No. 84496

––––––––––––––––––––––––

IN THE
MISSOURI SUPREME COURT

––––––––––––––––––––––––

ALLEN L. NICKLASSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

––––––––––––––––––––––––

Appeal from the Circuit Court of Lafayette County, Missouri
15th Judicial Circuit, Division 1
Honorable Kenneth M. Romines, Judge

––––––––––––––––––––––––

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

––––––––––––––––––––––––

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Attorneys for Respondent

INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of Lafayette County. The conviction sought to be vacated was for murder in the first degree, § 565.020.1, RSMo 1994, for which the sentence was death. Due to the sentence imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

The appellant, Allen L. Nicklasson, was charged by information in the Circuit Court of Lafayette County with murder in the first degree (L.F. 17-20).[1] This cause went to trial before a jury from St. Louis County[2] beginning on April 22, 1996, in the Circuit Court of St. Louis County, the Honorable Kenneth M. Romines presiding (L.F. 12; Tr. 676).

This Court stated the following facts in its opinion from the direct appeal of appellant's conviction:

> [On] August 23, 1994, Allen Nicklasson, Dennis Skillicorn and Tim DeGraffenreid decided to return to Kansas City after a trip east along Interstate 70 to obtain drugs. They drove a 1983 Chevrolet Caprice. It broke down near the westbound Danville exit on I-70. Sergeant Ahern and Trooper Morrison of the Missouri State Highway Patrol came upon

[1]The record on appeal consists of the 22-volume trial transcript ("Tr."), a separately paginated two-volume pre-trial transcript, another separately paginated transcript containing the end of the penalty phase evidence, arguments, and penalty phase verdict ("Pen.Tr."), a sentencing transcript, ("Sent.Tr."), a supplemental transcript, the direct appeal legal file ("L.F."), the post-conviction relief legal file ("PCR L.F."), and the evidentiary hearing transcript ("PCR Tr."). Respondent requests that this court take judicial notice of the record on appeal and briefs from the direct appeal in this case, State v. Allen L. Nicklasson, No SC79163.

[2]In response to appellant's Motion for Change of Venue, this Court ordered that jurors from St. Louis County be summoned for the trial (L.F. 30). The trial court later ordered the trial to be held in St. Louis County (L.F. 183-184).

the disabled auto, helped push the car to the side of the road and left the men. The troopers last saw the trio as they walked toward a pay phone.

By the next morning, August 24, 1994, Nicklasson, Skillicorn and Degraffenreid and their car had made 17 miles' progress further west. Near Kingdom City the Caprice broke down again. In an effort to find jumper cables, the three approached a Missouri Highway and Transportation Department employee working in the median of the interstate. He could not assist them. They spotted Merlin Smith's nearby home, decided to burglarize it, and took four guns, ammunition, a skinning knife, money, a pillow case, some change and a cracker box. They stashed most of the stolen property in the bushes, then called for a tow truck to take their car to Roger Redmond's garage. Redmond's mechanic found major problems with the car but was able to restart it. The men paid Redmond with a cracker box full of change and left in the car.

Nicklasson and his cohorts decided to try and make it back to Kansas City in their ailing vehicle. First, however, the three men coaxed the car back toward Smith's house to recover the stolen goods they had previously hidden in the bushes alongside the road. The car gave out again, this time on the south outer road, east of Kingdom City.

Between 4:00 and 5:00 p.m., Richard Drummond saw the stranded Nicklasson, Skillicorn and Degraffenreid, stopped, and offered

to take them to a telephone. They accepted. Drummond drove a white, 1994 Dodge Intrepid that belonged to AT&T, his employer. Nicklasson told Drummond to back up the Intrepid to the Caprice. Nicklasson and his friends loaded the stolen property from Smith's home into the trunk of Drummond's car, keeping a .22 caliber handgun and a shotgun with them when they got into Drummond's car. Nicklasson and Skillicorn sat in the back seat. Degraffenried sat in the front, passenger seat.

When Drummond took his place in the driver's seat, Nicklasson put the pistol to the back of Drummond's head and said, "You're going to take us to where we want to go." Nicklasson and his pals wanted to go back toward Kansas City. Along the way, they decided to kill Drummond. East of Higginsville, they told Drummond to take the Highway T exit. Four miles north of the interstate they turned onto County Road 202. Finding a secluded area, Nicklasson ordered Drummond to stop the car. Skillicorn took Drummond's wallet. Nicklasson walked Drummond into the woods, ordered Drummond to kneel, told him to say his prayers, and shot him in the head twice. Drummond's badly decomposed body was found and identified eight days later.

Nicklasson, Skillicorn and Degraffenreid continued west on I-70 in Drummond's car. They stopped at Joe Snell's house in Blue Springs. Kelly McEntee, who had dated Degraffenried, came to Snell's house,

looking for Degraffenreid. She knocked on the door. Nicklasson answered, then came outside and said, "Don't nobody touch my car," referring to Drummond's car. With that Nicklasson went to the trunk of the Intrepid and removed a shotgun to assist him in assuring those watching that he did not want them to touch the car. He put the shotgun to McEntee's head and announced that he would kill her. He did not kill her, apparently satisfied that he had made his point after he hit her in the face.

Sometime later, Nicklasson, Degraffenried and Skillicorn left Snell's and went to Annie Wyatt's house. Nicklasson told Wyatt that he had killed someone in the woods and described the murder. After a planning session at a local restaurant, Nicklasson and Skillicorn decided to drive to Arizona. Degraffenreid stayed behind. Authorities arrested the two in California, where they were hitchhiking. Arizona authorities found the Intrepid stuck in a sandbar. It contained a letter Nicklasson had written and some of Richard Drummond's and Melvin Smith's property. Authorities also found shell casings near the Intrepid that matched those recovered at the Smith burglary scene and the Drummond murder scene.[3]

---

[3]Skillicorn's conviction and death sentence for this murder, as well as the denial of his motion for post-conviction relief, were affirmed by this Court. State v. Skillicorn, 944 S.W.2d 877 (Mo.banc), cert.

State v. Nicklasson, 967 S.W.2d 596, 603-04 (Mo. banc), cert. denied 525 U.S. 1021 (1998).

During the penalty phase, the State presented evidence that appellant had committed and confessed to two more murders in Arizona and to shooting at people at a strip mall in California, had convictions for offering violence to a corrections officer and assault in the second degree, and had assaulted a guard in the Clay County Jail while awaiting trial in this case (Tr. 3393-3602). Appellant presented evidence about mistreatment by his mother and emotional problems as a child, and about his mental condition (Tr. 3632-3793; Pen.Tr. 15-127). At the conclusion of the penalty phase, the jury found four aggravating circumstances and returned a verdict of death (L.F. 470; Pen.Tr. 208).

On June 28, 1996, the trial court followed the recommendation of the jury and sentenced appellant to death (L.F. 702-703; Sent.Tr. 28). Appellant appealed to this Court, which affirmed the conviction and sentence. Id. at 603, 622.

On June 28, 1998, appellant filed his *pro se* Motion to Vacate, Set Aside, or Correct Judgment and Sentence (PCR L.F. 1-5). Counsel was appointed to represent appellant and filed an amended motion, raising twelve claims for relief (PCR L.F. 8-43). The motion court granted an evidentiary hearing on five of the twelve claims, and that hearing was held on March 19, 2002 (PCR L.F. 69; PCR Tr. 3). At that hearing, appellant presented brief testimony from Patrick Berrigan, one of his trial attorneys (PCR Tr. 3-17). On April 15, 2002, the motion court submitted findings of fact and conclusions of law denying appellant's motion (PCR L.F.). This appeal follows.

---

denied, 522 U.S. 999 (1997); Skillicorn v. State, 22 S.W.3d 678 (Mo. banc), cert. denied 531 U.S. 1039 (2000).

ARGUMENT

I.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S POST-CONVICTION CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO A PORTION OF THE PROSECUTOR'S GUILT-PHASE CLOSING ARGUMENT ON THE GROUND THAT IT MISSTATED THE LAW REGARDING DIMINISHED CAPACITY BECAUSE COUNSEL WAS NOT INEFFECTIVE IN NOT OBJECTING TO THE ARGUMENT IN THAT THE ARGUMENT WAS NOT A MISSTATEMENT OF THE LAW, BUT RATHER WAS A PERMISSIBLE COMMENT ON THE OVERWHELMING AMOUNT OF EVIDENCE THAT APPELLANT DELIBERATED IN THE MURDER OF MR. DRUMMOND.

Appellant argues that trial counsel was ineffective for failing to object to the prosecutor's statement that it "doesn't matter" whether appellant's personality disorder rose "to the level of mental disease or defect" (App.Br. 12). Appellant claims that this argument was a misstatement of the law and directly contradicted the jury instruction regarding whether or not appellant deliberated (App.Br. 12). Appellant contends that it is "inconceivable that any strategic reasons exist" for not objecting, and that the failure to object was "clearly prejudicial to him" (App.Br. 12-13).

A. Facts

During the guilt phase, appellant presented the testimony of two mental health professionals, Dr. Robert Geffner and Dr. William Logan, who testified that appellant suffered from a mental disease or defect, predominantly post-traumatic stress disorder and borderline personality disorder, among other disorders (Tr. 2850-2852, 3046, 3070). The State presented rebuttal testimony from psychologist Dr. Richard Gowdy, who stated that appellant did not suffer from a mental disease or defect, but from antisocial personality disorder, which is not classified as a mental disease or defect (Tr. 3205-3206). The defense presented surrebuttal testimony from Dr. Logan, who testified that he had ruled out antisocial personality disorder, and maintained that appellant suffered from borderline personality disorder (Tr. 3275-3280).

In his guilt-phase closing argument, the prosecutor made the following argument regarding whether or not appellant deliberated:

> [Appellant] killed, and he killed for three reasons. One, he is aggressive; he's violent; he's mean. That's his personality. That's his nature. You've heard the testimony. He's just mean. Whether that's because of a mental disease or defect; whether that's because of past abuse; whether that's because of environment or genetics, he is mean. And he kills.
>
> He kills because of a second reason: When it's to his advantage. It wasn't to his advantage to kill Tim Degraffenreid, Dennis Skillicorn, Keri McEntee, Roger Redmon, Dale Ahern, Mr. Morrison, or Kelly

> Johnson, but it was to his advantage to kill Mr. Drummond.
>
> And remember how he killed him: Two shots, two pulls of the trigger, showing deliberation. But that chamber or that clip holds ten. If we're acting out of our mind; if we are stressed, and we're releasing stress, we'd empty that clip. We don't stop firing. And he fired enough at a place he knew would cause instantaneous death, and he was right.
>
> And he kills for a third reason: He enjoys it. A warm glow came over him at the time. He enjoyed firing the gun at Merlin Smith's residence. He enjoyed what he did, releases he got, excitement of it to get to watch the flash in the man's eyes go out as he dies. It was deliberate. And he knew exactly what he was doing.
>
> You've heard testimony from a number of psychologists, a couple who have been hired to our defense, with one who had been appointed by the Court. ***And there's no doubt in anybody's mind that there is a personality disorder here. Whether that rises to the level of mental disease or defect doesn't matter, given the evidence that's before you. It's clear it wasn't affecting him then.***

(Tr. 3321-3323). There was no objection to this argument (Tr. 3323).

Appellant claimed on direct appeal that the argument that "it doesn't matter" whether appellant's personality disorder misstated the law as to appellant's defense of diminished capacity (SC79163 App.Br.

109). This Court declined plain-error review, ruling that, in context, the statement did "not provide substantial grounds for believing that a manifest injustice or miscarriage of justice [had] resulted." State v. Nicklasson, 967 S.W.2d 596, 615 (Mo. banc), cert. denied 525 U.S. 1021 (1998).

Appellant raised this claim again in his post-conviction relief motion, arguing that counsel was ineffective for failing to object to the alleged misstatement of the law that "it did not matter whether Mr. Nicklasson suffered from a personality disorder or mental disease or defect" (PCR L.F. 18-20). At an evidentiary hearing on this claim, counsel testified that he did not remember the statement until it was included in the post-conviction relief motion, that he had no strategic reason for not objecting, and that he believed he should have objected (PCR Tr. 9-11).

The motion court denied the claim, finding as follows:

> 1) A defense of diminished capacity under Section 552.015, RSMo., has two essential parts. First, a defendant must suffer from a mental disease or defect as defined by Section 552.010. Second, that mental disease or defect must negate a mental state which is an element of the offense charged.
>
> * * *
>
> 3) Movant's claim - - both on direct appeal and before this Court - - borders on the frivolous. Movant narrowly parses the State' argument (even ignoring basic rules of grammar) in a clear attempt to mislead this Court. Clearly, the second clause in the sentence (a dependent clause) and the surrounding sentences explain why the jury need not decide during

the guilt phase whether Movant suffered from a mental disease or defect.

4) Looking at the argument in its proper context, the State argued that since Movant's mental problems did not affect his ability to deliberate and, thus, whether they met the definition of a mental disease or defect did not have to be decided by the jury. This argument is a reasonable interpretation of the law of diminished capacity and the Notes on Use to the instruction on diminished capacity.

5) As the actual argument was not clearly objectionable, Movant has failed to carry his burden of proof that the lack of an objection demonstrated ineffective assistance of trial counsel. When an argument is not clearly objectionable, there are risks involved in objecting - - some of which were noted in trial counsel's testimony. Movant has failed to prove that - - when the entire argument is taken into consideration - - that counsel's decision not to object was anything other than reasonable trial strategy.

6) A Movant is not prejudiced by the failure to preserve a claim for appeal. A Movant is only prejudiced if there is a reasonable probability that the objection would have been sustained and that the jury - - having been told that the argument was improper - - would have reached a different verdict. In the present case, the objection would have been overruled. As such, there is no prejudice. Claim 2 is denied.

(PCR L.F. 75-77).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Lyons v. State, 39 S.W.3d 32, 36 (Mo. banc), cert. denied 122 S.Ct. 402 (2001); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

D. Trial Counsel was Not Ineffective as the Argument was Permissible

To prove ineffectiveness of trial counsel, the defendant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Bucklew v. State, 38 S.W.3d 395, 397 (Mo. banc), cert. denied 122 S.Ct. 374 (2001). To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Lyons, 39 S.W.3d at 36. A movant has the burden of proving grounds for relief by a preponderance of the evidence. State v. Kreutzer, 928 S.W.2d 854, 877 (Mo. banc 1996), cert. denied 519 U.S. 1083 (1997); Supreme Court Rule 29.15(i). Moreover, actions that constitute sound trial strategy are not grounds for ineffective assistance claims, and this Court presumes that any challenged action was a part of counsel's sound trial strategy and that counsel made those decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689-690.

In closing argument, the prosecution is allowed to argue reasonable inferences drawn from the evidence. State v. Ringo, 30 S.W.3d 811, 820 (Mo. banc 2000), cert. denied 532 U.S. 932 (2001). The argument that appellant charges was simply a comment on the evidence that appellant deliberated in the murder of Mr. Drummond. As the motion court pointed out in its findings, there are essentially two components to a diminished capacity defense: 1) that the defendant suffered from a mental disease or defect; and 2) that the disease or defect prevented the defendant from having the state of mind which is an element of the offense. § 552.015.2(8), RSMo 2000. The prosecutor's argument that it did not matter whether the first component was true—whether appellant's psychological disorders actually amounted to a "mental disease or defect"—was not a misstatement of the law, but was simply referring to the fact that the second component—that the disorders affected his ability to deliberate—was clearly not true, i.e., that "it wasn't affecting him" at the time of the murder (Tr. 3323).

The inference supporting this argument was reasonable in light of the overwhelming amount of evidence that appellant deliberated: appellant took the victim into an isolated rural wooded area to murder him (Tr. 2359-2360); he told the victim, "say your prayers," prior to shooting him, showing that appellant intended to take the victim's life (Tr. 2361); appellant shot the victim in the head "because he knew that it would kill Mr. Drummond instantly if he shot him there" (Tr. 2362); appellant and Skillicorn fled from Missouri in an effort to avoid apprehension (Tr. 2363); and appellant concealed the murder weapon by throwing it "in the ocean" (Tr. 2364). Therefore, the prosecutor's argument that it did not matter if appellant had a mental disease because it had not affected his ability to deliberate was a proper comment on the evidence. As the argument was not objectionable, counsel could not have been ineffective for failing to object to it, as counsel will not be deemed ineffective for failing to make a non-meritorious objection.

State v. Clay, 975 S.W.2d 121, 135 (Mo. banc 1998), cert. denied 525 U.S. 1085 (1999).

Because the prosecutor's argument was not a misstatement of the law, but rather a permissible comment on the overwhelming amount of evidence that appellant had the ability to deliberate, counsel was not ineffective for failing to object to the argument. Therefore, the motion court did not clearly err in denying appellant's post-conviction claim, and appellant's first point on appeal must fail.

II.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S POST-CONVICTION CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE ISSUE THAT APPELLANT WAS IMPROPERLY SHACKLED DURING HIS TRIAL BECAUSE APPELLANT'S CLAIM WOULD NOT HAVE REQUIRED REVERSAL IF RAISED ON APPEAL IN THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING RESTRAINTS IN LIGHT OF APPELLANT'S VIOLENT HISTORY, INCLUDING THREE CONFESSED MURDERS, PRIOR CONVICTIONS FOR ASSAULTIVE BEHAVIOR, AND INCIDENCES OF VIOLENCE WHILE IN CUSTODY.

FURTHER, APPELLANT FAILED TO PLEAD SUFFICIENT FACTS AS HE FAILED TO PLEAD THAT THE TRIAL RECORD SUPPORTED THE ALLEGATION THAT ANY JUROR WAS AWARE THAT APPELLANT WAS WEARING LEG IRONS DURING THE TRIAL, THUS FAILING TO ESTABLISH THAT IT WOULD HAVE BEEN POSSIBLE FOR APPELLATE COUNSEL TO HAVE SUCCEEDED IN RAISING SUCH A CLAIM.

Appellant claims that his direct appeal appellate counsel was ineffective for failing to raise the issue that he was forced to wear leg irons during his trial (App.Br. 15-16). Appellant complains that jurors "would naturally presume guilt and dangerousness" from the presence of the restraints (App.Br. 16). Appellant argues that "improper shackling requires automatic reversal[,]" thus he was prejudiced from

counsel's failure to raise the issue (App.Br. 17). Appellant contends that, had an evidentiary hearing been granted, he "would have presented testimony that the jury was aware of the shackling" (App.Br. 17).

A. Facts

Prior to trial, appellant filed a "Motion to Allow Accused to Appear in His Own Clothing and Without Restraints at Any and All Court Appearances" (PCR L.F. 133-134). At a pretrial hearing, the trial court granted the motion as to the clothing, but denied the motion as to the restraints, and referred counsel to the court's security personnel as to how the restraints would be handled (L.F. 133; Tr. 391-392).

Prior to the beginning of voir dire, appellant renewed his request to have his leg shackles removed (Tr. 684-685). The record shows that paper was put up around counsel table, so that the leg restraints could not be seen, and that appellant was not wearing handcuffs (Tr. 684-685). The court denied the request (Tr. 686).

Appellant included the denial of his motion in his 181-point motion for new trial (L.F. 520-522). Appellate counsel John Bailey, one of appellant's trial attorneys, did not raise this issue among the eleven points (some of which contained multiple sub-points) on appeal (SC79163 App.Br.12-24).

In his post-conviction motion, appellant claimed that appellate counsel was ineffective for failing to raise this claim (PCR L.F. 39-41). Appellant argued that there was no justification for the shackles, that the sheets of brown paper in front of the table only "highlighted the problem," and that the leg restraints "could be heard jingling in the courtroom" (PCR L.F. 39-40).

The motion court denied the claim without an evidentiary hearing, finding: 1) that appellate counsel had already received leave to file a brief that exceeded normal page limits to argue the points he raised, and

that appellant did not allege that counsel should have eliminated any of those points to make room for this one; and 2) that there was no evidence in the trial record showing that any juror was aware that appellant was shackled, thus appellate counsel could not have shown on appeal that the jury was aware of the shackles, which would have been required for appellant to succeed on appeal (PCR L.F. 89-90).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Lyons v. State, 39 S.W.3d 32, 36 (Mo. banc), cert. denied 122 S.Ct. 402 (2001); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

The motion court is not required to hold an evidentiary hearing where the motion and the files and records of the case conclusively show that the movant is not entitled to relief. Coates v. State, 939 S.W.2d 912, 914 (Mo. banc 1997); Supreme Court Rule 29.15(h). That burden is met only when (1) the movant alleges facts, not conclusions, which would warrant relief, (2) the allegations of fact raise matters not refuted by the record, and (3) the matters complained of resulted in prejudice to movant. State v. Brooks, 960 S.W.2d 479, 497 (Mo. banc 1997), cert. denied 524 U.S. 957 (1998).

C. Appellant's Claim Did Not Warrant Relief

To establish ineffective assistance of counsel, the defendant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984); Bucklew v. State, 38 S.W.3d 395, 397 (Mo. banc), cert. denied 122 S.Ct. 374 (2001). To prove prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Lyons, 39 S.W.3d at 36. A movant has the burden of proving grounds for relief by a preponderance of the evidence. State v. Kreutzer, 928 S.W.2d 854, 877 (Mo. banc 1996), cert. denied 519 U.S. 1083 (1997); Supreme Court Rule 29.15(i).

To prevail on a claim of ineffective assistance of appellate counsel, appellant must show that the actions of his attorney were outside the wide range of professionally competent assistance, that counsel's errors were so severe that counsel could not be said to be functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, and that the deficient performance resulted in prejudice. Franklin v. State, 24 S.W.3d 686, 691 (Mo. banc), cert. denied 531 U.S. 951 (2000). Strong grounds must exist which show that counsel failed to assert a claim of error which would have required reversal had it been asserted on appeal and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it. Hall v. State, 16 S.W.3d 582, 587 (Mo. banc 2000). "'The right to relief . . . due to ineffective assistance of appellate counsel inevitably tracks the plain error rule; i.e., the error that was not raised on appeal was so substantial as to amount to a manifest injustice or miscarriage of justice.'" Moss v. State, 10 S.W.3d 508, 514-15 (Mo. banc 2000)(quoting Reuscher v. State, 887 S.W.2d 588, 591 (Mo. banc 1994)).

1. The Trial Court Did Not Abuse Its Discretion in Restraining Appellant

The trial court has discretion to impose security measures necessary to maintain order and security in the courtroom. State v. Armentrout, 8 S.W.3d 99, 108 (Mo. banc 1999), cert. denied 529 U.S. 1120

(2000). That discretion includes the use of restraints. Id. The presence or absence of prior misconduct or threats of misconduct, the potential for escape, the nature of the offense charged, and a prior history of violent offenses are among the many factors which have been used to determine the propriety of restraints. State v. Fisher, 45 S.W.3d 512, 515 (Mo. App., W.D. 2001); see Armentrout, 8 S.W.3d at 108; State v. Guinan, 732 S.W.2d 174, 176 (Mo. banc), cert. denied 484 U.S. 933 (1987); State v. Olney, 954 S.W.2d 698, 701 (Mo. App., W.D. 1997).

The record in this case shows that the trial court did not abuse its discretion in ordering appellant to wear leg restraints during the trial. Appellant was charged with one count of first-degree murder, to which he confessed, which was a part of a multi-state crime spree in which appellant admittedly murdered two other people in Arizona and shot at others in a strip mall in California (L.F. 17; Tr. 2361, 3430, 3586-3588, 3593-3600, 3602). Appellant had prior convictions for assault in the second degree and "offering to commit violence" against a corrections officer for striking a guard at the Moberly Correctional Center (Tr. 3396, 3400-3401, 3408-3411). While awaiting trial for this offense, appellant had assaulted security personnel at the Clay County Jail and had apparently also broken a television in the jail, taken the antenna, and threatened to kill someone[4] (Tr. 3489-3495, Pen.Tr. 129). Appellant's pervasive history of violent behavior, including when in custody, demonstrates that the court was well within its discretion in ordering the limited restraints that it did in this case. Because the trial court did not abuse its discretion in requiring appellant to wear leg restraints, appellant's claim that the leg restraints were improper would not have

[4]The television incident was part of an offer of proof made by the prosecutor as potential rebuttal evidence in the penalty phase, which the court denied as improper rebuttal evidence (Pen.Tr. 129-130).

required reversal if raised on appeal. Therefore, appellate counsel was not ineffective for not raising this claim, and appellant's post-conviction claim did not warrant relief.

2. Appellant Failed to Plead that There Was Any Record to Support His Claim

In order to prevail on a claim on appeal that the court's use of restraints was improper, appellant must show not only that the court abused its discretion in ordering the restraints, but that he was also prejudiced by the shackles. Fisher, 45 S.W.3d at 515. To establish prejudice, appellant would have been required to demonstrate at a minimum that jurors saw him shackled. Olney, 954 S.W.2d at 701; State v. Dixon, 922 S.W.2d 75, 77 (Mo. App., W.D. 1996).

Here, measures were taken to prevent the jury from seeing appellant's leg restraints—paper was put around counsel table so that the restraints could not be seen by the jury (Tr. 684-685). Appellant acknowledged that the restraints could not be seen, but argued that "the jingling of the shackles was readily apparent throughout the trial" and claims that the prosecutor's table did not have "any such cloaking device," thus highlighting the problem (PCR L.F. 40; App.Br. 15-17). However, in his post-conviction motion, appellant failed to plead that any portion of the record on direct appeal supporting his assertion that any juror was aware that appellant was wearing the leg restraints (PCR L.F. 40).[5] In order to have succeeded on direct appeal, appellate counsel would have had to include citations to the record demonstrating that the jury was aware of the restraints, as all statements of fact and argument in an appellate brief require specific page references to the legal file or transcript. Supreme Court Rule 84.04(i).[6]

---

[5]Appellant has failed to include any citation to the record in his brief on appeal supporting his allegation (App.Br. 15-17). See Supreme Court Rule 84.04(i). In reviewing the record, respondent has been unable to find any support in the record for appellant's claim that any juror was aware of the restraints.

[6]This requirement applied to appellant's brief on direct appeal. Supreme Court Rule

If appellate counsel had attempted to raise this claim on direct appeal without any support in the record that the jury was aware of the restraints, this Court would have been left to speculate as to whether or not the jury knew that appellant was restrained. However, the appellate courts will not engage in this speculation. Olney, 954 S.W.2d at 701. Because appellant failed to plead in his post-conviction motion that there was support in the record on which appellate counsel could have relied in raising this claim—a fact essential to his claim on that appellate counsel should have raised this issue--- he was not entitled to an evidentiary hearing on his claim. See Morrow v. State, 21 S.W.3d 818, 822-825 (Mo. banc 2000), cert. denied 531 U.S. 1171 (2001).

Because the trial court did not abuse its discretion in requiring appellant to wear leg restraints during his trial, and because appellant pointed to no factual support in the record that the jury was aware of his restraints, appellant's post-conviction claim of ineffective assistance of failed to plead facts warranting post-conviction relief. Therefore, the motion court did not clearly err in denying appellant's claim without an evidentiary hearing, and his second point on appeal must fail.

30.06(h)(1997).

CONCLUSION

In view of the foregoing, the respondent submits that appellant's conviction and sentence and the denial of his Rule 29.15 motion should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122

P. O. Box 899
Jefferson City, MO 65102
(573) 751-332l
Fax (573) 751-5391

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 5691 words, excluding the cover and this certification, as determined by WordPerfect 9 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 27th day of January, 2003, to:

Susan Hunt
Attorney at Law
819 Walnut, Suite 413
Kansas City, Missouri 64106

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122

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

Attorneys for Respondent