IN THE

MISSOURI SUPREME COURT

ANGEL DEQUESNE,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC83508**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT

FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

SIXTEENTH JUDICIAL CIRCUIT, DIVISION NO. 1

THE HONORABLE DAVID W. SHINN, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Angel Dequesne, was convicted after a jury trial in the Circuit Court of Jackson County, Missouri, of second degree murder, § 565.021 RSMo 1994,[1] and armed criminal action, § 571.015. The Western District Court of Appeals affirmed his convictions in a *per curiam* memorandum opinion. On September 24, 1997, a timely *pro se* Rule 29.15 motion was filed in the Circuit Court of Jackson County. After an amended motion was filed, the motion court overruled the 29.15 motions without a hearing. On January 27, 2000, a notice of appeal was filed after the Western District granted leave to file a late notice of appeal on January 25th, to be filed within ten days of that order. Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Western District. Article V, Section 3, Mo. Const.; section 477.070. However, this Court granted the Appellant's application for transfer in this case, so therefore this Court has jurisdiction. Article V, Sections 3 and 10, Mo. Const. and Rule 83.03.

[1] All statutory citations are to RSMo 1994, unless otherwise noted.

STATEMENT OF FACTS

Appellant relies upon his Statement of Facts from his original brief

POINTS RELIED ON

III.

The motion court clearly erred in denying Mr. Dequesne's Rule 29.15 motion without an evidentiary hearing because Mr. Dequesne pleaded factual allegations which, if true, would warrant relief and which are not refuted by the record, in that Mr. Dequesne alleged that he had been denied his right to effective assistance of counsel when counsel did not offer the lesser included offense instruction of voluntary manslaughter, in violation of the 6th and 14th Amendments to the United States Constitution, and Article I, § 18(a) of the Missouri Constitution; the evidence supported giving a voluntary manslaughter instruction because the evidence showed a basis for acquitting Mr. Dequesne of second degree murder, but convicting him of voluntary manslaughter since the jury might have found that while he did not act in self-defense or defense of another, that he was acting under sudden passion arising out of adequate cause; the motion court denied the claim based upon trial strategy, yet there was no evidentiary hearing so we do not know whether or not trial counsel had a strategic reason for not requesting this instruction, and if so, whether or not that strategy was reasonable; and, the motion court ruled that instructional errors are not cognizable in a Rule 29.15 proceeding, but the claim was ineffective assistance of counsel for failing to request a lesser included offense instruction, a claim that is cognizable in a Rule 29.15 proceeding.

State v. Hamilton, 871 S.W.2d 31 (Mo. App., W.D. 1993);

State v. Redmond, 937 S.W.2d 205 (Mo. banc 1996);

People v. Bell, 152 Ill.App.3d 1007, 505 N.E.2d 365, 106 Ill.Dec. 59 (1987);

State v. Dexter, 954 S.W.2d 332 (Mo. banc 1997);

Sections 565.002, 565.023, and 565.025 and

Rule 29.15.

V.

The motion court clearly erred in denying Mr. Dequesne's Rule 29.15 motion without a hearing regarding a claim concerning trial counsel's failure to object to exhibit No. 39, a videotaped statement by State's witness Kindall Owens, which had been redacted by the State to omit that she had said that the decedent, Liggins, was in possession of a knife, and counsel's failure to adduce this evidence through Owens' cross-examination, because Mr. Dequesne pleaded factual allegations which, if true, would warrant relief, and which are not refuted by the record, in that the amended motion alleged that counsel was ineffective, in violation of the 6th and 14th Amendments to the U.S. Const. and Article I, § 18(a) of the Mo. Const., because counsel did not object to the redaction of this videotape which omitted Owens' reference to Liggins being in possession of a knife, which would have supported Mr. Dequesne's claim that Liggins was the initial aggressor, or, to adduce this same evidence from Owens through her cross-examination; and, as a result, a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different.

State v. Hayes, 785 S.W.2d 661 (Mo. App., W.D. 1990);

Taylor v. State, 755 S.W.2d 253 (Mo. App., W.D. 1988);

State v. Hamilton, 871 S.W.2d 31 (Mo. App., W.D. 1993); and

Rule 29.15.

ARGUMENT

III.

The motion court clearly erred in denying Mr. Dequesne's Rule 29.15 motion without an evidentiary hearing because Mr. Dequesne pleaded factual allegations which, if true, would warrant relief and which are not refuted by the record, in that Mr. Dequesne alleged that he had been denied his right to effective assistance of counsel when counsel did not offer the lesser included offense instruction of voluntary manslaughter, in violation of the 6th and 14th Amendments to the United States Constitution, and Article I, § 18(a) of the Missouri Constitution; the evidence supported giving a voluntary manslaughter instruction because the evidence showed a basis for acquitting Mr. Dequesne of second degree murder, but convicting him of voluntary manslaughter since the jury might have found that while he did not act in self-defense or defense of another, that he was acting under sudden passion arising out of adequate cause; the motion court denied the claim based upon trial strategy, yet there was no evidentiary hearing so we do not know whether or not trial counsel had a strategic reason for not requesting this instruction, and if so, whether or not that strategy was reasonable; and, the motion court ruled that instructional errors are not cognizable in a Rule 29.15 proceeding, but the claim was ineffective assistance of counsel for failing to request a lesser included offense instruction, a claim that is cognizable in a Rule 29.15 proceeding.

Trial counsel was constitutionally ineffective by not submitting a lesser-included offense instruction of voluntary manslaughter. Because the giving of such an instruction was justified, and the failure to request a lesser-included offense instruction can constitute ineffective assistance of counsel, and the record did not refute this allegation, this Court should reverse the motion court's denial of an evidentiary hearing and remand for a hearing on this claim.

Pleading

In Mr. Dequesne's amended motion he alleged:

> (4) Counsel unreasonably failed to request a jury instruction for the lesser included offense of voluntary manslaughter. From the evidence at trial, the jury could have concluded that even if movant was not justified in using the force he used in self-defense or defense of Kindall Owens, that "he caused the death [of Liggins] under the influence of sudden passion arising from adequate cause [.]" § 565.023.1(1), RSMo 1994. Sudden passion "means passion directly caused by and arising out of provocation by the victim . . . ." § 565.002(7), RSMo 1994. The jury could have concluded that Liggins' actions in: driving off with movant's girlfriend Kindall Owens against movant's and Owens' wishes after having consumed crack cocaine, saying "Fuck you, Cuban" (Tr. 376) when movant objected to Liggins' leaving, dragging movant with his car, and producing the knife, all provided adequate provocation which caused sudden passion in movant. A

reasonable probability exists that the outcome of movant's trial would have been better had counsel requested a voluntary manslaughter instruction;

(P.L.F. 20-21).

Motion court's findings and conclusions

The motion court issued findings of fact and conclusions of law denying Mr. Dequesne an evidentiary hearing on this claim ruling:

> 4. . . . The Supreme Court of Missouri has held "claims of instructional error are claims properly raised on direct appeal, not in postconviction proceedings." State v. Brooks, 960 S.W.2d 479, 500 (Mo. 1997). Movant's claim is not cognizable and therefore is denied. However, even assuming movant's claim is cognizable, it should still be denied. Trial counsel's decision not to request an instruction of voluntary manslaughter is a matter of trial strategy. Decisions of trial strategy do not establish ineffective assistance of counsel claims. State v. Butts, 938 S.W.2d 924, 930 (Mo. App. S.D. 1997). The Missouri Court of Appeals has held that sometimes "defense counsel will decide whether or not to submit jury instructions for strategic reasons. The strategy for not submitting a sudden passion or a voluntary manslaughter instruction, even if the evidence would warrant such submission, is left to the judgment of the parties. Thus, a defendant may not complain of prejudice when the court has conducted the trial in harmony with his apparent strategy and intent in not seeking an instruction." State v. McCoy, 971 S.W.2d 861, 864 (Mo. App. W.D. 1998).

> Movant claimed he acted intentionally in self-defense or in the defense of others. (Tr. 378, 379, 382-384, 387-388, 437-457). To request an instruction on voluntary manslaughter resulting out of sudden passion would be inconsistent with his strategic claim of self-defense. Movant's point is denied.

(P.L.F. 31).

Respondent's position

Respondent claims that Mr. Dequesne was not entitled to an evidentiary hearing because: (1) he did not allege in his amended motion that trial counsel's failure to request an instruction on the lesser-included offense was *not* a matter of considered trial strategy; (2) a manslaughter instruction would have been inconsistent with self-defense; (3) there was no evidence that he committed the homicide while under the influence of sudden passion; and (4) since the jury selected the maximum punishments, the jury would not have convicted Mr. Dequesne of voluntary manslaughter, even if given the opportunity to do so.

Discussion

The first reason given by the motion court for not granting Mr. Dequesne a hearing on this claim is that "claims of instructional error are claims properly raised on direct appeal, not in postconviction proceedings." (P.L.F. 31). Respondent also intimates this as a reason to support the denial of a hearing ("it is doubtful that the prohibition against raising claims of instructional error in a Rule

29.15 motion can be sidestepped merely by recasting the claim as 'ineffective assistance of counsel.'") (Resp. Br. at 35).

It is true that "instructional errors" are claims to be raised on direct appeal, not in a postconviction proceeding. However, Mr. Dequesne's claim is not a claim of "instructional error," rather, it is a claim of ineffective assistance of counsel, which is properly raised in a postconviction proceeding. *See*, **Rule 29.15(a)**. The mere fact that the allegation involves a lesser-included offense instruction and counsel's failure to request it does not transform the claim into a claim of "instructional error." The cases cited by the motion court (***Brooks***, *supra*) and respondent (***Morrow v. State***, 21 S.W.3d 819, 829[27] (Mo. banc 2000)) are not on point. ***Brooks*** involved a claim that the penalty phase jury instructions in that capital murder case were unconstitutional. 960 S.W.2d at 500. And, while the claim in ***Morrow*** was couched in terms of ineffective counsel, it actually was an attack on the constitutionality of the penalty phase instructions. 21 S.W.3d at 829.

Other cases show that such a claim is properly raised in a postconviction proceeding. The failure to request a lesser-included offense instruction when the evidence shows a basis for acquitting a defendant on the greater offense, but convicting him of the lesser-included offense, can be a basis for ineffective assistance of counsel. ***State v. Keenan***, 779 S.W.2d 743, 747 (Mo. App., S.D. 1989). *Also see*, ***People v. Bell***, 152 Ill.App.3d 1007, 505 N.E.2d 365, 106 Ill.Dec. 59 (1987) (defense counsel's failure to tender jury instruction for voluntary manslaughter despite defendant's testimony that he acted in self-defense and fact

that jury was instructed on law of self-defense could support defendant's ineffective assistance of counsel claim). And, this Court's opinion in ***State v. Dexter***, 954 S.W.2d 332, 344[13-14] (Mo. banc 1997), relied upon by respondent (Resp. Br. at 36), inferentially supports appellant's position, not respondent's.

In ***Dexter***, this Court refused to convict the trial court of plain error for failing *sua sponte* to submit instructions for lesser-included offenses. In reaching that conclusion this Court noted that during a Rule 29.15 evidentiary hearing the movant did not inquire of trial counsel as to counsel's reasons for not requesting a less-included offense instruction, and thus this Court presumed that counsel's decision was reasonable trial strategy. ***Id***. Under ***Dexter*** *if* there is a hearing, then a movant must inquire of trial counsel as to counsel's reasons for not requesting a lesser-included offense instruction. ***Dexter*** does not stand for the proposition that a claim of ineffective counsel for failing to request a lesser-included offense instruction cannot be raised in a Rule 29.15 motion. Indeed, the inference in ***Dexter*** is that because there may be trial strategy reasons for not requesting such an instruction, then plain error review on direct appeal should not be given; rather, a claim of ineffective assistance of counsel is to be raised in such a situation if there was no reasonable trial strategy for not requesting a lesser-included offense instruction.

The second reason given by the motion court for not granting Mr. Dequesne a hearing on this claim was that "[d]ecisions of trial strategy do not establish ineffective assistance of counsel claims" (P.L.F. 31). Respondent carries

that finding even further by asserting, without supporting caselaw, that Mr. Dequesne needed to allege in his amended motion that trial counsel's decision not to request an instruction on the lesser-included offense was *not* a matter of considered trial strategy (Resp. Br. at 37-38). This is the reason adopted by the Western District's opinion when it rejected this claim based upon "trial strategy" and held that "Appellant failed to allege facts which refute that defense counsel's strategy not to include a compromise verdict was unreasonable." (Mem. Op. at 12-13). The cases cited by the motion court, the Western District, and Respondent are not determinative of the issue.

McCoy, *supra*, did not even involve a Rule 29.15 proceeding. It was a direct appeal of a criminal conviction wherein the defendant alleged plain error for failure to give an instruction *sua sponte* on sudden passion. 971 S.W.2d at 863-64.

Although ***Butts*** at least did involve a claim under Rule 29.15, that case also is not dispositive of this point. In ***Butts*** there was a hearing, unlike Mr. Dequesne's case, and the trial attorney testified that he did not present a witness at trial because that witness showed up for trial intoxicated, that the witness had a criminal history, and further, among other reasons, that the defendant agreed with counsel not to call the witness. Thus, there was evidentiary support for a finding of trial strategy, unlike Mr. Dequesne's case. Without a hearing we do not know why counsel did not request a voluntary manslaughter instruction.

Similarly, ***Love v. State***, 670 S.W.2d 499 (Mo. banc 1984), ***State v. Kelley***, 901 S.W.2d 193 (Mo. App., W.D. 1995), ***Ellis v. State***, 773 S.W.2d 194 (Mo.

App., S.D. 1989), ***State v. Theus***, 967 S.W.2d 234 (Mo. App., W.D. 1998), and ***Buskuehl v. State***, 719 S.W.2d 504 (Mo. App., E.D. 1986) (Resp. Br. at 36-37) do not assist respondent's position since those cases involved denials of postconviction motions *after* hearings.

Although ***State v. Butler***, 904 S.W.2d 68 (Mo. App., E.D. 1995) involved the denial of a hearing on claim of ineffective counsel for failing to request MAI-CR3d 310.10 (impeachment of defendant by conviction of "unrelated crimes" shown solely for the purpose of impeachment), there the record showed that the first sentence of that instruction would have hurt the defense's position because the defendant's credibility was a major issue at trial and the first sentence of that instruction would have instructed the jury that it could consider the defendant's prior guilty plea for the purpose of deciding defendant's believability; and, the record also disclosed defense counsel's strategy to ignore the guilty plea. ***Id***. at 72-73. Here, the record does not refute Mr. Dequesne's claim.

Respondent's position that Mr. Dequesne's claim was not entitled to a hearing because he did not allege in his amended motion that trial counsel's "decision not to request an instruction on the lesser-included offense was *not* a matter of considered trial strategy" (Resp. Br. at 35, emphasis in original), is without merit. Whether counsel had a reasonable trial strategy not to request an instruction is a matter to be determined at a hearing. ***Dexter***, *supra*. Further, the amended motion did allege that "[c]ounsel unreasonably failed to request a jury instruction for the lesser included offense of voluntary manslaughter" (P.L.F. 20,

emphasis added) and that trial counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances" (P.L.F. 18). Clearly if that were the case, then counsel's failure to request a lesser-included offense instruction could not have been "a matter of reasonable trial strategy" (Resp. Br. at 35).

And, it is debatable whether trial counsel can strategically chose to not submit a lesser-included offense, which is supported by the evidence, without the consent of the defendant. *See*, ***People v. Brocksmith***, 162 Ill.2d 224, 205 Ill.Dec. 113, 642 N.E.2d 1230, 1232 (1994) ("[b]ecause it is defendant's decision whether to initially plead guilty to a lesser charge, it should also be defendant's decision to submit an instruction on a lesser charge at the conclusion of the evidence"); ***In re Trombly***, 160 Vt. 215, 627 A.2d 855, 856 (1993) ("once defense counsel consults fully with the client about lesser included offenses, the defendant should be the one to decide whether to seek submission to the jury of those offense") (internal quotations omitted); ***State v. Boeglin***, 105 N.M. 247, 731 P.22d 943, 945 (1987) (it is the defendant, not defense counsel, who decides whether to request lesser-included offense instructions).

But even if this Court finds that trial counsel makes the ultimate decision whether to request less-included offense jury instructions, this Court must still reverse for a hearing in order to determine why counsel did not request the voluntary manslaughter instruction. The issue before this court is whether the record is sufficient to support denial of Mr. Dequesne's Rule 29.15 motion <u>without</u>

an evidentiary hearing. There must first be an evidentiary hearing, or at least something affirmative on the record, to support a finding of trial strategy. *See*, ***State v. Hamilton***, 871 S.W.2d 31, 34-35 (Mo. App., W.D. 1993) (there has to be a hearing to determine not only whether trial counsel exercised trial strategy, but also whether that strategy was "reasonable" under the circumstances); ***State v. Clay***, 876 S.W.2d 760, 760-761 (Mo. App., E.D. 1994). ***State v. Talbert***, 800 S.W.2d 748, 749 (Mo. App., E.D. 1990) (noting that there are limits to the invocation of "trial strategy" especially when there is no evidentiary hearing); ***State v. Yates***, 869 S.W.2d 270, 273 (Mo. App., E.D. 1994); *cf.* ***State v. Hodges***, 829 S.W.2d 604, 608 (Mo. App., E.D. 1992) (when the motion court denied claim based on brief colloquy with trial counsel at sentencing concerning claim of ineffective assistance of counsel, the appellate court reversed and remanded for an evidentiary hearing noting that there remained a "genuine and unresolved dispute" between the defendant and trial counsel about the reasons the witness did not testify).

The final reason given by the motion court for not granting Mr. Dequesne a hearing, which respondent also asserts in its brief, is that since Mr. Dequesne claimed he acted intentionally in self-defense or in the defense of others, to request an instruction on voluntary manslaughter resulting out of sudden passion would be inconsistent with his strategic claim of self-defense. (P.L.F. 31). A self-defense claim is <u>not</u> inconsistent with a claim of voluntary manslaughter. *See* ***State v. Redmond***, 937 S.W.2d 205, 208 (Mo. banc 1996) (held that an instruction on self-

defense and an instruction on voluntary manslaughter are not inherently inconsistent). In ***Redmond***, the defendant was convicted of second degree murder, asserted self-defense at trial, yet this Court found reversible error because of the trial court's failure to give voluntary manslaughter instruction; a jury could rationally reject self-defense and find sudden passion arising from adequate cause. This Court noted that a jury may accept part of a witness's testimony while disbelieving other portions, and that a jury may also draw certain inferences from a witness's testimony, but reject others. ***Id***. at 209. And, unlike self-defense, there is no requirement that the defendant act reasonably to have his intentional killing reduced from murder to voluntary manslaughter. ***Id***.

Respondent also asserts that there was no evidence of sudden passion. Ridiculous. Even the motion court did not find this to be so. "The crime of voluntary manslaughter is defined as causing the death of another person under circumstances that would constitute murder in the second degree, except that the death was caused 'under the influence of sudden passion arising from adequate cause.'" ***Redmond***, 937 S.W.2d at 208 (*quoting* **§ 565.023.1(1)**). "'Sudden passion'" is defined as 'passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation. '" ***Id***. at 208 (*quoting* **§ 565.002(7)**). "'Adequate cause' is cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control." ***Id***. (quoting **§ 565.002(1)**).

In the instant matter, the evidence supported a finding of sudden passion arising from adequate cause, which would warrant a submission of a voluntary manslaughter instruction. The following evidence would have supported a voluntary manslaughter instruction: Liggins smoked crack cocaine right before the altercation (Tr. 188-89, 218-19, 226-27, 373); Mr. Dequesne knew that when Liggins used drugs that he became angry, mad and violent (Tr. 370-375); Mr. Dequesne feared that Liggins would become violent towards his girlfriend, Owens, so he approached the car to check on Owens' well-being (Tr. 188-190, 218-220, 375-376); Liggins started the car, grabbed Mr. Dequesne, said "Fuck you Cuban," and drove off, so that Mr. Dequesne had to grab onto the car while it was in motion (Tr. 195-197, 220, 375-377); Owens was yelling and began to hit Liggins (Tr. 303); Mr. Dequesne saw Liggins grab a knife, so Mr. Dequesne hit him, causing the knife to fall into the back-seat, and Mr. Dequesne grabbed the knife and cut Liggins with it (Tr. 286-88, 376-378); after Mr. Dequesne fell off of the car, the car stopped and Mr. Dequesne walked towards it so that he could get Owens out of the car (Tr. 239, 261-262, 379); as he walked in that direction, he put the knife in his pocket (Tr. 240, 263, 288-90); Liggins, who was bleeding, said "that little mother fucker, I'm going to get him," got out of the car and walked towards the trunk of his car (Tr. 198, 221-22, 241, 264, 292, 382); Liggins yelled that he was going to kill Mr. Dequesne (Tr. 382); before Liggins could get to the trunk, he and Mr. Dequesne began fighting, with Liggins swinging at Mr. Dequesne first (Tr. 200, 222, 241-42, 264-65, 277, 292-93, 383-84, 403-04);

Liggins hit Mr. Dequesne and threw him to the ground, where they continued fighting, until Mr. Dequesne got a knife and slashed out (Tr. 292-293, 383-384, 403-404). A jury could have rationally rejected self-defense yet found sudden passion arising from adequate cause. *See*, ***State v. Patterson***, 484 S.W.2d 278 (Mo. 1972) (this Court reversed and remanded a second degree murder conviction because of the trial court's failure to instruct on manslaughter); ***State v. Creighton***, 52 S.W.2d 556, 560-62 (Mo. 1932) (defendant, who was convicted of first degree murder for shooting the victim three times, testified to self-defense, but in his testimony he also said that he had been provoked by actual battery and opprobrious epithets; this Court held that failure to instruct on manslaughter was reversible error); ***State v. Hyster***, 504 S.W.2d 90 (Mo. 1974) (victim died from multiple lacerations and other trauma, and the defendant, who denied the offense altogether, was convicted of first degree murder; this Court held that instructions on both murder second degree and manslaughter should have been given in light of the evidence of drinking and antecedent fighting). *Cf*. ***State v. Richards***, 795 S.W.2d 428 (Mo. App., E.D. 1990) (the jury could have found that there was substantial evidence of sudden passion arising from adequate cause because it could have concluded that a fight broke out between the victim and the defendant over the victim's remark the day previous that he wanted to sleep with the defendant's girlfriend for money, and in the course of that fight, the defendant "put" the victim in the river, and he died, even though there was no evidence that the victim actually struck the defendant).

In ***Patterson***, *supra*, the defendant and the deceased began arguing at a party. The defendant went to get a pistol from his wife's purse after being informed that the deceased carried a knife. He returned, and when the deceased pulled a knife the defendant fired three times, twice as the deceased fled. The defendant stated that he shot because he would not let anyone kill him.
This Court held that it could not declare as a matter of law that the killing was not the result of a "sudden unexpected assault, encounter, or provocation tending to excite the passion beyond control," and that the failure to instruct on manslaughter was error. 484 S.W.2d at 280. The facts in Mr. Dequesne's case are more compelling than ***Patterson's*** regarding a finding of sudden passion arising out of adequate cause.

Finally, respondent asserts that since the jury selected the maximum punishments for second degree murder and armed criminal action that it is clear that the jury would not have convicted Mr. Dequesne of voluntary manslaughter, even if given the opportunity to do so (Resp. Br. at 43-46, *citing* ***Love***, *supra*). Here, unlike ***Love***, the motion court did not make a finding that Mr. Dequesne was not prejudiced by the failure of counsel to offer the lesser-included offense instruction of manslaughter. Despite the lack of such a finding, respondent argues that there was no prejudice in this case because the jury recommended the maximum sentence.

Of course that assertion ignores the fact that Mr. Dequesne was charged with first degree murder, yet the jury did not find that he coolly deliberated and

acquitted him of that offense, and thus was left with only two choices – to let Mr. Dequesne walk free, or to convict him of second degree murder. That the jury believed that the killing of an individual deserved the maximum sentence of the only offense that they were left with does not necessarily lead to the conclusion that the jury would not have found Mr. Dequesne guilty of voluntary manslaughter if they had been given that option. Although this Court in ***Love*** did write that, "[i]t is also clear that the jury at movant's trial was thoroughly convinced of movant's guilt on the murder charge in light of their [sentencing recommendation]," the reason that this Court did not find prejudice for the failure of trial counsel to raise an issue of automatic submission of a lesser included offense in a motion for new trial – after counsel testified at the post-conviction hearing that he intentionally did not request the trial court to submit such an instruction – is that "there was no evidence in either the first trial or in the hearing on the motion which might possibly have convinced the jury to reject second degree murder and convict movant of manslaughter." ***Id*** at. 503.

Mr. Dequesne has alleged facts that would warrant relief, are not refuted by the record, and have caused him prejudice. Mr. Dequesne is therefore entitled to an evidentiary hearing on this claim.

V.

The motion court clearly erred in denying Mr. Dequesne's Rule 29.15 motion without a hearing regarding a claim concerning trial counsel's failure to object to exhibit No. 39, a videotaped statement by State's witness Kindall Owens, which had been redacted by the State to omit that she had said that the decedent, Liggins, was in possession of a knife, and counsel's failure to adduce this evidence through Owens' cross-examination, because Mr. Dequesne pleaded factual allegations which, if true, would warrant relief, and which are not refuted by the record, in that the amended motion alleged that counsel was ineffective, in violation of the 6th and 14th Amendments to the U.S. Const. and Article I, § 18(a) of the Mo. Const., because counsel did not object to the redaction of this videotape which omitted Owens' reference to Liggins being in possession of a knife, which would have supported Mr. Dequesne's claim that Liggins was the initial aggressor, or, to adduce this same evidence from Owens through her cross-examination; and, as a result, a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different.

Pleading

In Mr. Dequesne's amended motion he alleged:

(6) Counsel failed to object to the admission of the edited videotaped statement (St. Exh. 39) of Kindall Owens on the basis that the tape was

edited to remove Owens' reference to the knife possessed by decedent Liggins: "I remember the T-shirt because I remember he (Liggins) ripped it off, he had the knife he had. He had a knife so I remember the T-shirt." (see page 14 of full transcript of Owens' statement). The issue of whether Liggins or movant had produced the knife was a main issue in movant's self-defense theory. A showing that Liggins possessed a knife in the car would support movant's claim that Liggins was the initial aggressor and had produced the knife to harm movant (see Tr. 376). Movant notes the tape was edited by the State to remove objectionable material (see Tr. 328). However, the state's editing also removed substantive evidence on the tape supporting movant's self-defense claim. The tape could have been edited to remove the objectionable material and leave Owens' assertion intact. Had counsel objected to the state's editing, a reasonable probability exists that a version of the tape with Owens' assertion that Liggins had a knife would have been brought into evidence. Further, trial counsel failed to inquire of Owens in cross-examination about her prior assertion that Liggins had a knife. But for counsel's failure, a reasonable probability exists that the outcome of movant's trial would have been better;

(P.L.F. 22-23).

Motion court's findings and conclusions

The motion court issued findings of fact and conclusions of law denying Mr. Dequesne an evidentiary hearing on this claim ruling:

> 6. . . .Movant alleges the edited version of the videotaped statement deleted Owens' reference to victim's possession of the knife which would have supported his claim of self-defense. However, movant himself testified that the victim had a knife. Further, the Court finds the edited portion of the videotaped statement failed to cause movant to suffer sufficient prejudice that would have substantially deprived him of the right to a fair trial. The jury was presented with movant's own testimony regarding the possession of the knife by victim and also with movant's claim of self-defense. The fact that the jury did not believe movant's claim of self-defense was not to [sic] due any fault of counsel but instead was due to the overwhelming presentation of evidence proving movant to be the aggressor. (Tr. 193, 198, 203, 224, 236, 239, 242). Further, in light of the strong evidence against movant, the fact that the portion of the videotaped statement referencing victim's possession of a knife was edited out of the tape is of no consequence. The victim's knife had nothing to do with the impeachment of this witness. The Court also finds movant's claim to be cognizable on direct appeal and not in a postconviction motion for relief. . . . Movant's points regarding the videotape statement of Kindall Owens are denied.

(P.L.F. 43-44).

Respondent's position

Respondent claims that Mr. Dequesne was not entitled to an evidentiary hearing because: (1) the mere failure to object does not rise to the level of

ineffective assistance of counsel; and (2) the redacted portion of the videotape would not have aided Mr. Dequesne's defense since it was cumulative to his testimony and involved an issue that was essentially irrelevant to the question of whether he had acted in self-defense when he stabbed Liggins in the chest.

Discussion

A showing that Liggins was the one who initially brought the knife into the affray would have supported Mr. Dequesne's claim that Liggins was the initial aggressor and had produced the knife to harm him (Tr. 376). So it would have been important for defense counsel to show that Owens had said in her videotaped statement, which was contrary to her trial testimony (Tr. 225-26), that Liggins was the one who had produced the knife, especially in light of the assistant prosecutor's subsequent argument that Owens' videotaped statement "is the truth." (Tr. 434). Yet, the motion court ruled that Mr. Dequesne was not entitled to a hearing because: Mr. Dequesne's claim was cognizable on direct appeal and not in a postconviction motion; Mr. Dequesne was not prejudiced because he had testified that Liggins had the knife; and there was overwhelming evidence proving Mr. Dequesne to be the aggressor. (P.L.F. 31-32).

Clearly, a claim of ineffective assistance of counsel, as presented in this claim, is cognizable in a postconviction motion not in a direct appeal. **Rule 29.15(a)**. So, the motion court's finding that this claim is a "direct appeal" claim rather than a postconviction claim is clearly erroneous. **Rule 29.15(k)**.

And, the fact that Mr. Dequesne testified that it was Liggins who had produced the knife does not preclude relief. As noted by ***State v. Hayes***, 785 S.W.2d 661 (Mo. App., W.D. 1990), which reversed on a claim of ineffective assistance of counsel, "[t]he defendant's own testimony on a decisive issue in a case is always received with doubt because of his interest in the result of the case. Corroboration is critical, and corroborative testimony by a single witness can never be discounted as 'merely cumulative.'" ***Id.*** at 663**.** *Also see*, ***Taylor v. State***, 755 S.W.2d 253 (Mo. App., W.D. 1988) (although witnesses were not eyewitnesses, ineffective assistance of counsel in failing to interview witnesses to corroborate self-defense theory).

Also, the motion court's assertion that the evidence that Mr. Dequesne was the initial aggressor was "overwhelming" is not supported by the transcript citations given by the motion court. (Tr. 193, 198, 203, 224, 236, 239, 242; P.L.F. 44). Those citations, involving two witnesses testimonies, merely refer to Mr. Dequesne holding onto the car as Liggins drove off, and to Mr. Dequesne walking towards the car after he had fallen off the car. The evidence was not "overwhelming that Mr. Dequesne was the initial aggressor. There was testimony that went both ways on this issue.

Respondent's related argument that "[t]he issue of who initially had the knife, the appellant or Liggins, was essentially a moot point," (Resp. Br. at 53) is belied by the closing arguments at trial.

First, the assistant prosecutor argued in his opening argument:

> The car starts driving; this defendant starts grabbing onto the car. He's right handed. You saw him up here. I would have to reach here and I would have to reach – remember he was trying to describe, I reached around to the back seat of the car to grab this knife? That is all a bunch of bunk. He had the knife. He couldn't have reached into the back seat. We know that.

(Tr. 430).

Defense counsel countered

> He [Liggins] was the aggressor at all stages of this fight. It was Liggins who had the knife. It was Liggins who pulled out the knife first at the park.

(Tr. 438, 439).

Then the assistant prosecutor respondent in closing argument:

> The defendant was clearly the initially aggressor here. . . . [Kindall Owens] tells you the victim never had a knife in this encounter, ever. She tells you this man [Mr. Dequesne] comes up to the car and starts stabbing the victim and grabs onto the car when he tries to drive away. He is clearly the initial aggressor, and he does not get self-defense. He does not get that privilege. That is the law.

(Tr. 460) (emphasis added).[2]

[2] This argument is contrary to Respondent's assertion on appeal that it was "undisputed" that Liggins originally had possession of the knife (Resp. Br. at 53).

Finally, appellant notes that respondent writes that "[o]bviously, Mr. Lance elected, as a matter of reasonable trial strategy, not to impeach [Owens'] testimony with any prior inconsistencies that her prior statement might have contained." (Resp. Br. at 55-56). Of course, without a hearing we do not know whether this was trial strategy or an omission by trial counsel. That is why a hearing is required. E.g., ***State v. Hamilton***, 871 S.W.2d 31, 34-35 (Mo. App., W.D. 1993) (a hearing is needed to determine not only whether trial counsel exercised trial strategy, but also whether that strategy was "reasonable" under the circumstances).

Because Mr. Dequesne's amended motion pleaded facts not refuted by the record in support of his claim of ineffective assistance of counsel that, if true, would warrant relief, the motion court erred in denying the motion without an evidentiary hearing. Mr. Dequesne requests that this Court remand this matter for an evidentiary hearing.

CONCLUSION

For the reasons discussed in Points I-VI in Mr. Dequesne's original brief and Points III and V in this substitute reply brief, Mr. Dequesne respectfully requests that this Court reverse the motion court's order denying postconviction relief, and remand for an evidentiary hearing on Mr. Dequesne's claims mentioned in Points I-V. In the alternative, if this Court rules that because the amended motion was untimely that it will not rule upon Mr. Dequesne's claims in Points I-V on the merits, then for the reasons noted in Point VI of his original brief, Mr. Dequesne requests that this Court reverse the motion court's denial of postconviction relief and remand for a *Sanders* hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13-point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,649 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in July, 2001. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this _____ day of July, 2001, to Mr. Philip M. Koppe Assistant Attorney General, Penntower Office Center, 3100 Broadway, Suite 609, Kansas City, MO 64111.

_____
Craig A. Johnston