No. 84322

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IN THE
MISSOURI SUPREME COURT

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CARLOS GREATHOUSE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

_____

Appeal from the Circuit Court of Benton County, Missouri
The Honorable Theodore B. Scott, Judge

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RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a Supreme Court Rule 29.15 Motion to Vacate, Set Aside or Correct Judgment or Sentence, after an evidentiary hearing, in the Circuit Court of Benton County, Missouri, the Honorable Theodore B. Scott, presiding. The conviction sought to be vacated was for first degree murder, ' 565.020, RSMo 2000, for which the sentence was life imprisonment. The Court of Appeals, Western District, affirmed appellant's convictions and sentences in Greathouse v. State, WD59518, memorandum order, (Mo.App. W.D. January 15, 2002). This Court has jurisdiction as it sustained appellant: s application for transfer pursuant to Supreme Court Rule 83.04. Article V, ' 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Carlos Greathouse, was charged by indictment with one count of murder in the first degree, in violation of ' 565.020, RSMo 1994 (2d Supp. L.F. 20).[1] Appellant's case was first heard before a jury in Wright County, Missouri, the Honorable Theodore B. Scott presiding (1st Supp. L.F. i-ii; 2d Supp. L.F. 14). The jury, however, could not reach a verdict, and a mistrial was declared (1st Supp. L.F. 777; 2d Supp. L.F. 14).

On October 18, 1996, the defense requested, and received, a change of venue from Wright County to Benton County, Missouri (2d Supp. L.F. 15). Appellant's case was then heard before a jury

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[1] For simplicity's sake, respondent has adopted the following designations of the various portions of the records on appeal, which are as follows: Trial transcript ("Tr."); Sentencing Transcript ("Sent.Tr."); Legal File ("L.F."); First Supplemental Legal File, which contains the transcript from appellant's first trial, in Wright County, which ended in a mistrial ("1st Supp. L.F."); Second Supplemental Legal File ("2d Supp. L.F."); Post-Conviction Legal File (APCR L.F.@); Post-Conviction Hearing Transcript (APCR Tr.@); and the Dr. Stetler Deposition (AStetler Depo.@).

in Benton County beginning on March 17, 1997, with the Honorable Theodore B. Scott again presiding (Tr. 1; L.F. 1).

Viewed in the light most favorable to the verdict, the evidence was adduced at trial as follows: In November, 1990, the victim in this case, Machelle Lee, was living with her aunt, LaDonna Strevel, in Hartville, Missouri (Tr. 607-608). On November 23, 1990, Machelle's mother was at the home; she had been drinking, as had Machelle (Tr. 608-609). Machelle and her mother got into an argument (Tr. 609). Around 8:00 pm, Machelle left the house wearing a two-piece pajama set with plastic feet on the bottoms (Tr. 609-610). She was also wearing white, tie-up tennis shoes and her eyeglasses (Tr. 609-610). She was carrying a sports cup or "sippy cup" with a Coca-Cola logo on it (Tr. 609-610).

Meanwhile, that same evening, appellant and Frankey Coday went to the home of Billy Ray Liles (Tr. 676-679). Appellant and Coday asked Liles if he wanted to ride around and drink a few beers with them (Tr. 680). Liles agreed to do so (Tr. 680). The men got into Coday's van and drove around, making a stop at a liquor store in Hartville to buy more beer, wine coolers, and whiskey (Tr. 681-682).

As they were driving around, and before they got to the intersection of Pleasant Hill and Sunshine, appellant, Coday and Liles passed Machelle, who was walking down the road (Tr. 682-685). Appellant knew Machelle and asked to stop and pick her up to see if she needed a ride (Tr. 685). Coday turned the van around and stopped to pick Machelle up (Tr. 686).

When Machelle got into the van, she talked about how she had gotten into an argument with her mother and said that she needed to use a phone (Tr. 686-687). Between 8:30 and 9:00 pm, the men took Machelle to the home of Cynthia Curtner where she used the phone (Tr. 618-621, 686-688). Machelle dialed, but no one answered, so she hung up (Tr. 620). She returned to the van and they headed back

down Sunshine Road (Tr. 688). Machelle asked if she could ride and drink with the men for a while and asked if they would take her to her grandfather's house (Tr. 689).

The group continued driving, essentially in a circle (Tr. 690). During this time, Liles and Machelle "were kind of groping each other and kissing" in the back seat (Tr. 691-692). Liles asked Coday to stop the van at the intersection of Pleasant Hill and Sunshine so that he and Machelle could have sex (Tr. 693). Liles then asked appellant and Coday to get out of the van but they refused and indicated that they wanted to watch while Liles and Machelle had sex (Tr. 693). Liles and Machelle refused at first but eventually relented (Tr. 693).

After Liles and Machelle had finished, Machelle asked Coday if he wanted to have sex with her but Coday declined (Tr. 693). Appellant then asked if he could have sex with her; Machelle refused (Tr. 693). Appellant and Machelle then argued (Tr. 695). Appellant still wanted to have sex with Machelle but she was calling appellant a "dirty old man" and continuing to refuse (Tr. 695).

A short while later, Liles and Coday, who were in the front seat of the van, turned around and saw that appellant had Machelle pinned on the back seat (Tr. 696). Machelle's clothes were up and she was naked from the waist down (Tr. 697). Appellant had his pants down (Tr. 697). Liles asked appellant to "quit" a couple of times (Tr. 697). Machelle, too, was telling appellant to stop and hitting him in the face (Tr. 697). Appellant continued until Coday told him to stop; then, he released Machelle (Tr. 697-698). Machelle got dressed and got out of the van (Tr. 698). Appellant followed (Tr. 698).

Liles heard arguing coming from outside the van (Tr. 698). Appellant then climbed back into the van (Tr. 699). Appellant said, "Let's get the hell out of here" (Tr. 699). When asked where Machelle was, appellant replied, "You don't want to know. Let's get the hell out of here" (Tr. 699). Appellant also made

the comment "that he'd hit her in the head with a rock" (Tr. 699). When they were up the road a bit, appellant explained that "she was going to tell the law that he'd raped her. So that's why he had hit her" (Tr. 699).

Coday asked how hard appellant had hit her, and Coday and Liles suggested going back to see how Machelle was (Tr. 700). When the men returned to the area, they found Machelle in a ditch (Tr. 700). Appellant got out of the van, looked Machelle over and tried to put her in the van so he could see better (Tr. 700). Appellant asked Coday to help him and together they picked Machelle up and put her back in the van (Tr. 700). Appellant checked to see if Machelle was breathing but she was not (Tr. 700). The men then assumed that Machelle was dead and tried to figure out what they were going to do with her body (Tr. 700-701).

The men drove up the road and dropped Machelle's body off on Morton Road (Tr. 701). Appellant and Coday removed her body from the van and threw her across a barbed wire fence (Tr. 701). Machelle's body was fully clothed at this point (Tr. 702-703). The men then started up Morton Road, but they had to turn back because of construction work on a bridge (Tr. 703). After backtracking, and after they had gotten back to where they had dumped the body, appellant said that he wanted to stop again because he had forgotten something (Tr. 703). The men stopped and appellant crossed the fence (Tr. 704). Then, appellant returned to the van carrying some articles of clothing (Tr. 704). Appellant threw the clothes in the back of the van (Tr. 704).

At this point, Liles had some concern about the semen left in Machelle (Tr. 718). Appellant said "that he had run a wire or a brier or something inside of her" (Tr. 718). Appellant said that this was to "make her bleed so that it would wash the semen out" (Tr. 718-719).

The men continued driving, throwing things out along the way, and wound up at an old, abandoned pallet mill (Tr. 704-705). There, they burned the clothing appellant had retrieved (Tr. 705). The men then returned to Coday's residence and because the van was low on gas at that point, Coday dropped appellant and Liles at their respective homes in his dump truck (Tr. 626-630, 705).

Roy McDaris, a school bus driver, discovered Machelle's body when he was driving his bus route (Tr. 630-632). McDaris contacted the Wright County Sheriff (Tr. 633).

Dwayne Gale, of the Missouri Highway Patrol, responded to the scene where the body was found north of Hartville, on Morton Road, in Wright County (Tr. 636-637, 645). The body was nude and face up (Tr. 640). There were several scratches on the body and a limb from a rose bush of some sort was inserted in the vagina (Tr. 640). Gale also found a beer can and a pajama top which he colleted as evidence (Tr. 639). A mile from the scene where the body was discovered, Gale found a "sippy cup" (Tr. 643).

Doug Loring, also of the Highway Patrol, responded to the scene where the body was discovered (Tr. 653-654). Loring found what he thought might be the murder weapon in the case -- a large rock (Tr. 655). The rock, which was found about four feet from Machelle's body, had blood and hair on it (Tr. 65-656). There was also a pool of blood near where the rock was found which measured a foot across and was at least 2-3 inches deep (Tr. 656). The blood found on the rock was consistent with Machelle's blood (Tr. 661, 950-952). Loring also found a combat boot track which was consistent with Coday's boot (Tr. 657-660).

On November 26, 1990, Dr. James Spindler performed an autopsy on Machelle Lee (Tr. 1032-1034). Dr. Spindler estimated that Machelle had been dead a minimum of 36-48 hours (Tr. 1035-1036).

He determined that the cause of death was from a massive blow to the back of the head which crushed her skull, causing bleeding within the head cavity, which in turn caused pressure on the brain and ultimately death (Tr. 1037). Machelle also suffered several other injuries (Tr. 1037). She had sustained multiple blunt force trauma injuries to the face; at least ten major blows to her face caused bruising (Tr. 1037, 1100). These facial injuries could have been caused by a fist (Tr. 1101). She also suffered a cut on her forehead from a blunt force injury which broke the skin (Tr. 1038). This injury to the forehead could not have been caused by a fist and was caused by another blunt object such as a rock or pipe (Tr. 1101-1103). Machelle had an injury to her nose that was consistent with wearing eyeglasses and being hit in the face (Tr. 1101). Any of Machelle's facial wounds could have caused her to lose consciousness (Tr. 1103).

The death blow was on the back of Machelle's head and was 1-3/4" in length (Tr. 1038). This blow caused pressure on the brain, or a subdural hematoma wherein a blood clot forms within the cranial cavity (Tr. 1038, 1102). The blow also fractured her skull which caused bleeding from the ear canal (Tr. 1039, 1100). Dr. Spindler testified that this injury could be consistent with someone slamming Machelle's head against a rock (Tr. 1039).

Machelle also had several scratches on her breasts and abdomen consistent with someone sawing or abrading the skin with a brier-type material (Tr. 1104-1105). Dr. Spindler opined that the scratches were not consistent with someone running through a brier patch (Tr. 1105). Machelle also had scratches concentrated on her inner thighs which were inconsistent with accidental injuries (Tr. 1106). She had scratches on the surface, but not the soles, of her feet (Tr. 1107-1108).

Dr. Spindler found a brier, which was about two feet long, protruding from Machelle's vagina (Tr. 1105-1106). Dr. Spindler indicated that while her other wounds were pre-mortem, the insertion of the

brier was likely post-mortem (Tr. 1099, 1111). Dr. Spindler also found that Machelle's genitalia were bruised, which was evidence of sexual assault (Tr. 1111). Dr. Spindler found defensive injuries on Machelle's left hand and bruising injuries to her ankles and wrists that were consistent with Machelle having been restrained (Tr. 1107, 1109).

Dr. Spindler found sperm in the vaginal and anal smears he took from Machelle's body (Tr. 1111). This evidence was tested; appellant was eliminated as a source of the sperm as well as Coday and Liles (Tr. 955-956, 965-966). Dr. Spindler testified that it would be possible for someone to rape and leave no sperm behind (Tr. 1112). Dr. Spindler also testified that he had reviewed appellant's medical records, that appellant had been diagnosed with a testicular mass, and that, as a result, appellant suffered from spermatocele, or swelling around the testicle (Tr. 1114). Spermatocele, in turn, is a condition which can cause insufficient production of sperm and lead to infertility (Tr. 1112, 1114-1115). Cary Maloney, a criminalist at the Missouri State Highway Patrol Crime Laboratory in Jefferson City, Missouri, conducted the DNA analysis on the vaginal swabs taken from the victim (Tr. 962). Maloney testified that there are instances where some type of sexual intercourse could occur and they would not be able to pick up any DNA because ejaculation may not have occurred and no semen deposited or where an individual may have low or no semen count (Tr. 967-968). Maloney also stated that it makes a difference as to how long after the intercourse that a sample is collected for analysis (Tr. 967-968).

A few days after Machelle's body was found, Dickie Moore attended a party at Clarence Lansdown's home where appellant and Coday were present (Tr. 927-931). Dickie[2] overheard a

[2] Because two witnesses share the last name "Moore," respondent will refer to these witnesses by their

conversation about Machelle's death (Tr. 931). Dickie heard appellant ask a question, then Coday nodded his head yes (Tr. 933-934). Appellant then asked if she was dead (Tr. 934). Coday either nodded or said yes (Tr. 934). Appellant then said that "the only thing he done was raped her" (Tr. 934). Appellant said that both he and Coday dragged her through the fence (Tr. 937).

Rodney Moore also attended a party, in December of 1990, where appellant and Coday were present (Tr. 916-919). Rodney overheard appellant and Coday talking about the murder of Machelle (Tr. 919). Appellant said "that he would like to do something like that again" and "that he'd like to have sex with another young girl" (Tr. 919). Rodney also heard something about picking up a young girl somewhere off of F Highway on a gravel road (Tr. 919-920). Rodney overheard appellant say that the girl's body was dumped over a fence in a brier patch (Tr. 920). Later, Rodney visited Coday and had a chance to look in his van; he noticed spots of blood (Tr. 920-921).

Liles also hosted a party, sometime prior to May of 1991, where appellant talked about the murder (Tr. 705-707). Appellant said "he had killed Machelle and he would do it again if he could get away with it" (Tr. 707).

Benjamin Hall also knew appellant and Coday and attended a party at Lee Liles' home where the subject of the murder was discussed (Tr. 851-856). Hall heard appellant telling Lee Liles that they had picked Machelle up and "just went out for -- had one hell of a night and they said they dumped her off on a dirt road" (Tr. 856-858). Later, Hall was in jail with appellant (Tr. 857). Appellant said that he did not

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first names.

know why they had him in jail (Tr. 857). Hall replied, "well, you know, that ain't what you told Lee" (Tr. 857). Appellant agreed and said, "yeah, don't tell them that" (Tr. 857). When appellant spoke to Hall about this in the jail, he seemed "kinda worried" (Tr. 905).

In 1992, appellant went to visit Jeri Crapo at her home (Tr. 990-993). Appellant told her about Machelle's death and "said that they had been out driving around, picked her up" (Tr. 993-995). Crapo said that appellant explained that "they had took her out somewhere on a gravel road and had raped and beat her. And supposedly, one of them had hit her in the head with a hammer and it's supposed to have killed her is what they told me anyway" (Tr. 994). Crapo also said that "they supposed to have stuck sticks and bottles up inside of her" and left her over a fence (Tr. 994). Appellant warned Crapo that she would "end up just like her [Machelle] if [she] said anything" (Tr. 995). Crapo also testified that in 1994, appellant tried to run her off the road (Tr. 996).

Appellant also spoke with Brian Hicks, who was housed with appellant in jail (Tr. 973). Hicks testified that appellant talked about the case all the time (Tr. 974). Appellant told Hicks that "they was lying about him because saying he went in the house. He knew they was lying because he stayed outside, didn't go in the house" when Machelle went in to make a phone call (Tr. 974).

Neldon Neil also testified that appellant spoke to him about the Machelle Lee homicide (Tr. 1050-1052).[3] Neil testified that he and appellant used to drink and drive around gravel roads (Tr. 1052). When appellant got drunk, he would talk about the murder "and tell [Neil] he didn't mean to kill the girl" (Tr.

[3]Neldon Neil's name is spelled "Neil" in the transcript but "Neal" elsewhere in the record and in appellant's brief. Respondent has chosen to refer to him as "Neldon Neil.@

1052). During one of these driving trips, appellant told Neil that he did not want to go into Wright County because he was afraid that police might pick him up for the Machelle Lee killing (Tr. 1053). When this happened, Neil told appellant, "Well, you told me you killed her, Carlos" (Tr. 1053). Appellant replied, "Yeah, but they can't prove it" (Tr. 1053). Neil first told this information to Kevin Floyd, with the Missouri Highway Patrol, in 1993 and again came forward with the information in 1996 (Tr. 1054-1055, 1092-1093).

Liles, meanwhile, left the state of Missouri in May of 1991, though he came back to Hartville to visit occasionally (Tr. 705-706). Ultimately, Liles moved to Lordsburg, New Mexico (Tr. 707).

Sheriff Mitchell, of Wright County, received information from Liles' brother that Liles could have been involved in the Machelle Lee case (Tr. 776-778). In 1995, Sheriff Mitchell went out to Lordsburg, New Mexico to interview Liles (Tr. 707-708, 777-778). When Sheriff Mitchell told Liles that they had arrested appellant and Coday in the case, Liles indicated that someone else was involved as well (Tr. 708-709, 779). When confronted, Liles admitted that he was the third person (Tr. 710, 779). Liles gave a written statement in Lordsburg, returned to Missouri, and gave additional details to the sheriff as he remembered them (Tr. 779-782). Liles also took Sheriff Mitchell to where Machelle was hit and then loaded back into the van, and to the location where they had dumped her body (Tr. 780). Liles testified that in exchange for his truthful testimony, he was being charged with sexual assault in the first degree (Tr. 678).

Appellant did not testify at trial but presented an alibi defense and asserted, through his witnesses, that he was working on a farm milking cows when the murder took place (Tr. 1151, 1173-1176, 1184-1185). The state offered evidence in rebuttal (Tr. 1275, 1280). At the close of the evidence, instructions,

and arguments of counsel, appellant's jury found him guilty as charged (Tr. 1335; L.F. 51). The parties then offered evidence in the penalty phase (Tr. 1396-1622). At the close of the penalty phase evidence, the jury assessed punishment at life imprisonment without possibility of probation or parole in the Missouri Department of Corrections (Tr. 1667; L.F. 68, 133).

Appellant=s conviction was affirmed by this Court on April 20, 1999. State v. Greathouse, WD54476, memorandum opinion (Mo.App. W.D. April 20, 1999).

Appellant filed his pro-se motion on September 17, 1999, and following appointment of counsel, appellant=s amended motion was filed on December 20, 1999 (PCR L.F. 1-130). Following an evidentiary hearing, the motion court issued its findings of fact and conclusions of law, denying appellant=s claims (PCR L.F. 131-166).

The Western District Court of Appeals affirmed the motion=s court=s judgment and denial of appellant=s motion for post-conviction relief. Greathouse v. State, WD59518, memorandum opinion (Mo.App. W.D. January 15, 2002).

This Court granted appellant=s request for transfer on April 23, 2002.

ARGUMENT

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT=S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO HIRE A DNA EXPERT, DR. DEAN STETLER, TO REBUT THE STATE=S ASSERTION THAT APPELLANT=S DIAGNOSIS OF SPERMACOTELE WHICH RESULTS IN A LOW SPERM COUNT WOULD CAUSE HIM NOT TO LEAVE A DETECTABLE AMOUNT OF SPERM IN THE VICTIM=S BODY, BECAUSE TRIAL COUNSEL ACTED REASONABLY AND APPELLANT WAS NOT PREJUDICED BY THE ACTIONS OF HIS COUNSEL IN THAT 1) TRIAL COUNSEL INVESTIGATED A DNA EXPERT, CARY MALONEY, AND WOULD HAVE CALLED HIM TO TESTIFY IF MALONEY HAD NOT TESTIFIED IN THE STATE=S CASE IN CHIEF, AND 2) DR. STETLER=S TESTIMONY WAS CUMULATIVE TO THAT PRESENTED BY THE STATE AND WOULD NOT HAVE PROVIDED APPELLANT WITH A DEFENSE.

Appellant claims that the motion court was clearly erroneous in denying his claim that his trial counsel was ineffective for failing to hire a DNA expert, Dr. Dean Stetler, to testify and rebut testimony from Dr. Spindler, a State=s witness, that appellant=s condition, spermacotele, which results in a low or nonexistent sperm count, would be a possible reason that his sperm was not found in the victim=s vagina (App. Br. 25). Appellant alleges that Dr. Stetler would have testified that a low sperm count would not make appellant=s sperm undetectable by DNA tests (App. Br. 27). Appellant claims that if the jury would have heard this testimony, there is a reasonable probability that the result of the trial would have been different (App. Br. 32).

Relevant Facts

Dr. Spindler, a pathologist, who performed the autopsy on the victim, testified, during appellant=s trial, as follows:

Q. Doctor, is it medically possible that someone could sexually assault a person and not leave a detectable amount of sperm?

A. Yes, it is.

* * * * *

Q. And how is that the case?

A. Well, there are a number of possibilities. The most - - you know, there are just a number of possibilities. A person could wear a condom when ejaculating. A person could have penile penetration of a vagina and pull the penis out before ejaculation. There would be no sperm left. A person could lose an erection during a sexual attack. There could be a condition existing in the person=s body that would prevent a sufficient number of sperm to be present to be registered on DNA and that type of thing.

Q. Is spermatocele such a condition?

A. Yes.

Q. And have you received any information indicating that the defendant suffers from this condition?

A. Yes, I have.

Q. And what information is that?

(Tr. 1113-1114).

During cross-examination, trial counsel questioned Spindler, in relevant part:

Q. (Cont. by Mr. Gralike) What training do you have in DNA?

A. I've been to a few courses. I don't have extensive training in DNA. I don't make that my job. I collect the samples and send it to the people that are expert in that area. It is beyond my field of expertise.

Q. So you cannot testify as to whether or not if a blood sample taken from this defendant was compared, and we've already heard from Cary Maloney with regard to the sample--you sent all of the semen, seminal fluid, sperm samples that you obtained to the Missouri Highway Patrol for testing, right?

A. That's correct.

Q. And who did that testing?

A. I do not know.

Q. Did you do any follow up?

A. No, sir.

* * * * *

Q. Again, you're not an expert in DNA, are you?

A. No, sir.

Q. You don't purport to be?

A. Not a bit.

Q. All the samples that you were able to obtain from this child you sent on to the highway patrol for testing?

A. That is correct.

Q. Do you know that Cary Maloney, the one who does know about DNA, stated under oath that it was conclusive that Mr. Greathouse did not deposit that sperm and seminal fluid in the body of Machelle Lee?

A. I'm not privy to any testimony that went on before. That would be improper.

(Tr. 1116-1118).

During re-direct examination, Dr. Spindler testified, in relevant part, that:

Q. And just for a point of clarification, defense counsel brought up DNA. This condition that the defendant has had for the last ten years, this spermatocele condition, how does that relate to sperm being found in the vagina?

A. It could decrease the amount of sperm produced and, therefore the amount of sperm in the vagina would have been lessened by one individual.

Q. And could it have been so low that it wouldn't have been detectable?

A. Possibly.

Q. And I think you even stated that in some cases it caused infertility?

A. That is correct.

(Tr. 1129-1130).

Dr. Spindler was questioned further by defense counsel, in relevant part:

Q. (Cont. by Mr. Gralike) Are you aware, Doctor, that Cary Maloney said that he had sufficient sperm sample from the body of Machelle Lee to conclusively eliminate Carlos Greathouse?

A. I've answered that. I have no knowledge of any other testimony in this trial.

(Tr. 1130).

Cary Maloney, a criminalist at the Missouri State Highway Patrol Crime Laboratory in Jefferson City, Missouri, conducted the DNA analysis on the vaginal swabs taken from the victim (Tr. 962). Maloney testified, during appellant's trial, that there are instances where some type of sexual intercourse could occur and they would not be able to pick up any DNA because ejaculation may not have occurred and no semen deposited or where an individual may have low or no semen count (Tr. 967-968). Maloney also stated that it makes a difference as to how long after the intercourse that a sample is collected for analysis (Tr. 967-968).

During cross-examination, appellant's trial counsel questioned Maloney about the difference between seminal fluid and sperm (Tr. 969). Maloney stated that seminal fluid and sperm make up semen (Tr. 969). Maloney testified that semen consists of spermatozoa or sperm cells within the seminal fluid (Tr. 969). Maloney also testified that if appellant had deposited the sperm or seminal fluid in the victim and he was able to extract DNA from their spermatozoa, he would expect to find patterns that would match their blood standard and that he did not find any DNA that matched appellant (Tr. 970-971).

Despite Maloney's testimony at trial, appellant now alleges that his trial counsel was ineffective for failing to hire a DNA expert to counter and rebut Spindler's testimony. Specifically, he claims that counsel should have called Dr. Dean Stetler.

Dr. Stetler, professor of biological sciences at the University of Kansas, testified via deposition for the Supreme Court Rule 29.15 evidentiary hearing. Dr. Stetler testified that Aan individual with a low sperm count would be expected to contribute a relatively low number of sperm to a mixture, and that could indeed

make it relatively difficult to make a match, but not necessarily impossible to make a match@ (Stetler Depo. 7). Dr. Stetler also stated that the number of spermatozoa affects the ability to obtain an accurate DNA comparison or sample and if the number is below a certain quantity, it lessens the ability or certainty to be able to obtain a DNA profile (Stetler Depo. 12). Dr. Stetler also stated that the ability to make a DNA match would depend on how low the sperm count is (Stetler Depo. 22). Dr. Stetler testified during cross-examination, that an individual would have to leave some type of DNA sample before a match could be made and that if a condom was used, it would be likely that no seminal fluid would be left behind (Stetler Depo. 19). Dr. Stetler also stated that the length of time between a sample being left in the victim and when the sample is taken out and tested would affect the testing for DNA (Stetler Depo. 20). Although Dr. Stetler testified that it would be possible that a person with a low sperm count could still leave DNA, Dr. Stetler admitted that a low sperm count could make it so that a DNA profile is not generated and a DNA match could not be made (Stetler Depo. 24).

During the evidentiary hearing, appellant=s trial counsel, Daniel Gralike, testified that he had spoken with and subpoenaed, Dr. Cary Maloney, the DNA analyst who testified at trial for the State (PCR Tr. 25). Since the State called Maloney to testify in their case-in-chief, Gralike cross-examined him rather than call him as his own witness (PCR Tr.26). Gralike stated that although he recalled the State=s assertion that appellant=s low sperm count could preclude DNA identification, trial counsel felt that it was a Avery far fetched position to take@ and did not feel that there was evidence to rebut (PCR Tr. 46). Gralike also testified that he cross-examined Maloney sufficiently (PCR Tr. 47).

In denying appellant=s claim, the motion court found that trial counsel was not ineffective because the DNA expert=s testimony would have been cumulative to trial testimony; that the selection of witnesses

is trial strategy which is virtually unchallengeable; that appellant had failed to rebut the presumption that the failure to retain and call a DNA expert was a strategic choice; and that appellant did not establish that the outcome of the case would have been different had counsel retained and called a DNA expert (PCR L.F. 150-151).

Standard of Review

Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." State v. Tokar, 918 S.W.2d 753, 761 (Mo. banc 1996), cert. denied 519 U.S. 933 (1996). To show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that there is a reasonable probability that, but for counsel=s errors, the result of the proceeding would have been different. State v. Johnson, 968 S.W.2d 686, 695 (Mo. banc 1998). A Areasonable probability@ is a probability sufficient to undermine confidence in the outcome. Id.

Analysis

Appellant alleges that Dr. Stetler=s testimony would have rebutted Dr. Spindler=s testimony that A[appellant] had been diagnosed with a condition that can limit his sperm production and therefore he could be undetectable by DNA tests@ (App Br. 27).

However, contrary to appellant=s assertion, Dr. Spindler did not testify about DNA or whether appellant=s low sperm count would result in no detection in DNA tests. Dr. Spindler only testified about whether sperm or semen would be found in an individual who had a low sperm count (Tr. 1113-1114,

1116-1118). It was Cary Maloney, a DNA expert, who testified that it would be possible for a person with a low sperm or semen count to not leave any DNA (Tr. 967-968).

In any event, appellant has failed to show that trial counsel=s actions were not reasonable. Appellant incorrectly alleges that trial counsel failed to investigate or consult with a DNA expert (App. Br. 28). However, trial counsel testified during the evidentiary hearing that he had contacted a DNA expert, Cary Maloney, to testify for the defense (PCR Tr. 25-26). However, since the State called Cary Maloney as a witness in their case in chief, trial counsel cross-examined him rather than call him as a defense witness (PCR Tr. 25-26). This was a reasonable strategy. Trial counsel investigated Cary Maloney and determined that he would be a good expert for the defense. Trial counsel was not required to shop around for a more favorable expert. State v. Kenley, 952 S.W.2d 250, 268-269 (Mo. banc 1997), cert. denied, 522 U.S. 1095 (1998). Furthermore, trial counsel rebutted Dr. Spindler=s testimony and Cary Maloney=s testimony by cross-examining them regarding this theory. Dr. Spindler admitted that he was not a DNA expert and could not testify about whether appellant=s DNA would be present in a sample taken from the victim, and trial counsel brought out the differences between seminal fluid, semen, and sperm and when a DNA match could be made through his cross-examination of Cary Maloney (Tr. 1116-1118). Trial counsel=s actions were reasonable in investigating a DNA expert for his defense and cross-examining the State=s witnesses.

Appellant has also failed to establish that he was prejudiced. Dr. Stetler=s testimony in the deposition was entirely consistent with the State=s evidence. Dr. Stetler testified that it is a possibility that a person with a low sperm count may not leave a DNA profile (Stetler Depo. 24). This testimony was cumulative to the State=s evidence that a person with a low sperm or semen count may not leave any DNA.

Trial counsel cannot be held ineffective for failing to introduce cumulative evidence. Skillicorn v. State, 22 S.W.3d 678, 683 (Mo. banc 2000), cert. denied, 531 U.S. 1039 (2000); State v. Johnson, 957 S.W.2d 734, 755 (Mo. banc 1997), cert. denied, 522 U.S. 1150 (1998).

Dr. Stetler=s testimony did not rebut the State=s evidence; rather, it was consistent and cumulative to the State=s evidence. As appellant=s trial counsel stated during the evidentiary hearing, Athere was no evidence presented by the State that needed rebuttal@ (PCR Tr. 46). Trial counsel was not ineffective for failing to introduce cumulative evidence.

Contrary to appellant=s assertion, Dr. Stetler did not testify that Athe fact that a person has a Alow sperm count@ would *not* make him undetectable by DNA tests@ (App. Br. 27). Rather, Dr. Stetler testified that it was Apossible@ that a person with a low sperm count would leave DNA but it was also Apossible@ that a person with a low sperm count could be undetectable by DNA tests (Stetler Depo. 24). This evidence was the same evidence as presented at trial by the State.

Moreover, Stetler=s testimony would not have provided appellant with a viable defense. To prevail on a claim of ineffective assistance of counsel for failure to call a witness, movant must show, among other things, that the witness's testimony would have produced a viable defense. Bucklew v. State, 38 S.W.3d 395, 400 (Mo. banc 2001), cert. denied, 122 S.Ct. 374 (2001); State v. Harris, 870 S.W.2d 798, 817 (Mo. banc) cert. denied, 513 U.S. 953 (1994); Helmig v. State, 42 S.W.3d 658, 667 (Mo.App. E.D. 2001); Teaster v. State, 29 S.W.3d 858, 859 (Mo.App. S.D. 2000). Dr. Stetler=s testimony would not have provided appellant with a defense. Dr. Stetler=s testimony that a person with a low sperm count may or may not leave any detectable DNA is not a defense to murder. His testimony was merely consistent with the State=s assertion that a person with low sperm count may not leave any DNA. Had Dr. Stetler testified

at trial, his testimony would have left the jury with the same information they had without his testimony - - that it is possible that appellant had sex with the victim but did not leave any DNA. There is no reasonable probability that Dr. Stetler=s testimony would have changed the outcome of the trial.

The motion court was not clearly erroneous in denying appellant=s claim. Trial counsel=s actions were reasonable in investigating and questioning Cary Maloney. Moreover, appellant was not prejudiced because Dr. Stetler=s testimony was cumulative to and consistent with the evidence presented at trial by the State and his evidence would not have provided appellant with a viable defense.

Based on the foregoing, appellant=s point must fail.

CONCLUSION

In view of the foregoing, the respondent submits that the denial of appellant's post-conviction relief should be affirmed.

Respectfully submitted,

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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)/Local Rule 360 of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of July, 2002.

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_____

IN THE
MISSOURI SUPREME COURT

_____

CARLOS GREATHOUSE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

_____

Appeal from the Circuit Court of Benton County, Missouri
The Honorable Theodore B. Scott, Judge

_____

RESPONDENT'S APPENDIX

_____