No. SC96118

In the
Missouri Supreme Court

CHRISTOPHER COLLINGS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Phelps County
Twenty-Fifth Judicial Circuit
The Honorable John Beger, Judge

RESPONDENT'S BRIEF

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INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF FACTS

Appellant, Christopher Collings, was convicted of first-degree murder and sentenced to death following a jury trial in the Circuit Court of Phelps County. *State v. Collings*, 450 S.W.3d 731, 746 (Mo. 2014). Appellant was convicted and sentenced to death for his actions in the 2007 kidnapping, rape, and murder of nine-year-old Rowan Ford, the stepdaughter of appellant's friend and one-time suspected accomplice David Spears. *Id.* The facts of the underlying criminal case, in the light most favorable to the verdict, were stated by this Court in its opinion affirming appellant's conviction and sentence on direct appeal. *Id.* at 747-52.

On January 23, 2015, appellant timely filed his *pro se* Motion to Vacate, Set Aside, or Correct Judgment and Sentence (PCR L.F. 6-11). Appointed counsel timely filed an amended motion, raising a freestanding claim that § 562.076 regarding voluntary intoxication was unconstitutional, twelve claims of ineffective assistance of trial counsel, two claims of ineffective assistance of appellate counsel, and a claim that this Court's time limits under Rule 29.15 are unconstitutional (PCR L.F. 13-139). An evidentiary hearing was held, at which appellant presented the testimony of trial counsel Janice Zembles (who had primary responsibility over the guilt phase) and Charles Moreland (who had primary responsibility over the

penalty phase), appellate counsel Rosemary Percival, two expert witnesses, and five other witnesses (PCR Tr. 8-410, 235).[1] On November 1, 2016, the motion court entered conclusions of law denying appellant's motion (PCR L.F. 144-194).

[1]Facts relevant to each point will be discussed in those points.

STANDARD OF REVIEW

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. *Nicklasson v. State*, 105 S.W.3d 482, 484 (Mo. 2003); Supreme Court Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. *Id.* On review, the motion court's findings and conclusions are presumptively correct. *Edwards v. State*, 200 S.W.3d 500, 505 (Mo. 2006).

To establish ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Nicklasson*, 105 S.W.3d at 483. To establish prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 694; *Nicklasson*, 105 S.W.3d at 483. In the context of capital sentencing, prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Johnson v. State*, 388 S.W.3d 159, 163

(Mo. 2012).

A movant has the burden of proving grounds for relief by a preponderance of the evidence. *Nicklasson*, 105 S.W.3d at 484; Supreme Court Rule 29.15(i). This Court gives deference to the motion court's superior opportunity to judge the credibility of witnesses. *Barton v. State*, 432 S.W.3d 741, 760 (Mo. 2014). Moreover, actions that constitute sound trial strategy are not grounds for ineffective assistance claims, and this Court presumes that any challenged action was a part of counsel's sound trial strategy and that counsel made those decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689-690.

ARGUMENT

I.

The motion court did not clearly err in denying appellant's claims regarding the constitutionality of § 562.076 and MAI-CR 3d 310.50.

The motion court did not clearly err in denying appellant's freestanding claim that the statute and instruction dealing with voluntary intoxication are unconstitutional and that trial counsel was ineffective for failing to adequately challenge them. The freestanding claim of constitutional error was not cognizable in this post-conviction proceeding and appellant failed to prove that counsel was constitutionally deficient for not challenging well-settled law holding that Missouri's law regarding voluntary intoxication is constitutional. Further, appellant was not prejudiced because counsel chose not to rely on evidence of intoxication affecting appellant's actions in the guilt phase, evidence established that appellant's ability to deliberate was affected by any intoxication, and the instruction did not prevent consideration of intoxication as mitigating evidence.

A. Facts

The evidence at trial showed that appellant drank a considerable amount of alcohol and used marijuana prior to the murder (Tr. 3717-3726).

Appellant stopped drinking 30 minutes to an hour prior to Nathan Mahurin and Spears leaving his trailer (Tr. 3727). Appellant claimed to law enforcement that all three men were "pretty F'ed up," but also said that he was less intoxicated than Spears (Tr. 4560; Mov.Exh. 32). The evidence showed that appellant was able to repeatedly and consistently recount all of the events of the night (Tr. 4556-4572; Mov.Exh. 26-29, 32).

At the guilt phase instruction conference, the State offered Instruction No. 9 based on pattern instruction 310.50, which said:

> The state must prove every element of the crime beyond a reasonable doubt. However, in determining the defendant's guilt or innocence, you are instructed that an intoxicated or a drugged condition whether from alcohol or drugs will not relieve a person of responsibility for his conduct.

(Tr. 5557). MAI-CR 3d 310.50. Counsel objected that the statute and instruction violated appellant's rights to due process and to present a defense (Tr. 5557-5559). The court overruled the objection (PCR Tr. 5560).

In his amended motion, appellant alleged that the statute and instruction unconstitutionally deprived a defendant of the right to present a defense based on evidence of intoxication affecting his ability to deliberate,

which he claimed should be determined by a jury (PCR L.F. 15-18). He alleged that case law holding the constitutionality of the statute and rule are no longer correct because an "abundance" of research now shows that addiction is a "chronic disease" that changes both brain structure and function, affecting judgment, decision-making, learning, memory, and behavior control and impairing the ability to exercise self-control, making subsequent alcohol use "increasingly automatic" (PCR L.F. 16-18). Thus, he alleged that it would "seem that due process would require that a jury be able to hear and consider evidence of addiction and its effects on the brain to determine if voluntary intoxication could prevent a defendant from deliberating (PCR L.F. 18). He alleged that Dr. Melissa Piasecki would testify that, as recently as 2012, research has "refined our understanding of addiction" to show specific neural deficits in decision-making and inhibition and weaken control over substance use (PCR L.F. 99-100). She would testify that impairments from acute alcohol intoxication to perception, emotional regulation, impulse control, motor coordination, and response inhibition decrease an intoxicated person's ability to avoid potentially aggressive acts (PCR L.F. 100-101). She would also testify that cannabis use could affect impulsive choice and impair inhibition (PCR L.F. 101).

Appellant also alleged that counsel was ineffective for failing to

challenge the statute and instruction "as being unconstitutional in that they deprive defendants the right to present a defense" (PCR L.F. 19). He alleged that counsel failed to investigate and present evidence to challenge the statute and instruction by showing that his intoxication affected his ability to deliberate (PCR L.F. 21). He reiterated his earlier arguments as to why the statute and instruction were unconstitutional (PCR L.F. 22-24). He alleged that, had counsel investigated and presented to the trial court evidence on this issue, there was a reasonable probability that he would not have been convicted of first-degree murder (PCR L.F. 24-25).

At the evidentiary hearing, Zembles testified that the defense did not consider hiring an expert to litigate the constitutionality of the statute and instruction (PCR Tr. 185). She testified that, in the guilt phase, she would not have chosen to rely on a voluntary intoxication defense regardless of whether the instruction was submitted (PCR Tr. 243). She testified that she was "very loathed" to argue "anything about intoxication" because, in her experience, regardless of "how many times you tell them it's not an excuse," jurors consider intoxication defenses an "excuse" and do not like such defenses (PCR Tr. 243-244). In her experience (including having made the "mistake" of making such arguments in the past), arguments that "he would never have done this if he hadn't been so drunk and so high" antagonize

jurors, so avoiding such arguments is a better strategy (PCR Tr. 254-255).

Moreland testified that he objected to the instruction as unconstitutional, but did not consider investigating and presenting scientific evidence from a "medical doctor or psychiatrist" specializing in addiction to challenge the statute and instruction (PCR Tr. 334).

Piasecki testified[2] that addiction occurs when voluntary use progresses to the point where self-control over substances erodes, the craving increases, and the addicted person loses control over the voluntary nature of his use of substances (PCR Tr. 26-27). She testified that acute intoxication (which she believed appellant experienced the night of the murder) results in decreased inhibition, impulse control, consequential thinking, and emotional control, and increased impulsivity (PCR Tr. 66-67). She testified that it also changes processing speed for inhibition and comprehending, processing, and applying information (PCR Tr. 67). She testified that the ability to stop and consider actions would be significantly compromised (PCR Tr. 67). She testified that she did not think a determination of appellant's "mental state" at the time of the crimes could be accurately made without considering appellant's

[2]Piasecki's testimony is set out in greater detail in Point II, *supra*. Respondent only refers to her findings and conclusions relevant to the constitutional issue here.

intoxication level and its effects on his brain (PCR Tr. 69).

The motion court denied appellant's claims (PCR L.F. 181-182). The court found that Piasecki's testimony did not establish that the nature of voluntary intoxication had drastically changed since the cases declaring § 562.067 constitutional were decided; it found that her conclusions were "nothing new or surprising" and "did not detail any new research findings" (PCR L.F. 181). The court concluded that the United States Supreme Court case of *Montana v. Egelhoff*, 518 U.S. 37 (1996), was controlling on the issue (PCR L.F. 182). Finally, the court concluded that the evidence demonstrated that appellant did deliberate and thus that his intoxication did not prevent him from doing so (PCR L.F. 182).

A. Appellant Failed to Prove His Claims

1. Appellant's Trial Error Claim was Not Cognizable

The motion court did not clearly err in denying appellant's freestanding claim that the statute and instruction are unconstitutional. This Court has repeatedly held that claims of trial court error are not cognizable in Rule 29.15 proceedings and the rule is not a substitute for direct appeal. *McLaughlin v. State*, 378 S.W.3d 328, 345 (Mo. 2012); *Zink v. State*, 278 S.W.3d 170, 176 (Mo. 2009); *Tisius v. State*, 183 S.W.3d 207, 212 (Mo. 2006); *State v. Ferguson*, 20 S.W.3d 485, 509 (Mo. 2000). The only exception to this

rule is when "rare and exceptional circumstances" exist leading to a fundamental fairness requirement to permit the claim. *Zink*, 278 S.W.3d at 176 n. 2. Appellant did not plead, prove, or argue that such circumstances exist (PCR L.F. 15-18, 100-101). Thus, his trial court error claim was not cognizable.

2. Appellant Failed to Prove Ineffective Assistance

Appellant failed to prove that counsel was ineffective because the law upholding the constitutionality of § 562.076 and MAI-CR 3d 310.50 was well-settled at the time of trial. In *Egelhoff*, four justices held that Montana's statute stating that the jury could not consider the defendant's "intoxicated condition…in determining the existence of a mental state which is an element of the offense" did not violate due process or the right to present a defense. *Egelhoff*, 518 U.S. at 41, 51-56. Those justices held that a rule "disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue" is within the prerogative of the states and "[n]othing in the Due Process Clause prevents them from doing so." *Id.* at 56.

Justice Ginsberg, concurring in the judgment, held that such laws are constitutional, not as improper prohibitions on "relevant, exculpatory evidence," but because such laws redefine the mental state element of the offense to remove the exculpatory value of voluntary intoxication from the

mens rea requirement for the crime. *Id.* at 57-58 (Ginsberg, J. concurring). States enjoy wide latitude in defining the elements of criminal offenses and the extent to which moral culpability should be a prerequisite to conviction of a crime. *Id.* at 58. Justice Ginsberg explicitly rejected the claim that such laws violate due process because they do not offend "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 58-59. She also explicitly stated that, in a prosecution for deliberate homicide, the State need not prove the *mens rea* "in a purely subjective sense." *Id.* at 58. Under such circumstances, voluntary intoxication is not a defense because it does not negate the mental state. Thus, a majority of the court held that statutes which eliminate voluntary intoxication's relevance to the *mens rea* requirement do not unconstitutionally violate due process or the right to present a defense. *Id.* at 41-61.

Section 562.076 and its attendant instruction have the same effect as the statute at issue in *Egelhoff*. The statute states that a person in an intoxicated or drugged condition is criminally responsible for conduct unless such intoxication is involuntary. § 562.076.1, RSMo 2000. Thus, evidence of voluntary intoxication may be admissible when relevant to conduct but not "for the purpose of negating a mental state which is an element of the offense." § 562.076.3, RSMo 2000. The statute is not a mere evidentiary rule,

but, like the statute in *Egelhoff*, a declaration that voluntary intoxication is not relevant to disprove a culpable mental state because the mental state as legislatively defined cannot be negated by voluntary intoxication. As this Court stated in *State v. Roberts*, 948 S.W.2d 577 (Mo. 1997), § 562.076 stands for the rule that jury may not consider voluntary intoxication on the issue of the defendant's mental state because a voluntarily intoxicated person maintains responsibility for his conduct. *Id.* at 588, citing *State v. Erwin*, 848 S.W.2d 476, 482 (Mo. 1993). This Court continued:

> A person who voluntarily puts himself…into a drugged condition is capable of forming an intent to kill. That drugs may remove a person's inhibitions and make the person more likely to act rashly, impulsively and anti-socially and increase the persons susceptibility to passion and anger does not alter the person's capacity to intend to kill.

Id. Thus, a defendant may not raise a diminished capacity defense where the alleged excuse for the lack of capacity is voluntary intoxication. *Id.* at 588-90. Such a defense is no defense at all.

Other courts which have reviewed § 562.076 since *Egelhoff*, *Erwin*, and *Roberts*, have continued to reach the same conclusion: the statute and

instruction do not violate due process because the statute redefines the mental state of the crime to declare that voluntary intoxication "has no exculpatory relevance." *Gary v. Dormire*, 256 F.3d 753, 758-59 (8th Cir. 2001); *see also State v. Fanning*, 939 S.W.2d 941, 944-48 (Mo. App., W.D. 1997); *State v. Wright*, 376 S.W.3d 696, 704-05 (Mo. App., E.D. 2012). Thus, the law at the time of trial overwhelmingly established that § 562.067 and MAI-CR 3d 310.50 were constitutional.

Appellant's arguments that the statute is unconstitutional depend on his assertion that the statute allows a first-degree murder conviction (and death sentence) to be imposed where the state has failed to prove the defendant's personal, subjective moral culpability for the offense (App. Br. 49). This argument is meritless. First, appellant improperly conflates the guilt-phase finding with the penalty-phase finding. That a punishment of death "must be tailored to" appellant's "personal responsibility and moral guilt" (App. Br. 49) is a punishment question, not a guilt question. Appellant's assertion that a first-degree murder finding is "limited solely to sentencing" because deliberation is the only distinction between first- and second-degree murder is incorrect. Everyone convicted of first-degree murder does not get sentenced to death; a death sentence requires additional findings which includes consideration of the subjective consideration of the defendant

because it includes consideration of "any evidence" which a juror considers aggravating or mitigating. § 565.032.1, RSMo 2000. Second, under *Egelhoff*, the states are expressly permitted to define the *mens rea* without doing so in a "purely subjective sense." *Egelhoff*, 518 U.S. at 58. Third, the redefinition of the *mens rea* to exclude voluntary intoxication from consideration does not mean that the State does not need to prove the *mens rea*. *Fanning*, 939 S.W.2d 947-48. Instead, the statute only holds that voluntary intoxication is not relevant to that determination. *Id.* Thus, appellant's argument that § 562.076 lessens or eliminates the element of deliberation is meritless.

Further, appellant's reliance on Piasecki's testimony that the nature of voluntary intoxication has somehow changed since federal and Missouri courts have held § 562.076 constitutional is meritless. As the motion court concluded, her testimony about the effects of alcohol on the brain, such as decreased impulsivity control and inhibition, are exactly the same types of things this Court stated in *Roberts* did not tend to demonstrate a lack of capacity to intend to kill. *Roberts*, 948 S.W.2d at 588. This shows that Piasecki's testimony 1) did not provide such new information to support a conclusion about the nature of addiction to call precedent into issue and 2) did not actually demonstrate that appellant lacked the capacity to deliberate. While her testimony showed that alcohol may have contributed to his

decision to deliberate or his desire to deliberate due to affecting his ability to modulate that decision and desire, it did not show that he did not or could not actually deliberate, i.e., coolly reflect on Rowan's murder. § 565.002(5), RSMo 2000. Thus, Piasecki's testimony failed to prove any basis for concluding that *Egelhoff*, *Erwin*, *Roberts*, *Gary*, or *Fanning* were wrongly decided.

In light of the above, appellant failed to prove that counsel was ineffective for failing to present Piasecki's testimony to challenge the constitutionality of § 562.067. The effectiveness of counsel is judged under the existing law at the time of counsel's representation. *Hoeber v. State*, 488 S.W.3d 648, 658 (Mo. 2016). Counsel is not ineffective for failing to anticipate a change in the law. *Id.* Accordingly, counsel is not constitutionally required to advocate for a change in the law. *See, e.g., Mangum v. State*, 521 S.W.3d 252, 256 (Mo. App., S.D. 2017) (in light of the fact that the statutes are presumed constitutional, counsel was not ineffective for failing to raise a claim that the statute prohibiting exposing another to HIV violated equal protection). Because counsel had no duty to challenge existing law, counsel's performance was not constitutionally deficient.

Moreover, appellant was not prejudiced by counsel's failure to challenge the statute. First, counsel decided as a matter of reasonable trial strategy not to argue appellant's intoxication in the guilt phase under any circumstance

based on her experience that such argument antagonized jurors (PCR Tr. 243-244, 254-255). Counsel is not ineffective for considering her professional experience to make decisions of reasonable strategy. *See, e.g., Tucker v. State*, 468 S.W.3d 468, 475 (Mo. App., E.D. 2015) (counsel relied on professional experience in considering risks of cross-examining child victims and was not ineffective for choosing not to do so).

Second, as this Court concluded on direct appeal, the evidence established that appellant was capable of deliberation. *State v. Collings*, 450 S.W.3d 741, 760 (Mo. 2014). Appellant's actions before the murder in planning his kidnapping and rape of Rowan, his decision to kill her because he was able to identify her, and his considerable efforts to hide the crime all demonstrated that appellant was capable of and actually did deliberate. *Id.* Therefore, even if Instruction No. 9 had not been given to the jury, there was not a reasonable probability that the jury would have concluded that appellant was unable to deliberate.

Finally, to the extent that appellant claims the statute and instruction prevented the jury from considering appellant's subjective moral responsibility for the murder before imposing death, this was not because of the statute and instruction. The instruction was not given to the jury before the penalty phase (L.F. 684-695). The statute and instruction did not prevent

counsel, if counsel so chose, to argue that appellant should not be deemed as morally or subjectively responsible for the crimes due to his intoxication or addiction. *See, e.g. Rompilla v. Beard*, 545 U.S. 374, 382 (2005) (suggesting that evidence of alcohol troubles could be evidence of a history of dependence that might have "extenuating significance" for mitigation). Because the statute and instruction did not prevent the consideration of voluntary intoxication as mitigation in the penalty phase, appellant's death sentence was not due to prejudice from counsel's failure to challenge the voluntary intoxication statute.

II.

The motion court did not clearly err in denying appellant's claim that trial counsel was ineffective for failing to call Dr. Melissa Piasecki to testify about appellant's substance abuse/addiction, childhood trauma, and mental/emotional development in the penalty phase.

Appellant failed to prove that counsel was ineffective for failing to investigation and call Dr. Piasecki to testify as an expert in substance abuse/addiction and trauma. Counsel conducted a thorough investigation into the same topics Piasecki would have testified to, reasonably decided not to present that evidence, and presented other evidence about childhood trauma and appellant's development.

A. Facts

At trial, appellant presented expert testimony from Dr. Wanda Draper, a human development expert to testify about appellant's physical, mental, and emotional development (Tr. 6120-6411). Among other issues, she testified to the effects of various issues of abuse and neglect throughout appellant's life (Tr. 6150-6411).

Regarding substance use and abuse, she discussed the substance abuse of appellant's birth parents (Tr. 6154-6156, 6173, 6301). She testified that, at

age 15, appellant was diagnosed with intermittent explosive disorder, dysthymia (sadness and loneliness), and depression (Tr. 6243, 6247-6248). She testified that these diagnoses increased the risk of alcohol dependency, which he "certainly moved into…relatively soon" (Tr. 6251). He started using marijuana at that age in place of prescribed medication because it was "cheaper" (Tr. 6392). By age 19, he was engaged in the "heavy use of alcohol" (Tr. 6267-6268). He said that he used alcohol to the point where he would find himself in someone's yard or ditch and would not remember how he got there (Tr. 6270). This was "not uncommon" for his diagnoses (Tr. 6270). He later stopped using alcohol because he was "totally out of control with" it but used marijuana because he was more in control with it (Tr. 6271). She testified that, at the time of the crime, appellant was able to control his choices to drink and use marijuana (Tr. 6356-6357).

In his amended motion, appellant claimed that counsel was ineffective for failing to call a psychiatrist, such a Piasecki, to present mitigation evidence on appellant's "substance abuse addiction and childhood trauma" (PCR L.F. 68). He alleged that reasonable counsel would have called such an expert and that there was a reasonable probability that he would not have been sentenced to death had counsel presented such evidence (PCR L.F. 68). He alleged that it was "incumbent" on counsel to investigate and present

evidence of "mental incapacity, substance abuse, and childhood trauma" (PCR L.F. 70). He alleged that counsel knew that appellant used a large amount of alcohol the night of the murder and was long-addicted to alcohol and marijuana (PCR L.F. 70). He alleged that counsel failed to "investigate and call a credible and qualified expert addiction specialist or psychiatrist" to provide a "wealth of non-statutory mitigating information (PCR L.F. 71). He alleged that such testimony would have supported the statutory mitigating circumstance that his capacity to appreciate the criminality of his conduct or conform his conduct to the law was substantially impaired (PCR L.F. 71).

He alleged that Piasecki would have testified that appellant's thinking and behavior at the time of the murder was affected by his alcohol use that night (PCR L.F. 72, 114). He alleged that addiction was a "brain disease" based on neurological changes in the brain which are related to craving, compulsive use, and erosion of judgment (PCR L.F. 72). He alleged that, while counsel had functional and structural brain testing performed, the results of which were not helpful, a qualified psychiatrist would have testified that all of the brain effects caused by appellant's addiction would have healed within 6-9 months of being in jail and thus would not have shown up on brain scans (PCR L.F. 72-73, 115-116).

He alleged that Piasecki reviewed information available prior to trial,

witness testimony from trial, and interviews with appellant (PCR L.F. 113). He alleged that she would have testified to his history of alcohol, marijuana, and ephedrine use and that his patterns of drinking resulted in a diagnosed alcohol disorder (PCR L.F. 113). He alleged that she would have testified that appellant abused alcohol and marijuana from an early age (PCR L.F. 113-114). She would testify that individuals with acute alcohol intoxication experience impairments in perception, emotional regulation, impulse control, motor coordination, and response inhibition (PCR L.F. 114). Relying on his statements of how much he claimed to have consumed the night of the crime, she would testify that his estimated BAC was .446, representing "acute intoxication" that "is always associated with significant impairments" (PCR L.F. 114). She would testify that his intoxication also prevented him from forming accurate memories of the night, leading to "alcohol-induced amnesia" which prevented him from remembering "large portions" of the night (PCR L.F. 115). She would also testify that appellant's sexual abuse when younger affected his brain and genetic predisposition to substance abuse from his parents was a risk factor for addiction (PCR L.F. 116-117). She would testify that she believed appellant's capacity to appreciate the criminality of his conduct or conform his conduct to the law was substantially impaired at the time of the crimes (PCR L.F. 117).

At the hearing, Piasecki testified that she was a forensic psychiatrist specializing in the neurobiology of addiction (PCR Tr. 19). Piasecki's direct testimony about the effects of alcohol addiction on the brain and appellant's alcohol abuse and marijuana use was essentially consistent with the allegations in the amended motion (PCR Tr. 22-30, 52-53). Her conclusions about addiction's effects on the brain were based on research on the observation of such brain structure and functioning with neuroimaging (PCR Tr. 23-26). She testified that acute alcohol intoxication would result in "dose-specific impairments" including impulse control and response inhibition (PCR Tr. 31-32). She testified that cannabis use was harder to study but that use can cause problems with information processing, memory, motivation, and impulsivity (PCR Tr. 32). She testified that someone experiencing both alcohol intoxication and cannabis use would be at a "very high risk for ongoing maladaptive decision-making, especially around substances" (PCR Tr. 33). She testified that childhood trauma and abuse could have an effect on the ability of the brain to regulate emotions and control stress responses (PCR Tr. 33-35).

She testified that she reviewed the same records that Dr. Draper reviewed (PCR Tr. 40-45). She also conducted new interviews of family witnesses in 2015 and interviewed appellant in 2015 (PCR Tr. 43). She

reviewed PET and MRI records from August 2010, which she admitted "did not reveal any significant structural or functional issues" (PCR Tr. 46). She testified that she did not believe that the equipment used would have detected the kinds of changes indicating the effects of alcohol and drugs on brain structure and function (PCR Tr. 46). She also testified that, over 2-3 years, the brain would go through "some recalibration and some normalization" (PCR Tr. 82).

Her testimony about appellant's early substance issues and emotional issues mirrored Draper's testimony (Tr. 6243-6271; PCR Tr. 47-53). She testified that appellant was diagnosed with alcohol and cannabis abuse in 2003 (PCR Tr. 53). She believed his history of drinking and marijuana use were consistent with "substance abuse and the diagnosis of alcohol disorder" (PCR Tr. 54). She testified that she believed that appellant's childhood trauma, including neglect and abandonment by his birth parents and sexual assault, could also cause a "neurological impact" on "early development and trauma in adversity" (PCR Tr. 54-59). She testified that those traumas and his parents' alcohol problems predisposed him to developing substance abuse addiction before he ever used those substances (PCR Tr. 61).

She testified that she relied on appellant's statement to her that he drank six "six-packs" of Smirnoff Triple Black Ice in the six hours prior to the

kidnapping by himself (PCR Tr. 63). He also smoked a number of marijuana cigarettes (PCR Tr. 64). She testified that he would have had an "acute" level of intoxication (PCR Tr. 64). She claimed he would have suffered motor impairments, decreased inhibition/impulse control, deceased consequential thinking, increased impulsivity, and decrease emotional control (PCR Tr. 66-67). She testified that this would significantly compromise a person's ability to stop and consider his actions (PCR Tr. 67). She testified there would be decreased memory and memory blackouts (PCR Tr. 67-68).

Piasecki testified that she did not think that one could "accurately assess" appellant's "mental status" without considering his alcohol use and its effects at the time of the crimes (PCR Tr. 69-70). She testified that appellant's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (PCR Tr. 70). She said that she or "a similarly situated forensic psychiatrist, addiction expert" could have made these same conclusions at trial, as the scientific information had been available for "more than 10 years" (PCR Tr. 71).

On cross-examination, Piasecki admitted that appellant "reported recall" of the events of the crimes when he spoke to police, although he claimed his memory in 2015 was "patchier" (PCR Tr. 72). She admitted that appellant did not have a "complete blackout" and that people do forget details

over time (PCR Tr. 73). But because he had forgotten some things in 2015, she claimed he had "fragmentary blackout" (PCR Tr. 73-74). She admitted that she could not say his childhood trauma caused brain problems, but only that those experiences heightened his risk of developmental and adult problems (PCR Tr. 76). She acknowledged that there was no indication in the 2010 imaging of long-term brain changes, but stated that higher resolution images would be required (PCR Tr. 77). She later acknowledged that the assessment done on him in 2012 was a "research level assessment" (PCR Tr. 82). She did not prepare any diagnostic findings for appellant (PCR Tr. 77).

Zembles testified that she assumed appellant was an alcoholic and smoked a lot or marijuana based on what she knew, although she was uncomfortable with using the term "addiction" to describe appellant because she believed that to be a medical term (PCR Tr. 228-229). She knew much about his background and other alcohol-related incidents (PCR Tr. 230). She was aware prior to trial that there were cognitive impairments associated with acute and chronic intoxication (PCR Tr. 230). She testified that she did not know if they hired a psychiatrist who was an addiction specialist because Moreland was responsible for penalty-phase experts (PCR Tr. 231). She testified that she would have wanted to present any statutory mitigating circumstance that they could have submitted (PCR Tr. 232). She testified

that she would not have wanted to argue anything about drug or alcohol intoxication during the guilt phase because, in her experience, jurors consider the argument an "excuse" (PCR Tr. 243-244). In the penalty phase, she would want to offer anything supporting mitigating circumstances (PCR Tr. 244).

Moreland testified on direct that he was aware appellant had alcohol and marijuana addictions and that, based on appellant's background, appellant had genetic and environmental risk factors for addiction (PCR Tr. 355-356). He was aware that acute and chronic intoxication were associated with cognitive impairments (PCR Tr. 356). He testified that he did not hire a psychiatrist who self-identified as an expert in addiction concerning the night of the offense (PCR Tr. 356). He testified that he did not request the "substantially impaired" mitigating circumstance (PCR Tr. 357). He said that he "would have to speculate" whether he would have submitted that mitigating circumstance if he had hired such an expert (PCR Tr. 357). When asked if that was because he did not investigate and get the information, he answered, "Oh, I investigated" (PCR Tr. 357-358). But he did not specifically hire a self-identified addiction-expert psychiatrist (PCR Tr. 358).

On cross-examination, Moreland testified that he investigated appellant's mental health "extensively" (PCR Tr. 391). He testified that he hired a neuropsychologist for a neuropsychological evaluation, who made

recommendations of directions to pursue (PCR Tr. 392). He hired another psychologist with expertise in fetal alcohol development and other specialties (PCR Tr. 392). He hired a specialist in the development of sex crimes (PCR Tr. 392). Based on that expert's recommendation, they hired a neuroradiologist, Dr. Orson, who suggested an MRI and brain scans because, due to appellant's history of consumption of alcohol and drugs, there was a very high probability of organic brain damage (PCR Tr. 392). The MRI did not reveal brain damage (PCR Tr. 392). He also hired a psychiatrist, Dr. Logan (PCR Tr. 393). He hired a "mental health coordinator" to help appellant through a crisis in the jail where he stopped allowing counsel to visit (PCR Tr. 393). He hired a specialist in gigantism who could not find any link in this case (PCR Tr. 393). He attempted to hire a geneticist, but was unable to find one willing to work on the case (PCR Tr. 393). After hiring all of these experts and conducting an investigation explicitly on how appellant's brain was affected by alcohol, he decided that Dr. Draper's testimony as a developmental expert was the best option for the defense (PCR Tr. 393-394). None of the experts identified would have supported a diminished capacity defense (PCR Tr. 394-395).

On redirect, counsel again stated that none of the experts was a "psychiatrist or medical doctor who were addiction specialists," but noted that

Dr. Logan was a forensic psychiatrist (PCR Tr. 397-398). He did not personally direct Dr. Logan to the theory of alcohol's effect on the brain (PCR Tr. 398).

He testified that he had the MRI and PET imaging done at the Martin Center, a "general-hospital-type setting" (PCR Tr. 403-404). Dr. Orson specialized in brain development and said that he preferred 3D images, but said if that could not be accomplished, to get the best images possible (PCR Tr. 404). The only facilities in the state that could do 3D images were in Kansas City and St. Louis (PCR Tr. 404). Counsel knew that the court would not let appellant be transported too far and that, the farther away the facility, the bigger the fight to get the scans done (PCR Tr. 404-405). They strategically decided to ask for appellant to go somewhere close so there would be less resistance to getting the tests done (PCR Tr. 405). They found an MRI in Springfield that, according to the neuroradiologist, was sufficient to allow him to make conclusions from the results (PCR Tr. 405-406).

The motion court denied this claim (PCR L.F. 187-188). The court found that many of Piasecki's opinions about alcohol and drug use and addiction were not new or surprising and would have been known to the jury even without an expert (PCR L.F. 158, 160). It found that her testimony about the effects of childhood trauma on development was not significantly different

than Dr. Draper's trial testimony (PCR L.F. 158-159). It found that Piasecki failed to establish that appellant's brain was not functioning with "any objective scientific evidence" (PCR L.F. 160). It found that her reliance on appellant's claim that appellant drank all of the Smirnoff Ice unfounded as Nathan Mahurin testified that all three men were sharing it (PCR L.F. 161; Tr. 3725-3726). The court credited Moreland's testimony that he consulted a number of experts, including on the topic of alcohol abuse (PCR L.F. 174). It concluded that counsel's decision as to which experts to hire was a matter of sound trial strategy, that Draper's testimony offered an extensive history which was not substantially different than Piasecki's, that Piasecki's testimony would not have affected the outcome because the jury would have understood the effects of alcohol on appellant even without her testimony (PCR L.F. 187-188).

B. Appellant Failed to Prove His Claim

In a death penalty case, counsel is obligated to investigate and discover all reasonably available mitigating evidence. *Davis v. State*, 486 S.W.3d 898, 906 (Mo. 2016). This includes investigating the defendant's medical history and family and social history. *Johnson v. State*, 388 S.W.3d 159, 165 (Mo. 2012). Trial counsel's selection of which expert witnesses to call at trial is generally a matter of matter of trial strategy and is virtually unchallengable.

Davis, 486 S.W.3d at 906. Counsel is not ineffective for failing to shop for an expert that would testify in a particular way. *Johnson*, 38 S.W.3d at 165. The duty to investigate does not force defense lawyers to "scour the globe on the off-chance something will turn up." *Davis*, 486 S.W.3d at 906; *Strong v. State*, 263 S.W.3d 636, 652 (Mo. 2008). Reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. *Id.*

Appellant identifies numerous cases in which counsel were found ineffective for failing to fully investigate mitigating evidence and urges this Court to conclude that, because counsel did not investigate and call Piasecki and instead only call Draper, counsel's investigation in this case was deficient (App. Br. 71-81). But appellant's argument ignores the overwhelming amount of investigation into expert witnesses, including experts on the issue of how appellant's drug and alcohol use affected his brain and thus his behaviors, counsel actually conducted in this case. Counsel explicitly stated that he investigated whether there was information to support the "substantially impaired" statutory mitigating circumstance (PCR Tr. 357-358). Moreland hired a neuropsychologist, who would be qualified to understand the effect of a defendant's various mental health conditions and experiences on his brain (PCR Tr. 392). He hired another psychologist with expertise in, among other

topics, fetal alcohol syndrome (PCR Tr. 392). Such an expert would presumably have an understanding of addiction. He also hired a forensic psychiatrist, who presumably would be capable of rendering medical opinions on the effect of appellant's life and circumstances on the crime (PCR Tr. 392). Despite appellant's claim that a forensic psychiatrist who is a self-described addiction expert was the only possible qualified expert who could render opinions to counsel on the effects of alcohol use, abuse, and addition (App. Br. 74-75, 80), substance abuse disorders were all set out in the DSM-IV-TR, the universal diagnostic manual for diagnosing psychological disorders applicable at the time of the investigation. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, p. 175-272 (4th ed., text rev. 2000). Tellingly, even though counsel stated that he investigated the availability of the mitigating circumstance, appellant chose not to ask counsel any questions about the qualifications of three experts to render similar, if not the same, opinions on the mental effects of alcohol as Piasecki (PCR Tr. 357-358, 396-398). Appellant failed to prove that counsel's investigation of this issue through these experts was deficient.

Further, Moreland hired an expert on sex offenses who suggested that the offenses could be attributable to the brain damage due to the heavy use of alcohol and drugs, which led him to hire a neuroradiologist to conduct scans

to find evidence of such drug-and-alcohol-related brain damage (PCR Tr. 392). Those tests, performed according to specifications provided by the neuroradiologist as sufficient to make his examination, did not reveal any brain damage (PCR Tr. 392-393, 405-406). This combination of these two experts' opinions would seem to cover the exact same information about brain structure and functioning that appellant claimed only Piasecki could offer. Again, appellant chose not to ask any questions about these experts' qualifications or opinions (PCR Tr. 357-358, 396-398).

Counsel also hired an expert in gigantism and attempted to hire a geneticist (PCR Tr. 393-394). He also hired a mental health expert to help deal with appellant prior to trial (PCR Tr. 393). And counsel hired Draper, a developmental expert (PCR Tr. 393-394). Thus, counsel hired eight different expert witnesses from the fields of psychiatry, psychology (with an alcohol-related specialty), neuropsychology, neuroradiology, sex offenses, human development, and gigantism, all in efforts to investigate the effect of appellant's life experiences, including his use of alcohol, on the charged offense. While appellant claims that this was not an issue of having chosen one expert over another (App. Br. 80), to suggest that only Piasecki was a qualified expert and relying on these other eight experts was deficient performance is merely a claim of failure to expert shop. Counsel is not

ineffective for shop for an expert who might provide the most or more favorable testimony. *Davis*, 486 S.W.3d at 908 (rejecting a claim that counsel relied on the testimony of a psychiatrist instead of a clinical psychologist specializing in "trauma"). Had appellant wanted to prove that the investigation counsel conducted through these witnesses was deficient, he could have asked Moreland about their qualifications and opinions or called the experts themselves. He chose not to do so. Appellant bore the burden of proving his claim by a preponderance of the evidence and failed to do so.

Because counsel conducted a thorough investigation of appellant's mental condition, including the effects of alcohol and drugs on it, and its applicability to the "substantially impaired" mitigating circumstance, counsel's strategic decisions as to his choice of expert witness to call at trial was virtually unchallengeable. *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. 2006). Counsel's decision not to call any expert but Draper was trial strategy, as counsel testified that he believed she was the "best option" for the defense after concluding his investigation (PCR Tr. 393-394). This testimony reflected a decision that the other expert's testimony would not be helpful, i.e., that they would not support the mitigating circumstances with evidence related to appellant's alcohol and drug use. Appellant failed to prove otherwise. Thus, appellant failed to overcome the presumption of reasonable trial strategy.

Finally, as the motion court found, Draper was able to testify about the effects of appellant's childhood trauma on his development, showing that Piasecki's proposed testimony on those issues was merely cumulative to Draper's testimony (Tr. 6150-6411). Counsel is not ineffective for failing to present cumulative evidence. *Johnson*, 388 S.W.3d at 167.

III.

The motion court did not clearly err in denying appellant's claim of ineffective assistance of appellate counsel for failing to challenge the exclusion of documents in the penalty phase.

The motion court did not clearly err in denying appellant's claim that appellate counsel was ineffective for assert that in the trial court erred in excluding the records Dr. Wanda Draper relied on to reach her conclusions. Appellant failed to prove that there was a reasonable probability that the claim would have been meritorious or that counsel did not exercise reasonable strategy in not raising the claim.

A. Facts

Prior to Draper's trial testimony, Zembles told the trial court that she wanted to "offer into evidence the records that she relied upon" before she testified (Tr. 6079). The prosecutor said that she had "many, many objections to these coming in wholesale" (Tr. 6079). Appellant argued that Draper would testify that she relied on each record in her assessment (Tr. 6082). The prosecutor agreed that Draper would so testify, but argued that there were multiple objections and reasons the records could not be admitted wholesale (Tr. 6083). The court, assuming that Draper would testify that she relied on them, considered each record individually (Tr. 6083).

Counsel offered a legal file and partial transcript from a 1975 criminal trial of two associates of appellant's birth father, Dale Pickett, which included details of a plot his birth mother, Barbara Pickett, concocted with the defendants which included testimony from both of appellant's birth parents which discussed aspects of his birth family's life during the first six months of appellant's life (Tr. 6088-6090). Counsel was not "suggesting…at all" that those records be admitted so the jury could look at them, but only so Draper could testify that she relied on them (Tr. 6090). The State argued: that Draper could testify that she relied on them without admitting the actual documents; that the documents would be duplicative to the testimony about them as well as to Pickett's testimony about the crime and trial; that the evidence about the crimes that occurred when appellant was less than six months old were not relevant to his character; that the records contained hearsay statements from numerous witnesses who could not be cross-examined and irrelevant matters about the trial unrelated to the Picketts (Tr. 6093-6094). Counsel argued that the evidence was not duplicative because Dale could not be trusted to remember everything and that appellant's household prior to his ability to remember or understand it was relevant to his later development (Tr. 6094-6095). The prosecutor argued that Draper could still testify to that information without admitting the

documents (Tr. 6096). The court ruled that the record itself was not admissible but Draper could testified that she reviewed the record and relied on them (Tr. 6096-6097).

Counsel next offered records from Arkansas Children's Hospital setting out a doctor's report of testing of appellant for "giantism" when he was 18 (Tr. 6097-6098). The prosecutor objected to hearsay, the records being duplicative to Draper's testimony, the records containing conclusions and conjecture, and "all of the other reasons that you can't just have records come in front of the jury" (Tr. 6098-6099). Counsel's only responsive argument was that experts are allowed to rely on hearsay to render an opinion (Tr. 6098). The court excluded that record but permitted Draper's testimony about it (Tr. 6098-6100).

Counsel offered several other records relying on the same argument that Draper relied on them, including: Barry County DFS records, Barry County adoption records, Heartland Behavioral Health Services records, records from appellant's adoptive parents' divorce, DYS records concerning appellant, University of Arkansas Medical Systems records, employment records, Wheaton School records of psychological assessments, and criminal cases records from cases against the Picketts (Tr. 6100-6114). The court sustained the State's various hearsay and relevance objections (Tr. 6100-

6114). The State did not object to educational records from Wheaton School or DYS (Tr. 6107, 6111). The State did not object to the "Life Path" Draper prepared from her review of those records (Tr. 6114-6115). On the second day of Draper's testimony, counsel restated his objection to the exclusion of the records, claiming the ruling violated appellant's "rights to a fair trial, a fair and reliable sentencing hearing and effective assistance of counsel" (Tr. 6226).

Draper testified that, in conducting her assessment of appellant's development, she reviewed all of the documents that the court excluded and explained that she relied on each record in reaching her conclusions (Tr. 6136-6144). Draper testified thoroughly about facts from those documents and how they affected appellant's development (Tr. 6157-6194, 6232-6271).

Appellate counsel Rosemary Percival did not raise the claim in her opening brief on direct appeal, instead raising ten other points on appeal, some of which contained multiple claims (SC92720 App.Br. 35-47). That brief was 30,712 words long, less than 300 words shy of this Court's word limit (SC92720 App.Br. 139).

In his amended motion, appellant alleged that appellate counsel was ineffective for failing to raise a claim that the trial court erred in excluding the documents (PCR L.F. 85). He alleged that the ruling was error because

the records were admissible independently of Draper's testimony and helped support her testimony (PCR L.F. 85). He alleged that he was prejudiced at trial from the records not being admitted (PCR L.F. 85). He alleged that, had counsel raised the issue, the case would have been remanded for a new trial or penalty phase (PCR L.F. 85). He alleged that the records all had business record or court record attestations and thus "were in a legally admissible form" (PCR L.F. 86-89). He alleged that the State's "general" and hearsay objections were meritless and that overruling the hearsay objection was "mandatory" (PCR L.F. 91). He alleged that the exclusion of the record prevented the defense from making a "full and complete" presentation of the background of appellant's life because they would have helped the jury understand Draper's testimony (PCR L.F. 93). He alleged that there was a reasonable probability that this Court would have reversed on appeal had this claim been raised (PCR L.F. 93).

At the evidentiary hearing, appellate counsel Percival testified[3] that she believed the claims regarding the admission of the records was preserved

[3]Trial counsel Zembles and Moreland also testified about this claim, but because this was a claim of ineffective assistance of appellate counsel on direct appeal, their further testimony about the records was irrelevant; this Court's review on direct appeal was limited to a review of the trial record.

for appeal (PCR Tr. 289-303). When she reviewed the records claim, she "rejected that fairly early" (PCR Tr. 315). She did "brief research" on the issue and found a capital case that, at the time, she believed defeated the claim (PCR Tr. 321). She testified that she later believed she "gave short shrift" to it because she considered all of the records together as opposed to each individually and because she was under time pressure to complete the brief (PCR Tr. 290-291, 315-316). She testified that, in hindsight, she believed that it was a mistake to dismiss the issue (PCR Tr. 290-291). She also testified that she had a "word-crunch problem" with her brief (PCR Tr. 307).

The motion court denied this claim (PCR L.F. 191-193). The court found that counsel researched and rejected the issue (PCR L.F. 170-171). The court did not find credible counsel's testimony about her belief that she made a mistake in not raising a records claim, as it was "convinced that her remorse is due to her loyalty to her client and not over any real belief that she failed to raise a meritorious claim" (PCR L.F. 171). The court found that counsel failed to articulate any prejudice from the failure to admit the records (PCR L.F. 172). The court concluded that counsel's decision not to raise the claim was part of a reasonable strategy to winnow out claims that did not maximize the likelihood of success (PCR L.F. 191-193). The court also concluded that

Draper was permitted to testify at trial about the contents of any of the records that she wished in explaining her findings (PCR L.F. 192).

B. Appellant Failed to Prove His Claim

To establish ineffective assistance of appellate counsel, the movant must prove that counsel failed to raise a claim of error that was so obvious that competent counsel would have recognized and asserted it. *Taylor v. State*, 262 S.W.3d 231, 253 (Mo. 2008). To establish prejudice, he must establish that there was a reasonable probability of a different outcome on appeal had counsel raised the issue. *Id.* Counsel has no duty to raise every possible issue asserted in the motion for new trial or to present non-frivolous issues where counsel strategically decides to winnow out arguments in favor of other arguments. *Tisius v. State*, 519 S.W.3d 413, 431-32 (Mo. 2017).

Appellant failed to prove that counsel was ineffective for failing to raise this claim. First, despite appellant's claim and counsel's testimony, the claim appellant raised in the amended motion and on appeal regarding the admissibility of the records was not preserved for appeal. At trial, appellant made only one argument for why the records themselves were admissible: because an expert may rely on hearsay to render her opinion (Tr. 6089-6090, 6098-6101, 6105, 6109; L.F. 752-756). In his amended motion and on appeal, however, appellant alleged counsel was ineffective for failing to argue that

the records were independently admissible as business records and court records (PCR L.F. 86-91; App. Br. 87-88). Thus, appellant provided a different theory for the admissibility of the documents at trial than he claimed counsel should have raised on appeal. If the defendant's argument on appeal is not based on the same theory that he raised at trial, the point is not properly preserved and therefore subject only to plain error review. *State v. Lewis*, 514 S.W.3d 28, 31 (Mo. App., S.D. 2017); *State v. White*, 466 S.W.3d 682, 686 (Mo. App., E.D. 2016); *State v. Flores*, 437 S.W.3d 779, 789 (Mo. App., W.D. 2014). Because appellant's claim was unpreserved, counsel would have had to raise this claim as plain error, which would have required a showing of evident, obvious, and clear error resulting in a manifest injustice. *State v. Smith*, 522 S.W.3d 221, 232 (Mo. 2017).

Appellant would not have been able to establish clear error on appeal. On the hearsay issue, appellant's argument that the records were admissible simply because they were court records or business records was meritless. Even if a document falls within a hearsay exception like the business exception, the document will not be admissible if underlying statements in the document are inadmissible hearsay. *State v. Sutherland*, 939 S.W.2d 373, 377 (Mo. 1997). A hearsay statement contained within other hearsay evidence is admissible only where both the statement and the original

hearsay evidence are within exceptions to the hearsay rule. *Id.* Under appellant's proposed appellate claim, the contents of statements within the records were sought to be introduced to prove that the things they described happened truly happened; thus, they were hearsay within those records. *Id.* at 376 (hearsay is an out-of-court statement used to prove the matter asserted). Thus, counsel would not have merely been able to argue that the records were business records and court records; she would have also had to be able to argue that the hearsay statements in the records (e.g., the statements of DFS case worker reports, the findings of health professionals in medical records, testimony of witnesses within trial transcripts) was also within hearsay exceptions. Appellant failed to allege any such exceptions applied to the statements within the records. Thus, appellant failed to prove clear error in refusing to admit the records full of hearsay within hearsay for the truth of the statements within the records. *See, e.g. McLaughlin v. State*, 378 S.W.3d 328, 354 (Mo. 2012) (no error in instruction to jury that records relied on by expert could not be considered for the truth of the matter asserted).

Further, as the prosecutor argued, hearsay within hearsay was not the only problem with the records. The prosecutor argued that the records contained irrelevant matters, conjecture, and improper conclusions (Tr. 6093-

6094, 6098-6099). The record bears this out. The records included such irrelevant and non-confirmable matters as: a DFS letters to appellant's foster mother as to how to resolve a school lunch issue (Mov.Exh. 5 p. 295); DFS payment records to appellant's foster parents (Mov.Exh. 5 p. 155, 171); inmate visiting rules for the Department of Corrections (Mov.Exh. 6 p. 99); that appellant stepped on a nail and had a puncture wound (Mov.Exh. 3 p. 4); claims the defendants in the trial of the Picketts' associates could be seen in handcuffs by jurors (Mov.Exh. 13); and unverified allegations by Barbara Pickett in her PSI that Dale set fire to the trailer that she was convicted of burning (Mov. Exh. 15). Appellant chose not to redact irrelevant or speculative information from the records and made no explanation at trial as to how such matters were relevant and admissible (Tr. 6090-6115). That those exhibits were not admitted and thus were not available to the jury did not amount to plain error. *See State v. Roberts*, 948 S.W.2d 577, 596-97 (Mo. 1997) (no abuse of discretion in refusing to allow jury to see "voluminous medical records" which contained "many matters not discussed at trial, as well as hearsay, irrelevant information, and information that could easily be misconstrued").

Appellant claims that cases such as *Hutchison v. State*, 145 S.W.3d 292 (Mo. 2004), and *Taylor v. State*, 262 S.W.3d 231 (Mo. 2008), hold that the

records were admissible and that the failure to introduce them was reversible error (App. Br. 88-91). But this Court essentially rejected that argument in *McLaughlin*. This Court noted that those cases were not about a mere failure to introduce records, but "involved a complete failure by counsel to investigate mitigating evidence." *McLaughlin*, 378 S.W.3d at 354. Thus, those cases "are not applicable" to a case about the failure to introduce the records where other evidence established the relevant information from the records. *Id.* That was the case here; the relevant content of the records was testified to by Draper, rendering the records duplicative. Moreover, as in *McLaughlin*, whether or not the events of appellant's life set out in the records and testified to by Draper actually occurred was not challenged by the State as untrue or unsupported by the records; instead, the prosecutor argued that appellant's background did not mitigate appellant's responsibility for the crimes (Tr. 6467-6469, 6477-6480, 6506). *Id.* at 353. Thus, for the same reasons set out in *McLaughlin* explaining why the failure to offer the records relied on by the expert was not erroneous under the cases appellant relies on, the trial court's ruling was not error.

Finally, appellant did not suffer a manifest injustice. The court ruled Draper was permitted to testify to anything out of the records that she used to assess appellant's development that the defense chose to ask her about (Tr.

6096, 6098-6099, 6104). Where a defense expert or other witnesses testified to the contents of records, those records are merely duplicative to the testimony. *Id.* at 352-53. Further, trial counsel even conceded that it was not asking that the records be admitted so that the jury could view them (Tr. 6090). In light of Draper's testimony about the contents of the records and appellant's concession that the jury would not see the records under his request to admit, appellant failed to demonstrate that appellant suffered any prejudice from the failure to admit the records, let alone a manifest injustice.

Because the court's ruling was not plain error and did not result in a manifest injustice, any claim by counsel would have been meritless. Appellate counsel is not ineffective for failing to raise a meritless claim. *Zink v. State*, 278 S.W.3d 170, 193 (Mo. 2009). Further, appellant failed to overcome the presumption of reasonable strategy; the court credited counsel's testimony that she had a problem with her word count in the brief and decided not to raise the claim after her research showed it was meritless and did not credit her testimony that she later believed her decision was a mistake (PCR L.F. 170-172, 190-193). Therefore, appellant failed to prove that counsel's performance in not raising this claim was deficient or resulted in prejudice.

IV.

The motion court did not clearly err in denying appellant's claim that trial counsel was ineffective for failing to admit David Spears's statement admitting to raping and murdering Rowan with appellant.

The trial court did not clearly err in denying appellant's claim that trial counsel was ineffective for failing to offer David Spears's "irreconcilable confession" as evidence of a false confession to show that police elicited false confessions from both Spears and appellant. Appellant failed to prove that the content of the statement was admissible, that counsel's decision not to admit the statement was not reasonable trial strategy, and or that he was prejudiced.

A. Facts

The night of the same day that appellant confessed to kidnapping, raping, and murdering Rowan, David Spears claimed to other law enforcement officers that he and appellant acted together to rape and kill Rowan (Mov.Exh. 31). Spears told police that, when he left appellant's trailer, appellant told Spears and Mahurin to take back roads home because Spears liked back roads (Mov. Exh. 31). When they got back to Spears's house around midnight, Spears discovered that Rowan was not there (Mov. Exh.

31). Spears claimed that "something clicked" that made him think Rowan was at appellant's property (Mov. Exh. 31).

He said that he went to appellant's trailer and saw appellant on top of Rowan "doing something with her" (Mov. Exh. 31). He said appellant did not have all of his clothes on (Mov. Exh. 31). He said that he also had intercourse with Rowan, although he could not "see much of" her (Mov. Exh. 31). He claimed that appellant handed him a cord which he used to choke Rowan (Mov. Exh. 31). He said that the surrounding moments were "real fuzzy" (Mov.Exh. 31). The police asked if appellant said anything; Spears said he did not know exactly what appellant said but that he got the impression that appellant wanted him to get his Suburban (Mov.Exh. 31). Police said that Spears had said something earlier that appellant said that "it had to be done" (Mov.Exh. 31). Spears replied that appellant handed him the cord and said "It's gotta be done" (Mov.Exh. 31). He said that he then went back to his house to get his mother's Suburban, then went to check on his father at his father's house, where a clock said it was 3:30 a.m. (Mov.Exh. 31). He said that he then went back to appellant's property (Mov.Exh. 31). He said that appellant loaded Rowan into the Suburban, that appellant drove to Fox Cave, and that appellant took the body towards the cave and then came back without her (Mov.Exh. 31). He said did not remember the ride back from the

cave and that woke up in the morning in the Suburban with the engine still running (Mov.Exh. 31). At the end of the statement, he said:

> …this entire time I've been talking to the police…I told 'em that I didn't know where she was and that I didn't do anything to her. I really believed it. And that…that…Mark talked to me…through what happened so that I could recall it to tell people so I could take accountability.

(Mov.Exh. 31).

Spears's statement was not admitted at trial (Tr. 5869-5880). The police interview of appellant where police told appellant that Spears was saying that he was also involved in raping and murdering Rowan was admitted at counsel's request (Tr. 4847-4852). In the interview, officers told appellant: that Spears was admitting to "almost the exact same thing" that appellant confessed to; that Spears was there when it happened; that Spears "had sex with her too"; that Spears's story was "so much" the same as appellant's and contained details only the murderer would know; that appellant killed her while Spears was there; that Spears helped appellant get rid of the body; that a nylon rope was used; and that Spears choked Rowan (Mov.Exh. 32). Appellant speculated that Spears was more intoxicated than

appellant was that night and may have been so intoxicated to have made his statement up or that he felt guilty about Rowan's death and his "mind started playing tricks on him" (Mov.Exh. 32). Appellant repeatedly and strenuously denied that Spears was involved (Mov.Exh. 32). Officers also told appellant two times that blood was found in his truck, which was not true (Mov.Exh. 32; Tr. 5609-5610).

In his amended motion, appellant claimed that counsel was ineffective for failing to offer Spears's full statement into evidence to attempt to show that it and appellant's statements were both false (PCR L.F. 25). He alleged that, had counsel offered Spears's statement in the guilt phase as evidence that law enforcement "often obtained false confessions and, in fact, did so in this case," the trial court would have admitted the statement and the jury would not have convicted appellant of first-degree murder or sentenced him to death (PCR L.F. 25, 28). He also alleged that counsel was ineffective for failing to offer the statement in the penalty phase to show that appellant did not plan Rowan's "death alone" (PCR L.F. 28-29).

At the evidentiary hearing, Zembles testified that she "never wanted that jury to hear David Spears'[s] statements at all for any reason" (PCR Tr. 201). She testified that this was "never going to be an innocence case" because appellant made "too many statements in too great of detail for that"

(PCR Tr. 242). Because she concluded that the jury would believe appellant's statements, even "if not every word," she believed it was better strategy to use his statements to argue for a second-degree murder conviction (PCR Tr. 242-243). She believed that there was no potential to shift the responsibility for the crime to Spears, that Spears's statement weakened a second-degree murder argument because it made appellant the instigator and deliberator in the murder, and that Spears's statement made it more likely that appellant would be convicted of first-degree murder (PCR Tr. 245-246). She believed that Spears's statement made appellant "sound worse" (PCR Tr. 263).

Moreland testified that the defense considered presenting Spears's statements but rejected it (PCR Tr. 337). Moreland preferred that the jury not see Spears or hear his actual words, but instead just have the jury hear what police claimed Spears had said (PCR Tr. 337-338). He believed the police references to Spears's statements were "more powerful for us and gave us more room to work to try to build that into a…defense theory versus actually" seeing or hearing Spears (PCR Tr. 338). He testified that they considered admitting Spears's statements to argue that both statements could be false and "coerced by police or something of that nature," but stuck with their position of wanting to use the police statements about Spears's statements instead of Spears's actual statements (PCR Tr. 339-340).

The motion court denied this claim (PCR L.F. 182-183). The court credited Zembles's testimony that she did not want Spears's actual confession before the jury as it made appellant sound worse than his own confession and Moreland's testimony that the defense did not want the jury to see or hear Spears (PCR L.F. 166-167, 172, 182-183). The motion court concluded that appellant failed to prove how the contents of Spears's actual statement were relevant even if they were admitted as hearsay and failed to prove that counsel's decisions were not reasonable trial strategy (PCR L.F. 183).

B. Appellant Failed to Prove His Claim

To prove a claim of ineffective assistance for failing to offer evidence at trial, the movant must that the proposed evidence would have produced a viable defense. *See Davis v. State*, 486 S.W.3d 898, 909 (Mo. 2016) (in the context of a failure to call a witness claim). If evidence would not have unqualifiedly supported the defense theory, counsel is not ineffective for failing to present that evidence. *Tisius v. State*, 519 S.W.3d 413, 428 (Mo. 2017). The failure to present certain evidence will ordinarily not support an ineffective assistance of counsel claim because the choice of what evidence to present is presumptively a matter of trial strategy. *Id.* at 427.

Appellant failed to prove his claim. First, he failed to prove that Spears's actual statement was admissible even to prove that it was false.

While that would be a non-hearsay purpose, appellant failed to prove that the statement established what appellant claimed. Appellant failed to allege or prove that contents of the statement itself tended to establish police coercion or manipulation in Spears's statement. Further, it was the *fact* that Spears made statements inconsistent with appellant's admission to acting alone but consistent with details of the crime that would tend to show that the statement was false, not the actual *content* of the statement. The fact that Spears made such statements was admitted (Tr. 4848-4853, 5608-5609). Finally, actually admitting the statement itself to show that parts of it were irreconcilable with appellant's confession[4] possibly could have confused or misled the jury, as the entirety of the statement was not irreconcilable and the jury could have had difficulty in separating out the "true" portions from the "false" or in considering the irreconcilable portions only as false statements. Because appellant failed to prove that the contents of the actual statement tended to prove police manipulation and failed to prove that admitting the statement for its partial falsity would not confuse or mislead

[4]The entirety of the statement was not shown to be false; for example, Spears's statements of what happened before he got back to his residence was not inconsistent with Nathan Mahurin's testimony (Mov.Exh. 30; Tr. 3717-3734).

the jury or be cumulative to the other evidence that Spears made the irreconcilable statement, he failed to prove the contents of the statements were logically and legally relevant. *See State v. Anderson*, 76 S.W.3d 275, 276 (Mo. 2002) (evidence must be logically and legally relevant to be admissible).

As for admitting the evidence in the penalty phase to try to convince the jury that appellant did not act alone (PCR L.F. 28-29), the statement was inadmissible. Under that theory, the statement would be admitted for the truth of Spears's statements, i.e., that he acted with appellant. Thus, the statement was inadmissible hearsay for that purpose. Counsel is not ineffective for failing to present inadmissible evidence. *Tisius*, 519 S.W.3d at 422.

Further, appellant failed to overcome the presumption of reasonable trial strategy. Counsel made the strategic decision not to admit the content of Spears's statements (PCR Tr. 201, 242-246, 263, 337-340). Counsel believed that the actual content made appellant sound worse than appellant's own version of the crime (PCR Tr. 242-246, 263). This was reasonable; Spears's statement included allegations that: something from that night caused him to believe appellant kidnapped Rowan; appellant directed Spears to strangle the victim; appellant gave Spears the murder weapon; appellant told Spears to get the Suburban; and appellant loaded Rowan in the Suburban and drove it

to the cave (Mov.Exh. 30). As counsel concluded (PCR Tr. 245-246, 263), these portions tended to show that appellant deliberated more than his own confession did. Thus, the evidence did not unqualifiedly support the defense. If evidence would not have unqualifiedly supported the defense theory, counsel is not ineffective for failing to present that evidence. *Tisius v. State*, 519 S.W.3d at 428. Thus, counsel's decision not to admit the content of Spears's statement was reasonable.

Appellant argues that counsel's decision was not reasonable because: the jury heard the "substance" of Spears's statement through the police interview of appellant referencing the statement; appellant could not be found guilty of second-degree murder for a strangling murder; and counsel's concerns did not apply to the penalty phase (App. Br. 101-105). But, as explained above, the facts demonstrating appellants deliberative, directive role according to appellant made appellant look more guilty of first-degree murder; these details were *not* included in the police statements to appellant (Mov.Exh. 32). Further, just because strangling *can* support an inference of deliberation, as this Court concluded on appeal, *State v. Collings*, 450 S.W.3d 741, 760 (Mo. 2014), does not mean that it can *only* support such an inference. Second-degree murder convictions can also be based on strangulation. *See, e.g. State v. Segraves*, 956 S.W.2d 442, 445 (Mo. App., S.D.

1997). Finally, the jury could still consider the circumstances of the crime in determining appellant's sentence (L.F. 689). Thus, the fear that the content of Spears's statement would make appellant look worse did not just go away for the penalty phase. Therefore, appellant's arguments that counsel's strategy was unreasonable are meritless.

Finally, appellant failed to prove prejudice. As established above, the jury knew that Spears made statements implicating himself and appellant in the murder which was consistent with details about the murder but inconsistent with appellant's statements (Mov.Exh. 32; Tr. 5609-5610). Thus, introducing the statement itself to prove that Spears made and irreconcilable statement was merely cumulative to other evidence establishing that fact. There is no prejudice from counsel's failure to present cumulative evidence. *Johnson v. State*, 388 S.W.3d 159, 167 (Mo. 2012). Further, in light of appellant's detailed confession, initially made in narrative form without prompting and oft repeated, as well as appellant's "vehement[] and repeated[]" denials that Spears was involved, and appellant's refusal to allow the police to change his mind about Spears's involvement despite considerable efforts to do so, there was not a reasonable probability that the jury would have found that appellant's confession was false even if they had heard more details of Spears's statements (Mov.Exh. 32). *Collings*, 450

S.W.3d at 750-52 (setting out the detailed, repeated, insistent nature of appellant's confessions). Therefore, appellant failed to prove prejudice.

V.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to sufficiently investigate and call Dr. Dean Stetler to challenge DNA evidence.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to sufficiently investigate DNA evidence identifying Rowan's hair from appellant's truck and call Dr. Dean Stetler to challenge the State's expert's findings. Appellant failed to prove that Dr. Stetler's testimony would have presented a viable defense, the proposed testimony was inconsistent with counsel's guilt-phase theory of defense, and there was not a reasonable probability of a different result had the testimony been offered.

A. Facts

At trial, Missouri Highway Patrol Crime Laboratory DNA section supervisor Stacey Bolinger testified that that her analysis of a hair found in appellant's truck revealed a partial DNA profile at six loci (Tr. 5435-5436). She could only use the pairs of alleles at four of those six loci for a statistical comparison with Rowan's DNA profile because one of the other two loci only revealed gender and the other only had a single allele which made the result for that locus incomplete (Tr. 5451-5456). She testified that the lab had no

minimum requirements for how many loci can be used to report a partial profile (Tr. 5457). She testified that the partial profile was consistent with Rowan's DNA (Tr. 5435). The statistical frequency of that partial profile was 1 in 328,700 in the Caucasian population and 1 in 256,500 in the black population (Tr. 5443).

In his amended motion, appellant alleged that counsel was ineffective for failing to investigate and call an expert witness, such as Dr. Dean Stetler, to testify in the guilt phase that the DNA analysis and comparison of the hair was flawed (PCR L.F. 62). He alleged that such testimony would have explained that the MSHP lab's "results are different from the analysis and testimony given by Stacy Bollinger at trial when you consider the peak heights in the partial profile that was developed" (PCR L.F. 62). He alleged that counsel ineffectively failed to properly investigate the DNA evidence because, while the defense requested and received a disc of the electronic data associated with the MSHP lab's analysis, the lab employed by the defense was unable to access the data because it did not have the correct software (PCR L.F. 65-66). He alleged that counsel failed to retrieve that disc and follow up with another expert (PCR L.F. 67). He alleged that Stetler subsequently reviewed the DNA analysis (which also included criminalist/technician notes, the MSHP casefile, and all DNA reports) and

claimed that the "actual results are somewhat different when one considers the r.f.u. numbers associated with the peak heights" in the electronic data (PCR L.F. 66-67). He alleged that Stetler believed that the relative peak heights of the alleles at three of the loci were "not within 60% of each other" and thus did not comply with the "60% rule" required to conclude the alleles are a pair and thus from the same person (PCR L.F. 67). He alleged that Stetler claimed that the loci used for the calculations had peak heights lower than the 50 RFU (relative fluorescence units) cutoff used by the lab and that, using a lower standard than the lab's 50 RFU cutoff revealed alleles not consistent with the victim (PCR L.F. 67). He alleged that, had this evidence been sufficiently investigated and presented in the guilt phase, there was a reasonable probability that the outcome of the trial would have been different (PCR L.F. 67-68).

Appellant raised a separate claim in his amended motion alleging that counsel was also ineffective for failing to sufficiently investigate and present the above evidence in the penalty phase (PCR L.F. 78). He alleged that, had testimony such as Stetler's proposed testimony been offered, the doubt that the jury would have had about the identification of Rowan's hair would have created a reasonable probability of a different penalty-phase result (PCR L.F. 83-84).

At the evidentiary hearing, Zembles testified that the defense received DNA worksheets, reports, and electronic date from the MSHP lab (PCR Tr. 216-217). The defense sent that information to a lab called "Forensic Bioinformat" in Ohio for an independent analysis of that information (PCR Tr. 217-218). She testified that there should have been two discs, one with raw data and one with analyzed data, that she wanted an expert to review (PCR Tr. 221-222). The raw data would show all of the alleles in the testing, including those which were "tossed out" by the lab analyst because they are not "important" (PCR Tr. 224). She testified that she communicated with the MSHP lab, prosecutor's office, and Attorney General's Office "[m]any times" due to problems the defense lab had accessing the raw data disc (PCR Tr. 224). The State provided her four different copies of the raw data disc, but counsel claimed that "my guy [was] telling me the data isn't there" (PCR Tr. 228). The defense was never able to open any of the raw data discs (PCR Tr. 225). She testified that, "at some point I just ran out of time" (PCR Tr. 228). She testified that she was unable to cross-examine Bolinger about the raw data because she never could get it analyzed (PCR Tr. 227). Thus, she decided that, at trial, she would to challenge the low number of loci identified in the testing (PCR Tr. 228).

Moreland testified that he had no role in the DNA evidence because

Zembles was handling the DNA evidence as it primarily affected the guilt phase (PCR Tr. 349). He testified that he remembered seeing emails discussing the disk problem; Bolinger told the defense that the data was analyzed using GeneMapper IV software and that she was not sure if it could analyzed using GeneScan or any other DNA software (PCR Tr. 353). He had no knowledge if the disk was sent to a different expert with the proper software to review (PCR Tr. 354). He testified that any strategic decision about the DNA evidence was not up to him (PCR Tr. 354).

Moreland later testified that he did not want to challenge the hair evidence with the DNA evidence because they instead decided that the "natural challenge" to the DNA evidence was that the hair would be in the truck because Rowan and Spears regularly were in appellant's truck and at his house (PCR Tr. 364-365). He admitted that DNA evidence contrary to Bolinger's testimony "would have been an additional challenge to" in the penalty phase that Rowan was not transported in appellant's truck (PCR Tr. 365).

Stetler testified that, in preparation for the post-conviction case, he testified that he reviewed the MSHP's lab report and worksheets, the disc, and the trial testimony of Bolinger and an FBI analyst (PCR Tr. 89-91). He testified that the current FBI protocol for peak height standards required

that two peaks must be within 60% of each other's height to be considered "sister alleles" (PCR Tr. 94). The current FBI protocol required a 50 RFU cutoff for peak height to either include or exclude someone as a possible contributor of that allele; anything under that height is not considered an allele (PCR Tr. 95). He claimed that, having previously reviewed the MSHP lab protocol, the lab's RFU cutoff was also 50 RFU (PCR Tr. 95-96).

Stetler testified that he looked at the data from the four loci Bolinger found alleles for the partial profile of the hair—D3, TH01, D5, and VWA—and claimed that they were not all over the 50 RFU cutoff (PCR Tr. 101). He said that the two alleles at D3 locus were both over 50 RFU, but one of the two at TH01 was 39 RFU, one of the two at D5 was 45 RFU, and one of the two at VWA was 36 RFU (PCR Tr. 102-103). He also claimed that there was a 14 RFU allele at D18 which should be considered if other alleles under 50 RFU were not considered; that allele was not consistent with Rowan's profile (PCR Tr. 103-104). He claimed that that would not be her DNA if "we assume it's DNA from a single person" (PCR Tr. 104). He also claimed that the relative peak heights at TH01, D5, and VWA did not conform to the "60% rule" (PCR Tr. 105). Thus, he claimed that only one locus had a "set of true allelic pairs" (PCR Tr. 105). He claimed that none of this peak height information was in the printed materials from the lab and could only be seen

on the electronic data (PCR Tr. 106). He claimed that it was "probably not" proper for Bolinger to use the TH01, D5, and VWA loci for her statistical analysis because they did not meet his 50 RFU or 60% peak height rules (PCR Tr. 106). He testified that the statistical frequency of finding the one allele he considered valid was 1 in 17 (PCR Tr. 107-108). He alleged that he (or another similarly-situated DNA expert) could have reached these conclusions at the time of trial and that he would have been available to testify to that information at that time had he had access to the electronic data (PCR Tr. 108).

On cross-examination, Stetler testified that he had testified for the Public Defender's Office "[m]any times" (PCR Tr. 109). Stetler insisted that he believed that the MSHP lab followed the current FBI 60% rule (PCR Tr. 109). He looked at Respondent's Exhibit A, a document similar to those he reviewed from the lab (PCR Tr. 111). He did not recall receiving it from post-conviction counsel (PCR Tr. 110). He testified that that exhibit showed the presence of the same alleles but showed different peak heights, all of which were more than 50 RFU (PCR Tr. 111).

Bolinger testified for the post-conviction case by deposition (Depo. 3). She testified that the standard for the lab for peak heights was 50 RFU (Depo. 13, 27). She testified that all of the alleles she relied on to determine

the partial profile were over 50 RFU; for example, the pair at TH01 had peaks of 204 and 53, the pair at D5 had peaks of 183 and 70 (Depo. 14-16, 35). She testified that Dr. Stetler's measurement of one of the peak heights at TH01 was not accurate (Depo. 16).[5] She testified that the computer used to analyze and report the peak heights would not show any peak height that was not at least 50 RFU (Depo. 41). She testified that the difference could have been because Dr. Stetler used "different smoothing or analysis parameters that caused different peak heights" or because he used a different data file from a different sample injection; she used the injection that had the most available data (Depo. 33). The injection with the most data would be the most accurate (Depo. 48).

She testified that there was no 60% rule for the peak heights at one loci in effect in the lab at the time she conducted her analysis (Depo. 17-18, 21). She testified that the analysis of the loci where the alleles were not within 60% of each other would be affected by such a rule (Depo. 21-22). She testified that there was one in effect at the time of this deposition (Depo. 18). She testified that, if she had changed any of the results using the lab's software, such change would be noted in the data (Depo. 28-29).

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[5]She was not asked about the other peak heights Dr. Stetler challenged.

The motion court denied appellant's claim (PCR L.F. 161). The court found Stetler to be "very difficult to understand" and not "credible at all" (PCR L.F. 162). The court found his testimony to be "inexact and vague" about his prior defense work, "terribly inconsistent" regarding his understanding of the standards for his work, and contradicted by other evidence refuting his testimony (PCR L.F. 162). The court found that, not only was Stetler's demeanor "troublesome," he "testified to things that are untrue and inaccurate and are contradicted by the record and the witnesses" (PCR L.F. 163). The court concluded that appellant was not prejudiced by any failure to challenge the DNA evidence because the DNA evidence at trial was "not so compelling that it impacted on the outcome" of the trial (PCR L.F. 163, 178-179). The court found that Bolinger's testimony that all of the peak heights she relied on were above 50 RFU was "credible and accurate" (PCR L.F. 177). The court credited her testimony (and disbelieved Stetler's testimony) that the MSHP lab did not have a 60% rule at the time of Bolinger's analysis (PCR L.F. 177-178). The court "suspected" that counsel "likely" made a strategic decision to abandon the efforts to investigate the DNA evidence since the DNA evidence was not significant in light of appellant's confession (PCR L.F. 178-179). Thus, the court concluded that appellant did not disprove that counsel's decisions regarding the DNA

evidence were reasonable trial strategy (PCR L.F. 185).

B. Appellant Failed to Prove His Claim

The selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim. *Vaca v. State*, 314 S.W.3d 331, 335 (Mo. 2010). Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance of counsel. *Id.* To prevail on a claim of ineffective assistance of counsel for failing to call a witness, a defendant must show that counsel knew or should have known of the existence of the witness, the witness could have been located with reasonable investigation, the witness would have testified, and the witness's testimony would have provided a viable defense. *Strong v. State*, 263 S.W.3d 636, 652 (Mo. 2008). In a death penalty case, counsel is expected to discover all reasonably available mitigating evidence. *Johnson v. State*, 388 S.W.3d 159, 165 (Mo. 2012). This includes, among other things, investigating the defendant's medical history and family and social history. *Id.* Reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. *Id.*

Appellant failed to prove his claim because he failed to overcome the presumption that counsel's decision to abandon the attempts to analyze the

DNA data disk was not reasonable trial strategy. Counsel repeatedly attempted to have the data disk analyzed by an expert witness and was repeatedly told by counsel's expert that the data was not accessible on the disk, even with Bolinger providing information attempting to help the defense expert access the disk (PCR Tr. 216-228; Depo. 38-39). Despite counsel's efforts, counsel ran out of time to have the evidence analyzed (PCR Tr. 228). They decided that instead of challenging Bolinger's methods, they would challenge the limited nature of the partial profile and, if necessary, they would argue that the hair could have been left in the truck at any time because Rowan regularly was in the truck (PCR Tr. 228, 364-365). This was not an unreasonable decision by counsel. To prove ineffectiveness, the movant must do more that demonstrate there was evidence that existed that was not presented. *Zink v. State*, 278 S.W.3d 170, 181 (Mo. 2009). Counsel has limited time and resources and may choose not to expend limited resources towards a strategy that does not look promising. *Id.* Counsel undertook reasonable efforts to have the DNA raw data analyzed and, naturally limited by time, reasonably decided to no longer pursue that evidence.

That such a decision was reasonable was especially true in light of counsel's overall trial strategy. In the guilt phase, Zembles testified that her guilt-phase strategy was that "this was never going to be an innocence case"

because of the numerous and detailed statements appellant made (PCR Tr. 242). She thought that the jury would believe his statements even if they did not believe "every single word" of them (PCR Tr. 243). Thus, she believed the better strategy was to pursue a second-degree murder conviction (PCR Tr. 242). As counsel was not challenging the fact that appellant committed the murder, whether or not the hair belonged to Rowan did not matter as the presence of the hair was consistent with the defense. As for the penalty phase, while Moreland testified that he wanted to make the evidence appear that, while guilty, appellant exaggerated and confessed to more than he actually did, he did not believe that the blame could be fully shifted away from appellant (PCR Tr. 362). While challenging the DNA evidence was "an additional challenge" to the evidence that appellant transported Rowan's body, he reasonably decided the explanation for the hair being in the truck without further challenging the DNA was a "natural challenge" to the hair (PCR Tr. 364-365). The choice of one reasonable trial strategy over another is not ineffective assistance. *Zink*, 278 S.W.3d at 176. Thus, appellant failed to prove that counsel's decision to abandon their efforts to analyze the DNA data disk was not reasonable trial strategy.

Appellant also failed to present credible evidence that Stetler's testimony provided appellant a viable defense because he failed to prove that

any of Stetler's conclusions were true. The motion court found Stetler's testimony not only to be not credible, but also to be contradicted by other credible evidence (PCR L.F. 161-163, 178-180). Stetler's conclusions that the Bolinger's DNA testing was not done correctly relied entirely on his belief that some of the alleles used for identifying the profile were below 50 RFU and that the MSHP lab had a 60% rule for pairing alleles (PCR Tr. 101-108). But the motion court, crediting Bolinger's testimony, found that neither of these things were true (Depo. 14-16, 17-18, 21, 35; PCR Tr. 162-163, 177-178). Because Stetler's testimony was found to be not true, appellant failed to prove that his testimony provided a viable defense. *See, e.g., Davis v. State*, 486 S.W.3d 898, 907 (Mo. 2016) (deferring to motion court's "explicit reject[ion]" of expert witnesses' conclusions in rejecting claim that counsel was ineffective for failing to call those expert witnesses).

Appellant argues that the motion court was not permitted to make credibility determinations about Stetler's testimony because he only needed to prove that a jury, not the motion court, may have credited his testimony (App. Br. 118). He relies on a footnote from the United States Supreme Court's opinion in *Kyles v. Whitney*, 514 U.S. 419 (1995), and language from another federal habeas case, to argue that a "state post-conviction judge's findings that a witness in the proceeding is not convincing doesn't defeat a

claim of prejudice" (App. Br. 118). *Kyles*, 514 U.S. at 449 n. 19; *Antwine v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1995).

But on the issue of deference to lower state court credibility findings, these cases dealt with defining the federal statutory "presumption of correctness" federal courts give state court decisions in federal habeas cases and thus do not dictate the deference state courts give to lower courts in state post-conviction proceedings. *Kyles*, 514 U.S. at 449 n. 19 (opinion), 467 (Scalia, J., dissenting); *Antwine*, 54 F.3d at 1365. Thus, the cases say nothing about whether a state appellate court can defer to a state motion court in a post-conviction proceeding.

Additionally, appellant misconstrues the motion court's finding as merely finding that the jury would not believe Stetler. As this Court said in explicitly rejecting this same argument in *Davis*, "The motion court's rejection of certain witness testimony as non-credible goes to whether Movant met his burden of demonstrating a claim for relief, not whether a jury would have believed that witness at trial." *Davis*, 486 S.W.3d at 905 n. 2. The motion court's conclusion was not merely that the jury would not have believed Stetler and thus failed to prove prejudice. Instead, the motion court's conclusion that Stetler was not credible because his testimony was contradicted by the facts showed that appellant failed to prove that Stetler's

testimony established that counsel's performance was deficient. Counsel has no obligation to present false evidence. *See, e.g., Vann v. State,* 26 S.W.3d 377, 380 (Mo. App., S.D. 2000) (counsel has a duty not to knowingly present perjured testimony); *State v. Dixon*, 969 S.W.2d 252, 257 (Mo. App., W.D. 1998) (counsel was not ineffective for failing to call an alibi witness when counsel doubted the legitimacy of the witness's testimony). Because the motion court found that Stetler's testimony was not true, appellant failed to prove that the proposed testimony provided a viable defense or that the failure to present it amounted to ineffective assistance of counsel.

Appellant also failed to prove prejudice. As to the guilt phase, appellant did not challenge his guilt, but argued that the crime was not second-degree murder (Tr. 4572, 4574-4575, 5595-5598, 5621-5624). Thus, a challenge to the DNA analysis was contrary to the defense and would thus have not had any effect on the jury's decision. As to the penalty phase, counsel presented other evidence, i.e., evidence of a cadaver dog indicating the presence of decaying skin cells in Spears's vehicle to suggest that appellant did not transport Rowan (Tr. 5888-5919), and thus put on evidence questioning whether or not appellant actually put Rowan in his truck even without the DNA data disk being evaluated in time for trial (PCR Tr. 364-365). Thus, the failure to present further evidence challenging which vehicle transported Rowan's body

did not amount to ineffective assistance of counsel. There is no prejudice from counsel's failure to present cumulative evidence. *Johnson v. State*, 388 S.W.3d 159, 167 (Mo. 2012).

Finally, the fact that Stetler's testimony was so contradicted by Bolinger's testimony—who knew the MSHP lab better than Stetler and explained why Stetler's analysis was not only incorrect but deficient (Depo. 17-18, 21, 33, 48)—made it unlikely that the jury would have been convinced by Stetler's testimony at all, let alone to such an extent that it would have created such residual doubt about appellant's involvement in the crime that it would have created a reasonably probability of a life sentence. Not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. *Zink*, 278 S.W.3d at 181. Therefore, appellant failed to prove that this evidence resulted in prejudice.

VI.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to present guilt-phase evidence of internet use at Spears's house in the early morning hours after the murder.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to present guilt-phase evidence that someone used the internet on the computer in Spears's house between from just before 2:00 a.m. until around 3:45 a.m., which appellant argues proved "somebody [was] lying" about who was present at Spears's house at that time and thus would cast reasonable suspicion about appellant's confession (App. Br. 120-124). Appellant failed to prove that this information contradicted appellant's confession at all or that it presented admissible evidence, consistent with trial counsel's strategy, that anyone else kidnapped, raped, and murdered Rowan.

A. Facts

In his amended motion, appellant alleged that counsel was ineffective for failing to offer during the guilt phase a forensic internet history report from "Heart of America RCFL forensic internet history analysis showing that someone used the computer at Spears's home "consistently" between 1:58

a.m. and 3:42 a.m. (PCR L.F. 60-61). He alleged that appellant was not at Spears's residence at any point after Nathan Mahurin dropped Spears off around midnight (PCR L.F. 61). He alleged that this evidence "would have cast doubt on the truth and accuracy" of his confessions and created an inference that someone other than appellant had kidnapped and murdered Rowan (PCR L.F. 57). He alleged that, but for counsel's failure to offer this evidence, there was a reasonable probability that he would not have been convicted of first-degree murder (PCR L.F. 57).

The parties stipulated that Movant's Exhibit 23 was an internet history report of the computer at Spears's house and showed active use of the computer from 1:54 a.m. to 3:36 a.m. on November 3 (PCR L.F. 140-141). The actual exhibit showed intermittent use of the computer to search the website MySpace during that time period (Mov.Exh. 23). The computer was used to go to different pages on MySpace consistently for fourteen minutes from 1:54-2:08 a.m. (Mov. Exh. 23). A single MySpace profile was visited at 2:40 a.m. (Mov. Exh. 23). The computer was consistently used for four minutes from 3:05-3:09 a.m. and then again for four minutes from 3:32-3:36 a.m. (Mov. Exh. 23).

Zembles testified that there was information the defense had that Spears's mother Myrna came to Spears's house in the early morning hours of

November 3 and that Spears took her vehicle and went driving on back roads (PCR Tr. 211). Counsel testified that she did not recall the times Myrna supposedly arrived or Spears supposedly left and then came back and that she was unaware if they ever had any specific times for those events (PCR Tr. 211). She did not recall Myrna testifying in a deposition that she only knew how to use the computer to play games (PCR Tr. 212-213). Counsel stated that they were not arguing that appellant was at Spears's house at that time (PCR Tr. 213). She was not interested in admitting it to impeach Spears because Spears's statements to police were not being admitted and therefore there was no opportunity to impeach Spears (PCR Tr. 213). She testified that she did not want Spears's statements admitted "at all for any reason" in the guilt phase because they made appellant's actions in the murder look more deliberated and thus contradicted the defense that appellant did not deliberate and was only guilty of second-degree murder (PCR Tr. 202, 216, 245, 264-265).

Moreland testified that he remembered receiving the internet history (PCR Tr. 346). He testified that Myrna said in her deposition that she only knew how to turn the computer on and off and play games on it (PCR Tr. 347). He could not recall a strategic reason for not presenting the internet history at trial (PCR Tr. 347).

The motion court denied this claim, finding that, because Spears did not testify and counsel's reasonable trial strategy was to not admit Spears's statements, the computer history could not impeach Spears (PCR L.F. 184-185). Thus, the court concluded that the evidence was not relevant or beneficial to the defense (PCR L.F. 184).

B. Appellant Failed to Prove His Claim

To prove a claim of ineffective assistance for failing to offer evidence at trial, the movant must that the proposed evidence would have produced a viable defense. *See Davis v. State*, 486 S.W.3d 898, 909 (Mo. 2016) (in the context of a failure to call a witness claim). If evidence would not have unqualifiedly supported the defense theory, counsel is not ineffective for failing to present that evidence. *Tisius v. State*, 519 S.W.3d 413, 428 (Mo. 2017). The failure to present certain evidence will ordinarily not support an ineffective assistance of counsel claim because the choice of what evidence to present is presumptively a matter of trial strategy. *Id.* at 427.

Counsel was not ineffective for failing to offer the computer report because whether or not someone was in Spears's house on the computer between 1:50 a.m. and 3:45 a.m. did not provide a viable defense. According to the evidence offered at trial by appellant's friend Nathan Mahurin and his own confession, appellant went back to Spears's house to kidnap Rowan

before some time prior to midnight; appellant told police that he hurried back to Spears's house to kidnap Rowan after Mahurin and Spears left his property and Mahurin testified that he left appellant's between 11:00-11:30 p.m. dropped Spears off before midnight (Tr. 3723-3735, 4560-4562). Whether or not someone was in the house at points between 2 and 4 hours after that would have done nothing to contradict appellant's statements. Thus, that someone was on Spears's computer well after appellant admitted to kidnapping the victim did not contradict anything about appellant's statement.

Nor was counsel ineffective for failing to offer the evidence to prove that Spears was using the computer to somehow impeach his statements to police. As explained in Point IV, *supra,* counsel did not want evidence of Spears's statements admitted "at all for any reason" as a matter of reasonable trial strategy; counsel believed that Spears's statement made him look more guilty of first-degree murder as it more fully demonstrated deliberation than appellant's own statement (Tr. 202, 216, 245, 264-265). To the extent that the fact that someone was using Spears's computer may have implicated Spears, it also implicated appellant, and thus was not consistent with appellant's innocence or counsel's reasonable trial strategy. If evidence would not have unqualifiedly supported the defense theory, counsel is not

ineffective for failing to present that evidence. *See Tisius,* 519 S.W.3d at 428.

Finally, the evidence did not support a theory that some unidentified other person murdered Rowan. When the evidence tending to show another person committed the offense is merely that another person had opportunity or motive to commit the offense and there is no evidence that another person committed an act directly connect to the offense, the minimal probative value of such evidence is outweighed by its tendency to confuse or misdirect the jury. *State v. Bowman*, 337 S.W.3d 679, 686 (Mo. 2011). There was no evidence available to the defense showing that anyone other than appellant acting alone or appellant acting with Spears committed any act connected to the murder. Thus, appellant failed to prove that the computer usage evidence provided a viable defense. Therefore, appellant failed to prove that counsel was ineffective.

VII.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to offer guilt-phase testimony from search and rescue worker Alicia Brown.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to call search and rescue worker Alicia Brown to testify in the guilt phase about cadaver dogs indicating the presence of the scent of dead tissue cells in a vehicle driven by Spears because counsel's decision not to call Brown was reasonable trial strategy and appellant failed to prove prejudice.

A. Facts

At trial, the evidence established that appellant told police that, after killing Rowan, he put her body in his pickup truck and drove to the cave where he hid the body (Tr. 4566-4569).

Brown testified for the defense during the penalty phase that she used two dogs trained to search for human remains to search a Suburban purportedly driven by Spears the night of the murder (Tr. 5888, 5900-5914). The dogs indicated that the scent of human "dead tissue cells" had been in the vehicle (Tr. 5914-5917, 5925). The dogs specifically indicated the presence of the scent in the driver's seat and the left side of the rear cargo area (Tr.

5917-5919).

In his amended motion, appellant alleged that counsel was ineffective for failing to offer Brown's testimony during the guilt phase, arguing that her testimony would have "contradicted [appellant's] inculpatory statements" about how the victim's body was transported because the dogs alerted on two areas of Spears's vehicle but not on appellant's truck (PCR L.F. 61-62). He alleged that, had counsel called Brown during the guilt phase, it was reasonably probable that he would not have been found guilty of first-degree murder (PCR L.F. 55-56).

Zembles testified that her guilt-phase strategy was that "this was never going to be an innocence case" because of the numerous and detailed statements appellant made (PCR Tr. 242). She thought that the jury would believe his statements even if they did not believe "every single word" of them (PCR Tr. 243). Thus, she believed the better strategy was to pursue a second-degree murder conviction (PCR Tr. 242). She believed that, once the trial court ruled that appellant's statements were admissible, those statements provided a basis to "legitimately argue" that appellant "felt bad about what happened" and showed that he actually was trying to confess to the crime throughout the week (PCR Tr. 242-243). She also believed that appellant's version of the crimes made the murder appear to be an "impulsive act" (PCR

Tr. 263-264). Zembles did not call Brown during the guilt phase because she was afraid of opening the door to evidence that she did not want introduced during the guilt phase, i.e., evidence about Spears (PCR Tr. 215-216). She testified that, while she could have called Brown to testify in the guilt phase, she "had a different approach" to the defense and that calling Brown to testify about the dog evidence was not part of that approach (PCR Tr. 216).

Moreland testified that there was a "conflict of opinion" among the defense team regarding Brown testifying in the guilt phase and that both Zembles and appellate attorney Janet Thompson did not want Brown's testimony in the guilt phase (PCR Tr. 348). Moreland decided that he wanted it in the penalty phase to help suggest that Spears was involved and that appellant's statements "were inflated and maybe he admitted to more than he did" (PCR Tr. 348, 362-363).

The motion court denied this claim because appellant did not call Brown at the evidentiary hearing and thus failed to present evidence to support the claim (PCR L.F. 185).

B. Appellant Failed to Prove His Claim

Appellant failed to prove that counsel was ineffective for not calling Brown because he failed to overcome the presumption of reasonable trial strategy. "Ordinarily, the failure to call a witness will not support an

ineffective assistance of counsel claim because the choice of witnesses is presumptively a matter of trial strategy." *Tisius v. State*, 519 S.W.3d 413, 427 (Mo. 2017). If a potential witness's testimony would not "unqualifiedly support" the defense, the failure to call such a witness is not ineffective assistance of counsel. *Id.* Counsel is not ineffective for pursuing one reasonable trial strategy to the exclusion of another. *Davis v. State*, 486 S.W.3d 898, 909 (Mo. 2017).

Here, counsel chose to pursue a defense of attempting to get a second-degree murder conviction (PCR Tr. 242; Tr. 3612, 5603, 5621). A defense designed to mitigate a first-degree murder charge to a second-degree murder charge and thus avoid a death sentence by showing that the murder was not the result of deliberation, even if "risky" and if failure was "inevitable," does not establish incompetence. *Winfield v. State*, 93 S.W.3d 732, 738 (Mo. 2002). Counsel's defense depended on appellant's statement being deemed sufficiently credible regarding his statements about not premeditating on the murders, such as his claim that he always planned to return the victim after the rape and that he was "paranoid" and he "freaked out" when the victim saw him after the rape (Tr. 4572, 4574-4575, 5595-5598, 5621-5624). Appellant told Chief Clark that his plan to return the victim was the one thing about his confession that he wanted Clark to believe (Tr. 4693).

Counsel emphasized that everything appellant said in every one of his statements to police "indicate[d] what his state of mind was" (Tr. 5622). In light of counsel's reasonable choice of defense for the murder, counsel's desire not to attack the credibility of appellant's confession because the confession supported that reasonable defense theory was not ineffective assistance.

Further, counsel testified that she did not want to open the door to evidence about Spears's statement that he was involved in the murder with appellant (Tr. 215-216). In that statement, Spears claimed that he found appellant raping Rowan, that appellant gave him the murder weapon and told him to kill her, saying, "It's gotta be done," that appellant told Spears to go get his Suburban to move the body, and that appellant drove the Suburban to the cave and disposed of the body (Mov. Exh. 31). Counsel's fear of opening the door to that evidence was reasonable. Missouri courts, including this court, have held that a defendant can open the door to otherwise inadmissible evidence of statements by an accomplice about the crimes. *See, e.g., State v. Petary,* 781 S.W.2d 534, 544 (Mo. 1989); *State v. Jennings*, 815 S.W.2d 434, 441 (Mo. App., E.D. 1991). Had counsel attempted to introduce evidence suggesting that Rowan's body was transported in Spears's vehicle, that evidence could have created the impression that appellant was claiming that Spears, and not appellant, had alone killed

Rowan. This false impression may have opened the door to the admission of Spears's statement to correct that false impression, which counsel believed was more damaging to appellant's case than appellant's confessions (PCR Tr. 202, 215-216). Therefore, counsel's decision not to impeach the credibility of appellant's confession to avoid opening the door to Spears's statement was a matter of reasonable trial strategy.

Appellant claims that counsel's testimony was not "plausible" because counsel made other references and introduced other evidence related to Spears's statements (App. Br. 127-128). But the brief reference in counsel's opening statement to Spears claiming that he also participated in the crime and the references to Spears "confessing" made during appellant's interview did not present a false impression that appellant was not involved in the crime (Tr. 3610; Mov.Exh. 28-29). Those references to Spears's statements included Spears's claims that appellant participated in the murder (Tr. 3610; Mov.Exh. 28-29). Thus, these references did not raise the same dangers of opening the door that Spears's actual statements did. As for counsel's closing argument to the lack of evidence that the victim's body was in his truck (Tr. 5608-5611), the guilt-phase evidence was already closed and thus counsel could not have opened the door to Spears's statement in the guilt phase at that point. Further, the context of that portion of the argument was that

appellant had been forthright with the police and had not tried to implicate Spears, even when the police "inaccurate[ly]" told him they found blood in appellant's truck (Tr. 5609-5611). Evidence that appellant had not been forthright and had lied about the vehicle he used to transport the victim's body was contrary to this argument and counsel's strategy. Thus, appellant's argument that counsel's explanation was not "plausible" in light of this record is meritless. Moreover, it was the motion court's role to resolve any issue of the credibility of counsel's explanation and this Court defers to that resolution. *Davis*, 486 S.W.3d at 905. The court credited counsel's explanation that she did not want the jury to hear Spears's statements (PCR L.F. 166-167). Thus, appellant's argument about the "plausibility" of counsel's explanation of her strategy was meritless.

Appellant also failed to prove that he suffered prejudice. Brown's testimony was admitted at the penalty phase (Tr. 5896-5933). Moreland explicitly argued that the dog evidence proved that Spears was involved and appellant confessed to more than he actually committed during the crime (Tr. 6493-6496). But the jury necessarily rejected the claim that this evidence cast any residual doubt about appellant's admissions to his role in the crimes; had the jury had any doubt that appellant was fully responsible for the murders, there was a reasonable probability that it would have sentenced appellant to

life, not death. Because the jury sentenced appellant to death, there was not a reasonable probability that the cadaver dog evidence convinced the jury that appellant's statements were so unreliable as to call his doubt into question. As Zembles testified, even if the jury did not believe "every single word" of the statements, the jury was going to believe appellant's repeated and strident assertions that he committed the rape and murder (PCR Tr. 242). Therefore, appellant failed to prove that the cadaver dog evidence would have created a reasonable probability of a different result.

VIII.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to investigate and call Lisa Blevins to testify about vehicle activity at Spears's residence, including on the night of the murder.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to investigate and call appellant's neighbor, Lisa Blevins, in the guilt phase to testify about seeing various "druggies" in numerous different cars at Spears's house at many times prior to the night of the murder and that she heard loud vehicle sounds, including from the direction of Spears's house, at times after appellant said that he kidnapped Rowan. Appellant failed to prove that Blevins's prior statements or her contradictory evidentiary hearing testimony would have provided a viable defense as they would not have contradicted appellant's confession nor provided admissible evidence that someone other than appellant committed the murder. Thus, appellant failed to prove that counsel was ineffective.

A. Facts

In his amended motion, appellant claimed that counsel was ineffective for failing to investigate and call Blevins during the guilt phase (PCR L.F. 55-60). He alleged that counsel had an FBI report of a statement by Blevins

stating that she lived 2-3 blocks from Spears's house (PCR L.F. 59-60). He alleged that the report stated that "there were always different vehicles at [Spears's] residence, especially at nighttime," including "many" with Oklahoma and Arkansas license plates (PCR L.F. 59-60). He alleged the report stated that the cars appeared to be occupied by "druggies" (PCR L.F. 60). He alleged that the report stated that she arrived home at 11:30 p.m. on night Rowan disappeared and that she stayed up until 4:00 p.m. (PCR L.F. 60). He alleged that the report stated that she heard a car from the direction of Spears's residence revving its engine between 1:30 a.m. and 2:00 a.m. and that she heard an instance of squealing tires between 2:00 a.m. and 4:00 a.m., but did not know where those sounds came from (PCR L.F. 60). He alleged that Blevins would testify to those facts and further testify that she was never contacted by the defense, but was willing to testify to those facts if called at trial (PCR L.F. 105-106).

At the evidentiary hearing, Blevins testified that she frequently saw numerous cars and people in and out of Spears's home at "all hours" of the day and night from the time Spears started living there until the murder (PCR Tr. 134-135). She testified that this included cars with Oklahoma and Arkansas license plates (PCR Tr. 135). As to the night of the murder, Blevins did not testify to the facts contained in the amended motion, but instead

provided a considerably different account (PCR Tr. 133-140). She testified that she was at home "[e]arly in the evening" and saw that "they" were working on a vehicle, so the vehicle was "being revved up…throughout the whole evening[]" (PCR Tr. 136). She said she was smoking out on her porch and saw cars going "back and forth and in and out" until "[m]aybe close to daylight" (PCR Tr. 136). She claimed that she stayed outside "[m]ost of the night" (PCR Tr. 139). She claimed that she could "actually see" the cars, not just hear them (PCR Tr. 140). She admitted that she did not remember what she told the FBI (PCR Tr. 140).

The FBI report was admitted into evidence (PCR Tr. 251). In that report, Blevins said that, on the night of the murder, she did not arrive home until 11:30 p.m. (Resp.Exh. B). She did not tell the FBI that she saw any vehicles at Spears's house that night like she did on previous nights (Resp.Exh. B). She only commented on two unusual car sounds: an engine loudly revving from the direction of Spears's house between 1:30 a.m. and 2:00 a.m. and squealing tires from somewhere outside between 2:00 a.m. and 4:00 a.m. (Resp.Exh. B). She said she only heard the vehicles outside and did not look outside to see the vehicles (Resp.Exh. B).

Counsel testified that she had "no doubt" that she read Blevins's FBI report (Tr. 207). Counsel had no independent recollection of whether or not

anybody on the defense team interviewed her; counsel knew that she had not done so (Tr. 207-208, 249). She did not believe that, based on the information in the FBI report, Blevins would have had information that might be beneficial to her defense (Tr. 252). Moreland testified that Blevins's name was familiar and that he thought that he remembered her FBI report (PCR Tr. 344-345). He testified that, based on the report, the defense team would have considered interviewing Blevins "a very low priority" (PCR Tr. 344).

The motion court denied this claim, finding that counsel's testimony established that the information in the FBI report was "neither significant nor substantial," and thus counsel was not ineffective for not conducting further investigation (PCR L.F. 164). The court further concluded that the contradictions between Blevins's FBI statement and testimony rendered her testimony incredible (PCR L.F. 184).

B. Appellant Failed to Prove His Claim

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary. *Dorsey v. State*, 448 S.W.3d 276, 291 (Mo. 2014). In assessing the decision not to investigate, "great deference" is given to counsel's judgments. *Id.* When counsel generally knows the facts supporting a potential defense, the need for further investigation may be considerably diminished or eliminated

altogether. *Sanders v. State*, 738 S.W.2d 856, 858 (Mo. 1987); *Roberts v. State*, 502 S.W.3d 734, 737 (Mo. App., W.D. 2016).

Counsel had sufficient evidence to reasonably conclude that further investigation of Blevins was not necessary because her proposed testimony would not provide a viable defense. The movant must prove that a witness counsel failed to investigate and call would have provided a viable defense. *Williams v. State*, 168 S.W.3d 433, 441 (Mo. 2005). Appellant's argument that Blevins's testimony would have cast doubt on his confession is meritless. According to the evidence offered at trial by appellant's friend Nathan Mahurin and his own confession, appellant went back to Spears's house to kidnap Rowan some time before midnight; appellant told police that he hurried back to Spears's house to kidnap Rowan after Mahurin and Spears left his property and Mahurin testified that he left appellant's between 11:00-11:30 p.m. and dropped Spears off before midnight (Tr. 3723-3735, 4560-4562). Whether or not there were ever other vehicles around Spears's house later that night was irrelevant to appellant's confession; that fact would have done nothing to contradict appellant's statements. Thus, that Blevins heard other vehicles around Spears's house did not contradict anything about appellant's statement.

Nor did Blevins's FBI statement support a defense that somebody other

than appellant murdered Rowan. When the evidence tending to show another person committed the offense is merely that another person had opportunity or motive to commit the offense and there is no evidence that another person committed an act directly connect to the offense, the minimal probative value of such evidence is outweighed by its tendency to confuse or misdirect the jury. *State v. Bowman*, 337 S.W.3d 679, 686 (Mo. 2011). Here, evidence that other vehicles occupied by "druggies" regularly frequented Spears's house and that there was a vehicle or vehicles in the area making loud noises at some point in the evening did nothing more than suggest that somebody other than appellant went to the residence and kidnapped Rowan's. Because there was no evidence connecting anyone other than appellant to Rowan's abduction, the fact that some other unnamed "druggie" may have had opportunity to enter Spears's house and kidnap the victim did not establish a viable defense that somebody other than appellant took the victim.

There was evidence connecting one other person to the victim's murder—Spears's statements implicating himself and appellant (Mov.Exh. 30-31). But this evidence did not exonerate appellant, as it identified appellant as kidnapping, raping, and directing the murder of Rowan and then using Spears's vehicle to dispose of her body (Mov. Exh. 30-31; PCR Tr. 245). As explained in Point IV, *supra,* counsel did not want evidence of

Spears's statements admitted "at all for any reason" as a matter of reasonable trial strategy; counsel believed that Spears's statement made appellant look more guilty of first-degree murder as it more fully demonstrated deliberation than appellant's own statement (Tr. 202, 216, 245, 264-265). To the extent that the sound of vehicles around Spears's house may have implicated Spears, it also implicated appellant, and thus was not consistent with appellant's innocence or counsel's reasonable trial strategy. If a witness's testimony would not have unqualifiedly supported the defense theory, counsel is not ineffective for failing to call that witness. *Tisius v. State*, 519 S.W.3d 413, 428 (Mo. 2017). Thus, the evidence that Blevins would have allegedly provided as set out in her FBI statement and in the amended motion would not have provided a viable defense. Therefore, counsel's decision not to further investigate Blevins based on the uselessness of her statements to the defense was not ineffective assistance.

Appellant points to Blevins's evidentiary hearing testimony as establishing that Blevins was on her porch and thus could actually see the activity as Spears's home and that there far more activity at the house than she originally told the FBI about (App. Br. 130-131). But this is irrelevant. First, appellant did not allege that Blevins would provide that contradictory testimony in his amended motion; he only alleged that she would testify to

the facts contained in the FBI report (PCR L.F. 59-60, 106-107; Resp.Exh. B). The failure to properly plead a post-conviction claim cannot be remedied by the presentation of evidence and refinement of the claim on appeal. *Dorsey*, 448 S.W.3d at 284.

Second, the trial court did not find the contradictory testimony to be credible (PCR L.F. 184). Despite appellant's argument to the contrary,[6] the defendant must present credible evidence of a proposed witnesses testimony for the evidence to establish that the witness's testimony was available and would provide a viable defense. As this Court has held, "The motion court's rejection of certain witness testimony as non-credible goes to whether Movant met his burden of demonstrating a claim for relief, not whether the jury would have believed that witness at trial." *Davis v. State*, 486 S.W.3d 898, 905 n. 2 (Mo. 2016). Because appellant failed to provide credible evidence of Blevins's proposed testimony, he failed to prove his claim.

Finally, even if Blevins was willing to testify as she did at the hearing and counsel had discovered her new account, that evidence still would not have affected on the defense. As with her FBI statement, Blevins's testimony

[6]Respondent more fully addresses the specifics of appellant's argument as to why he believes a motion court is not permitted to make credibility findings about prospective witnesses in Point V, *supra*.

did not establish that anyone other than appellant (or appellant and Spears) committed any act connecting them to Rowan's murder nor did it establish that appellant was not telling the truth about the crimes. Even if Blevins's testimony was truthful, her testimony did not exonerate appellant. Because she could not identify the vehicles she claimed she saw at Spears's house, appellant's truck could have been one of those vehicles (PCR Tr. 139). Thus, because Blevins's new testimony added nothing more helpful than her FBI statement, did not exonerate appellant, and did not connect anyone else to the crime, counsel was not ineffective for failing to conduct further investigation to discover evidence of equal uselessness as the FBI statement counsel reviewed. Therefore, appellant failed to prove that counsel's decision not to further investigate Blevins was unreasonable.

IX.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to further investigate and call Joni Blake to testify about alleged discrepancies in the color of car Spears was in earlier the night of the murder.

The motion court did not clearly err in denying appellant's claim that trial counsel was ineffective for failing to call Spears's neighbor Joni Blake to testify that she saw Spears in a silver car at the Fast Trip store the night of the murders, which appellant claimed would have refuted appellant's statement and Nathan Mahurin's testimony that appellant, Mahurin, and Spears went to that store and then to appellant's property (App. Br. 138-139). Blake's testimony was not so contradictory as to call Mahurin's testimony and appellant's statements into question, but instead corroborated their account that appellant was with Spears and Mahurin at the store and cast appellant in a negative light. Thus, the evidence would not have provided a viable defense nor had any probability of affecting the outcome of the trial.

A. Facts

At trial, Mahurin testified that, on the night of November 2, before going to appellant's property, he drove appellant and Spears to the Fast Trip store to buy more alcohol (Tr. 3725-3726). On cross-examination, he testified

that he was driving his 1996 Eagle (Tr. 3747). In one of his statements to police, appellant said that he, Spears, and Mahurin went to the store and his property in Mahurin's car (Tr. 4828; Mov.Exh. 26-27).

Appellant alleged that counsel was ineffective for failing to investigate and call Blake during the guilt phase (PCR L.F. 55-59). He alleged that she would testify that she saw Spears, whom she knew as a neighbor, in the back of a "silver or gray car, possibly a Mercury or Lincoln" in the parking lot of the Fast Trip at 10:30 p.m. on November 2 (PCR L.F. 58). He alleged that she would testify that she was "scared by the way" Spears stared at her from the car (PCR L.F. 58). He alleged that Blake would testify that she saw the same car the next morning at Spears's residence; it had an Arkansas license plate (PCR L.F. 58). She would testify that the car was gone later that day (PCR L.F. 59). Appellant alleged that this evidence differed from statements of appellant's, Spears's, and Mahurin's statements that they were together in Mahurin's blue Eagle Vision at that time (PCR L.F. 59). He alleged that Blake could be found because she had spoken to the FBI during the investigation and that she was willing to testify at trial to these facts (PCR L.F. 106). He alleged that, had counsel investigated and called Blake, "the outcome of the trial would have been different" (PCR L.F. 59).

At the evidentiary hearing, Blake testified that she was "familiar" with

Spears because she lived near him but did not know him personally (PCR Tr. 124). She testified that, the night of November 2, she stopped at the Fast Trip store in Wheaton sometime between 10:00-11:00 p.m. with some co-workers (PCR Tr. 124-125). She saw a man in the back seat of a gray "long-bed" car in the parking lot and "believe[d] it was" Spears, noticing that he was not wearing a shirt (PCR Tr. 125-126). She testified that she then saw appellant walk out of the store and get in the same car into the front passenger seat; appellant gave her and her co-workers "this weird look that made us really feel uncomfortable" and caused an "uneasy feeling" (PCR Tr. 126, 130). She testified that she never saw the driver but assumed there was one in the store because neither appellant nor Spears were in the driver's seat (PCR Tr. 131).

Blake testified that she saw the same car parked in Spears's driveway after work the next morning (Tr. 127). She did not recall what license plates the car had and did not remember telling the FBI that the car had Arkansas license plates (PCR Tr. 128). She said that, if there was a report that said she had said that, she probably did, but appellant never showed her a copy of the report nor offered the report into evidence (PCR Tr. 123-132, 128). She testified that she was never contacted by counsel and that she would have testified to these facts had she been called (PCR Tr. 128).

Mahurin testified at the evidentiary hearing (PCR Tr. 141-146). He was asked if he drove a "dark green '96 Eagle Vision" when he was with appellant and Spears the night of November 2 (PCR Tr. 143-144). He answered, "It's an Eagle, yes" (PCR Tr. 144). When asked if that car had an Arkansas license plate, he replied, "Not that I'm aware of" (PCR Tr. 144).

Zembles testified that she recalled receiving the report and remembered that Blake told investigators that she saw Spears in a silver car with Arkansas plates at the Fast Trip and then saw the car at Spears's house the next morning (PCR Tr. 204-205). She did not interview Blake and did not remember if anyone else on the defense team did (PCR Tr. 205). She testified that, if Blake was not interviewed, she did not know why (PCR Tr. 206). Moreland testified that he recognized Blake's name and that the report "sound[ed] familiar," although he did not recall the specific details (PCR Tr. 343). He testified that he did not recall whether the defense interviewed Blake and said that it should have been done (PCR Tr. 344). He testified that there was no trial strategy reason for not interviewing her (PCR Tr. 344).

The motion court denied this claim, finding that Blake's testimony corroborated the testimony that Mahurin, Spears, and appellant were together at the Fast Trip store purchasing alcohol (PCR L.F. 163-164). The court noted that Blake could not recall if the car actually had Arkansas

license plates (PCR L.F. 163). Further, the court found that, in light of counsel's trial strategy not to challenge evidence that appellant committed the crime and the strength of the evidence at trial, the alleged difference in her description of the car color was "not significant" and thus counsel was not ineffective for failing to call Blake (PCR L.F. 184).

B. Appellant Failed to Prove His Claim

To prove a claim of ineffective assistance for failing to investigate and call a witness at trial, the movant must show that trial counsel knew or should have known of the witness, the witness could be located through reasonable investigation, the witness would testify, and the witness's testimony would have produced a viable defense. *Davis v. State*, 486 S.W.3d 898, 909 (Mo. 2016). If a witness's testimony would not have unqualifiedly supported the defense theory, counsel is not ineffective for failing to call that witness. *Tisius v. State*, 519 S.W.3d 413, 428 (Mo. 2017).

Counsel was not ineffective for failing to investigate and call Blake because Blake's testimony would not have provided a viable defense. Despite appellant's claims to the contrary (App. Br. 138-139), he did not prove that Blake's testimony was not so contradictory as to call any important fact about the night into question. First, Blake's testimony was equivocal on whether she recalled the license plates at all, she was never shown her report to

refresh her recollection, and appellant did not offer the report into evidence (PCR Tr. 123-132, 128). Second, while appellant alleged in his motion that Mahurin's car was blue (PCR L.F. 59) and appellant attempted to get Mahurin to testify that it was dark green (PCR Tr. 143-144), appellant did not prove that the color could not have been perceived to be a grayish color when Blake saw it; the paint could have had a grayish hue or a metallic finish giving a grayish or silver appearance, some gray primer could have been visible on the car, or the car may have had gray trim which Blake noticed and took for the color of the car. Third, as for the car Blake saw the next morning, if Mahurin's car was green, Blake could have mistaken it for Myrna Spears's green car that Rowan's mother had driven to work on the night of November 2 and driven back home the morning of November 3 (Tr. 3690). Thus, appellant did not prove that Blake's testimony necessarily contradicted Mahurin's testimony and appellant's statement to police about riding in Mahurin's car that night that the testimony would have provided a viable defense or had any probability of changing the outcome of the case.

Further, as the motion court concluded (PCR Tr. 163-164), even if Blake's testimony called into question the description of the car, it otherwise corroborated appellant's and Mahurin's accounts of the events of the night. While appellant argues that Blake's testimony would have "created an

inference that someone" other than appellant was with Spears that night (App. Br. 139), Blake testified that she saw appellant come out of the store and get into the car with Spears and that the driver was still in the store (PCR Tr. 125-126, 130). Thus, her testimony would have placed appellant with Spears, just as Mahurin and appellant stated (Tr. 3725-3726; Mov.Exh. 26-27).

Finally, Blake's testimony painted appellant in a bad light that would not have aided the defense. While appellant alleged that Blake was "scared by the way…Spears stared at her" (App. Br. 105), she testified that Spears never looked at her (PCR Tr. 126). Instead, she testified that appellant gave the female occupants of Blake's vehicle a "weird look that made us really feel uncomfortable" (PCR Tr. 126). In light of counsel's reasonable defense strategy that appellant committed the crimes but did not do so after deliberation (PCR Tr. 242-243), evidence that appellant had given a disturbing look to some women about an hour before he kidnapped the victim would have been contrary to a theory that the kidnapping, rape and murder were spontaneous acts and not done after deliberation. Thus, the testimony would not have unqualifiedly supported the defense. Therefore, appellant failed to prove that counsel was ineffective for failing to present Blake's testimony.

X.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to call appellant's stepmother Julie Pickett in the penalty phase.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to call appellant's stepmother Julie Pickett in the penalty phase because counsel reasonably decided not to call her after she was involved in a hallway confrontation with jurors and her testimony was essentially cumulative to other penalty-phase testimony or did not create a reasonable probability of a different result.

A. Facts

At the penalty phase, counsel called four family members, a minister, and a developmental expert, Dr. Wanda Draper, to testify about appellant's background (Tr. 5934-5962).

Dale Pickett, appellant's birth father, testified that appellant's birth mother "liked her booze" but that Dale's alcohol use was "extremely worse" around the time of appellant's birth (Tr. 5938-5939). He testified that he was drunk every day (Tr. 5939, 5986). He testified that he went to prison for around eight years starting when appellant was still a baby (Tr. 5941-5943, 5967-5969). When appellant was 18, appellant came to live with him and

Julie (Tr. 5958-5959, 5984). Dale testified that Julie and appellant's relationship was "volatile" at first, but they later became "very close"; as far as Julie was concerned, appellant was her son (Tr. 5959). Dale testified that, when appellant was 18 years old, appellant told him that he had been molested by his stepfather (Tr. 5976).

Appellant's stepsister, Robin Brattin, testified that appellant started getting into trouble in his teenage years (Tr. 6071-6072). She told counsel's mitigation specialist that appellant started using alcohol at fifteen, but said she was speculating as to when his drinking started (Tr. 6072).

Dr. Wanda Draper, the defense expert in human development, testified that she interviewed Julie while investigating the case (Tr. 6145). She testified that appellant told her that he was sodomized by his stepfather during the couple of months that he lived with his birth mother (Tr. 6240-6241). Appellant told Dr. Draper that he had also been molested by a babysitter (Tr. 6321, 6366). At age fifteen, he stopped using his prescribed medications and used marijuana instead because it was cheaper and "just as good" (Tr. 6392). She testified that, by his late teens, appellant was engaged in the "heavy use of alcohol" (Tr. 6268). Around age 22, appellant's alcohol use was "getting out of hand"; he said he would get so drunk he would wake up in a ditch or someone's yard and not remember how he got there (Tr.

6270). She described him as having "poor inner controls" (Tr. 6270). Appellant told her, however, that he was able to quit using alcohol and marijuana to keep a job in Little Rock (Tr. 6271). Appellant acknowledged that his alcohol use had been "totally out of control" but believed that he was "more in control" with marijuana (Tr. 6271). She testified that appellant chose to drink alcohol and smoke marijuana and that appellant was able to control the choices he made (Tr. 6356-6357).

In his amended motion, appellant alleged that counsel was ineffective for failing to call Julie during the penalty phase (PCR L.F. 75). He alleged that appellant lived with Julie "off and on" from 18 years of age until the murder (PCR Tr. 75). He alleged that she could have testified about appellant's and Dale's substance abuse (PCR L.F. 76). He alleged that she would testify that appellant drank alcohol "a lot," would get "very drunk and pass out" (PCR L.F. 118). He alleged that she would testify about one occasion where appellant was so drunk that, during a fight with Dale, he took off his shorts and walked down the road naked (PCR L.F. 118). He alleged that she would testify that appellant would not remember how he got home after drinking (PCR L.F. 119). He alleged that she could also testify that she was aware of "sexual trauma" appellant suffered as a child (PCR L.F. 76).

At the evidentiary hearing, Julie testified that her relationship with

appellant was "pretty close now" and that they would "sit up at all hours" in his bedroom talking about "everything under the sun" (PCR L.F. 151). She testified that, when appellant drank, he would "pass out, blackout, not remember what he done" (PCR L.F. 151). She testified that this happened "[p]robably every other week" except for times when he did not have money to buy alcohol (PCR L.F. 151). She testified that Dale was an alcoholic, but that he could drink a lot and not get drunk (PCR Tr. 152). She testified that appellant told her that he was sexually abused as a child by a babysitter and a family member when he was a teenager (PCR Tr. 154-156).

Zembles testified that Zembles and mitigation specialist Beth Holzknect interviewed Julie prior to trial, but she did not specifically recall everything Julie told them (PCR Tr. 233). She testified that, if her memory of the timing the witnesses was correct, the defense had planned to call Julie, but before she could testify, there was a confrontation in the courthouse hallway; members of the Pickett family had "begun verbally accosting the jury" (PCR Tr. 236). After the court told counsel about this, counsel decided that they were no longer needed and that they should leave (PCR Tr. 236-238).

Moreland testified that he had interviewed Julie and that the defense originally intended to call her (PCR Tr. 358-359). He remembered that the

decision not to call Julie was a "choice" to "jettison her as a witness" during the trial, but he could not remember the reason (PCR Tr. 360). As they got to the penalty phase, they made strategic decisions to "let go" of some witnesses and keep others to testify (PCR Tr. 361).

The motion court denied appellant's claim, finding that Pickett's testimony was not "compelling" and that counsel's decision not call Pickett after the incident with jurors was a matter of trial strategy (PCR L.F. 189).

B. Appellant Failed to Prove His Claim

To prove a claim of ineffective assistance for failing to call a witness at trial, the movant must show that trial counsel knew or should have known of the witness, the witness could be located through reasonable investigation, the witness would testify, and the witness's testimony would have produced a viable defense. *Davis v. State*, 486 S.W.3d 898, 909 (Mo. 2016). If a witness's testimony would not have unqualifiedly supported the defense theory, counsel is not ineffective for failing to call that witness. *Tisius v. State*, 519 S.W.3d 413, 428 (Mo. 2017). Moreover, strategic decisions as to the choice of witnesses made after thorough investigation of law and facts are virtually unchallengeable. *Davis*, 486 S.W.3d at 909 (Mo. 2016).

Appellant failed to overcome the presumption of reasonable trial strategy. The evidence established that Julie was thoroughly investigated;

Moreland, Holtzknect, and Dr. Draper all interviewed her prior to trial (PCR Tr. 233, 358-359). Moreland testified that she was not called for a strategic reason, even though he could not remember it (PCR Tr. 360-361). Even where counsel cannot recall the reason for a strategic decision, the movant fails to overcome the presumption of reasonable strategy. *Deck v. State*, 381 S.W.3d 339, 357 (Mo. 2012). Zembles believed that the Picketts' confrontation of jurors motivated the decision not to call Julie, an explanation credited by the motion court (PCR L.F. 189). It was reasonable for counsel to be concerned that jurors could have a negative reaction to Julie's subsequent testimony. While appellant faults counsel's explanation for not requesting a mistrial due to this interaction (App. Br. 145) appellant did not allege a claim of ineffectiveness for failing to request a mistrial in his amended motion and thus cannot rely on such a basis to disregard counsel's decision now. *See Mallow v. State*, 439 S.W.3d 764, 769-70 (Mo. 2014) (claims not in the amended motion are waived). Further, this argument merely attempts to have this Court ignore the motion court's credibility finding as to Zembles's testimony. This Court defers to the motion court's credibility findings. *Barton v. State*, 432 S.W.3d 741, 760 (Mo. 2014).

Appellant also failed to prove prejudice from the failure to call Julie. Appellant argues that Julie's testimony was necessary to highlight

appellant's alcohol problems and disclosure of sexual abuse (App. Br. 144). But the limited testimony Julie presented at the evidentiary hearing was already before the jury through the testimony of his birth father, stepsister, and Dr. Draper (Tr. 5976, 6071-6072, 6240-6241, 6268, 6270-6271, 6321, 6366). There is no prejudice from counsel's failure to present cumulative evidence. *Johnson v. State*, 388 S.W.3d 159, 167 (Mo. 2012).

XI.

The motion court did not clearly err in denying appellant's claim that counsel was ineffective for failing to call appellant's brother-in-law Bobby Thomas during the penalty phase.

The motion court did not clearly in denying appellant's claim that counsel was ineffective for failing to call appellant's brother-in-law Bobby Thomas to testify about alcohol and drug use and an incident where appellant stopped Thomas from killing himself. Appellant failed to prove that counsel knew or should have known that Thomas had relevant information to provide to the defense that would have provided a viable defense.

A. Facts

In his amended motion, appellant alleged that counsel was ineffective for failing to investigate and call Thomas in the penalty phase (PCR L.F. 75-76). He alleged that Thomas knew appellant as a brother-in-law (appellant's stepsister Sonya was married to him) (PCR L.F. 76). He alleged that Thomas knew appellant when appellant lived with his father and stepmother Dale and Julie Pickett (PCR L.F. 76). He alleged that Thomas could testify "about his relationship with [appellant] as well as his substance abuse issues" (PCR L.F. 76-77). He alleged that Thomas could also have testified about appellant saving his life when he tried to commit suicide (PCR L.F. 77). He alleged that

Thomas's testimony would have supported defense expert Dr. Wanda Draper's conclusions (PCR L.F. 75-76). He alleged that this evidence would have created a reasonable probability of a different result in the penalty phase (PCR L.F. 77).

Thomas testified at the evidentiary hearing that appellant was his wife's stepbrother (PCR Tr. 169). He testified that appellant worked with him for "a year or two" in Little Rock around 2003 (PCR Tr. 169-170, 172). He described appellant as a good worker and friend (PCR Tr. 170). He saw appellant interact well with appellant's daughters (PCR Tr. 170). He testified that appellant drank "[q]uite often," cashing his paychecks at the liquor store and buying liquor when he did so (PCR Tr. 170-171). He recounted a time that he tried to hang himself in his basement, but appellant found him and held him up until someone else could come and cut the rope (PCR Tr. 171-172). He testified that he was not contacted by the defense and was willing to testify to these facts had he been contacted (PCR Tr. 172).

Zembles testified that, while she knew about Thomas's wife, she had never seen Thomas's name prior to seeing the amended motion and was not aware at the time of trial that Thomas existed (PCR Tr. 238-240). Thus, she had no awareness of any potential testimony Thomas could provide (PCR Tr. 239-240).

Moreland testified that he did not interview Thomas and was not aware of the nature of appellant's relationship with Thomas or of the incident about Thomas wanting to commit suicide (PCR Tr. 361-362).

The motion court denied appellant's claim, finding that appellant failed to prove that trial counsel was ever made aware that Thomas was a potential witness and failed to provide "any compelling evidence" in Thomas's testimony (PCR Tr. 165-166, 189).

B. Appellant Failed to Prove His Claim

To prove a claim of ineffective assistance for failing to investigate and call a witness at trial, the movant must show that trial counsel knew or should have known of the witness, the witness could be located through reasonable investigation, the witness would testify, and the witness's testimony would have produced a viable defense. *Davis v. State*, 486 S.W.3d 898, 909 (Mo. 2016). Here, appellant failed to prove that counsel was ineffective for failing to investigate and call Thomas because he failed to prove that counsel knew or should have known that Thomas had helpful information. Appellant neither alleged nor presented any evidence that anyone had ever told counsel about Thomas. Dr. Wanda Draper, the defense expert at trial, did not identify Thomas as one of the relatives she interviewed (Tr. 6145-6146). Appellant could have asked Julie Pickett, who

had been thoroughly investigated prior to trial and thus could have told counsel about her son-in-law (PCR Tr. 160-162). Appellant could have called Sonya, Thomas's wife, who was known to counsel (Tr. 5956-5959; PCR Tr. 361) and thus could have told counsel that her husband had relevant information. Appellant could have called Beth Holzknecht, counsel's mitigation specialist, if the defense investigation had revealed the existence of Thomas and his proposed testimony and if that information had been put into appellant's social history (PCR Tr. 178-180, 246-247, 360). Appellant could have provided his own testimony that he told counsel about Thomas and his proposed information. But appellant did not do any of these things.

Because the evidence showed a thorough investigation of appellant's past, without some evidence that counsel was ever made aware of Thomas, appellant failed to prove that counsel knew or should have known that the witness existed. Where counsel takes all reasonable steps to discover the names of potential witness and did not know about a witness, counsel is not ineffective. *Edwards v. State*, 200 S.W.3d 500, 517-18 (Mo. 2006); *Collis v. State*, 334 S.W.3d 459, 464 (Mo. App., S.D. 2011). Thus, without evidence that counsel was made aware of Thomas's potential testimony, appellant failed to prove that counsel was ineffective.

XII.

The motion court did not clearly err in denying appellant's claim that appellate counsel was ineffective for failing to raise a claim that the torture aggravating circumstance is unconstitutionally vague.

The motion court did not clearly err in denying appellant's claim that appellate counsel was ineffective for failing to raise a novel claim that the torture aggravating circumstance in Instruction 16 and § 565.032.2(7) is unconstitutionally vague. Appellant failed to prove that counsel had a duty to raise this claim which is contrary to existing law, that counsel's decision not to raise the claim was not reasonable appellate strategy, or that there was a reasonably probability that the claim required reversal on appeal.

A. Facts

At trial, appellant objected to Instruction 16, arguing that the evidence did not support the aggravating circumstance and that torture was not defined, leaving the jury "without guidance" and creating the possibility that jurors would not be unanimous because they would "individually decide what torture is" (Tr. 6421). He did not cite to any cases specifically holding that the word "torture" as an aggravating circumstance was vague, but only cited to cases for general holdings about vagueness and the requirement of unanimity

and to academic articles about torture being vague (Tr. 6422-6423). The State replied that torture is not to be defined and that the jury was required to find evidence of torture (Tr. 6427). The court overruled the objection (Tr. 6428). Appellant raised the claim in his motion for new trial (L.F. 756-757).

Appellate counsel Rosemary Percival did not raise the claim in her opening brief on direct appeal, instead raising ten other points on appeal, some of which contained multiple claims (SC92720 App.Br. 35-47). That brief was 30,712 words long, less than 300 words shy of this Court's word limit (SC92720 App.Br. 139). Counsel did argue in her reply brief that appellant's sentence was disproportionate, in part, because the word "torture" in the aggravating circumstance was not defined and thus was unconstitutionally vague, as it did not provide sufficient guidance and gave no assurance that the jury was unanimous (SC92720 Rep.Br. 33).

In his amended motion, appellant alleged that appellate counsel was ineffective for failing to raise the claim that Instruction Number 16 was unconstitutionally vague because "torture" was not defined (PCR L.F. 94-97). He alleged that, because torture was not defined, the jurors were not "adequately informed as to what they should consider 'torture' to be, and thus their discretion was not properly channeled (PCR L.F. 95). He alleged that the same narrowing factors as the "depravity of mind" aggravating

circumstances should be applied to the torture aggravating circumstance or else jurors may not unanimously agree as to what "type of conduct" constituted torture (PCR L.F. 96-97). He alleged that, had counsel raised this claim, there was a reasonable probability this Court would have reversed appellant's death sentence (PCR L.F. 97).

Percival testified that she did not raise the torture issue in her initial brief (PCR L.F. 307). She testified that she had drafted a claim on that issue, but that she had "quite a word-crunch problem," so she decided not to include the issue in her opening brief, but instead to raise the issue as part of her arguments regarding proportionality review (PCR L.F. 307-308). While she believed raising it as a separate point would have been the "better way" of approaching it and that, had she thought of it, she could have tried to shorten other parts of the brief to save words, she acknowledged that she needed to "scale back" her brief and that she was "way over" the word count (PCR L.F. 308). She admitted that this Court's proportionality review included consideration of whether the aggravating circumstances warranted the death sentence (PCR L.F. 309). She testified that she "did say what [she] wanted to say about" the torture issue in the reply brief (PCR L.F. 324).

The motion court denied this claim, finding that counsel's testimony that she chose not to raise the torture claim as a separate point in her

opening brief due to word-count issues and the desire to raise more meritorious issues was a reasonable strategic decision (PCR L.F. 170, 193). Further, the court noted that appellant cited no authority showing that the word "torture" required a definition (PCR L.F. 193).

B. Appellant Failed to Prove His Claim

To establish ineffective assistance of appellate counsel, the movant must prove that counsel failed to raise a claim of error that was so obvious that competent counsel would have recognized and asserted it. *Taylor v. State*, 262 S.W.3d 231, 253 (Mo. 2008). To establish prejudice, he must establish that there was a reasonable probability of a different outcome on appeal had counsel raised the issue. *Id.* Counsel has no duty to raise every possible issue asserted in the motion for new trial or to present non-frivolous issues where counsel strategically decided to winnow out arguments in favor of other arguments. *Tisius v. State*, 519 S.W.3d 413, 431-32 (Mo. 2017).

Appellant failed to prove his claim. First, appellant failed to prove that counsel had a duty to raise a novel claim. Appellant cited no authority, below or on appeal, from the United States Supreme Court, this Court, or any other court, holding that the use of the word "torture" in § 565.032.2(7) or MAI-CR 3d 314.40 (the pattern instruction for Instruction 16) is unconstitutionally vague (PCR L.F. 94-97; App.Br. 150-157). While appellant

cited to cases from the United States Supreme Court and this Court addressing the vagueness of "depravity of mind" aggravating circumstances and the need for narrowing factors to support such circumstances, none of those cases applied that reasoning to the "torture" aggravating circumstance. *Godfrey v. Georgia*, 446 U.S. 427, 427-32 (1980) (plurality opinion); *Maynard v. Cartwright*, 486 U.S. 356, 359-65 (1988); *State v. Preston*, 673 S.W.2d 1, 10-11 (Mo. 1984). Further, even these cases held or at least suggested that such circumstances would not be unconstitutionally vague where they were premised on "torture." *Godfrey*, 446 U.S. at 429-32 (noting a case where the the choking of two children after sexually assaulting them was of "similar ilk" as a "horrifying torture-murder"); *Maynard*, 486 U.S. at 365; *Preston*, 673 S.W.2d at 11 (listing the "infliction of physical and psychological torture upon the victim" as a sufficient limiting factor for depravity of mind). Thus, the authority appellant relies on does not support a claim that torture is unconstitutionally vague and actually supports the opposite conclusion: that "torture" is sufficient to support an aggravating circumstance.

Because appellant cited to no precedent showing that a claim that "torture" was too vague to constitutionally guide the jury and ensure sufficient unanimity, appellant proposed that counsel was ineffective for failing to raise a novel legal argument before this Court. The effectiveness of

counsel is judged under the existing law at the time of counsel's representation. *Hoeber v. State*, 488 S.W.3d 648, 658 (Mo. 2016). Counsel is not ineffective for failing to anticipate a change in the law. *Id.* Because these things are true, it must also be true that counsel is not constitutionally required to advocate for a change in the law. *See, e.g., Mangum v. State*, 521 S.W.3d 252, 256 (Mo. App., S.D. 2017) (in light of the fact that the statutes are presumed constitutional, counsel was not ineffective for failing to raise a claim that the statute prohibiting exposing another to HIV violated equal protection). Thus, appellant failed to prove that counsel was ineffective for not raising this novel claim.

Second, appellant failed to overcome the presumption of reasonable strategy. Counsel testified that she made the intentional decision not to raise this claim because she winnowed it out in favor of other claims she believed she should raise and she did not have sufficient words in her brief available to raise this as a freestanding claim (PCR Tr. 307-309, 317-318). Counsel was free to exercise this discretion as part of her reasonable strategy. *Tisius*, 519 S.W.3d at 431-32. While she testified that, in retrospect, she thought that she should have tried to eliminate more words in her opening brief to fit this claim into her brief, counsel's performance is judged according to counsel's perspective at that the time without the distorting effects of hindsight.

Strickland v. Washington, 466 U.S. 668, 689 (1984). Counsel's strategy to winnow out this claim for the sake of other claims yet also present the argument to this Court to consider as part of its independent obligation to determine if the aggravating circumstances were supported by the evidence was reasonable. § 565.035, RSMo 2000. Appellant failed to prove otherwise.

Finally, appellant failed to prove that there was a reasonable probability that this Court would have reversed his sentence had counsel raised this claim. As noted above, appellant cited no authority that the use of the word "torture" in § 565.032.2(7) or MAI-CR 3d 314.40 has ever been held to be unconstitutionally vague. Even though the word "torture" is not defined by statute, that does not render the statue and instruction vague. In the absence of statutory definitions, words are given their plain and ordinary meaning as derived from the dictionary. *State v. Jones*, 479 S.W.3d 100, 107 (Mo. 2016). In the context of this case, the common meaning of the act of "torture" means to "cause great physical or mental pain to someone." "Torture," *Cambridge Dictionary*, http://dictionary.cambridge.org/us/dictionary/english/torture (last accessed Sept. 27, 2017).

As this Court concluded on direct appeal, the evidence sufficiently established that appellant inflicted great physical and mental pain on Rowan. Appellant subjected the nine-year-old victim to the "very painful" act

of rape which lacerated her from her vagina almost to her anus (Tr. 5209-5212). Rowan cried during the rape, evidencing the fact that she was subjected to pain (Mov.Exh. 28-29). Then, after being led from the trailer outside, as Rowan was strangled, she did not die quickly and she suffered (Mov.Exh. 27-28). While Dr. Norton testified that she may have lost consciousness in ten seconds, that was only if there was enough pressure to cut off arterial flow to the brain (Tr. 5222-5223). She would have struggled with the ligature while she remained conscious, thus being aware that her death was imminent (Tr. 5224-5225). She received other wounds prior to death (Tr. 5201-5202). Thus, the evidence supported the finding that Appellant inflicted physical torture on the victim prior to her death. *See, e.g., Preston*, 673 S.W.2d at 11. As the Court held on direct appeal, the evidence was sufficient to show that the murder involved torture, noting that the crime "was horrific and painful for Rowan." *State v. Collings*, 450 S.W.3d 741, 767 (Mo. 2014). In light of this evidence and this Court's holding, there was not a reasonable probability that this Court would have concluded on direct appeal that the word "torture" was so vague that the jury was not provided sufficient guidance to reasonably and unanimously conclude that Rowan's murder involved torture. Thus, appellant failed to prove that he was prejudiced by counsel's failure to include this claim in her opening brief.

CONCLUSION

In view of the foregoing, the denial of appellant's motion for post-conviction relief 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 Supreme Court Rule 84.06 and contains 27,276 words as determined by Microsoft Word 2010 software.

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