victims with the use of the weapon. Obviously, making a threat with the weapon gives rise to an inference that the weapon is readily capable of lethal use.

In the present case (similar to the facts of *Richardson*, *Geary*, and *Lutjen*), Appellant's use of the gun to intimidate D.W. by holding it against her head was uncontroverted (Tr. 198). Further, Appellant stated that he would kill D.W. later (Tr. 201), which, similar to the defendant's statement in *Lutjen*, 661 S.W.2d at 847, was evidence that his weapon was readily capable of lethal use.

Appellant cites a number of cases upholding convictions for unlawful use of a weapon, and Appellant asserts that there was evidence of the weapon's functionality in all such cases. *E.g.*, *State v. Purlee*, 839 S.W.2d 584, 590 (Mo. banc 1992) (conviction for unlawful use of a weapon was supported by evidence that revolver was loaded and operational); *State v. McCausland*, 829 S.W.2d 34 (Mo. App. E.D. 1992) (conviction for unlawful use of a weapon was supported by evidence when the weapon was loaded and operational and bullets were found on the seat). However, the mere fact that functionality of the weapon may have been proven in some cases does not equate with a requirement that such proof be presented in all cases.

Purlee, for example, is readily distinguishable because the conviction in that case was under § 571.030.1(1) for knowingly carrying "concealed on or about his person a knife, firearm, a blackjack or any other weapon readily capable of lethal use[.]" 839 S.W.2d at 590. There this Court stated that "[t]he essential elements of the offense are the knowing concealment and accessibility of a functional lethal weapon." *Id.* The defendant's conviction in *Purlee* was not for committing unlawful use of a weapon under § 571.030.1(4), and this Court's statement in *Purlee* (which may be regarded as *dicta*) as to functionality of the weapon, *id.*, is not applicable here.[4]

The reported cases demonstrate that certain distinct elements of the crime of unlawful use of a weapon under § 571.030.1(4), RSMo Supp. 2005, may be established by the same proof. *Richardson*, 886 S.W.2d at 176; *Geary*, 884 S.W.2d at 45; *Lutjen*, 661 S.W.2d at 847. The display of the weapon in a threatening manner also gives rise to an inference that the

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[4] In the present case, Appellant was also convicted of armed criminal action under Count II, which required that he use a "deadly weapon" in the course of the robbery (L.F. 18, 75). The term "deadly weapon" is specifically defined by § 556.061(10), RSMo Supp. 2005, to include "any firearm, loaded or unloaded, or any weapon from which a shot, readily capable of producing death or serious physical injury, may be discharged" (emphasis added). Appellant's amended motion for postconviction relief raised no claim that appellate counsel was ineffective in failing to challenge that conviction (PCR L.F. 25-31), though he claims that appellate counsel should have challenged an alleged lack of proof of "readily capable of lethal use" under Count III (PCR L.F. 31).

weapon is readily capable of lethal use. Thus, proof of distinct elements—"readily capable of lethal use," and "threatening manner"—may be established by the same facts—for example, that the defendant pointed a gun at someone. *Richardson*, 886 S.W.2d at 176; *Geary*, 884 S.W.2d at 45; *Lutjen*, 661 S.W.2d at 847. The State is not required to present a separate set of facts to establish each separate element of a crime. In *Lutjen*, 661 S.W.2d at 847, for example, the Court noted:

> There was substantial evidence, albeit circumstantial, that the shotgun was loaded when leveled at the victim in threat. The admonition, not once, but twice: "Lady, don't come any closer or I'll shoot" was an assertion that the weapon was loaded—and lethal.

Thus, evidence of the exhibition of the weapon in a threatening manner may also establish that the gun was readily capable of lethal use. *Id.*

In addition, the plain statutory language of § 571.030.1 RSMo Supp. 2005, supports the notion that a firearm is, by definition, a weapon that is readily capable of lethal use, although the reported cases such as *Richardson*, *Geary*, and *Lutjen* were not based on such reasoning. Section 571.030, RSMo Supp. 2005, provides that:

> 1. A person commits the crime of unlawful use of weapons if he knowingly:
>
> (1) Carries concealed upon or about his person a knife, a **firearm**, a blackjack **or any other weapon readily capable of lethal use**[.]

(Emphasis added). Although exhibition of the weapon in an angry or threatening manner under paragraph (4), rather than carrying a concealed weapon under paragraph (1), was the issue in the present case, the plain language of paragraph (1) suggests that a firearm, by

definition, is a "weapon readily capable of lethal use." Indeed, the motion court quoted paragraph (1) and stated that "[t]his language suggests that a knife, firearm or blackjack is necessarily 'a weapon readily capable of lethal use'" (PCR L.F. 65). Though reported cases such as *Richardson*, *Geary*, and *Lutjen* did not rest upon the statutory interpretation of paragraph (1), there was abundant evidence to make a submissible case for unlawful use of a weapon under § 577.030.1(4), RSMo Supp. 2005, in the present case in light of the prevailing case law, and the plain language of the statute provides an additional rationale to buttress that conclusion.

C. Appellate counsel was not ineffective.

Because there was sufficient evidence to submit the case to the jury on the charge of unlawful use of a weapon, there was no legitimate challenge to the sufficiency of the evidence to be raised on direct appeal. There was no trial error, and thus no "claim of error that was so obvious that a competent and effective lawyer would have recognized and asserted it." *Taylor*, 262 S.W.3d at 253. Appellate counsel's performance was not deficient in failing to raise a challenge on direct appeal as to the sufficiency of the evidence as to Count III.

Further, because there was no legitimate challenge to the sufficiency of the evidence to be raised on direct appeal, there was no reasonable probability that the outcome of the appeal would have been different if appellate counsel had raised the issue on direct appeal. *Id*. Appellate counsel was not ineffective in failing to raise a challenge on direct appeal as to the sufficiency of the evidence on Count III.

D. The motion court's findings and conclusions were not clearly erroneous.

Appellant's amended Rule 29.15 motion failed to assert facts which, if true, warranted relief. *Hill*, 181 S.W.3d at 617-18. Therefore, Appellant was not entitled to an evidentiary hearing on his claim, *id*., and the motion court's findings and conclusions were not clearly erroneous. Supreme Court Rule 29.15(k).

In this case, the motion court stated that "in the case of a firearm, that is used in the manner movant used the gun," the State need not prove that the gun was "readily capable of lethal use" to make a submissible case (PCR L.F. 66). Clearly, that the weapon be "readily capable of lethal use" is an element of the crime under § 571.030.1(4), RSMo Supp. 2005. The motion court relied on § 571.030.1(1), RSMo Supp. 2005, which provides that a person commits the crime of unlawful use of a weapon if he carries concealed upon his person "a knife, a firearm, a blackjack or any other weapon readily capable of lethal use," and stated that "[t]his language suggests that a knife, firearm or blackjack is necessarily "a weapon readily capable of lethal use" (PCR L.F. 65).

In light of the prevailing case law, *Lutjen*, 661 S.W.2d at 847; *Richardson*, 886 S.W.2d at 176, in addition to the motion court's interpretation of the statute, the motion court was imminently correct in its statement that the State does not have to prove that the gun was loaded (PCR L.F. 66). Further, the motion court's reference to the "manner [in which] movant used the gun" suggests an inference that because Appellant used the gun in a threatening manner, the gun was also readily capable of lethal use (PCR L.F. 66).

The motion court's findings and conclusions were not clearly erroneous. Appellant would not have prevailed if appellate counsel had raised a point on appeal that the gun was not shown to be readily capable of lethal use when the weapon was not recovered.

Appellant's point should be denied.

CONCLUSION

The motion court did not clearly err in denying Appellant's Rule 29.15 motion. The motion court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

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2. That a copy of this notification was sent through the eFiling system on this 13th day of June, 2012, to:

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