No. SC96184

In the
Missouri Supreme Court

RWOESHAN BOOKER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable Mark H. Neill, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant (Defendant) appeals from a St. Louis City Circuit Court judgment overruling his Rule 24.035 motion for postconviction relief without an evidentiary hearing that sought to set aside his guilty plea to first-degree assault. In the underlying criminal case, Defendant was charged, along with four other individuals, with first-degree assault for striking A.A. for the purpose of attempting to kill or cause serious physical injury to A.A., occurring on June 20, 2010. (L.F.8-9). Defendant appeared in court on January 28, 2013, to enter his plea of guilty.[1] (L.F. 15).

Defendant was delivered to the Department of Corrections on April 15, 2013. (L.F. 76). Defendant timely filed his pro se motion for postconviction relief on August 12, 2013. (L.F. 61, 62-67). On August 22, 2013, Jessica Hathaway entered her appearance. (L.F. 61). On October 23, 2013, Hathaway withdrew as counsel and Srikant Chigurupati entered his appearance. (L.F. 60). Chigurupati requested an additional 30 days to filed an amended motion

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[1] During the same plea hearing, Defendant also pleaded guilty to unrelated crimes, second-degree robbery and misdemeanor assault, in which he acted with another, Ernest Carter. (L.F.17, 24, 26). Mr. Carter was one of the additional defendants charged in the underlying case here. (L.F. 7-9).

(L.F. 60). The transcript was filed on November 21, 2013. (L.F. 60).[2] This made the amended motion due by January 21, 2014. Rule 24.035(g). On January 17, 2014, the motion court granted the additional 30 days to file the amended motion, (L.F. 60), making the amended motion due on February 20, 2014. The amended motion was timely filed on February 19, 2014. (L.F. 60, 76-88). The motion court overruled Defendant's motion without an evidentiary hearing and entered its order with findings of fact and conclusions of law on June 10, 2015. (L.F. 59-60, 89-101).

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[2] The docket entry by the court on June 20, 2015, and the finding of facts state that the transcript was filed on November 21, 2014. Defendant asserted that the transcript was filed on November 21, 2013 (L.F. 86, 89). Respondent has found no other indication of when the transcript was filed.

ARGUMENT

Point I (factual basis)

The motion court did not clearly err in denying Defendant's postconviction motion because: (1) there was a sufficient factual basis for Defendant's guilty plea, in that the indictment contained all elements of the crime and the nature of the charge was explained to Defendant; (2) Defendant possessed the requisite intent, in that he had the purpose to promote an offense, namely, an assault, and his codefendants' assaults were reasonably foreseeable; and (3) Defendant did not allege facts warranting relief, in that he did not allege that the purportedly inadequate factual basis deprived him of actual knowledge of the factual basis for the charge or that he would not have pleaded guilty and would instead have insisted on going to trial.

A. Facts

Count I of the indictment charged Defendant as follows:

> The defendants . . . acting together . . . committed the class A felony of assault in the first degree . . . in that on June 20, 2010 . . . the defendants . . . acting together, struck A.A., and such conduct was a substantial step toward the commission of the crime of attempting to kill or cause serious physical injury to A.A, and was done for the

purpose of committing such assault, and in the course thereof inflicted serious physical injury on A.A.

(L.F. 8-9).

During the plea hearing, Defendant admitted that he had had enough time to discuss the case with counsel, that he had spoken with counsel "[a] nice amount of times," and that counsel explained the charges to him. (Tr. 17, 17-19). He said that he was pleading guilty because he was guilty. (L.F. 24). He said that he understood, and counsel had explained to him, what it meant to be guilty by acting with another. (L.F. 29).

The plea colloquy continued as follows:

MS. SCHWARZLOSE [prosecutor]: Thank you, Your Honor. In Cause No. 1122-CR03756, the state would prove beyond a reasonable doubt that the defendant acting with Ernest Carter, Jasmine Jeffries, Shaquanta Monroe, and Johnnie Lane committed the class A felony of assault in the first degree in that on or about June 20, 2010, in the City of St. Louis, State of Missouri, the defendant acting with Ernest Carter, Jasmine Jeffries, Shaquanta Monroe, and Johnnie Lane struck [A.A.], and such conduct was a substantial step toward the commission of the crime of attempting to kill or cause serious physical injury to [A.A.] and was done for the purpose of committing such assault, and in the course thereof inflicted serious physical injury on the person of [A.A.].

Specifically, Your Honor, the defendant was with Ernest Carter, Jasmine Jeffries, Johnnie Lane, and Shaquanta Monroe at the Jack in the Box located at Gravois here in the City of St. Louis. While on the parking lot, [A.A.] and his friend Luther Jones also arrived on the Jack in the Box parking lot. At some point Mr. Luther Jones started talking to Jasmine Jeffries and an argument ensued.

Johnnie Lane got out of his vehicle, started arguing with Luther Jones, and started pushing each other. [A.A.]went up to the situation, and Johnnie Lane swung on [A.A.]. Rwoeshan Booker then struck [A.A.], and [A.A.] fell on the ground. Everyone in the group joined in and continue[d] to hit [A.A.] after he fell on the ground. Specifically, Jasmine Jeffries and Shaquanta Monroe kicked [A.A.] at least one time in the head. Mr. Booker continued to hit [A.A.] once he was on the ground. While he was on the ground, Mr. Ernest Carter went through [A.A.]'s pockets, removed currency.

As a result of this incident, [A.A.] suffered a traumatic brain injury. He is now unable to control his bodily functions on his own, including the fact he cannot walk on his own, he cannot feed himself, or do anything to care for himself and requires constant care as a result of these actions.

The state would prove all of this evidence beyond a reasonable doubt.

THE COURT: Did you hear what Ms. Schwarzlose told the Court regarding the 2011 case?

MR. KALLIAL [defense counsel]: Judge, before Mr. Booker answers that question. May I approach?

THE COURT: This on or off the record?

MR. KALLIAL: Off the record.

(A brief discussion was held off the record.)

THE COURT: Mr. Kallial, off the record you said that you had some questions about the chronology of events, especially regarding the timing or the chronology concerning our client's participation in this episode, vis-à-vis [A.A.] being kicked in the head; is that correct?

MR. KALLIAL: That's correct.

THE COURT: Tell me what you believe the chronology is.

MR. KALLIAL: Our standpoint regarding the series of events would be that the stomping occurred subsequent to Mr. Booker's contact with the victim.

MS. SCHWARZLOSE: And I believe that is correct, Your Honor, I was simply reading the summary of the events that Mr. Booker did. Our

evidence would show Mr. Booker hit [A.A.] while he was on the ground. It may have been before he was kicked in the head by Jasmine Jeffries.

MR. KALLIAL: And Mr. Booker did not go back and then make further contact.

MS. SCHWARZLOSE: I wasn't - -

THE COURT: Let me try to clarify this, if you will. If the matter were to proceed to trial, the jury or the Court would hear the series of events took place in the early morning hours on a Jack in the Box parking lot; is that correct?

MS. SCHWARZLOSE: Yes, Your Honor.

THE COURT: And during the course of events, Rwoeshan Booker struck [A.A.] and knocked him down; is that correct?

MR. KALLIAL: That is correct.

THE COURT: And while [A.A.] was on the ground, Mr. Booker hit him again?

MR. KALLIAL: I believe that would be the evidence, yes.

THE COURT: And it was subsequent to that second hitting that [A.A.] was kicked at least twice in the head and suffered head injuries?

MR. KALLIAL: That's true. As to the exact specific amount of time, I think that is a different question as well. There was a series of contact made with the victim.

THE COURT: But did all this happen at the same time and place on the parking lot? This is a sequence of events; is that correct?

MS. SCHWARZLOSE: Correct,

MR. KALLIAL: Correct,

THE COURT: You'll agree with that?

MR. KALLIAL: Correct.

THE COURT: Mr. Booker remained on the parking lot, at some place on the lot or on the premises of Jack in the Box?

MR. KALLIAL: I believe the evidence would be at some point in time Mr. Booker fled the scene. Exactly when, I do not know.

THE COURT: Have you heard all this, Mr. Booker?

THE DEFENDANT: Yes, sir.

THE COURT: Based on what happened, are you pleading guilty to assault in the first degree?

THE DEFENDANT: Yes, sir.

THE COURT: Now, there may be some dispute as to exactly where everybody was at every particular time or occurrence, correct?

THE DEFENDANT: Yes, sir.

THE COURT: And maybe some of you don't even know where someone was standing at the time of a particular occurrence in this series of events; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you probably didn't - - well, let me ask this, did you see everything that occurred there?

THE DEFENDANT: No, sir.

THE COURT: Okay. And you're not denying any of these events occurred, correct?

THE DEFENDANT: Yes, sir.

THE COURT: You are denying?

THE DEFENDANT: I mean no, sir. Sorry about that.

THE COURT: And you understand that the state would show and hopefully prove beyond a reasonable doubt that [A.A.] was severely struck and has suffered and continues to suffer head injuries. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. You have any questions you want to ask Mr. Kallial or me before I formally accept your plea?

THE DEFENDANT: No, sir.

THE COURT: Has anybody made any threats or promises to you in this case - -

THE DEFENDANT: No, sir.

THE COURT: - - to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: You understand the range of punishment is anywhere from ten to 30 years in prison and/or life in prison? You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that one person has pled guilty before a different judge and received 15 years?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that I'm not bound by the state's recommendation, by what happened to Ms. Jeffries in another courtroom, or by your attorney's recommendation? You understand that?

THE DEFENDANT: Yes, sir.

(L.F.30-37). The court accepted the plea, noting that Defendant understood what he was doing and finding that there was a factual basis for the plea. (L.F. 37). Defendant received a 13-year sentence for the assault charge. (L.F. 11, 45).

At sentencing, Defendant repeated that he had had enough time to discuss the charge with counsel. (L.F.50). He said that counsel went over his trial rights and discussed possible defenses. (L.F.50).

In his amended motion, Defendant alleged that the plea court erred in accepting his guilty plea because there was an insufficient factual basis for the plea:

> 8(a) This Court erred in accepting Movant's guilty plea to the charge of assault in the first degree because there was an insufficient factual basis for the plea. Movant's plea of guilty to that charge was not knowingly, voluntarily, and intelligently entered. The record fails to show that Movant pled guilty with an awareness of the elements of the offense he was pleading guilty to. It is not even clear as to whether Movant pled guilty as an accomplice or as a principal.

(L.F. 77).

Defendant alleged that he never expressed an awareness that in order to commit first-degree assault as a principal, he needed to attempt to kill or cause serious physical injury to A.A. (L.F. 81). He also alleged that he never expressed an awareness that in order to commit first-degree assault as an accomplice, he needed to have acted with others for the common purpose of attempting to kill or cause serious physical injury to A.A., or at least aided or encouraged others with the common purpose of attempting to kill or cause serious physical injury to A.A. (L.F. 81-82).

The motion court overruled the motion without an evidentiary hearing, finding that Defendant admitted that he acted together with others, that

their conduct was a substantial step in attempting to kill or cause serious physical injury to A.A., and that they inflicted serious physical injury to A.A. (L.F. 91). The court found that Defendant pleaded guilty based on what occurred and that he did not deny that any of the events occurred. (L.F. 92).

B. Standard of review

This appeal relates solely to the motion court's judgment overruling Defendant's postconviction motion. Appellate review of a judgment overruling a postconviction motion is limited to a determination of whether the findings of fact and conclusions of law issued by the motion court are "clearly erroneous." *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *see also Barnett v. State*, 103 S.W.3d 765, 768 (Mo. banc 2003); Rule 24.035(k). Appellate review in postconviction cases is not de novo; rather, the findings of fact and conclusions of law are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). "Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made." *Morrow*, 21 S.W.3d at 822. In reviewing the denial of postconviction relief under Rule 24.035, appellate courts "view the record in the light most favorable to the motion court's judgment, accepting as true all evidence and inferences that support the judgment and disregarding evidence and inferences that are contrary to the judgment." *Smith v. State*, 443 S.W.3d 730, 733 (Mo. App. S.D. 2014).

To be entitled to an evidentiary hearing on a motion for postconviction relief, the motion must meet three requirements: "(1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters of which movant complains must have resulted in prejudice." *Morrow*, 21 S.W.3d at 823; *see also Dorris v. State*, 360 S.W.3d 260, 267 (Mo. banc 2012) ("[T]he movant must allege facts showing a basis for relief to entitle the movant to an evidentiary hearing.").

C. Defendant has not demonstrated that his plea was unintelligent.

A sufficient-factual-basis claim is a distinct claim from a sufficiency-of-the-evidence claim. *See Daniels v. State*, 70 S.W.3d 457, 463 (Mo. App. W.D. 2002). Because "[a] trial court is not required to explain every element of a crime to which a person pleads guilty," *State v. Taylor*, 929 S.W.2d 209, 217 (Mo. banc 1996), and because the question "is not whether each element of the charge would now withstand a trial on the merits," *Thurman v. State*, 263 S.W.3d 744, 753 (Mo. App. E.D. 2008), a defendant's admission of guilt will almost always constitute a sufficient factual basis. "When an accused admits in open court facts which constitute the offense for which he is charged, he cannot thereafter withdraw his plea on the assertion that he did not understand the nature of the charge to which he plead[ed] guilty." *Taylor*, 929 S.W.2d at 217.

A claim that a defendant did not understand the charges against him "will most often be deemed refuted by the record at his plea hearing when he claimed . . . to understand the charges," *Frantz v. State*, 451 S.W.3d 697, 703 (Mo. App. W.D. 2014), or when he acknowledged that the charges were explained to him and that he was pleading guilty because he was guilty.

1. Relevant law

"A guilty plea waives . . . all constitutional and statutory claims except jurisdictional defects and claims that the guilty plea was not made knowingly, voluntarily, and intelligently." *Stanley v. State*, 420 S.W.3d 532, 544 (Mo. banc 2014).

"Where there is a guilty plea, effectiveness of counsel is relevant only as affecting the voluntariness of the plea." *Felton v. State*, 103 S.W.3d 367, 371 (Mo. App. S.D. 2003). "All errors are waived by a guilty plea except those that are relevant to the voluntary nature of the plea." *Id.* "The burden of proof is upon Movant to demonstrate that his guilty pleas were not knowingly and voluntarily entered." *Id.*

Additionally, the movant must show that any alleged error resulted in prejudice—the second prong of the *Strickland-Hill* test. *See Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for

counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

2. Defendant was questioned extensively about acting with others.

The conclusion that there was a sufficient factual basis, discussed below in Section 3, is buttressed by the fact that Defendant was questioned extensively about whether he understood what it meant to be charged with acting with others. During the plea hearing, Defendant pleaded guilty to second-degree robbery while acting with another in connection with a separate case that was discussed immediately prior to the charge in the present case. (L.F. 24-30). Defendant swore that he understood what it meant to be guilty of acting with another:

> THE COURT: Okay. You understand that you're charged with acting with Ernest Carter in this?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Ernest Carter had pled guilty in this case or as a codefendant to robbery in the second degree.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You admit you were with him, you were part of it?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Now, has anybody told you not to tell me the truth?

THE DEFENDANT: No, sir.

THE COURT: Do you understand what it means to be guilty if you're acting with another?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Kallial explained that to you?

THE DEFENDANT: Yes, sir.

THE COURT: There any questions you want to ask me or him before I accept your plea?

THE DEFENDANT: No, sir.

(L.F. 28-29).

Defendant understood what it meant to be guilty of acting with another. Any assertion that he did not is clearly refuted by the record.

3. There was a sufficient factual basis.

"[T]he purpose of Rule 24.02(e) is to aid in the constitutionally required determination that a defendant enter a plea of guilty intelligently and voluntarily." *Chipman v. State*, 274 S.W.3d 468, 472 (Mo. App. S.D. 2008) (internal quotation marks omitted). "Rule 24.02(e) provides that '[t]he court shall not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea.'" *Id.* "This rule, however, is not constitutionally mandated." *Id.*

"The pertinent question on appeal is whether [Movant] understood the nature of the charge against him and not . . . whether a particular ritual was followed or every detail was explained." *Gooch v. State*, 353 S.W.3d 662, 667 (Mo. App. S.D. 2011) (emphasis added) (internal quotation marks omitted). "Movant is not required to admit or to recite the facts constituting the offense in a guilty plea proceeding, so long as a factual basis for the plea exists." *Roussel v. State*, 314 S.W.3d 398, 401 (Mo. App. S.D. 2010). "Every element of a crime to which a defendant pleads guilty need not be explained as long as the defendant understands the nature of the charge." *Id.* "[A]s long as the basis exists on the record as a whole, the factual basis need not be established by the defendant's words or by an admission of the facts recited by the State." *Fee v. State*, 283 S.W.3d 296, 298 (Mo. App. E.D. 2009).

The record demonstrates that there was a sufficient factual basis. "A factual basis exists if the defendant understands the facts presented at the guilty plea proceeding and those facts establish the commission of the charged crime." *Martin v. State*, 187 S.W.3d 335, 339 (Mo. App. E.D. 2006). "Where the trial court reads the information to a defendant, where the information contains all of the required elements of the crime charged, and where the nature of the charge has been explained to the defendant, the defendant's subsequent guilty plea will satisfy the requirements of Rule 24.02(e)." *Browder v. State*, 326 S.W.3d 33, 35 (Mo. App. W.D. 2010).

Defendant admitted in open court facts which constituted the offense, and he may not now withdraw his plea on the assertion that he did not understand the nature of the charge. *Taylor*, 929 S.W.2d at 217. The indictment charged Defendant, acting with others, with all elements of the crime:

> The defendants . . . acting together . . . committed the class A felony of assault in the first degree[3] . . . in that on June 20, 2010 . . . the defendants . . . acting together, struck A.A., and such conduct was a substantial step toward the commission of the crime of attempting to kill or cause serious physical injury to A.A, and was done for the purpose of committing such assault, and in the course thereof inflicted serious physical injury on A.A.

(L.F. 8-9). The prosecutor recited the indictment during the plea soliloquy, (L.F. 30-31), and Defendant admitted that all of these events occurred. (L.F. 35). Defendant admitted that he punched A.A., causing A.A. to fall to the ground. (L.F. 31). Defendant admitted that he hit A.A. again while A.A. was on the ground. (L.F. 34). Defendant admitted that everyone in his group then

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[3] "A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person." Section 565.050.

joined in and continued to hit A.A. while he was on the ground, with two individuals stomping or kicking A.A. in the head at least once each. (L.F. 31, 33-35). Defendant admitted that he understood what it meant to be guilty of acting with another and that counsel had explained this concept to him. (L.F. 28-29). Defendant admitted that A.A. suffered serious injuries and now cannot walk on his own, feed himself, control his bodily functions, or do anything to care for himself. (L.F. 32).

All of the requirements detailed in *Browder* are present here. At the plea hearing, Defendant admitted that he had had enough time to discuss the case with counsel, that he had spoken with counsel "[a] nice amount of times," and that counsel explained the charges and evidence to him. (L.F. 18-19). The indictment, which contained all elements of the crime, was read to Defendant. (L.F. 30-31). Defendant admitted to the factual allegations described by the prosecutor and defense counsel, which also included all elements of the crime.[4] (L.F. 30-37). Defendant admitted that he was pleading guilty because he was in fact guilty. (L.F. 24). Additionally,

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[4] The only clarification defense counsel made to the prosecutor's statement of facts was to assert that Defendant stopped hitting A.A. before Defendant's codefendants kicked or stomped A.A. in the head. (L.F. 32-33).

Defendant swore that he understood what it meant to be guilty of acting with another. (L.F. 28-29).

"A factual basis exists if the defendant understands the facts presented at the guilty plea proceeding and those facts establish the commission of the charged crime." *Martin v. State*, 187 S.W.3d 335, 339 (Mo. App. E.D. 2006). The State clearly explained to Defendant, both in the indictment and at the plea hearing, that Defendant was being charged with acting with his group of people in attacking A.A. for the purpose of attempting to kill or cause serious physical injury to A.A. (L.F. 8-9, 31). Defendant admitted that this conduct occurred, (L.F. 35), and that he understood what it meant to be guilty of acting with another. (L.F. 28-29).

There was a sufficient factual basis. *See Browder*, 326 S.W.3d at 35; *Taylor*, 929 S.W.2d at 217. The record refutes Defendant's claim. The motion court found that Defendant's claim was refuted by the record. (L.F. 94). The court found that a factual basis was established because the indictment clearly charged Defendant with all the elements of the crime, the nature of the crime was explained to Defendant, and he admitted guilt. (L.F. 95-96). A full review of the record does not definitely and firmly reveal that the trial court made a mistake by denying Defendant's motion without an evidentiary hearing. *Morrow*, 21 S.W.3d at 822.

Furthermore, Defendant stated that he understood that he was charged with first-degree assault and that counsel had explained the charges to him and gone over the evidence with him. (L.F. 18-19). Defendant did not allege in his amended motion that he did not understand the nature of the charge. But even if he had made such an allegation, a claim that a defendant did not understand the charges against him "will most often be deemed refuted by the record at his plea hearing when he claimed . . . to understand the charges." *Frantz v. State*, 451 S.W.3d 697, 703 (Mo. App. W.D. 2014). Defendant acknowledged that he understood the charge against him. (L.F. 18-19, 28-29).

Defendant also failed to allege that he did not act with the purpose to kill or cause serious physical injury to A.A. Such an allegation would be refuted by the record in any event, as the prosecutor clearly alleged that fact during the plea hearing, (L.F. 31), and Defendant admitted that the facts alleged were true. (L.F. 35).

Moreover, "Where the allegations contained in the counts are simple, specific and sufficient to inform the defendant in terms that a layman would understand what acts he was charged with committing, then a factual basis is established." *Finley v. State*, 321 S.W.3d 368, 373 (Mo. App. W.D. 2010). The charge was simple, describing a very simple assault by Defendant and his codefendants. (L.F. 8-9). The term "acting with others" was simple and

sufficient to inform Defendant that he was charged with acting with other people in committing the crime. The "acting with others" aspect of the case was also repeatedly reiterated throughout the plea proceeding. The record established a factual basis. *Finley*, 321 S.W.3d at 373; *see also Johnson v. State*, 115 S.W.3d 422, 426 (Mo. App. W.D. 2003) ("serious physical injury" was simple, specific, and sufficient to inform defendant of charge); *Kennell v. State*, 209 S.W.3d 504, 508 (Mo. App. E.D. 2006) ("deadly weapon" would be easily understood by most people); *Browder v. State*, 326 S.W.3d 33, 37 (Mo. App. W.D. 2010) (meaning of "threat involving danger to life" is readily apparent, so defendant's admission that he "threatened to kick someone's ass" was sufficient to establish factual basis); *Wray v. State*, 474 S.W.3d 230, 235 (Mo. App. W.D. 2015) (average person would understand meaning of "sexual contact," an element of child molestation).

Defendant's focus on whether the requisite intent was explained to him is irrelevant. Regardless of the intent necessary for first-degree assault under accomplice liability, there was a sufficient factual basis for Defendant's plea. The intent element was not required to be explained to Defendant. *Roussel*, 314 S.W.3d at 401 ("Every element of a crime to which a defendant pleads guilty need not be explained as long as the defendant understands the nature

of the charge.").[5] "A factual basis exists if the defendant understands the facts presented at the guilty plea proceeding and those facts establish the commission of the charged crime." *Martin*, 187 S.W.3d at 339.

Moreover, it is irrelevant whether the ultimate facts would withstand a trial on the merits. "[T]he question is not whether each element of the charge would now withstand a trial on the merits, but rather whether the information before the court supplied a factual basis to the plea." *Thurman v. State*, 263 S.W.3d 744, 753 (Mo. App. E.D. 2008). There was a sufficient factual basis, even if Defendant had lacked the intent for the underlying crime.

This Court rejected a similar argument in *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996), in which the defendant argued that his plea to first-degree murder was not knowing because he was not advised that he had to

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[5] Defendant cites *Douglas v. State*, 410 S.W.3d 290, 296 (Mo. App. E.D. 2013), for his assertion that it was necessary for him to be aware of all elements of the offense. (Appellant's Subst. Br. 27). Defendant takes this sentence from *Douglas* out of context, as the very next sentence reads: "Accordingly, so long as the defendant understands the *nature* of the charge, *there is no requirement that every element of a crime to which a defendant pleads guilty be explained*." *Douglas*, 410 S.W.3d at 296 (second emphasis added).

have the intent to kill the victim. *Taylor*, 929 S.W.2d at 217. In rejecting the defendant's argument, this court noted, "When an accused admits in open court facts which constitute the offense for which he is charged, he cannot thereafter withdraw his plea on the assertion that he did not understand the nature of the charge to which he plead[ed] guilty." *Id.* "[A] trial court is not required to explain every element of a crime to which a person pleads guilty so long as the defendant understands the nature of the charge." *Id.* (internal quotation marks omitted). As discussed, Defendant understood the nature of the charge.

D. Defendant possessed the requisite intent.

A defendant's intent may be shown by the State including the mental state in the charging document and stating it again during the plea hearing. *See Felton v. State*, 103 S.W.3d 367 (Mo. App. S.D. 2003) (holding there was a sufficient factual basis, noting that "knowingly acted" was included in both the information and the recitation of facts). This was done here. Defendant's guilty plea was adequate.

The State must be permitted to rely on Defendant's admission of intent. "[T]he intent element [of first-degree assault] is generally not susceptible of proof by direct evidence." *State v. Chambers*, 998 S.W.2d 85, 90 (Mo. App. W.D. 1999). "Instead, the necessary intent may be based upon circumstantial evidence or inferred from surrounding facts, such as evidence of defendant's

conduct before the act, from the act itself, and from the defendant's subsequent conduct." *Id.* (internal citation omitted). Where a defendant pleads guilty after the intent is included in the charging document, is read to the defendant, and the defendant admits that the facts as read are true, the defendant cannot later claim that he did not act with that intent. Any such assertion would be contradicted by the record.

Moreover, the State is not required to show that the conduct of an accessory satisfied the elements of the underlying crime charged to make a submissible case. *State v. Barnum*, 14 S.W.3d 587, 590 (Mo. banc 2000). Rather, any evidence that shows "affirmative participation in aiding the principal to commit the crime is sufficient to support a conviction." *M.A.A. v. Juvenile Officer*, 271 S.W.3d 625, 629 (Mo. App. W.D. 2008). As discussed in further detail below, Defendant actively participated in—and in fact initiated—the assault of A.A.

1. Statutes

Section 562.036 reads: "A person with the required culpable mental state is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is criminally responsible, or both."

Section 562.041.1(2) reads: "A person is criminally responsible for the conduct of another when . . . [e]ither before or during the commission of *an* offense with the purpose of promoting the commission of an offense, he aids

or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense."

Section 562.051 reads: "Except as otherwise provided, when two or more persons are criminally responsible for an offense which is divided into degrees, each person is guilty of such degree as is compatible with his own culpable mental state and with his own accountability for an aggravating or mitigating fact or circumstance."

2. Defendant had the purpose to promote *an* offense.

> The Missouri Supreme Court has held that "Section 562.051 does not create any elements of intent in addition to that of Section 562.041." . . . A defendant who embarks on a course of criminal conduct with others is responsible for any crimes he could reasonably anticipate would be part of the conduct. "The evidence need not establish a defendant's specific knowledge of which particular crime his co-participant will commit."

State v. Johnson, 456 S.W.3d 521, 525 (Mo. App. E.D. 2015) (internal citations omitted) (citing *State v. White*, 622 S.W.2d 939, 945 (Mo. banc 1981); *State v. Whittemore*, 276 S.W.3d 404, 407 (Mo. App. S.D. 2009)).

The *Johnson* court emphasized that a defendant need only have the purpose to commit *an* offense, not necessarily the offense that his cohort committed: "the only shared intent required to find an accomplice criminally

responsible for the conduct of a principal is the intent to promote the commission of *an* offense." *Johnson*, 456 S.W.3d at 525 (emphasis in original) (citing Section 562.041 and *State v. Forister*, 823 S.W.2d 504 (Mo. App. E.D. 1992)). "[A] defendant does not need to possess the intent to commit the underlying felony in order to be convicted as an aider or abettor." *Id.* "Rather, proof of any form of participation in a crime is sufficient to support a conviction." *Id.*

Consistent with *Johnson*, Missouri courts have repeatedly held that defendants are liable for crimes that they could reasonably foresee would be committed, even if they lacked knowledge of which particular crime would ultimately be committed. "The evidence need not establish a defendant's specific knowledge of which particular crime his co-participant will commit." *Whittemore*, 276 S.W.3d at 407 (citing *State v. Robinson*, 196 S.W.3d 567, 570 (Mo. App. S.D. 2006)); *see also Howard*, 896 S.W.2d at 495; *State v. Workes,* 689 S.W.2d 782, 785 (Mo. App. E.D. 1985). "When a defendant has embarked upon a course of criminal conduct with others, he is responsible for those crimes which he could reasonably anticipate would be part of that conduct." *Whittemore*, 276 S.W.3d at 407 (citing *Robinson*, 196 S.W.3d at 570); *see also State v. Howard*, 896 S.W.2d 471, 495 (Mo. App. S.D. 1995); *Workes,* 689 S.W.2d at 785.

Under the overwhelming body of accomplice caselaw that has developed in Missouri, the case here is a very straightforward one. Defendant embarked on a course of criminal conduct and was actually the first person to strike A.A., forcing him to the ground, where Defendant continued to strike A.A. It was reasonably foreseeable that Defendant's cohorts would follow his lead and continue to assault A.A. while he was on the ground. Defendant's point should be denied.

3. Defendant need not have acted with the intent to kill or cause serious physical injury.

Contrary to virtually all Missouri caselaw, Defendant asserts that his conviction could not stand unless Defendant personally had the intent to kill or cause serious physical injury when he assaulted A.A. or encouraged his cohorts to do so. (Appellant's Subst. Br. 23-24, 28).

Defendant's argument ignores the fact that it is irrelevant whether the ultimate facts would withstand a trial on the merits. "[T]he question is not whether each element of the charge would now withstand a trial on the merits, but rather whether the information before the court supplied a factual basis to the plea." *Thurman*, 263 S.W.3d at 753.

But even if the ultimate facts would need to withstand a trial on the merits, they would in this case. As discussed, the caselaw developed in Missouri is that "[a] defendant who embarks on a course of criminal conduct

with others is responsible for any crimes he could reasonably anticipate would be part of the conduct." *Johnson*, 456 S.W.3d at 525. "[T]he only shared intent required to find an accomplice criminally responsible for the conduct of a principal is the intent to promote the commission of *an* offense." *Id.* (emphasis in original).

Defendant's argument rests on the premise that for accomplice liability, a defendant must have purposefully promoted an offense *and* had the culpable mental state for the underlying crime for which he is charged. As explained in *State v. Smith*, 229 S.W.3d 85 (Mo. App. W.D. 2007), this Court has rejected this argument:

> In *State v. Neal*, this court did hold, in pertinent part, that §§ 562.036 and 562.041: "require the State to prove that a defendant (1) purposefully promoted an offense, and (2) had the culpable mental state for the crime for which he is to be held liable," 14 S.W.3d at 239, which was cited favorably by this court in *England v. State*, 85 S.W.3d at 110. However, both of those cases were decided after *State v. White* and *State v. Roberts* and neither made any mention of those cases. They also did not discuss the plain language of § 562.041 and MAI–CR3d 304.04. Because we are bound by the most recent holding of our Supreme Court on the issue . . . , *State v. Neal* and *England v. State*, and their progeny, to the extent they require dual accomplice intent, by

> holding that an accomplice must not only purposely promote the underlying offense, but must also possess the requisite intent for the underlying offense, they were never good law and should not be followed.

Smith, 229 S.W.3d at 95 (footnote omitted). "If the Legislature had intended to require an aider to have a dual intent, it would have said so in the statutes." *State v. White*, 622 S.W.2d 939, 944 (Mo. banc 1981). Rather, Section 562.041 requires only a "purpose to promote the commission of *an* offense." *Id.* (emphasis added).

Thus, a defendant need not possess the culpable mental state for the underlying crime for which he is charged. For accomplice liability, a defendant who embarks upon a criminal course of conduct with another is responsible for crimes he could reasonably anticipate would be part of the conduct.

Nothing more is required, except for accomplice liability for first-degree murder, where the State must also prove that the defendant deliberated on the victim's death. *State v. O'Brien*, 857 S.W.2d 212, 218 (Mo. banc 1993). This Court explained that first-degree murder was the exception due to the "*unique* role of premeditation in the law of accomplice liability." *O'Brien*, 857 S.W.2d at 217 (emphasis added); *see also State v. Liles*, 237 S.W.3d 636, 639-40 (Mo. App. S.D. 2007) (citing *O'Brien* in explaining that first-degree murder

is the only exception to the intent requirement for accomplice liability). *White* and *O'Brien* do not assist Defendant because both cases involved accomplice liability for first-degree murder as opposed to first-degree assault. To the extent *White* or *O'Brien* require any additional intent beyond that required by the body of caselaw developed in Missouri regarding accomplice liability in general, that additional intent is applicable to first-degree murder only, as explained in *O'Brien* and *Liles*.

A similar version of Defendant's argument appears throughout the caselaw, where defendants argue that they could not be convicted of first-degree assault or first-degree robbery because they did not know that their cohorts were armed. In virtually all cases, Missouri courts have rejected this argument. *See, e.g.*, *State v. Johnson*, 456 S.W.3d 521 (Mo. App. E.D. 2015); *State v. Liles*, 237 S.W.3d 636 (Mo. App. S.D. 2007); *State v. Ward*, 473 S.W.3d 686 (Mo. App. W.D. 2015); *State v. Anderson*, 953 S.W.2d 646 (Mo. App. S.D. 1997); *State v. Hicks*, 203 S.W.3d 241 (Mo. App. S.D. 2006); *State v. Forister*, 823 S.W.2d 504 (Mo. App. E.D. 1992).[6]

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[6] *State v. Smith*, 229 S.W.3d 85 (Mo. App. W.D. 2007), is an outlier which, as discussed below, is counter to Missouri caselaw and this Court's previous holding.

There is no meaningful difference between the referenced cases and the case here. Dual intent is not required. A defendant need only intend to embark on a course of criminal conduct; he need not also have the intent for the underlying felony. Just as the defendants in those cases were not required to intend for their cohorts to be armed, Defendant here was not required to have intended to kill or cause serious physical injury.

This conclusion is supported by *State v. Barnum*, where this Court examined accomplice liability for first-degree assault. *State v. Barnum*, 14 S.W.3d 587 (Mo. banc 2000). In *Barnum*, the defendant's friends beat up a 14-year old girl over the course of one hour while the defendant watched. *Barnum*, 14 S.W.3d at 589-90. At some point, the defendant laughed and yelled, "yeah, yeah, let's kill her, kill her . . . run her over with the van." *Id.* at 590. The defendant argued that the evidence was insufficient because she did not participate in the beating and the actual attackers did not act on her suggestions. *Id.*

This Court explained that the doctrine of accomplice liability "comprehends any of a potentially wide variety of actions intended by an individual to assist another in criminal conduct." *Id.* at 591. "[T]he broad concept of 'aiding and abetting' plainly encompasses acts that could be construed as 'encouragement' or its derivation." *Id.* "Mere encouragement is enough." *Id.* "Encouragement is the equivalent of conduct that by any means

countenances or approves the criminal action of another." *Id.* (internal quotation marks omitted). "'Countenances or approves' includes encouraging or exciting [a criminal act] by words, gestures, looks, or signs." *Id.* (internal quotation marks omitted).

This Court did not explicitly require the defendant to have the culpable mental state of the actual attackers or require the defendant to have intended the attackers to cause serious physical injury to the victim. Rather, this Court merely required that the defendant have supported or encouraged the attack. *Id.* at 591. This Court indicated that encouragement, countenance, or approval sufficient for accomplice liability could be met with *minimal* involvement in the actual assault: "associating with those that committed the crime before, during, or after its occurrence, acting as part of a show of force in the commission of the crime, attempting flight from the crime scene, or failing to assist the victim or seek medical help are all factors which may be considered." *Id. All* of these factors are present here. Defendant was associating with his codefendants in a restaurant parking lot before the assault. (L.F. 31). Defendant acted as not just a part of the show of force in committing the crime, he was the aggressor who landed the first punch, starting the assault and knocking A.A. to the ground, whereupon he struck A.A. again. (L.F. 31, 33). Defendant also fled the scene. (L.F. 34). Finally,

there is no evidence that Defendant assisted A.A. or sought medical help. (L.F. 31-37).

Missouri's accomplice-liability caselaw is also consistent with felony-murder liability in Missouri. "Missouri follows the foreseeability-proximate cause theory of felony murder in interpreting whether a death resulted from the perpetration of a felony." *O'Neal v. State*, 236 S.W.3d 91, 96 (Mo. App. E.D. 2007). "[A] defendant may be considered responsible for any deaths that are the natural and proximate result of the commission of a felony." *Id.* Thus, it is sensible to impose accomplice liability on defendants who embark upon a criminal course of conduct for crimes they could reasonably anticipate would be part of the conduct.

4. *Smith*, *White*, and *Rosemond* do not assist Defendant.

In support of his argument, Defendant cites three cases: *State v. Smith*, 229 S.W.3d 85 (Mo. App. W.D. 2007); *State v. White*, 622 S.W.2d 939 (Mo. banc 1981); and *Rosemond v. United States*, 134 S. Ct. 1240 (2014). (Appellant's Subst. Br. 33-36). None of these cases assist Defendant.

Although *Smith* might provide some support for Defendant's argument, it is an outlier that is in clear contradiction with this Court's prior holdings, as explained by the Eastern District in *Johnson*:

> To the extent that *Smith* can be read to permit accomplice liability for first-degree robbery only if the accomplice has knowledge of the

> principal's display or threatened use of a deadly weapon, *Smith* is in clear contradiction with this Court's previous holdings on accomplice intent.

Johnson, 456 S.W.3d at 524-25. The *Smith* court reversed an accomplice-based first-degree robbery conviction because the jury could have found that the defendant did not act with the purpose of his coconspirator using a gun during the robbery. *Smith*, 229 S.W. 96-98. The *Johnson* court explained why *Smith* was wrongly decided:

> The Missouri Supreme Court has held that "Section 562.051 does not create any elements of intent in addition to that of Section 562.041." . . . A defendant who embarks on a course of criminal conduct with others is responsible for any crimes he could reasonably anticipate would be part of the conduct. "The evidence need not establish a defendant's specific knowledge of which particular crime his co-participant will commit."

Johnson, 456 S.W.3d 525 (internal citations omitted).

Defendant's next case, *White*, involved first-degree murder, which is "unique" in accomplice-liability law. Moreover, *White* actually support's the State's position here, in that the *White* court "*refused* to declare as a matter of law that an accomplice must be found to have both the intent to purposely promote the commission of the murder *and the intent for the underlying*

felony." *State v. Roberts*, 709 S.W.2d 857, 860-61 (Mo. banc 1986) (emphases added) (citing *White*, 622 S.W.2d at 944-45). Thus, Defendant here need not have possessed the intent for the underlying felony of first-degree assault, namely, the intent to kill or to knowingly cause serious physical injury. Section 565.050. Rather, Defendant need only have intended to promote *an* offense. *Johnson*, 456 S.W.3d at 525. Defendant embarked on a course of criminal conduct, and so he was responsible for any crimes he could reasonably have anticipated would be a part of that conduct, even if he lacked specific knowledge of which particular crime his codefendants would commit. *Id.*

Finally, *Rosemond* does not assist Defendant because it interpreted a specific federal statute, as explained in *State v. Ward*, 473 S.W.3d 686 (Mo. App. W.D. 2015):

> *Rosemond*, however, is irrelevant to the issues in this case. Nothing in *Rosemond*, suggests that its holding rests on any constitutional requirement or has any application to state criminal laws on accomplice liability; rather, the Court's analysis was merely a question of federal interpretation of the federal aiding and abetting statute. As such, it does not control here even where the federal statute and state aiding and abetting statutes are similar. . . . Missouri law has consistently held that an accessory is responsible for the crimes

committed by the principal and any crimes that he could reasonably anticipate as a result of his conduct. Nothing in *Rosemond* mandates a contrary result.

Ward, 473 S.W.3d at 693.[7]

E. Even if the intent for the underlying offense was required, Defendant did not allege facts warranting relief.

1. Defendant did not allege that the purportedly inadequate factual basis deprived him of actual knowledge of the factual basis for the charge.

Even assuming that, contrary to the caselaw, Defendant was required to have the intent for the underlying felony of first-degree assault, he did not allege facts warranting relief, as he was required to do. *Morrow*, 21 S.W.3d at 823. Defendant was required to allege facts, not contradicted by the record, demonstrating that his plea was unintelligent. *Id.*

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[7] The *Ward* court further noted, "Some federal courts have also found that the advance knowledge of a firearm requirement to convict someone of aiding and abetting a violation of [the federal statute] is *not* applicable where the government's theory to convict is that a conspirator is liable for a co-conspirator's *reasonably foreseeable* use of a firearm during a drug trafficking crime." *Ward*, 473 S.W.3d at 693 n.5 (emphases added).

In his amended motion, Defendant merely alleged that he never affirmatively expressed an awareness of the intent required for first-degree assault as either a principal or an accomplice. (L.F. 81-82). Defendant did not allege that he lacked the intent for the underlying offense. Defendant did not allege that counsel misinformed him of the requisite intent, or even that he did not understand the requisite intent—he merely alleged that he never *affirmatively expressed* an understanding of the requisite intent and that there was a *possibility* that he pleaded guilty without the purpose to cause serious physical injury. (L.F. 82). Additionally, Defendant failed to allege that he did not understand the nature of the charges against him. (L.F. 77-83).

"[A] movant's post-conviction constitutional challenge to the knowingness and voluntariness of his or her guilty plea based upon an insufficient factual basis must not only prove the insufficiency of a factual basis on the record before the plea court, i.e., the lack of compliance with Rule 24.02(e), *but also must demonstrate that such failure deprived him or her of the actual knowledge of the factual basis for the charge, thereby rendering his or her plea unknowing and involuntary and, thus, unconstitutional*." *Chipman*, 274 S.W.3d at 472 (emphasis added).

Importantly, Defendant failed to allege facts demonstrating that any purported failure of compliance with Rule 24.02(e) deprived him of the actual knowledge of the factual basis for the charge. Defendant did not allege that

his supposed misunderstanding deprived him of actual knowledge of the factual basis for the charge, rendering his plea involuntary or unintelligent. Because Defendant has failed to even allege this requirement, it is clear that he has failed to demonstrate such requirement, as is necessary to succeed on his claim. *Chipman*, 274 S.W.3d at 472.

2. Defendant failed to demonstrate prejudice.

To be entitled to an evidentiary hearing on a motion for postconviction relief, a defendant must demonstrate that the complained-of matters resulted in prejudice. *Morrow*, 21 S.W.3d at 823; *see also Price v. State*, 137 S.W.3d 538, 543 n.6 (Mo. App. S.D. 2004) ("We would be remiss if we failed to mention the fact that Movant has also entirely failed to demonstrate any sort of prejudice by the alleged lack of a factual basis.").

Defendant makes the conclusory statement that the facts alleged "demonstrate prejudice because they show that the plea was not knowingly, voluntarily, and intelligently entered." (Appellant's Subst. Br. 26). But Defendant fails to explain how the facts demonstrate that his plea was not intelligent. And as discussed, Defendant failed to demonstrate that the supposed misunderstanding deprived him of the actual knowledge of the factual basis for the charge, thereby rendering his plea unintelligent.

3. Defendant failed to allege that he would not have pleaded guilty.

Defendant's amended motion is insufficient to state a claim for relief. To be entitled to an evidentiary hearing on his motion for postconviction relief, Defendant's motion must "allege facts, not conclusions, warranting relief." *Morrow*, 21 S.W.3d at 823; *see also Dorris*, 360 S.W.3d at 267 ("[T]he movant must allege facts showing a basis for relief to entitle the movant to an evidentiary hearing.").

The rule regarding a sufficient factual basis for a guilty plea is not constitutionally mandated. *Chipman*, 274 S.W.3d at 472. To obtain postconviction relief, a defendant must demonstrate prejudice, which in the guilty-plea context is defined as "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. Thus, as a preliminary pleading requirement in the guilty-plea context, a Rule 24.035 motion must plead that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Stanley v. State*, 420 S.W.3d 532, 544 (Mo. banc 2014) ("[Defendant] does not allege in his [Rule 24.035] first amended motion that he would not have pleaded guilty and would have insisted on going to trial if . . . counsel had not erred. Therefore, [defendant]

is not entitled to an evidentiary hearing on any of his claims, and the motion court did not clearly err in denying a hearing.").

Defendant's amended motion fails to allege that but for his supposed misunderstanding, Defendant would not have pleaded guilty and would have instead insisted on going to trial. (L.F. 77-83). As such, Defendant's pleading is insufficient on its face, as it does not allege the prejudice required for relief.[8] A full review of the record does not definitely and firmly reveal that the trial court made a mistake by denying Defendant's motion without an evidentiary hearing. *Morrow*, 21 S.W.3d at 822.

F. It is irrelevant whether Defendant pleaded guilty as an accomplice or principal.

Defendant attempts to circumvent that the record clearly shows he was advised of the elements and admitted that he committed the crime of first-degree assault while acting with others by arguing that the record is not clear whether he pleaded guilty as a principal or as an accomplice. (Appellant's Subst. Br. 16). But the record is clear that: Defendant was charged with first-degree assault acting with others; Defendant admitted he committed this

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[8] On appeal, Defendant still does not allege that but for his supposed misunderstanding, Defendant would not have pleaded guilty and would instead have insisted on going to trial. (Appellant's Subst. Br. 13-37).

crime; he acknowledged that he understood the nature of the charge and that he understood what it meant to be guilty of acting with others; and he pleaded guilty to this crime because he was guilty.

Defendant's argument is based on his claim that the indictment did not inform him whether the State would proceed on a theory of principal or accomplice liability. (Appellant's Subst. Br. 17). The indictment charged him with first-degree assault while acting with others, and at the plea hearing the State said that it would prove that Defendant committed this crime while acting with others. (L.F. 8, 30-31). The indictment was clear, and the prosecutor's statement as to what the State was prepared to prove was clear. Defendant's argument is without merit. "Long ago, this Court eliminated the common law distinction between principals and accessories. All persons who act together with a common intent and purpose in the commission of a crime are equally guilty." *State v. Isa*, 850 S.W.2d 876, 898 (Mo. banc 1993). "Because no distinction of guilt is recognized between principal and accomplice in the law, the State [is] not required to charge [a] [d]efendant as an accomplice since charging a defendant as a principal or as an aider or encourager has the same legal effect and, even if charged as a principal, the case may be submitted to the jury on the theory of accomplice liability." *State v. Biggs*, 170 S.W.3d 498, 504 (Mo. App. S.D. 2005) (internal quotation marks omitted).

Thus, it is irrelevant whether the State charged Defendant as a principal, an accomplice, or both. "Every element of a crime to which a defendant pleads guilty need not be explained as long as the defendant understands the nature of the charge." *Roussel*, 314 S.W.3d at 401.

In any event, there was a sufficient factual basis for Defendant's guilty plea under either a theory of principal liability or accomplice liability. The indictment stated that all of the defendants, including Defendant, struck A.A. for the purpose of killing or causing serious physical injury to A.A. (L.F. 8-9). The prosecutor also alleged this fact during the plea hearing; Defendant acknowledged that it was true; and Defendant acknowledged that he was pleading guilty because he was guilty. (L.F. 24, 31, 35). Thus, Defendant admitted that he assaulted A.A. with the purpose of killing or causing serious physical injury, and he also admitted that he acted with the other defendants in doing so. Moreover, there is nothing in the record demonstrating that A.A.'s injuries were sustained from the codefendants rather than Defendant. It is at least as likely that A.A. suffered serious physical injury while being knocked onto the surface of a parking lot by Defendant, and then stricken again by Defendant, as opposed to A.A. being assaulted subsequent to him hitting the hard parking-lot surface.

A full review of the record does not definitely and firmly reveal that the trial court made a mistake by denying Defendant's motion without an

evidentiary hearing. *Morrow*, 21 S.W.3d at 822. Defendant's point should be denied.

Point II (sudden-passion defense)

The motion court did not clearly err in denying Defendant's postconviction motion because Defendant's factual allegations are refuted by the record, and because sudden passion was not a viable defense in any event.

A. Facts

At sentencing, Defendant stated that counsel went over his trial rights and discussed possible defenses. (L.F. 50). He also said that he had had enough time to discuss the charge with counsel. (L.F. 50).

At the plea hearing, Defendant said that he had had enough time to discuss his case with counsel and that counsel had talked to him "[a] nice amount of times." (L.F. 17, 19). Defendant said that he knew what he was charged with. (L.F. 18). He stated that counsel explained the charges to him and had gone over the evidence with him. (L.F. 19). Defendant said that counsel explained to him the range of punishment and that he knew the range of punishment. (L.F. 18-19). He said that counsel told him whom the State would call as witnesses against him. (L.F.19-20). He also acknowledged that he had discussed with counsel the nature of the injuries the victim received and that counsel had explained to him his constitutional rights to a trial. (L.F. 20-21). Defendant said that he understood that he had the right to plead not guilty and to have a trial. (L.F. 21).

The motion court explained to Defendant his constitutional rights to a trial, and Defendant said he understood that by pleading guilty he was giving up those rights. (L.F. 21-23). Defendant said that counsel explained to him his rights to a trial. (L.F. 23). He said that counsel answered all of his questions. (L.F. 23). He also said that he was pleading guilty because he was guilty. (L.F. 24). He stated that he understood, and counsel had explained to him, what it meant to be guilty by acting with another. (L.F. 29).

In his amended motion, Defendant argued that counsel was ineffective for failing to advise him that he had a viable defense because he acted under sudden passion. (L.F. 77, 83-85). Defendant argued that he suffered prejudice because if he had known of this defense, he would not have pleaded guilty and would have insisted on going to trial. (L.F. 84-85).

The motion court overruled the motion without an evidentiary hearing, finding that the facts Defendant alleged would not have been sufficient to establish that he acted under sudden passion as there was no conduct by the victim that would have caused Defendant to claim that he acted under sudden passion. (L.F. 99).

B. Standard of Review

This appeal relates solely to the motion court's judgment overruling Defendant's postconviction motion. Appellate review of a judgment overruling a postconviction motion is limited to a determination of whether the findings of fact and conclusions of law issued by the motion court are "clearly erroneous." *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *see also Barnett v. State*, 103 S.W.3d 765, 768 (Mo. banc 2003); Rule 24.035(k). "Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made." *Morrow*, 21 S.W.3d at 822. In reviewing the denial of postconviction relief under Rule 24.035, appellate courts "view the record in the light most favorable to the motion court's judgment, accepting as true all evidence and inferences that support the judgment and disregarding evidence and inferences that are contrary to the judgment." *Smith v. State*, 443 S.W.3d 730, 733 (Mo. App. S.D. 2014).

To be entitled to an evidentiary hearing on a motion for postconviction relief, the motion must meet three requirements: "(1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters of which movant complains must have resulted in prejudice." *Morrow*, 21 S.W.3d at 823; *see also Dorris v. State*, 360 S.W.3d 260, 267 (Mo. banc 2012)

("[T]he movant must allege facts showing a basis for relief to entitle the movant to an evidentiary hearing.").

"[R]epresentation by counsel is presumed to be effective, and their decisions are presumed to be strategic." *McLaughlin v. State*, 378 S.W.3d 328, 343 (Mo. banc 2012). A claim of ineffective assistance of counsel related to a guilty-plea proceeding is evaluated under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984), which was modified for the guilty-plea context in *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In evaluating any claim of ineffective assistance of counsel, "[s]urmounting *Strickland*'s high bar is never an easy task." *Premo v. Moore*, 562 U.S. 115, 122 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

First, it must be shown that plea counsel's representation fell below "the range of competence" for attorneys in criminal cases as set forth in *Tollett v. Henderson*, 411 U.S. 258 (1973), and *McMann v. Richardson*, 397 U.S. 759 (1970). *Hill*, 474 U.S. at 56, 58. A defendant seeking to set aside a guilty plea must "allege and prove serious derelictions on the part of counsel sufficient to show [the] plea was not, after all, a knowing and intelligent act." *McMann*, 397 U.S. at 772.

The movant must additionally show that counsel's actions resulted in prejudice—the second prong of the *Strickland-Hill* test. *See Hill*, 474 U.S. at 58-59. "[I]n order to satisfy the 'prejudice' requirement, the defendant must

show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

C. Defendant's allegations are refuted by the record

In his amended motion, Defendant alleged that victim A.A. and A.A.'s friend "sexually harassed a young lady" and that A.A. and his friend "swung on Movant/Movant's friend when Movant's friend tried to intervene on behalf of the young lady." (L.F. 83).

This series of events is directly refuted by the record, which demonstrated that victim A.A. did not participate in any alleged harassment. Defendant agreed with the prosecutor's statement of facts indicating that A.A.'s friend Luther Jones starting talking to Jasmine Jeffries, resulting in an argument. (L.F. 31). Defendant's friend Johnnie Lane then got out of his vehicle and started arguing with Jones, resulting in Lane and Jones pushing each other. (L.F. 31). *Only then* did A.A. "[go] up to the situation" and approach the group, at which point Defendant's friend Lane swung at A.A. (L.F. 31). Defendant then began the group assault on A.A., striking him and knocking him to the ground, then striking him again on the ground. (L.F. 31-

32). Defendant admitted that this is what happened, and he never suggested that his actions were the result of sudden passion.[9]

Thus, the record demonstrates that A.A. was not involved in any alleged harassment of Ms. Jeffries and that A.A. did not swing on Defendant or Defendant's friend.

Defendant's allegations are refuted by the record. They are also refuted by Defendant's other allegations. Defendant alleged that Ms. Jeffries told police that *Mr. Jones* got out of his vehicle, not A.A., and *Mr. Jones* began talking to her and "trying to put himself on her" in a way that made her "uncomfortable." (L.F. 84). Defendant stated that the police report indicated that A.A. was still in the car at this point. (L.F. 84). Thus, A.A. had no involvement in this alleged conduct.

A full review of the record does not definitely and firmly reveal that the trial court made a mistake by denying Defendant's motion without an evidentiary hearing. *Morrow*, 21 S.W.3d at 822.

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[9] The only clarification defense counsel made to the prosecutor's statement of facts was to assert that Defendant stopped hitting A.A. before Defendant's codefendants kicked or stomped A.A. in the head. (L.F. 32-33).

D. Sudden passion was not a viable defense.

Even if Defendant's factual allegations were not refuted by the record, they would not support a sudden-passion defense.

A person is guilty of second-degree assault if he "[a]ttempts to kill or knowingly causes or attempts to cause serious physical injury to another person under the influence of sudden passion arising out of adequate cause." Section 565.060. Adequate cause "means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control." Section 565.002(1). Sudden passion "means passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation." Section 565.002(7).

The "sudden passion" requirement was not met, as A.A. and his friend Jones's alleged harassment was not directed toward Defendant. To show sudden passion, Defendant would be required to prove that A.A. or Jones took some action toward Defendant, not a third party. *State v. Everage*, 124 S.W.3d 11, 16 (Mo. App. W.D. 2004) ("Whether or not the victim's conduct could be considered provocative toward Robert, it was never directed toward [defendant]. [Defendant] became an aggressor against [victim] when he joined in the fight. To show sudden passion arising from adequate cause,

[defendant] had to prove the victim took some action to inflame him and that he was not the initial aggressor.").

In *Everage*, the victim was initially in a fist fight with the defendant's brother, Robert, because Robert cheated the victim out of $10 during a drug purchase. *Id.* The defendant then joined in. *Id.* The court held that the defendant was the initial aggressor because the victim had taken no action toward the defendant. *Id.* Likewise, here, Defendant was the initial aggressor against A.A., who had taken no action toward Defendant. The record clearly demonstrates that Defendant was the initial aggressor by striking A.A. and causing him to fall to the ground. The record also demonstrates that codefendant Lane also swung on A.A. Defendant and his codefendants were the initial aggressors. Any allegation to the contrary is refuted by the record. The sudden-passion defense was not available to Defendant. *Id.*; *Hill v. State*, 160 S.W.3d 855, 859 n.5 (Mo. App. S.D. 2005) ("Sudden passion cannot arise unless a defendant shows the victim took some action to inflame the defendant and that the defendant was not the initial aggressor.").

Defendant was in control of himself and not acting out of sudden passion. Defendant, by his own admissions during the plea colloquy, established that he did not act in sudden passion as he admitted that he and his codefendants were the initial aggressors. (L.F. 31, 35).

The "adequate-provocation" requirement also was not met. Ms. Jeffries stated that she was merely "uncomfortable" with Mr. Jones's conduct. (L.F. 84). This is not sufficient for adequate provocation. Conduct that causes another person to be merely uncomfortable[10] cannot reasonably produce a degree of passion to make a person of ordinary temperament lose his self-control.

"In order for an offense to be reduced to one less culpable, there must be a sudden, unexpected encounter or provocation tending to excite the passion beyond control. Passion may be rage or anger, or terror, but it must be so extreme that for the moment, the action is being directed by passion, not reason." *State v. Simmons,* 751 S.W. 2d 82, 91 (Mo. App. E.D. 1988). Even

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[10] For the first time on appeal, Defendant asserts that Jones "was trying to put his penis on [Ms. Jeffries]." (Appellant's Subst. Br. 47). Defendant greatly overstates the allegation made in his amended motion, which was that the police report indicated that Ms. Jeffries told police she was "uncomfortable" with the way Jones was talking to her and "trying to 'put himself' on her." (L.F. 84). Defendant was free to make his new allegation during the plea hearing or in his amended motion but did not do so. In any event, such an allegation seems unlikely to have occurred in a populated restaurant parking lot, particularly if it merely made Ms. Jeffries "uncomfortable."

if A.A.'s friend flirted with Ms. Jeffries in a way that made her "uncomfortable," that would not create such rage or anger in a person of ordinary temperament to be directed by passion, not reason, and lose self-control. The facts here are more like being cheated out of $10 in a drug sale, as in *Everage*: however annoying or obnoxious it may be, it is not so extreme that an ordinary person would lose self-control.[11] Additionally, Defendant's admissions during the plea hearing established that A.A.'s friend Jones—not A.A.—made Ms. Jeffries uncomfortable, and that Defendant and his codefendants were the initial aggressors. Thus, even if "uncomfortable" flirting could evoke sudden passion, Defendant must have assaulted Jones, not A.A., in order to use the defense.

Finally, Defendant failed to allege that Ms. Jeffries was his wife, girlfriend, friend, or an acquaintance. Defendant failed to allege that he even knew Ms. Jeffries. (L.F. 83-85). Flirting toward a stranger, even if it made the stranger uncomfortable, would not cause rage or anger in an observer of ordinary temperament sufficient to lose self-control.

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[11] Defendant provides no authority supporting the proposition that a sudden-passion defense would be available under the facts here or similar facts.

A sudden-passion defense was not viable here. Counsel cannot be deemed ineffective for failing to advise his client of a non-viable defense. *Gerlt v. State*, 339 S.W.3d 578, 583 (Mo. App. W.D. 2011)

Defendant was not entitled to an evidentiary hearing because his claim was refuted by the record. Defendant's assurances to the court during the plea colloquy that he had had enough time to consult with plea counsel before he pled guilty; that plea counsel had advised him of possible defenses; and that he was pleading guilty freely and voluntarily were specific enough to refute his current claim.

Defendant failed to plead facts that established that counsel was ineffective, and in any event, such a claim was refuted by the record of the plea. Defendant's point should be denied.

CONCLUSION

In view of the foregoing, the judgment of the motion court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 11,701 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2010 software.

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