No. SC96453

In the Supreme Court of Missouri

VINCENT McFADDEN,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable Tom W. DePriest, Jr., Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Vincent McFadden is appealing the denial of his Rule 29.15 motion which sought to vacate his conviction for murder in the first degree, section 565.020, RSMo, for which he was sentenced to death; armed criminal action, section 571.015, RSMo; and witness tampering, section 575.270, RSMo. (PCR L.F. 811-13).[1] Appellant was tried by a jury on April 1-10, 2008, before Judge Gary M. Gaertner, Jr., after his initial conviction and sentence on the charges was overturned on direct appeal.[2] (L.F. 16, 23-25). Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

On May 15, 2003, Eva Addison was at 31 Blakemore in Pine Lawn when Appellant arrived in a Nissan Altima driven by a man named B.T. (Tr. 61-62). Appellant and Addison had a child together. (Tr. 61). Appellant got

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[1] The record on appeal will be cited as: SC89429 Legal File (L.F.); SC89429 Supplemental Legal File (Supp. L.F.); SC89429 Transcript of Motions and Preliminary Matters (Mot. Tr.); SC89429 Voir Dire Transcripts (VD Tr.-I-V); SC89429 Trial Transcript (Tr.); SC89429 Sentencing Transcript (Sent. Tr.); SC96453 Legal File (PCR L.F.); SC96453 Supplemental Legal File (PCR Supp. L.F.); SC96453 Transcript (PCR Tr.); SC96453 Movant's Exhibits (Movant's Ex.).

[2] *State v. McFadden*, 216 S.W.3d 673 (Mo. 2007).

out of the car, kissed the child and then slapped Addison in the face, telling her that "You ho's can't come back to Pine Lawn." (Tr. 62). Addison took the reference to "ho's" to refer to her and her sisters. (Tr. 64). Appellant told Addison that one of the sisters was "supposed to have told something on him." (Tr. 64). Appellant got back in the car and left. (Tr. 65).

Addison's sisters, Leslie and Jessica, soon arrived at the house.[3] (Tr. 65-66). Eva told them that they had to leave Pine Lawn and recounted the incident with Appellant. (Tr. 66). Eva gave Jessica the keys to her car, and Jessica left with Eva's child and her niece and nephew. (Tr. 66, 200). Eva also accidentally gave Jessica the keys to a car belonging to another sister, but neither woman realized it at the time. (Tr. 66, 200). Eva and Leslie were searching for the keys when Appellant returned. (Tr. 66). He got out of the car and said, "I told you all ho's to leave, to get out of Pine Lawn." (Tr. 67). Leslie replied, "We didn't do nothing to you." (Tr. 67). Appellant told Leslie to "shut the fuck up," pointed a gun at her and pulled the trigger, but the gun did not go off. (Tr. 68). A companion of Appellant's who had been following in another car told Appellant to leave the women alone. (Tr. 68). Appellant replied, "One of these ho's has got to die tonight." (Tr. 68). Appellant had also

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[3] To avoid confusion, the Addison sisters will hereafter be referred to by their first names. No disrespect is intended.

told Leslie, when he was pointing the gun at her, that she would see her deceased brother that night. (Tr. 69). Appellant and his companions got back into their cars and drove off. (Tr. 69). Eva and Leslie went back into the house. (Tr. 69).

Leslie decided to leave, and said she was going to walk to a skating rink to use a pay phone and call for a ride out of Pine Lawn. (Tr. 70-71, 131). As Leslie was walking down the street, Eva saw the car that Appellant had been riding in come around a corner. (Tr. 71). Eva ran to Leslie and urged her to come back, but Leslie waved her off and continued walking. (Tr. 71, 79). Eva hid in some bushes and watched as Appellant got out of the car, ran to Leslie and began arguing with her. (Tr. 72). A resident of a nearby house, Stacy Stevenson, overheard an argument between a man and a woman and heard the man say, "Fucking bitch, come here. Where are you fittin' to go? I thought I told you and your sister to get the fuck from down here and stay the fuck from down here." (Tr. 178-79). Eva saw Appellant point a gun at Leslie and heard him laugh. (Tr. 72, 78). Leslie said, "Please don't shoot me," and pushed the gun away. (Tr. 72-73). Appellant said, "Shut the fuck up," and shot Leslie. (Tr. 73). She fell to the ground and Appellant shot her several more times as he stood over her. (Tr. 73). He then got into the car with B.T. and they drove off. (Tr. 73).

Eva ran back to 31 Blakemore and told the woman who lived there that Appellant had killed her sister. (Tr. 74). She and the woman then ran back to the scene. (Tr. 74, 181). Stevenson, the neighbor who had overheard the argument between Appellant and Leslie, came outside after hearing the gunshots and ran to Leslie's body. (Tr. 18). As he checked Leslie's pulse, she coughed and choked and said, "Help me. He shot me. He shot me." (Tr. 180-81). Eva gave statements to the police that night where she identified Appellant as the shooter. (Tr. 102-03, 165-67).

An autopsy showed that Leslie had been shot four times. (Tr. 280). The fatal wound was to the head, with the bullet entering above and in front of the left ear and coming to rest at the base of the skull. (Tr. 281). Another bullet entered the lower jaw at the chin and came to rest at the base of the neck. (Tr. 289-90).

Appellant called one of Eva's cousins the day after the shooting and learned that Eva had seen him murder Leslie. (Tr. 205). He said to the cousin, "Tell them bitches to get my name out of that shit . . . I'm out of town. But when I come back, it's going to be like that for any one of you all I see." (Tr. 203). Appellant called Eva's parent's house the same day and told Eva to "get his name off that shit or he was going to kill [her]." (Tr. 104). Appellant was arrested at a motel in St. Charles on May 17th. (Tr. 266-68). Eva went to stay with Appellant's mother and Appellant called the house from jail on May

27th. (Tr. 106, 115). An inmate identified as "Slim" participated in the phone call and relayed messages between Appellant and Eva. (Tr. 106-07, 116). Appellant asked Eva to go to his lawyer and sign papers and to go into court and say that it wasn't him. (Tr. 127). Eva refused, despite Appellant's threats indicating that his friends might do something to her or her family. (Tr. 127, 130, 134-35). Eva later visited Appellant at the jail, where he held up a sign saying that he was sorry for killing her sister, while telling her that she should not talk about it over the phone. (Tr. 136).

Appellant did not testify or present any evidence during the guilt phase of the trial. (Tr. 311-12). The jury found Appellant guilty of first-degree murder, armed criminal action, and tampering with a witness. (Tr. 415-16).

The State submitted the following statutory aggravating circumstances during the penalty phase of the trial:

> 1. Whether the defendant has a serious assaultive conviction in that he was convicted of Murder in the First Degree on September 7, 2007 in the Circuit Court of St. Louis County, Missouri, because defendant killed Todd Franklin on July 3, 2002.
>
> 2. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on September 7, 2007, in the Circuit Court of St. Louis County,

Missouri, because defendant killed Todd Franklin with a deadly weapon on July 3, 2002.

3. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant on April 4, 2002.

4. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant with a deadly weapon on April 4, 2002.

5. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Jermaine Burns on April 4, 2002.

6. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County,

Missouri, because defendant shot at Jermaine Burns with a deadly weapon on April 4, 2002.

(L.F. 669-70). The State entered certified copies of those convictions into evidence and elicited testimony from witnesses about the underlying facts of those crimes. (Tr. 460-571, 624-28). The State presented evidence of non-statutory aggravating circumstances, including the fact that Appellant had crack cocaine in his pants pockets when he was arrested after Leslie's murder, that Appellant laughed and said that he felt good and wanted to celebrate when talking to others about Todd Franklin's murder, and that he had gotten into an altercation with Leslie the year before her murder where he went after her with guns and had to be restrained by his father. (Tr. 572-94). The State presented evidence that Leslie, who was eighteen-years-old when she was killed, had a wig placed on her head for her funeral, that her face was so swollen that she looked like a forty-year-old, and that all the mourners kissed her face as they filed past the casket, causing the make-up on her face to rub off and reveal the bullet hole in her chin. (Tr. 596-97, 600, 630-31). The State presented evidence that Appellant had slapped Jessica Addison when he saw her talking on the phone during the time that he was wanted for Todd Franklin's murder. (Tr. 612).

Appellant presented live testimony from five witnesses during the penalty phase of the trial, and read into the record previous trial testimony given by a sixth witness who had passed away. (Tr. 646-728).

Lynette Elaine Hood lived in Pine Lawn from 1993 to 2001, and knew Appellant through her daughters. (Tr. 646-47). She described the area of Pine Lawn where she lived as "kind of rough." (Tr. 649). Hood said that a main reason she moved away was hearing frequent gunshots in the neighborhood that prompted her to drop to the floor. (Tr. 649). Hood testified that Appellant's demeanor changed after he was shot in the leg – that he seemed to be scared. (Tr. 651).

Hood testified on cross-examination that she did not know who was responsible for the shootings and that she would be surprised to learn that Appellant had committed some of them. (Tr. 658). She admitted that there were good people in Pine Lawn. (Tr. 659). Hood agreed that the shootings were horrible and terrorized the residents of Pine Lawn. (Tr. 659-60).

Appellant's aunt, Gwendolyn McFadden, testified that Appellant's parents did not marry and that they were not together continuously after his father returned from military service in Germany. (Tr. 662-64. Aunt testified that Appellant's mother held two jobs and left Appellant and his two sisters alone when Appellant was nine or ten years old. (Tr. 662-67). The children would call other family members, who would pick them up and care for them.

(Tr. 667). Aunt testified that Appellant was protective of his sisters and picked them up from school. (Tr. 668). Aunt testified that other children in the neighborhood picked on Appellant and beat him up. (Tr. 669). She also testified that Appellant's father was a serious alcoholic who did not provide financial support to his children. (Tr. 669-70). Aunt enrolled Appellant in various sports. (Tr. 671). Neither of his parents attended any of his games. (Tr. 671). Aunt said Appellant tried to be there for his own son. (Tr. 671-72).

Aunt acknowledged on cross-examination that Appellant was raised in a nice home, was not abused by his parents, that he always had a place to live, was never in foster care, and was never without food. (Tr. 679-80). Aunt said that she ensured that Appellant got to attend events like awards banquets, while some kids had no one to take them. (Tr. 681-82).

Appellant's grandmother, Mini McFadden, testified that Appellant often stayed at her house as a child when his mother was working, sometimes for months at a time. (Tr. 683-84, 686). She said that Appellant and his sisters were often left alone by their mother. (Tr. 687-88). Grandmother also testified that other children liked to "jump on" Appellant because he was small for his age. (Tr. 688).

Grandmother acknowledged on cross-examination that Mother's absences were due to her working so that she could make money to support her children. (Tr. 690). She also admitted that Mother called for help from

other family members. (Tr. 691). Grandmother said that Appellant was only left alone on occasion and that he always had food, clothing, and a nice house to live in. (Tr. 692-93). Grandmother said that both she and Grandfather were hard working people who were good to Appellant. (Tr. 691-93). Grandmother said that Father was not aggressive or violent. (Tr. 692).

Lisa Northern, Appellant's aunt, testified that her late husband, Donald, used to do things with Appellant, such as teaching him to ride a bike or taking him to baseball games, parks, movies, and Six Flags.[4] (Tr. 694-95). He also involved Appellant in church activities. (Tr. 698-99). She said that Appellant's father spent as much time with Appellant as he could when he was home on leave. (Tr. 695). Lisa said that Appellant did not cause any problems while living at her house, and he voluntarily helped with household chores. (Tr. 697). Appellant asked to live with the Northerns when he was thirteen or fourteen years old, but his mother withheld permission. (Tr. 699).

Donald Northern's testimony from a prior court hearing was read to the jury. (Tr. 708-09). His testimony largely confirmed that of his wife. Donald additionally testified that Appellant grew up in some "pretty rough and

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[4] To avoid confusion, the Northerns will hereafter be referred to by their first names. No disrespect is intended.

violent" neighborhoods. (Tr. 711). Donald said that Appellant was frequently picked on due to his small size. (Tr. 711). Donald testified that if Appellant had been allowed to live with him and his wife, he would have intervened if Appellant had become involved in any inappropriate activities, and Appellant would have attended church. (Tr. 715, 717).

Appellant's father, Vincent McFadden, Sr., testified that he lived off and on with Appellant and his mother until Appellant was four or five years old. (Tr. 718-20). When Appellant was eight or nine years old, he called Father on a couple of occasions because he and his sisters had been left alone by their mother. (Tr. 720-21). Appellant sometimes called Father because he wanted to do things with him, and Father would not show up. (Tr. 722). Appellant got into fights and had visible bruises and injuries. (Tr. 722).

The jury returned with a verdict of death for the charge of murder in the first degree. (Tr. 826). The jury found beyond a reasonable doubt the existence of all of the statutory aggravating circumstances submitted to it. (Tr. 826-28). The court imposed the jury's verdict on June 12, 2008, and also imposed consecutive sentences of seventy-five years imprisonment for armed criminal action and seven years imprisonment for tampering with a witness. (Sent. Tr. 12-13).

The convictions and sentences were affirmed on direct appeal. *State v. McFadden*, 391 S.W.3d 408 (Mo. 2013). The mandate issued on March 19,

2013. (PCR L.F. 730). On June 14, 2013, Appellant timely filed a *pro se* Motion to Vacate, Set Aside or Correct the Judgment and Sentence under Supreme Court Rule 29.15. (PCR L.F. 1, 13-18). Counsel was appointed to represent Appellant on June 20, 2013. (PCR L.F. 1, 21). Counsel requested, and was granted an additional thirty days to file an amended motion. (PCR L.F. 1-2, 23-25). Counsel timely filed an amended motion on September 18, 2013, that raised thirteen claims. (PCR L.F. 3, 46-258). The motion court entered a judgment denying the claims following an evidentiary hearing. (PCR L.F. 11, 728-807). Additional facts specific to Appellant's claims of error will be set forth in the argument portion of the brief.

STANDARD OF REVIEW

In reviewing the overruling of a Rule 29.15 motion, the motion court's findings are presumed correct. *Johnson v. State*, 406 S.W.3d 892, 898 (Mo. 2013). A motion court's judgment will be overturned only when either its findings of fact or its conclusions of law are clearly erroneous. Supreme Court Rule 29.15(k). A motion court's findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *Tisius v. State*, 519 S.W.3d 413, 420 (Mo. 2017). The motion court's findings should be upheld if they are sustainable on any grounds. *Swallow v. State*, 398 S.W.3d 1, 3 (Mo. 2013).

A movant is entitled to post-conviction relief for ineffective assistance of counsel upon establishing that: (1) trial counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation, and (2) he or she was prejudiced by that failure. *Tisius*, 519 S.W.3d at 420; *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both prongs of the *Strickland* test must be shown by a preponderance of the evidence in order to prove ineffective assistance of counsel. *Tisius*, 519 S.W.3d at 420.

To satisfy the *Strickland* performance prong, a movant must overcome the strong presumption that counsel's conduct was reasonable and effective. *Id.* This presumption is overcome if the movant identifies specific acts or omissions of counsel that, in light of all the circumstances, fell outside the

wide range of professional assistance. *Id.* This Court has never found that a failure to litigate a trial perfectly constitutes ineffective assistance of counsel. *Strong v. State*, 263 S.W.3d 636, 650 n.7 (Mo. 2008). "[N]or does this Court believe a 'perfect' litigation to be possible." *Id.* Just because a jury returns a guilty verdict does not mean that counsel was ineffective. *Johnson*, 406 S.W.3d at 901.

To establish *Strickland* prejudice, a movant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Tisius*, 519 S.W.3d at 420. A reasonable probability exists when there is a probability sufficient to undermine confidence in the outcome. *Id.* Regarding a sentence of death, a defendant must show with reasonable probability that the jury, balancing all the circumstances, would not have awarded the death penalty. *Id.*

ARGUMENT

I.

The motion court did not clearly err in finding that PCR counsel had been given an adequate opportunity to investigate alleged juror non-disclosure.

Appellant claims that the motion court clearly erred in not permitting him to examine all the petit jurors to establish that juror Jimmy Williams was biased against him and/or that he had discussed with other jurors' prior knowledge that he allegedly had about one of Appellant's assault cases. But the motion court properly found that Appellant had been given an adequate opportunity to explore his claims through questioning of Williams and another juror.

A. Underlying Facts.

1. *Trial and direct appeal proceedings*.

Appellant raised a claim on direct appeal that the trial court plainly erred in entering a judgment of conviction and sentencing him to death because one of the jurors failed to disclose that, three years prior to the trial in the instant case, he was a member of the venire panel in Appellant's trial for assault and armed criminal action. *McFadden*, 391 S.W.3d at 417.

Jimmie L. Williams was Juror No. 44 on the venire panel in the underlying murder case and was selected for the petit jury as Juror No. 3.

(L.F. 616, 619). The jury questionnaire for this case stated that Williams was employed as a service technician by Industrial Battery, that he was married with no children under the age of eighteen, that his spouse's occupation was marketing coordinator, and that he had previously served as a juror. (Supp. L.F. 1). The court introduced the attorneys and the parties towards the beginning of the voir dire:

> I'm going to introduce at this time, Mr. Vincent McFadden.
>
> Does anyone think they recognize Mr. Vincent McFadden?
>
> Again, I see no hands.
>
> You may be seated, Mr. McFadden.

(VD Tr.-II 7). During the death qualification portion of voir dire, the prosecutor told the venire members that they would hear "that in 2005 another jury in a separate case altogether convicted the defendant of Assault First Degree, Armed Criminal Action, Assault First Degree, Armed Criminal Action." (VD Tr.-II 21).

Appellant was tried on December 14, 2004 for three counts of assault in the first degree, three counts of armed criminal action, and one count of unlawful use of a weapon.[5] (Supp. L.F. 17, 20, 103). The jury questionnaire

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[5] Appellant was sentenced on those convictions on February 4, 2005, and that date was used in the instruction submitting those convictions as

for that case listed as Juror No. 6 on the venire panel Jimmie L. Williams, who was employed as a service technician by Industrial Battery, who was married with no minor children, whose spouse was employed as a marketing coordinator, and who had no previous jury experience. (Supp. L.F. 5). The venire panel was informed during voir dire of the charges. (Supp. L.F. 21). Defense counsel introduced Appellant to the venire at the beginning of the defense voir dire. (Supp. L.F. 69). Defense counsel also discussed the charges when talking to the venire about the burden of proof. (Supp. L.F. 78-79). Williams was apparently struck peremptorily, as his name was crossed through on the juror questionnaire and the record does not show that he was struck for cause. (Supp. L.F. 5, 96-102).

This Court rejected Appellant's claim of juror non-disclosure. *Id.* at 419. The Court found that it was plausible that Williams failed to recall Appellant from the previous trial, and that Appellant had failed to present evidence demonstrating intentional non-disclosure. *Id.* at 418. The Court also found that Appellant had failed to demonstrate prejudice so as to warrant a new trial based on unintentional non-disclosure. *Id.*

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aggravating circumstances. (Supp. L.F. 103; L.F. 669-70). Additionally, the trial court directed verdicts of acquittal on one count of assault in the first degree and one count of armed criminal action. (Supp. L.F. 20, 103).

2. *PCR proceedings.*

Prior to filing the amended Rule 29.15 motion, PCR counsel requested an order from the motion court permitting them to contact the entire venire panel from Appellant's murder trial to determine if Juror Williams intentionally failed to disclose his knowledge of Appellant from the assault trial, and to determine if Williams discussed the assault charge with other venire members. (PCR L.F. 29-34). Judge Steven H. Goldman, who was presiding over the case at that point, granted the motion in part, permitting counsel to contact Williams and one other member of the jury. (PCR L.F. 35). The court conducted a hearing at which it heard testimony from Williams and from juror Erin Elswick, whose name was selected at random by the court administrator. (PCR L.F. 393). Judge Goldman proposed to question the jurors using both questions submitted by PCR counsel and the court's own questions. (PCR L.F. 399). PCR counsel renewed their objection to not being allowed to talk to all the jurors. (PCR L.F. 400-01).

Juror Elswick testified that she had no specific recollection of Juror Williams. (PCR L.F. 404). Elswick said that she did not overhear any juror discussing previous knowledge of Appellant during the trial. (PCR L.F. 404). Juror Williams testified that he did not remember participating in jury selection on an assault case three years prior to the murder case, and that he did not recognize Appellant from the previous trial. (PCR L.F. 407-09).

Williams said that he did not tell anyone during the murder trial that he had been exposed to Appellant in the past. (PCR L.F. 408).

Judge Goldman found that both witnesses were credible, and that Williams' facial expressions indicated that he did not have a clear memory about the jury selection in the assault case. (PCR L.F. 409-11).

The amended Rule 29.15 motion alleged that Juror Williams was biased and that the motion court denied PCR counsel the opportunity to conduct an adequate investigation. (PCR L.F. 50). The motion specifically alleged that the hearing conducted by the court was inadequate to determine if Williams recalled his prior jury service or shared any information about the assault case with other members of the venire. (PCR L.F. 55).

Judge Tom W. DePriest issued the judgment denying relief on the amended Rule 29.15 motion. (PCR L.F. 11, 728-807). In denying the claim of an inadequate opportunity to contact and question the venire panel, the motion court noted that trial courts have discretionary power to grant permission for contact with jurors after trial. (PCR L.F. 741). The court found that the inquiry conducted by the court was adequate to investigate possible bias by Williams, and that the investigation confirmed the Missouri Supreme Court's observation that Williams memory of the assault case had faded (PCR L.F. 741). The court found that further inquiry of all potential jurors was

unnecessary given William's answers that indicated an unintentional non-disclosure. (PCR L.F. 741).

B. Analysis.

Appellant's claim on appeal differs from the claim raised in his amended motion. The point on appeal alleges that the court clearly erred in denying counsel the opportunity to contact all petit jurors. (Appellant's Brf., p. 29). Appellant's motion for juror contact sought contact with the entire venire panel, and the amended Rule 29.15 motion also alleged that counsel should have been permitted to question the entire venire. (PCR L.F. 29-34, 57, 58).

Claims not raised in a Rule 29.15 motion are waived on appeal. *Dorsey v. State*, 448 S.W.3d 276, 283 (Mo. 2014). Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal. *Id.* Furthermore, there is no plain error review in appeals from judgments on post-conviction motions. *Id.* Appellant's more measured claim that counsel should have been permitted to contact only the petit jurors is not preserved for review because that was not the relief requested of the motion court. *Id.* at 284. Appellant is not entitled to relief even if he did preserve the claim raised on appeal.

Appellant has no inherent right to contact and interview jurors. *Strong*, 263 S.W.3d at 643. Courts have discretionary power to grant permission for

contact with jurors after a trial. *Id.* St. Louis County has a local rule that prohibits an attorney or party from contacting jurors after a trial, unless a court exercises its discretion to allow such contact. St. Louis County Local Rule 53.3. This Court and the Court of Appeals have previously upheld as a proper exercise of the trial court's discretion orders denying juror contact altogether or limiting the issues about which jurors could be questioned. *Strong*, 263 S.W.3d at 644; *State v. Jones*, 979 S.W.2d 171, 183 (Mo. 1998); *State v. Harris*, 477 S.W.3d 131, 147 (Mo. App. E.D. 2015).

The court here properly exercised its discretion in limiting the scope of the inquiry of the jurors. Williams's testimony that he did not recall serving on the venire panel on Appellant's assault trial and that he did not remember Appellant disposed not only of the claim of intentional non-disclosure, but also of the allegation that Williams may have contaminated the venire panel by discussing the prior assault case with other veniremembers. Juror Elswick's testimony confirmed that of Williams. The court found Williams's testimony credible, based on his demeanor during the hearing. (PCR L.F. 409-11). The Court defers to that credibility determination. *Davis v. State*, 486 S.W.3d 898, 907 (Mo. 2016).

Furthermore, any information that could have been obtained from other jurors would have been limited, in that Missouri courts exclude juror testimony from consideration on post-judgment matters. *Strong*, 263 S.W.3d

at 643. A juror may not impeach a unanimous, unambiguous verdict after it is rendered. *Harris*, 477 S.W.3d at 147. Nor may a jury's verdict be impeached by a juror's testimony about jury misconduct that allegedly affected deliberations. *Id.* The rule has two limited exceptions that do not apply in this case: (1) testimony about juror misconduct occurring outside the jury room, such as the gathering of extrinsic evidence, and (2) statements evincing ethnic or religious bias or prejudice during deliberations. *Id.*

Appellant has also failed to show the prejudice necessary to obtain a new trial based on unintentional non-disclosure. *McFadden*, 391 S.W.3d at 418. The venire panel learned during voir dire that Appellant had a prior assault conviction. (VD Tr.-II 21). Williams did not obtain any detailed information about the underlying facts of that case from his relatively brief service on the venire panel. Thus, his knowledge of the case would equal that of his fellow venire members in the murder trial.

The motion court did not clearly err in denying Appellant's claim. Appellant's point should be denied.

II.

The motion court did not clearly err in denying the renewed motions for juror contact after the original judge recused.

Appellant claims that the motion court clearly erred in denying his renewed motion to examine all the petit jurors (*see* Point I *supra*) after the judge presiding over the initial hearing on the issue recused himself. But the successor judges could reasonably rely, in their discretion, on the testimony presented in the earlier hearing to determine that questioning of additional jurors was not necessary.

A. Underlying Facts.

Judge Gary M. Gaertner, Jr. presided over Appellant's trial. *McFadden*, 391 S.W.3d at 408. Judge Gaertner had been appointed to the Court of Appeals by the time Appellant filed his *pro se* Rule 29.15 motion, and the post-conviction case was assigned to Judge Steven H. Goldman. (PCR L.F. 1). Judge Goldman issued the order to allow Juror Williams and one other juror to be questioned about the allegation of non-disclosure, presided over the September 6, 2013, hearing where he questioned those witnesses, and made the finding that Williams had not failed to disclose any information during voir dire. (PCR L.F. 2-3, 35, 45).

Judge Goldman continued to preside over the case until May 5, 2014, when he recused. (PCR L.F. 3). In a written order, Judge Goldman stated

that he was recusing because he recalled that he may have had conversations about the trial with prosecutor Keith Larner while the trial was in progress. (PCR L.F. 265). Judge Goldman was deposed on July 13, 2015. (PCR L.F. 302). He testified that prosecutor Larner occasionally talked to him about cases he was handling, and that Larner's retirement prompted him to think that Appellant's case might have been one of them. (PCR L.F. 308). Goldman said several times that he did not specifically remember any conversations about Appellant's case, but decided out of an abundance of caution that he should recuse. (PCR L.F. 308-13). Goldman said that he did not have any discussions with Larner after the post-conviction case was assigned to him. (PCR L.F. 311).

The case was assigned to Judge Colleen Dolan. (PCR L.F. 3, 266, 274). Appellant filed a renewed motion for juror contact on July 30, 2015. (PCR L.F. 5, 294-300). The motion alleged that Judge Goldman had a conflict of interest at the time he ruled on the original motion for juror contact, and that the issue needed to be revisited by a conflict-free judge. (PCR L.F. 299). Appellant later filed with the court a deposition of former prosecutor Larner taken on August 20, 2015. (PCR L.F. 351).

Larner testified that he tried both of Appellant's murder cases and also handled the post-conviction case arising out of Appellant's assault conviction. (PCR L.F. 360). Larner could not recall having any specific conversations

with Judge Goldman about any of those cases. (PCR L.F. 361, 366). He said it was possible that he discussed the facts of the cases with Judge Goldman. (PCR L.F. 361, 366). Larner said that he never sought legal or strategic advice from Judge Goldman, but that he would not hesitate to discuss with Goldman the facts of a case that was before another judge. (PCR L.F. 362-63).

Judge Dolan denied the motion on January 26, 2015. (PCR L.F. 7, 414-15). She noted that neither Juror Williams nor Elswick indicated at the prior hearing that Williams remembered Appellant or spoke to any jurors about remembering Appellant. (PCR L.F. 414). Judge Dolan also noted the rule against impeaching the jury's verdict and found that Appellant had not alleged either of the applicable exceptions to that rule. (PCR L.F. 414-15).

Judge Dolan was appointed to the Court of Appeals and the case was eventually reassigned to Judge DePriest. (PCR L.F. 7, 418, 427-28). Appellant filed a second renewed motion for an order to contact jurors. (PCR L.F. 8, 446-52). Judge DePriest denied the motion after hearing arguments from counsel. (PCR L.F. 10, 484).

In his judgment denying post-conviction relief, Judge DePriest noted the renewed juror contact motions filed by Appellant. (PCR L.F. 741). Judge DePriest found that the inquiry by Judge Goldman was sufficient to investigate possible juror bias and that further inquiry of all potential jurors was unnecessary given Juror Williams's disclosures indicating an

unintentional non-disclosure as a result of faded memory due to the passage of more than three years. (PCR L.F. 741).

B. Analysis.

As in the previous point, Appellant's claim on appeal differs from the relief sought in the motion court. The point on appeal alleges that the court clearly erred in denying Appellant's renewed motions to contact all petit jurors. (Appellant's Brf., p. 30). But Appellant's motions requested contact with the entire venire panel and did not include contact with only the petit jurors as an alternative form of relief. (PCR L.F. 294-300, 446-52). An argument on appeal that is distinct from the argument presented to the trial court is not preserved for review. *State v. Sisco*, 458 S.W.3d 304, 311 (Mo. 2015). Issues that were not preserved may be reviewed for plain error only. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. 2009). There is, however, no plain error review in appeals from judgments on post-conviction motions. *Dorsey*, 448 S.W.3d at 284. Appellant is not entitled to relief even if his claim is properly before the Court.

Appellant devotes part of his argument to discussing the standards for disqualification of a judge for actual or perceived bias. It is questionable whether Judge Goldman was required to recuse, since the record does not identify any extrajudicial information imparted to Judge Goldman that the judge relied on in making his ruling, but instead suggests only the possibility

that Judge Goldman received extrajudicial information. *Cf. Martin v. State*, 526 S.W.3d 169, 187 (Mo. App. W.D. 2017) (application for change of judge failed to identify objective facts demonstrating disqualifying bias). Nevertheless, Judge Goldman did recuse and the issue before the Court is whether either of the successor judges, Judge Dolan or Judge DePriest, was required to grant Appellant's request to contact the entire venire panel.

Appellant's argument under this point largely mirrors his argument concerning the sufficiency of Judge Goldman's examination of Jurors Williams and Elswick. Respondent incorporates into this point the arguments contained in Point I as to why that inquiry represented a proper exercise of discretion that did not result in prejudice. Appellant appears to argue that Judges Dolan and DePriest were not entitled to rely on the answers given by Williams and Elswick in the earlier hearing because of Judge Goldman's recusal. But Appellant fails to identify any deficiencies in the actual examination of those jurors and fails to explain why their answers would be rendered unreliable by Judge Goldman's recusal. Judges Dolan and DePriest could properly find that Williams's denial that he recognized Appellant from the voir dire of the assault trial made any further inquiry of additional jurors unnecessary.

Appellant has failed to show an abuse of discretion or prejudice. His point should be denied.

III.

Counsel not ineffective in conducting voir dire.

Appellant claims that trial counsel was ineffective for failing to question Juror Williams about his familiarity with Appellant after Appellant alerted counsel that he recognized Williams. But counsel's performance was reasonable given the available information, and Appellant failed to carry his burden of showing that a biased venireperson served on the jury.

A. Underlying Facts.

1. *Rule 29.15 motion.*

The amended motion alleged that Appellant advised trial counsel during voir dire that he recognized veniremember Williams, though he could not recall the circumstances under which he had seen him. (PCR L.F. 59). The motion claimed that Appellant advised counsel that Williams had nodded toward Appellant when he entered the courtroom. (PCR L.F. 59). The motion alleged that counsel was ineffective for failing to probe the nature of the relationship between Appellant and Williams to discover any bias that Williams might have had toward Appellant. (PCR L.F. 59-60).

2. *Rule 29.15 hearing.*

Co-counsel Karen Kraft testified at the evidentiary hearing that she briefly attended parts of the assault trial. (PCR Tr. 509). Kraft did not believe that she attended the voir dire in that case. (PCR Tr. 510). Kraft said that

she did not become aware that Williams was on the venire panel in the assault case until she received a copy of the amended Rule 29.15 motion. (PCR Tr. 510). Kraft said she recalled Appellant pointing out a juror during the murder case and saying that he looked familiar, but that he did not know from where. (PCR Tr. 510-11). Kraft acknowledged on cross-examination that she was unsure that a strike for cause would have been successful had Williams been questioned and denied remembering anything about the assault case. (PCR Tr. 586).

Co-counsel Sharon Turlington testified that she also attended portions of the assault trial. (PCR Tr. 683-84). Turlington said she had no independent recollection of Appellant saying that he recognized one of the veniremembers in the murder trial from somewhere. (PCR L.F. 684-85). Turlington also said that Appellant would have had to relay that information at a point in time where further questioning was permissible before counsel could follow up on it. (PCR Tr. 735).

3. *Motion court findings.*

In denying the claim, the motion court found that Appellant had failed to show that reasonable trial counsel should have known that Williams participated in jury selection in an unrelated trial they did not attend, when Appellant only offered that Williams looked familiar from somewhere. (PCR L.F. 742-43). The court also found that the record failed to establish when

Appellant spoke to counsel, and that counsel is not ineffective for failing to act on inadequate information. (PCR L.F. 743).

The court also found that Appellant failed to establish prejudice, noting that Williams's answers to Judge Goldman clearly indicated that he did not remember Appellant from the previous jury selection, which was consistent with Williams's failure to answer Judge Gaertner's questions regarding any familiarity with Appellant prior to trial. (PCR L.F. 743). The court found any questioning of Williams would not have triggered a memory that did not exist. (PCR L.F. 743). The court concluded that nothing in the record indicated that Juror Williams had a bias that would have been the basis of a strike for cause. (PCR L.F. 743).

B. Analysis.

One aspect of the right to a fair and impartial jury is an adequate voir dire to identify unqualified jurors. *Knese v. State*, 85 S.W.3d 628, 632 (Mo. 2002). The motion court did not clearly err in finding that counsel's voir dire was adequate. The trial court asked the venire members at the beginning of voir dire if they recognized Appellant and no one, including Juror Williams, answered affirmatively. (VD Tr.-II 7). It is not clear from the record at what point during voir dire that Appellant alerted counsel that Williams looked familiar, but that vague statement did not give counsel anything to work with in terms of questioning Williams further, even assuming that further

questioning was permissible at that point. All counsel could have done was re-ask the same question asked earlier by the court, which would presumably have garnered the same response.

Even if counsel's performance was deemed deficient, Appellant must still show by a preponderance of the evidence that he was prejudiced by counsel's deficient performance. *Id.* at 633. To be entitled to a presumption of prejudice resulting from defense counsel's ineffective assistance during the jury selection process, a post-conviction movant must show that a biased venireperson ultimately served as a juror. *Moss v. State*, 10 S.W.3d 508, 513 n.17 (Mo. 2000), *overruled on other grounds by*, *Mallow v. State*, 439 S.W.3d 764, 770 n.3 (Mo. 2014). Appellant has wholly failed to make that showing. To the contrary, the record demonstrates that Williams had no recollection of Appellant from his brief service on a venire panel. *See State v. Thompson*, 835 S.W.2d 394, 400-01 (Mo. App. E.D. 1992) (finding that juror's statements refuted claim of inadequate voir dire).

Rather than argue actual prejudice, Appellant relies on *Knese* to claim structural error in jury selection that abrogates the need to demonstrate prejudice. What the Court actually said in *Knese* was that structural error results in a *per se* rule of reversal on direct appeal, but that a post-conviction movant must still show prejudice from counsel's deficient performance. *Knese*, 85 S.W.3d at 633. This Court has further distinguished *Knese* on the

basis that the defendant in that case showed by a preponderance of the evidence that counsel's errors resulted in the empanelling of biased jurors, thus depriving the defendant of the right to a fair and impartial trial.[6] *Strong*, 263 S.W.3d at 648. The defendant in *Strong*, like Appellant here, failed to make such a showing and was thus not entitled to a presumption of prejudice. *Id.* The Court of Appeals has likewise distinguished *Knese* on the grounds that the movant failed to demonstrate that a biased venireperson served on his jury, and had at best raised the possibility that additional questioning may have revealed jury bias. *Christian v. State*, 455 S.W.3d 523, 527 (Mo. App. W.D. 2015). As in the cases cited above, Appellant has failed to carry his burden of showing that a biased venireperson served on his jury, and he is thus not entitled to a presumption of prejudice. He has also not demonstrated the existence of *Strickland* prejudice and has thus not met his burden of showing that he is entitled to relief.

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[6] The structural error in *Knese* was counsel's failure to read juror questionnaires that contained statements suggesting that certain jurors would automatically vote to impose a death sentence after a murder conviction. *Knese*, 85 S.W.3d at 632-33. No such clear indication of bias exists in the record of this case.

IV.

Counsel not ineffective for not presenting an expert on cultural conditions in Pine Lawn.

Appellant claims that trial counsel was ineffective for failing to call Dr. Norman White as an expert witness to testify about cultural conditions in Pine Lawn. But counsel pursued a reasonable mitigation strategy that relied on testimony of family members, and Dr. White's cross-examination testimony at the Rule 29.15 evidentiary hearing showed that he would have provided information that bolstered the State's theory of aggravation.

A. Underlying Facts.

1. *Rule 29.15 motion.*

The amended motion alleged that counsel was ineffective for failing to investigate and present a social profile of Appellant in the penalty phase through the testimony of Dr. Norman White. (PCR L.F. 83-84). The motion alleged that the testimony would have explained how the conditions that Appellant grew up in made it impossible for him to develop normally, and would have neutralized the State's aggravating evidence. (PCR L.F. 84).

2. *Rule 29.15 hearing.*

Dr. White testified at the evidentiary hearing that he was a Professor and Associate Dean in the Department of Criminology and Criminal Justice at St. Louis University. (PCR Tr. 456-57). Appellant's post-conviction counsel

asked White to look at how Appellant was affected by the social conditions in and around Pine Lawn that he grew up in. (PCR Tr. 465-66).

One of the Pine Lawn residents he talked to was Elaine Hood, who testified for Appellant at the penalty phase of the trial. (PCR Tr. 625; Tr. 646). She talked to White about the frequency of gunfire in the neighborhood. (PCR Tr. 625). Some of those whom Dr. White interviewed were serving prison sentences. (PCR Tr. 626-27). Dr. White interviewed the Director of Youth Development Services for the City of St. Louis about the development of gangs and the violence associated with that. (PCR Tr. 628-29-30). Dr. White concluded from his interviews that it "was really hard" for Appellant to negotiate the combination of his personal issues and the violence surrounding him. (PCR Tr. 631). When asked if he could have conducted similar research at the time of Appellant's trial, Dr. White responded, "I believe so." (PCR Tr. 632). He noted on cross-examination that he had never previously prepared a social profile for a court case. (PCR Tr. 633).

Dr. White also acknowledged that being born into an at-risk community did not pre-destine someone to become a multiple murderer. (PCR Tr. 634). He admitted that the accuracy of his conclusions would be affected by the truthfulness of the information provided. (PCR Tr. 636). Dr. White said that he informed Appellant at their first meeting that he had been hired by his lawyers to help him if possible, and that his ultimate opinion would be based

largely on the information that Appellant provided. (PCR Tr. 638-39). He admitted that he was not provided with any of the testimony given by Appellant's relatives in the penalty phase of the trial. (PCR Tr. 644). Dr. White acknowledged that Appellant may have contributed by his own conduct to the risk factors that existed in Pine Lawn. (PCR Tr. 640-41, 658). The prosecutor pointed out that three murders were committed in Pine Lawn from 2000 to 2004, and that Appellant was convicted of two of those and was the main suspect in the third. (PCR Tr. 645-46). Dr. White agreed that Appellant knew he was committing crimes. (PCR Tr. 657). He acknowledged that other residents of Pine Lawn did not commit murder, and that Appellant's upbringing did not compel him to murder others. (PCR Tr. 666).

Counsel Kraft testified that the theory underlying the mitigation case was to focus on Appellant's upbringing, the neglect and possible abuse that he dealt with growing up, the rough neighborhood he lived in, and the fact that he still had family that loved him. (PCR Tr. 524). She said that the defense tried to present evidence of the conditions in Pine Lawn through lay witnesses like Elaine Hood. (PCR Tr. 527). Kraft said the defense team went to Pine Lawn and talked mainly to family members that lived there. (PCR Tr. 529). The team also attempted to find friends mentioned by Appellant. (PCR Tr. 529).

Kraft could not remember any capital attorneys calling sociologists to testify about a particular area in 2008, and her recollection was that the ABA guidelines did not mention such a practice until well after 2008. (PCR Tr. 598). Kraft said that a lot of the research being done on that subject in 2017 was not available in 2008. (PCR Tr. 599). Kraft agreed that much of the material in Dr. White's report was subject to relevance and hearsay objections. (PCR Tr. 600). Kraft testified that consideration was given to hiring an expert on gangs, but that idea was rejected because bringing gang membership into evidence would also bring in evidence of other offenses that the defense wanted to keep out. (PCR Tr. 600, 604). Kraft was able to argue that Appellant had a difficult childhood through Elaine Hood's testimony about neighborhood violence. (PCR Tr. 603). Kraft said that testimony about a difficult childhood can be both aggravating and mitigating. (PCR Tr. 604).

Co-counsel Sharon Turlington testified that the mitigation theory was that Appellant had a chaotic childhood in which he did not have consistent parenting. (PCR Tr. 698). Counsel believed that information was provided by the family members who testified. (PCR Tr. 703). She testified that counsel did not consider hiring a specific expert on the effects of growing up in at-risk communities, but did consider hiring an expert on gangs. (PCR Tr. 702). That plan was abandoned after counsel decided it might be more harmful than helpful. (PCR Tr. 702-03).

Turlington testified that she was not aware of anyone calling sociologists to testify in 2008. (PCR Tr. 749). She said that some of the science and research in Dr. White's report was not available in 2008. (PCR Tr. 751). She agreed that some of the report's contents were subject to relevance and hearsay objections. (PCR Tr. 751). Turlington agreed that part of the defense strategy was to keep gang information out of the trial. (PCR Tr. 752). Turlington further agreed that a gang expert or sociologist could be cross-examined about other criminal offenses that had not resulted in a conviction, bolstering the State's argument that Appellant was dangerous. (PCR Tr. 753-55). Turlington said another potential problem with raising Appellant's environment as a defense was that the victims came from the same environment but did not commit the same crimes. (PCR Tr. 758). Turlington said that it was "very, very, very difficult" to get a favorable verdict in a case where one of the State's aggravating circumstances was a prior murder committed by the defendant. (PCR Tr. 760).

3. *Motion court findings.*

The motion court found that Dr. White's testimony did not meet the *Frye*[7] standard for admitting expert testimony, and that his testimony was of dubious value given his lack of specific knowledge of the underlying case or of

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7 *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

the murder of Todd Franklin. (PCR L.F. 755). The court found that Dr. White's failure to discuss the murders with Appellant left him unable to render an opinion about how the impact of growing up in Pine Lawn related to the murders. (PCR L.F. 756). The court found that much of the information and research that Dr. White relied on was not available in 2008. (PCR L.F. 757). The court concluded that Dr. White's testimony was rife with hearsay and speculation, that it lacked the scientific basis for admissibility, and that it reinforced negative stereotypes of Appellant. (PCR Tr. 758). The court stated that it was not convinced that testimony from new or different experts would have altered the outcome of the trial. (PCR L.F. 759).

B. Analysis.

Counsel in a death penalty case has an obligation to investigate and discover reasonably mitigating evidence. *Davis*, 456 S.W.3d at 906. Trial counsel's selection of which expert witnesses to call at trial is generally a question of trial strategy and is virtually unchallengeable. *Id.* To show ineffective assistance of counsel based on failure to present an expert witness, a movant is required to show what the evidence would have been if called. *Id.* However, the duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. *Id.*

Appellant disputes the motion court's finding that Dr. White's testimony did not meet the *Frye* standard for admissibility of scientific procedures, by noting the long-standing nature of sociological research. *Frye*, however, requires a finding that the procedure used by the expert is sufficiently established to have gained general acceptance in the particular field in which it belongs. *State v. Davis*, 814 S.W.2d 593, 600 (Mo. 1991). Appellant failed to establish at the evidentiary hearing that the procedures used by Dr. White were generally accepted in the field of sociological research at the time of his trial. He thus failed to meet his burden of showing that Dr. White could have aided the defense by presenting admissible testimony at trial. Supreme Court Rule 29.15(i).

Appellant is not entitled to relief even if Dr. White's testimony was admissible. Both counsels testified that they pursued a mitigation theory focused on Appellant's chaotic childhood and, following the unsuccessful use of experts in the previous trials, made a strategic decision that the best way to present that theory was through the testimony of family members and others who knew Appellant. (PCR Tr. 524, 527, 698, 703). Counsel considered the option of hiring an expert witness on gangs, but strategically decided that approach might open the door to harmful evidence. (PCR Tr. 600, 604, 702-03). "'The question in an ineffective assistance claim is not whether counsel could have or even, perhaps, should have made a different decision, but

rather whether the decision was reasonable under all the circumstances.'" *Johnson*, 406 S.W.3d at 901 (quoting *Henderson v. State*, 111 S.W.3d 537, 540 (Mo. App. W.D. 2003)). Counsel is thus not ineffective for pursuing one reasonable trial strategy to the exclusion of another reasonable trial strategy. *Barton v. State*, 432 S.W.3d 741, 749 (Mo. 2014).

Counsel Turlington pointed out that a sociologist could be cross-examined about other criminal offenses, thus bolstering the State's argument that Appellant was dangerous. (PCR Tr. 753-55). She noted that another problem with raising Appellant's environment as a defense was that the victims came from the same environment but did not commit the same crimes. (PCR Tr. 758).

Dr. White's testimony at the Rule 29.15 evidentiary hearing demonstrated the validity of those concerns. The prosecutor was able to elicit information that three murders were committed in Pine Lawn between 2000 and 2004, and that Appellant was convicted of two of those murders and was the main suspect in the third. (PCR Tr. 645-46). Dr. White also had to acknowledge that other residents of Pine Lawn did not commit murder, that Appellant's upbringing did not compel him to commit murder, and that Appellant's own conduct may have contributed to the risk factors that existed in Pine Lawn. (PCR Tr. 640-41, 644-46, 658, 666). Dr. White's testimony thus had the potential to be more aggravating than mitigating. Counsel is not

ineffective for failing to call a witness whose testimony would not unqualifiedly support the defendant. *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. 2005).

Appellant also cannot show prejudice. As noted in Points VII and VIII below, expert testimony was presented in his previous murder trials regarding his family life and upbringing, and his developmental issues. The juries in each of those trials returned death verdicts. It is not reasonably likely that more generalized sociological evidence would have changed the outcome of the penalty phase in light of the strong evidence of the charged crime and the aggravating circumstances. *Smulls v. State*, 71 S.W.3d 138, 155 (Mo. 2002).

V.

Counsel not ineffective for deciding not to call additional lay mitigation witnesses.

Appellant claims that trial counsel was ineffective for not calling Lisa Thomas, Tanesia Clark, Elwynn Walls, Sean Nichols, and Willibea Blackburn as cultural mitigation witnesses. But the testimony of those witnesses would have brought out evidence of Appellant's role in gang activity and drug dealing, which counsel strategically decided to keep out of the trial.

A. Underlying Facts.

1. *Rule 29.15 motion.*

The amended motion alleged that counsel was ineffective for failing to investigate and present mitigating sociological evidence of the role and impact of the Pine Lawn community and surrounding area on Appellant's development and social history. (PCR L.F. 130-31). The motion listed several potential witnesses, but only five of those putative witnesses testified at the evidentiary hearing.

2. *Rule 29.15 hearing.*

Lisa Thomas is Appellant's first cousin and is one year younger than him. (PCR Tr. 139). Thomas spent a lot of time as a teenager hanging out with Appellant in Pine Lawn. (PCR Tr. 140). She said that Appellant was

affected by the shooting death of a friend when Appellant was sixteen. (PCR Tr. 142-43). Thomas said that there was little parental supervision, so teenagers frequently did what they wanted. (PCR Tr. 145). Thomas testified that there was a gang presence in the Pine Lawn area, and lots of fighting and drug sales on the streets, and easy access to guns. (PCR Tr. 146). She said the relationship between the community and the police was not good. (PCR Tr. 148). Thomas testified on cross-examination that she knew Appellant sold drugs and was involved in fights. (PCR Tr. 153-54). Thomas also said that her time in Pine Lawn did not cause her to commit any crimes. (PCR Tr. 154-55).

Tanesia Clark lived around the corner from Appellant's grandparents and was friends with him. (PCR Tr. 156-57). She said that the mid-1980's and 1990's saw an increase in drugs and gangs in Pine Lawn. (PCR Tr. 158). She called the police "horrific" and said that they harassed residents. (PCR Tr. 159). Thomas said most of the young kids in the neighborhood were shot or killed. (PCR Tr. 160). She said most of the fathers of the neighborhood children were not present. (PCR Tr. 161). Clark said that growing up in Pine Lawn made her feel hopeless and suicidal, and that other young people had that same sense of hopelessness. (PCR Tr. 163-65).

Clark testified on cross-examination that her brother saw many of the same things that she did, but that he had not committed any crimes, had

gone on to college, and was doing well. (PCR Tr. 168-69). Clark herself had married a serviceman and moved out of state. (PCR Tr. 167-68). She also said that gangs caused the problems in Pine Lawn and admitted that Appellant was a gang member. (PCR Tr. 170-71).

Willibea Blackburn had lived in Velda Village, a community adjoining Pine Lawn, since 1970. (PCR Tr. 386-87). She testified that gangs and violence got really bad in the area in the 1980's. (PCR Tr. 389). Her grandson, who might have been a friend of Appellant, was shot and killed. (PCR Tr. 389, 392-93). Blackburn testified on cross-examination that gangs had brought violence. (PCR Tr. 394). She admitted that much of what she testified to was based on what other people had told her. (PCR Tr. 394).

Elwynn Walls owned a barbershop in Pine Lawn and lived in an adjoining community. (PCR Tr. 195-96). He said that crime increased in the area during the 1980's. (PCR Tr. 197). He described the use and sale of drugs as prevalent and out in the open. (PCR Tr. 197-98). Walls said gangs became an issue in the 1980's and 1990's, and homicides escalated. (PCR Tr. 200-01). Walls stated on cross-examination that he did not know Appellant and did not know whether Appellant had experienced any of the problems he described. (PCR Tr. 205-06). Walls acknowledged that a lot of good people lived in Pine Lawn and many of them became crime victims. (PCR Tr. 206).

Sean Nichols was an elementary school principal in the St. Louis Public Schools District. (PCR Tr. 352-53). He testified generally about the challenges facing children from at-risk communities, particularly the challenges caused by the presence of gangs. (PCR Tr. 356-63). Nichols testified on cross-examination that all of his students were at-risk, but not all of them turn out bad. (PCR Tr. 366). Nichols admitted that he had no personal knowledge about Appellant's experiences or about the crimes that he committed. (PCR Tr. 372).

Counsel Kraft was not asked by PCR counsel whether there was a strategic reason for not calling the witnesses listed in the amended motion. She did say that a decision whether to call those witnesses would have depended on what else they had to say. (PCR Tr. 531-36). Kraft testified that she and co-counsel Turlington fought very hard to keep gang membership and gang activity out of the trial. (PCR Tr. 592, 604). She acknowledged that that type of information can be aggravating to a jury. (PCR Tr. 599). Kraft also admitted that information about a difficult childhood can be both aggravating and mitigating. (PCR Tr. 604).

Counsel Turlington was also not asked by PCR counsel whether there was a strategic reason for not calling the additional witnesses. She confirmed that the defense strategy was to keep evidence of gang activity out of the trial. (PCR Tr. 752). Turlington agreed that evidence of a difficult childhood

can be aggravating in some ways. (PCR Tr. 756-57). She said that it is possible to call too many witnesses, and those who were called were the ones who had performed well in the previous trials. (PCR Tr. 757). Turlington said that it is very difficult to get a favorable verdict where the defendant has a prior murder conviction. (PCR Tr. 760).

3. *Motion court findings.*

In rejecting the claim, the court found that Nichols and Walls had no personal knowledge of Appellant, his character, his record, or the circumstances of the murders. (PCR L.F. 771). The court found those witnesses would also have given damaging testimony regarding gangs and the effect their violence had on the community. (PCR L.F. 771). The court found that the testimony of Clark, Thomas, and Blackburn about their relationship with Appellant would have been cumulative to other evidence adduced at trial. (PCR L.F. 771-72). The court also found that their testimony would have provided damaging information about the effects of gang-related violence on the community. (PCR L.F. 772).

B. Analysis.

Counsel's decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of trial strategy unless the defendant clearly establishes otherwise. *Deck v. State*, 381 S.W.3d 339, 346 (Mo. 2012). To prevail on a claim of ineffective assistance of counsel for

failure to call a witness, a defendant must show that: (1) counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have provided a viable defense. *Id.*

Because Appellant is challenging counsel's failure to call certain witnesses during the penalty phase, a "viable defense" is one in which there is a reasonable probability that the additional mitigating evidence those witnesses would have provided would have outweighed the aggravating evidence presented by the prosecutor, resulting in the jury voting against the death penalty. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at n.4.

Counsel made a reasonable strategic decision to keep evidence of gang activity out of the trial. The testimony presented at the evidentiary hearing largely concerned gang activity and drug dealing, and included admissions that Appellant was himself a gang member and involved in selling drugs. (PCR Tr. 153-54, 170-71). That type of testimony would have opened the door to the State being able to argue that Appellant was a cause of the problems in Pine Lawn rather than a victim of those problems. That argument would have had particular force since some of the putative witnesses testified that they themselves, or others, had experienced the same conditions as Appellant but had not become involved in criminal activity. (PCR Tr. 154-55, 167-69,

206, 366). Counsel is not ineffective for failing to call a witness whose testimony would not unqualifiedly support the defendant. *Worthington*, 166 S.W.3d at 577.

Furthermore, both counsel expressed the belief that evidence of a difficult childhood can be aggravating, while counsel Turlington noted the potential difficulty of calling too many witnesses. (PCR Tr. 604, 756-57). This Court has credited similar beliefs of counsel, and the wide discretion afforded counsel in the choice of witnesses, to reject a claim that counsel was ineffective for failing to call witnesses to testify about the defendant's poor childhood. *Strong*, 263 S.W.3d at 653.

Some of the testimony about violence in Pine Lawn and the effect it had on Appellant, as well as testimony about unstable family structures was cumulative to testimony presented by the defense in the penalty phase. Appellant's argument that the witnesses would have provided additional detail of conditions in Pine Lawn all but concedes that the testimony would have been cumulative. *Deck*, 381 S.W.3d at 351. Counsel is not ineffective for failing to present cumulative evidence. *Id.*

The testimony of Willibea Blackburn about violence and gangs was based largely on what other people had told her. (PCR Tr. 394). Witnesses typically may testify only to those matters of which they have personal first-hand knowledge. *Tisius*, 519 S.W.3d at 421. Counsel is not ineffective for

failing to present inadmissible evidence. *Id.* at 422. Putative witnesses Elwynn Walls and Sean Nichols did not know Appellant and had no knowledge of his own experiences or conduct. (PCR Tr. 205-06, 372). To the extent any of their testimony was admissible, it would have been of questionable value and not of a type that would have been reasonably likely to have changed the outcome of the penalty phase in light of the strong evidence of the charged crime and the aggravating circumstances. *Smulls* 71 S.W.3d at 155.

VI.

Counsel not ineffective for failing to object to certified copies of prior convictions.

Appellant claims that trial counsel was ineffective for failing to object to portions of trial exhibits 103 and 104, certified records of Appellant's prior convictions that were used as non-statutory aggravating circumstances, because they contained information that had not been proven by a preponderance of the evidence. But Appellant has not cited any authority holding that the underlying facts of a prior conviction used as an aggravating circumstance need be proven by a preponderance of the evidence, and thus has not demonstrated that an objection would have been meritorious. Appellant also cannot show prejudice given that the offenses underlying those prior convictions pale in comparison to his prior murder and first-degree assault convictions used as statutory aggravating circumstances.

A. Underlying Facts.

1. *Trial proceedings*.

Defense counsel filed motions objecting to the State being allowed to present evidence of Appellant's prior convictions, and to the introduction of prior convictions that would not qualify as statutory aggravators. (Tr. 440). The penalty phase began with the State offering into evidence as State's Exhibit 104 the certified record of conviction on a charge of assault in the

third degree to which Appellant pled guilty in St. Louis County Circuit Court on December 18, 1996. (Tr. 460-61). The prosecutor also offered into evidence as State's Exhibit 103 the certified record of conviction on a charge of possession of a controlled substance and unlawful use of a weapon to which Appellant pled guilty on December 17, 1997. (Tr. 461-62). The exhibits were admitted over Appellant's objections. (Tr. 460-61). The only specific reference made to those convictions in the penalty phase closing argument was when the prosecutor told the jury that Appellant did not deserve the death penalty because of those convictions, but deserved it for the murders of Leslie and of Todd Franklin, and for the assault on Daryl Bryant. (Tr. 816). The prosecutor did say that Appellant had been thumbing his nose at the criminal justice system since his first conviction at the age of sixteen. (Tr. 817).

2. *Rule 29.15 motion.*

The amended motion alleged that State's Exhibit 103 was certified paperwork for a guilty plea to drug possession and unlawful use of a weapon charges, and that it also contained a felony complaint alleging facts that were not proven by a preponderance of the evidence, and were not contained in the charging document to which Appellant pled. (PCR L.F. 187). The motion alleged that State's Exhibit 104 was the certified paperwork of a prior misdemeanor assault conviction that contained juvenile court paperwork, certification paperwork, and a Juvenile Petition alleging a felony assault with

serious physical injury. (PCR L.F. 187). The motion alleged that counsel was ineffective for failing to object to the exhibits on the basis that they contained allegations that had not been proven by a preponderance of the evidence. (PCR L.F. 191, 194).

3. *Rule 29.15 hearing*.

Counsel Kraft testified that she did not have a reason for not objecting to the exhibits on the basis that they contained allegations that were not proven by a preponderance of the evidence. (PCR Tr. 553). Kraft noted on cross-examination that a successful objection would have allowed the State to bring in witnesses to testify about those crimes, and that could have a far worse impact on the jury than the prosecutor reading from a piece of paper. (PCR Tr. 613).

Counsel Turlington testified that certified convictions of a circuit court are admissible and can be used in some cases to prove aggravating circumstances. (PCR Tr. 726-27). Turlington noted that the documents at issue in this case were being used to prove that Appellant had those convictions, not to prove the details of the underlying crimes. (PCR Tr. 727). Turlington also said the documents were less inflammatory than any live testimony the State might have presented about the details of those crimes. (PCR Tr. 727-28).

4. *Motion court findings*.

The court denied the claim, finding that any objection to admission of the documents would have been without merit. (PCR L.F. 796). The court also found that Appellant was not prejudiced by admission of the exhibits, given his other convictions for assault and murder. (PCR L.F. 796).

B. Analysis.

Appellant's argument that the State had to prove by a preponderance of the evidence the factual information contained in the exhibits relies on three cases. All are inapposite. Those cases involved the admission in the penalty phase of a non-capital case of evidence of prior criminal conduct *for which the defendant was never convicted*. *State v. Clark*, 197 S.W.3d 598, 600 (Mo. App. W.D. 2006); *State v. Fassero*, 256 S.W.3d 109, 119 (Mo. 2008); *State v. Doss*, 394 S.W.3d 486, 496 (Mo. App. W.D. 2013). The exhibits in this case, by contrast, memorialize Appellant's prior convictions on charges to which he pled guilty.

A certified record of a prior conviction is sufficient to allow the jury to make the factual determination that a prior conviction actually occurred. *State v. Ervin*, 835 S.W.2d 905, 925 (Mo. 1992); *State v. Reuscher*, 827 S.W.2d 710, 715 (Mo. 1992). Appellant offers no authority that the State is obligated to further prove any factual information contained in the certified records of a prior conviction. Appellant has thus failed to show that an objection would

have been meritorious and has therefore failed to establish that counsel was ineffective for failing to object.

Even if such proof was necessary, counsel correctly noted that had an objection to the documents been sustained, the State could have brought in witnesses to provide live testimony that would have had a greater impact on the jury than the dry recitations contained in court documents. (PCR Tr. 613, 727-28). The record thus does not support a finding that counsel was ineffective for failing to object.

Appellant also cannot show that he was prejudiced by counsel's failure to object. The information contained in the challenged exhibits and the charges involved in those cases pale in comparison to the evidence of Appellant's prior convictions for murder and assault, particularly the extensive testimony about the underlying facts of the murder of Todd Franklin and the shooting of Daryl Bryant. (Tr. 466-571, 613-15, 624-27). That's especially true since the State made only a fleeting reference to the fact of the prior convictions memorialized in the Exhibits 103 and 104, and did not argue or rely on the facts underlying those convictions. There is no reasonable likelihood that the jury would not have returned a death sentence had counsel succeeded in excluding the challenged information in the exhibits.

VII.

Counsel not ineffective for strategically deciding not to call Dr. Draper.

Appellant claims that trial counsel was ineffective for failing to call Dr. Wanda Draper to testify at the penalty phase about Appellant's childhood. But counsel made a strategic decision not to call Dr. Draper based on her poor performance in Appellant's previous trials.

A. Underlying Facts.

1. *Rule 29.15 motion.*

The amended motion alleged that counsel was ineffective for failing to call Dr. Wanda Draper to explain how Appellant's violent, dysfunctional childhood and adolescent development made it impossible for him to develop normally. (PCR L.F. 134). The motion noted that Dr. Draper had testified in the penalty phase of all of Appellant's previous trials. (PCR L.F. 138).

2. *Rule 29.15 hearing.*

Dr. Draper testified at the evidentiary hearing that she was self-employed in the area of human development. (PCR Tr. 395). She was retained in 2004 by trial counsel to determine what developmental issues were present in Appellant's childhood and up to his present age. (PCR Tr. 400-01). She found developmental neglect and traumatic stress due to the lack of a consistent, stable care-giver. (PCR Tr. 423-24). Dr. Draper

acknowledged on cross-examination that she had testified as a penalty phase witness for Appellant at three previous trials and that the jury in each trial recommended a death sentence. (PCR Tr. 435-37).

Counsel Kraft testified that Dr. Draper was not called in the last trial because her testimony in the previous trial had not worked in the previous trials. (PCR Tr. 541). Kraft said the defense decided to try something different. (PCR Tr. 541). She further noted that expert testimony sometimes detracts from the testimony of family members, and that Appellant did not like Dr. Draper's testimony and agreed with the decision not to call her. (PCR Tr. 541, 607). Kraft said that Draper's testimony probably aided the State more than the defense. (PCR Tr. 606).

Counsel Turlington said that Dr. Draper "testified really badly in the third trial." (PCR Tr. 714). Turlington said that Draper "got mixed up on some stuff" and did not perform well on cross-examination. (PCR Tr. 714). The decision not to call Draper in the underlying trial was based on her performance in Appellant's third trial. (PCR Tr. 714-15). By not putting Draper on the stand, the State was not able to elicit damaging information that came out in earlier trials, such as an incident where Appellant threatened his mother with a shotgun. (PCR Tr. 767).

3. *Motion court findings*.

In rejecting the claim, the court noted that Draper had testified in the penalty phase of three of Appellant's four death penalty trials and that the jury in each case sentenced him to death. (PCR L.F. 773). The court found that counsel had made a reasonable strategic decision not to call Dr. Draper given the results of the previous trials and her poor performance during the third death penalty trial. (PCR L.F. 776).

B. Analysis.

Trial counsel's selection of which expert witnesses to call at trial is generally a question of trial strategy and is virtually unchallengeable. *Davis*, 456 S.W.3d at 906. When defense counsel believes a witness' testimony would not unequivocally support her client's position, it is a matter of trial strategy not to call her, and the failure to call such witness does not constitute ineffective assistance of counsel. *Id.* at 914. Counsel made a strategic decision not to call Dr. Draper after determining that her performance at Appellant's previous trials had not been effective. (PCR Tr. 541, 714-15). A decision not to present mitigation evidence that had not been successful in previous trials is a sound trial strategy that does not constitute ineffective assistance of counsel. *Baumruk v. State*, 364 S.W.3d 518, 536 (Mo. 2012); *State v. Simmons*, 955 S.W.2d 752, 776 (Mo. 1997).

VIII.

Counsel not ineffective for strategically deciding not to call Dr. Gelbort.

Appellant claims that trial counsel was ineffective for failing to call Dr. Michael Gelbort to testify about Appellant's brain limitations to support a pretrial motion to bar the death penalty, or to testify as a mitigation witness in the penalty phase of the trial. But a motion to bar imposition of the death penalty would not have been meritorious and counsel made a strategic decision not to call Dr. Gelbort in the penalty phase based on his poor performance in Appellant's previous trials.

A. Underlying Facts.

1. *Rule 29.15 motion.*

The amended motion alleged that counsel was ineffective for failing to call Dr. Michael Gelbort to testify that Appellant did not have normal brain functioning and that his thinking abilities were impaired. (PCR L.F. 158). The motion noted that Dr. Gelbort had been called to testify at two of Appellant's previous trials. (PCR L.F. 160). The motion alleged that counsel was ineffective for not using Dr. Gelbert's findings to ask the court to bar the State from seeking the death penalty, or alternatively, from failing to ask for an instruction that would require the jury to find that Appellant was

mentally over the age of eighteen before it could consider the death sentence. (PCR L.F. 170).

2. *Rule 29.15 hearing*.

Dr. Gelbort testified at the evidentiary hearing that he was a self-employed neuropsychologist. (PCR Tr. 211). He first evaluated Appellant in 2004, when Appellant was twenty-four years old. (PCR Tr. 220). He found indicators of difficulty with higher level verbal reasoning abilities, problem-solving capabilities, and some visual learning issues. (PCR Tr. 227).

Counsel Kraft testified that Gelbort was not called in the 2008 trial, "Because I thought he did a horrible job in his testimony previously and it didn't work." (PCR Tr. 544). She said that the prosecutor was able to effectively cross-examine Gelbort, and his testimony probably aided the State more than the defense. (PCR Tr. 606). Kraft said that Appellant agreed with the decision not to call him. (PCR Tr. 607).

Counsel Turlington also said the decision not to call Gelbort in the underlying trial was based on the assessment that his testimony did not go well in the previous trials and did not have an impact on those juries. (PCR Tr. 715-16). She noted that he testified poorly, had an attitude, and that the jury was obviously not paying attention to his testimony. (PCR Tr. 764). By not putting Gelbort on the stand, the State was not able to elicit damaging

information that came out in earlier trials, such as an incident where Appellant threatened his mother with a shotgun. (PCR Tr. 767).

Both Kraft and Turlington testified that they did not consider using Gelbort to support a pretrial motion to prohibit the State from seeking the death penalty due to Appellant's impaired mental development. (PCR Tr. 545, 716-17).

3. *Motion court findings.*

In rejecting the claim, the court noted that Gelbort had testified in the penalty phase of two of Appellant's four death penalty trials and that the jury in each case sentenced him to death. (PCR L.F. 777). The court found that counsel had made a reasonable strategic decision not to call Dr. Gelbort given the results of the previous trials and his poor performance during the second death penalty trial. (PCR L.F. 779-80). The court found that its first-hand observations of Dr. Gelbort confirmed trial counsel's opinions, with the court finding that Dr. Gelbort "radiate[d] disdain and elitism." (PCR L.F. 779-80).

B. Analysis.

Appellant claims that Dr. Gelbort should have been used to support a motion to prevent the State from seeking the death penalty because he was mentally under the age of eighteen, even though Appellant was in his early twenties when he committed the murder and when Dr. Gelbort evaluated him. (Tr. 61-62; PCR Tr. 220). This Court recently rejected a claim that

counsel was ineffective for failing to file a pretrial motion to exclude the death penalty because the defendant's mental age was younger than eighteen at the time of the offense. *Tisius*, 519 S.W.3d at 430-31. This Court found that the United States Supreme Court had recognized the potential for a defendant's mental age to differ from his biological age, but had nonetheless enacted a bright line rule of eighteen as the minority age for imposition of the death penalty. *Id.* (citing *Roper v. Simmons*, 543 U.S. 551 (2005)). This Court found that any objection to the imposition of the death penalty based on *Roper* would not have been meritorious. *Id.* at 431. Such a motion would similarly have lacked merit in this case, so counsel was not ineffective for failing to use Dr. Gelbort to support such a motion. *See Baumruk*, 364 S.W.3d at 529 ("Counsel is not ineffective for failing to file a meritless motion.").

As to the claim that Dr. Gelbort should have been called as a penalty phase witness, counsel's selection of which expert witnesses to call at trial is generally a question of trial strategy and is virtually unchallengeable. *Davis*, 486 S.W.3d at 906. When defense counsel believes a witness' testimony would not unequivocally support her client's position, it is a matter of trial strategy not to call him, and the failure to call such witness does not constitute ineffective assistance of counsel. *Id.* at 914. Counsel made a strategic decision not to call Dr. Gelbort after determining that his performance at Appellant's previous trials had not been effective. (PCR Tr. 554, 715-16). A decision not to

present mitigation evidence that had not been successful in previous trials is a sound trial strategy that does not constitute ineffective assistance of counsel. *Baumruk*, 364 S.W.3d at 536; *Simmons*, 955 S.W.2d at 776.

IX.

Counsel not ineffective for failing to object to proper penalty phase arguments.

Appellant claims that trial counsel was ineffective for failing to object to portions of the State's closing argument. But this Court found on direct appeal that the arguments were proper, so counsel was not ineffective in failing to object.

A. Underlying Facts.

1. *Direct appeal proceedings*.

Appellant raised several allegations of error on direct appeal concerning arguments made by the prosecutor in the penalty phase of the trial. *McFadden*, 391 S.W.3d at 422. This Court found that none of the claims had merit. *Id.* Among the arguments complained of were the following:

> And on that day that he killed Todd, on the following May, there was one juror in Pine Lawn. That juror was the foreperson. Had no instructions of law. There was no trial. There were no jury instructions. There was no evidence. There were no witnesses. And that foreperson and that juror decided that the death penalty was appropriate then and that Todd and Leslie should not get a fair trial. Because if there's one person that believes in the death penalty, it's that man right there.

Id. at 425. This Court found that the argument, and another expressing similar sentiments, were not erroneous because they assisted the jury in understanding both the evidence and legal process in the case. *Id.* The Court noted that arguments likely to inflame and excite prejudices of the jury are not improper if they help the jury understand and appreciate evidence that is likely to cause an emotional response. *Id.*

Appellant also raised a claim that the following argument improperly appealed to the jury's emotions:

> Ladies and gentlemen, I leave you with Leslie and Todd. Hold them. Hug them. Tell them you love them. But most of all, don't let them down. This verdict is for Leslie and Todd.

Id. In finding that the trial court did not plainly err in permitting the argument, this Court stated that while the arguments were emotionally charged, the facts of the case were inherently emotionally charged. *Id.* The Court again noted that arguments likely to inflame and excite prejudices of the jury are not improper if they help the jury understand and appreciate evidence that is likely to cause an emotional response. *Id.*

2. *Rule 29.15 motion.*

The amended motion alleged that counsel was ineffective for failing to object to the arguments set forth above. (PCR L.F. 203. 204). The amended

motion alleged that a timely objection would have resulted in the jury being instructed to disregard the improper argument. (PCR L.F. 205).

3. *Motion court findings*.

In rejecting the claims, the motion court noted that the arguments were reviewed by this Court and that counsel was not ineffective for failing to object to proper arguments by the prosecutor. (PCR L.F. 805).

B. Analysis.

A post-conviction motion cannot be used as a substitute for a direct or second appeal. *Zink v. State*, 278 S.W.3d 170, 191 (Mo. 2009). The denial of a plain error claim on direct appeal is not dispositive of the question of whether counsel was ineffective for failure to object. *Deck v. State*, 68 S.W.3d 418, 426-27 (Mo. 2002). The difference in the standards of review for direct appeal and post-conviction cases will, however, seldom cause a court to grant post-conviction relief after it has denied relief on direct appeal. *Id.* at 428. The Court of Appeals has identified four ways in which a plain error claim can be decided on direct appeal:

1. The court may simply decline to exercise its discretionary authority to review the point for plain error;

2. The court may conduct plain error review and conclude that no error occurred at all;

3. The court may conduct plain error review and conclude that an error occurred, but it was harmless and caused no prejudice to the appellant;

4. The court may conduct plain error review and conclude that a prejudicial error occurred, but deny relief because the prejudice to appellant does not arise to the level of a manifest injustice or miscarriage of justice; or

5. The court may conduct plain error review and grant relief because the error caused a manifest injustice or miscarriage of justice to occur.

Shifkowski v. State, 136 S.W.3d 588, 590-91 (Mo. App. S.D. 2004); *Cornelious v. State*, 351 S.W.3d 36, 42 (Mo. App. W.D. 2011). Only plain error rulings falling into the fourth category of cases listed above can be relitigated in connection with an ineffective assistance of counsel claim. *Shifkowski*, 136 S.W.3d at 591; *Cornelious*, 351 S.W.3d at 43. Neither of the arguments complained of in this case fall within the fourth *Shifkowski* category.

This Court concluded on direct appeal that the arguments were not improper. *McFadden*, 391 S.W.3d at 425. Defense counsel cannot be found ineffective for failing to object to the arguments when the arguments were not in error. *Ringo v. State*, 120 S.W.3d 743, 746 (Mo. 2003). The point,

having already been determined on direct appeal cannot be raised again in a post-conviction relief motion. *Id.*

X.

Counsel not ineffective for strategically deciding not to seek a PET scan of Appellant's brain.

Appellant claims that trial counsel was ineffective for failing to call Dr. Ruben Gur to present PET scan evidence showing the functional limitations of Appellant's brain. But counsel made a reasonable strategic reason to not seek a scan due to the risk that the results would undermine other mitigation evidence.

A. Underlying Facts.

1. *Trial proceedings*.

Sometime in 2004, trial counsel sent films of an MRI of Appellant's brain to a Dr. David Preston. (Movant's Ex. 33). Dr. Preston sent a letter to counsel dated November 11, 2004, in which he stated his opinion that the brain MRI was "essentially normal." (Movant's Ex. 33). Dr. Preston went on to state that Appellant's history of head trauma and drug abuse was of interest, and that it was "not uncommon for such persons to have a normal brain MRI but have an abnormal brain PET with F-18 deoxy glucose (FDG)." (Movant's Ex. 33). Dr. Preston suggested that a brain FDG/PET be performed. (Movant's Ex. 33).

2. *Rule 29.15 motion*.

The amended motion alleged that counsel was ineffective for failing to arrange for a positron emission tomography (PET) scan as recommended by their retained radiology and brain imaging expert, Dr. David Preston, have Dr. Preston review the results, and call him to testify during the penalty phase to explain those results. (PCR L.F. 171).

3. *Rule 29.15 hearing*.

Dr. Preston did not testify at the evidentiary hearing. Post-conviction counsel instead retained Dr. Ruben Gur, a professor of neuropsychology at the University of Pennsylvania School of Medicine to review and analyze a PET scan of Appellant performed on September 29, 2015. (PCR Tr. 11, 37-38). Dr. Gur testified that a PET scan is a generally accepted tool to assist doctors in making medical and neuropsychogical diagnoses and to determine whether a portion of a person's brain is functioning normally. (PCR Tr. 33, 35). Dr. Gur found that Appellant's PET scan showed abnormalities in regions that are important for regulating emotions and behavior. (Movant's Ex. 5, p. 2). Dr. Gur testified that a combination of abnormalities found in the scan might result in Appellant misinterpreting danger signals and then being unable to exercise control over his emotional impulses. (Movant's Ex. 5, pp. 2-3). Dr. Gur testified that he would have been able and willing to provide the same testimony at Appellant's trial. (PCR Tr. 51-58).

The prosecutor obtained admissions on cross-examination that some of Appellant's actions before and after the murder reflected planning, the exercise of judgment, and an intent to kill. (PCR Tr. 56-59, 132). It was also pointed out on cross-examination that Dr. Gur listed Wikipedia as a source for some of the information that he presented in a slideshow prepared for the Rule 29.15 hearing. (PCR Tr. 60-61). Dr. Gur also admitted that a PET scan pattern by itself does not indicate a psychiatric problem, and that the findings of a PET scan cannot be linked to specific behaviors absent a clinical interview of the patient. (PCR Tr. 72). He agreed that experts should avoid drawing conclusions about specific behaviors based on imaging data alone. (PCR Tr. 104-05). Dr. Gur, who is not a medical doctor, never talked to Appellant and did not review any materials other than the results of the PET scan. (PCR Tr. 72, 87, 89-90). Dr. Gur could not definitely say that the information he reviewed would have been the same in 2008, but from his experience thought it would be. (PCR Tr. 117).

Counsel Kraft testified that the defense team arranged an MRI of Appellant that showed a normal brain. (PCR Tr. 537). The MRI was sent to a retained expert, Dr. Preston, who suggested a PET scan. (PCR Tr. 537-39). Kraft said that PET scans at the time of the evidentiary hearing were different than those used when Appellant was facing trial, and that the allowances given in interpreting the scans was different. (PCR Tr. 611). Kraft

said she was unaware of any experts who forensically interpreted PET scans in 2008. (PCR Tr. 611).

Counsel Turlington could not specifically recall the conversations about conducting a PET scan. (PCR Tr. 712). She testified that a PET scan showing no damage to the brain could have undercut Dr. Gelbort's neuro-psychological testing that showed some deficits in Appellant's decision making capabilities. (PCR Tr. 712-13, 769). Turlington said that counsel tended to proceed cautiously with imaging for that reason. (PCR Tr. 713). She also confirmed Kraft's testimony that PET scans were rarely done for forensic purposes, and that Washington University refused to analyze scans for use in criminal cases. (PCR Tr. 770-71).

4. *Motion court findings*.

In denying the claim, the court found that counsel made a reasonable strategic decision not to risk undermining Dr. Gelbort's psychological testimony by pursuing a scan that could show Appellant's brain was normal. (PCR L.F. 789). The court also found that Dr. Gur was susceptible to significant, damaging cross-examination, and that the bases of his conclusion were questionable. (PCR L.F. 790-91). The court found that, in light of the "weighty" aggravating evidence and overwhelming evidence of deliberation, there was no reasonable probability that Dr. Gur's testimony and the PET scan would have resulted in a lesser sentence. (PCR L.F. 791-92).

B. Analysis.

Appellant failed to prove the claim alleged in the amended motion. The motion alleged that counsel was ineffective and Appellant was prejudiced by the failure to arrange for a PET scan of Appellant's brain and have Dr. David Preston review the PET scan results and testify during the penalty phase to explain those results. (PCR L.F. 171). Dr. Preston never testified at the evidentiary hearing, nor does the record show why he did not testify. There is thus no evidence that Dr. Preston would have given favorable testimony had a PET scan been performed before trial. The amended motion did not allege that counsel should have presented testimony from a similar expert to Dr. Preston, and Dr. Gur's name appears nowhere in the motion.

A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). Unlike some other civil pleadings, courts will not draw factual inference or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief. *Id.* Any allegations or issues that are not raised in the Rule 29.15 motion are waived on appeal. *McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. 2012). Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal. *Id.* Furthermore, there is no plain error review in appeals from post-conviction judgments for claims that were not presented in the amended motion. *Id.*

Because Appellant did not allege that counsel was ineffective for failing to call Dr. Gur to testify about the PET scan results, that claim is not preserved for appeal.[8] *Id.* Appellant is still not entitled to relief even if the Court determines that the claim is adequately preserved.

Counsel Turlington testified at the evidentiary hearing that counsel proceeded cautiously on the issue of ordering PET scans because a normal scan could have undercut other evidence showing deficits in Appellant's decision-making capabilities.[9] (PCR Tr. 712-13, 769). That reasoning is

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[8] While the amended motion and the argument portion of Appellant's brief discuss the failure to obtain a PET scan, the point relied on does not include that as a specification of error. It instead only alleges error in the failure to call Dr. Gur or a similarly qualified expert. (Appellant's Brf., p. 38). Questions for decision on appeal are those stated in the points relied on, and a question not there presented will be considered abandoned. *State v. Nathan*, 404 S.W.3d 253, 271 n.12 (Mo. 2013). An appellant cannot expand the issues presented for review simply by discussing issues within the body of the argument. *Id.*

[9] Counsels' ultimate decision not to present expert testimony at the penalty phase hearing does not affect the reasonableness of counsel's pre-trial

similar to that employed by counsel in *Forrest v. State*, 290 S.W.3d 704 (Mo. 2009). Trial counsel in that case testified that she did not pursue a PET scan because the scan could not have been conducted *ex parte* and under seal, and it was not guaranteed to provide helpful information, but might have provided harmful information that would have undermined other mitigating evidence. *Id.* at 708-09. This Court concluded that trial counsel did not order a PET scan for strategic reasons, and that counsel's trial strategy was not a basis for finding ineffective assistance of counsel. *Id.* at 709. The same conclusion is warranted here.

Even if one were to assume that a PET scan conducted prior to trial would have yielded the same results as the scan done for the Rule 29.15 evidentiary hearing, the mitigating value of PET scan evidence is limited absent evidence that Appellant suffered from impaired cognitive abilities. *Zink*, 278 S.W.3d at 182-83. Any testimony that Appellant did have such impairments would have come from Dr. Gelbort, the retained neuropsychologist. But as discussed in Point VIII above, Dr. Gelbort's performance in previous trials was so deficient that counsel reasonably decided not to call him in the underlying trial. And had Dr. Gelbort testified

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decision not to pursue the PET scan evidence. *Cf. McLaughlin*, 378 S.W.3d at 342 n.4.

at the underlying trial, there is nothing in the record to indicate that the PET scan results would have altered his testimony. The PET scan results thus would, at best, have merely corroborated Dr. Gelbort's testimony. Counsel will not be deemed ineffective to failing to offer such cumulative evidence. *Forrest*, 290 S.W.3d at 709.

The motion court also did not clearly err in finding that Dr. Gur's testimony was subject to significant and damaging cross-examination. (PCR L.F. 790-91). That cross-examination would have yielded admissions that Appellant's actions before and after the murder could have reflected planning, the exercise of judgment, and an intent to kill. (PCR Tr. 56-59, 132). Dr. Gur would have been forced to admit that a PET scan pattern by itself does not indicate a psychiatric problem, and that PET scan findings cannot be linked to specific behaviors absent a clinical interview, which Dr. Gur did not conduct. (PCR Tr. 72, 87, 89-90). And Dr. Gur's reliance on Wikipedia as a source likely would have undercut his credibility with the jury. (PCR Tr. 60-61). The cross-examination of Dr. Gur at the evidentiary hearing exposed the limited mitigating value that the PET scan evidence would have had, and the motion court did not clearly err in finding that it was not reasonably likely that the outcome of the sentencing phase would have been different in light of the strength of the evidence of guilt and of the aggravating circumstances. *Id.*; *Zink*, 278 S.W.3d at 183.

XI.

Counsel not ineffective for deciding not to call purported impeachment witnesses.

Appellant claims that trial counsel was ineffective for failing to call Maggie Jones, Margaret Walsh, and Arnell "Smoke" Jackson to impeach or discredit Eva Addison's testimony about the events surrounding Leslie's death. But the proposed testimony of the witnesses would not have provided a viable defense or changed the outcome of the trial, and counsels' decision not to call the witnesses was reasonable.

A. Underlying Facts.

1. *Trial proceedings*.

Eva Addison testified that she was on the front porch of Maggie Jones's house at 31 Blakemore on May 15, 2003, when Appellant approached her, hit her in the face, and told her that she and her sisters could not come to Pine Lawn. (Tr. 62, 138-40). Eva testified that following that incident, she was at the house on Blakemore with Leslie. (Tr. 63-66). Eva was looking for her keys when two cars drove up. (Tr. 66). Eva said that Appellant was riding in a car driven by a man she identified as B.T., and that a man she identified as "Smoke" was in the other car. (Tr. 67). Appellant got out of B.T.'s car and said, "I told you ho's to leave, to get out of Pine Lawn." (Tr. 67). Eva described what happened next:

> Leslie said, we didn't do nothing to you. He told Leslie to shut the fuck up, and he pointed the gun at her and pulled the trigger, but it didn't go off. And Smoke came over there and told J.R., You trippin'.

(Tr. 68). Eva testified that after "Smoke" encouraged Appellant to leave, Appellant said, "One of these ho's has got to die tonight." (Tr. 68). Appellant and Smoke then got into their respective cars and drove off. (Tr. 69). Eva testified that about two or three minutes later, Appellant returned on foot. (Tr. 69-70). He ran back towards an alley after he heard the police. (Tr. 70).

2. *Rule 29.15 motion*.

The amended motion alleged that counsel was ineffective for failing to impeach Eva with testimony from Maggie Jones, Margaret Walsh, and Arnell "Smoke" Jackson. (PCR L.F. 67-68). The motion alleged that Jackson's testimony would have impeached Eva's testimony that he was there when Appellant pointed a gun at Leslie in front of 31 Blakemore, and her testimony that Appellant returned on foot after driving away with B.T. (PCR L.F. 72). The motion alleged that Jones would have testified that she did not hear any fighting or arguing outside her house. (PCR L.F. 72-73). The motion alleged that Margaret Walsh was a forensic scientist with the St. Louis County Crime Lab who could testify that she performed a blood analysis of the clothing worn by Appellant and found no blood. (PCR L.F. 74-75).

2. *Rule 29.15 hearing.*

Maggie Jones testified by deposition that she lived across the street from the house where the Addison sisters grew up. (Movant's Ex. 26, pp. 7-8). She said that Eva was at her house on the night of the murder, and told her that Leslie was doing someone's hair a couple of streets over. (Movant's Ex. 26, pp. 10-11). Eva told Jones that she had lost her car keys, and she went outside. (Movant's Ex. 26, p. 11). She later came back in and said that her sister Jessica had picked up the baby. (Movant's Ex. 26, pp. 11-12). Eva said that she was waiting around for Leslie. (Movant's Ex. 26, p. 12). Jones stayed in her house that evening, watching television in her bedroom. (Movant's Ex. 26, pp. 12, 14). She did not see anyone outside besides Eva and did not hear any other voices. (Movant's Ex. 26, pp. 12-13). Jones said she did not hear any arguments. (Movant's Ex. 26, p. 13). Jones said that the bedroom window was to the side of her house and her storm window was closed, so she could not hear what was going on outside. (Movant's Ex. 26, p. 14).

Jones said that Eva banged on her door later that night and was hollering that "he killed my sister." (Movant's Ex. 26, p. 13). Jones walked with Eva to the murder scene, with Eva saying that she saw the murder while hiding in some bushes. (Movant's Ex. 26, pp. 16-17). Before they left, Jones received a phone call from a man that she believed to be Appellant, saying that he did not kill Leslie. (Movant's Ex. 26, pp. 13, 21).

Arnell "Smoke" Jackson testified by deposition from the Algoa Correctional Center, where he was serving sentences for murder, robbery, and armed criminal action. (Movant's Ex. 10A, pp. 5-6).[10] Jackson testified that he was on Blakemore Street in Pine Lawn on the night that Leslie was murdered. (Movant's Ex. 10A, pp. 7-8). Jackson said he was driving through the area when he encountered a group of people who appeared to be having a dispute. (Movant's Ex. 10A, p. 8). After Jackson warned Appellant to leave, Appellant got into a car with Brian Travis. (Movant's Ex. 10A, pp. 8-9). Jackson followed the car down Blakemore until it made a right turn on Kienlen and traveled towards the Skate King. (Movant's Ex. 10A, pp. 13-14). Jackson made a left turn onto Kienlen, then a right onto another street and headed home. (Movant's Ex. 10A, p. 14). Jackson said he never saw anyone get out of the car occupied by Appellant and Travis while he was following it. (Movant's Ex. 10A, p. 14). Jackson said that he was contacted in March of 2008 by counsel Turlington but he could not remember what he told her. (Movant's Ex. 10A, pp. 16-18).

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[10] Movant's Exhibit 10A is the transcript of Jackson's deposition. A recording of the deposition was admitted into evidence as Movant's Exhibit 10. (PCR Tr. 7).

Jackson admitted that he did not know whether Appellant returned to the scene later. (Movant's Ex. 10A, pp. 55-56). Jackson clarified that Appellant and Eva were having a "heated conversation," which prompted him to urge Appellant to leave. (Movant's Ex. 10A, p. 60). Part of his motivation for doing so was his knowledge that the police were seeking Appellant for the murder of Todd Franklin. (Movant's Ex. 10A, p. 57).

Appellant was arrested at a motel in St. Charles on May 17th, two days after the murder. (Tr. 266-68). Margaret Walsh was then a forensic scientist at the St. Louis County Crime Laboratory. (PCR Tr. 343-44). She tested the clothing that Appellant was wearing when he was arrested for the presence of blood and found none. (PCR Tr. 344-47). Walsh testified on cross-examination that she had no way of knowing if Appellant was wearing the clothes that she tested when he committed the murder. (PCR Tr. 350-51).

Counsel Kraft could not remember why Maggie Jones was not called to testify at Appellant's 2008 trial. (PCR Tr. 517). Kraft said that Margaret Walsh was not called because her testimony would probably not be helpful, since Appellant was arrested more than two days after the murder, and it could not be proven that the clothing tested was the same clothing worn during the murder. (PCR Tr. 520, 595). Kraft said that Jackson's statements to Turlington did not provide any reason to call him. (PCR Tr. 591). She also said that Jackson had credibility issues due to his own murder conviction,

and that testimony he was a member of Appellant's gang would cause problems. (PCR Tr. 592).

Counsel Turlington said that someone from the defense team had a phone interview with Jackson, who was then incarcerated. (PCR Tr. 686). Turlington said she would have wanted to present evidence from Jackson if he had told her about following Appellant's car and not seeing anyone get out of it. (PCR Tr. 689). But Jackson's statement to post-conviction counsel was different than what he had told trial counsel, and he was not called because his earlier statement did not contain any useful information. (PCR Tr. 743).

Turlington did not recall why Jones was not called at the second trial after being called at the first trial, but she noted that the defense chose not to repeat things in the second trial that did not work in the first trial. (PCR Tr. 691). Turlington noted that Jones's testimony could have raised unfavorable information about Eva's demeanor and statements after the shooting that verified Eva's testimony. (PCR Tr. 742). She said that was part of the evaluation in deciding whether to call her. (PCR Tr. 742).

Turlington said that calling Walsh would not be helpful since there was no way to show that the clothing she tested was the clothing Appellant wore when he shot Leslie. (PCR Tr. 693, 744-45).

4. *Motion court findings.*

In denying the claim, the motion court found that Jackson's testimony would have only provided minimal impeachment and would not have provided Appellant with a defense. (PCR L.F. 746). The court also found that Jackson was not a credible witness. (PCR L.F. 746). On the claim regarding Maggie Jones, the court found that counsel's strategic decision not to call her was not ineffective, since Jones's testimony in the previous trial did not change the outcome of that trial. (PCR L.F. 747-49). As to Walsh, the court found that her testimony would not have provided a viable defense since it could not be established that the clothing she tested was the same clothing Appellant wore on the night of the murder. (PCR L.F. 748).

B. Analysis.

The mere failure to impeach a witness does not entitle a movant to post-conviction relief. *State v. Phillips*, 940 S.W.2d 512, 524 (Mo. 1997). Rather, the movant has the burden of showing that the impeachment would have provided him with a defense or would have changed the outcome of the trial. *Id.* He must also overcome the presumption that counsel's decision not to impeach was a matter of trial strategy. *Id.*

Appellant alleged that "Smoke" Jackson should have been called to impeach Eva's testimony that he was there when Appellant pointed a gun at Leslie, and that Appellant returned on foot after driving away with B.T. (PCR

L.F. 72). Jackson's testimony would not have impeached Eva on whether Appellant returned to the scene, because Jackson admitted that he only followed Appellant and B.T. for a short distance before turning in the opposite direction. (Movant's Ex. 10A, pp. 13-14). He admitted to not knowing if Appellant returned to the scene later. (Movant's Ex. 10A, pp. 55-56). As to the remainder of the claim, Jackson did not specifically testify that he did not see Appellant point a gun at Leslie. Appellant thus failed to meet his burden of proof on that claim. Supreme Court Rule 29.15(i). Furthermore, Jackson's testimony corroborated some aspects of Eva's testimony, such as the fact that Appellant was engaged in a heated argument and that Jackson urged Appellant to leave. Counsel is not ineffective for failing to call a witness whose testimony would not unqualifiedly support the defendant. *Worthington*, 166 S.W.3d at 577.

Counsel also articulated reasonable strategic reasons for not calling Jackson: (1) he did not give them the information that he testified to in his deposition; (2) Jackson had credibility issues due to his own murder conviction; and (3) that information he and Appellant were in the same gang could be damaging to the defense. (PCR Tr. 592, 743). Furthermore, the motion court found that Jackson's deposition testimony was not credible. (PCR L.F. 746). This Court defers to that credibility determination. *Davis*, 486 S.W.3d at 907.

Appellant alleged that counsel should have called Maggie Jones to testify that she did not hear any fighting or arguing outside of her house just before the murder. (PCR L.F. 72-73). That testimony was not necessarily inconsistent with Eva's testimony, since Jones was watching television in her bedroom with the storm windows closed and could not hear what was going on outside. (Movant's Ex. 26, p. 14). *Id.* Furthermore, Jones's testimony about Eva's demeanor and actions both before and after the shooting would have corroborated portions of Eva's testimony. That was part of counsel's strategy in deciding not to call her. (PCR Tr. 742). Counsel is not ineffective for failing to call a witness whose testimony would not unqualifiedly support the defendant. *Worthington*, 166 S.W.3d at 577. Finally, Appellant has not demonstrated prejudice, since her testimony at an earlier trial did not change the outcome of that trial. *Phillips*, 940 S.W.2d at 524.

Walsh would not have provided impeachment testimony, since it could not conclusively be shown that the clothes she tested were the ones worn by Appellant at the time of the murder. (PCR Tr. 350-51). Her testimony thus would not have unqualifiedly helped the defense and counsel was not ineffective for deciding not to call her. *Worthington*, 166 S.W.3d at 577.

XII.

Appellant has failed to show ineffectiveness or prejudice from the failure to present evidence rebutting the facts of two prior convictions used as aggravating circumstances.

Appellant claims that trial counsel was ineffective for failing to present evidence rebutting the facts underlying two of the prior convictions used as statutory aggravators. But Appellant failed to prove one of his allegations, some of the purported evidence was inadmissible, and the remaining evidence would not have changed the outcome of the penalty phase.

A. Underlying Facts.

1. *Trial proceedings*.

The statutory aggravating circumstances submitted by the State included Appellant's convictions in the Todd Franklin murder, plus the following convictions:

> 1. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant on April 4, 2002.
>
> 2. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on

February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant with a deadly weapon on April 4, 2002.

3. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Jermaine Burns on April 4, 2002.

4. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Jermaine Burns with a deadly weapon on April 4, 2002.

(L.F. 669-70).

During the penalty phase of the trial, the Court admitted certified records of the above convictions into evidence. (Tr. 463-64). The remaining evidence of the assaults came from Eva and Leslie's sister, Shonte Addison. (Tr. 623). Shonte testified that she pulled into her driveway on April 4, 2002, and saw her cousin, Jermaine Burns, sitting in his van. (Tr. 624). Daryl Bryant was also in the van and rolled down his window to talk to Shonte. (Tr. 625). Appellant approached Bryant, pointed a gun at him, and said he was

getting ready to kill him. (Tr. 625). Appellant tried unsuccessfully to open the van's door. (Tr. 626). Burns and Bryant drove off to the north. (Tr. 626). Appellant got into a car with a man named Laverne and they drove off to the south. (Tr. 626). Shonte took her daughter inside the house, where she heard gunshots. (Tr. 626). Shonte then got into a car with her cousin and drove until they found the van with the windows shot out. (Tr. 626).

Shonte followed the van as Burns drove it to Barnes Hospital. (Tr. 627). When the van got to the hospital, Bryant opened his door and fell onto Shonte. (Tr. 627). Shonte testified that Bryant, "had a big hole in his side, a lot of blood, and I dragged him in the hospital." (Tr. 627). Shonte "practically threw" Bryant at the first doctor she saw and ran. (Tr. 627). She gave a statement to police after they contacted her the next day. (Tr. 627). Shonte provided similar testimony at Appellant's assault trial. (Tr. 628). Counsel Kraft got Shonte to reaffirm on cross-examination that she did not witness the actual shooting and did not know who fired the first shot. (Tr. 637).

2. *Rule 29.15 motion.*

The amended motion alleged that counsel was ineffective for failing to investigate and rebut aggravating penalty phase evidence regarding Appellant's convictions for assaulting Daryl Bryant and Jermaine Burns. (PCR L.F. 176). The motion alleged that counsel should have presented Daryl Bryant's hospital records to show that Shonte Addison exaggerated the

extent of Bryant's injuries. (PCR L.F. 180-81). The motion further alleged that counsel should have called investigator Butch Johnson to testify that ballistics evidence contradicted witness testimony about how the shootings occurred. (PCR L.F. 181-83). The motion also alleged that counsel should have called Michael Douglas to testify that his brother, Kyle Dismukes, admitted to shooting Bryant. (PCR L.F. 183).

3. *Rule 29.15 hearing.*

Peron "Butch" Johnson, a retired investigator for the public defender's office, testified by deposition that he reviewed police reports, crime scene photos, and Bryant's medical records. (Movant's Ex. 36, pp. 5-7, 21). He testified at the post-conviction hearing in the assault case. (Movant's Ex. 36, p. 22). He testified at that hearing and in his deposition that the shooter was standing in a different place than Appellant was alleged to be in the police reports. (Movant's Ex. 36, pp. 23-24). Johnson said the medical records indicated that Bryant suffered only a superficial abrasion on his right buttock. (Movant's Ex. 36, p. 31).

Johnson also obtained a notarized statement in 2006 from a Michael Douglas, which said that Douglas's brother, Kyle Dismukes had taken credit

for shooting Bryant.[11] (Movant's Exs. 18; 36, p. 26). Johnson said he gave the statement to Appellant's trial attorneys in the murder case. (PCR Tr. 27).

Johnson admitted on cross-examination that he was not certified in ballistics or in crime scene interpretation, and had never been qualified as an expert witness in Missouri. (Movant's Ex. 36, pp. 37-38). Johnson also acknowledged that he did not look at the assault case until almost five years after it happened. (Movant's Ex. 36, p. 38). Johnson said the pictures that he reviewed were of poor quality. (Movant's Ex. 36, p. 41). Johnson also did not talk to the investigating officer or review his sworn testimony in the post-conviction case. (Movant's Ex. 36, p. 43).

Counsel Kraft testified that the defense team may have received Douglas's affidavit concerning his brother's alleged statement. (PCR Tr. 546). She could not recall a reason for not using the affidavit to challenge the convictions. (PCR Tr. 546). Counsel Turlington testified that going into the facts of the assault conviction would have reinforced the idea that Appellant and other people he was associated with went around shooting each other.

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[11] Douglas declined to testify in the post-conviction proceedings. (Movant's Ex. 36, p. 28). Dismukes died on November 27, 2003, the year following the assault and just more than six months after Leslie was murdered. (Movant's Exs. 19; 36, p. 29-30).

(PCR Tr. 772). She added that it was not credible that Kyle Dismukes was named as a suspect in every shooting that Appellant was charged with, and that the jury in the assault case had rejected Appellant's testimony naming Dismukes as the shooter. (PCR Tr. 772).

4. *Motion court findings*.

In denying the claim, the motion court found that it was identical to claims raised in the post-conviction motion filed in the underlying assault case. (PCR L.F. 793). The court agreed with the findings of the motion court in the assault case that Johnson's investigations were unreliable and refuted by the physical evidence in the case. (PCR L.F. 793). The court noted counsels' testimony that attempting to attack the convictions could prove aggravating to the jury. (PCR L.F. 794).

B. Analysis.

To prove ineffective assistance for failure to call a witness, the defendant must show that: (1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have provided a viable defense. *Deck*, 381 S.W.3d at 346. When a movant challenges counsel's failure to call certain witnesses during the penalty phase, a viable defense is one in which there is a reasonable probability that the additional mitigating evidence those witnesses would

have provided would have outweighed the aggravating evidence presented by the prosecutor resulting in the jury voting against the death penalty. *Id.*

Appellant failed to meet his burden of proving that counsel was ineffective for failing to call Michael Douglas to testify that his brother, Kyle Dismukes, shot and wounded Daryl Bryant. (PCR L.F. 183). Douglas did not testify at the evidentiary hearing. Appellant therefore failed to establish that Douglas would have testified at trial and failed to establish the substance of the testimony that he would have given had he appeared, thus failing to prove that his testimony would have provided a viable defense. Supreme Court Rule 29.15(i). Allegations in a post-conviction motion are not self-proving. *Gittemeier v. State*, 527 S.W.3d 64, 71 (Mo. 2017). Failure to present evidence at a hearing in support of factual claims in a post-conviction motion constitutes abandonment of that claim. *Id.*

Appellant also has not demonstrated that evidence of Dismuke's purported confession would have been admissible. Statements against penal interest can be admitted in the penalty phase of a trial when substantial reasons exist to assume the reliability of the statement. *McLaughlin*, 378 S.W.3d at 347. Courts consider three factors in determining the reliability of a statement: (1) the confessions were, in a real sense, self-incriminatory and unquestionably against interest; (2) the confessions were made spontaneously to a close acquaintance shortly after the crime had occurred; and (3) the

confessions were corroborated by other evidence in the case. *Id.* at 346-47. While the first two factors appear to be satisfied, Appellant points to no evidence in the assault case that would corroborate Dismuke's purported confession. Evidence of the out-of-court statement would thus not have been admissible, and counsel is not ineffective for failing to present inadmissible evidence. *Id.* at 346; *Skillicorn v. State*, 22 S.W.3d 678, 687 (Mo. 2000).

The motion court did not clearly err in finding that counsel was not ineffective for failing to present Bryant's medical records or the testimony of Johnson about the ballistics evidence. Johnson admitted that he was not certified in ballistics or in crime scene interpretation, and his cross-examination revealed flaws in the manner that he conducted his *post hoc* investigation some five years after the crime occurred. (Movant's Ex. 36, pp. 37-38, 41, 43). A jury would also have good reason to question Johnson's bias and motivations, given his employment by the same office that was representing Appellant. Appellant has failed to prove that any mitigating evidence that Johnson would have provided would have outweighed the aggravating evidence presented by the prosecutor and caused the jury to vote against the death penalty. *Deck*, 381 S.W.3d at 346.

The amended motion alleged that the medical records should have been introduced for the purpose of impeaching Shonte Addison, who testified that she followed Daryl Bryant to the hospital after he was shot, helped him

inside after he fell at the doorway, and saw "a big hole in his side," and a lot of blood. (PCR L.F. 180-81; Tr. 627). The mere failure to impeach a witness does not entitle a movant to post-conviction relief. *Phillips*, 940 S.W.2d at 524. Rather, the movant has the burden of showing that the impeachment would have provided him with a defense or would have changed the outcome of the trial. *Id.* He must also overcome the presumption that counsel's decision not to impeach was a matter of trial strategy. *Id.*

First of all, the records did not refute Shonte's testimony in any meaningful sense. They reflected that Bryant had a gunshot wound to the right hip, described in radiology reports as the right flank. (Movant's Ex. 21). That would be consistent with Shonte's observation of a big hole in Bryant's side. While the records did reflect minimal bleeding at the wound site, that discrepancy can be attributed to a difference in perception of a trained medical professional versus a lay witness whose own testimony indicated that she was in an agitated state.

Counsel Kraft cross-examined Shonte and elicited her admission that she had not witnessed the shooting and thus did not know who fired the shots. (Tr. 637). That evidence would be more valuable to Appellant's defense than evidence of the minor discrepancies between the medical records and Shonte's brief description of Bryant's injuries. In spite of that, the jury heard that Shonte had given similar testimony at Appellant's trial in which he was

found guilty for the assaults. (Tr. 628). Appellant has not demonstrated that the purported impeachment evidence would have changed the sentence, in light of the strong evidence presented in both the guilt and penalty phases. *Skillicorn*, 22 S.W.3d at 688.

XIII.

Counsel was not ineffective for failing to present impeachment evidence about Eva's ability to identify Appellant as the shooter.

Appellant claims that trial counsel was ineffective for failing to present photos and measurements that would have raised questions about Eva's ability to accurately identify Appellant as the shooter. But counsel investigated the scene and determined that Eva could have witnessed what she testified to, and the evidence presented at the Rule 29.15 hearing did not demonstrate otherwise.

A. Underlying Facts.

1. *Trial proceedings*.

Eva Addison testified that she followed her sister Leslie, as she walked to the Skate King after being threatened by Appellant. (Tr. 69-71). Eva hid in some bushes when she saw the car that Appellant and B.T. had been riding in turn onto Kienlen and park in front of the Pine Lawn School. (Tr. 71-72, 82). From that vantage point, Eva witnessed Appellant get out of the car, approach Leslie, and then shoot her. (Tr. 72-73, 81-85). Eva testified that she clearly saw Appellant and recognized him from his face, body, clothing, and the way he walked. (Tr. 82-85). She also recognized his voice when he told Leslie to shut up. (Tr. 88-89).

Counsel Turlington cross-examined Eva. (Tr. 138). Turlington elicited testimony that the shooter got out of the car and walked across the street towards Leslie, who was standing across the street from the school. (Tr. 149).

Jeffrey Hunnius, a police officer assigned to the St. Louis County Crime Scene Unit, testified that he arrived at the murder scene shortly after midnight. (Tr. 213-15). Leslie's body had already been moved by that point. (Tr. 215-16). Hunnius took photographs using a flash on his camera. (Tr. 216). He said that area around him was lit by dusk-to-dawn street lamps. (Tr. 217). Hunnius testified there were three street lamps located in front of the Pine Lawn School and a fourth street lamp on the south side of Naylor, east of Kienlen. (Tr. 218). Hunnius testified that the streetlight on Naylor gave off more light than what it appeared to give out in photographs he took near it. (Tr. 225-26).

Counsel Kraft cross-examined Hunnius. (Tr. 229). Hunnius testified that the streetlight on Naylor did not illuminate the area near Kienlen. (Tr. 230-31). Kraft also elicited testimony that the distance from the bushes where Eva hid to the location where he found Leslie's purse and a bullet fragment was between 150 and 200 feet. (Tr. 236-37). Hunnius testified on re-direct that the lights at the school would have illuminated the intersection where Appellant got out of the car. (Tr. 237-39). He also testified that there was enough light for a person hiding in the bushes to see someone walking up

Naylor from that intersection. (Tr. 239). Kraft elicited testimony on re-cross that the light on Naylor would not have illuminated a person who crossed the street directly to Kienlen from the intersection. (Tr. 242).

2. *Rule 29.15 motion*.

The amended motion alleged that counsel was ineffective for failing to adduce evidence that would have challenged the State's guilt phase evidence regarding the lighting and distances at the murder scene. (PCR L.F. 76). The motion alleged that the defense should have offered its own photographs and measurements showing the lighting at Pine Lawn Elementary School and the distance from the bushes where Eva hid to the area where Leslie's purse was found. (PCR L.F. 79).

3. *Rule 29.15 hearing*.

Counsel Kraft testified that she visited the crime scene with her investigators. (PCR Tr. 521-22). She said that the defense did not take and present pictures because they thought that it was possible that Eva could have seen the murder from her location. (PCR Tr. 522). Kraft said on cross-examination that she felt that a claim that Eva could not have seen the murder would not have been effective. (PCR Tr. 590). Kraft also said that Eva had potentially inflammatory information that she did not want to come out, and that Eva could potentially be upset by challenges to her ability to see,

resulting in some of that inflammatory information coming out. (PCR Tr. 589-90).

Counsel Turlington also visited the crime scene and observed lights on Pine Lawn Elementary School. (PCR Tr. 694-95). She agreed from her observations of the scene that Eva could have seen from her location the events she testified to. (PCR Tr. 739). Turlington said someone from the defense team visited the area at night and did not report that Eva would not have been able to see what happened. (PCR Tr. 740-41).

Former public defender's investigator Butch Johnson testified by deposition that he visited the murder scene in 2013 and took photos of the area. (Movant's Ex. 36, pp. 11-12). Johnson admitted that those photographs were taken during the day, more than ten years after the murder, and that he had no idea what the lighting was like at the time of the murder. (Movant's Ex. 36, pp. 52, 57). Johnson never asked Eva to show him where she was standing when the murder took place. (Movant's Ex. 36, p. 58).

Crime scene investigator Hunnius also testified at the evidentiary hearing. (PCR Tr. 318-42). That testimony, on both direct and cross-examination, was largely consistent with his testimony at trial.

4. *Motion court findings*.

In denying the claim, the court credited counsels' testimony that they visited the scene of the crime and formed the opinion that Eva could have witnessed the murder. (PCR L.F. 751). The court found that Johnson was not credible and was not qualified to give expert testimony as to lighting. (PCR L.F. 752). The court further noted that one picture taken by Johnson supported counsels' conclusion that Eva was in a position to witness the shooting. (PCR L.F. 751). The court found that counsel conducted a reasonable investigation into the lighting and distances at the scene and made a reasonable strategic decision to use that information in cross-examining the State's witnesses. (PCR L.F. 753). The court also found that Appellant failed to establish how any photographs or measurements taken by counsel would have differed from what the State presented or how they would have provided a viable defense. (PCR L.F. 753).

B. Analysis.

The mere failure to impeach a witness does not entitle a movant to post-conviction relief. *Phillips*, 940 S.W.2d at 524. Rather, the movant has the burden of showing that the impeachment would have provided him with a defense or would have changed the outcome of the trial. *Id.* He must also overcome the presumption that counsel's decision not to impeach was a matter of trial strategy. *Id.*

Counsel made a reasonable strategic decision not to challenge Eva's ability to witness the murder after personally visiting the crime scene and determining that Eva could have witnessed the events that she testified to. (PCR Tr. 521-22, 694-95, 739-41). Strategic choices made after a thorough investigation of the facts relevant to plausible opinions are virtually unchallengeable. *Johnson v. State*, 388 S.W.3d 159, 164 (Mo. 2012). Reasonably diligent counsel may draw a line when they have good reason to think that further investigation would be a waste. *Id.* at 165.

The motion court also did not clearly err in finding that Johnson's testimony did not establish that the purported impeachment evidence would have changed the outcome of the trial. Former public defender's investigator Butch Johnson testified by deposition that he visited the murder scene in 2013 and took photos of the area. (Movant's Ex. 36, pp. 11-12). Johnson's investigation took place more than ten years after the murder, he took his photographs during the daytime, and he admitted that he had no idea what the lighting was like at the time of the murder. (Movant's Ex. 36, pp. 52, 57). Johnson also never asked Eva to show him where she was standing when the murder took place, so no showing was made that his photographs accurately reflected Eva's viewpoint. (Movant's Ex. 36, p. 58). This Court has recently rejected a similar claim that a State's witness should have been impeached with photographs calling into question a witness's ability to observe the

relevant events, finding that such evidence would have resulted only in conflicting testimony about the lighting conditions. *Tisius*, 519 S.W.3d at 425. The same is true here.

Finally, the motion court found that Johnson was not a credible witness. (PCR L.F. 752). This Court defers to that credibility determination. *Davis*, 486 S.W.3d at 907.

CONCLUSION

In view of the foregoing, Respondent submits that the denial of Appellant's Rule 29.15 motion 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 22,613 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software.

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