No. SC96548

In the
Missouri Supreme Court

TERRANCE ANDERSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Cape Girardeau County
Thirty-Second Judicial Circuit
The Honorable Kelly W. Parker, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant, Terrance Anderson, was convicted of two counts of first-degree murder for the murders of Debbie and Stephen Rainwater following a jury trial in the Circuit Court of Cape Girardeau County. *State v. Anderson*, 79 S.W.3d 420, 427 (Mo. 2002) ("*Anderson I*"). Appellant was sentenced to death for the murder of Debbie and life without parole for the murder of Stephen. *Id.* The facts of the underlying criminal case, in the light most favorable to the verdict, were summarized by this Court in its original opinion on direct appeal. *Id.* at 427-28. This Court affirmed appellant's convictions and sentences. *Id.* at 427.

Appellant unsuccessfully sought post-conviction relief from his convictions and death sentence. *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. 2006) ("*Anderson II*"). This Court affirmed the denial of relief as to his convictions but reversed his death sentence and remanded for a new penalty phase trial. *Id.* Following that penalty phase trial, appellant again received a death sentence, a verdict affirmed by this Court. *State v. Anderson*, 306 S.W.3d 529, 534 (Mo. 2010) ("*Anderson III*").

On July 19, 2010, appellant timely filed his *pro se* Motion to Vacate, Set Aside, or Correct Judgment and Sentence challenging the judgment from his second penalty phase trial (PCR L.F. 1, 7-12). Appointed counsel timely filed

an amended motion, raising eighteen claims of ineffective assistance of trial counsel and one claim of ineffective assistance of appellate counsel (PCR L.F. 36-150). Following an evidentiary hearing, the motion court denied appellant's motion (PCR L.F. 186-216).

Appellant appealed from that judgment, and this Court reversed, holding that the motion court should have recused itself due to its references to extrajudicial information about the credibility of certain mental health evidence. *Anderson v. State*, 402 S.W.3d 86, 92-94 (Mo. 2013) ("*Anderson IV*"). While noting the motion court's "record of integrity" and "openness" regarding the extrajudicial information, this Court held that, under the "appearance of impropriety" standard, a reasonable person would have had factual grounds to believe the motion court relied on the extrajudicial statements in deciding certain issues in the case. *Id.* at 94.

On remand, the Honorable Kelly W. Parker was appointed by this Court to preside over a new evidentiary hearing (PCR L.F. 255). Appellant presented new testimony from trial co-counsel Sharon Turlington and Beth Ann Davis Kerry, trial mitigation specialist Catherine Luebbering, and two other witnesses, as well as prior testimony from other witnesses and numerous other exhibits (PCR Tr. 6-290). On May 21, 2017, the motion court denied appellant's motion (PCR L.F. 375-411).

STANDARD OF REVIEW

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

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

(Mo. 2012).

To prove ineffective assistance of appellate counsel, the movant must prove that counsel failed to raise a claim of error that was so obvious that competent counsel would have recognized and asserted it. *Taylor v. State*, 262 S.W.3d 231, 253 (Mo. 2008). To establish prejudice, he must establish that there was a reasonable probability of a different outcome on appeal had counsel raised the issue. *Id.*

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

ARGUMENT

I.

The motion court did not clearly err in denying appellant's claim that trial counsel were ineffective for failing to call Dr. Dorothy Lewis and Earline Smith to testify about the effect of Robert Smith's alleged past abuse on appellant (responds to appellant's Points I and II).

A. Facts

At the penalty phase retrial, counsel called appellant's stepfather, Robert Smith, to testify on appellant's behalf (Tr. 849-859). He testified that he worked for the Poplar Bluff School District and served on the City Council (Tr. 851). He testified that, even though appellant was a 10-month-old when he came into Robert's life, Robert treated him like his own child (Tr. 850). He described appellant as a well-behaved, "quiet, easy going kid" (Tr. 850). As a teenager, appellant remained "very much" well-adjusted and popular in school (Tr. 856-857). He testified about a time appellant volunteered to be the Easter Bunny for a church party even though he was "[n]ot at all excited" about it as a 13-14 year-old boy but did so "for the kids" (Tr. 854-855). He testified that appellant was happy and "quite elevated" about becoming a father and was "quite protective" of his child (Tr. 857). He testified that he

still loved appellant, even more so at the time of the retrial because "you just kind of feel for him" (Tr. 860).

In his amended motion, appellant alleged that trial counsel were ineffective for failing to call Earline Smith to testify regarding abuse by appellant's stepfather, Robert Smith, committed on her before he divorced Earline and married appellant's mother (PCR L.F. 52-54). He alleged that she would testify that Earline and Robert separated after 3½ years of marriage and that, during that time, he frequently beat her, stomped on her, hurt her shoulder to the point of requiring numerous surgeries, and raped her, including on one occasion while she held her two-week-old baby (PCR L.F. 53). He alleged that Robert had also injured Earline's breast (PCR L.F. 53). He alleged that the children were "frightened" by Robert's violence against Earline, and was Robert "verbally abusive" to the children (PCR L.F. 53). He alleged that Robert stalked and threatened her after she left him (PCR L.F. 53). He alleged that counsel had no strategy for failing to call Earline and that he was prejudiced because, with this evidence of Robert's "history of violence behavior", the jury would have believed that appellant was later subjected to violence committed by Robert (PCR L.F. 54). He also alleged that this evidence "could have independently validated any expert testimony regarding [his] psychological issues and issues stemming from

childhood, (PCR L.F. 54).

Appellant also alleged that counsel were ineffective for failing to call Dr. Lewis to testify "to statutory and non-statutory mitigation" regarding appellant's mental health (PCR L.F. 63-70). Appellant alleged that Dr. Lewis would testify that Robert's childhood and military history record, and that accounts by Earline, her daughter, and another woman showed that Robert had an "extremely violent past," suffered from "Explosive Personality" disorder, committed "extreme violence" against Earline, and twice assaulted the other woman (PCR L.F. 125-126). He alleged that Dr. Lewis believed that it was "highly unlikely" that Robert's prior violent behavior would have changed while he was living with appellant (PCR L.F. 127). He also alleged that Dr. Lewis was treated at the emergency room four times as a child, at least some of which appeared to be for injuries she believed were suspect (PCR L.F. 124-125).

At the evidentiary hearing, appellant presented a stipulated summary of Earline's proposed testimony as she had subsequently died (PCR Tr. 9; Exh. GG). That proposed testimony essentially recounted the facts alleged in the amended motion and stated that she would have willingly testified at the retrial to that testimony if she had been called (Exh. GG).

Appellant also introduced Dr. Lewis's deposition (Exh. FF). She

testified that she reviewed various records relating to Robert in preparing an evaluation of Appellant prior to the first trial, and that she interviewed Earline and her daughter Deborah (Exh. FF 19, 36-45). She testified that the behavior of a parent had an effect on a child, and it would be unlikely that a person with the duration and degree of violence reflected in the records of Robert's past alleged acts of violence from childhood to his marriage to Earline would entirely change his behavior later in life (Exh. FF 35, 46). She said that while appellant's family denied any violence by Robert, appellant told her that he sometimes had to "come between" his parents, which led her to speculate, "So, of course, there was violence at home" (Exh. FF 46). Dr. Lewis testified that appellant and his sister had reported only one specific "violent outburst," where he overturned a table and smashed a chandelier after learning that appellant had eaten a Cornish game hen that Robert had been saving for himself (Exh. FF, p. 48).

On cross-examination, Dr. Lewis admitted that she could not recall appellant describing any physical violence between Robert Smith and his mother, though she characterized the incident of turning over the table and throwing things as "physical violence" directed towards appellant's mother. (Exh. FF 94-95). Dr. Lewis also said that she was unaware of Robert Smith ever spanking or laying hands on appellant, claiming that he "seemed to limit

his violence" to adults (Exh. FF 95).

Counsel's files had a significant amount of information through interviews and reports about allegations of prior violent acts by Robert (PCR Tr. 104-123). Counsel Turlington testified that counsel were aware that those interviews and reports contained evidence of "pretty substantial abuse" by Robert against Earline (PCR Tr. 161). The defense interviewed Earline and confirmed her version of those claims, including her claim that Robert had been "verbally abusive" to their children (PCR Tr. 161-162). They decided not to use the claims about Robert's abuse because they wanted to paint Robert in a positive light (PCR Tr. 163-164). By the time of the retrial, everyone else in appellant's family other than Robert had "withdrawn" from appellant and did not want to be involved in the case anymore (PCR Tr. 163). Robert still had positive things to say about appellant and still "had a lot of emotion" about appellant, so they wanted to show Robert as a positive influence on appellant (PCR Tr. 164). The decision not to present evidence of Robert's alleged violence was strengthened by the fact that there was "not a lot of evidence that [Robert] was abusive in the household with" appellant despite evidence of his prior violent tendencies (PCR Tr. 163-167, 207). While there were reports of other incidents of possible violence by Robert during the time he was appellant's stepfather (including some which included the use of

weapons in possible self-defense), counsel testified that they considered all of those incidents and still rejected presenting a claim that appellant observed any of these violent acts or was treated violently by Robert (PCR Tr. 174). Because appellant, his sister, and his mother all denied witnessing any violence by Robert in their household, because Robert was the only family member still engaged with appellant and willing to testify positively about him, and because Robert was a city council member and thus a well-respected member of the community, they chose to portray Robert positively instead of pursuing a defense based on Robert's prior violence (PCR Tr. 174-175, 207-208).

Counsel Davis-Kerry testified that, in general, the defense wanted to change what had been done in the first trial to use less mental health evidence and instead rely on appellant telling the jury himself what he was thinking and feeling at the time (PCR Tr. 217-218). Davis-Kerry spoke to Earline prior to trial about Robert's alleged abuse of her (PCR Tr. 230-231). The defense considered a possible theory that appellant's violence was possibly influenced by Robert's violence (PCR Tr. 231-232). But the defense had no witnesses or other evidence showing that Robert was ever abusive toward appellant or his mother (PCR Tr. 232). They also had numerous other people in the community saying that Robert was a "great guy" (PCR Tr. 232).

Because they could not connect earlier reports of Robert's violence with any reports of violence against appellant or his mother or any violence appellant actually witnessed, they rejected a defense based on Robert's alleged violence (PCR Tr. 232). They made a strategic decision not to make Robert a villain but instead, consistent with the reports of appellant, his family, and the community, called Robert to testify to things that were good about appellant (PCR Tr. 233-234). Thus, they did not believe evidence of Robert's violence would benefit appellant (PCR Tr. 235).

Kerry-Davis also testified that the defense "did [their] best to confer with" Dr. Lewis before trial (PCR Tr. 237). She testified that Dr. Lewis was "very, very difficult to work with" (PCR Tr. 237). Dr. Lewis first told them she had no recollection of appellant's case and then, when her memory was refreshed, still could not accurately remember the facts of the case (PCR Tr. 237, 242). Dr. Lewis had been difficult to work with in other Public Defender cases; in one case, she refused to leave her hotel room until an investigator went to physically bring her to the trial (PCR Tr. 238, 273). Not only was Dr. Lewis difficult to work with, but, in this case, she was "not delivering on the work" (PCR Tr. 239). For example, she lied about not receiving records from counsel even though she had signed for them and then admitted she had them but had not looked at them; she then insisted that they be formatted in

a different way for her review (PCR Tr. 242-243). She also was not very persuasive in previous cases she had done for the Public Defender's office even if she could be persuasive in other contexts, such as radio and television interviews (PCR Tr. 273). Counsel was not comfortable with Dr. Lewis testifying because "I would have not had any idea what would have come out of her mouth" (PCR Tr. 243).

The motion court denied appellant's claims regarding the evidence of Robert's violence (PCR L.F. 403-404). The motion court found that there was no evidence that appellant witnessed or was aware of any violent act by Robert (PCR L.F. 391). The court concluded that counsel made a rational judgment not to try to introduce this evidence (PCR L.F. 403). The court also concluded that appellant failed to prove that the evidence of Robert's past violence were mitigating as there was no evidence that appellant was subjected to or witnessed any violence committed by Robert (PCR L.F. 403).

B. There was No Clear Error

The motion court did not clearly err in denying appellant's claim because he failed to prove that counsel were ineffective. First, appellant failed to overcome the presumption of reasonable trial strategy. Counsels' decision not to pursue the evidence of Robert's prior violence, though ultimately unsuccessful, was reasonable. Both counsel recognized that there

was no witness who could testify that Robert committed any act of actual violence against any member of appellant's family or that appellant witnessed Robert commit any act of actual violence (PCR Tr. 163-167, 174-175, 207, 231-232). This conclusion was reached after a full review of all of the evidence appellant presented about Robert's violence, including Earline's statements, Dr. Lewis's speculation, and the records from which that speculation was drawn (PCR Tr. 103-123, 161-174). Counsel reviewed that evidence, considered raising the claim about Robert appellant now argues should have made, and chose not to make that claim because they did not believe that the claim would benefit the defense (PCR Tr. 161-162, 174, 230-232, 235). Thus, counsel's decisions were made after a complete investigation of Robert's violence.

Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance. *Anderson II*, 196 S.W.3d at 33. Strategic choices made after a thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable. *Id.* Where counsel has investigated possible strategies, courts should rarely second-guess counsel's actual choices. *Id.* It is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy. *Id.* Due to the difficulties

in connecting Robert's prior violence to any action by appellant and the lack of any other family member willing to help appellant, counsel instead chose to portray Robert in a positive light to make his testimony in support of appellant credible (PCR Tr. 164, 174-175, 232-234).

This was a reasonable decision. Appellant argues that several U.S. Supreme Court cases and another federal case require a finding that counsel is ineffective for failing to present evidence of an abusive childhood as mitigating (App. Br. 55-59). This overstates the holding of those cases. Those cases dealt with capital counsel's failure to adequately *investigate and discover* and then present evidence of childhood trauma. *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Wiggins v. Smith*, 539 U.S. 510, 531-34 (2003); *Rompilla v. Baird*, 545 U.S. 374, 381-90 (2005); *Porter v. McCollum*, 558 U.S. 30, 38-40 (2009); *Griffin v. Pierce*, 622 F.3d 831, 843-45 (7th Cir. 2010). Those cases also dealt with evidence that was clearly shown to have occurred to the defendant and not speculative claims about violence that no evidence connected to being experienced or witnessed by the defendant. *Wiggins*, 539 U.S. at 516-17; *Williams*, 529 U.S. at 370; *Rompilla*, 545 U.S. at 391-92; *Porter*, 130 S. Ct. at 449; *Griffin*, 622 F.3d at 844-45. Here, counsel fully investigated the violence claims and had no evidence demonstrating that appellant had ever witnessed Robert's violence.

Thus, counsel's actions in this case are like counsel's actions in *Edwards v. State*, 200 S.W.3d 500 (Mo. 2006). In *Edwards*, this Court found that counsel made a proper investigation into the defendant's social history by interviewing all known witnesses and learning at least some of the prior history, although all alleged facts were not revealed to counsel by the known witnesses. *Id.* at 516. Based on what information was known to counsel, this Court concluded that counsel's strategic decision not to present the traumatic childhood evidence, but instead present Edwards as a "contributing member of a loving family," was a reasonable strategic decision based on thorough investigation. *Id.* at 516-17. Likewise, counsel had acquired all known information available to them about Robert's past violence, but had no evidence directly tying appellant to Robert's violent actions. Thus, counsel's decision to forgo a defense based on Robert's violence was a reasonable strategic decision based on the information available to them after thorough investigation.

Further, counsel's decision not to call Dr. Lewis to testify about Robert's violence was reasonable trial strategy. Counsel both testified that they believed that Dr. Lewis' presented "problems" (PCR Tr. 181-182). Turlington testified that both appellant and his sister had denied or disagreed with things Dr. Lewis claimed they had said (PCR Tr. 181-182).

Davis-Kerry testified that, based on experiences in other cases and in things that had occurred in this case while consulting with her, Dr. Lewis had essentially proven unprofessional and unreliable, thus creating doubt as to how she would testify (PCR Tr. 237-243, 273). Counsel is not ineffective for failing to call a witness they do not believe will be beneficial to the defense. *See, e.g., Sanders v. State*, 738 S.W.2d 856, 860 (Mo. 1987) (counsel's belief that a witness would not beneficial rendered counsel's decision not to investigate and call that witness reasonable).

Appellant attempts to contradict a finding of reasonable trial strategy by citing to testimony from counsel Davis-Kerry in the previous evidentiary hearing that she believed the evidence of Smith's violence was presented in the first trial and that the defense wanted to do something different in the retrial (App. Br. 60-61). Appellant overstates this testimony and ignores abundant testimony of counsel's reasonable trial strategy. It is true that Davis-Kerry testified in that earlier hearing about such testimony being admitted in the earlier trial (which was inaccurate), but repeatedly qualified that answer, saying, "*I think* that *kind of evidence* was presented *somewhat* to the first jury," demonstrating some uncertainty about that (SC92101 L.F. 272). Her other answers at that time did not contain such uncertainty; she clearly testified that they chose not to present Robert's past violence because

"number one, Terrance never said he [suffered violence at the hands of Robert], and we specifically asked him about that. And number two, in the past I have presented that kind of evidence" (SC92101 L.F. 272). Thus, counsel was not certain about her belief about the previous trial but was certain about appellant's failure to indicate witnessing Robert's violence and about past experience with such defenses. Further, appellant's argument ignores Davis-Kerry's testimony in this evidentiary hearing clarifying that the "something new" they wanted to try was only having one expert witness to present a more streamlined mental health case and then rely on appellant's own testimony (PCR Tr. 217-218). Both of those things were different from the first trial, which featured testimony from a psychiatrist and a neurologist who testified about appellant's brain function, but no testimony from appellant (SC83680 Tr. 1379-1512, 1670-1703). Further, appellant's argument ignores the abundant other evidence, detailed above, of counsel's strategic decision to use Robert as a positive character witness due to the lack of evidence of Robert using violence on or in front of appellant and the lack of other willing family to testify on appellant's behalf. Therefore, appellant's claim that counsel's strategic decision was based on a misunderstanding of the record from the first trial is meritless.

Finally, appellant failed to prove that he suffered prejudice from

counsel's failure to present this evidence. As the motion court concluded, without evidence that appellant actually was ever subjected to actual violence by Robert, either to himself or to another which he witnessed, appellant failed to demonstrate how such violence could have had any effect on appellant (PCR L.F. 403-404). Any conclusion that childhood exposure to Robert's violence affected appellant thus would have been highly speculative. A defendant does not demonstrate prejudice from speculative mitigation claims. *See, e.g., Gonzalez v. Knowles*, 515 F.3d 1006, 1015-16 (9th Cir. 2008) (claim of ineffective assistance for failing to investigate potential evidence of mental illness was speculative and did not establish prejudice where there was no evidence the defendant had a mental illness). Therefore, appellant failed to prove prejudice.

II.

The motion court did not clearly err in denying appellant's claim that trial counsel were ineffective for failing to call Dr. Dorothy Lewis (responds to appellant's Point III).

A. Facts

Dr. Lewis testified by deposition in the guilt phase of appellant's first trial (SC83680 Def. Exh. E). In that deposition, Dr. Lewis testified that, in the months leading up to the murders, appellant became more suspicious of people due to numerous stressors in his life, many of which involved the Rainwaters (SC83680 Def. Exh. E 36-38). He became more depressed, unable to sleep, experienced crying, and became more distraught and ruminative (SC83680 Def. Exh. E 38). He was "just disintegrating" psychologically (SC83680 Def. Exh. E 38). He became filled with rage because he believed that the Rainwaters were "plotting" to take the baby away from him and move her to California (SC83680 Def. Exh. E 39-40). She testified that appellant's memory of the murders was "absent in parts and in other parts distorted." (SC83680 Def. Exh. E 43). She testified that appellant claimed that he did not remember the shooting of Debbie, knew that he did not kill Debbie, and knew who did but could not say; he also claimed that he shot Steven in self-defense (SC83680 Def. Exh. E 44). Her opinion was that

appellant was paranoid, severely depressed, and in an altered state at the time of the murders because he was suffering from a mental disease or defect (SC83680 Def. Exh. E 46-47). Further, she opined that the mental disease impaired his ability to coolly reflect on the murders (SC83680 Def. Exh. E 46-47). She also opined that appellant could not remember the acts with which he was charged (SC83680 Def. Exh. E 46-47).

In his amended motion, appellant alleged that counsel were ineffective for failing to call Dr. Lewis at the retrial to testify about appellant's mental health to establish statutory and non-statutory mitigating circumstances (PCR L.F. 63-70). He alleged that Dr. Lewis would have testified that appellant had been diagnosed with major depression, paranoia, and psychogenic amnesia by "several mental health experts" (PCR L.F. 65). He alleged that Dr. Lewis would have testified that appellant was in an "altered state" at the time of offenses, had "distorted memories" and amnesia of the events surround the murders, and experienced psychotic symptoms including auditory hallucinations and paranoid ruminations (PCR L.F. 67). He alleged that counsel, knowing this, failed to present this evidence to provide a "wealth" of statutory and non-statutory mitigating evidence (PCR L.F. 67-68). He alleged that there was a reasonable probability that he would not have been sentenced to death but for counsel's failure to call Dr. Lewis (PCR L.F.

69).

Dr. Lewis's testimony was submitted at the evidentiary hearing by deposition (PCR Tr. 7; Exh. FF). She testified that appellant was becoming obsessed with the thought that the Rainwaters were going to deprive him of all contact with his daughter (Exh. FF 62). She also said that appellant confessed to shooting Stephen, but insisted he had not shot Debbie (Exh. FF 64-65). Dr. Lewis diagnosed appellant with depression and said that he was under extreme mental disturbance at the time of the murders (Exh. FF 69-70). She also expressed the opinion that appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired because he was delusional and was misperceiving what was going on around him (Exh. FF 70). Dr. Lewis said there were a couple of possibilities for appellant's trial testimony where he remembered shooting Debbie (Exh. FF 71). She stated that one explanation was that some of his memories did come back (Exh. FF 72). Dr. Lewis said an equally plausible explanation was that he pieced together the events from what he had heard from others about what happened (Exh. FF 72). Dr. Lewis said that appellant's retrial testimony did not change her opinions about his mental state at the time of the offense (Exh. FF 73). She said that she would have testified to those opinions if called as a witness at the 2008 retrial (Exh.

FF 74).

Counsel Turlington testified that counsel had spoken with Dr. Lewis and were aware of her findings, including the claims of appellant's "deteriorating mental health" prior to the murders and being in an "altered state" at the time of the murders, the diagnosis of depression with psychotic features, the claims of amnesia and "distorted memory," and her opinion that appellant and appellant's little sister had heard voices (PCR Tr. 177-179). She testified that she was aware that Dr. Lewis's testimony could have supported two statutory mitigating circumstances (PCR Tr. 181). Counsel Turlington testified that they decided not to use Dr. Lewis for several reasons (PCR Tr. 182). First, appellant's sister denied Dr. Lewis's claim that she had claimed to have heard voices (PCR Tr. 182). Second, appellant disagreed with Dr. Lewis's claim that he had been in a dissociative state (PCR Tr. 182). Third, appellant "did not like Dr. Lewis" (PCR Tr. 206). Fourth, the defense could have Dr. Holcomb testify about Dr. Lewis's findings as part of his testimony and thus introduce the same conclusions without the "problems" that Dr. Lewis had (PCR Tr. 181). Therefore, they decided to use Dr. Holcomb instead of Dr. Lewis (PCR Tr. 181).

Counsel Kerry-Davis testified that, in general, the defense wanted to change what had been done in the first trial to use less mental health

evidence and instead rely on appellant telling the jury himself what he was thinking and feeling at the time (PCR Tr. 217-218). Thus, they decided to use "*a* mental health professional" instead of multiple experts (PCR Tr.217) (emphasis added). She testified that the defense "did [their] best to confer with" Dr. Lewis before trial (PCR Tr. 237). She testified that Dr. Lewis was "very, very difficult to work with" (PCR Tr. 237). Dr. Lewis first told them she had no recollection of appellant's case and then, when her memory was refreshed, still could not accurately remember the facts of the case (PCR Tr. 237, 242). Dr. Lewis had been difficult to work with in other Public Defender cases; in one case, she refused to leave her hotel room until an investigator went to physically bring her to the trial (PCR Tr. 238, 273). Not only was Dr. Lewis difficult to work with, but, in this case, she was "not delivering on the work" (PCR Tr. 239). For example, she either forgot receiving records from counsel or lied about not receiving those records even though she had signed for them and then admitted she had them but had not looked at them; she then insisted that they be formatted in a different way for her review (PCR Tr. 242-243). She also was not very persuasive in previous cases she had done for the Public Defender's office even if she could be persuasive in other contexts, such as radio and television interviews (PCR Tr. 273). Counsel was not comfortable with Dr. Lewis testifying because "I would have not had any

idea what would have come out of her mouth" (PCR Tr. 243). Finally, counsel testified that appellant admitted to counsel during the trial that he had lied to all of the doctors about his lack of memory, saying that "he was playing with Dr. Lewis when she was diagnosing him" and that he remembered everything about the Debbie's murder (PCR Tr. 249).

The motion court denied this claim, finding that Dr. Lewis's testimony was not credible, that her similar testimony had been rejected at the previous trial, that she lacked a good grasp of the facts, that she was a "victim" of appellant's lies that damaged any credibility she otherwise may have had (PCR L.F. 383-384, 403-404).

B. There was No Clear Error

The motion court did not clearly err in denying appellant's claim. First, counsel made a reasonable choice of trial strategy not to use Dr. Lewis as an expert witness, planning instead to use Dr. Holcomb, who would be able to testify to the same information and conclusions (PCR Tr. 181-182). Trial counsel's selection of which expert witnesses to call at trial is generally a question of trial strategy and is virtually unchallengeable. *McLaughlin v. State*, 378 S.W.3d 328, 343 (Mo. 2012). This is especially true where counsel concludes that the testimony of another expert will be sufficient to present all of the needed information about the defendant's mental health issues. *Id.* at

342-43.

Here, counsel had significant problems with Dr. Lewis. She made statements about appellant and his sister which they denied making (PCR Tr. 182). She either could not accurately remember facts about the cases and other details about her work on it or lied to counsel about those details, such as the manner in which she had presented her prior testimony and whether she had received requested documents from counsel (PCR Tr. 237, 242-243). She had a history of being a difficult witness to work with in the Public Defender's capital litigation division (PCR Tr. 238, 273). She was not "delivering on the work" (PCR Tr. 239). Her behavior made her so unreliable to counsel that counsel would not have known what to expect to "come out of her mouth" at trial (PCR Tr. 243). When defense counsel believes that a witness's testimony will not unequivocally support his client's position, it is a matter of trial strategy not to call him, and the failure to call such a witness does not constitute ineffective assistance of counsel. *Winfield v. State*, 93 S.W.3d 732, 739 (Mo. banc 2002). In light of the difficulties Dr. Lewis presented, counsel reasonably chose to use the less-problematic Dr. Holcomb to provide the same essential testimony. In light of that decision, had trial gone as counsel expected, Dr. Lewis's testimony would have been, at best, cumulative to Dr. Holcomb's testimony. Counsel is not ineffective for failing

to present cumulative testimony. *Collings v. State*, 543 S.W.3d 1, 16 (Mo. 2018). Thus, counsel's choice of Dr. Holcomb over Dr. Lewis was reasonable trial strategy.

While it is true that counsel eventually did not call Dr. Holcomb, this was not counsel's fault. As detailed in Point III, *supra*, appellant admitted to counsel for the first time during the trial that he had lied to all of the mental health expert witnesses, including Dr. Lewis and actually remembered everything about the murders (PCR Tr. 186-187, 249). Counsel reasonably believed that appellant's testimony[1] about the crimes and claims to have remembered them would contradict any expert testimony claiming that appellant suffered from amnesia resulting from his alleged mental diseases or defects, which would have destroyed appellant's and the expert's credibility (PCR Tr. 204-205). Counsel's decision not to present contradictory testimony is reasonable trial strategy. *Ringo v. State*, 120 S.W.3d 743, 749 (Mo. banc 2003). The fact that counsel could no longer reasonably call and expert and appellant was based on appellant's lack of truthful cooperation, not through any unreasonable action or decision by counsel. Counsel is not ineffective for making strategic decisions regarding expert witness where the

[1]The issue of appellant's decision to testify is discussed in Point VII, *supra*.

record shows the defendant's lack of cooperation regarding evaluation by those witnesses. *Davis v. State*, 486 S.W.3d 898, 909 (Mo. 2016). Thus, even though counsel was unable to present Dr. Holcomb's testimony, the decision to employ Dr. Holcomb instead of Dr. Lewis (whose testimony would have had the same contradiction with appellant's testimony) was not unreasonable.

Appellant was also not entitled to relief on this claim because he failed to prove that Dr. Lewis's testimony provided a viable defense. The motion court found that Dr. Lewis's evidentiary hearing testimony by deposition was not credible (PCR L.F. 383-384). To demonstrate ineffective assistance of counsel for failing to call a witness, the movant must prove that the proposed testimony presented a viable defense. *Strong v. State*, 263 S.W.3d 636, 652 (Mo. 2008). By necessity, a viable defense must be a true defense, as counsel has no obligation to present false evidence. *See, e.g., Vann v. State,* 26 S.W.3d 377, 380 (Mo. App., S.D. 2000) (counsel has a duty not to knowingly present perjured testimony); *State v. Dixon*, 969 S.W.2d 252, 257 (Mo. App., W.D. 1998) (counsel was not ineffective for failing to call an alibi witness when counsel doubted the legitimacy of the witness's testimony). The motion court's rejection of a witness's testimony as non-credible goes to the issue of whether appellant met his burden of proving his claim for relief (i.e., that a defense

was actually true and thus viable). *Davis v. State*, 486 S.W.3d 898, 905 n. 2 (Mo. 2016). Because Dr. Lewis's testimony about appellant's mental issues was not believed, appellant failed to prove that he had viable mental health mitigation evidence. Therefore, appellant failed to prove his claim.

Finally, appellant failed to prove that there was a reasonable probability of a different result but for counsel's failure to call Dr. Lewis. As the motion court concluded, appellant's first jury heard the same evidence and conclusions by Dr. Lewis that appellant claimed she should have presented at the retrial and still returned a death verdict (PCR L.F. 404; SC83680 Def. Exh. E 36-47; Exh. FF 62-73). Appellant argues that this finding could not be relied on because a potentially biased juror sat on the jury and the evidence was elicited in the guilt phase, not the penalty phase (App. Br. 94). *See Anderson II*, 196 S.W.3d at 40-42. But neither of these arguments deprive the court's finding of accuracy. First, the evidence was not limited to the guilt phase. Both the instruction and closing argument permitted the jury to use guilt phase evidence to determine whether mitigating evidence outweighed aggravating evidence (SC83680 L.F. 1016; (SC83680 Tr. 1731). Further, the jury was instructed on both statutory mitigating circumstances appellant claimed were supported by Dr. Lewis's testimony (SC83680 L.F. 1016). Had the jury really believed that Dr. Lewis's

testimony sufficiently mitigated appellant's responsibility, it would have returned a life sentence. Second, the jury did not hang on the issue of punishment; thus, the finding of death was unanimous (SC83680 L.F. 1021-1022). Had any of the eleven qualified jurors truly believed appellant's mental health defense, it would have hung on the issue of punishment (SC83680 L.F. 1022). Thus, the prior verdict rejecting Dr. Lewis's conclusions was relevant to demonstrate a lack of prejudice. At the very least, it was sufficient to demonstrate to counsel that Dr. Lewis's prior testimony had been unsuccessful and thus supported counsel's decision to pursue a different approach to the mental health evidence in the retrial (PCR Tr. 217-218). Therefore, appellant failed to overcome the presumption of reasonable trial strategy or prove prejudice.

III.

The motion court did not clearly err in denying appellant's claim that trial counsel were ineffective for failing to call Dr. Robert Holcomb (responds to appellant's Point IV).

A. Facts

In his amended motion, appellant alleged that counsel were ineffective for failing to call Dr. Holcomb to testify in support of statutory and non-statutory mitigation (PCR L.F. 70-75). He alleged that Dr. Holcomb would have testified that appellant suffered from "major depression and psychotic paranoia" during the offenses which contributed to "severe emotional distress so that he did not fully appreciate the nature, quality, and wrongfulness of his actions" (PCR L.F. 72-73). He alleged that Dr. Holcomb could have provided a "wealth" of mitigating information and information to explain appellant's testimony and would have supported the submission of two statutory mitigating circumstances (PCR L.F. 73). He alleged that, but for counsel's failure to call Dr. Holcomb, there was a reasonable probability that the jury would not have sentenced appellant to death (PCR L.F. 74).

At the evidentiary hearing, Dr. Holcomb testified that he evaluated appellant in 2001 in connection with the first trial (PCR Tr. 39). He testified that, among the records he reviewed was an assessment by Dr. Lewis, and he

summarized Dr. Lewis's findings that appellant suffered from a severe major depression with psychotic paranoia and that he also suffered "psychogenic amnesia" and thus denied committing Debbie's murder, claiming that appellant remembered nothing about it (PCR Tr. 41, 43-44). Dr. Holcomb testified that appellant "adamantly refused" to acknowledge that he killed Debbie, claiming that he had no memory of it and that she must have been dead before he arrived (PCR Tr. 46, 49). Dr. Holcomb opined that appellant still suffered from major depression because of his negative self-image and sense of hopelessness and still had paranoid symptoms because he did not interact with his attorneys and did not believe they had done a good job (PCR Tr. 46-47). Dr. Holcomb testified that he believed appellant's claims that he did not remember killing Debbie due to the traumatic nature of the event (PCR Tr. 48). He opined that the major depression, psychotic depression, and alcohol abuse all contributed to appellant becoming delusional, believing people wanted to hurt him and the baby (PCR Tr. 51). He testified that appellant was under "extreme mental or emotion disturbance" at the time of the murders and that his ability to fully appreciate the wrongfulness of his actions and conform them to the law was substantially impaired by that distress (PCR Tr. 53).

Dr. Holcomb testified that counsel contacted him to testify at the retrial and provide mitigation testimony (PCR Tr. 54). Dr. Holcomb interviewed appellant two more times (PCR Tr. 54). He reviewed test results showing no negative neurological findings (PCR Tr. 55). He amended his report, finding that appellant was no longer suffering the high level of distress or paranoia that he was suffering in 2001 (PCR Tr. 56). Appellant still denied the shooting, again claiming that he did not kill Debbie (PCR Tr. 56). Dr. Holcomb believed appellant's claims of amnesia (PCR Tr. 56). His conclusions were the same (PCR Tr. 57). He testified that he was prepared to testify at the retrial but was told by counsel prior to his testimony that he was no longer needed because appellant had "insisted that he testify" and told the jury that he did remember Debbie's murder (PCR Tr. 58, 69-70). He testified that, even if he had been made aware that appellant remembered Debbie's murder, he still would have had the same opinions (PCR Tr. 58-59). He admitted that he never read appellant's trial testimony but that appellant's memory coming back was possible even with psychogenic amnesia; that appellant remembered the murders at the time of trial did not dissuade Dr. Holcomb's belief that appellant had not remembered it prior (PCR Tr. 60-61, 64).

On cross-examination, Dr. Holcomb admitted that the amnesia was "one piece" of his conclusion because it showed that appellant was "very stressed and very emotionally disturbed" (PCR Tr. 67). The doctor also stated that appellant's alcohol consumption contributed to his "emotional instability" (PCR Tr. 67-68).

Counsel Turlington testified that the defense decided to have Dr. Holcomb testify at the retrial and had him update his previous report with an addendum in preparation for trial (Tr. 182, 184-186). But,during some of the State's testimony, appellant told counsel that the State's witness was lying, which he knew because he "really remembered what happened" and it was not consistent with the witness's account (PCR Tr. 186). Appellant's unexpected admission that he remembered everything was a "bombshell" (PCR Tr. 187). Counsel spent several hours with appellant that evening, during which he explained that he remembered everything; counsel said that appellant had "been lying for ten or eleven years about what happened and he fooled the doctor and now he's going to get up here and testify" (PCR Tr. 187). Because appellant was going to testify, counsel decided not to call Dr. Holcomb because appellant's testimony would have undercut Dr. Holcomb's testimony about amnesia (PCR Tr. 187-188, 205). Because counsel believed appellant's testimony that he "was just fooling everyone for ten or eleven

years" would render Dr. Holcomb's testimony problematic, counsel decided that they could only present appellant's or Dr. Holcomb's testimony; otherwise, the credibility of both would be "completely tanked" (PCR Tr. 204-205). Counsel testified that, because appellant testified instead of Dr. Holcomb, appellant's claims of amnesia were never heard by the jury (PCR Tr. 201).

Counsel Davis-Kerry testified that the defense had decided to pare down the mental health portion of the case and only present Dr. Holcomb for that evidence (PCR Tr. 227). But, during trial, appellant admitted "that he had lied to the doctors, that he remembered everything" (PCR Tr. 249). After a long discussion with appellant that night, they decided that, because appellant was going to testify, they would not call Dr. Holcomb (PCR Tr. 248-251). The defense decided to use appellant to testify about what he was feeling at the time to make up for the lack of expert testimony necessitated by appellant's last-minute admission of lying to the experts (PCR Tr. 252-253).

The motion court denied this claim, concluding that counsel made a reasonable strategic decision not to call Dr. Holcomb because counsel believed appellant's testimony was more important and Dr. Holcomb's credibility would be undermined upon the revelation of appellant's fabrication of his

amnesia (PCR L.F. 405-406). Further, in light of Dr. Holcomb's insistence on his conclusion despite appellant's admission to lying to the mental health experts, the motion court found Dr. Holcomb's testimony incredible (PCR L.F. 386-387).

B. There was No Clear Error

The motion court did not clearly err in denying this claim because the decision not to call Dr. Holcomb was reasonable trial strategy. When defense counsel believes that a witness's testimony will not unequivocally support his client's position, it is a matter of trial strategy not to call him, and the failure to call such a witness does not constitute ineffective assistance of counsel. *Winfield v. State*, 93 S.W.3d 732, 739 (Mo. banc 2002). Here, counsel recognized that Dr. Holcomb's testimony about psychogenic amnesia regarding Debbie's murder would have conflicted with appellant's testimony that he remembered shooting Debbie and "completely tanked" the credibility of both witnesses (Tr. 774-776; PCR Tr. 58-64, 187-188, 204-205, 249). Counsel's decision not to present contradictory testimony is reasonable trial strategy. *Ringo v. State*, 120 S.W.3d 743, 749 (Mo. banc 2003). Because counsel reasonably believed that Dr. Holcomb's insistence that appellant truly had psychogenic amnesia was inconsistent with appellant's insistence that he had lied to the doctors about the amnesia, it was not unreasonable for

counsel to choose to not present Dr. Holcomb's testimony in an effort to preserve the credibility of not only appellant's testimony, but of the entire defense.

Appellant argues that counsel's decision was unreasonable because appellant's memory and the doctor's insistence about amnesia were not "mutually exclusive" (App. Br. 105). Appellant relies on Dr. Holcomb's testimony that the revelation of appellant's memory of the shooting was not a "genuine recall" of the events and appellant's claim of remembering was not actually lying about memory loss (App. Br. 105). This argument fails for several reasons. First, appellant's argument understates the actual record of appellant's memory claims. Appellant did not merely tell counsel that he just regained memory of the events, as suggested by Dr. Holcomb's testimony (PCR Tr. 58-61, 64), but instead told counsel that he had remembered the events all along and had lied to the experts (PCR Tr. 187-188, 204-205, 249). That appellant knowingly lied to the doctor and thus fooled him is far different than later regaining his memory or "confabulating" (i.e. creating a memory from exposure to others' reports of the crime). Because the evidence did not show that appellant's memory was newly discovered, but instead showed his admission to lying about his memory, appellant's claim that the record showed that appellant actually suffered from amnesia was meritless.

Second, appellant's claim of confabulation was also contradicted by the record. Dr. Holcomb claimed that appellant could have "fill[ed] in" his memory of Debbie's murder after having heard versions of what happened the night of the murder in prior hearings (PCR Tr. 61-62). But appellant's version of the actual murder of Debbie differed from the version presented in prior hearings. Amy Dorris, the only eyewitness to the shooting, previously testified at trial that appellant shot Debbie while she was on her knees begging for her life and he was standing over her (SC83680 Tr. 1305-1306; Tr. 628-630). The autopsy showed that the shot was to the back of her head downward to the base of the skull (PCR Tr. 606-609). But appellant claimed he shot Debbie while the two were side-by-side and physically struggling for the baby; appellant said he had an arm around the baby when he fired (Tr. 775, 789). While Dr. Holcomb claimed that inconsistencies were consistent with real memories coming back to someone with psychogenic amnesia (PCR Tr. 62), he did not testify that this was true of those creating false memories from others' accounts (PCR Tr. 61-62). Thus, the record showed that appellant did not unknowingly confabulate his memories based on prior accounts of others.

Third, appellant's claim that Dr. Holcomb's testimony that appellant's amnesia was consistent with appellant's admissions of remembering the

murder was meritless because the motion court rejected it as incredible (PCR L.F. 386-387). To demonstrate ineffective assistance of counsel for failing to call a witness, the movant must prove that the proposed testimony presented a viable defense. *Strong v. State*, 263 S.W.3d 636, 652 (Mo. 2008). By necessity, a viable defense must be a true defense, as counsel has no obligation to present false evidence. *See, e.g., Vann v. State,* 26 S.W.3d 377, 380 (Mo. App., S.D. 2000) (counsel has a duty not to knowingly present perjured testimony); *State v. Dixon*, 969 S.W.2d 252, 257 (Mo. App., W.D. 1998) (counsel was not ineffective for failing to call an alibi witness when counsel doubted the legitimacy of the witness's testimony). The motion court's rejection of a witness's testimony as non-credible goes to the issue of whether appellant met his burden of proving his claim for relief (i.e., that a defense was actually viable). *Davis v. State*, 486 S.W.3d 898, 905 n. 2 (Mo. 2016).

Dr. Holcomb had not interviewed appellant since before the retrial (i.e., prior to appellant's admission to lying) and did not even bother to review appellant's trial testimony to examine it for confabulation (PCR Tr. 60, 70-71). Because Dr. Holcomb's opinion about confabulation was not credible, counsel was not ineffective for refusing to present it. Thus, counsel could reasonably have concluded that Dr. Holcomb's claim that appellant suffered amnesia and appellant's admission that he did not were indeed inconsistent.

As the motion court concluded, by telling counsel in the middle of the retrial that he had lied to the mental health experts, appellant placed counsel in "stressful circumstances" that required "difficult strategic decisions" (PCR L.F. 406). Counsel is not ineffective for making strategic decisions regarding expert witnesses where the record shows the defendant's lack of cooperation regarding evaluation by those witnesses. *Davis*, 486 S.W.3d at 909. Even if counsel could have reasonably attempted to try to thread the proverbial needle with the jury and present both appellant's and Dr. Holcomb's inconsistent testimony, it was also reasonable to conclude that the jury would hold the inconsistency against the defense. Trial counsel is not ineffective for pursuing one reasonable trial strategy to the exclusion of the other. *Id.* Pursuing a theory of remorse is reasonable trial strategy. *See, e.g., Glass v. State*, 227 S.W.3d 463, 473 (Mo. 2007). Because counsel's decision not to call Dr. Holcomb in order to preserve appellant's credibility was reasonable, appellant failed to meet his burden of overcoming the presumption of reasonable trial strategy.

IV.

The motion court did not clearly err in denying appellant's claim that counsel were ineffective for failing to call four witnesses to testify about appellant's mental state before and after the murders (responds to appellant's Point V).

A. Facts

In his amended motion, appellant claimed that counsel were ineffective for failing to call witnesses to testify that appellant was depressed, withdrawn, and upset in the time leading up to the murders and disoriented and appearing to lack knowledge as to what he had done after the murders (PCR L.F. 37-38). He alleged that Tim Jones would have testified that appellant became abnormally depressed, distant, and more quiet than before and told him that the Rainwaters were trying to keep him from his daughter (PCR L.F. 43). He alleged that Adrienne Webb would have testified that, on the day of the murders, appellant acted strangely and unusually shared his feelings for them (PCR L.F. 46-47). She also saw him in the jail after the murders and that appellant did not "seem to be all there" and did not understand what he had done or why he was in jail (PCR L.F. 47). He alleged that Larry Woods, a Public Defender investigator, would have testified that he saw appellant after the murder and that appellant was disoriented, did

not understand what he had done, and was "not all there" (PCR L.F. 49). He alleged that Lamont Stovall would have testified that he saw appellant in jail and that appellant was disoriented and did not understand why he was there (PCR L.F. 51). Appellant alleged that all of these witnesses had been identified through investigation and were thus known to counsel, that they were all willing to testify, that there was no trial strategy reason for failing to call them, and that, but for counsel's failure, there was a reasonable probability of a different result (PCR L.F. 43-52).

Jones testified at the evidentiary hearing (PCR Tr. 18). He testified that he knew appellant since childhood and knew him to be quiet and non-aggressive (PCR Tr. 20-21). He testified that he knew appellant lost his job and had a baby on the way (PCR Tr. 22). He testified that appellant had usually been talkative and jovial when they were together, but the last time he saw appellant prior to the murders, he was distant and in a daze like "he wasn't there with us" (PCR Tr. 23). He testified that appellant was depressed and talked about Abbey's family trying to keep him away from his child (PCR Tr. 23). He recalled going with other potential witnesses to speak with the defense team before the first trial (PCR Tr. 25-26). He testified that he was not contacted before the retrial or else he would have been willing and available to testify (PCR Tr. 26).

The prior evidentiary hearing testimony of the three other potential witnesses was admitted (PCR Tr. 12-13; Exh. II, KK, LL). In her prior testimony, Webb testified that she knew appellant since childhood and that he had been a good, supportive friend (Exh. KK 346-348). She knew appellant to be quiet and "a good guy" (Exh. KK 348). Near the time of the murders, appellant was not very relaxed anymore, instead becoming cynical, negative, and agitated; his dress was unusually messy and looked sweaty and wild all the time (Exh. KK 349-350). He was paranoid and took everything personally (Exh. KK 351). The day of the murders, he was loud and boisterous, would not make eye contact, and kept walking around (Exh. KK 352). She testified that her husband met with appellant's mitigation specialist in 2007 but that she was "down for quite some time" following surgery around that time (Exh. KK 353-354). She testified she would have spoken to the defense had they asked and that she was willing to testify at trial (Exh. KK 354-355).

Woods (now deceased) testified that, as a Public Defender investigator, he had served appellant with a subpoena a couple of weeks prior to the murders and that appellant was "real bright," nice, very cooperative, real clean cut, and real sharp (Exh. II 92-93). After the murders, he went to get an application for services from appellant and testified that appellant had experienced "a total transformation"; he did not know who Woods was or why

he was in jail (Exh. II 96). He testified that appellant could not answer questions and only spoke about his daughter (Exh. II 96). He testified that appellant "just wasn't there" (Exh. II 96). He testified that he helped with the investigation for the first trial and testified on appellant's behalf (Exh. II 100-101). He testified that he might have talked to the trial team for the retrial because he "talked to somebody" (Exh. II 102). He testified that he was willing to cooperate and would have testified for appellant in the retrial (Exh. II 102, 106). He claimed that he was never uncooperative with counsel (Exh. II 106). He testified that he did suffer a heart attack in 2008, but claimed to be well enough to testify at the time of trial (Exh. II 107).

Stovall testified that he knew appellant from school and knew him to be a "very good guy" who played sports and stayed out of trouble (Exh. LL 76-78). He saw appellant briefly in the jail in August 1997 (Exh. LL 78-79, 82). He testified that he saw appellant in passing and that appellant looked absent minded and did not seem to know why he was in jail (Exh. LL 79, 82).

Mitigation specialist Catherine Luebbering testified that Jones had been interviewed by the first trial team and that the defense had information about him and his potential testimony (PCR Tr. 83-88). She testified that she tried to contact Jones by phone and in person on an investigative trip to Poplar Bluff but that the trial team had no success in finding him (PCR Tr.

88). She testified that she met with Webb's husband prior to trial and that the defense was aware of Webb's potential testimony (PCR Tr. 93-95). She testified that they tried to contact Webb, but that her husband would not return phone calls and that their efforts to go by her house and speak to her were unsuccessful (PCR Tr. 95-96). A note in the defense files showed that Mr. Webb was avoiding the defense team (PCR Tr. 96). She testified that she spoke to Woods on the phone about the case (PCR Tr. 100; Exh. CC). The notes from that phone call do not show any conversation occurred about Woods potentially testifying, but only that he would contact some people who could be helpful (Exh. CC). She testified that the trial team did not obtain records seeking the identity of everyone in the jail at the same time as appellant or attempt to contact Stovall (PCR Tr. 103).

Counsel Turlington testified that she believed the Jones information was in the file and that appellant mentioned him (PCR Tr. 148). She testified that the file indicated the defense wanted to speak with him (PCR Tr. 151). She had no independent recollection of the efforts made to locate him or the reason for not calling him (PCR Tr. 149-150). She also knew that the defense had information about Webb but that she was sick and her husband would not give them access to her to speak to her about the case; at least two efforts to speak to her were unsuccessful (PCR Tr. 153-154). She testified that they

wanted to call Woods and tried to make contact with him (PCR Tr. 158). They considered calling Woods even during trial, but a drastic change in strategy caused by appellant admitting he lied about having amnesia about Debbie's murder changed their strategy (PCR Tr. 158). She also recalled that there was something about Woods that made it seem that he was uncooperative with the defense, but she could not recall any specifics (PCR Tr. 158-159). She did not recall any effort to interview anybody incarcerated with appellant (PCR Tr. 159-160).

Counsel Davis-Kerry testified that there were "a number of witnesses" Luebbering was trying to contact but either refused to get in contact with her or were not forthcoming when she did (PCR Tr. 221). She remembered Jones's name and that appellant had provided the name of some friends (PCR Tr. 218). She could not recall whether they were able to contact Jones (PCR Tr. 220). She did not recall anything about Webb (PCR Tr. 222-223). She did not recall if they tried to get jail records about other inmates incarcerated with appellant (PCR Tr. 229).

As to Woods, she testified that the defense team made an appointment to speak with him at city hall since he was now a small-town mayor; when they arrived, however, they were told that Woods was not expecting them even though they had an appointment (PCR Tr. 225-226). They waited an

hour to talk to him because he was supposed to come back, but he never did (PCR Tr. 226). She could not recall whether there was another in-person contact attempt or a phone call where "he wasn't as enthusiastic as he had been when he was working for the Public Defender system" (PCR Tr. 227). She testified that Woods's observations at the jail was not the type of testimony they were going to "use…so much" because they had planned on using Dr. Holcomb for mental health issue evidence (PCR Tr. 227). Thus, she could not recall if they were that intent on pursuing Woods after his failure to meet with them (PCR Tr. 227-228). She seemed to remember that the defense believed that Woods would not be as helpful as they initially thought and decided not to call him (PCR Tr. 228).

The motion court denied these claims (PCR L.F. 401-402). The court credited the defense team's testimony that Woods was dodging the defense team and thus would not cooperate with them, that there was difficulty contacting Jones, and that the Webbs were avoiding the defense team despite reasonable efforts to contact Webb (PCR L.F. 388, 390-391). The court found that Jones's testimony was not compelling, very general, and may have opened the door to a statement appellant made to Jones that if the Rainwaters would not let appellant see the baby, "then they wouldn't see the baby either" (PCR L.F. 401). The court concluded that Webb resisted the

defense team's efforts to contact her (PCR L.F. 402). The court concluded that Stovall's proposed testimony of seeing appellant for a few minutes was not compelling or persuasive (PCR L.F. 387, 402).

B. There was No Clear Error

Ineffective assistance for failure to call a witness requires a defendant to show: (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 produced a viable defense. *Edwards v. State*, 200 S.W.3d 500, 518 (Mo. 2006). Here, appellant failed to prove these points as to each of these witnesses.

First, appellant failed to prove that counsel could have located the witnesses through reasonable investigation or that they were willing to testify. The motion court found that the credible evidence showed that Webb and Woods were not cooperative and resisted counsel's efforts to interview them and arrange for their testimony (PCR L.F. 388, 390-391). These findings were supported by the evidence (PCR Tr. 158-159, 225-228). The motion court was free to credit counsel's testimony on these issues and reject the proposed witnesses' testimonies, as the motion court was free to believe or disbelieve any portion of the testimony. *Duncan v. State*, 539 S.W.3d 95,

105 (Mo. App., W.D. 2018). This Court defers to those credibility findings. *Barton v. State*, 432 S.W.3d 741, 760 (Mo. 2014).

The evidence also established that counsel attempted to contact Jones both by phone and in person, but that he could not be located (PCR Tr. 88). Thus, the record showed that, as to Jones, Webb, and Woods, counsel made reasonable efforts to locate the witnesses and secure their cooperation. Unsuccessful efforts to contact witnesses by phone and by attempting to visit them in person constitute a reasonable investigation and effort to contact those witnesses. *See, e.g., Barker v. State*, 83 S.W.3d 677, 680 (Mo. App., S.D. 2002) (efforts to contact by phone, letter, and at the witness's residence was a reasonable investigation). In light of the "heavy deference" given counsel's investigative decisions in light of considerations of "real limitations of time and human resources," appellant failed to prove that counsel's investigation of these three witnesses was unreasonable or that they were willing to testify.

As for Stovall's testimony, appellant failed to prove that counsel knew or should have known Stovall was a potential witness. All that appellant established was that, sometime within the month after appellant was arrested, Stovall saw appellant for a few moments and believed he was absent minded and did not know why he was there (Exh. LL 78-82). He had

no interaction with appellant after that (Exh. LL 79). Stovall did not testify about when he got to the jail or how long he was there (Exh. LL). There was no evidence that appellant or another person known to appellant could tell counsel about Stovall. Thus, appellant's claim suggests that counsel had an affirmative duty to track down every inmate who passed through the jail in at least a five-week period after appellant's arrest to find a single witness who knew appellant and saw him for a few moments. Appellant's argument is unreasonable. Counsel's duty to investigate does not require counsel to scour the globe on the off-chance that something will turn up. *Strong v. State*, 263 S.W.3d 636, 652 (Mo. banc 2008). Thus, appellant failed to prove that counsel knew or should have known about Stovall.

Further, appellant failed to prove that the four witnesses' proposed testimony presented a viable defense. The motion court found that the proposed testimony of Woods and Stovall as to appellant's demeanor and condition after the murders was unpersuasive (PCR L.F. 387-388). By necessity, a viable defense must be a true defense, as counsel has no obligation to present false evidence. *See, e.g., Vann v. State,* 26 S.W.3d 377, 380 (Mo. App., S.D. 2000) (counsel has a duty not to knowingly present perjured testimony); *State v. Dixon*, 969 S.W.2d 252, 257 (Mo. App., W.D. 1998) (counsel was not ineffective for failing to call an alibi witness when

counsel doubted the legitimacy of the witness's testimony). The motion court's rejection a witness's testimony as non-credible goes to the issue of whether he met his burden of proving his claim for relief (i.e., that a defense was actually true and thus viable). *Davis v. State*, 486 S.W.3d 898, 905 n. 2 (Mo. 2016). Because the motion court was not persuaded to believe the testimony of either Woods or Stovall, appellant failed to prove that there was a viable defense.

Appellant also failed to prove that Jones's testimony provided a viable defense because it opened the door to testimony that was far more damaging to appellant than the allegedly beneficial evidence would have aided appellant. Jones's interview with the original defense team included recounting appellant telling him that he was considering taking the baby from the Rainwaters and that, "if they wouldn't let him see her, then they wouldn't see the baby, either" (Exh. AA). This evidence could have made it seem as if appellant planned to deprive the victims of access to the baby well before the murders and thus that appellant planned to kill them well before the events of the day of the murder. This testimony would not have aided appellant's defense that the murder was "out of character," and it could have significantly harmed the defense. If evidence would not have unqualifiedly supported the defense theory, counsel is not ineffective for failing to present

that evidence. *Tisius v. State*, 519 S.W.3d 413, 428 (Mo. 2017). Counsel is not considered ineffective for failing to call a witness whose testimony would open an unfavorable avenue of cross-examination. *Rios v. State*, 368 S.W.3d 301, 307 (Mo. App. W.D. 2012). Counsel was not ineffective for failing to present Jones's risky testimony.

Finally, appellant failed to prove that any of the proposed testimony would have provided a viable defense, was not a matter of reasonable strategy, or resulted in prejudice because all of the testimony went to mental health issues that counsel strategically abandoned due to appellant's revelation that he had lied about not remembering the murders.[2] Turlington's testimony established that this action by appellant made counsel have to change their strategy to avoid evidence that appellant claimed that, because of his mental state at the time of the murder, he did not remember anything (PCR Tr. 158, 187-188, 204-205). Because appellant testified that he remembered everything about the murders (Tr. 774-784), evidence suggesting that he was in such a mental state that he could not do so, either right before or right after the murders, would have been contrary to counsel's trial strategy at that point and would not have aided appellant's defense.

Moreover, the testimony from appellant and other defense witnesses of

[2]The reasonableness of this decision was discussed in Point III, *supra*.

the stressful and upsetting circumstances leading up the murders duplicated some of the effect of Jones's and Webb's testimony (Tr. 752-774, 836-839). Counsel is not ineffective for failing to present cumulative testimony. *Collings v. State*, 543 S.W.3d 1, 16 (Mo. 2018). Thus, the proposed testimony did not present a viable defense, would have been contrary to counsel's reasonable trial strategy, and would not have had any appreciable positive effect on appellant's case. Therefore, appellant failed to prove that counsel's performance regarding these witnesses was deficient or that he suffered prejudice.

V.

The motion court did not clearly err in denying appellant's claim that trial counsel were ineffective for failing to object to cross-examination of appellant about the State's witnesses' testimony (responds to appellant's Point VI).

A. Facts

The prosecutor cross-examined appellant as follows:

> Q. Thank you, Your Honor. So when you went over there on the afternoon of July 25th, Stephen Rainwater called you a coward, is that right?
>
> A. Yes.
>
> Q. That didn't make you mad at the time. You got mad later?
>
> A. I was already mad.
>
> Q. All right. So it did make you mad. It was the truth, wasn't it?
>
> A. I mean, everybody's entitled to their opinion.
>
> Q. Well, men who beat on women are cowards, aren't they?

A. I never beat on a woman.

Q. You never beat on a woman?

A. No.

Q. Okay. So everything that was said about the physical abuse of Abbey Rainwater by you is a lie. Is that what you're saying?

A. The allegations that she made, I did not do those.

Q. Beg your pardon?

A. I did not do those.

Q. All right. So it is a lie. Is that what you're saying?

A. Yes.

Q. All right. That night, why did you go to the Rainwater house at all?

A. I wanted to see, I wanted to see my child.

Q. You had taken a gun to go see a child?

A. No.

Q. You did that night. You took a gun to that house, didn't you?

A. Yes.

Q. To see your child. Sir, it was your purpose to go there to kill somebody, wasn't it?

A. Yes.

Q. All right. So you didn't go there to see your child, did you?

A. I still went to see my child.

Q. And kill somebody, I guess? The fact is, sir, you were losing control of this situation, and you didn't like it, isn't that right?

A. I don't know, I guess you could say that.

Q. And if I understand what you're saying, it was the statements that were repeated to you by then Stacey Turner that really got you to thinking and getting, started getting you angry. Is that right?

A. I mean, I've been thinking about it for a while.

Q. Do you understand that Stacey sat where you're sitting right now yesterday and said she never said any of those things?

A. Yes.

Q. So she is lying on you, too?

A. I don't know what she's doing.

Q. Well, you're saying that's not true so you must be calling her a liar.

MS. KERRY: Judge, I'm going to object at this time.

A. It's a bad situation.

THE COURT: One at a time. Yes, ma'am.

MS. KERRY: My legal objection, commenting on another witness's testimony.

THE COURT: Sustained.

MR. AHSENS: I am allowed, sir, to explore inconsistencies in the evidence.

THE COURT: Sustained.

(Tr. 786-788).

In his amended motion, appellant claimed that trial counsel were ineffective for failing to object to the earlier questions about the State's witnesses "lying" (PCR L.F. 85-87). He alleged that counsel should have

objected to all of the improper questions and that, had counsel done so, there was a reasonable probability of a different outcome (PCR L.F. 89).

Counsel Davis-Kerry, who handled appellant's direct examination and thus was tasked with objecting during cross-examination, testified that she did not recall whether she thought about objecting prior to the point when she did object (PCR Tr. 255-256). On cross-examination, counsel testified that she generally will object to a misstatement of law, but, as to questions which are argumentative, she will consider objecting "depending on how I think it's coming across to the jury[.] I may object or I may not and I may use that in my closing argument later" (PCR Tr. 278). She considered the prosecutor's questions about State's witnesses "lying" as the type of argumentative questions as "something that's…best reserved for closing argument" (PCR Tr. 278). She was generally concerned that making too many objections comes across poorly to the jury and therefore the lack of objection meant she may have "made that mental calculation in my mind," especially if it appeared not to have a negative effect on the jury (PCR Tr. 279).

The motion court denied this claim, concluding that, while the questions were argumentative, they were not so inflammatory as to have any impact on the jury's verdict (PCR L.F. 407).

B. There was No Clear Error

It is true that it is improper for an attorney to directly ask one witness if another witness lied in his or her testimony. *State v. Roper*, 136 S.W.3d 891, 901 (Mo. App. W.D. 2004). But despite the merit an objection to the prosecutor's question would have had, appellant was not entitled to relief on his claim. First, appellant failed to overcome the presumption of reasonable trial strategy. Counsel testified that she did not specifically remember why she did not object to the earlier questions (PCR Tr. 255-256). Where counsel cannot verbalize her trial strategy for a decision or testifies that she cannot remember the reason for the decision for making a strategic decision, the movant does not overcome the presumption of reasonable trial strategy. *Rios v. State*, 368 S.W.3d 301, 310 (Mo. App., W.D. 2012); *Bullock v. State*, 238 S.W.3d 710, 715 (Mo. App., S.D. 2007). This is especially true here, as counsel testified that this is the type of question she may choose not to object to based on her perception of the jury's response, but would instead confront the questions in another way. Such a strategy is reasonable. *See, e.g., Harrison v. State*, 301 S.W.3d 534, 540-41 (Mo. App., S.D. 2009) (counsel Kerry-Davis was reasonable in choosing not to object to the same type of question because she believed her client handled the question well). Because the record shows counsel likely made a strategic reason to delay objection until the prosecutor

continued to ask similar questions, and appellant failed to prove the lack of a strategic decision, appellant failed to overcome the presumption of reasonable trial strategy.

Finally, appellant failed to prove prejudice from counsel's failure to object earlier. Ineffective assistance is rarely found in cases of failing to object and will only be found when the defendant has suffered a "substantial deprivation of his right to a fair trial." *Worthington v. State*, 166 S.W.3d 566, 582 (Mo. 2005). While objectionable, the prosecutor's questions achieved no substantive advantage. All of the evidence showing that appellant's statements were inconsistent with the prior testimony was already before the jury (Tr. 678, 681-682, 686-760-763, 707-708). The jury still had to resolve the questions of credibility between the State's witnesses and appellant regardless of the improper questions. Thus, appellant was not so prejudiced by the prosecutor's argumentative questions as to have substantially deprived him a fair trial. *See State v. Savory*, 893 S.W.2d 408, 411 (Mo. App., W.D. 1995) (no prejudice from the same type of question where the jury was required to resolve inconsistent versions of the events and the credibility of the various witnesses and there was no showing that the erroneous questions affected that determination).

The conclusion that there was no prejudice is especially true here, where the jury heard an objection to a similar question sustained shortly after the other improper questions (Tr. 788). Even in *Roper*, where the prosecutor made the same type of argument at least six times without any intervention, the Western District refused to find that there was a reasonable probability of a different result had an objection been made. *Roper*, 136 S.W.3d at 903-04. That the jury heard the trial court say that this type of question was improper, despite the prosecutor's argument to the contrary, certainly robbed the line of questioning of whatever prejudicial effect it may have had. Thus, appellant failed to prove that the prosecutor's questions were so improper that they had any reasonably probable effect on the jury's deliberations. Therefore, appellant failed to prove prejudice.

VI.

The motion court did not clearly err in denying appellant's claim that trial counsel were ineffective for failing to object to State's Exhibit 38, an *ex parte* order of protection received by Abbey Rainwater against appellant (responds to appellant's Point VII).

A. Facts

Prior to trial, counsel filed a Motion to Exclude Bad Acts in the Penalty Phase (Tr. 11: L.F. 57-60). Counsel argued that admitting such evidence violated due process because the jury was not given any guidance about the burden of proof that applied to that evidence (Tr. 12). Defense counsel stated that she anticipated that the State might put on evidence of alleged acts of domestic violence by appellant against Abbey Rainwater (Tr. 12-13). The prosecutor responded that the deterioration of their relationship that resulted in a restraining order against appellant was relevant to motive (Tr. 13). The trial court overruled the motion (Tr. 16). Defense counsel renewed the motion at a hearing the day before the trial began, and it was again overruled (Tr. 49-50).

Abbey testified on direct examination that, the day of the murders, Stephen took Abbey to the courthouse to get an ex parte order of protection issued against appellant (Tr. 645). The order of protection was admitted over

counsel's "previous objection" (Tr. 645). Abbey testified that she told appellant about the order over the phone that same day, causing appellant to become angry (Tr. 645-646). Near the completion of the direct examination, the exhibits were passed to the jury (Tr. 654-655).

Per assertions of fact raised in prior briefing in this case before this Court, State's Exhibit 38, the order of protection presented to the jury, was contained in a sealed plastic envelope-style cover (SC92101 Resp.Br. 78). The exhibit sticker was affixed to the outside of the exhibit as opposed to on the physical pages itself, suggesting that the original exhibit was not removed from the cover, but submitted to the jury in that form (SC92101 Resp.Br 78). In that form, only the front and back of the packet of six pages containing the petition and order were visible to the jury (SC92101 Resp.Br. 78). The front page included boilerplate language that the petitioner had filed a verified petition for an ex parte order of protection and that the issuing court "finds that there is good cause to issue" the order (Exh. NN).

Movant's Exhibit NN, a copy of the petition and order prepared by the clerk of this Court, supports the conclusion that the exhibit was in a sealed plastic envelope prior to this Court copying the exhibit in 2013 (Exh. NN). The first and last pages of the copies are reduced and contain, in bold ink, the inscription "AG-68" on the first page and "AGO Criminal Div. 6-11-12" on the

back, the latter of which is visible from behind on the first copy of the first page (Exh. NN). The second and second-to-last pages of the copies in Exhibit NN are full-sized copies of those two pages, but do not have the bold-ink inscriptions on them (Exh. NN). Thus, the records supports the inference that, prior to the most recent prior appeal in this case, State's Exhibit 38 was a sealed plastic envelope which held the order of protection.[3]

The front page included boilerplate language that the petitioner had filed a verified petition for an ex parte order of protection and that the issuing court "finds that there is good cause to issue" the order (Exh. NN). The last page contained an affirmation, signed by Stephen, that the facts in the petition were true (Exh. NN). The other pages included factual allegations alleging that appellant had repeatedly paged and called Abbey, choked her, bruised her neck, pulled her hair, and repeatedly threatened to kill her (Exh. NN).

On cross-examination, counsel questioned Abbey about conflicts between appellant, Abbey, and the victims, suggesting those were about

[3]Appellant does not contest that the exhibit was in the envelope-style cover, but posits that the jurors must have removed the order from inside the cover in order to review it (App. Br. 132-133). Respondent will address this argument *infra*.

various issues unrelated to any violence against Abbey (Tr. 665-674). Counsel then asked about going "to court" the day of the murders and getting a restraining order (Tr. 675). Abbey replied, "I went to the police station and showed them my body and got a restraining order" (Tr. 675). On redirect, Abbey testified that she got the restraining order because appellant "beat" her, that she showed her injuries to the police, and that she was awarded a temporary restraining order (Tr. 678).

In closing argument, the prosecutor argued that the fact that Abbey got the order of protection showed that appellant lied about never physically abusing Abbey (Tr. 894). But the prosecutor did not argue any facts set out in the petition or order (Tr. 892-901, 921-926).

In his amended motion, appellant alleged that counsel were ineffective for failing to object to the admission of the order, the viewing of it by the jury, and the State's argument that the obtaining of the order was proof that the assault had actually occurred and that appellant was lying (PCR L.F. 83). He faulted counsel for failing to object to the admission of the order itself, the viewing of the order by the jury, and the State's argument that the order "was proof" that appellant assaulted Abbey and lied about it (PCR L.F. 83). He alleged that reasonable counsel would have objected and that, but for

counsel's failure, there was a reasonable probability of a different outcome (PCR L.F. 89).

Counsel Turlington that she remembered there was "an issue about there being an ex parte order right around the time of the homicides," but did not recall the contents of State's Exhibit 38 (PCR Tr. 193-194). She agreed that she objected to the order because the jury would receive no guidance as to the proper burden of proof to consider the order as a non-statutory aggravating circumstance (PCR Tr. 194). But she did not recall not objecting on any other grounds (PCR Tr. 194). She had no "independent recollection" of her reason for not raising any other objection to the exhibit or requesting a redaction (PCR Tr. 195-196). She testified that she would agree with the transcript stating that the exhibit was one of the exhibits passed to the jury during the trial, but she was not asked (and there was no other evidence) whether the jury actually removed the petition and order from its plastic envelope to review the internal contents of the exhibit (PCR Tr. 194).

The motion court denied this claim, concluding that the order of protection was admissible evidence of motive and "proper and relevant" evidence for the penalty phase and that counsel's objection was sufficient to raise the objection appellant pled in his amended motion (PCR L.F. 407).

B. There was No Clear Error

The motion court did not clearly err in denying appellant's claim. First, due to the lack of clarity in the legal theory under which appellant claimed the order of protection was inadmissible, it appears that the motion court's conclusion that counsel raised a sufficient objection at trial is supported by the record (PCR L.F. 407). In his amended motion, appellant never alleged that the evidence was inadmissible because it was irrelevant, hearsay, improper evidence of uncharged bad acts, or some other similar legal theory (PCR L.F. 82-85). The best language setting out a theory of inadmissibility was this allegation:

> Using the civil court's entry of an ex parte order in a civil case as evidence that Movant in fact committed the assault on Abbey and that he lied in the criminal case, denied Movant the right to have the jury (and not a civil court) determine the aggravating evidence and whether Movant lied or committed the earlier assault. The jury would naturally have deferred to and assigned considerable weight to the judge's findings in granting the Order of Protection, in

> determining that Movant had beaten Abbey and in determining Movant's credibility.

(PCR L.F. 83-84). Counsel's objection to the introduction of all of the evidence of violence between appellant and Abbey included the argument that the evidence was being admitted "without any burden of proof or any instructional guidance for the jury to follow" (PCR Tr. 12). Counsel also argued that "the only evidence that can be weighed in determining whether or not the jury can impose the death penalty is evidence *that's been found by the trier*" (PCR Tr. 12) (emphasis added). Counsel argued that it was improper "for the jury to hear this type of evidence without any guidance or burden of proof whatsoever" (PCR Tr. 15). Thus, counsel's objection could reasonably have been understood by the trial court to have included the argument that the jury would not properly evaluate the evidence of the order of protection because it had no understanding of the proper burden or weight to assign to it (i.e., it was the jury's duty to consider whether the evidence of prior misconduct was true, not merely defer to the civil court's finding and assume it was proven). Because the language used by counsel could reasonably have been interpreted to have included the specific legal theory alleged before the motion court, the motion court's conclusion that counsel's objection was sufficient is supported by the record. The motion court's

conclusions are presumptively correct. *Edwards v. State*, 200 S.W.3d 500, 505 (Mo. 2006).

Further, even if the objection was insufficient to raise the claim raised in appellant's amended motion regarding the introduction of the petition and order, appellant still failed to prove his claim. During the penalty phase, both the State and the defense may introduce any evidence pertaining to the defendant's character, including evidence detailing the circumstances of prior convictions, evidence of a defendant's prior unadjudicated criminal conduct, and evidence of the defendant's conduct subsequent to the crime being adjudicated. *State v. Bowman*, 337 S.W.3d 679, 691 (Mo. 2011). The trial court has broad discretion during the penalty phase to admit any evidence it deems helpful to the jury in assessing punishment. *Id.* Ineffective assistance is rarely found in cases of failing to object and will only be found when the defendant has suffered a "substantial deprivation of his right to a fair trial." *Worthington v. State*, 166 S.W.3d 566, 582 (Mo. 2005).

The admission of the order of protection was not erroneous. As the motion court concluded, the order of protection was a vital piece of the evidence of appellant's motive and explained why appellant committed the murders that night (PCR L.F. 407; Tr. 645-648). Evidence of prior uncharged acts demonstrating motive and which are part of the circumstances of the

events surrounding the charged crime have a legitimate tendency to directly establish the defendant's guilt and therefore such evidence may be admitted. *State v. Prince*, 534 S.W.3d 813, 818 (Mo. 2017). Such uncharged crimes evidence is also admissible in the penalty phase as evidence of the defendant's character. *State v. Kreutzer*, 928 S.W.2d 854, 874 (Mo. 1996). Finally, there was other testimony establishing the existence of the order of protection that was not subject to objection, challenged in the amended motion, or challenged on appeal (Tr. 644-645; PCR L.F. 82-85; App. Br. 123-133). Testimony was therefore merely cumulative to the order itself. Counsel's failure to object to cumulative evidence does not result in prejudice. *Polk v. State*, 539 S.W.3d 808, 822 (Mo. App., W.D. 2017). Thus, there was no clear error in the denial of the claim regarding the failure to object to the admission of the order.

Appellant also challenges the failure to seek redactions. First, appellant argues that the trial court's finding of "good cause" to issue the order should have been redacted (App. Br. 132). But this phrase, which was in small type among additional lines of text and not highlighted in any way and therefore was in no way emphasized, added no additional information to the testimony that Abbey obtained the order of protection (Tr. 644; Exh. NN). The only reasonable inference to be drawn from her testimony that she

received an order of protection was that a court found a sufficiently good reason to issue the order. Thus, that a court found reason to issue the order was merely cumulative in effect to that language. The failure to object to cumulative evidence is not prejudicial. *Id.* Therefore, the failure to seek redaction of the small, non-emphasized phrase "for good cause" was not ineffective assistance of counsel.

Finally, appellant complains of failure to object to or seek redaction of the details of abuse in the petition (App. Br. 129-130, 132). Appellant primarily relies on the Western District case of *State v. Clevenger*, 289 S.W.3d 626 (Mo. App., W.D. 2009). In that case, the record established that the petition for an order of protection was admitted and published to the jury, that the consideration of the facts in the petition was improper because they may have been considered on the issue of guilt for the charged offense, and that the defendant was prejudiced because he had no opportunity to cross-examine the complaining witness about the incidents and the jury had no knowledge of the allegations prior to the exhibit being published. *Id.* at 628-30. Appellant failed to prove that any of these things occurred here.

First, there was no record showing that the exhibit was actually unsealed and removed from its plastic envelope when being passed to the jury. As explained above, because it appears the exhibit remained sealed

until the most recent prior appeal to this court, there is reason to believe that the interior pages (containing the allegations) were not viewed by the jury because the order and petition was sealed. Appellant argues that the jury had to have done so because it was presumed to "consider all the evidence" as required by Instruction No. 9 and thus the jury had to remove the exhibit to "consider" it (App. Br. 132). This argument fails. The exhibit was admitted to prove the existence of the order, not the contents; despite appellant's claims to the contrary (App. Br. 133), the prosecutor did not argue the "contents" of the petition, but only that it was received—every fact appellant cites in the prosecutor's argument came from Abbey's testimony (App. Br. 133; Tr. 644-645, 678, 894). Thus, it was not necessary for the jury to see anything other than the fact of the order's existence. Moreover, the jury did not receive this instruction until after the evidence and did not request to view the exhibits during deliberations (Tr. 891, 927-929). Thus, the record did not establish that the jury was able to see the interior pages of the order and petition. Had appellant chosen to prove this fact, he could have done so by asking counsel or another witness if the exhibit was removed from the envelope when passed to the jurors. He did not do so. Appellant bore the burden of proving his claim. Supreme Court Rule 29.15(i). He failed to prove that the jury saw the

petition and thus failed to prove any error in failing to seek redaction of the petition's allegation.

Second, even if the jury saw the allegations, there was no danger here that the jury would use the allegations as evidence of guilt. Appellant's guilt had already been decided; this trial was only to decided appellant's punishment. Appellant's prior bad acts of violence were relevant to appellant's punishment. *Bowman*, 337 S.W.3d at 691. Thus, the danger present in *Clevenger* was not present here.

And finally, also unlike in Clevenger, Abbey, the complaining witness, did testify and was available for cross-examination (Tr. 641). Additionally, much of the detail of appellant's past abuse of her was admitted without objection or challenge in this proceeding. Abby testified that she got the restraining order because appellant "beat" her (Tr. 678); that she showed her injuries to police (Tr. 678); that he threatened her frequently (Tr. 680); and that he choked her, hit her, and shoved her down a number of times she could not quantify (Tr. 680). Thus, not only was the complaining witness available to testify, she testified to essentially the same information in the petition (Exh. NN). Thus, the allegations in the petition were merely cumulative. *Polk*, 539 S.W.3d at 822. Therefore, because all of the information in the order of protection and petition was cumulative to other unchallenged

evidence, appellant failed to prove that there was a reasonable probability of a life sentence but for counsel's failure to object to that cumulative evidence.

VII.

The motion court did not clearly err in denying appellant's claim that trial counsel were ineffective for advising appellant to testify at his penalty phase retrial (responds to appellant's Point VIII).

A. Facts

Before Appellant took the stand, the trial court gave him the following admonishment:

> THE COURT: Mr. Anderson, before you begin, I would advise you that even though this is late in the game, you have the right not to testify on this matter should you choose. I'm sure you've discussed this with your lawyers, and I'm sure you have made up your mind. I'm not telling you what you should or shouldn't do, but I'm compelled to advise you that you do not have to testify if you don't want to. If you'd like some additional time to consider this, if you'd like some additional time to confer with your counsel, you may do so.
>
> THE DEFENDANT: No, I'm going to do it.

(Tr. 750). When Appellant took the stand, counsel asked him why he was testifying:

> A. I just want everybody to know what actually happened that night. I don't – I feel I owe it to their family.
>
> Q. Say again. I'm sorry. We're having a very hard time hearing you.
>
> A. I feel I owe it to their family to really know what happened. You know, I just want to get it all out there in the open.

(Tr. 751). Appellant proceeded to testify to prior acts by the Rainwaters which strained his relationship with Abbey and to a version of events of the murders different from the State's witnesses (Tr. 751-784). He finished his direct examination by saying he only wanted the victim's family to know the truth, that he did not feel good about anything that had happened, that he was sorry for everything that had happened, and that he thought about what happened every day (Tr. 784-785).

In his amended motion, appellant alleged that counsel were ineffective for advising appellant to testify and for failing to tell him that testifying could hurt his case (PCR L.F. 104-110). He alleged that appellant was

reluctant to testify but counsel advised him that it would be for the best (PCR L.F. 104-105). He alleged that reasonable counsel would not have advised appellant to testify due to their knowledge of his mental health issues and issues with his demeanor (PCR L.F. 105-107). He alleged that it was "imperative" for counsel to advise appellant that testifying "would hurt his case and his chances for a life sentence" because the jury would not hear his mental health evidence, his testimony was inconsistent with other evidence, and the prosecutor would argue that he lied (PCR L.F. 107). He alleged that he would have followed the advice of counsel and chosen not to testify had counsel so advised him (PCR L.F. 108). He alleged that, but for counsel's advice, there was a reasonable probability that he would not have been sentenced to death (PCR L.F. 109-110).

Counsel Turlington testified that, in considering the issue of appellant testifying "very, very early on," she first spoke with appellant's prior PCR counsel, formerly of the Public Defender Capital PCR Division, who felt like it was a good idea for appellant to testify (PCR Tr. 197). She testified that, early on, the idea of testifying originated with counsel (PCR Tr. 197-198). At the hearing, she did not recall appellant's concerns with testifying, although at the earlier evidentiary hearing she testified that appellant did not "immediately jump" on the idea but had concerns about losing his cool, saying

something inappropriate, or being nervous and laughing inappropriately (PCR Tr. 197; SC92101 PCR Tr. 398-399). Counsel had concerns that appellant would appear unemotional and has some concerns about his mental issues, but was not concerned about his I.Q. of 84 affecting his ability to testify (PCR Tr. 198-199).

Turlington testified that, the night before he testified, they had a multiple-hours-long conversation due to appellant's revelation during trial that he actually remembered everything and had lied about not remembering killing Debbie (PCR Tr. 187, 199). She testified that, during that conversation, they may have talked about appellant not testifying, but she could not recall if she advised him not to testify (PCR Tr. 199). She was sure that they talked about the fact that his testimony would be different than the State's witness (PCR Tr. 199-200). She believed that the "most important part" of appellant's testimony was to show remorse and love for his child and not factual disputes about the details of the murders since he had already been convicted of first-degree murder (PCR Tr. 200-201). She testified that the testimony went pretty much as she thought it would in light of the conversation from the previous night (PCR Tr. 201). She was "very relieved" that the fact appellant had lied to his mental health doctors was not revealed in cross-examination (PCR Tr. 205). She testified that appellant was told that

the decision to testify was his decision and that counsel did not force him to testify; they did tell appellant that they believed it was in his best interest and he agreed (PCR Tr. 212).

Counsel Davis-Kerry testified that the defense trial strategy included appellant testifying to "convey to the jury…what he was feeling and what he was going through at the time that all of this happened" (PCR Tr. 217). She testified that they had spoken to prior PCR counsel about the idea and approached appellant with the idea about one year before trial (PCR Tr. 257-258). Appellant told her that he did not think he would be allowed to testify, to which counsel told him that a defendant "always has the right to testify" (PCR Tr. 258). She testified that she had the same kind of concerns about fear and anger that she had for any client who testifies, but that they spent a lot of time preparing appellant for his testimony, including having other attorneys come in to do mock cross-examinations with him (PCR Tr. 258-259). She testified that they considered everything about the case, including appellant's mental health issues, in advising appellant about testifying (PCR Tr. 260). She testified that they did not discourage appellant from testifying, but "we're never going to say to a client[, ']You've got to do this.['] It has to be the client's decision" (PCR Tr. 260).

Davis-Kerry did not recall whether she advised appellant not to testify after appellant revealed his years of lying about amnesia, but said that his revelation "change[d] everything" and left them with a lot of work to do (PCR Tr. 261). They spoke for several hours the night prior to his testimony (PCR Tr. 261-262). Appellant was "steadfast" that he remembered everything (PCR Tr. 265). Counsel expected that appellant's testimony would be different from the State's witnesses; she did not specifically recall talking to appellant about this, but was "sure" that they did talk about it (PCR Tr. 262, 264). She testified that, while it is best for the defense evidence to match the physical evidence as closely as possible, she would not advise a client to change their testimony if they stated otherwise, but instead deal with those issues in argument (PCR Tr. 263-264). She testified that counsel's opinion was that it was helpful for appellant to testify at the retrial and show remorse since the evidence at the first trial had not been persuasive and having appellant testify to show remorse was an attempt to try something different to get a different result (PCR Tr. 267). She thought that appellant did not do a bad job testifying and that his testimony could be seen as remorseful (PCR Tr. 267-268). She believed that, the evening before appellant's testimony, they considered "all kinds of possibilities," including the possibility of not having

appellant testify but to instead call Dr. Holcomb, but they "ultimately decided" to have appellant testify (PCR Tr. 288).

Appellant did not testify at the evidentiary hearing nor have his testimony presented by deposition (PCR Tr. 2-4).

The motion court denied this claim, concluding that counsel had extensive decisions with appellant about his right to testify and explained to appellant that it was his decision whether or not to testify (PCR L.F. 410). The court concluded that counsel competently advised him of the risks and benefits of testifying (PCR L.F. 410). The court concluded that the advice to testify was reasonable trial strategy (PCR L.F. 410).

B. There was No Clear Error

The motion court did not clearly err in denying appellant's claim. The decision whether to exercise the right to testify rests exclusively with the defendant. *Davis v. State*, 486 S.W.3d 898, 917 (Mo. 2016). The defendant is entitled to "reasonably competent advice" as to that decision. *Rousan v. State*, 48 S.W.3d 576, 565 (Mo. 2001). Generally, counsel's advice regarding whether or not a defendant should testify is a matter of trial strategy. *Davis*, 486 S.W.3d at 917. When a defendant later claims ineffective assistance of counsel regarding such advice, barring exceptional circumstances, such a claim is not a ground for relief. *Id.*

Appellant failed to prove his claim. First, appellant alleged that he would establish that he would not have testified but for counsel's advice that he should testify (PCR L.F. 108). Appellant failed to prove this was true. He did not testify at the hearing that he would have chosen not to testify but for counsel's advice (PCR Tr. 2-4). While there was evidence that he had initial reservations about testifying (SC92101 PCR Tr. 398-399), there was no evidence that, at the time he testified, he had any such remaining reservations. Instead, there was evidence suggesting that he wanted to exercise his right to testify and that he knew that the decision was his alone. Dr. Holcomb testified that counsel Turlington told him that appellant "had insisted that he testify" (PCR Tr. 58). In the previous PCR hearing, Turlington testified that, by the time of trial, she believed appellant wanted to testify (SC92101 PCR Tr. 421). The strident nature of appellant's insistence to counsel that State's witness Stacy Butler had lied supported the conclusion that appellant wanted to set the record straight (PCR Tr. 187). And appellant unequivocally told the court that he was going to testify and testified that he wanted everyone to know what happened that night (Tr. 750-751). Because appellant failed to present any evidence that he only decided to testify because of counsel's advice or that he would not have done

so but for counsel's advice, he failed to prove that counsel's advice had any effect on his ultimate decision.

Further, appellant failed to overcome the presumption of reasonable trial strategy. Counsel believed that it was in appellant's best interest to testify because it would give them the chance to have appellant explain what was going on in his life and mind prior to the murders, to demonstrate his love for his child, and to express remorse (PCR Tr. 200-201, 217, 267). Appellant's testimony did all of these things (Tr. 756-775, 784-785). Pursuing a theory of remorse is reasonable trial strategy. *See, e.g., Glass v. State*, 227 S.W.3d 463, 473 (Mo. 2007). Moreover, counsel's consideration of the issue was competent; they started discussing the issue a year before trial, sought advice from another attorney familiar with the case, and discussed every possibility, including potential drawbacks to testifying (PCR Tr. 197-201, 212, 257-264, 267, 288). Because counsel's advice for appellant to testify was based on reasonable trial strategy after careful consideration and explanation of all of the options, appellant failed to prove that counsel were ineffective.

Appellant alleged that "extraordinary circumstances" demonstrating counsel's unreasonableness existed here because appellant's testimony was inconsistent with other evidence, the prosecutor was able to argue that the defendant lied, and appellant's testimony led counsel not to call Dr. Holcomb

to testify about mental health issues due to inconsistency between appellant and Dr. Holcomb on the issue of appellant's memory (PCR L.F. 107). But these were not extraordinary circumstances. The first two—that a defendant's version of the facts would be different than the State's witnesses and that the prosecutor could claim the defendant lied because of those differences—would ostensibly exist in any case in which a defendant chose to go to trial and testify. If the defendant agreed with all of the State's evidence, there would be nothing to testify to. That a defendant does not agree with the State's evidence would always open him up to a prosecutorial claim of lying. Thus, these factors, potentially present in any case where the defendant testifies, do not create "extraordinary circumstances" sufficient to render counsel's reasonable trial strategy unreasonable.

As for the issue with having to decide between appellant's testimony and Dr. Holcomb's testimony, as explained above, appellant failed to prove that he was willing not to testify at that point. But, even if he had been, a strategy based on demonstrating remorse and accepting responsibility is not unreasonable. *Glass*, 227 S.W.3d at 473; *Dorsey v. State*, 448 S.W.3d 276, 291 (Mo. 2014) (counsel's advice to plead guilty to accept responsibility and then persuade the jury not to choose death was not unreasonable trial strategy). It may have also been reasonable for counsel to convince appellant not to testify

and call Dr. Holcomb instead. But that is merely a choice between two reasonable trial strategies. The choice of one reasonable trial strategy over another is not ineffective assistance. *Zink v. State*, 278 S.W.3d 170, 176 (Mo. 2009). Thus, appellant failed to prove his claim that counsel's advice was extraordinarily unreasonable.

In essence, appellant's arguments are not that counsel's decision, made prior to appellant's testimony, was unreasonable, but that appellant's testimony did not effectively achieve counsel's goals for it and wound up hurting appellant's case (App. Br. 139-143). But this argument does nothing but judge counsels' decision in hindsight. In evaluating counsel's performance, this Court must eliminate the distorting effects of hindsight and evaluate counsel's perspective at the time. *Meiners v. State*, 540 S.W.3d 832, 836 (Mo. 2018). Counsel is not ineffective even if counsel's strategic decisions appear ill-fated in hindsight. *Cole v. State*, 152 S.W.3d 267, 270 (Mo. 2004). Because counsel's advice to appellant was reasonable at the time it was given, appellant failed to overcome the presumption of reasonable trial strategy.

VIII.

The motion court did not clearly err in adopting findings of facts and conclusions of law similar to the prior motion court's findings and conclusions (responds to appellant's Point IX).

Appellant claims clear error in the motion court essentially adopting much of the findings of fact and conclusions of law issued by Judge Syler following the prior Rule 29.15 hearing, arguing that he was deprived "fair consideration" of his claims and rendered this Court's remand for a new hearing "a nullity" and "fundamentally unfair" (App. Br. 145-153). Appellant's argument is meritless.

Appellant's claim can be likened to a claim that it was improper for a motion court to adopt the State's findings of fact and conclusions of law. Such action is a common practice and raises no constitutional problems so long as the motion court, after independent reflection, concurs with the contents of the proposed findings and conclusions. *Skillicorn v. State*, 22 S.W.3d 678, 690 (Mo. 2000). To be valid, the proposed findings of fact and conclusions of law must be supported by the evidence. *Id.* "Though drafted by another, this process makes the findings of fact and conclusions of law those of the court." *Id.* Where the motion court makes some substantive changes, it reflects that the court thoughtfully and carefully considered the claims. *Ferguson v. State*,

325 S.W.3d 400, 416 (Mo. App., W.D. 2010). The presence of some minor errors does not establish that the court did not thoughtfully and carefully consider the claims. *State v. Link*, 25 S.W.3d 136, 148 (Mo. 2000).

This Court remanded for a new evidentiary hearing because of the appearance of impropriety caused by Judge Syler in considering extrajudicial claims as to appellant's claims regarding the failure to present mental health evidence and, more specifically, the failure to call Dr. Lewis in the penalty phase. *Anderson IV*, 402 S.W.3d at 88-94. It is true that the findings of fact regarding Dr. Lewis's deposition testimony were the same in both sets of findings, but that is explained by the fact that the testimony was identical; the testimony in both cases was provided by submission of the same deposition (Exh. FF). That the motion court relied on the same findings is not suspect under such circumstances. The conclusions of law regarding her testimony, however, eliminated the Judge Syler's references to the extrajudicial information, thus grounding its adoption of the findings in its review of her testimony and not from improper sources (SC92101 L.F. 202-203; L.F. 404-405). Thus, the record shows that the motion court did not solely rely on Judge Syler's prior findings as to Dr. Lewis nor any improper outside information obtained by Judge Syler, but on its own perception of the evidence.

That the motion court conducted its own thoughtful and thorough review of the evidence regarding appellant's mental health claims can be seen in its findings and conclusions for the claim about Dr. Holcomb. Because Dr. Holcomb testified at both hearings, the motion court's findings are vastly different and much more detailed, reflecting the court's independent evaluation of that claim (SC92101 L.F. 187-188; L.F. 384-387). Thus, the record shows that the motion court independently considered the new evidence elicited at the second hearing in determining its findings and conclusions as to the mental health issues.

As to the remaining claims, there are numerous changes, including additional paragraphs, throughout the remaining findings and conclusions emphasizing additional points or reflecting the changes in the evidence at the hearing after remand (SC92101 L.F. 183-184, 186, 188, 192, 196, 199, 202, 205; L.F. 379, 381, 384, 387, 391-392, 397, 401, 406-407). The findings of fact as to the testimony of both counsel were different and considerably longer after remand, again reflecting the fact that they testified in two different hearings and that the motion court carefully considered the new testimony made before it (PCR L.F. 193-196, 197-199; L.F. 394-397, 397-401, 404). To the extent that the conclusions of law were identical in many places, this is attributable to the claims and evidence being identical; in many instances,

the motion court was considering the exact same prior testimony and exhibits as admitted at the prior hearing.

Further, appellant only points out minor errors of fact, such as misidentifying Dr. Lewis as a "forensic psychologist" instead of an M.D. or omitting Abbey as an additional witness as to her father's bipolar disorder (App. Br. 151). Such minor errors do not require a finding that the motion court did not carefully consider the claims. *Link*, 25 S.W.3d at 148. Further, where appellant makes his most vigorous claim of error—that the motion court's conclusion that Dr. Lewis did not have a "good grasp of the facts"—even if there was error, the record still supported that conclusion. Counsel Davis-Kerry testified that Dr. Lewis could not keep the facts of the case straight and even insisted that she had testified in person at the first trial when she had actually testified by video deposition (PCR Tr. 237, 242-243). Thus, even if there had been any erroneous factual claims regarding Dr. Lewis's testimony, there was evidence supporting the conclusion that she did not have a "good grasp" of the facts. Adoption of proposed findings and conclusions are valid if supported by the record. *Skillicorn*, 22 S.W.3d at 690.

Because the findings and conclusions eliminated any reference to extrajudicial information, reflected numerous changes throughout, and were supported by the record, there was no clear error in the motion court's

adoption of much of the prior findings and conclusion.

IX.

The motion court did not clearly err in denying appellant's claim that appellate counsel was ineffective for failing to brief a point regarding this Court's proportionality review (responds to appellant's Point X).

A. Facts

On direct appeal following appellant's penalty phase retrial, appellant raised eight points on appeal, some of which argued multiple claims of error. *Anderson III*, 306 S.W.3d at 534-43. This Court also conducted its statutorily-mandated proportionality review, finding that a "thorough review of the record does not indicate…that the death sentence was influenced by passion, prejudice, or other arbitrary factors," that the evidence supported the jury's finding of statutory aggravating factors, and that similar death-penalty cases showed that appellant's sentence was not disproportionate. *Id.* at 544. The concurring opinion, noting that appellant had not challenged his sentence as disproportionate, also reviewed homicide resulting in life sentences and found that nothing in those cases demonstrated that appellant's death sentence was disproportionate. *Id.* at 545-47.

In his amended motion, appellant alleged that appellate counsel was ineffective for failing to brief the proportionality issue (PCR L.F. 94-104). He

alleged that counsel's failure to brief the issue prevented this Court from considering arguments that the death sentence was disproportionate because: (1) the first jury imposed life for Stephen's murder, demonstrating that a life sentence was reasonable; (2) there were only two statutory aggravating circumstances found for Debbie's murder which "addressed the exact same conduct" of killing more than one person; (3) there was significant mitigating evidence; and (4) this Court did not consider similar cases where life sentences were imposed (a practice this Court adopted one month after the death sentence was affirmed in this case) and similar cases showed that the death sentence was disproportionate (PCR L.F. 97-102). Appellant alleged that counsel had sufficient remaining words to raise a proportionality claim and unreasonably chose other oft-rejected claims instead of briefing the proportionality issue (PCR L.F. 99).

Counsel testified that she had occasionally raised proportionality points in prior cases and considered doing so in this case (Exh. HH 226). She initially claimed there was no strategic reason for doing so, but then admitted that she was aware prior appellate counsel had unsuccessfully raised the issue in appellant's first direct appeal and that she made a "conscious decision" not to raise the issue because she had never prevailed on one before (Exh. HH 228). She decided that it was "just better to respond to what [this

Court does] in [its] opinion" and challenge the Court's proportionality finding in a motion for rehearing, which she did (Exh. HH 226-231).

The motion court denied this claim (PCR L.F. 409-410). The Court did not believe counsel's testimony that her decision not to raise the proportionality point was not strategic and credited evidence showing she had researched the issue and chose not to raise it because she did not believe the issue would be successful (PCR L.F. 409). The Court also concluded that the record did not support a conclusion that appellant's sentence was disproportionate and thus that appellant was not prejudiced (PCR L.F. 409-410).

B. There was No Clear Error

Appellate counsel is under no duty to present non-frivolous issues where counsel strategically decides to winnow out arguments in favor of other arguments. *Storey v. State*, 175 S.W.3d 116, 148 (Mo. 2005). Despite her initial characterization, counsel made a strategic decision not make a proportionality argument in her brief because she did not believe that it would be successful (Exh. HH 228-229; PCR L.F. 409). Counsel was free to rely on her belief that certain claims were not strong and instead raise other claims that she believed were more meritorious. *Sykes v. State*, 372 S.W.3d 33, 42 (Mo. App., W.D. 2012) (citing *Storey*, 176 S.W.3d at 149). Because

counsel believed, based on her considerable past experience, that an argument regarding this Court's independent proportionality review would not be meritorious, she had a reasonable strategic reason for not briefing the issue.

That counsel's decision was reasonable is especially true for this issue of proportionality review, since this Court is statutorily required to conduct its independent review whether briefed or not. § 565.035.1, RSMo 2000. This Court is even required to conduct proportionality review when the defendant waives his right of direct appeal. § 565.035.7, RSMo 2000. This Court conducted that review in this case. Thus, counsel did not fail to raise an issue that prevented this Court from considering that issue. Claims of ineffective assistance of appellate counsel are issue-based; counsel fails to provide constitutionally effective assistance for failing to raise *an issue* that is reasonably likely to have resulted in a different outcome. *Tisius v. State*, 519 S.W.3d 413, 431-32 (Mo. 2017). Because counsel's decision not to raise the proportionality issue did not prevent this Court from taking up (and rejecting) the issue, counsel's decision was not ineffective.

Essentially, appellant's point is premised on the idea that this Court is incapable of fulfilling its statutory obligation in the absence of briefing by a defendant. But courts are presumed to follow the law *See, e.g., State v. Roll*,

942 S.W.2d 370, 374 (Mo. 1997). Not only is it presumed that this Court generally knows and understands the law as it applies to its proportionality review, it explicitly set out that law in its opinion in this case. *Anderson III*, 306 S.W.3d at 543-44. Appellant's argument that this Court was incapable of conducting a sufficient proportionality review without appellate counsel's briefing is meritless.

Finally, this Court's opinion on direct appeal demonstrates that the specific arguments regarding proportionality review that he claimed counsel should have made were also meritless. First, that the first jury imposed life for Stephen's murder did not make the sentence for Debbie's murder disproportionate (PCR L.F. 97-98). Instead, this fact supports the first required finding under proportionality review: that appellant's sentence was not imposed under the influence of passion, prejudice, or arbitrary factor. That appellant's first jury was able to recommend a life sentence for one murder and a death sentence for the other shows their careful consideration of the law, not a product of passion based on any unfair prejudice. Thus, as this Court concluded in both of appellant's appeals, after a thorough review of the record, the death sentence for Debbie's murder was not a result of improper passion or prejudice. *Anderson I*, 79 S.W.3d at 446; *Anderson III*, 306 S.W.3d at 544.

Second, appellant claimed that the evidence of statutory aggravating circumstances was deficient because the two circumstances were duplicative, i.e. only required a finding of the murder of more than one person (PCR L.F. 98). But this Court rejected a claim that the aggravating circumstances were improperly duplicative in appellant's first appeal and twice found that the evidence supporting the aggravating circumstances was sufficient. *Anderson I*, 79 S.W.3d at 442, 446; *Anderson III*, 306 S.W.3d at 544. Thus, appellant's proposed argument would have had no effect on this Court's review.

Third, appellant pointed out that there was significant mitigation evidence (PCR L.F. 98-99). Even accepting this claim as true, the existence of mitigation evidence was not one of the independent factors for consideration under this Court's proportionality review. § 565.035.3, RSMo 2000. While this Court considers the "strength of the evidence[ ] and the defendant" in comparing the case at bar with other cases, appellant presented no allegation in his amended motion that the amount of mitigation in his case distinguished his case from others so as to demonstrate that his punishment was disproportionate (PCR L.F. 94-103). Thus, he failed to show how briefing on this issue would have had any impact on this Court's review.

Finally, appellant faulted counsel for failing to argue in her brief that this Court include murder cases with life sentences in its proportionality

comparison (App. Br. 101-103). This argument fails for several reasons. First, the law at the time counsel filed her brief was that proportionality review did not include a review of life-sentenced cases as the purpose of proportionality review was to "prevent freakish and wanton application of the death penalty." *State v. Deck*, 303 S.W.3d 527, 551 (Mo. 2010). Not until three judges concluded in separate concurrences in *Deck* (decided after argument in this case) that life-sentenced cases should be considered had that argument been positively considered by this Court; instead, the argument had been repeatedly rejected. *Id.* at 551, 544.[4] And it was not until the opinion in appellant's appeal six weeks later that four judges of this Court agreed that life-sentenced cases should be considered in proportionality review. *Anderson III*, 306 S.W.3d at 544-47 (Breckenridge, J., concurring in part and

[4]This Court subsequently stated that a majority held in *Deck* that proportionality review required the review of life-sentenced cases. *See, e.g., State v. Dorsey*, 318 S.W.3d 648, 659 (Mo. 2010). But only three judges joined in one of the opinions in *Deck* reaching that conclusion. *Deck*, 303 S.W.3d at 544 (stating that Breckenridge, J., concurred in part and in the result in a separate opinion, Stith, J., concurred in the result in a separate opinion, Wolfe, J., concurred in the opinion of Stith, J., and Teitelman, J., concurred in the result only, not joining any opinion).

concurring in the judgment), 551 (Wolff, J., dissenting). Counsel's effectiveness is determined by the law at the time of counsel's actions and counsel is not ineffective for failing to anticipate a change in the law. *Collings v. State*, 543 S.W.3d 1, 12 (Mo. 2018). Thus, counsel was not ineffective for failing to raise a claim that was not meritorious until after the case was argued.

Moreover, once counsel was aware of the change in the law when this Court's opinion was issued, she filed a motion for rehearing arguing that this Court's conclusion on the proportionality review was wrong, citing numerous other life-sentenced cases suggesting that appellant's sentence was not proportional, and requesting the opportunity for further examination and briefing on the issue (PCR Tr. 227, 231-232; Exh. W 2-12). Thus, once the change in the law was made clear to counsel, counsel did everything she could to have this Court consider the same arguments appellant faults counsel for not making. This Court was capable of considering those arguments and reconsidering its opinion; its decision not to do so establishes that this Court would not have reached a different decision had counsel raised those issue before, rather than after, this Court's opinion. Because counsel raised the issues in an appropriate manner, she did not fail to

present any argument to this Court. Therefore, appellant failed to prove ineffective assistance of appellate counsel.

CONCLUSION

In view of the foregoing, the denial of appellant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains 21,372 words as determined by Microsoft Word 2010 software.

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