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No. SC96633

In the Supreme Court of Missouri

LANCE SHOCKLEY,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Carter County Circuit Court
Thirty-Seventh Judicial Circuit
The Honorable Kelly W. Parker, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Lance Shockley is appealing the denial of his Rule 29.15 motion which sought to vacate his conviction for murder in the first degree, section 565.020, RSMo 2000, and sentence of death. (PCR L.F. 1462).[1] Appellant was tried by a jury on March 18-28, 2009, before Judge David Evans. (L.F. 34, 52-57).

In its opinion affirming the conviction and sentence on direct appeal, this Court noted that the relevant sequence of events began on November 26, 2004, when Appellant lost control of a vehicle he was driving, resulting in the death of a passenger, and left the scene of the accident. *State v. Shockley*, 410 S.W.3d 179, 182-83 (Mo. 2013). Highway patrol Sergeant Carl DeWayne Graham, Jr., headed the investigation of the accident. *Id.* at 183. Sergeant Graham eventually obtained information implicating Appellant. *Id.* When Appellant learned of that, he obtained Sergeant Graham's home address. *Id.*

The Court went on to summarize the remainder of the evidence, viewed in the light most favorable to the verdict, as follows:

> At approximately 12:20 p.m. the next day, March 20, 2005,
> Mr. Shockley borrowed his grandmother's red 1995 Pontiac

[1] The record on appeal will be cited as: Direct Appeal Legal File (L.F.); Direct Appeal Transcript (Tr.); Post-Conviction Legal File (PCR L.F.); Post-Conviction Transcript (PCR Tr.); Movant's PCR Exhibits (Movant's Ex.).

Grand Am. The car had a bright yellow sticker on the driver's side of the trunk. Between about 1:45 p.m. and 4:15 p.m. that afternoon, various witnesses noticed a red Pontiac Grand Am – with a bright yellow sticker affixed to the driver's side of the trunk – parked on the wrong side of the road a few hundred feet from Sergeant Graham's residence. Mr. Shockley returned the Grand Am to his grandmother between 4:15 p.m. and 4:30 p.m. that same day. Investigators calculated that it took approximately 18 minutes to drive from Mr. Shockley's grandmother's house to the location where the red Grand Am with the yellow sticker had been parked near Sergeant Graham's house.

At 4:03 p.m. that day, Sergeant Graham had returned home, backed his patrol car into his driveway, and radioed dispatch that he was ending his shift. As Sergeant Graham exited his vehicle, he was shot from behind with a high-powered rifle that penetrated his Kevlar vest. The bullet severed his spinal cord at the neck, immediately paralyzing him. He fell backward and suffered fractures to the skull and ribs upon impact with the pavement. At this point, Sergeant Graham was still alive. The killer then approached Sergeant Graham and shot

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him twice more with a shotgun – into the face and shoulder. Sergeant Graham's body was discovered around 5:15 p.m. that day. The recovered rifle bullet was deformed, but ballistics determined that it belonged to the .22 to .24 caliber class of ammunition that would fit a .243 caliber rifle. Investigators later learned that around 7:00 p.m. on the evening of Sergeant Graham's murder, Mr. Shockley gave Mr. Shockley's uncle a box of .243 caliber bullets and stated, "Lance said you'd know what to do with them."

That night, two Highway Patrol investigators went to the Shockley residence to interview Mr. Shockley. They were accompanied by S.W.A.T. members, who concealed themselves in the woods around the property. Before approaching the door, the investigators called Mr. Shockley on the telephone and informed him that they wanted to speak about the murder of Sergeant Graham. Mr. Shockley refused to talk, stating that he was a busy man and that they should visit him at work.

After the telephone call ended, the investigators saw Mr. Shockley walk out the front door of his house. They approached and identified themselves. Mr. Shockley immediately denied killing Sergeant Graham and stated that he had spent all day

working around his house with his neighbor Sylvan Duncan. Mr. Shockley then told the investigators that the conversation was over and to get off of his property.

Shortly after the investigators departed but before all S.W.A.T. members had left, Mr. Shockley saw a S.W.A.T. member and yelled at him. When the members of S.W.A.T. started to leave, one S.W.A.T. member accidentally discharged his weapon while getting up off of the ground, injuring another S.W.A.T. member.

At about 11:30 a.m. the next day the two investigators with whom Mr. Shockley had spoken the night before approached him outside his workplace, where he was sitting in his car eating lunch with his cousin. Mr. Shockley told the officers he would speak with them when he finished eating. While the investigators waited by their car, Mr. Shockley called his wife on his cousin's cell phone and asked whether she had spoken with the police. She said that she had told the police that Mr. Shockley had been at home the day of the shooting until almost 5:45 p.m., when he went to his uncle's for a few minutes. Mr. Shockley responded, "Okay, that will work, that will be fine."

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> Mr. Shockley then met with the investigators and elaborated on the alibi that he had given them the night before, claiming that he had spent the previous day visiting relatives, including his grandmother, and that he watched from his living room as his neighbor, Sylvan Duncan, pushed brush. He also said he knew Sergeant Graham was investigating him for the fatal truck accident and, without prompting, declared that he did not know where Sergeant Graham lived. Mr. Shockley's parting words to the investigators were, "Don't come back to my house without a search warrant, because if you do there's going to be trouble and somebody is going to be shot."
>
> Later that day, Mr. Shockley visited his grandmother and instructed her to tell the police that he had been home all day on the day Sergeant Graham was murdered. When his grandmother told Mr. Shockley that she would not lie for him, he put his finger over her mouth and said, "I was home all day." He also told his cousin, who had overheard his lunch break telephone call with Ms. Shockley, not to say anything about it.

Id. at 183-84. A jury convicted Appellant of first-degree murder for the death of Sergeant Graham. *Id.* at 184-85. In the punishment phase, the jury found that the State had proven the existence of three statutory aggravating

circumstances beyond a reasonable doubt. *Id.* at 185. But the jury did not unanimously find that the mitigating circumstances outweighed the aggravating circumstances, and it was ultimately unable to agree on punishment. *Id.* The trial court ultimately imposed a death sentence after following the procedures outlined in section 565.030.4, RSMo. *Id.* at 185-86.

This Court affirmed the conviction and sentence on August 13, 2013. *Id.* at 179, 204. The mandate issued on October 29, 2013. (PCR L.F. 235). Appellant timely filed a *pro se* motion under Supreme Court Rule 29.15. (PCR L.F. 1, 26). Appointed counsel timely filed an amended motion that raised eighteen claims. (PCR L.F. 1, 5, 234-629). The motion court denied those claims following an evidentiary hearing. (PCR L.F. 22, 25, 1381-1456). Additional facts specific to Appellant's claims will be set forth in the argument portion of the brief.

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STANDARD OF REVIEW

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

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

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

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

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

To prevail on a claim of ineffective assistance of appellate counsel, a Rule 29.15 movant must show that his counsel failed to raise a claim of error that a competent and effective lawyer would have recognized and asserted. *Williams v. State*, 386 S.W.3d 750, 753 (Mo. 2012). Appellate counsel is not, however, required to raise every possible issue asserted in the motion for new trial, and is under no duty to present non-frivolous issues where counsel strategically decides to winnow out arguments in favor of other arguments.

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Baumruk v. State, 364 S.W.3d 518, 539 (Mo. 2012). Therefore, a Rule 29.15 movant must also show that the claimed error was sufficiently serious to create a reasonable probability that, if it was raised, the outcome of the appeal would have been different. *Williams*, 386 S.W.3d at 753.

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ARGUMENT

I.

Appellant has not shown that Juror No. 58 was biased.

Appellant claims that counsel was ineffective for failing to voir dire Juror No. 58 about a book that he had authored. But Appellant has failed to show that Juror 58 was biased and he is thus not entitled to relief.

A. Underlying Facts.

1. *Trial and direct appeal.*

Juror 58 answered during the death qualification portion of voir dire that he could give meaningful consideration to returning either a death sentence or a sentence of life without parole if the jury reached the point where it had to consider those options. (Tr. 685-87). Juror 58 also approached the bench during a break in the proceedings to inform the court and the attorneys that he was a published author and that his son was a police officer in Springfield. (Tr. 710). The court thanked Juror 58 for volunteering that information and said that the attorneys could ask questions later. (Tr. 710). Neither the prosecutor nor defense counsel Brad Kessler followed up on Juror 58's disclosure that he was a published author. The prosecutor did later question Juror 58 about the disclosure that his son was a police officer, and Juror 58 answered that he could be fair and decide the case solely on the evidence. (Tr. 742). No motion was made to strike Juror 58 for cause. (Tr.

759, 765-66). He served as the jury foreman in the guilt phase of the trial. (Tr. 983, 2148; L.F. 1610, 1704).

During the penalty phase, Kessler informed the court that he had obtained a copy of the book written by Juror 58. (Tr. 2148). Kessler conceded that Juror 58 had disclosed in voir dire that he was a published author and that neither side had followed up on that information. (Tr. 2149). Kessler proceeded to read portions of the book, which described the protagonist kidnapping, torturing, and killing the drunk driver who had killed his wife after that man was placed on probation following a conviction for involuntary manslaughter. (Tr. 2148-59). At another point in the book the protagonist, a retired Green Beret, mistakenly believes that his FBI agent son has been killed in a shooting. (Tr. 2149). He then steals nuclear material in an attempt to strike back at the system. (Tr. 2149). Kessler asked the court to declare a mistrial due to juror misconduct in the first stage of the trial. (Tr. 2161). Kessler also asked that Juror 58 be removed from the jury for future proceedings. (Tr. 2162).

After listening to extensive argument and reviewing transcripts of Juror 58's voir dire responses, the court denied the request for a mistrial, finding that there was no evidence of juror misconduct. (Tr. 2162-74). After additional arguments, Juror 58 was dismissed by consent of the parties, and an alternate juror took his place for the penalty phase deliberations. (Tr.

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2174-2211). Appellant's new trial motion claimed that the court erred in not declaring a mistrial when the contents of Juror 58's book were revealed to the court. (L.F. 1739-40).

A claim was brought on direct appeal that "the trial court should have granted his motion for mistrial or subsequent motion for new trial because the contents of Juror 58's novel is so close to the facts of Mr. Shockley's case and reveals such an inherent bias that it must mean that Juror 58 lied during *voir dire* when he stated that he could be fair and impartial. Mr. Shockley claims Juror 58's experiences and beliefs, as illuminated in his writing, had likely been influential upon the other jurors." *Shockley*, 410 S.W.3d at 199. This Court found the argument to be without merit:

> While the nature of the novel's subject matter caused the court concern, the court determined that nothing in the record demonstrated that Juror 58 lied when he said he could be fair and impartial or that he was willing but reluctant to impose the death penalty. Mr. Shockley's argument to the contrary is premised on a degree of factual congruity between the novel and the facts of the trial that does not exist. Further the defense's argument that Juror 58's assurance of his impartiality was false is premised on the assumption that Juror 58 shared the views expressed by the protagonist in his novel and tried to hide that

fact from the court and counsel so that he could be seated on the jury. This is inconsistent with the fact that it was Juror 58 himself who brought his novel, and his son's police work, to the attention of the court and counsel so they could include these issues in their remaining line of questions.

Id. at 200-01 (footnote omitted). The Court went on to state that it was possible that Juror 58 would have reaffirmed at a hearing on the motion for new trial that he could be fair and impartial. *Id.* at 201.

2. *29.15 proceedings.*

The amended motion alleged that counsel was ineffective for failing to conduct an adequate voir dire that would have uncovered the bias of Juror 58. (PCR L.F. 236). Juror 58 was deposed by post-conviction counsel. (Movant's Ex. 10). He gave the following answer when asked to characterize the themes in the book:

> Some of them are very violent, some are heart rendering, some will make you laugh, some will make you cry and some will make you feel anger.

(Movant's Ex. 10, p. 16-17). Juror 58 testified that his book was not about jury trials, but was a love story. (Movant's Ex. 10, p. 24).

Juror 58 acknowledged that he had authored promotional materials describing his book as a fictional autobiography that was filled with some of

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his life experiences. (Movant's Ex. 26). But he said he had not personally experienced any of the events in the book related to the drunk driving incident. (Movant's Ex. 10, pp. 26-27). He said the factual aspects of the book were his mother dying of cancer when he was a boy and his various experiences in the military. (Movant's Ex. 10, p. 28). Juror 58 went on to say that the book did not represent his personal feelings towards the government or the justice system:

> I vote, I pay taxes and what I want, the hardest thing for me on this jury was I would go back to my room every night and I swear to God I would get on my knees and I'd pray, "Lord let me find this man innocent" because I did not want to pass judgment on anybody. When it became clear to me during the trial that he was guilty, I would say that was probably Thursday, when Grandma testified, I think that was the day she testified and I never talked about it with anybody, I did not do any politicking, I was surprised when the rest of the jury members asked me to be the jury foreman, you know. I was the quiet guy, I didn't, I wasn't, I talked like I do now.

(Movant's Ex. 10, p. 29). Post-conviction counsel questioned Juror 58 about various plot points of the book: that the drunk driver faked remorse, the court was too lenient with him, and the only way for the protagonist to get justice

was to administer his own punishment to the drunk driver. (Movant's Ex. 10, pp. 30-31). Juror 58 gave the following answer when asked if he believed that the court system was too lenient and let people charged with crimes get off too easily:

> My book expresses that for the story. It's not my expression and my belief in that, I don't. Do we have people going to jail, you know, that maybe shouldn't? Yes. Do you have some that get out that shouldn't? Yes, you know. But I didn't use or relate to any of that writing the book, that wasn't the, that was to make the story, it wasn't my personal belief there that our court systems are no good or our judges are no good or anything like that.

(Movant's Ex. 10, p. 33). Juror 58 said the book had no bearing on his decision. (Movant's Ex. 10, p. 33).

Counsel Kessler testified by deposition that he would have moved to strike Juror 58 if he had learned about the themes of the book during voir dire. (PCR L.F. 1257-58). But Kessler also testified on cross-examination that there were things he liked about Juror 58:

> [] I want to just say this, and I don't know that I've ever said this to you guys, I might have said it to you this morning. Here's a guy with some military experience and he knows something about guns. He's got a kid who's a police officer who

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> knows something about guns. This case is going to revolve, at least in large part, around the absence of ballistics or the contradiction in ballistics. When he said that he self-published or whatever but he could be fair, there was nothing X, Y and Z. I didn't really see a problem with a guy who potentially might also be able to contradict what one of these guys said or say hey, this one guy's more full of shit than the other guy.

(PCR L.F. 1325).

In denying the claim, the motion court noted that both the State and defense counsel decided to focus on Juror 58's disclosure that his son was a law enforcement officer, which was a matter that might logically give rise to some bias or partiality. (PCR L.F. 1395). The court also found that Appellant had failed to establish that he was prejudiced. (PCR L.F. 1396-97).

B. Analysis.

If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which will often be so, that course should be followed. *Strong*, 263 S.W.3d at 647. Appellant does not attempt to establish *Strickland* prejudice, but instead asserts that counsel's failure to question Juror 58 about his book was a structural error that is presumptively prejudicial. Structural defects are constitutional deprivations affecting the framework within which the trial proceeds, rather than simply an error in

the trial process itself. *Id.* One such structural defect is the trial by an adjudicator who is not impartial. *Id.* Therefore, where a criminal defendant is deprived of the right to a fair and impartial jury, prejudice therefrom is presumed. *Id.* Nonetheless, in order to avail himself of this presumption, the defendant must establish that the errors complained of resulted in his trial by a jury that was not fair and impartial. *Id.*

Appellant failed to make that showing. His argument that Juror 58 was biased is based on the same assumption underlying his direct appeal claim – that the contents and storyline of Juror 58's book reflected his own personal beliefs. But this Court rejected the notion that the contents of the book made a facial showing of bias when it noted that a hearing might affirm what Juror 58 said in voir dire – that he had a son who was a police officer and that he was a published author, but that he could be fair and impartial. *Shockley*, 410 S.W.3d at 201. Juror 58's deposition established exactly that, as he made clear that the book did not reflect his personal beliefs and that he did not hold pre-conceived ideas that were prejudicial to Appellant. To the contrary, the juror demonstrated a thoughtfulness about the judicial system and his role as a juror that a defendant would want to see in a juror. (Movant's Ex. 10, pp. 29, 33).

Appellant's response is to attack the veracity of that testimony. But it is his burden to establish by a preponderance of the evidence that he is

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entitled to relief. Supreme Court Rule 29.15(i). There is no evidence that refutes Juror 58's assurances that he was fair and impartial.

The motion court also did not clearly err in finding counsel's performance during voir dire to be reasonable. The generalized disclosure that Juror 58 had written a book was not the kind of information that would automatically raise a red flag as to potential bias. As the court noted, the disclosure that Juror 58's son was a law enforcement officer was more obviously relevant to the instant case involving the murder of a law enforcement officer, and both the prosecution and the defense reasonably focused their attention to that disclosure. (PCR L.F. 1395).

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II.

Appellant is not entitled to relief on his claim of juror misconduct (responds to Appellant's Points II through IV).

Appellant raises three points of error that revolve around a claim that Juror 58 committed misconduct by bringing with him to the trial copies of the book that he had authored. Each point was a subpart of a single claim of error raised in the amended motion and Respondent will address those three points together. Appellant has failed to show that Juror 58 committed misconduct by bringing copies of the book with him and sharing them with court personnel. And he has failed to show that any member of the jury was subjected to any improper influences.

A. Underlying Facts.

1. *Trial proceedings.*

During a break in the voir dire, the court noted that Appellant's previous counsel had requested that the court provide a list of all books and movies that the jurors would be watching, and insisted that only "G" rated movies be shown to the jury. (Tr. 769-70). Counsel Kessler withdrew the request about "G" rated movies, but asked that there not be any "overt like, crime stories, CSI-kind of thing that lead them to believe that there's all sorts of secret DNA stuff that should be developed that we should have to come up with, you know, these extraordinary defenses and alibis and – or that the

State has to come up with this extraordinary scientific evidence." (Tr. 770-71). After the jury was selected, the court gave the following admonition while briefing the jurors on what to expect while they were sequestered:

> You will be able to bring books with you, even movies with you, to the trial. The cautionary note on there, the only one the attorneys ask that I mention, avoid movies and books about trials, particularly periodicals or legal documents. That's normally something, again, the law has to be supplied by the Judge, not due to your independent research and investigation. So general movies, avoiding crime shows and issues of that nature.
>
> (Tr. 988).

A week after Appellant filed his motion for new trial, the trial court sent a letter to the prosecutor and to defense counsel directing them to make arrangements for a phone conference if either side planned on questioning jurors at a post-trial hearing. (L.F. 1756). The court also advised counsel that Juror 58 gave a copy of his book to the court bailiff during the week of trial. (L.F. 1756). The sentencing hearing was held twenty-four days after that letter was written. (Tr. 2231). Kessler acknowledged receipt of the court's letter and advised the court that the defense did not intend to call any witnesses regarding Juror No. 58. (Tr. 2231-32). Kessler argued that the

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court should grant a mistrial because Juror No. 58 may have violated the court's admonition if he had discussed his book with other jurors. (Tr. 2162).

2. *29.15 proceedings.*

The amended motion alleged that Appellant's constitutional rights were violated because:

> 1) Juror No. 58 committed misconduct by defying the court's order that prohibited the jurors from having books or movies about crimes;
>
> 2) The trial judge, who overruled Movant's motions for relief due to Juror No. 58's misconduct and sentenced Movant to death, did not timely disclose to the parties that: he learned, before the guilt phase deliberations, that Juror No. 58 had given the book to his bailiff; and he questioned the bailiff regarding his receipt of the book; and
>
> 3) Defense counsel, when notified by the court that the bailiff had received a copy of the book from Juror No. 58 during the trial, failed to: investigate the issue before the motion for new trial proceedings; move to recuse the trial judge; and call the judge, bailiff, judge's secretary, juror coordinator, and the jurors as witnesses at the motion for new trial proceedings.

(PCR L.F. 430).

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Juror 58 acknowledged that he brought no more than four copies of his book with him to the hotel where the jury was sequestered. (Movant's Ex. 10, pp. 9, 13-14, 15-16). Juror 58 gave copies of the book to the jury coordinator, to a juror that he thought was named Ken, to security officer Mike Wall, and possibly to a female juror. (Movant's Ex. 10, p. 12-13, 16). Juror 58 said that Ken read the book and they talked about Vietnam. (Movant's Ex. 10, p. 15). Juror 58 said that the jurors to whom he gave the book returned their copies to him. (Movant's Ex. 16). Juror 58 said that he had no discussions with the jurors about the themes of the book. (Movant's Ex. 10, pp. 17, 21). He did not think that the female juror wanted to read the book because of the language it contained. (Movant's Ex. 10, p. 17).

Juror 58 said that as a first-time author, he was excited and wanted to share his book. (Movant's Ex. 10, 18-19). He did not think that he had done anything wrong by bringing his book with him. (Movant's Ex. 10, p. 18). Juror 58 said that he complied with the trial court's instructions about sequestration because his book was a love story and was not about trials, as only one chapter involved court proceedings. (Movant's Ex. 10, pp. 24-25). Juror 58 never thought there would be a problem passing out copies of the book because the trial was such a minor part of it. (Movant's Ex. 10, p. 33). Juror 58 said the book had no bearing on his decision, and as far as he knew, no bearing on anyone else's decision. (Movant's Ex. 10, p. 33).

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Juror 117 testified at the evidentiary hearing (PCR Tr. 122; L.F. 1611). At the time of the trial, she and her husband operated a gift shop that specialized in Native American items. (PCR Tr. 127). Juror 117 said that those selected to serve on the jury met at the Carter County Courthouse to be taken to West Plains, where the trial was conducted. (PCR Tr. 126). As she and her husband were waiting at the courthouse, a man who had been in their store before and had talked to them about carrying his book walked up to her husband and handed him a copy of the book. (PCR Tr. 127, 133). Juror 117's husband gave the book to her. (PCR Tr. 127, 133). Juror 117 put the book in her backpack. (PCR Tr. 127). Juror 117 said that she never read the book during the trial:

> As best as I can recall late that night I'm talking probably about 11:30, 12:00 o'clock maybe I took it, I was in my backpack, discovered the book, I thought okay I'll look through it, I told him I would, I read the intro, I skimmed through it and I thought I'm too tired to deal with this, I stuck it in the back of my suitcase in the zipper compartment, I thought again another day, another time because I was tired, it wasn't anything that appealed to me at all to look at and I never looked at it the rest of the time.

(PCR Tr. 129). Juror 117 said she only considered the book as a possible item to sell in her store and did not consider it for any other reason. (PCR Tr. 131).

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Juror No. 3, whose first name was Ken, also testified at the evidentiary hearing. (PCR Tr. 190; L.F. 1606). He said that Juror No. 58 showed him a copy of the book while they were talking about their military experiences. (PCR Tr. 193-95). Juror No. 3 said that Juror No. 58 did not give him the book and that he did not read it during the trial. (PCR Tr. 194-96).

Juror No. 49 testified that Juror No. 58 gave her a book during the trial. (PCR Tr. 198-99; L.F. 1607). She read two or three pages before giving the book back to him. (PCR Tr. 200). Juror No. 49 never read the book. (PCR Tr. 200).

Jury coordinator Michele Nigliazzo testified by deposition that she was setting up a day room for the jurors at the hotel where they were staying when Juror 58 approached, told her he had written a book, and handed her a copy. (Movant's Ex. 11, p. 9). Nigliazzo put the book in her bag and never opened it or read it. (Movant's Ex. 11, p. 10). Nigliazzo did not see any other copies of the book during the trial, did not see Juror 58 give it to anyone else, and did not hear any jurors discussing it. (Movant's Ex. 11, pp. 11, 16, 24). Nigliazzo informed the court about receiving a copy of the book after defense counsel had raised concerns about it. (Movant's Ex. 11, pp. 13-14).

Howell County Sheriff's Sergeant Mike Wall served as head of court security during Appellant's trial. (Movant's Ex. 9, pp. 3, 7). His primary job was protecting the jurors. (Movant's Ex. 9, p. 8). Wall said he was approached

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at the motel by a juror who asked Wall if he would like a copy of a book that he had written. (Movant's Ex. 9, p. 4, 11, 13). Wall looked at the synopsis on the back of the book, thought it was trash, and did not read it. (Movant's Ex. 9, p. 11). He did not see any other copies of the book. (Movant's Ex. 9, p. 19). Wall said that the situation was somewhat out of the ordinary so he gave the book to the judge's secretary the following day, suggesting that the judge might want to take a look at it. (Movant's Ex. 9, pp. 16-17). Wall said that he thought that the judge asked him questions about the book within an hour after he gave it to the secretary. (Movant's Ex. 9, p. 19).

April Mayfield was the judge's secretary. (Movant's Ex. 8, p. 3). In her deposition, Mayfield remembered that a book was brought to the office, but did not remember how it got there. (Movant's Ex. 8, p. 5). She did not recall Mike Wall telling her that the judge should look at the book. (Movant's Ex. 8, p. 12). Mayfield said when she last saw the book, Michele Nigliazzo was retrieving it at the request of Wall to give back to him. (Movant's Ex. 8, p. 7). Nigliazzo did not recall in her deposition retrieving the book for Wall. (Movant's Ex. 11, p. 14). Mayfield did not recall any conversations with the judge about the book during the week of trial. (Movant's Ex. 8, p. 11).

Judge David Evans testified by deposition that the jury returned its guilt phase verdict on a Friday, and that he saw a copy of Juror 58's book on his desk that night. (Movant's Ex. 30, pp. 8-9, 12). Judge Evans presumed

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that Mayfield put the book on his desk but did not see her do it. (Movant's Ex. 30, p. 12). Judge Evans did not remember seeing the book prior to that time. (Movant's Ex. 30, p. 13). Judge Evans said that his primary concern on that Friday night was to go over the sentencing instructions for the next day. (Movant's Ex. 30, p. 13). He glanced at the book, but did not read it. (Movant's Ex. 30, p. 13). Judge Evans did notice, however, that the book had something to do with a criminal case and he decided to discuss it with the attorneys in the morning. (Movant's Ex. 30, p. 14).

When he met with the attorneys that next morning, defense counsel had learned about the book and objected to Juror 58 remaining on the jury. (Movant's Ex. 30, pp. 14-15). Judge Evans said that the book was on his desk when he talked to the attorneys in his chambers, but he did not remember what he said to them about how he came into possession of the book. (Movant's Ex. 30, p. 16). Judge Evans did not recall having any conversations with court personnel concerning the book. (Movant's Ex. 30, pp. 17-19, 23-24). Judge Evans said that he had no information during the trial about Juror 58 passing out copies of his book to other jurors. (Movant's Ex. 30, p. 24).

Counsel Kessler testified that he was never informed during the trial that the judge had reviewed a copy of the book in chambers. (PCR L.F. 1259). He also did not know until after the motion for new trial was filed that Juror No. 58 had given a copy of his book to the bailiff, who turned it over to the

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judge. (PCR L.F. 1259). The first time that Kessler learned that Juror 58 had brought copies of his book to the trial was when he received the judge's letter. (PCR L.F. 1260). Kessler did not think from the wording of that letter that the judge had read the book himself. (PCR L.F. 1260). Kessler said that when he read portions of the book aloud in court, the judge did not give any indication that he had read it before. (Tr. 1261).

Kessler said that he did not consider subpoenaing Juror 58 or the bailiff for the new trial motion hearing because they would have had several weeks to figure out answers to any questions. (PCR L.F. 1262). Kessler did not know whether recusing the judge would have been an option, so he could not say whether he would have considered it. (PCR L.F. 1264).

Co-counsel David Bruns also testified that he was unaware before the motion for new trial was filed that Juror 58 had brought copies of his book to the trial. (PCR Tr. 640). Bruns said that he assumed from the judge's letter informing the parties that the juror had given a copy of the book to the bailiff and that the bailiff had given the book to the judge. (PCR Tr. 643).

Bruns said that a decision was made not to call any witnesses at the hearing because they felt there was a better chance at that point that the judge would impose a sentence of life without parole. (PCR Tr. 643-44). Bruns was not sure if a motion would have been made to recuse the judge because he had been good to the defense during the trial. (PCR Tr. 646).

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In denying the claim, the motion court first questioned whether the claim of juror misconduct was cognizable in a Rule 29.15 action, but proceeded to analyze that claim on the merits. (PCR L.F. 1434-35). The court found that the judge's comments about sequestration were not an instruction of the court concerning the law of the case. (PCR L.F. 1436). The court also found no intentional misconduct by Juror 58, but at most only a miscommunication about what the court intended. (PCR L.F. 1440). The court further found no prejudice because Appellant had not presented evidence that the book had any influence on deliberations. (PCR L.F. 1443).

The motion court also concluded that Appellant had failed to prove any misconduct on the part of, or prejudice created by, Judge Evans that affected Appellant's right to a fair trial. (PCR L.F. 1446). Finally, the motion court concluded from the record that additional investigation by trial counsel would not have established constitutional error. (PCR L.F. 1447).

B. Analysis.

Respondent will address Points II through IV in a different order than they are set out in Appellant's brief. The claim of ineffective assistance of counsel raised in Point II necessarily turns on the outcome of the claim of juror misconduct raised in Point IV. Respondent will accordingly discuss the juror misconduct issue first, followed by the claim of ineffective assistance of

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counsel, and then the claim of non-disclosure by the trial judge that is raised in Point III.

1. *Juror 58 did not commit misconduct when he brought with him copies of the book he authored.*

The first part of Appellant's claim is that Juror 58 committed misconduct by "defying" the trial court's order not to have books or movies about crimes. (PCR L.F. 430). A claim of juror misconduct is normally not cognizable in a Rule 29.15 proceeding. *Jackson v. State*, 538 S.W.3d 366, 369 (Mo. App. W.D. 2018). An exception has been made where the alleged error amounts to constitutional violations and if exceptional circumstances are shown which justify not raising the constitutional grounds on direct appeal. *Id.* at 369-70. Counsel had the opportunity prior to the motion for new trial hearing to uncover potential juror misconduct by questioning Juror 58 and other jurors, and presenting evidence at that hearing. (L.F. 1756). The factual basis of the claim thus could have been discovered in time to raise the issue on direct appeal, and this portion of Appellant's claim can be properly rejected as non-cognizable. Appellate courts have, however, reviewed such claims on the merits where the motion court granted an evidentiary hearing and denied the substantive claim, and where the appellate court agrees that the claim fails on the merits. *Id.* at 371. As those conditions exist here, Respondent will address the substance of Appellant's claim.

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A claim of juror misconduct raised in a post-conviction case is subject to the standards set forth in Rule 29.15. *Maynard v. State*, 87 S.W.3d 865, 866 n.2 (Mo. 2002). Because Appellant was granted an evidentiary hearing on his claim, he bore the burden of establishing by a preponderance of the evidence that he was entitled to relief. Supreme Court Rule 29.15(i).

Appellant must first prove that misconduct occurred. *Jackson*, 538 S.W.3d at 372. Juror 58's action of bringing copies of his book with him was not by itself misconduct. The motion court correctly noted that the directions given to the jurors prior to sequestration are not contained in MAI. (PCR L.F. 1436). The prohibition against books or movies about crimes was instead a condition requested by counsel that the court agreed to place on the jury. (Tr. 770-71, 988). One can quibble over whether the book fell within the scope of the admonition. Juror 58 believed that he complied with the trial court's instructions about sequestration because his book was not about trials, as only one chapter involved court proceedings. (Movant's Ex. 10, pp. 24-25).

But even if the book is considered to be one about crime, Juror 58's actions must be viewed in light of the purpose behind the trial court's admonition. *See id.* at 372-73 (interpreting scope of court's instructions to jury). That purpose was to prevent jurors from reading books about crime that might influence the way they viewed the case and the manner in which they determined Appellant's guilt or innocence. As Kessler noted, he did not

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want the jurors exposed to materials that would have given them false ideas about the types of evidence that were available and that should have been presented. (Tr. 770-71). Juror 58 was bringing a book that he himself authored, not a book to read, so he did not violate the letter or the spirit of the court's directions. Nor would he have violated it by handing out copies to court personnel, since that would not have deprived Appellant of a fair trial. The only action of Juror 58 that could be said to be a violation of the court's directions was his handing out or showing copies to a few jurors.

But Appellant cannot show prejudice from that action. Three jurors testified on the claim. Juror No. 117 testified that she did not read the book and that it did not influence her. (PCR Tr. 129, 131). Juror No. 3 said that Appellant showed him a copy of his book but did not actually give it to him. (Tr. 194-95). Juror No. 3 did not read the book during the trial. (PCR Tr. 195-96). Juror No. 49 testified that she read only two or three pages before giving the book back to Juror No. 58. (PCR Tr. 200). Appellant thus did not meet his burden of proving that the jurors were improperly influenced by Juror 58's actions. *Maynard*, 87 S.W.2d at 866 n.2; Supreme Court Rule 29.15(i). The motion court did not clearly err in denying that portion of the claim.

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2. *Appellant cannot show prejudice from trial counsel's failure to investigate prior to the hearing on the motion for new trial.*

Appellant argues that the evidence presented at the Rule 29.15 evidentiary established *Strickland* prejudice because it revealed that Juror 58 shared his book with other jurors. But that is not enough. *Strickland* prejudice requires a showing of a reasonable probability that the result of the proceeding would have been different had the named witnesses testified at the hearing on the motion for new trial. *Storey v. State*, 175 S.W.3d 116, 130 (Mo. 2005). A new trial is permitted when the jury has been guilty of any misconduct tending to prevent a fair and due consideration of the case. *State v. Chambers*, 891 S.W.2d 93, 101 (Mo. 1994). Juror misconduct creates a rebuttable presumption of prejudice, but that presumption can be overcome by evidence showing that the jurors were not subject to improper influences. *Id.* Appellant's evidence at the Rule 29.15 hearing did not establish that any jurors were subject to improper influences from Juror 58's book, so Appellant failed to show that he would have been entitled to a new trial had counsel called witnesses to testify at the motion for new trial hearing.

3. *Credible evidence in the record refutes claim of untimely disclosure by the trial court.*

Point III of Appellant's brief is phrased differently than the corresponding claim of error in the amended motion. The claim as pled in the

motion was that the trial judge did not timely disclose that he had learned before the guilt phase deliberations that Juror 58 had given a copy of his book to the bailiff, and that the judge questioned the bailiff about his receipt of the book. (PCR L.F. 430). Point III of the brief alleges that the judge failed to timely disclose that Juror 58 brought his book to the sequestered jury. (Appellant's Brf., p. 33). That change may be a reflection of the fact that Judge Evans's testimony did not support the allegations that he received the book prior to guilt phase deliberations and questioned the bailiff about the book. Any allegations or issues that are not raised in the Rule 29.15 motion are waived on appeal. *McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. 2012). Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal. *Id.* Furthermore, there is no plain error review for claims that were not presented in the post-conviction motion. *Id.*

Appellant is not entitled to relief even if his point on appeal fairly encompasses the claim that is pled in the amended motion. Appellant argues that if Judge Evans had mentioned earlier that Juror 58 had brought copies of his book to the trial, he could have developed evidence supportive of granting a mistrial or a new trial. But counsel was given every opportunity to question Juror 58 in connection with the motion for new trial. Such questioning would have revealed that Juror 58 shared his book with two jurors, and counsel could then have questioned those jurors. The record does

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not support the claim that any act or omission by the trial court inhibited counsel from developing evidence of potential juror misconduct.

Furthermore, Appellant has again failed to prove that he was prejudiced by the alleged untimely disclosure, as he failed to meet his burden of showing that any jurors were subject to improper influences from Juror 58's book. Appellant has thus not demonstrated a reasonable possibility of a different outcome had the court made an earlier disclosure.

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III.

Counsel made a reasonable strategic decision not to call a ballistics expert (responds to Appellant's Point V).

Appellant claims counsel was ineffective for failing to call a ballistics expert to testify that a .243 Winchester could not have fired the bullet that struck Sergeant Graham, and that the wadding recovered at the scene suggested that Sergeant Graham was shot with a ten-gauge shotgun rather than a twelve-gauge. But counsel decided to pursue a reasonable strategy of exploiting differences in the opinions of the State's experts rather than call a hired expert who would be subjected to cross-examination.

A. Underlying Facts.

1. *Trial proceedings.*

The rifle bullet recovered from Sergeant Graham's body was deformed, but was determined to be a small caliber bullet that would fit a .243 caliber rifle. (Tr. 1261-62, 1270). Sometime around 7:00 on the night of the murder, Appellant's wife Coree, went to the home of his uncle Robert, and gave him a box of .243 shells. (Tr. 1395-96). When Robert protested that he did not have a .243 rifle, Coree responded by saying, "Lance said you'd know what to do with them." (Tr. 1396-97). Appellant had owned at least one .243 rifle and had fired it on Robert's property. (Tr. 1403-05, 1407, 1579). One witness testified the gun was kept in a gun cabinet. (Tr. 1732). Spent Winchester .243

shell casings were recovered from Appellant's property. (Tr. 1458, 1467-71, 1534). No .243 caliber weapons or ammunition were recovered from Appellant's home, but officers did see a gun cabinet with one empty slot. (Tr. 1481, 1489, 1547-48). Officers did seize three shotguns. (Tr. 1479, 1483-85, 1535-47).

Highway Patrol firearms examiner Jason Crafton compared class and individual characteristics on three bullet fragments recovered from Appellant's property to the slug pulled out of Sergeant Graham's body. (Tr. 1672). He concluded within a reasonable degree of scientific certainty that those bullet fragments and the slug were fired from the same weapon. (Tr. 1676-77). Two other examiners at the Highway Patrol Laboratory also examined the bullet fragments and the slug and came to the same conclusion. (Tr. 1678-79). The slug and some of the bullet fragments were identified as belonging to the .22 to .24 caliber class of ammunition, which would include .243-caliber ammunition. (Tr. 1665-71). Crafton also testified that shotgun shell heads pulled from a wood stove on Appellant's property were twelve-gauge Olin/Winchester brand manufacture, which was consistent with the wadding found near Sergeant Graham's body. (Tr. 1702-03).

John Dillon, Jr., a private forensic consultant also compared the bullet fragments and the slug recovered from Sergeant Graham. (Tr. 1581, 1583, 1595-98). He testified that the bullet fragments and the slug recovered from

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Sergeant Graham's body had consistent class characteristics and had some individual characteristics that corresponded to one another. (Tr. 1609, 1616). But Dillon was unable to either identify or exclude any of the ammunition as being fired from the same gun. (Tr. 1614).

Crafton also compared class and individual characteristics of a .243 shell casing found at Robert Shockley's home with the .243 shell casings found at Appellant's home. (Tr. 1691-93). He concluded within a reasonable degree of scientific certainty that all of the shell casings had been fired from the same weapon. (Tr. 1693-94).

2. *29.15 proceedings.*

The amended motion alleged that trial counsel was ineffective for failing to investigate and present evidence that no Browning BLR in .243 Winchester, as a class, could have fired the bullet recovered from Sergeant Graham, and that the size of the wadding recovered at the scene made it more likely that Sergeant Graham was shot with a ten-gauge shotgun rather than a twelve-gauge shotgun. (PCR L.F. 172). The motion noted that Appellant's previous counsel retained expert Steve Howard, who had reached those opinions, and that those opinions had been forwarded to trial counsel. (PCR L.F. 174).

Counsel Kessler testified that the notes he received from prior counsel showed that they had talked to Howard. (PCR L.F. 1292-93). He also

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reviewed notes discussing other ballistics experts. (PCR L.F. 1321-22). Kessler testified that he had a lot of experience with ballistics testimony. (PCR L.F. 1322).

Kessler said that his trial strategy was to exploit the differences in the testimony of the State's two experts rather than to call a hired expert who could be cross-examined by the prosecutor. (PCR L.F. 1275). Kessler said that he had previously had bad experiences with his ballistics experts in cross-examination. (PCR L.F. 1295). Kessler said it was better for the defense to have the State's two experts contradicting each other. (PCR L.F. 1276-77). Kessler said that the State's experts also disagreed with each other about whether the shotgun wadding was more consistent with a ten-gauge than a twelve-gauge. (PCR L.F. 1298). Kessler also said that his trial strategy was informed by the question of whether or not Appellant testified, and that he wanted to present his case in a way so that Appellant could testify without damaging the defense position. (PCR L.F. 1313-14). Kessler said that Appellant would have admitted to owning a .243-caliber rifle if he had testified. (PCR L.F. 1314). The strategy was thus to hammer on the lack of various evidentiary items, including a ballistics match. (PCR L.F. 1314).

Jason Crafton testified at the evidentiary hearing that he was a member of two forensic science organizations at the time of trial: the Association of Firearm and Toolmark Examiners ("AFTE"), and the Missouri

Division for International Association for Identification. (PCR Tr. 208, 210-11). Crafton said that he used the standards developed by AFTE for the identification of toolmarks. (PCR Tr. 216-17). Crafton said that in his work he looked for class characteristics and individual characteristics on the bullets he examined. (PCR Tr. 233).

Crafton said that class characteristics are imparted onto the firearm by the manufacturer and consist of the caliber, the number and width of lands and grooves, and the rate of twist. (PCR Tr. 233, 252). Class characteristics on a bullet can be used to exclude a firearm, but not to identify it. (PCR Tr. 233). Crafton described individual characteristics as marks that are incidental to the manufacturing process and not intended by the manufacturer. (PCR Tr. 233). A bullet with class characteristics but no individual characteristics would be deemed inconclusive for comparison purposes. (PCR Tr. 233-34, 252-53).

Crafton contacted the Browning rifle company in April of 2005 to obtain specifications on the Model 81 BLR Browning lever action rifle. (PCR Tr. 271-72). The groove width that he was provided was smaller than the groove widths that he measured on the bullets, but Crafton said the difference was not significant. (PCR Tr. 274-75). Crafton noted that he had never testified that the bullets he tested were .243-caliber or that they were fired from a Browning rifle. (PCR Tr. 285-86). Crafton said that he could not match or

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eliminate a particular firearm as firing a particular bullet unless he had the firearm. (PCR Tr. 294). Crafton never had a firearm to test in Appellant's case. (PCR Tr. 294).

Steve Howard testified that he was a weapons ballistics expert, a firearms expert, and a practicing attorney in Lansing, Michigan. (PCR Tr. 298-99). Howard described himself as a third generation gunsmith, a trained barrel maker, a trained gun and rifle maker, and a certified police armorer. (PCR Tr. 299). Howard admitted that he was not certified as a firearms examiner by AFTE. (PCR Tr. 318). When asked to describe his training in firearm and toolmark identification, Howard referred to his studies pertaining to his Criminal Justice Bachelor of Science degree from Metropolitan State College of Denver. (PCR Tr. 322).

Appellant's original attorney, Tom Marshall, contacted Howard in 2007 about working on Appellant's case. (PCR Tr. 325, 352). Howard acknowledged that he did not examine any of the bullets in Appellant's case. (PCR Tr. 319-20). He instead relied on Crafton's measurements. (PCR Tr. 323-24). Howard also checked with an FBI database and received from Browning the class characteristics for a Browning BLR and a .243 Winchester. (PCR Tr. 327). Howard's memory of the groove measurements that he received from Browning differed from the measurements that Crafton said he received from Browning. (PCR Tr. 272, 329). Howard testified that it was physically

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impossible for a Browning BLR .243 Winchester to have fired the bullet recovered from Sergeant Graham. (PCR Tr. 334).

Howard acknowledged on cross-examination that other companies beside Browning manufacture a .243-caliber rifle. (PCR Tr. 342). He also agreed that if a different barrel was put on a rifle he would not know if the lands and grooves matched the manufacturer's specifications without firing a test bullet. (PCR Tr. 350).

Evan Garrison, Criminalist Supervisor with the Highway Patrol Crime Laboratory, testified as the State's only witness. (PCR Tr. 733). Garrison, a certified armorer himself, testified that armorers and gunsmiths are not the equivalent of trained forensic firearms examiners. (PCR Tr. 737-39). Garrison said that the FBI database that Howard checked cannot be used to exclude a firearm because it only contains information voluntarily sent in by firearms examiners and does not include every firearm. (PCR Tr. 752, 762). Garrison said the database only comes into play when an examiner wants to relate a bullet to a specific firearm. (PCR Tr. 800). Garrison said the database did not contain any information about a Browning .243 Winchester rifle. (PCR Tr. 763, 774).

Garrison said a firearm can have different lands and grooves measurements than what were originally manufactured, and he explained different ways that could happen. (PCR Tr. 760-62). Garrison said that

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eliminating a particular gun barrel based on class characteristics would not eliminate any gun of that model made by that manufacturer, because class characteristics could change over the years. (PCR Tr. 807-08). Garrison testified that no "firearms examiner worth his or her weight" would absolutely exclude a firearm based on minor differences in the lands and grooves measurements. (PCR Tr. 772).

Tom Marshall testified that Howard informed him during a telephone conference in 2008 that the shotgun wadding components found at the murder scene were almost certainly from a ten-gauge shotgun. (PCR Tr. 523). Marshall said that there was no evidence that Appellant had ever owned a ten-gauge shotgun. (PCR Tr. 524).

The motion court denied the claim, finding that Kessler had a reasonable strategy of focusing on disagreements between the State's experts instead of hiring an expert who would be subject to cross-examination. (PCR L.F. 1407-08). The court noted that the 29.15 hearing made clear that Howard was not as experienced and knowledgeable as the State's experts, that he did not personally view the evidence in the case, that he did not understand how information was put in the FBI database, and that he failed to consider how a firearm may be altered after its original purchase. (PCR L.F. 1408). The court found Crafton and Garrison compelling and credible. (PCR L.F. 1409). The court also found that Howard did not testify about his

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conclusions concerning the type of shotgun used, so that the court had no evidence to consider on that portion of the claim. (PCR L.F. 1409).

B. Analysis.

Generally, the selection of a witness and the introduction of evidence are questions of trial strategy and are virtually unchallengeable. *Barton v. State*, 432 S.W.3d 741, 755 (Mo. 2014). Counsel Kessler testified that he consciously adopted a strategy of exploiting the difference of opinion between the State's two experts concerning the rifle and shotgun ammunition, instead of calling an expert of his own who would be viewed as a hired gun and would be subject to cross-examination. That strategic choice was based on his experience in previous trials where ballistics experts had performed poorly. Counsel is entitled to pursue other reasonable trial strategies besides seeking out an expert who might provide helpful testimony. *Worthington v. State*, 166 S.W.3d 566, 575 (Mo. 2005). It is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy. *Barton*, 432 S.W.3d at 749.

Howard's testimony at the evidentiary hearing demonstrated the reasonableness of Kessler's strategy. Howard did not have the same level of training and expertise as the State's experts. Howard admitted at one point that he might have been misinformed as to how the FBI obtained information for a database that he relied on in reaching his opinion. (PCR Tr. 854). The

court pointed out shortcomings in the methodology used by Howard. The court found the State's experts to be compelling and credible, implicitly finding that Howard was not. This Court defers to the motion court's credibility determinations. *Davis v. State*, 486 S.W.3d 898, 905 (Mo. 2016).

Appellant has also failed to demonstrate a reasonable probability of a different outcome had Howard testified. His testimony, if taken as true, eliminated one particular type of rifle as firing the bullets that struck Sergeant Graham. But Crafton never testified that the bullets were fired from a Browning rifle. (PCR Tr. 285-86). For that matter, Crafton never testified that the firearm was a .243-caliber. (PCR Tr. 286). He instead testified that the bullets were in the .22 to .24 caliber class. (PCR Tr. 286). While there was some evidence that Appellant possessed a Browning .243-caliber, that did not foreclose the possibility that Appellant possessed other rifles that could have fired the bullets. It also did not foreclose the possibility that Appellant used a Browning rifle with a modified barrel.

Howard did not testify as to his conclusions about the shotgun wadding or how he reached them. That opinion was only briefly mentioned by Appellant's first trial counsel, who retained Howard. The motion court did not clearly err in finding that Appellant failed to carry his burden of proof on that portion of the claim.

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IV.

Counsel was not ineffective for failing to call a rebuttal witness (responds to Appellant's Point VI).

Appellant claims that counsel was ineffective for failing to call Appellant's grandfather, Gerald Sanders, to refute evidence that Appellant inherited a .243-caliber rifle from his father. But Appellant failed to establish that Sanders could have directly refuted that evidence, and there is no reasonable probability that his testimony would have changed the outcome of the trial in light of the substantial evidence that Appellant had possessed a .243-caliber rifle.

A. Underlying Facts.

1. *Trial proceedings.*

Appellant's former girlfriend, Laura Smith, testified at trial that Appellant had various firearms given to him by his father, including a .243-caliber rifle. (Tr. 1579). She described the rifle as a "prized possession." (Tr. 1579). Defense counsel Kessler elicited testimony on cross-examination that the gun was old and beat up. (Tr. 1580-81).

2. *29.15 proceedings.*

The amended Rule 29.15 motion alleged that counsel was ineffective for not calling Appellant's maternal grandfather, Gerald Sanders, to testify that

Appellant did not inherit from his father a .243-caliber rifle or a Browning BLR in any caliber. (PCR L.F. 405-412).

Sanders testified at the evidentiary hearing that Appellant came to live with him about two or three months after his father died. (PCR Tr. 616). Sanders said that he never saw Appellant with a Browning BLR lever action rifle. (PCR Tr. 616). Sanders was asked on cross-examination if he knew whether Appellant's rifles were kept at the home of his grandmother, Mae Shockley. (PCR Tr. 620). Sanders said that he did not know, just that Appellant did not bring any rifles to his house. (PCR Tr. 620).

Counsel David Bruns testified that he did not think that the defense team was aware that Sanders would testify as set forth above. (PCR Tr. 687). He said they might have considered putting on that testimony, but that it would have been "pretty tenuous." (PCR Tr. 687). Counsel Molly Henshaw Frances did not recall any discussions about the potential testimony. (PCR L.F. 1364). As noted in a previous point, counsel Brad Kessler testified that he wanted to present the case in a way that Appellant could testify, if he so chose, without damaging his position. (PCR L.F. 1314). Kessler said that if Appellant had testified he would have admitted that he owned a .243-caliber rifle. (PCR L.F. 1314).

The motion court found that counsel had a reasonable trial strategy of not presenting evidence that would have undermined Appellant had he

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chosen to testify. (PCR L.F. 1410-11). The motion court also noted that there was evidence from other witnesses at the 29.15 hearing that Appellant had inherited a .243-caliber rifle from his father. (PCR L.F. 1411).

B. Analysis.

Appellant had the burden at the evidentiary hearing of proving his claims by a preponderance of the evidence. Supreme Court Rule 29.15(i). The claim as pled in the amended motion was that counsel was ineffective for failing to present evidence that Appellant did not inherit a Browning BLR from his father. (PCR L.F. 410). Gerald Sanders never expressly testified that Appellant did not inherit a rifle from his father. He only testified that he never saw Appellant with a Browning BLR rifle and that Appellant did not bring any guns with him when Appellant came to live with Sanders following his father's death. Appellant thus failed to meet his burden of proving the claim that was pled in the amended motion.

Even beyond that, Appellant failed to prove that counsel was ineffective. "In terms of an attorney's duty to investigate, an investigation need only be adequate under the circumstances, and the 'reasonableness of a decision not to investigate depends upon the strategic choices and information provided by the defendant.'" *Ringo v. State*, 120 S.W.3d 743, 748 (Mo. 2003). Counsel expressed that they were unaware that Sanders would have testified about Appellant not having a rifle. Not only is there no

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evidence in the record that Appellant told counsel that he never inherited a rifle and that Sanders would testify to that effect, the record affirmatively shows that Appellant admitted to counsel that he owned a .243-caliber rifle. That record includes not only Kessler's testimony at the evidentiary hearing, but his cross-examination of Laura Smith that demonstrated an awareness of the condition of the rifle that Appellant inherited from his father.

Also, the failure to call a witness or to impeach a witness does not constitute ineffective assistance of counsel unless such action would have provided a viable defense or changed the outcome of the trial. *State v. Ferguson*, 20 S.W.3d 485, 506 (Mo. 2000). It bears repeating that no specific weapon was ever tied to the murder. Even if the jury did not believe that Appellant inherited a .243-caliber rifle from his father, that would not have precluded his possession of another rifle of that caliber. Indeed, multiple witnesses testified that Appellant had a .243 rifle with a scope on it. (Tr. 1405, 1731, 1744, 1748, 1792). It also would not have negated the evidence that Appellant possessed .243-caliber ammunition that he tried to dispose of on the night of the murder, or the discovery of spent .243-caliber shell casings on his property. Sanders's testimony thus would not have provided a viable defense and there is no reasonable probability that it would have changed the outcome of the trial.

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V.

Counsel was not ineffective for failing to make a non-meritorious objection to a demonstrative exhibit (responds to Appellant's Point VII).

Appellant claims that counsel was ineffective for failing to object to the State's use of a Browning BLR .243-caliber rifle as a demonstrative exhibit. But counsel did not present evidence showing that counsel did not have a strategic reason for not objecting, and the record demonstrates that an objection would have lacked merit.

A. Underlying Facts.

1. *Trial proceedings.*

Several witnesses, including Appellant's uncle Robert Shockley, testified that Appellant had a .243-caliber rifle with a scope on it. (Tr. 1405, 1731, 1744, 1748, 1792). One of those witnesses was Tom Chilton, who testified that the gun was kept in a gun cabinet. (Tr. 1732). The following exchange took place between the prosecutor and Chilton:

Q. Do you think you could recognize that weapon if it was shown to you again?

A. For the most part, yeah.

Q. And I'm going to show you what's been state – marked as State's Exhibit [257], and ask if you can identify this for us as far as whether it is similar to Mr. Shockley's weapon.

MR. ZOELLNER: And I want to be clear – Judge, I want to be clear with the jury that this is not Mr. Shockley – this weapon was not found in his possession or on the property. It's one we bought just to show the witnesses in this situation.

MR. KESSLER: It's a demonstrative piece of evidence.

MR. ZOELLNER: It's a demonstrative piece of evidence.

(Tr. 1732-33). Kessler stated that he had no objection. (Tr. 1733). Chilton went on to testify that the exhibit did not have a scope but was otherwise similar to Appellant's gun. (Tr. 1734). Other witnesses viewed the exhibit and said it resembled a gun possessed by Appellant. (Tr. 1741, 1748, 1755).

2. *29.15 proceedings.*

The amended motion alleged that counsel was ineffective for failing to object to the State's use of the demonstrative exhibit. (PCR L.F. 398). Trial counsel Kessler was asked at the evidentiary hearing if he had a strategic reason for not calling up and arguing a motion in limine filed by prior counsel that sought to exclude the exhibit. (PCR L.F. 1291). Kessler said he did not recall his strategic reason. (PCR L.F.

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1292). The motion court rejected the claim, finding that an objection to the exhibit would not have been sustained. (PCR L.F. 1413).

B. Analysis.

A post-conviction movant must prove that a failure to object was not strategic. *State v. Clay*, 975 S.W.2d 121, 135 (Mo. 1998). Appellant had the burden of proving his claim at the evidentiary hearing by a preponderance of the evidence. Supreme Court Rule 29.15(i). The claim as pled in the amended motion and set out on appeal was that counsel was ineffective for failing to object at trial or seek other relief to the use of the rifle. (PCR L.F. 398). Appellant thus had to demonstrate that counsel did not have a strategic reason for not objecting at trial. But counsel was only asked about his strategic reason for not renewing a motion in limine filed by Appellant's original counsel. (PCR L.F. 1291). He was not asked about his reasons for not objecting at trial. Appellant thus failed to meet his burden of proving the claim pled in the amended motion. There are other reasons beyond that failure why Appellant's claim fails.

An object may be properly admitted for the limited purpose of demonstration even if it is not connected with the defendant or with the offense charged so long as it is relevant, if it is a fair demonstration of what it is demonstrating, and it is not inflammatory, deceptive, or misleading. *State v. Freeman*, 269 S.W.3d 422, 427 (Mo. 2008). This Court upheld in *Freeman*

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the admission of Galliano bottles as demonstrative exhibits in a case where the defendant was seen in possession of a Galliano bottle on the night of the charged murder, and the injuries suffered by the victim could have been inflicted by such a bottle. *Id.*

Appellant relies on two cases that articulate the proposition that admitting evidence of weapons unrelated to an offense is inherently prejudicial. Both cases are distinguishable. *State v. Perry* did not involve a demonstrative exhibit. The exhibit in question there was a shotgun that was wrapped in a blanket in the back seat of a motor vehicle that the defendant was driving but that was owned by his mother. *State v. Perry*, 689 S.W.2d 123, 124 (Mo. App. W.D. 1985). Not only was there no evidence as to who owned the shotgun, but the robbery with which the defendant was charged had been perpetrated with a handgun. *Id. State v. Grant* did involve a demonstrative exhibit, but there was no evidence that the pistol used as the exhibit was similar to the pistol used in the charged robbery. *State v. Grant*, 810 S.W.2d 591, 592 (Mo. App. S.D. 1991).

Contrary to those cases, several witnesses testified at Appellant's trial that he had owned a rifle similar to the one used as an exhibit. (Tr. 1734, 1741, 1748, 1755). That rifle had been kept in a gun case that had one empty slot when police searched the house. Spent .243-caliber ammunition was found on Appellant's property and Appellant, through his wife, tried to

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dispose of unused .243 ammunition on the night of the murder. Those circumstances made the gun legally relevant. *State v. Speaks*, 298 S.W.3d 70, 82-83 (Mo. App. E.D. 2009). The prosecutor's clear statement when the rifle was first used at trial that it was mere demonstrative evidence negated any potential to mislead the jury. *Freeman*, 269 S.W.3d at 427. The motion court did not clearly err in finding that an objection to the exhibit would not have been sustained. Counsel is not ineffective for failing to make a non-meritorious objection. *McLaughlin*, 378 S.W.3d at 357.

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VI.

Counsel was not ineffective for strategically deciding not to call witnesses to provide an imperfect alibi (responds to Appellant's Point VIII).

Appellant claims that counsel was ineffective for failing to call three witnesses to testify that they saw Appellant driving in his pick-up truck during the time he was alleged to be waiting near Sergeant Graham's home. But none of the three witnesses could provide a true alibi as they did not see Appellant at the time the murder was committed, and counsel made a reasonable strategic choice not to call those witnesses.

A. Underlying Facts.

1. *Trial proceedings.*

Sergeant Graham backed his patrol car into the driveway of his home and radioed the dispatcher at 4:03 p.m. that he was ending his shift. (Tr. 1168-69, 1192, 1226, 1297-98). At about the same time, employees of a nearby business heard a rifle shot coming from the direction of the house. (Tr. 1175-76). A few minutes later, they heard two shotgun blasts coming from the same area. (Tr. 1178, 1190). A passerby discovered Sergeant Graham's body at about 5:10 or 5:15 p.m. (Tr. 1199, 1208-11).

Appellant's grandmother, Mae Shockley, owned a red 1995 Pontiac Grand Am with a yellow sticker on the left hand side of the trunk. (Tr. 1800,

1803-04). She identified State's Exhibits 126 through 129 as pictures of her car. (Tr. 1804-06). Ms. Shockley testified that Appellant borrowed her car at about 12:25 in the afternoon. (Tr. 1806-08). She gave him the keys and he left right away. (Tr. 1808-09). Ms. Shockley heard the car return about 4:18 p.m. (Tr. 1810). Appellant came to her house about ten minutes to five and stayed for less than ten minutes. (Tr. 1811-12).

Rick Hamm lived on a road called Deer Run 2. (Tr. 1854-55). A gravel road just off of Deer Run 2 went to a house owned by a couple named Johnson. (Tr. 1859-60). Hamm was driving to the store between 3:45 and 4:00 p.m. on the day of the murder when he saw a red car that he thought was a Grand Am parked on the wrong side of the gravel road. (Tr. 1865-67). The car was still there when Hamm returned home about twenty minutes later. (Tr. 1870-71). Hamm had to turn around and return to the store because he forgot something. (Tr. 1872). The car was still there as he drove past. (Tr. 1873). It was gone when he passed by the area again on his way home. (Tr. 1874). Hamm was shown pictures of Mae Shockley's car and said it was similar to the car he saw. (Tr. 1877).

Lisa Hart and her husband went to the Johnson home on the day of the murder to look at it as a possible purchase. (Tr. 1886-88). They turned down the gravel drive at about 1:45 p.m. and saw a red Pontiac Grand Am parked on the wrong side of the road. (Tr. 1892-93). The car was in the same location

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when the Harts left between 3:00 and 3:30. (Tr. 1897). A few days after the murder, the Harts were later asked to come to the command center from where the investigation was being conducted. (Tr. 1904). As they pulled into the parking lot, Lisa Hart saw Mae Shockley's car and immediately recognized it as the same car she had seen on the day of the murder. (Tr. 1906). Hart said that she was 100-percent certain it was the same car and that there was no doubt in her mind. (Tr. 1906).

Roger Hart testified for the defense and confirmed his wife's testimony about the timeframe in which they saw the car parked on the gravel road. (Tr. 1993-95). Hart also saw Mae Shockley's car at the command center and said there was no question in his mind that that was the car he saw parked on the gravel road. (Tr. 2001-03).

2. *29.15 proceedings.*

The amended motion alleged that counsel was ineffective for failing to call as witnesses Sylvan and Carol Duncan, and James Chandler. (PCR L.F. 273). The motion alleged each of the witnesses would have placed Appellant, during the time frame of the murder, in an area away from where the red car allegedly used by the murderer was seen. (PCR L.F. 273).

Carol Duncan testified at the evidentiary hearing that her house shared a gravel road with the homes of Appellant and Mae Shockley. (PCR Tr. 135-36). Ms. Duncan could see Mae Shockley's trailer from her kitchen.

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(PCR Tr. 138). Ms. Duncan said that on the afternoon of the murder, she saw Mae Shockley's car parked in front of her trailer between 1:30 and 2:00 p.m., and did not see the car leave at any time after that. (PCR Tr. 145). Ms. Duncan said that she and her husband took a walk that afternoon and saw Appellant drive up in his pick-up truck shortly before 5:00. (PCR Tr. 145-46). Appellant stopped and had a brief conversation with Mr. Duncan. (PCR Tr. 146).

Ms. Duncan testified on cross-examination that she told the police following the murder that Appellant was supposed to help her husband with some work that afternoon but he didn't show up. (PCR Tr. 151). Ms. Duncan noticed that Mae Shockley's car was gone around 12:45 or 1:00. (PCR Tr. 156). Ms. Duncan admitted that she did not see the car leave or return, and thus did not know who was driving it. (PCR Tr. 152). She also testified that Mae Shockley had told her that she let Appellant borrow her car that day. (PCR Tr. 153). Ms. Duncan testified that Appellant came to her house, said that Sergeant Graham had been shot and that the injuries were such that his skin could be pulled out over onto his face. (PCR Tr. 154).

Sylvan Duncan testified that Appellant approached him on the morning of the murder and asked for help in shoving a treetop that had been cut out near Mae Shockley's trailer. (PCR Tr. 166). After he returned from church later that day, Mr. Duncan took his tractor and moved the wood. (PCR

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Tr. 167). He saw Appellant's truck at his grandmother's house, but did not see Mae Shockley's car. (PCR Tr. 167-68). Mr. Duncan said that he heard Appellant's truck leave between 2:00 and 2:30. (PCR Tr. 168). At about the same time, Ms. Duncan remarked to him that Mae Shockley's car had returned. (PCR Tr. 168). Mr. Duncan said that he saw Appellant in his truck between 4:45 and 5:00 while taking a walk with his wife. (PCR Tr. 169). Appellant stopped and thanked Mr. Duncan for helping move the wood. (PCR Tr. 170).

Mr. Duncan testified on cross-examination that Appellant came to his house the day after the murder and asked if law enforcement had talked to him. (PCR Tr. 172-73). Appellant told Mr. Duncan that he could not have known what time he was gone because Mr. Duncan did not look at his watch. (PCR Tr. 173-74). Appellant also said that Sergeant Graham had been shot in the face and his injuries were such that a flap of skin could have been pulled away from his face, (PCR Tr. 174). One of the Duncans remarked that a person would have to be pretty close to cause that injury. (PCR Tr. 174). Appellant responded, "Not if you were using turkey loads." (PCR Tr. 174-75).

James Chandler testified that he was in his yard on the day of the murder when he saw Appellant drive by in his truck between 2:00 and 2:30. (PCR Tr. 184). Appellant was driving north, which would have been in the general area of the home of his uncle, Robert Shockley. (PCR Tr. 186).

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Counsel Bruns testified that he would have reviewed the police reports and depositions taken by previous trial counsel. (PCR Tr. 650). Bruns testified that the defense considered calling Sylvan Duncan. (PCR Tr. 655). He could not recall why Duncan was not called. (PCR Tr. 655). Bruns said the decision whether or not to call Duncan would have been made jointly by himself and co-counsel Kessler. (PCR Tr. 655). Bruns gave similar answers concerning Carol Duncan and James Chandler. (PCR Tr. 655-57).

Bruns testified on cross-examination that every "red car" witness had information that was both helpful and not helpful. (PCR Tr. 711-12). Bruns said he was not inclined to call witnesses who would provide bad information unless that witness could establish actual innocence. (PCR Tr. 712). Bruns said the "red car" witnesses did not meet that standard. (PCR Tr. 712-13).

Counsel Kessler testified that he went to the Duncan's home and spoke to them in person. (PCR L.F. 1267). Kessler did not necessarily believe that Sylvan Duncan would hold up under cross-examination. (PCR L.F. 1267). He also said that Carol Duncan was unsure about some of the matters contained in her police report, which would potentially put him in the position of having to call the police officer who wrote the report to impeach his own witness. (PCR L.F. 1269). Kessler could not specifically remember James Chandler. (PCR L.F. 1270).

Kessler did not have a specific memory as to the reason for not calling alibi witnesses, but he noted that the witnesses would not have provided an actual alibi since there were times they could not account for. (PCR L.F. 1268). Kessler would have considered calling witnesses who would have helped a good alibi defense, as opposed to the imperfect alibi that they had in Appellant's case. (PCR L.F. 1269). Kessler said that if he called a witness who saw someone either before or after an event that could lead to cross-examination that highlighted the hole in the alibi. (PCR L.F. 1271). Kessler testified that Appellant had opinions and input on each of the witnesses, though he refused to say what that input was. (PCR L.F. 1316-17).

Counsel Frances recalled that there was a lot of discussion amongst the three attorneys about who would be called to testify. (PCR L.F. 1354). She could not recall why the Duncans and Chandler were not called to testify. (PCR L.F. 1354-56). Frances testified that part of the defense strategy was to concede that Appellant drove his grandmother's car on the day of the murder. (PCR L.F. 1371).

The motion court found that counsel had a reasonable trial strategy for not calling the witnesses. (PCR L.F. 1399-1400). The court noted that information obtained from the Duncans by the police and in their pretrial depositions would have been of substantial benefit to the State's case. (PCR

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L.F. 1400). The court concluded that the testimony of Chandler and the Duncans would not have provided a viable alibi defense. (PCR L.F. 1402).

B. Analysis.

Ordinarily, the choice of witnesses is a matter of trial strategy and will not support a claim of ineffective assistance of counsel. *Barton*, 432 S.W.3d at 750. This is because strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Id.* at 751. If an attorney believes that the testimony of an alibi witness would not unqualifiedly support his client's position, it is a matter of trial strategy not to call him to the stand. *Eldridge v. State*, 592 S.W.2d 738, 741 (Mo. 1979). This Court has invoked that principle to find that counsel was not ineffective for failing to call a witness who could not account for the defendant's whereabouts for a significant period of time on the day of the crime. *Leisure v. State*, 828 S.W.2d 872, 875 (Mo. 1992).

The record shows that the murder took place shortly after 4:03 p.m. (Tr. 1168-69, 1175-76, 1178, 1190, 1192, 1226, 1297-98). None of the putative witnesses could testify about Appellant's whereabouts during that time, but only that they observed him either before or after that time. "It is not ineffective assistance of counsel to decide not to call witnesses whose testimony does not support an alibi defense but only accounts for movant's whereabouts before or after the time of the crime." *Helmig v. State*, 42 S.W.3d

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658, 670 (Mo. App. E.D. 2001). "None of these witnesses would have provided [Appellant] with an alibi because they would not have so far removed him from the scene of the crime at the relevant time to render it impossible that he is the guilty party." *Id.* (internal quotation marks omitted).

Appellant's point claims that the testimony of the three witnesses would have corroborated the defense that he did not shoot Sergeant Graham. The court of appeals rejected a similar claim in *Wren v. State*, 313 S.W.3d 211 (Mo. App. E.D. 2010). The movant there claimed that counsel should have called his wife to corroborate his mistaken identity defense by testifying that she was with the movant immediately prior to the time of the offense and that he was not in the car involved in the charged crime. *Id.* at 213, 218. The Court found that counsel made a deliberate and logical decision not to call the wife as a matter of trial strategy, and that her testimony would not have unequivocally supported the defense because she did not provide an alibi. *Id.* The record in this case supports a deliberate and logical decision by counsel not to call the witnesses as a matter of trial strategy.

Counsel reviewed the police reports and depositions taken by previous trial counsel. (PCR Tr. 650). All three counsel discussed which witnesses to call, with Bruns and Kessler jointly deciding who to put on the stand. (PCR Tr. 655; PCR L.F. 1354). Both attorneys testified that they were not inclined to call witnesses who could not provide a true alibi. Bruns said he was not

inclined to call witnesses who would provide bad information unless that witness could establish actual innocence. (PCR Tr. 712). Bruns said the "red car" witnesses did not meet that standard. (PCR Tr. 712-13). Kessler would have considered calling witnesses who would have helped a good alibi defense, as opposed to the imperfect alibi that they had in Appellant's case. (PCR L.F. 1269).

Kessler went to the Duncan's home and spoke to them in person. (PCR L.F. 1267). That visit caused him concerns about calling them as witnesses. Kessler did not necessarily believe that Sylvan Duncan would hold up under cross-examination. (PCR L.F. 1267). He also said that Carol Duncan was unsure about some of the matters contained in her police report, which would potentially put him in the position of having to call the police officer who wrote the report to impeach his own witness. (PCR L.F. 1269). Additionally, the testimony of the Duncans at the Rule 29.15 hearing showed that they would have been vulnerable to cross-examination that would have brought out information that was damaging to the defense case. Counsel is not ineffective for failing to call a witness whose testimony will not unqualifiedly help the defense. *Collings v. State*, 543 S.W.3d 1, 15 (Mo. 2018).

Appellant has also failed to overcome the presumption of trial strategy for not calling James Chandler. A movant does not overcome that presumption even where trial counsel fails to verbalize a trial strategy for his

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decision. *Salazar v. State*, 499 S.W.3d 738, 748 (Mo. App. S.D. 2016); *Rios v. State*, 368 S.W.3d 301, 310 (Mo. App. W.D. 2012). Counsel could not remember Chandler or why he was not called. But again, the record shows that counsel had a strategy of not calling witnesses who could not provide a true alibi, which Chandler could not. The motion court did not clearly err in denying Appellant's claim.

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VII.

Appellant did not prove counsel was ineffective for failing to call a witness (responds to Appellant's Point IX).

Appellant claims that counsel was ineffective for failing to call Mila Linn to testify that she saw a red car near Sergeant Graham's home and that she did not identify Appellant as the driver. But Appellant failed to meet his burden of proving that Linn would have testified or would have provided a viable defense.

A. Underlying Facts.

1. *Pre-trial and trial proceedings.*

Highway Patrol Trooper Lowell Sanders contacted Mila Linn by phone the day after Sergeant Graham's murder. (Movant's Ex. 73). Linn told Sanders that she and her son lived on Deer Run 3, about a half-mile north of Sergeant Graham's home. (Movant's Ex. 73). Linn said she stopped at a dumpster near her home at about 3:30, while en route to town, and saw an older (possibly 1990-ish) red two-door car, possibly a hatchback, with a loud muffler. (Movant's Ex. 73). She described the driver as a white male with brown shaggy hair and a sunken face. (Movant's Ex. 73). The report said that Linn had stated that she lived in the area all her life and did not recognize the person or the car. (Movant's Ex. 73). Linn said the car hung around the area for some time. (Movant's Ex. 73).

The day after that interview, two troopers visited Linn and showed her six pictures, including one of Appellant. (Movant's Ex. 74). The only photograph that Linn identified was that of a man named Scott Saylor, who had visited her home about two weeks before the murder, looking for Linn's boyfriend. (Movant's Ex. 74).

Linn was deposed by Appellant's original trial counsel on July 8, 2008. (Movant's Ex. 75, pp. 1-3). Linn said that she did not know Appellant, but did know one of his sisters. (Movant's Ex. 75, p. 6). Linn thought that Sergeant Graham had stopped her for a DWI about a day or two before he was murdered. (Movant's Ex. 75, pp.7-8). Linn said that she had not lived in the area her whole life, but did confirm that she did not recognize the person in the car. (Movant's Ex. 75, p. 11). She remembered that the man had brown hair and then said her son had refreshed her memory about it a day or so before the deposition. (Movant's Ex. 75, p. 12). Her son was fourteen at the time of the deposition and was ten or eleven at the time of the murder. (Movant's Ex. 25, p. 26). Linn said that she was unable to remember a lot of what happened then because she used to be a heavy drinker. (Movant's Ex. 75, pp. 14-15).

She did not remember going to town when she saw the car, as indicated in the police report, because she had gotten a DWI. (Movant's Ex. 75, p. 22). She later testified that she might have been going to a nearby golf course.

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(Movant's Ex. 75, pp. 22, 25-26). Linn was unsure whether the car contained one or two people. (Movant's Ex. 75, p. 24). She said the car was driving by the dumpster when she approached it. (Movant's Ex. 75, pp. 24-25).

At trial, Highway Patrol Sergeant McDonald Brand testified about his investigation of the crime scene. (Tr. 1294-1332). Counsel Kessler cross-examined Sergeant Brand about whether Mila Linn had reported seeing two people in a red car and had said, after being shown a picture of Appellant, that he was not one of them. (Tr. 1336-38).

Kessler made the following statement during the defense's closing argument:

> There were not a unanimous number of people who saw the same red car. You heard Officer Brand say that Mila Linn said that there was a red car with two men in it, and she was shown a lineup that included Lance Shockley, and she told the police not (sic) one of the two people in the car. She saw that car, that same red car that everybody else came in and testified about. She said he wasn't in it and it wasn't the grandmother's car. They didn't call her to tell you that. They hid the ball.

(Tr. 2037).

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2. *29.15 proceedings.*

The amended Rule 29.15 motion alleged that counsel was ineffective for failing to call Linn to testify about the car she had seen. (PCR L.F. 302). Linn's statements to the police and her discovery deposition were admitted as exhibits at the Rule 29.15 hearing. (PCR Tr. 659-60).

Counsel Bruns testified that the defense team considered calling all potential witnesses, including Linn. (PCR Tr. 659). Bruns could not recall the reason that she was not called. (PCR Tr. 659). Bruns testified on cross-examination that the defense was free to argue Linn's statement to police since it came in without objection. (PCR Tr. 713). He said a possible reason not to call Linn would be if she could be impeached. (PCR Tr. 713).

Linn was not called to testify at the evidentiary hearing. The parties did indicate that an agreement had been reached to have Linn deposed for the post-conviction case. (Tr. 117-18, 724). Appellant rested his case without filing any deposition of Linn. (PCR L.F. 1376). The motion court denied the claim, finding that Appellant had presented no evidence. (PCR L.F. 1402).

B. Analysis.

For a movant to prove ineffective assistance of counsel for failure to call a certain witness at trial, the movant must establish that: (1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would

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testify; and (4) the witness's testimony would have produced a viable defense. *Collings*, 543 S.W.3d at 18. Because Linn's testimony was not adduced, either through live testimony or an evidentiary deposition, Appellant failed to meet his burden of proof. *Burton v. State*, 817 S.W.2d 926, 929 (Mo. App. E.D. 1991). The motion court thus did not clearly err in denying the claim. *Gittemeier v. State*, 527 S.W.3d 64, 72 (Mo. 2017).

The information that is contained in the record also supports the denial of the claim. Linn made a damaging admission in her discovery deposition, namely that her memory of the events of the day in question was impaired by her heavy drinking. (Movant's Ex. 75, pp. 14-15). Linn's credibility and the accuracy of her testimony certainly would have been an issue had she testified. *Barton*, 432 S.W.3d at 751. Furthermore, Linn could only testify that she saw some sort of red car, and was not able to specifically describe a make and model. Counsel is not ineffective for failing to call a witness whose testimony will not unqualifiedly help the defense. *Collings*, 543 S.W.3d at 15.

Furthermore, Appellant has the burden to overcome the strong presumption that any omissions by trial counsel were trial strategy. *Salazar*, 499 S.W.3d at 748. A movant does not overcome that presumption even where trial counsel fails to verbalize a trial strategy for his decision. *Id.*; *Rios*, 368 S.W.3d at 310. Counsel could not recall why Linn was not called and acknowledged that avoiding impeachment could be one reason not to call a

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witness. (PCR L.F. 659, 713). By not calling Linn, counsel was able to go well beyond the scope of her actual deposition testimony in characterizing her statements to the jury in closing argument. The defense was able to present that version of her statements without subjecting her to impeachment on differences between her statements to police and her deposition testimony and on her ability to make accurate observations. It is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another. *Barton*, 432 S.W.3d at 749. Appellant has failed to show that counsel was ineffective or that he was prejudiced.

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VIII.

Counsel was not ineffective for failing to impeach a witness with her prior statements (responds to Appellant's Point X).

Appellant claims that counsel was ineffective for failing to impeach Lisa Hart's testimony about the location of the yellow sticker that she saw on the red car parked near Sergeant Graham's home. But Appellant has failed to overcome the presumption of trial strategy and has not demonstrated that there is a reasonable probability that the proposed impeachment would have changed the outcome of the trial.

A. Underlying Facts.

1. *Trial proceedings.*

As noted above, Lisa Hart testified that she saw a red Pontiac Grand Am as she and her husband turned down a gravel drive to go to the Johnson house. (Tr. 1887-93). Hart said, "For some unknown reason there was a yellow fist to softball-sized sticker that stuck out." (Tr. 1892).

The day after the murder, Hart mentioned the car to a co-worker who was married to a Highway Patrol trooper. (Tr. 1901). Hart was contacted by the Patrol, and she gave a written statement three days after the murder. (Tr. 1903). Hart and her husband were later asked to come to the command center from where the investigation was being conducted. (Tr. 1904). As they pulled into the parking lot, Hart saw a red car with a yellow sticker and

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recognized it as the same car she had seen on the day of the murder. (Tr. 1906). Hart said that she was 100-percent certain it was the same car and that there was no doubt in her mind. (Tr. 1906).

Counsel Frances cross-examined Hart and elicited testimony that the yellow sticker was one of the first things she noticed about the car. (Tr. 1906-07). Hart later said that the yellow sticker, "stuck out when I saw the whole car, but not when I was driving in." (Tr. 1908). She said that she might have seen it when she was driving out. (Tr. 1908). Hart said on redirect examination that the first time she saw the car, the front was facing her and she was closest to the passenger side. (Tr. 1915).

2. *29.15 proceedings.*

The amended motion alleged that counsel was ineffective for failing to impeach Hart with her prior inconsistent statement to the police that the red car she saw might have had a yellow sticker on it when facing the front of the car. (PCR L.F. 331). The motion also alleged that counsel should have impeached Hart with her deposition testimony that she saw the sticker for the first time when driving by the car while heading towards the house for sale, when she would have been facing the front of the car. (PCR L.F. 331). At the evidentiary hearing, Hart's written statement to the Patrol and her deposition taken by Appellant's original trial counsel were admitted into evidence. (PCR Tr. 541).

In the written statement, Hart said that the car was parked on the west side of the gravel road, facing north. (Movant's Ex. 70). In describing the car, Hart wrote, "It seemed that it might have had some sort of yellow sticker about fist size on it when facing the front of the car." (Movant's Ex. 70).

In her deposition, Hart described the route she and her husband took as M Highway to Deer Run 2, and then right onto the gravel road going to the house. (Movant's Ex. 69, p. 12). Hart said that she saw the car as soon as her husband turned onto the gravel road. (Movant's Ex. 69, p. 13). She said it was parked on the west side of the road, facing north. (Movant's Ex. 69, p. 13). Hart testified about her observations of the car as they drove past. (Movant's Ex. 69, pp. 13-14). One of the things she mentioned was a fist-sized yellow sticker. (Movant's Ex. 69, p. 14). Hart said that she noticed the sticker the first time she passed the car. (Movant's Ex. 69, pp. 14, 40). Hart could not remember what part of the car the sticker was on. (Movant's Ex. 69, p. 22).

Hart said that she was 100-percent certain that the car she saw at the command center was the car she saw parked alongside the road. (Movant's Ex. 69, p. 37).

Counsel Frances said that she did not have very specific memories of the yellow sticker and did not have an independent recollection of Hart's testimony. (PCR L.F. 1356-57). Frances could not independently recall what her trial strategy was concerning impeachment of Hart. (PCR L.F. 1359).

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Frances said that she called Roger Hart as a witness in the defense case-in-chief in an attempt to bring out discrepancies in Lisa Hart's testimony. (PCR L.F. 1371).

The motion court found that counsel had a reasonable trial strategy and that the failure to impeach Hart did not prejudice Appellant. (PCR L.F. 1403). The court noted the testimony of other witnesses concerning the red car and Lisa Hart's certainty that the car she saw was the one belonging to Appellant's grandmother. (PCR L.F. 1403).

B. Analysis.

The mere failure to impeach a witness does not entitled a movant to relief. *Barton*, 432 S.W.3d at 750. This Court generally presumes that counsel's decision not to impeach a witness is a matter of trial strategy. *Id.* In proving that counsel was ineffective for failing to impeach a witness, Appellant has the burden of showing that the impeachment would have provided him with a defense or would have changed the outcome of the trial. *Id.* He must also overcome the presumption that counsel's decision not to impeach was a matter of trial strategy. *Id.* A movant does not overcome that presumption even where counsel fails to verbalize a trial strategy for her decision. *Salazar*, 499 S.W.3d at 748; *Rios*, 368 S.W.3d at 310. Counsel Frances could not independently recall what her trial strategy was concerning impeachment of Hart. (PCR L.F. 1359). She did, however, make a

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conscious decision to call Roger Hart as a witness in the defense case-in-chief in an attempt to bring out discrepancies in Lisa Hart's testimony. (PCR L.F. 1371). Appellant has thus failed to overcome the presumption of trial strategy.

Appellant is also not entitled to relief because Hart's prior inconsistent statements do not give rise to a reasonable doubt as to Appellant's guilt. *Johnson*, 406 S.W.3d at 904. The proposed impeachment might have raised a question as to when Hart first saw the yellow sticker on the car, but it would not have negated the fact that she saw the sticker after having the opportunity to view both the front and back of the vehicle. Nor would it have negated Hart's consistent declarations that she was one-hundred percent certain that Mae Shockley's car was the car that she saw parked along the gravel road. The impeachment evidence thus would not have shown that Appellant was not involved in the crime. *Ferguson*, 20 S.W.3d at 507.

Appellant also has failed to show a reasonable probability that impeaching Hart would have changed the outcome of the trial, as she was not the only witness to link Mae Shockley's car to the car seen on the gravel road. Roger Hart testified that he was one-hundred percent certain the two cars were the same. (Tr. 2001-03). And Rick Hamm said that Mae Shockley's car was similar to the car that he saw parked on the road at three different times. (Tr. 1877).

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IX.

Counsel was not ineffective for failing to make a non-meritorious motion to strike a juror for cause (responds to Appellant's Point XI).

Appellant claims that counsel was ineffective for failing to move to strike Juror No. 3 for cause because that juror was more inclined to impose death for the killing of a law enforcement officer. But Juror No. 3's voir dire answers indicated that he could give fair consideration to both death and to life without parole, so that a motion to strike would have lacked merit.

A. Underlying Facts.

1. *Trial proceedings.*

Juror No. 3 stated during the death qualification voir dire that he could consider both death or life without parole if called upon to make that choice. (Tr. 563). He said that he would not automatically sentence someone to death for killing another. (Tr. 564). Defense counsel Kessler asked Juror No. 3 if he would automatically be more inclined to give the death penalty simply because the victim was a law enforcement officer, and Juror No. 3 answered, "I probably would be more inclined." (Tr. 582). Counsel asked Juror No. 3 if he felt that the death penalty was the only appropriate punishment for the death of a law enforcement officer, and Juror No. 3 answered, "Well, I mean I respect law officers and what they have to do. I guess I would feel that more

of a crime than just an average -- " (Tr. 583). Kessler cut-off Juror No. 3 and began questioning another venire member. (Tr. 583). Kessler then returned to Juror No. 3:

> [MR. KESSLER]: But now, Juror No. 3, if you found that he did and it was the murder of a law enforcement officer are you more inclined to say that that person deserves the death penalty and, therefore, that's the only punishment you're going to give meaningful consideration to?
>
> JUROR NO. 3: I can't say that I would be more inclined because it would bother me. I respect law enforcement, but, I mean, I could be impartial.
>
> MR. KESSLER: All right. So here's what I hear you saying. You would consider that as an aggravating circumstance, but it wouldn't automatically make you vote for the death penalty?
>
> JUROR NO. 3: No, it would not.

(Tr. 584). Kessler did not move to strike Juror No. 3 for cause. (Tr. 594). During general voir dire, Juror No. 3 said that, based on the evidence, he could stand up to law enforcement and find Appellant not guilty, or stand up to Appellant's family and friends and find him guilty. (Tr. 610). Juror No. 3 served on the jury. (Tr. 983).

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2. *29.15 proceedings.*

The amended motion alleged that counsel was ineffective for failing to move to strike for cause Juror No. 3, who initially stated that he would be more inclined to give the death penalty for the murder of a law enforcement officer (PCR L.F. 236-37).

Kessler testified at the 29.15 hearing that he did not specifically recall Juror No. 3. (PCR L.F. 1264). After reviewing Juror No. 3's voir dire answers, Kessler still could not say specifically why he did not move to strike the juror for cause. (PCR L.F. 1266). He noted that Juror No. 3 had said that he could be impartial and indicated that he would not automatically vote for the death penalty. (PCR L.F. 1266).

The motion court found that there was no evidence in the record to suggest that a motion to strike Juror No. 3 would have been successful, because his voir dire testimony was clear that he could be impartial on the issue of punishment. (PCR L.F. 1398). The court found that a motion to strike would have been denied. (PCR L.F. 1399).

B. Analysis.

A decision whether or not to move to strike a veniremember for cause is a matter of trial strategy. *Driscoll v. State*, 767 S.W.2d 5, 9 (Mo. 1989). Appellant has the burden to overcome the strong presumption that any omissions by trial counsel were trial strategy. *Salazar*, 499 S.W.3d at 748. A

movant does not overcome that presumption even where trial counsel fails to verbalize a trial strategy for his decision. *Id.*; *Rios*, 368 S.W.3d at 310. Counsel could not recall Juror No. 3, much less his reasons for not making a motion to strike him for cause. (PCR L.F. 1264, 1266). Appellant has thus failed to overcome the presumption that counsel's actions were a matter of trial strategy.

The motion court also did not clearly err in finding that a motion to strike was unlikely to be granted. Courts do not disqualify a venireperson because he had unchannelled opinions about the death penalty. *State v. Brown*, 902 S.W.2d 278, 296 (Mo. 1995). Instead, the critical inquiry is whether his opinion is so strong that he will not follow the instructions. *Id.* The voir dire indicated that Juror No. 3 would follow the court's instructions and give consideration to both available punishments if the trial reached the stage where he had to make that choice. Appellant has thus not shown prejudice from counsel's failure to make a motion to strike. *Id.*

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X.

Counsel not ineffective for failing to object to victim impact evidence (responds to Appellant's Point XII).

Appellant claims that counsel was ineffective for failing to object to three of the State's penalty phase exhibits. But Appellant failed to demonstrate that the exhibits were inadmissible and that an objection would have been meritorious.

A. Underlying Facts.

1. *Trial proceedings.*

Sergeant Graham's father, Carl Graham, Sr., testified for the State in the penalty phase. (Tr. 2098). After describing his son's upbringing and relationships with family members, Mr. Graham identified State's Exhibit 250 as a disk that he had given the prosecution. (Tr. 2102-03). He said the disk contained a four-minute photo montage that was played during Sergeant Graham's funeral. (Tr. 2103). The exhibit was admitted into evidence, with counsel Bruns stating "No objection." (Tr. 2103). The video was played for the jury at the end of the State's penalty phase case. (Tr. 2127).

Mr. Graham went on to describe his son's funeral and the large turnout for it. (Tr. 2103-04). The court admitted into evidence State's Exhibit 133, which the prosecutor described as a photograph of the funeral scene that

depicted Sergeant Graham's casket being taken out. (Tr. 2104). Counsel Bruns again said, "No objection." (Tr. 2104).

Tami Ogden was Sergeant Graham's former wife and the father of his son. (Tr. 2120). The boy was four years old when his father was murdered. (Tr. 2120). Ogden described Sergeant Graham as an "awesome" father and detailed the relationship he had with his son. (Tr. 2120-23). Ogden testified about her son's reaction when she told him that his father was dead. (Tr. 2123). The boy cried and asked if there were phones in heaven so he could talk to his father. (Tr. 2123). He asked God to take care of his daddy. (Tr. 2123). He also had nightmares and said that he wished he could die so he would get to see his daddy. (Tr. 2123). Ogden described a picture drawn by her son that was admitted as State's Exhibit 254. (Tr. 2124). The boy said, "I'm drawing a picture of my daddy and then down here is Lance Shockley killing him." (Tr. 2124). Counsel Bruns stated, "No objection," when the drawing was offered. (Tr. 2124).

2. *29.15 proceedings.*

The amended motion alleged that counsel was ineffective for failing to object to the three exhibits described above. (PCR L.F. 416). The motion alleged that the exhibits exceeded the bounds of permissible victim impact evidence and were designed to arouse the emotions of the jury. (PCR L.F. 417). At the beginning of the evidentiary hearing, the motion court, at the

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request of post-conviction counsel, took judicial notice of the underlying circuit court criminal case. (PCR Tr. 109-10).

Counsel Bruns testified that he did not remember the photomontage or the picture from the funeral. (PCR Tr. 679, 681). When asked whether he considered objecting to the photomontage, Bruns said, "I'm sure we always considered objecting and I would[,] I just don't remember it and my judgment at the time must have been that they could do worse stuff to us quite frankly." (PCR Tr. 680). Bruns said he might remember a reason for not objecting to the funeral photograph if he saw it. (PCR Tr. 681). Bruns was not shown the photograph, but he added the following: "Out of everything that's coming in I can't imagine that that sort of photograph is the worst thing, I mean." (PCR Tr. 681).

Bruns gave the following answer when asked if he considered objecting to the picture drawn by Sergeant Graham's son:

> I don't think I did and that would be an example of something that is terrible and terribly hurtful. I don't know, I mean as I sit here I don't know under the law what I can object to other than it's more prejudicial than probative but I would say that my understanding whether rightly or wrongly would be is that one drawing like this is probably going to come in. And if I'm wrong I'm wrong.

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(PCR Tr. 681-82).

Bruns had testified earlier that he tried his best not to object during the State's presentation of aggravating evidence. (PCR Tr. 677-78). The prosecutor asked Bruns why that was:

> A. Well one of the reasons is is that you're hoping that they don't object during your's (sic) and that it is and if they do that they look terrible about it and the law's broad as far as my understanding about what they can bring in about what the government can bring in and that there's not, that unless they really step over the boundary that the law's really not on your side and a lot of it is very, very discretionary.
>
> Q. During the presentation of victim impact evidence would you agree with me that there's some concern about making it appear to the jury that you're insensitive to the victim's loss?
>
> A. You don't want to be an un-nice human being and to be viewed as not a nice human being.
>
> Q. And it's true as well that objecting too much or maybe even objecting at all during the victim impact testimony could make the jury think okay they are not being nice right now?

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A. Well and it can you know and unfortunately I guess it also because you know it's hard being a defense lawyer and that sometimes you've got to just object if they're doing stuff no matter who it makes upset. But on the other hand my understanding is the law is really, really broad and that really a lot of the stuff is just plainly admissible.

(PCR Tr. 694-95).

The motion court found that Appellant had failed to show that the victim impact evidence was prejudicial and rendered the trial fundamentally unfair. (PCR L.F. 1425). The court found that counsel was thus not ineffective for failing to make a non-meritorious objection. (PCR L.F. 1425).

B. Analysis.

Victim impact evidence is admissible under the United States and Missouri Constitutions. *State v. McLaughlin*, 265 S.W.3d 257, 273 (Mo. 2008). Just as the defendant is entitled to present evidence in mitigation designed to show that the defendant is a uniquely individual human being, the State is also allowed to present evidence showing each victim's uniqueness as an individual human being. *Id.* Victim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair. *Id.* In particular, this Court has upheld the admission of a video of the

victims' family Christmas celebration. *State v. Gray*, 887 S.W.2d 369, 389 (Mo. 1994).

Counsel is not ineffective for failing to object to admissible victim impact evidence. *State v. Kreutzer*, 928 S.W.2d 854, 878 (Mo. 1996). Appellant failed to demonstrate that the evidence was inadmissible and that an objection would thus have been meritorious.

The challenged exhibits were not themselves introduced or admitted into evidence at the post-conviction evidentiary hearing. While the trial court did take judicial notice of the underlying circuit court case, the record does not demonstrate that the exhibits were part of the physical file available for the court's review. Appellant thus failed to meet his burden of establishing, at the evidentiary hearing, that the exhibits were so unduly prejudicial as to render the trial fundamentally unfair. As a result, Appellant failed to demonstrate that an objection would have been meritorious and by extension failed to demonstrate that counsel was ineffective.

Even if the description of the exhibits in the underlying trial transcript is deemed sufficient to demonstrate the nature of the exhibits, Appellant's argument consists only of a conclusory allegation of prejudice and a discussion of an out-of-state case where counsel was found ineffective for failing to object to a video admitted as victim impact evidence. But even that opinion noted that courts in capital cases had found victim impact videos

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permissible when they are short in duration and do not include special effects such as narration or evocative music. *State v. Hess*, 23 A.3d 373, 392-93 (N.J. 2011). The video at issue in *Hess* was seventeen minutes in length, professionally produced, and included music and poems that scrolled across the photos and video clips. *Id.* at 393. The record in this case only discloses that the video was four minutes in length and compiled by Sergeant Graham's family. (Tr. 2103). Nothing in the record demonstrates that the video contained any of the type of inflammatory features described in *Hess*.

Appellant also failed to demonstrate that counsel's failure to object was not a valid trial strategy. *Kreutzer*, 928 S.W.2d at 875. Counsel testified that he tried to limit objections to the State's victim impact evidence because that could alienate the jury. (PCR Tr. 694-95). This Court has recognized that as a valid reason not to object. *Storey*, 175 S.W.3d at 132.

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XI.

Counsel was not ineffective for failing to object to an isolated comment by the prosecutor (responds to Appellant's Point XIII).

Appellant claims that counsel was ineffective for failing to object, request a mistrial, or request a curative instruction in response to a remark by the prosecutor that Appellant claims was a comment on his right to remain silent. But Appellant failed to overcome the presumption of trial strategy or to show prejudice from the isolated comment.

A. Underlying Facts.

1. *Trial and direct appeal.*

Lisa Hart testified that she and her husband saw a red Grand Am with a yellow sticker parked along a gravel road near Sergeant Graham's home on the afternoon that Graham was murdered. (Tr. 1886-89, 1892). Hart also testified that she saw the Grand Am belonging to Appellant's grandmother after it was seized by police and that she was one-hundred percent certain that it was the same car that she had seen on the gravel road. (Tr. 1905-06).

On cross-examination, the defense asked questions designed to suggest that Hart could only provide a general description of the car and that she could not specifically tie it to Appellant's grandmother. (Tr. 1907-12). The prosecutor addressed that line of questioning on redirect examination:

Q. Defense counsel asked you if that's the only description you were able to give. Actually you gave the description, "That's the car"; isn't that true?

A. Yes. That is the car. I am 100 percent sure the picture you showed me is the car.

Q. And when they were backing it out, it wasn't sitting out there amongst a whole bunch of police cars, you –

A. I didn't see any police cars.

Q. And it just happened to be coming out of a garage?

A. And they would not have known what time I was pulling up. I did not even know what time I was going to get there.

Q. So you just see it and instantly?

A. Instantly I said, "Oh my gosh. That's it." No doubt.

Q. Did you know Mae Shockley?

A. No.

Q. Do you know why her car would be across from where Sergeant Graham was murdered –

A. No.

Q. – on March 20, 2005?

A. No.

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[PROSECUTOR]: Someone does.

THE COURT: Keep the comments to yourself. I've already warned defense counsel.

(Tr. 1913-14). Defense counsel then immediately began to re-cross examine Hart about the certainty of her identification of the car. (Tr. 1914-16).

Appellant raised a claim on direct appeal that the prosecutor's comment improperly referred to Appellant's failure to testify. *Shockley*, 410 S.W.3d at 188. This Court found that the comment was not a direct comment on Appellant's failure to testify. *Id.* at 189. The Court declined to make a finding as to whether the comment was an indirect comment on Appellant's failure to testify. *Id.* It concluded that the remark was an off-the-cuff, isolated comment that was not intended to magnify Appellant's decision not to testify. *Id.* at 190. The Court found that the comment did not have a decisive effect on the jury and further noted that the jury was instructed that it could not draw an adverse inference from Appellant's decision not to testify. *Id.* at 190-91. The Court concluded that the trial court did not plainly err in failing to grant a mistrial *sua sponte*. *Id.* at 191.

2. *29.15 proceedings.*

The amended motion alleged that counsel was ineffective for failing to object, request a mistrial, or alternatively a curative instruction after the prosecutor made the complained-of comment. (PCR L.F. 374). The motion

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alleged that the comment was intentional and was "an unambiguous assurance to the jury that Movant knew why the automobile was parked near the scene of Sgt. Graham's murder and it surely highlighted and was apt to direct the jury's attention to his ultimate silence." (PCR L.F. 377).

Counsel Frances was the responsible attorney for Lisa Hart's testimony. (Tr. 1906). In her deposition for the 29.15 hearing, she did not recall the prosecutor's statement and also did not recall whether she considered making an objection, moving for a mistrial, or asking for an instruction. (PCR L.F. 1361). Frances was unable to recall whether she had a strategy reason for not objecting. (PCR L.F. 1361).

The motion court found that an objection, request for mistrial, or curative instruction would not have been granted if requested. (PCR L.F. 1418). The court also found that an objection would have drawn further attention to the statement, and that it was thus reasonable for counsel to refrain from objecting. (PCR L.F. 1418). The court further found that Appellant had not demonstrated a substantial deprivation of his right to a fair trial. (PCR L.F. 1418).

B. Analysis.

A failure to object to comments by a prosecutor is generally not error, but rather a function of trial strategy. *Barton*, 432 S.W.3d at 755. To prevail on a claim that counsel was ineffective for failing to object, a movant must

prove that the failure to object was not a matter of trial strategy and that the failure to object was prejudicial. *Id.*

Appellant has the burden to overcome the strong presumption that any omissions by trial counsel were trial strategy. *Salazar*, 499 S.W.3d at 748. A movant does not overcome that presumption even where trial counsel fails to verbalize a trial strategy for her decision. *Id.*; *Rios*, 368 S.W.3d at 310. Counsel could not recall the comment at issue, much less her reasons for not objecting or requesting other relief. (PCR L.F. 1361). Appellant has thus failed to overcome the presumption that counsel's actions were a matter of trial strategy.

Appellant has also not demonstrated prejudice. An allegedly improper comment must be considered in the context of the whole trial. *Hall v. State*, 16 S.W.3d 582, 586 (Mo. 2000). Appellant's argument that the prosecutor's comment told the jury that Appellant knew why his grandmother's car was parked near Sergeant Graham's house conflicts with this Court's finding on direct appeal that the statement could have referred to many people in addition to Appellant. *Shockley*, 410 S.W.3d at 190-91. The Court concluded that the comment did not have a decisive impact on the jury. *Id.* at 190. While the plain error standard on direct appeal is different from the *Strickland* prejudice standard, it is the rare case where the difference in the two standards will cause a court to grant post-conviction relief after it has

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denied relief on direct appeal. *Deck v. State*, 68 S.W.3d 418, 428 (Mo. 2002). Appellant's cursory argument makes no attempt to demonstrate why this is one of those rare cases.

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XII.

Appellant has failed to show ineffectiveness or prejudice relating to law enforcement presence at trial and sentencing (responds to Appellant's Point XIV).

Appellant claims that counsel was ineffective for failing to object to a visible police presence in and around the courthouse during trial and sentencing, and failing to object to judge sentencing in the face of such police presence because of the electoral pressures on the judge. But Appellant failed to show that any jurors had contact with the officers and he failed to present evidence on his claim of failure to object to judge sentencing.

A. Underlying Facts.

The amended motion alleged that counsel should have objected to the number and location of armed guards and officers in and surrounding the courthouse. (PCR L.F. 369). The motion also alleged that counsel should have objected to Judge Evans sentencing Appellant to death because he was an elected official and the courtroom was filled during the sentencing proceedings with uniformed Highway Patrol troopers. (PCR L.F. 419).

Appellant's aunt, Marcia Miller, testified that she came to the Carter County Courthouse when jury selection was underway. (PCR Tr. 373-74). Miller said that there were between fifty to sixty armed officers in uniform. (PCR Tr. 375). She said the officers were in the courthouse square, outside

the courthouse wall, in the courthouse itself, and around the police station or sheriff's office. (PCR Tr. 375). Miller saw the same scenario when she came to the second day of jury selection. (PCR Tr. 376).

Miller also attended each day of the trial at the Howell County Courthouse. (PCR Tr. 377). She observed between 75 and 100 officers inside and outside the courthouse, including on the courthouse roof. (PCR Tr. 377-78). Some of the officers were armed with long rifles. (PCR Tr. 377). Miller said that Appellant was escorted into the courthouse with a line of officers on each side of him. (PCR Tr. 380). The court admitted into evidence newspaper photos showing officers at the courthouse and showing Appellant being escorted out of the courthouse under guard. (PCR Tr. 380-82). Miller acknowledged on cross-examination that people would be gathered around the square and yelling things at Appellant as he was brought in and out of the courthouse. (PCR Tr. 385).

Counsel Bruns testified that he did not remember much about the voir dire in Carter County. (PCR Tr. 664). He said there may have been some Highway Patrol outside, but nothing that stuck out. (PCR Tr. 664). Bruns did remember that there was a large police presence in Howell County, and that a lot of it had to with the transporting of Appellant. (PCR Tr. 664). Bruns remembered that there were threats to everybody and people were yelling at Appellant. (PCR Tr. 664). Bruns did not remember any officers with guns

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outside the courtroom. (PCR Tr. 665). He said that in at least one instance, "there were a fair amount of law enforcement and I think it had to do with moving Lance again. I think they were concerned, there was a genuine concern that someone was going to shoot him." (PCR Tr. 665). Bruns could not remember if any thought was given to objecting about the presence of law enforcement around the courthouse. (PCR Tr. 666-67). Bruns said that he did not consider objecting to the presence of officers at sentencing because that was not going to affect the judge's decision. (PCR Tr. 682).

Counsel Kessler testified that it was his recollection that the sequestered jury, which was transported to and from court in the same vehicle, did not come through a "phalanx of uniformed people to get in and out of the courthouse." (PCR L.F. 1278). Kessler said that the jury would also not have been around when Appellant was transported back and forth. (Tr. 1278). Kessler did not remember officers standing around in uniform when the jury was transported. (PCR L.F. 1279). He only saw assault weapons when Appellant was transported. (PCR L.F. 1279). Kessler never saw anyone with a gun around Appellant at the same time as the jury and never saw him handcuffed at any time when the jury was around. (PCR L.F. 1279-80). Kessler said that he would not have thought to ask the judge to limit the presence of people that the jury would not have seen. (PCR L.F. 1280).

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Kessler said that numerous uniformed officers were present at the sentencing hearing. (PCR L.F. 1302). Kessler said he did not consider objecting to their presence because it was known that they were police officers regardless of what they were wearing. (PCR L.F. 1302-03).

Counsel Frances did not recall a huge police presence during voir dire. (PCR L.F. 1359). She remembered a large police presence outside of the courthouse during the trial and several officers guarding Appellant in the courtroom. (PCR L.F. 1359-60). She did not remember a police presence in the hallways. (PCR L.F. 1360). Frances could not recall any discussions with co-counsel about objecting to the presence of the officers and could not recall whether there was a strategy reason for not objecting. (PCR L.F. 1360-61).

Frances testified that the officers who sat directly behind counsel table were dressed in civilian clothes. (PCR L.F. 1368). She could not recall if any other officers were in the courtroom. (PCR L.F. 1368). Frances said that the uniformed officers were outside the courthouse. (PCR L.F. 1369). She had been told that those officers were there to protect Appellant due to threats that had been made. (PCR L.F. 1369). Appellant was placed in a bullet-proof vest when he was transported. (PCR L.F. 1369). Frances could not speak to what the jury might have seen in terms of a police presence. (PCR L.F. 1370).

The motion court found that no evidence had been presented to suggest that any jurors had contact with the officers who were present to provide

security or who were in the courthouse during the trial. (PCR L.F. 1415, 1426). The court found that no evidence clearly demonstrated that the courtroom lacked the appearance of neutrality necessary to afford Appellant a fair trial. (PCR L.F. 1416). It also found no evidence that the presence of any law enforcement officers influenced the outcome of the trial. (PCR L.F. 1426). The claim that counsel should have objected to the trial judge imposing the death penalty was rejected as non-cognizable. (PCR L.F. 1427).

B. Analysis.

Appellant groups two separate allegations of error into a single point: (1) the failure to object to a visible police presence, and (2) the failure to object to the judge imposing the death penalty. While that multifarious point violates Rule 30.06, Respondent will address it on the merits in accordance with this Court's policy to decide a case on the merits rather than on technical deficiencies in the brief. *Christeson v. State*, 131 S.W.3d 796, 799 n.5 (Mo. 2004).

Appellant's second claim, the failure to object to the trial judge imposing the death penalty, is easily disposed of. Appellant presented no evidence on that claim. He instead only asked trial counsel about their failure to object to the presence of uniformed officers at the sentencing hearing. (PCR Tr. 682; PCR L.F. 1302-03). Allegations in a post-conviction motion are not self-proving. *Gittemeier*, 527 S.W.3d at 71. Failure to present evidence at a

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hearing in support of factual claims in a post-conviction motion constitutes abandonment of that claim. *Id.*

The motion court did not clearly err in denying the other portion of Appellant's claim – that counsel was ineffective for failing to object to the presence of uniformed officers during the trial and at sentencing. A trial court has wide discretion in determining whether to take action to avoid an environment for trial in which there is not a sense or appearance of neutrality. *Johnson*, 406 S.W.3d at 903. The movant in *Johnson* was denied an evidentiary hearing on a similar claim when he failed to plead facts giving any reason to believe that the sequestered jury came into contact with any officers and failed to present any fact that would support the ultimate conclusion that the presence of officers in the courthouse could have influenced the outcome of the trial. *Id.*

Appellant received an evidentiary hearing in this case, but failed to present credible evidence showing that any members of the sequestered jury came into contact with law enforcement officers in or around the courtroom. The court credited counsel Kessler's testimony that the jury was not present to witness Appellant being escorted by officers, and that he would not have thought to ask the judge to limit the presence of people that the jury would not have seen. (PCR L.F. 1415-16). This Court defers to that credibility determination. *Davis*, 486 S.W.3d at 905.

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XIII.

Appellant was not prejudiced by direct appeal counsel's performance (responds to Appellant's Point XV).

Appellant claims that direct appeal counsel was ineffective in combining two grounds of error into a claim challenging the failure to grant a mistrial, because that caused the claim to be reviewed for plain error. But this Court determined on direct appeal that the evidence was not improperly admitted as character evidence and Appellant has thus not established that this Court would have ordered a new trial if the claim had been brought as one of preserved error.

A. Underlying Facts.

1. *Direct appeal.*

Appellant raised a claim on direct appeal that the trial court erred in not sustaining his request for a mistrial after a Highway Patrol officer testified that Appellant had a history of violence. *Shockley*, 410 S.W.3d at 191. Appellant argued on appeal that the comment constituted impermissible propensity evidence. *Id.* This Court found that claim was not preserved because defense counsel objected at trial on the basis that the comment was improper character evidence. *Id.* at 193. The Court further rejected Appellant's attempt to merge the character and propensity concepts, finding that they are distinct from one another. *Id.* The Court concluded that the

State did not introduce the evidence to show Appellant's bad character, but instead to explain why the police acted as they did. *Id.* at 194. The Court further noted that Appellant had opened the door to that testimony and that other evidence of his violent character was properly before the jury. *Id.*

2. *29.15 proceedings.*

The amended motion alleged that appellate counsel should have raised his claim of error on the same basis as the objection made in the trial court. (PCR L.F. 467). The motion alleged that this Court would have reversed had counsel done so. (PCR L.F. 467).

Direct appeal counsel Michael Gross testified that he believed that he had raised both the character and propensity arguments in his brief. (PCR Tr. 491). Gross said that, in hindsight, he might have raised the issue differently. (PCR Tr. 491). Gross said that he thought that the propensity argument was valuable because of this Court's opinions on the subject at the time of the direct appeal. (PCR Tr. 492).

The motion court found that this Court would not have been compelled to reverse Appellant's conviction, and that he therefore did not prove prejudice. (PCR L.F. 1453).

B. Analysis.

Appellant offers only a conclusory allegation that this Court would have granted a new trial had the claim of error been briefed on the preserved

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grounds of improper character evidence. Appellant wholly fails to address this Court's finding on direct appeal that the witness did not give the testimony to prove Appellant's character, but instead made the statement to explain why the police acted as they did, and that Appellant had opened the door to the testimony in his opening statement. *Id.*

The Court further noted that other evidence of Appellant's violent character was properly before the jury. *Id.* Even if evidence is improperly admitted, no reversible error occurs when other evidence before the court establishes essentially the same facts. *State v. Zagorski*, 632 S.W.2d 475, 478 n.2 (Mo. 1982). Appellant has failed to show that this Court would have ordered a new trial had his claim been framed differently on direct appeal.

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XIV.

Counsel was not ineffective for failing to call additional mitigation witnesses (responds to Appellant's Point XVI).

Appellant claims that counsel was ineffective for failing to call three additional mitigation witnesses to testify about his character. But Appellant has failed to demonstrate that counsel's investigation was insufficient or that calling the witnesses would have resulted in his receiving a life sentence.

A. Underlying Facts.

1. *Trial proceedings.*

Appellant presented three witnesses at the punishment phase of the trial. Laura Smith had known Appellant almost all her life. (Tr. 2128). They were together for more than six years and had two children. (Tr. 2128). She identified pictures of Appellant and his daughters. (Tr. 2129). Smith testified that it was important for the girls to have a relationship with their dad, and that explaining to them the possibility that he could be put to death was the hardest thing she had to do. (Tr. 2130). She testified that the girls could have a relationship with Appellant if he were given a life sentence. (Tr. 2130). Smith pleaded with the jury not to sentence Appellant to death, saying that her daughters would have to pay a price. (Tr. 2130).

Rachel Shockley was Appellant's cousin and said he was more like a brother. (Tr. 2131). Rachel said she always admired and looked up to

Appellant. (Tr. 2131). She said Appellant looked after and protected her, and "would save me from my own brother from a mud puddle." (Tr. 2132). Rachel said Appellant looked after their grandparents, checking on them two or three times a day. (Tr. 2132). He helped with tasks like cutting down trees or giving them rides. (Tr. 2132). Rachel described Appellant as the backbone of the family. (Tr. 2132). She said it would mean everything in the world to her if Appellant received a life sentence and she could continue to see him and talk by phone. (Tr. 2132).

Appellant's grandfather, Gerald Sanders, described Appellant as one of the best kids that he believed was ever put on Earth. (Tr. 2133). Appellant spent a lot of time at Sanders's house throughout his childhood and never gave him any trouble. (Tr. 2133). Appellant lived with Sanders after Appellant's father was killed when Appellant was eight years old. (Tr. 2134). Sanders said that Appellant was a straight-A student and one of the best ball players to ever come out of Carter County. (Tr. 2133). He detailed how Appellant was a hard worker. (Tr. 2134). Sanders continued to have contact with Appellant as an adult, and Appellant took care of his farm while Sanders recovered from open heart surgery. (Tr. 2135-36). Sanders talked about how much he loved Appellant and how much he missed him, describing the family activities they had enjoyed. (Tr. 2136-37).

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2. *29.15 proceedings.*

The amended motion alleged that counsel should have called Velma Dowdy, Eugene Jackson, and Butch Chilton to testify as mitigation witnesses during the penalty phase. (PCR L.F. 421, 425).

Velma Dowdy testified at the evidentiary hearing that she had known Appellant all his life. (PCR Tr. 406-08). His parents and grandparents were her neighbors. (PCR Tr. 408). Laura Smith, was Dowdy's granddaughter. (PCR L.F. 413). She said that Appellant attended family activities like barbecues and that he helped to feed and take care of his daughters. (PCR Tr. 414). Dowdy said that her feelings about Appellant did not change when he split up with Smith. (PCR Tr. 418). Dowdy said that she did not see Appellant very much after that. (PCR Tr. 419).

Dowdy admitted on cross-examination that she was not aware that Appellant killed Jeff Bayless while he was driving drunk. (PCR Tr. 424). She was asked whether she was aware that Appellant assaulted the stepfather of his daughters. (PCR Tr. 424-25). She was unaware that Appellant grew, used, and sold marijuana. (PCR Tr. 425). She was unaware that he threatened to kill a jailer. (PCR Tr. 425).

Eugene Jackson testified that he was friends with Appellant going back to childhood. (PCR Tr. 460-61). Jackson said it was tough for Appellant when his father died. (PCR Tr. 462). Jackson described Appellant as a clown, or a

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cut-up, when they were in school. (PCR Tr. 463). He said Appellant was liked by the other students. (PCR Tr. 463). He was not aware of Appellant having trouble with others as an adult. (PCR Tr. 464). Jackson called Appellant a happy-go-lucky and friendly person who never had anything bad to say about others. (PCR Tr. 465). Jackson said that Appellant temporarily took in a friend's daughter who was having problems. (PCR Tr. 466).

Butch Chilton testified that he coached Appellant in Little League, and that Laura Smith was his niece. (PCR Tr. 504-05). He said that Appellant, as a child, was the center of attention and wanted everyone to listen to him having fun. (PCR Tr. 506). He saw Appellant play with his daughters at family get-togethers, but did not really observe how they got along. (PCR Tr. 507). Chilton said that Appellant took his father's death hard. (PCR Tr. 509). Chilton said on cross-examination that he did not hear too many people say anything about Appellant. (PCR Tr. 511). He had not heard anything about Appellant leaving Bayless to die when he drove drunk. (PCR Tr. 511).

During the examination of original trial counsel Tom Marshall, the court admitted into evidence State's Exhibit C, which Marshall identified as a memo to his electronic case management file. (PCR Tr. 560-63). The memo reflected that Appellant had indicated to another member of the trial team that Velma Dowdy was crazy. (PCR Tr. 562).

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Counsel Bruns prepared most of the mitigation case. (PCR Tr. 625). He said that part of his strategy was to get the best witnesses who could talk about the client and tell really good stories to try to establish that the client's life was meaningful. (PCR Tr. 684). Bruns said that he had talked to Appellant about possible mitigation witnesses. (PCR Tr. 684). Bruns did not recall a trial strategy for not contacting Jackson (PCR Tr. 690). Bruns was not asked whether he had a trial strategy for not contacting Dowdy, and was not asked any questions about Chilton. (PCR Tr. 691).

Bruns said that he likely would not call a witness who had not had recent interaction with the client to testify about the client's character. (PCR Tr. 698). Bruns also said that he would never expect a unanimous verdict of life without parole after a jury has returned a first-degree murder conviction, and that the end result of the jury hanging on punishment was a lot better than a unanimous verdict for the death penalty. (PCR Tr. 702).

Bruns said that he would have discussed with Appellant who might have made good mitigation witnesses. (PCR Tr. 704). Bruns said that he considered Appellant to be intelligent, that Appellant had strong opinions, and that decisions were made jointly between Appellant and the defense team. (PCR Tr. 704-05).

Counsel Kessler testified that he did not know who Jackson or Dowdy were, and that any decisions on which witnesses to call would have depended

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on potential cross-examination on things about Appellant that would have been bad. (PCR L.F. 1307-08). Kessler said that Appellant was consulted about the witnesses called in the penalty phase and that no decisions were made that were contrary to Appellant's requests. (PCR L.F. 1331).

The motion court noted that Chilton had limited interaction with Appellant as an adult. (PCR L.F. 1432). The court noted that Dowdy was unable to remember specific individuals in Appellant's family, and that she had been described in trial counsel's files as someone that Appellant had labeled as "crazy" and therefore unreliable. (PCR L.F. 1432). The court said that it was not clear that the testimony presented at the evidentiary hearing would have changed the outcome of the trial. (PCR L.F. 1433).

B. Analysis.

Trial counsel in a death penalty case has an obligation to investigate and discover all reasonably available mitigating evidence. *Davis*, 486 S.W.3d at 906. That includes evidence concerning medical history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. *Wiggins v. Smith*, 539 U.S. 516, 524 (2003). But the duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. *Strong*, 263 S.W.3d at 652. In

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the real world containing real limitations of time and human resources, criminal defense counsel is given a heavy measure of deference in deciding what witnesses and evidence are worthy of pursuit. *State v. Twenter*, 818 S.W.2d 628, 635 (Mo. 1991).

To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: (1) counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have provided a viable defense. *Deck v. State*, 381 S.W.3d 339, 346 (Mo. 2012). Because Appellant is challenging counsel's failure to call certain witnesses during the penalty phase, a "viable defense" is one in which there is a reasonable probability that the additional mitigating evidence those witnesses would have provided would have outweighed the aggravating evidence presented by the prosecutor, resulting in the jury voting against the death penalty. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at n.4.

The record in this case shows that counsel discussed potential mitigation witnesses with Appellant, and also spent time with Appellant's grandfather. (PCR Tr. 684). No evidence was presented that Appellant mentioned Jackson or Chilton as possible witnesses. Appellant did apparently mention Dowdy to his previous trial counsel, but labeled her as

"crazy." (PCR Tr. 562). Trial counsel took reasonable steps to discover the names of potential witnesses. *Edwards v. State*, 200 S.W.3d 500, 518 (Mo. 2006). Counsel thus conducted an appropriate investigation and made a reasonable strategic decision based on the information received from Appellant and his family. *Id.* at 517.

Appellant has also failed to demonstrate a reasonable probability that he would have received a life sentence had the witnesses testified. Their testimony at the evidentiary hearing was general in nature and not particularly compelling. The testimony did not fit within counsel Bruns's stated trial strategy of getting witnesses who could tell really good stories. (PCR Tr. 684). Bruns also said that he likely would not call a witness who had not had recent interaction with the client to testify about the client's character. (PCR Tr. 698). That would apply to Dowdy and Chilton.

Testimony about Appellant's relationship with his daughters and other family members was cumulative to the evidence presented in the penalty phase. Counsel will not be deemed ineffective for failing to present cumulative evidence. *Deck*, 381 S.W.3d at 351. The motion court did not clearly err in finding that Appellant had failed to prove a reasonable probability that the testimony presented at the evidentiary hearing would have changed the outcome of the trial. (PCR L.F. 1433).

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XV.

Appellant did not prove that the State committed a *Brady* violation (responds to Appellant's Point XVII).

Appellant claims that the State committed a *Brady*[2] violation when it failed to disclose information allegedly possessed by Sergeant Graham relating to other possible suspects in the murder. But Appellant failed to meet his burden of establishing that a *Brady* violation occurred.

A. Underlying Facts.

The amended motion contained a claim that the State failed to disclose evidence pointing to another suspect. (PCR L.F. 468). That evidence included, but was not limited to, files kept by Sergeant Graham of his investigation of wrong-doing by at least one other officer or public official. (PCR L.F. 468).

Cathy Runge knew Sergeant Graham for three years before his murder. (PCR Tr. 387). They were not formally engaged, but were planning to get married. (PCR Tr. 386-87). Runge testified that Sergeant Graham did not tell her prior to March of 2005 that he was "looking into things concerning an officer or officer's conduct." (PCR Tr. 388). Runge denied that Sergeant Graham told her that he had files in his home about another officer. (PCR Tr. 389). Runge said she assumed that because he was a supervisor

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[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

that Sergeant Graham had supervisory files. (PCR Tr. 389). Runge stayed off and on with Mike and Jeanne Kingree following Sergeant Graham's murder. (PCR Tr. 390). Runge had no recollection of telling either of them that Sergeant Graham had files at his home on other officers or that the Highway Patrol had removed the files from the house. (PCR Tr. 390-91). Runge had no recollection of telling her friend Carly Carter that Sergeant Graham was "looking into some things that were going on in Carter County." (PCR Tr. 391-92). Runge also had no recollection of telling her niece, Krista Kingree, that Sergeant Graham kept files on other officers in his home because he was investigating things going on in Carter County. (PCR Tr. 392).

Runge testified on cross-examination that she did not know what files, if any, Sergeant Graham kept on his computer. (PCR Tr. 393). She said she never used or looked at his home computer. (PCR Tr. 393). Runge saw Sergeant Graham play video games on the computer but never saw him working or drafting documents on it. (PCR Tr. 394). Runge said she was not aware of any issues between Sergeant Graham and other law enforcement officers. (PCR Tr. 394). Runge was aware of no files that were at Sergeant Graham's home that were removed, concealed, or destroyed. (PCR Tr. 396).

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Jeanne Kingree testified that Runge said something to her husband about files on Sergeant Graham's home computer.[3] (PCR Tr. 401). Jeanne Kingree said that she could tell that Runge did not know what was in the files. (PCR Tr. 401). Jeanne Kingree had no idea what the files pertained to and never heard that the Highway Patrol had removed files from Sergeant Graham's home. (PCR Tr. 402).

Carly Carter testified that after the murder, Runge had told her that Sergeant Graham had been working on several cases, including one involving the Carter County Sheriff. (PCR Tr. 430). Carter said she had no personal knowledge of any documentation prepared or maintained by Sergeant Graham about any investigation. (PCR Tr. 433).

Krista Kingree testified that she recalled a statement that Sergeant Graham had some files. (PCR Tr. 436). She could not recall where the files were kept. (PCR Tr. 436). Krista Kingree was unable to remember details of the conversation, except that the subject came up more than once. (PCR Tr. 437). Krista Kingree never heard Runge say that the Highway Patrol had taken files from Sergeant Graham's home. (PCR Tr. 438).

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[3] Mike Kingree was deceased by the time of the evidentiary hearing. (PCR Tr. 399).

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The parties entered into the following stipulation at the evidentiary hearing:

> During the post-conviction case, post-conviction counsel sought mirror images of the drives of the computers that the victim used at the time of his death, including a zone-office work computer, a mobile computer and a home computer. During the post-conviction case the State represented to post-conviction counsel that the victim's zone office-work computer was a shared unit at the time of his homicide. Therefore the victim's files were copied to a disk which was disclosed to the defense. Prior to the post-conviction case the original drive was put back into routine service and was eventually retired and is no longer available. Starting post-conviction case (sic) in November of 2014, the State informed post-conviction counsel that the hard drives of the victim's mobile and home computers were no longer accessible due to the passage of time. In November of 2014, post-conviction counsel's expert was permitted to examine the hard drives of the victim's mobile and home computers but was unable to access those hard drives.

(PCR Tr. 477-78).

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The motion court found that defense counsel was provided access to all evidence seized, including the computer hard drives from Sergeant Graham's home. (PCR L.F. 1454). The court also found that Appellant did not demonstrate through evidence the presence of any exculpatory or mitigating information on the hard drive. (PCR Tr. 1455).

B. Analysis.

To prevail on a *Brady* claim, a movant must show each of the following: (1) the evidence at issue must be favorable to movant either because it is exculpatory or it is impeaching; (2) the State suppressed the evidence, either willfully or inadvertently; and (3) the movant was prejudiced by such suppression. *Dorsey v. State*, 448 S.W.3d 276, 285 (Mo. 2014). To show prejudice, the movant must show that the evidence at issue is material, i.e., a reasonable probability that the result would have been different. *Id.*

The favorable evidence that Appellant claims was withheld was material allegedly stored in electronic and other formats by Sergeant Graham that related to other possible suspects in his murder. Appellant did not meet his burden of showing that such evidence existed, and thus did not show by a preponderance of the evidence that any favorable evidence was withheld. Supreme Court Rule 29.15(i).

Appellant has also failed to demonstrate that he was prejudiced even if the evidence existed. Evidence that another person had the opportunity or

motive to commit the offense is insufficient to admit alternative perpetrator evidence. *State v. Bowman*, 337 S.W.3d 679, 686 (Mo. 2011). A defendant must present evidence that the other person committed an act directly connected to the defense. *Id.* Appellant makes no attempt to demonstrate that any investigative files kept by Sergeant Graham would have led to the discovery of an act directly connecting someone else to his murder. Without evidence of such a direct connection, Appellant would not have been able to admit evidence of an alternative suspect. Inadmissible evidence is not evidence at all and *Brady* is not violated by the non-disclosure inadmissible evidence. *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995). Mere speculation that the inadmissible evidence might have led to the discovery of admissible evidence that could have been utilized at trial is insufficient to support a *Brady* violation. *Id.* Appellant has not met his burden of showing a reasonable probability that the result of the trial would have been different. *Dorsey*, 448 S.W.3d at 286.

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CONCLUSION

In view of the foregoing, Respondent submits that the denial of Appellant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations in Supreme Court Rule 84.06, and contains 26,258 words as calculated under the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software.

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