No. SC95916

In the
Supreme Court of Missouri

STEWART R. HOPKINS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Taney County
Thirty-Eighth Judicial Circuit
The Honorable Laura J. Johnson, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant (Defendant), Stewart R. Hopkins, appeals a Taney County Circuit Court judgment denying his Rule 29.15 motion for postconviction relief. Defendant's motion sought to set aside his convictions of first-degree murder and armed criminal action, for which he was sentenced to life in prison without the possibility of parole.

Defendant was charged with one count of the class-A felony of murder in the first degree and one count of the unclassified felony of armed criminal action for events that took place on or about October 27, 2010. (L.F. 15-17.) On August 27 through September 4, 2012, a jury trial was conducted. (Tr. 284-1351.)

Viewed in the light most favorable to the verdict, the evidence at trial showed the following:

On the afternoon of October 27, 2010, Defendant and the victim, who was his ex-wife, arrived at a motel in Branson in separate cars. (Tr. 319, 325-26.) They both went to the lobby, and the victim checked in to room 128. (Tr. 328, 350.)

Between 1:30 and 2:00 a.m. on October 28, Defendant called the house of another of his ex-wives and asked her boyfriend to put her on the phone. (Tr. 313.) The ex-wife's boyfriend told Defendant that she was sleeping and asked if he could help Defendant with something. (Tr. 313-14.) Defendant

told the boyfriend that he could not help and that he needed to speak to his ex-wife because he had just killed the victim. (Tr. 314.) The boyfriend did not believe Defendant, so he told him that his ex-wife was not available and ended the phone call. (Tr. 314, 317.)

At around 11:00 a.m. that morning, a housekeeper at the motel found the victim's body on the floor of the motel room. (Tr. 1215.) It appeared that the victim's throat had been slit from one ear to the other. (Tr. 1215.) After trying to revive the victim, the housekeeper called the motel manager, who came to the room while calling 911. (Tr. 320-21, 1215-16.) The manager saw the victim lying on her back on the floor in a puddle of blood with a cut across her neck. (Tr. 322, 355.) The manager also saw bottles of liquor in the room and pills all over the floor. (Tr. 322.) He checked the bathtub for another person because two people had checked in to the room the day before, but the bathtub was empty. (Tr. 322.)

Police and emergency personnel arrived shortly thereafter, and they confirmed that the victim was deceased. (Tr. 356.) Officers saw lacerations and bruising on the victim's arm and an injury on the victim's hand in addition to the neck wounds. (Tr. 361, 375.) The only place where there was a large amount of blood in the room was the pool under the victim, so the officers believed the victim had not been moved after the infliction of the neck

wound. (Tr. 361, 801.) An open folding lock-blade knife was found on a table in the room with what appeared to be blood on it. (Tr. 377-78, 422, 798.)

The victim's cell phone also was in the room in a pile of clothes, and the back of the phone had been separated from the rest of it. (Tr. 417-18.) The telephone in the room had the cord removed. (Tr. 798-99.) A pill bottle with the victim's name on it and papers indicating they belonged to the victim, including divorce papers, an order of protection, and a purported handwritten last will and testament, were all found on the bed. (Tr. 436, 444, 801-04, 890-91.) The documents showed that Defendant was the victim's ex-husband, and one had a license plate number one digit off from the license plate of Defendant's grandmother's car. (Tr. 803-04.) The victim's wallet was found between the mattress and the box spring of the motel bed. (Tr. 806.)

The victim's car was still parked outside the room. (Tr. 806.) Police found another knife under a bus parked in the parking lot near the room. (Tr. 387-88, 538-39.)

Police got a search warrant for the victim's cell phone. (Tr. 539-40.) On the phone, they found a text message originating from Defendant's phone that said, "I just killed your mom." (Tr. 543, 810, 812; St. Exh. 55.)[1]

[1] There was some testimony suggesting that a phone number for the victim's daughter went to phones answered by the victim. (Tr. 613.)

While police were investigating the scene, a friend of the victim checked his phone and found that he had multiple voicemail messages from the victim from the previous night. (Tr. 605-06, 663.) When the friend checked the messages, he discovered several disturbing messages from a phone number the victim regularly used and from a 417 area-code number later confirmed to be Defendant's phone number. (Tr. 608-09, 613, 664; St. Exh. 66.) At least five of the messages had discernable content, including one where the victim said "you're hurting me" and/or "he's stabbing me," and screaming; and one where Defendant said to the friend, "you're next." (Tr. 608-09, 648, 941; St. Exh. 67.)

Later that night, officers investigating the incident learned that Defendant's cell phone "pinged" off of a tower in Tulsa, Oklahoma. (Tr. 814-15.) A fugitive task-force there found Defendant and arrested him. (Tr. 718-21; 767.) In the motel room where they found Defendant, the officers also found bloody clothes and shoes and blood in the shower and on a towel in the bathroom. (Tr. 745.)

Detectives interviewed Defendant, and Defendant told them that, at the victim's invitation, the two went to the motel to talk and drink. (St. Exh. 89.) He said that, at some point, the victim took out a fishing knife, set it on the television, and said that the only reason she invited him there was that "one of us is going to meet Jesus tonight." (St. Exh. 89.) Defendant said that

the victim wanted the two of them to make a suicide pact, so she took all of her Xanax and Defendant took some of his. (St. Exh. 89.) Defendant said that the victim told him she would never let him see their daughter again and that she hated his guts and wanted to see him dead. (St. Exh. 89.)

Defendant said that the argument got heated, and, at some point, the victim grabbed her knife and cut his neck while he sat in a chair. (St. Exh. 89.) He said he "popped up" and slashed at her with his own knife. (St. Exh. 89.) He said he then took her knife and threw it out the door towards the bus in the parking lot. (St. Exh. 89.) At that point, Defendant said that everything else was a "cloudy area" because he "went insane" and "just lost my freaking mind." (St. Exh. 89.) Defendant said that later, sometime after dark, he left the room to buy cigarettes and then returned, but had locked his key in the room, so he had to go to the office to get another one. (St. Exh. 89.) He could not remember if this happened after the confrontation with the victim or "in-between." (St. Exh. 89.)

Defendant later claimed that he cut the victim three times, and that the third time he actually stabbed her throat by pushing the tip of the knife into her neck. (St. Exh. 89.) He could not remember stabbing her anywhere else. (St. Exh. 89.) He said that she was lying on the floor face-up and was near death at that point. (St. Exh. 89.) He said that he would never forget the victim's face, which haunted him, because her lips were discolored, her head

was back, there was blood in her hair, and she was "kind of whitish." (St. Exh. 89.)

Defendant said the next thing he could remember was being in his car on his way to Springfield around 9:30 p.m. (St. Exh. 89.) He was still wearing the bloody clothes. (St. Exh. 89.) He spent the night in his car at a truck stop in Oklahoma, and the next day he went to Tulsa, checked into a motel, and took a shower. (St. Exh. 89.) Defendant said he never called for help for the victim because he knew someone would find her by 11:00 a.m. (St. Exh. 89.)

An autopsy of the victim showed that she had 20 sharp-injury wounds. (Tr. 463-64.) Six of those were to her neck and a seventh hit her ear and face. (Tr. 481.) Three of the neck wounds, including the "particularly" lethal wound that partially severed her carotid artery, were stab wounds and not slashing wounds. (Tr. 495-96.) The victim had also been stabbed in the back below her shoulder blade and below her right buttock. (Tr. 464.) The first of these wounds entered into the lower lobe of her left lung. (Tr. 466.) She had other sharp-injury wounds to her legs, arms, and hand, the latter two of which were defensive wounds. (Tr. 464-65.) The victim had a blood-alcohol content of .277 and had a toxic level of Xanax in her system. (Tr. 487-88.)

DNA tests were conducted on the knives and some clothing found at the crime scene. (Tr. 580-87.) Some of the clothing had blood with Defendant's DNA, and some had blood with the victim's DNA. (Tr. 583-84.)

Defendant's knife had blood on it with a mixture of his own and the victim's DNA on the handle, but only the victim's DNA on the blade. (Tr. 580.) The fishing knife had Defendant's DNA on the blade. (Tr. 581.)

The week after the murder, Defendant made at least two calls from jail. (Tr. 1087-88; St. Exh. 98.) In the first, he told his family members that the victim had his fishing knife and said one of them was going to die that night. (St. Exh. 98.) He said that he took the knife away from the victim and threw it in the parking lot, then took his knife and "had to kill her." (St. Exh. 98.) He also said that he hoped he would go back to one of the correctional centers in Cameron, because that would be "all right." (St. Exh. 98.) In the second call, he told his family to tell his lawyer that he was going to plead self-defense because the victim had her knife and "got me first." (St. Exh. 98.)

About a month later, Defendant made another call. (Tr. 1088; St. Exh. 98.) In that call, he said that he could not wait to get out of jail and back to the Department of Corrections. (St. Exh. 98.) He said he was not going to take his case to trial or anything "stupid like that." (St. Exh. 98.)

Defendant did not testify at trial, but presented the testimony of the housekeeper from the motel who believed she saw the victim alive around midnight. (Tr. 1213-74.)

The jury found Defendant guilty as charged. (L.F. 81-82.) The court sentenced Defendant to concurrent terms of life in prison without the

possibility of parole for murder in the first degree and 25 years for armed criminal action. (L.F. 88; Tr. 1360.)

On May 5, 2014, the Missouri Court of Appeals for the Southern District affirmed Defendant's convictions and sentences in an unpublished opinion. *State v. Hopkins*, SD32486 (Mo. App. S.D. May 5, 2014). The Southen District issued its mandate on May 21, 2014.

On July 16, 2014, Defendant timely filed his pro se motion for postconviction relief. (PCR L.F. 5-17.) On August 18, 2014, the motion court "notified" the Missouri Public Defender's office that Defendant had filed a pro se motion. (PCR L.F. 18.) On September 26, 2014, postconviction counsel entered an appearance and requested 30 additional days to file an amended motion. (PCR L.F. 1.) On October 1, 2014, the motion court granted postconviction counsel's request for additional time. (PCR L.F. 19.)

On December 26, 2014, postconviction counsel filed an amended motion. (PCR L.F. 1, 20-29.) On February 19, 2015, and March 30, 2015, the motion court held hearings. (PCR L.F. 2.) On August 3, 2015, Defendant submitted trial counsel's deposition. (PCR L.F. 3.) On September 10, 2015, Defendant filed a notice with the court stating that he did not wish to testify. (PCR L.F. 3, 30.) On October 19, 2015, the motion court denied Defendant's postconviction motion. (PCR L.F. 4.)

ARGUMENT

I. This Court should remand this case to the motion court for an inquiry into whether Defendant was abandoned by postconviction counsel because Defendant's amended postconviction motion was untimely filed.[2]

1. The record pertaining to this claim.

On July 16, 2014, Defendant filed a timely pro se Rule 29.15 motion for postconviction relief with an affidavit of indigency. (PCR L.F. 5-17.) On August 18, 2014, the circuit court entered an "Order of Notification" stating: "Now on this 18th day of August, 2014, the Court orders the Circuit Clerk to notify the Central Appellate Division for the State Public Defender of the filing of this 24.035 (sic) action and to provide the State Public Defender with a copy of Movant's Form 40. The Circuit Clerk is ordered to furnish to the State Public Defender any and all pleadings from this file or the underlying criminal case that the State Public Defender may request." (PCR L.F. 18.)

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[2] *State v. Creighton*, SC95527 (transfer granted April 5, 2016), which was argued in this Court on October 5, 2016, dealt with the same issue of whether an order notifying the public defender's office about the filing of a pro se motion was an appointment.

On September 26, 2014, postconviction counsel entered his appearance and requested an additional 30 days to file his amended motion. (PCR L.F. 1.) On October 1, 2014, the motion court granted postconviction counsel's request for an additional 30 days to file the amended motion. (PCR L.F. 19.) Then, on December 26, 2014, postconviction counsel filed an amended motion. (PCR L.F. 20-29.) The amended motion did not incorporate any of Defendant's pro se claims. (PCR L.F. 5-17, 20-29.)

On October 5, 2015, the motion court issued its findings of fact and conclusions of law denying Defendant's amended motion. (PCR L.F. 31-37.) The findings of fact and conclusions of law addressed only the claims in Defendant's amended motion. (PCR L.F. 31-37.) Defendant appealed the motion court's judgment. (PCR L.F. 39-40.)

The Missouri Court of Appeals, Southern District, issued its opinion in the case holding that the circuit court's "Order of Notification" constituted an appointment of the public defender's office, and it remanded the case back to the motion court for an abandonment inquiry. (*Hopkins v. State*, SD34216 (Sept. 1, 2016)). The Southern District also transferred the case to this Court pursuant to Rule 83.02.

2. Movant's amended postconviction motion was untimely filed.

Rule 29.15(e) states that "[w]hen an indigent movant files a pro se motion, the [circuit] court *shall* cause counsel to be appointed for the

movant." (emphasis added). The date of appointment is important when determining the deadline for filing a Rule 29.15 amended postconviction motion:

> If an appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days.

Rule 29.15(g).

In this case, if the time limit (60 days plus one 30-day extension) did not begin to run until Defendant's postconviction counsel entered his appearance, then the amended motion was timely filed on December 26, 2014. If the circuit court's order notifying the public defender's office on August 18, 2014, is considered the appointment of counsel, however, then the amended motion was untimely filed. If the amended motion was untimely filed, then the case should be remanded back to the motion court for an

abandonment inquiry without considering the merits. *See Moore v. State*, 458 S.W.3d 822 (Mo. banc 2015).

"The time limits for filing a post-conviction motion are mandatory." *Stanley v. State*, 420 S.W.3d 532, 539 (Mo. banc 2014). Although "[c]ourts 'are solicitous' of post-conviction claims that present a genuine injustice," that "policy . . . must be balanced against the policy of 'bringing finality to the criminal process.'" *Dorris v. State*, 360 S.W.3d 260, 267 (Mo. banc 2012) (quoting *White v. State*, 939 S.W.2d 887, 893 (Mo. banc 1997)). When the time limits are disregarded, "finality would be undermined and scarce public resources will be expended to 'investigate vague and often illusory claims, followed by unwarranted courtroom hearings.'" *Id.* "The time limits in [the postconviction rules] 'serve the legitimate end of avoiding delay in the processing of prisoner's claims and prevent the litigation of stale claims." *Id.* at 267 (quoting *Swofford v. State*, 323 S.W.3d 60, 64 (Mo. App. E.D. 2010)).

One of these postconviction time limits involves the filing of the amended postconviction motion, and one of the triggering events to determine the deadline for filing this motion is the appointment of counsel for indigent movants. As stated above, under Rule 29.15(e), courts "shall" cause counsel to be appointed for indigent postconviction movants. "Generally the word 'shall' connotes a mandatory duty." *Dorris*, 360 S.W.3d at 267 (quoting *State ex rel. Blue Springs v. Rice*, 853 S.W.2d 918, 920 (Mo. banc 1993)). This Court has

held that "the effective date of appointment of counsel is the date on which the office of the public defender is designated rather than the date of counsel's entry of appearance." *Stanley*, 420 S.W.3d at 540 (quoting *White*, 813 S.W.2d at 864).

The circuit court was under a mandatory duty to appoint counsel when it received Defendant's pro se postconviction motion accompanied by an affidavit of indigency. Therefore, the order notifying the public defender's office of Defendant's motion in this case was the legal equivalent of designating that office as appointed counsel for Defendant. If the order notifying the public defender is not considered an appointment, then it is unclear when the appointment actually took place, which frustrates the mandatory time limits of Rule 29.15.

Further, the date of postconviction counsel's entry of appearance cannot be the date when the mandatory time limits began to run in this case. Rule 29.15(g) allows such an entry to be the start of the time limits when "an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant." Here, because Defendant filed a Form 40 with an affidavit of indigency, and because the public defender's office took the case, this case falls into the first category of cases contemplated by Rule 29.15(g), which requires the appointment of counsel. Therefore, if the notification date is not considered the date of appointment of counsel, then

the record is insufficient to determine when the mandatory time limits began to run. If the record is insufficient to make such a determination, this case should still be remanded to the motion court for an abandonment inquiry. *See Austin v. State*, 484 S.W.3d 830, 833 (Mo. App. E.D. 2016).

Finally, if the circuit courts are allowed to "notify" the public defender's office, and if the public defender's office is allowed to arbitrarily decide when to enter an appearance to start the mandatory filing dates, that could give rise to manipulation or circumvention of the mandatory time limits. Such manipulation contradicts the purpose of the rule. Further, Missouri would run the risk that its postconviction judgments would be subject to federal habeas review on the ground that its postconviction deadlines are not "firmly established" or "regularly followed." *See Oglesby v. Bowersox*, 592 F.3d 922 (8th Cir. 2010) (holding that the defendant's federal habeas claim was defaulted for failure to comply with the "firmly established" and "regularly followed" time limits regarding the filing of amended postconviction motions).

This Court should find that the motion court's notice to the public defender's office that Defendant had filed a pro se motion constitutes an appointment of the public defender's office. Such a finding would result in Defendant's amended motion having been untimely filed. Therefore, this Court should remand this case back to the motion court for an abandonment inquiry pursuant to *Moore v. State*, 458 S.W.3d 822 (Mo. banc 2015).

II. The motion court did not clearly err in denying, after an evidentiary hearing, Defendant's claim of ineffective assistance of counsel alleging that his trial counsel failed to object to the admission of Defendant's jail conversations.

1. The record pertaining to this claim.

In his amended postconviction motion, Defendant alleged that trial counsel was ineffective for failing to object to the State's introduction of three telephone calls Defendant made from jail to his family, two of which included references to Defendant's prior incarceration." (PCR L.F. 25.)

In the first phone call, Defendant stated that he hoped to be sent back to Cameron because that was a level three facility. (PCR L.F. 25; St. Exh. 98.) In the third phone call, Defendant stated that he could not wait to get back to the Department of Corrections and out of the local county jail. (PCR L.F. 25; St. Exh. 98.)

In his deposition, which was submitted in lieu of testimony at a hearing, Defendant's trial counsel testified that he believed that there was a conversation off the record during which the trial court ruled that the jail recordings were admissible. (Def. Exh. 1, p. 22-24.) Trial counsel testified that he did not object to the recordings at trial for this reason. (Def. Exh. 1, p. 22-24.)

In its findings of fact and conclusions of law, the motion court found that, even if the evidence was erroneously admitted, Defendant failed to show prejudice because he admitted to stabbing the victim more than twenty times:

> Even if this Court were to find that the evidence was inadmissible and that the (sic) [trial counsel] was ineffective for failing to object to their admission, [Defendant] still fails to meet his burden of proof as to [this claim] – specifically, he fails to show any form of prejudice to himself. The evidence in the State's case partially consisted of a lengthy interview conducted by the City of Tulsa, Oklahoma Police Department in which [Defendant] gave a blow-by-blow account of the victim's murder, all the way to the final blow. Even if the jail phone calls did not come into evidence, the evidence of [Defendant's] guilt is overwhelming and no prejudice resulted from the admission of those phone calls.

(PCR L.F. 35.)

2. Standard of review

Appellate review of a judgment overruling a Rule 29.15 postconviction motion is limited to whether the motion court's findings and conclusions were "clearly erroneous." *Johnson v. State*, 333 S.W.3d 459, 463 (Mo. banc 2011); Rule 29.15(k). "The motion court's findings and conclusions are clearly

erroneous only if, after reviewing the entire record, the appellate court is left with the definite and firm impression that a mistake has been made." *Midgyett v. State*, 392 S.W.3d 8, 12 (Mo. App. W.D. 2012) (quoting *Krider v. State*, 44 S.W.3d 850, 856 (Mo. App. W.D. 2001)).

In order to establish ineffective assistance of counsel, the movant must show that (1) counsel's performance was so deficient that it fell below an objective standard of reasonable competence, and that (2) counsel's deficient performance prejudiced the movant's defense. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment. *Id.* at 689-90. To show prejudice, the movant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Defendant bears the burden of proving his claim by a preponderance of the evidence. Rule 29.15(i).

3. Movant is not entitled to any relief.

Defendant alleges that trial counsel was ineffective for failing to object to evidence of phone calls Defendant made from jail that included references to Defendant's prior incarceration. (Defendant's substitute brief at 23.) This allegation, however, is without merit because Defendant cannot show that counsel was ineffective or that he was prejudiced.

"Ineffective assistance of counsel is rarely found in cases where trial counsel has failed to object." *Cornelious v. State*, 351 S.W.3d 36, 44 (Mo. App. W.D. 2011). "The movant must prove that the failure to object was not strategic and that the failure to object was prejudicial." *Id*. Just because trial counsel failed to object to everything objectionable does not equal incompetence. *Greer v. State*, 406 S.W.3d 100, 105 (Mo. App. E.D. 2013). "In many instances seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes." *Id*. "If a movant fails to proffer evidence of prejudice and deprivation of a fair trial, a trial counsel's failure to object constitutes only a procedural default, precluding appellate or collateral relief." *Id*.

Here, trial counsel stated a strategic reason for failing to object: He believed the court ruled that the evidence of the jail phone calls was admissible. (Def. Exh. 1, p. 22-24.) It was reasonable for counsel to forgo an objection when he had no reason to believe that the court would rule in his favor. *See Helming v. State*, 42 S.W.3d 658, 689 (Mo. App. E.D. 2001) (finding that it was reasonable for counsel not to object to evidence where counsel had objected to similar evidence and the objections were overruled, and counsel had no reason to believe that the court would sustain an objection to this particular evidence).

Trial counsel also is not ineffective for failing to make a non-meritorious objection. *Zink v. State*, 278 S.W.3d 170, 188 (Mo. banc 2009). An objection to the admission of the phone calls in question would have been without merit, and it would have been overruled. Generally, evidence of uncharged crimes is inadmissible unless it has the legitimate tendency to establish the defendant's guilt of the crime charged and is not merely used to show the defendant's bad character or predisposition to commit the crime. *State v. Harris*, 477 S.W.3d 131, 143 (Mo. App. E.D. 2015). "Evidence of prior bad acts may be admissible, however, if it is logically relevant in that it has some tendency to establish directly the defendant's guilt of the charged crimes and if its probative value outweighs its prejudicial effect." *State v. White*, 329 S.W.3d 710, 713 (Mo. App. S.D. 2010).

Here, the recorded conversations included Defendant's admission that he murdered the victim. (St. Exh. 98.) In the first conversation, Defendant told his family members that the victim had his fishing knife and said one of them was going to die that night. (St. Exh. 98.) Defendant said that he took the knife away from the victim and threw it in the parking lot, then took his knife and "had to kill her." (St. Exh. 98.) In the second call, he told his family to tell his lawyer that he was going to plead self-defense because the victim had her knife and "got me first." (St. Exh. 98.) In the third conversation, Defendant said that he was not going to take his case to trial or anything

"stupid like that." (St. Exh. 98.) Defendant said, "I know what happened. I told them straight up what happened." (St. Exh. 98.) Because the conversations contained admissions of guilt, they were admissible, and an objection would have been without merit.

In addition, Defendant's comments during the phone calls had a legitimate tendency to directly establish his guilt of the charged crimes by showing consciousness of guilt and expectation of conviction. Because the comments were an admission of consciousness of guilt, the evidence was highly probative, which outweighed any prejudicial effect it may have had. The evidence also was not a bare reference to Defendant's prior incarceration; it was instead phrased as an expectation of being convicted of the current crime, which was probative of Defendant's current guilt. *See State v. Boone*, 869 S.W.2d 70, 75 (Mo. App. W.D. 1993).

Further, no particular crime was mentioned in any of the phone calls, so any reference was vague and showed only that Defendant had been to prison before. This is not enough to constitute evidence of prior crimes because "'[v]ague references' are not clear evidence associating a defendant with other crimes." *State v. Butler*, 24 S.W.3d 21, 34 (Mo. App. W.D. 2000) (quoting *State v. Hornbuckle*, 769 S.W.2d 89, 96 (Mo. banc 1989)).

Moreover, Defendant cannot show prejudice from the admission of the jail phone calls because there was overwhelming evidence of his guilt. As the

motion court noted, Defendant confessed to the crime, giving a detailed description of how he killed the victim. (St. Exh. 89.) DNA tests on some of the clothing found at the crime scene showed that Defendant's DNA was on the bloody clothing, and some had blood with the victim's DNA. (Tr. 583-84.) Defendant's lock-blade knife had blood on it with a mixture of Defendant's and the victim's DNA on the handle, but only the victim's DNA on the blade. (Tr. 580.) The fishing knife had Defendant's DNA on the blade. (Tr. 581.) Where, as here, there is overwhelming evidence of guilt, Defendant cannot show prejudice from his counsel's actions. *Taylor v. State*, 382 S.W.3d 78, 81 (Mo. banc 2012).

Therefore, the motion court did not clearly err, and Defendant's claim should be denied.

CONCLUSION

Defendant's amended postconviction motion was untimely filed, so this Court should remand this case to the motion court for an abandonment inquiry. Alternatively, the motion court did not clearly err, and its judgment denying Defendant's motion for postconviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) in that it contains 5310 words excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix.

2. That a copy of this brief was sent through the eFiling system on Monday, October 31, 2016, to:

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