

IN THE
MISSOURI SUPREME COURT

ANDREW L. LEMASTERS,)	
)	
Appellant,)	
)	
v.)	No. SC97878
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF NEWTON COUNTY, MISSOURI
THE HONORABLE TIMOTHY W. PERIGO, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Andrew L. Lemasters appeals the denial of his Rule 29.15 motion to vacate, set aside, or correct the judgment and sentence entered against him in *State v. Andrew L. Lemasters*, Newton County, Missouri, Case No. 12NW-CR00817-01, for statutory sodomy in the first degree, resulting in a sentence of 31 years (D74:1).¹ The Honorable Timothy W. Perigo denied Mr. Lemasters' amended motion under Rule 29.15 following an evidentiary hearing (D66:8). After the Missouri Court of Appeals, Southern District, issued its opinion in SD35490, this Court granted Mr. Lemasters' application for transfer pursuant to Rule 83.04. This Court has jurisdiction over this appeal under Art. V, § 10, of the Missouri Constitution.

¹ System-generated legal file documents are cited by document number ("D") and page number (":"), where applicable. The transferred direct appeal legal file is cited "L.F.", and the trial transcript is cited as "Tr." The postconviction relief evidentiary hearing transcript is cited as "P.Tr."

STATEMENT OF FACTS

Underlying Criminal Case

Mr. Lemasters was charged with two counts of statutory sodomy in the first degree, § 566.062, for allegedly molesting his daughter H.L. (D110:1-2).

Mr. Lemasters married P.L. in July, 1992 (Tr. 213, 359). They had two children together, D.L. and A.L. (Tr. 213). In addition, Mr. Lemasters had a daughter, H.L., who was living with her biological mother when Mr. Lemasters married P.L. (Tr. 360). H.L. was born in 1992 (Tr. 278, 325). Eventually, Mr. Lemasters obtained legal custody of H.L. (Tr. 359). P.L. helped raise H.L. from about the age of three months, but P.L. was never awarded legal custody of H.L. (Tr. 213-214, 279).

The Lemasters moved from Newton County, Missouri, to Mississippi in November, 2002, when H.L. was about nine years old (Tr. 214-216, 280). They lived in Mississippi for about four years and then moved to Texas (Tr. 217, 280). They moved back to Missouri in June, 2011 (Tr. 218, 220).

P.L. left Mr. Lemasters in June, 2011 (Tr. 245-246). H.L. had moved out a month before (Tr. 245-247). H.L. left after an incident in which she had not come home on time, and when she walked inside the house, Mr. Lemasters grabbed his cane and either hit her with it or attempted to hit her with it, causing H.L. to run away and live with her friend (Tr. 246, 247, 302-304). H.L. was eighteen years old at the time (Tr. 302).

P.L. filed for divorce when H.L. was nineteen years old (Tr. 247-248). H.L. moved in with P.L. and P.L.'s sons in October, 2011 (Tr. 248, 279-280). Sometime after that, P.L.'s teenage son disclosed that he had been molested by another man (Tr. 248-249, 315-316). Upon hearing that, H.L. told P.L. that she had been abused by Mr. Lemasters (Tr. 248-249, 315-316). P.L. contacted the police (Tr. 249).

On May 22, 2012, Detective Mike Barnett interviewed H.L. (Tr. 204-205). She told him that Mr. Lemasters had sexually molested her in Newton County, Missouri, in the late spring of 2001, when she was eight years old (Tr. 204-205, 317, 336). She alleged that this also occurred in the states of Mississippi and Texas (Tr. 205, 295-296). She said that the molestation occurred until she was an adult (Tr. 205). One of the acts H.L. alleged was that Mr. Lemasters “put his fingers in her” (Tr. 207). Det. Barnett requested an arrest warrant, and Mr. Lemasters was arrested in Texas before being transported to Newton County (Tr. 205-206).

H.L. was twenty years old at the time of trial (Tr. 215, 278). She testified that in the spring of 2001 she lived in Granby, Missouri, in a mobile home with Mr. Lemasters, her brother D.L., and P.L. (Tr. 281). She said that sometime around the spring of 2001, when she was about eight or nine years old, Mr. Lemasters touched her vagina with his hand (Tr. 282, 286, 288, 346). He put one of his fingers inside of her (Tr. 289, 346). He also attempted to put his penis in her, but he stopped when she asked her to stop because it hurt (Tr. 289-290, 346).

Prior to opening statements, defense counsel submitted a motion in limine for an order that the state could not elicit testimony through P.L. that Mr. Lemasters had physically abused her and their sons D.L. and AL throughout their lives (Tr. 165-67). The trial court sustained the motion in limine on the basis that such evidence would be legally irrelevant (Tr. 166-67). The trial court found that such evidence would result in unfair prejudice, and the unfair prejudice would outweigh any probative value (Tr. 166-67).

Despite the ruling in limine, the prosecutor directly asked P.L. on direct examination whether Mr. Lemasters had abused her and the boys (Tr. 239-40). Defense counsel did not object (Tr. 240). P.L. answered in the

affirmative (Tr. 240). There were multiple violations of the ruling in limine, but defense counsel did not object regarding this subject (Tr. 241-42, 248). However, defense counsel did object to the relevance of P.L.'s depression and separately to her testifying about visitation during the divorce case (Tr. 245, 250). Defense counsel later cross-examined P.L. about the abuse of herself and D.L. (Tr. 253, 256, 257-58, 262). Once the door was opened, P.L. eventually testified that Mr. Lemasters shot her, stabbed her, and hit her with his car, and that she lived in constant fear for her life and the lives of her children due to Mr. Lemasters abusing them for 19 years (Tr. 262, 268-69).

On redirect, P.L. testified in more detail about the abuse Mr. Lemasters allegedly inflicted on the boys (Tr. 269). There was one instance when Mr. Lemasters made D.L. go outside in a dangerous neighborhood to determine what a suspicious noise was, and when D.L. protested that he could get killed, Mr. Lemasters allegedly said that it would be no great loss, which made D.L. suicidal (Tr. 270-71). P.L. determined that A.L. was not as abused as the two older children because he was little, and it was not until more recently that Mr. Lemasters started abusing A.L. (Tr. 273). Trial counsel did not object to these statements, but he did object to an instance of the prosecutor leading the witness P.L. (Tr. 274).

Mr. Lemasters caused the following disruptions at the trial:

- His statements were non-responsive to the trial court's questions about the waiver of jury sentencing (Tr. 35-37). He volunteered in response to the trial court's frustration with him that he had experienced some memory loss and that he was uncomfortable or unfamiliar with being in the courtroom for these proceedings as a result (Tr. 36-37).

- There was a disruption during the state's case when Mr. Lemasters was talking too loudly at the defense table (Tr. 333).
- Mr. Lemasters apparently fell asleep and apologized for "dosing off" (Tr. 351-52).
- The prosecutor pointed out that Mr. Lemasters was mumbling (Tr. 365).
- Mr. Lemasters was worried about passing out in court due to the medicines he was taking, and he was having chest pains (Tr. 379-80).
- He admitted that he could not do his best on the stand because of his health problems (Tr. 381-82). His heart problems caused psychological problems (Tr. 388-89).

Mr. Lemasters testified in his own defense and denied that he had ever touched H.L.'s vagina with his fingers (Tr. 362). He never touched her inappropriately or had her touch him in a sexual manner (Tr. 364, 413). Mr. Lemasters testified that the allegations made by H.L. arose within a month or two after Mr. Lemasters had called P.L. about wanting to see his children for the summer, and P.L. got mad and said that she was going to see to it that Mr. Lemasters would be put in prison (Tr. 394-395, 401). Also, shortly before the allegations, his son, who was living with P.L., broke his arm (Tr. 411-412). Additionally, H.L., who had hoped that Mr. Lemasters and P.L. would get back together, found out that another woman was interested in Mr. Lemasters and said that she was a whore (Tr. 411-412).

The jury found Mr. Lemasters guilty of statutory sodomy in the first degree (Tr. 445; D74).

At sentencing, Mr. Lemasters' trial counsel argued that Mr. Lemasters did not appear to be mentally sound at the trial, and that it could have been

due to the heart problems (Tr. 458). Mr. Lemasters said the same and informed the trial court that his doctors had provided letters to his attorney prior to trial (Tr. 462). Mr. Lemasters explained that his heart had stopped approximately five times while he was out on bond, and the resulting automatic defibrillator shocks affected his memory and mental state (Tr. 462). His short term memory was so bad at the time of trial that he did not remember the content of the conversation that he had with his attorney the day before (Tr. 464). When trial counsel reiterated that Mr. Lemasters was possibly not mentally stable enough to take the stand, the trial court responded that it was not a mental issue, and Mr. Lemasters was just being “self-centered” and “egotistical” (Tr. 470).

Although Mr. Lemasters was found guilty of only one count of first degree statutory sodomy, the trial court entered a written judgment sentencing him to 31 years on two counts. (Tr. 447, 471; LF 51-52). Mr. Lemasters appealed his convictions and raised two points on appeal (D110).

First, he argued that he should receive a new trial because there was a conflict of interest within the prosecutor’s office (D80:1). Second, he argued that the trial court erred in entering two convictions when the jury only found him guilty of a single count (D80:1). The Court of Appeals ruled against Mr. Lemasters regarding the first point but in his favor regarding the second point (D80:1-2). This Court took transfer and reached the same conclusions as to the respective points (D110).

While the direct appeal was pending, and unbeknownst to the appellate courts, the trial court signed an amended judgment on July 14, 2014, purporting to fix the same issue that was the subject of the second point on appeal (D76). It was filed as a sealed, confidential document in the underlying criminal case and categorized as if it had been entered on August

12, 2013, the date of the original judgment (D56:2; D76). The publicly-visible Case.Net docket sheet is devoid of any reference to the additional document and does not otherwise indicate that the trial court took any such action (D56:20-22). The trial court does not appear to have sought or received permission from the appellate courts to alter the judgment while the case was pending on appeal (D56). The parties and the courts proceeded to litigate over the issue even though the trial court had purported to make it moot.

Unaware of what the trial court had already done, this Court's mandate stated that the trial court's judgment "is affirmed in part and in part vacated and remanded in part with directions to the said Circuit Court of Newton County for further proceedings to be had therein in conformity with the opinion of this Court herein delivered" (D111:3). The mandate also stated that Mr. Lemasters was to be brought to the trial court from prison for the further proceedings (D111:3). On remand, the trial court was to enter a *nunc pro tunc* amended judgment to remove one of the two counts and convictions while leaving the other (D110:17-18). The mandate was handed down on March 12, 2015. (D111:3). The trial court took no action after this Court's mandate other than making the following docket entry: "Affirmed." (D56:22).

Postconviction Proceedings

Mr. Lemasters filed his pro se motion on June 17, 2015 (D56:7).² The motion court appointed counsel to represent Mr. Lemasters on June 29 and granted a 30-day extension of time for counsel to file the amended motion

² June 17 is 97 days after March 12.

(D56:7). The amended motion was therefore due on Monday, September 28, 2015. Rule 29.15(g); Rule 44.01(a).

Before filing the amended motion, postconviction counsel filed a motion to treat the pro se motion as timely and pleaded facts to establish third-party interference (D63). The motion court entered an order sustaining that motion (D56:8).

The amended motion was timely filed on September 24, 2015 (D56:7). It raised six claims, two of which are relevant to this appeal (D64:2-3). Claim B alleged that trial counsel was ineffective for failing to request a continuance of the trial when Mr. Lemasters' medical physician recommended that Mr. Lemasters not travel and participate at trial due to his then current medical condition and the effects of the medication he was taking (D64:4). Claim E alleged that trial counsel was ineffective for failing to object to P.L.'s testimony about abuse that she and her sons sustained at the hands of Mr. Lemasters, in violation of the trial court's pretrial ruling in limine barring such testimony (D64:8).

As a pretrial matter at the evidentiary hearing on the amended motion, appointed counsel addressed the timeliness issue with the motion court:

I just wanted to be clear on the record that...I filed a motion on behalf of Mr. Lemasters, asking the court to treat his original Form 40 as timely filed, setting out the reasons that it was delayed, and I believe...the court's record reflects that you sustained that...but I just wanted to be sure we're clear on the record that that's the situation.

(P.Tr. 5). The motion court responded, "Sure...your motion was sustained and the record should reflect the same." (P.Tr. 5). The State did not object or ask for evidence to be presented on the matter (P.Tr. 5). In its Findings of Fact, Conclusions of Law, and Judgment, the motion court adopted the allegations from the motion to treat as timely and made a finding that Mr. Lemasters'

delay in filing his pro se motion was caused by third-party interference (D66P5).

As to Claim B, at the evidentiary hearing Mr. Lemasters submitted three letters that his doctors had written prior to trial outlining his medical issues (P.Tr. 104; Ex. 1-3). Mr. Lemasters testified that he was not supposed to travel because his heart had stopped five times while he was on bond, and he was put on a lot of medications (P.Tr. 23). He did not know what was going on half the time at trial (P.Tr. 25). The specific medications Mr. Lemasters was taking at the time of trial included mexiletine, Xanax, Percocet, and painkillers (P.Tr. 29). Mr. Lemasters testified that he passed out several times during trial, and the court reporter noted that Mr. Lemasters fell asleep during the post-conviction evidentiary hearing (P.Tr. 30, 73). Between all of the medications he was taking, Mr. Lemasters concluded that he was “probably high as a kite” during trial (P.Tr. 31).

He tried to assist his attorney in his defense, but looking back on it he realized he was of no help at all because he would attempt to communicate with his attorney, only to forget what he was communicating, and his attorney would get mad at him (P.Tr. 31). In the context of discussing his mental state at trial, Mr. Lemasters testified at the evidentiary hearing that he had not planned to testify prior to trial, implying that his mental state caused him to take the stand (P.Tr. 32). As a result of testifying in such a drugged state, Mr. Lemasters was “pretty out there” and “pretty flighty” most of the time (P.Tr. 53).

Trial counsel agreed that, although it was a difficult case to begin with, Mr. Lemasters’ testimony was “the breaking point” or “the point where I thought we got clobbered” (P.Tr. 86). Trial counsel testified that he did not request a continuance because he felt that he had run out of continuances,

but he conceded that in his experience approximately 11 months is not an extreme delay in going to trial in a major case (P.Tr. 75-76). Another reason he did not request a continuance was that he never got a doctor's letter specifically stating that it would be harmful to Mr. Lemasters' health to sit through a trial (P.Tr. 92).

The motion court denied postconviction relief but did not enter findings of fact or conclusions of law regarding Claim B (D66:6-7).

As to Claim E, which alleged that trial counsel was ineffective for failing to object to P.L.'s testimony about Mr. Lemasters abusing their sons, trial counsel testified that he had no independent recollection of the motion in limine or the trial testimony in question (D64:8; P.Tr. 84-86). He hypothesized that his failure to object must have been because he reached a point in P.L.'s testimony where he stopped objecting "because the jury wasn't even believing what she said, so it just wound up making her look bad" (P.Tr. 86). The motion court denied the claim as reasonable trial strategy (D66:8).

On March 26, 2018, the motion court entered findings of fact and conclusions of law denying the amended motion (D56:1; D66). Mr. Lemasters timely filed a notice of appeal, and this appeal follows (D56:1).

POINTS RELIED ON

I.

The motion court clearly erred in proceeding on, and denying, Mr. Lemasters' Rule 29.15 motion because a review of the record leaves a definite and firm impression that the postconviction relief proceeding is premature, in that the judgment and sentence in the criminal case is not yet final; specifically, the trial court has not yet carried out the Court's mandate that Mr. Lemasters be brought to the trial court for entry of a new judgment removing the second count.

McKay v. State, 520 S.W.3d 782 (Mo. banc 2017);

Katz v. Anheuser-Busch, Inc., 347 S.W.3d 533 (Mo. App. 2011);

Foraker v. Foraker, 133 S.W.3d 84 (Mo. App. 2004);

Mo. Sup. Ct. Rule 74.01(b); and

Mo. Sup. Ct. Rule 74.06(a).

II.

The motion court clearly erred in denying Mr. Lemasters' Rule 29.15 motion because a review of the record leaves a definite and firm impression that the court's findings of fact and conclusions of law violate Rule 29.15(j), in that the motion court failed to adjudicate all claims in the amended motion; specifically, the motion court failed to address Claim B, which asserted that trial counsel was ineffective for failing to request a continuance of the trial due to Mr. Lemasters' medical problems.

Green v. State, 494 S.W.3d 525 (Mo. banc 2016);

Crews v. State, 7 S.W.3d 563 (Mo. App. 1999);

Strickland v. Washington, 466 U.S. 668 (1984); and

Mo. Sup. Ct. Rule 29.15.

III.

The motion court clearly erred in denying Mr. Lemasters' Rule 29.15 motion because a review of the record leaves a definite and firm impression that he was denied effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that trial counsel failed to act as a reasonably competent attorney under the same or similar circumstances when he failed to object to P.L.'s testimony abuse that she and her sons allegedly sustained at the hands of Mr. Lemasters, in violation of the trial court's pretrial ruling in limine. Mr. Lemasters was prejudiced because the trial court had already determined that the unfair prejudice of such evidence outweighed its probative value.

Blankenship v. State, 23 S.W.3d 848 (Mo. App. 2000);

Seals v. State, 551 S.W.3d 653 (Mo. App. 2018);

Strickland v. Washington, 466 U.S. 668 (1984);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Sec. 18(a); and

Mo. Sup. Ct. Rule 29.15.

ARGUMENT

I.

The motion court clearly erred in proceeding on, and denying, Mr. Lemasters' Rule 29.15 motion because a review of the record leaves a definite and firm impression that the postconviction relief proceeding is premature, in that the judgment and sentence in the criminal case is not yet final; specifically, the trial court has not yet carried out the Court's mandate that Mr. Lemasters be brought to the trial court for entry of a new judgment removing the second count.

Factual and Procedural History

Mr. Lemasters was found guilty of one count of first degree statutory sodomy. The trial court entered a written judgment sentencing him to 31 years on two counts. Mr. Lemasters appealed his convictions first in the Court of Appeals and then to this Court following transfer. This Court granted Mr. Lemasters' point that the trial court erred in sentencing him for two counts when he was only found guilty of one.

The Court's mandate stated that the trial court's judgment "is affirmed in part and in part vacated and remanded in part with directions to the said Circuit Court of Newton County for further proceedings to be had therein in conformity with the opinion of this Court herein delivered" (D111:3). The mandate also stated that Mr. Lemasters was to be brought to the trial court from prison for the further proceedings (D111:3). On remand, the trial court was to enter a nunc pro tunc amended judgment to remove one of the two counts and convictions while leaving the other (D110:17-18). The mandate was handed down on March 12, 2015. The trial court took no action after the

Supreme Court's mandate other than making a docket entry that said, simply, "Affirmed." (D56P22)

While the direct appeal was pending, and unbeknownst to the appellate courts, the trial court signed an amended judgment on July 14, 2014, purporting to fix the same issue that was the subject of the second point on appeal (D76). The amended judgment does not appear on Case.Net (D56:20-22). It is buried in the electronic file of the underlying criminal case as a sealed, confidential filing with a filing date of August 12, 2013, as if it had been filed on the date of the original judgment. The trial court does not appear to have sought or received permission from the appellate courts to alter the judgment while the case was pending on appeal.

Mr. Lemasters filed his pro se postconviction motion on June 17, 2015, which was 97 days after this Court's mandate (D56:7). Counsel was appointed, and counsel timely filed the amended motion on September 24, 2015 (D56:7).

Mr. Lemasters' postconviction counsel pleaded that the pro se motion was untimely based on an assumed 90-day deadline from this Court's mandate (D63:1). Counsel further pleaded facts to establish third-party interference (D63:2-3). The motion court found the pro se motion to be out of time, but it found that the untimely filing was excused due to third party interference (D56:4-5; D66:5). The motion court sustained the motion to treat as timely before hearing any evidence, and Mr. Lemasters' attorney then transitioned to proving up the amended motion claims on the merits (P.Tr. 5).

Standard of Review

This Court reviews the denial of a Rule 29.15 motion to determine whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Wallar v. State*, 403 S.W.3d 698, 705 (Mo. App. 2013). The motion

court's findings and conclusions are clearly erroneous when the reviewing court is left with a definite and firm impression that a mistake has been made. *Id.* The movant bears the burden of demonstrating clear error. *Id.*

Analysis

Both postconviction counsel and the motion court relied on a mistaken belief that Mr. Lemasters had 90 days to file his pro se motion after the appellate court's mandate. He actually had more time pursuant to the language of Rule 29.15(b):

If:

- (1) An appeal of such judgment or sentence is taken;
- (2) The appellate court remands the case resulting in entry of a new judgment or sentence; and
- (3) An appeal of the new judgment or sentence is taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming the new judgment or sentence.

If no appeal of such new judgment or sentence is taken, the motion shall be filed within 180 days of the later of:

- (1) The date the person is delivered to the custody of the department of corrections; or
- (2) The date the new judgment or sentence was final for purposes of appeal.

*Order dated June 21, 2002, re: Rules 24.035, 29.15, 41.01, 51.045, 54.13, 55.27, 56.01, 83.02 and 84.06 (Mo. banc 2002).*³

³ This version of Rule 29.15, in effect from 2003 to 2016, is included in the appendix to this brief along with the subsequent versions of the rule. The applicable language has since been revised for clarity, but the substance of these distinctions remains unchanged.

Applying the above-quoted language along with the typical 90-day rule for an affirmance, when a Rule 29.15 movant is filing a pro se motion after a direct appeal, the case falls into one of three categories:

1. The appellate court affirms the trial court's judgment on appeal: the pro se motion is due within 90 days of the appellate court's mandate.
2. The appellate court remands the case to the trial court for further proceedings, which result in the trial court entering a new judgment, and the new judgment is not appealed: the pro se motion is due within 180 days of the new judgment being entered.
3. The appellate court remands the case to the trial court for further proceedings, which result in the trial court entering a new judgment, and the new judgment is appealed but affirmed: the pro se motion is due within 90 days of the mandate affirming the new judgment.

Rule 29.15(b).

Postconviction counsel and the motion court erroneously assumed that this case falls within the first category. However, the Court's mandate stated that the trial court's judgment "is affirmed in part and in part vacated and remanded in part with directions to the said Circuit Court of Newton County for further proceedings to be had therein in conformity with the opinion of this Court herein delivered" (D111:3).

Looking to the docket sheets in the underlying criminal case to see when the trial court entered its new judgment in response to the mandate, one discovers that the trial court has not yet done so. The docket sheet lists no action taken after the Court's mandate except a docket entry erroneously

stating that the Court “affirmed” (D56:22). Because the remand is not yet complete, the judgment in the criminal case is not yet final, and this post-conviction case is premature. Once there is a final judgment, the deadline for the pro se motion will fall into either the second or the third of the procedural categories listed above, depending on whether Mr. Lemasters appeals again following the remand.

Further complicating the issue, the trial court purported to furtively amend the judgment on its own while the direct appeal was pending in the appellate courts. Although the public docket sheet does not show an amended judgment ever being filed, the electronic file in the criminal case contains a hidden document called “Amended Judgment,” which is included in the Electronic Legal File as Document Number 76 and visible on the Legal File’s table of contents, which appears on the second page of Document Number 56. The non-public document indicates that the judge signed it on July 14, 2014, but it was entered in the criminal file as if it had been issued on August 12, 2013, the date of the original judgment.

This amended judgment could not have been entered following the Supreme Court’s mandate, which did not issue until March 12, 2015. Rather, it was signed on July 14, 2014, while the case was pending on appeal, and it was misleadingly placed in the trial court’s e-file as if it had been there prior to the direct appeal. As of July 14, 2014, the Court of Appeals had issued its opinion and denied the motion for rehearing or transfer, but it had not issued a final mandate, as the application for transfer was pending in this Court. This Court would soon sustain the motion for transfer, on August 19, 2014.

Unbeknownst to the Court, the trial court had already purported to fix the judgment on its own. Meanwhile, the issue was the subject of Point II on appeal in both the Court of Appeals and this Court. The appellate courts

would not have known that the trial court had already purported to fix the judgment because the trial court's action was covert, and the record on appeal was already finalized before the trial court's action. The trial court further buried the fact that there had been an irregularity by making a docket entry stating that the Court's mandate was a straight-forward affirmance, without reference to the remand for further proceedings.

The July 14, 2014, amended judgment is void because the trial court did not have authority to enter it while the case was pending on direct appeal. Generally, a trial court loses jurisdiction in a case upon the filing of a notice of appeal. *Katz v. Anheuser-Busch, Inc.*, 347 S.W.3d 533, 547 (Mo. App. 2011) (citing *Foraker v. Foraker*, 133 S.W.3d 84, 92 (Mo. App. 2004)). This general rule is subject to certain exceptions. *Katz* at 533 (citing *Lardinois v. Lardinois*, 852 S.W.2d 872, 873 (Mo. App. 1993)). One recognized exception clarifies that a "trial court has continuing jurisdiction to perform certain ministerial acts involving the case so long as those acts do not affect the appeal." *Katz* at 533 (quoting *Lardinois* at 873) (emphasis added). Rule 74.06(a) specifically addresses *nunc pro tunc* orders and anticipates the problem that has arisen in Mr. Lemasters' case:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected with leave of the appellate court.

Foraker at 93 (quoting Rule 74.06(a)) (emphasis added). The trial court in Mr. Lemasters' case did not request leave of the appellate courts, the appellate courts did not know of the trial court's action, and the action altered the crucial part of the record that was being litigated in Point II on appeal. For these reasons, the trial court's July 14, 2014, amended judgment was a

nullity, and it cannot serve as the triggering event for the deadline in Mr. Lemasters' post-conviction relief case.

While it is true that Rule 74.06(a) is a civil rule, and its criminal corollary Rule 29.12(c) does not contain a provision prohibiting a trial court from correcting clerical mistakes in its judgments during appeal without leave of the appellate court, our appellate courts have applied Rule 74.06 in criminal contexts before. In *State v. Johnson*, 861 S.W.2d 807, 809 (Mo. App. 1993), the appellate court specifically cited Rule 74.06(a) to declare that a trial court cannot correct a criminal judgment *nunc pro tunc* while appeal is pending without leave from the appellate court. Other criminal cases also apply Rule 74.06. *E.g.*, *State v. Declue*, 564 S.W.3d 755 (Mo. App. 2018); *State v. McCauley*, 496 S.W.3d 593, 594-95 (Mo. App. 2016) ("Per rule text and case law, the two rules operate similarly and essentially codify the common-law remedy").

McKay v. State, 520 S.W.3d 782, 785 (Mo. banc 2017), provides guidance on how to treat a mandate stating that the trial court's judgment is affirmed in part and in part vacated and remanded:

While Rules 29.15(b) and 24.035(b) establish a narrow time window within which the defendant must file a post-conviction motion, that window does not close before the judgment being collaterally attacked is final. The rules require that only a single post-conviction motion may be filed. In light of this strict rule, it is vital a defendant not be led into filing a motion prematurely and thereby losing his entitlement to seek post-conviction review of still-pending claims through a partial affirmance of a judgment. Rather, Rule 29.15 and its companion Rule 24.035 contemplate only one mandate affirming a conviction...Both of the rules thereby contemplate a single mandate [or new judgment] that starts the running of the 90-day [or 180-day] period for filing a motion.

Carefully and technically applying the timeliness mechanisms of Rule 29.15, this postconviction relief case is premature because the judgment in the underlying criminal case is not yet final. The judgment will become final when the trial court complies with the Court's mandate and Mr. Lemasters either appeals the new judgment or allows it to become final by declining to appeal. Rule 29.15(b). Because the criminal judgment and sentence is not yet final, and the pro se motion and the amended motion were premature, this Court should remand the case to the motion court for further proceedings to be had once a final judgment in the underlying criminal case is reached.

If the Court finds that the 90-day rule applies, and therefore Mr. Lemasters' pro se motion was untimely, the Court should remand the case for a hearing on the issue of third-party interference to allow Mr. Lemasters an opportunity to prove the allegations in his motion to treat as timely. He did not have an opportunity to do so before because the motion court prematurely sustained the motion to treat as timely.

Mr. Lemasters' failure to present evidence on the issue of third-party interference was in reliance on the court's assurance and without objection from the state. While the state cannot waive the issue of timeliness or concede the legal conclusion that third-party interference existed, the state can stipulate to or concede the facts that if true would constitute third-party interference. The motion to treat as timely alleged the facts, the motion court found the facts in its judgment, and the state did not object when the motion court sustained the motion to treat as timely or when the issue was taken up again at the evidentiary hearing.

When an appellate court faces an insufficient record on the similar issue of abandonment, the court in this situation would remand the case for an abandonment hearing. *See, e.g., Lampkin v. State*, 560 S.W.3d 67, 70 (Mo.

App. 2018) (“[S]imply signing and dating” a timeliness motion does not make a sufficient record for our review into the abandonment inquiry); *Barber v. State*, 569 S.W.3d 556, 558 (Mo. App. 2019) (“Because we do not have a sufficient record to review the motion court's inquiry into abandonment, we reverse and remand for the motion court to make a sufficient record of the inquiry into abandonment”). Similarly, here, because the motion court made a timeliness finding as to third-party interference with an insufficient record, Mr. Lemasters should receive a remand to make a sufficient record.

II.

The motion court clearly erred in denying Mr. Lemasters' Rule 29.15 motion because a review of the record leaves a definite and firm impression that the court's findings of fact and conclusions of law violate Rule 29.15(j), in that the motion court failed to adjudicate all claims in the amended motion; specifically, the motion court failed to address Claim B, which asserted that trial counsel was ineffective for failing to request a continuance of the trial due to Mr. Lemasters' medical problems.

Factual and Procedural History

Claim B alleged that trial counsel was ineffective for failing to request a continuance of the trial when Mr. Lemasters' medical physician recommended that Mr. Lemasters not travel and participate at trial due to his then current medical condition and the effects of the medication he was taking (D64:4). The motion court's written judgment addressed all six claims in the Amended Motion except Claim B.

For example, as to claim A, which alleged ineffectiveness for failing to seek a change of venue, the motion court specifically denied the claim on the grounds that Mr. Lemasters' allegations "are not credible...and that an unbiased and impartial jury was seated for [his] trial" (D66:6). As to Claim C, which alleged ineffectiveness for failure to provide a copy of discovery, the court found "[t]here was no evidence presented here that affirmatively demonstrated that Movant was provided copies of discovery...Further, no prejudice was proven" (D66:7). The motion court disposed of Claims D and E in a similar fashion. As to Claim F, postconviction counsel abandoned the claim in his proposed findings (D65:4). The motion court accordingly disposed

of the claim by finding that no testimony was offered in support of the claim and that the trial record refutes the claim (D66:5).

Where it had intended to discuss Claim B, on the other hand, the motion court merely recited the allegation:

Movant claims that he had severe lifelong health issues stemming from his congenital heart defect. Further, that stress had contributed to his deterioration of cardiac status causing sudden cardiac death requiring shocks from an implanted defibrillator to jump start the heart, putting Movant at risk of death. Further that Movant's trial counsel was aware of Movant's current cardiac situation in the winter and spring of 2013 through written letters of Movant's doctor. There was no motion to continue the trial setting in June, 2013. The symptoms claimed by Movant were chest pain, fatigue, dyspnea and palpitations and could all interfere with Movant's ability to assist his trial counsel.

(D66:6-7). The motion court's recitation seems sympathetic to Mr. Lemasters' claim, but the court never affirmatively resolved the claim one way or the other.

At the end of the Findings of Fact, Conclusions of Law, and Judgment, the motion court summarized its findings as follows:

Movant failed to show that he received ineffective assistance of counsel in violation of [his constitutional rights] when his trial counsel did not move for a change of venue [Claim A]; allowing the State's attorney to ask leading questions [Claim D], and allowed evidence of uncharged crimes adduced before the jury [Claim E]. Further that counsel prepared him to testify...The Court finds the Movant failed to meet his burden beyond a preponderance of the evidence that he received ineffective assistance of trial counsel, and secondly he was prejudiced thereby. There is a reasonable probability that the result at trial would not have been different if counsel had objected more at trial [Claims D and E], and had asked for a change of venue [Claim A].

(D66:8).

Standard of Review

This Court reviews the denial of a Rule 29.15 motion to determine whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Wallar v. State*, 403 S.W.3d at 705. The motion court's findings and conclusions are clearly erroneous when the reviewing court is left with a definite and firm impression that a mistake has been made. *Id.* The movant bears the burden of demonstrating clear error. *Id.*

Analysis

Rule 29.15(j) states that "[t]he court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held." There is no ambiguity in this directive, and the requirement is not a mere formality. *Cummings v. State*, 535 S.W.3d 410, 416 (Mo. App. 2017) (citing *Crews v. State*, 7 S.W.3d 563, 567 (Mo. App. 1999)). The motion court is not required to issue itemized findings and conclusions, but the findings and conclusions must be sufficient to permit meaningful appellate review. *Id.* The appellate courts will not supply findings of fact and conclusions of law by implication from the motion court's ruling. *Id.*

In *Crews*, the Court listed five exceptions to the Rule 29.15(j) requirement for findings and conclusions:

1. No finding of fact is necessary where the only issue is one of law, but the motion court must still issue a conclusion of law.
2. An appellate court will not order a useless remand to direct the motion court to enter a proper conclusion of law on an isolated issue overlooked by the motion court where it is clear that the movant is entitled no relief as a matter of law and will suffer no prejudice by being denied a remand.
3. Findings of fact or conclusions of law are not required on an allegation if the motion court grants a hearing on the motion and

the movant fails to present substantial evidence at the hearing to support that allegation.

4. Findings and conclusions are not required upon issues which were not properly raised or are not cognizable in a post-conviction motion.

5. Reversal is not required where the motion itself was insufficient.

7 S.W.3d at 568 (internal citations omitted). None of the exceptions are applicable here. Each exception is taken up in turn.

First, Claim B requires findings of fact. As recited by the motion court, “[t]he symptoms claimed by Movant were chest pain, fatigue, dyspnea and palpitations and could all interfere with Movant’s ability to assist his trial counsel” (D66:6-7). Such claims required a settling of the facts. The motion court did not make clear what it made of the three letters from Mr. Lemasters’ doctors, nor did it reconcile its denial of relief with trial counsel’s concession at the sentencing hearing that Mr. Lemasters did not appear to be mentally sound at the trial, possibly due to his health problems, and that maybe Mr. Lemasters should not have taken the stand as a result. Trial counsel testified similarly at the evidentiary hearing that Mr. Lemasters’ testimony was “the breaking point...where we got clobbered” (P.Tr. 86). Though the motion court found generally that trial counsel was credible, while Mr. Lemasters was not, these credibility determinations would not lead to a denial of relief here where trial counsel, the doctors’ letters (Ex. 1-3), and the entire trial transcript supported the claim.

Second, this is not an isolated issue overlooked by the motion court where it is clear that the movant is entitled no relief as a matter of law and will suffer no prejudice by being denied a remand. Mr. Lemasters’ mental state pervaded the entire trial transcript, and trial counsel acknowledged it throughout the record. The doctors’ letters provide extrinsic evidence to

support the claim, and trial counsel seemed to agree with the claim both at the sentencing hearing and the evidentiary hearing. If Mr. Lemasters was not mentally and physically stable enough to endure trial, resulting in frequent disruptions in front of the jury and a body of “clobber[ing]” testimony that otherwise would not have occurred, it casts serious doubt on the legitimacy of the conviction.

Third, as laid out in the preceding two paragraphs, substantial evidence was adduced in support of Claim B.

Fourth, the claim was properly raised in the amended motion. The motion pleaded facts that would amount to *Strickland* ineffectiveness and prejudice if proven. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The pleaded facts included: that Mr. Lemasters wanted his attorney to ask for a continuance; that his attorney did not request one; that Dr. Magalski had provided his letter to defense counsel; and that the letter advised of Mr. Lemasters’ medical risks (D64:5). As to prejudice, the motion pleaded that: Mr. Lemasters’ health problems and medications caused lapses of memory and brief periods of unconsciousness; that Mr. Lemasters was not able to concentrate at trial and assist counsel; that Mr. Lemasters’ own testimony was affected because he was not able to maintain focus; and that the result of trial would have been different had the trial occurred at a later time when Mr. Lemasters’ health condition was stabilized (D64:5). The amended motion also pleaded that Mr. Lemasters would rely on trial counsel and the underlying transcript to support the claim (D64:5-6).

Fifth, and finally, the amended motion was not deficient. In addition to the claim being sufficiently pleaded, as listed in paragraph four, the amended motion as a whole met all requirements of Rule 29.15. Because none of the

exceptions apply, the analysis turns to the interplay between Rules 74.01(b) and 78.07(c).

“A final judgment is one that resolves all claims and issues in a case, leaving nothing for future determination.” *Green v. State*, 494 S.W.3d 525, 527 (Mo. banc 2016) (superseded by rule on other grounds as stated in *Creighton v. State*, 520 S.W.3d 416, 422, fn. 8 (Mo. banc 2017)). A final judgment is a prerequisite for appeal. *Green*, 494 S.W.3d at 527; Rev. Stat. Mo. § 512.020. Absent a final judgment, there is no appellate review and the appeal must be dismissed. *Bryan v. State*, 536 S.W.3d 808, 809 (Mo. App. 2018) (citing *Green* at 528).

However, Rule 78.07(c) provides, “In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review.” “The purpose of the rule is ‘to ensure that complaints about the form and language of judgments are brought to the attention of the trial court where they can be easily corrected, alleviating needless appeals, reversals, and rehearings.’” *Green* at 529 (quoting *Dunlap v. State*, 452 S.W.3d 257, 263 (Mo. App. 2015)).

In *Green*, there were seven claims before the motion court, but the motion court’s findings stated that there were only five claims before the court. 494 S.W.3d at 527. The motion court continued to specifically discuss the five claims it was aware of, issuing findings of fact and conclusions of law on only those five claims. *Id.* The judgment, however, contained no acknowledgment, discussion, or adjudication of the two other claims. *Id.* When the movant argued a lack of final judgment on appeal, the state attempted to invoke Rule 78.07(c) to preclude the claim as unpreserved. *Id.* at 529. This Court distinguished that rule because there is a difference between

a motion court's error with the “form or language” of the judgment and its failure to dispose of or adjudicate the claim itself. *Id.* In the case of *Green*, as is the case here, the issue was not one of “form or language” but instead a complete failure to dispose of or adjudicate the claim.

Green went on to hold that when a judgment adjudicates and disposes of some, but not all of the claims before it, the motion court’s judgment is not final under Rule 74.01(b), which provides that, “ ‘[w]hen more than one claim for relief is presented in an action,’ the court may enter a judgment on fewer than all of the claims only upon express determination that there is no just reason for delay.” *Green* at 531 (quoting Rule 74.01(b)). Absent such a determination, “any order or other form of decision, however designated, that adjudicates fewer than all the claims ... shall not terminate the action as to any of the claims or parties” *Id.*

Our appellate courts have had the opportunity to apply these rules at least five times since *Green*. See, e.g., *Cummings v. State*, 535 S.W.3d at 416; *Bryan v. State*, 536 S.W.3d at 809; *Hicks v. State*, 553 S.W.3d 425, 428-29 (Mo. App. 2018); *McAllister v. State*, 561 S.W.3d 492, 493 (Mo. App. 2018); *Conn v. State*, 564 S.W.3d 386, 387 (Mo. App. 2018).

In *Cummings*, the court did not reach the 74.01(b) and 78.07(c) analysis because one of the *Crews* exceptions applied, but footnote 4 noted that Rule 78.07(c) would likely apply because a “blanket denial” was issued at the end of the judgment. 535 S.W.3d 417.

In contrast, the court in *Bryan* held that *Green* was directly on point. 536 S.W.3d 808, 809. The Court noted that it “has limited the application of broad denials to claims specifically addressed in the judgment.” *Id.* at n. 3 (emphasis added) (citing *Emory v. State*, 536 S.W.3d 345, 347 (Mo. App. 2017)).

Similarly, in *Hicks*, the court reversed for lack of a final judgment and held that “the judgment’s general findings that trial counsel was not incompetent and provided ‘skillful representation’ cannot be taken as acknowledging, adjudicating, or disposing of the [specific] claim.” 553 S.W.3d at 429 (citing *Goetz v. State*, 502 S.W.3d 771, 772 (Mo. App. 2016), which reasoned that under *Green*, “blanket denials are deemed to refer only to the claims that are actually mentioned in the judgment”).

Finally, in *McAllister* and *Conn*, the court found that the respective motion courts failed to adjudicate all claims, and subsequently dismissed the appeals, without reaching the five exceptions listed in *Crews*. 561 S.W.3d at 493; 564 S.W.3d at 387.

Here, although Claim B was “mentioned” in the judgment, it was not “addressed”. (Compare *Goetz*, 502 S.W.3d at 772 with *Emory*, 536 S.W.3d at 347). “Addressed” is the word that more appropriately conveys the holding here, where the motion court set out the allegations of Claim B but failed to address the merits of the claim or make a holding one way or the other. In addition, the final page of the motion court’s judgment here was not a blanket denial because it summarized which claims it was denying and the reasons why in the sentences bookending the conclusion of law under *Strickland*, but Claim B was not one of the claims summarized. The final sentence begins with the word “[t]herefore,” meaning that the accompanying conclusion is based on the analysis set out above it.

A judgment denying post-conviction relief is not final and appealable if it fails to “acknowledge, adjudicate, or dispose” all of the claims asserted in the post-conviction motion. *Creighton v. State*, 520 S.W.3d at 423, fn. 9 (Mo. banc 2017) (quoting *Green*, 494 S.W.3d at 532–33). Because the judgment here is not final, the appeal should be dismissed.

III.

The motion court clearly erred in denying Mr. Lemasters' Rule 29.15 motion because a review of the record leaves a definite and firm impression that he was denied effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that trial counsel failed to act as a reasonably competent attorney under the same or similar circumstances when he failed to object to P.L.'s testimony about abuse that she and her sons allegedly sustained at the hands of Mr. Lemasters, in violation of the trial court's pretrial ruling in limine. Mr. Lemasters was prejudiced because the trial court had already determined that the unfair prejudice of such evidence outweighed its probative value.

Factual and Procedural History

Prior to opening statements, defense counsel made a motion in limine for an order that the state could not elicit testimony through P.L. that Mr. Lemasters had allegedly physically abused her and their sons D.L. and A.L. throughout their lives (Tr. 165-67). The trial court sustained the motion in limine on the basis that such evidence would be legally irrelevant (Tr. 166-67). The trial court found that such evidence would result in unfair prejudice, and the unfair prejudice would outweigh any probative value (Tr. 166-67).

Despite the order in limine, the prosecutor squarely asked P.L. on direct examination whether Mr. Lemasters had abused her and the boys (Tr. 239-40). Defense counsel did not object (Tr. 240). P.L. answered in the affirmative (Tr. 240). There were multiple violations of the ruling in limine, but defense counsel did not object regarding this subject (Tr. 241-42, 248). Defense counsel did object to the relevance of P.L.'s depression and

separately to her testifying about visitation during the divorce case (Tr. 245, 250). Defense counsel later cross-examined P.L. about the abuse inflicted on herself and D.L. (Tr. 253, 256, 257-58, 262). Once the door was opened, P.L. would eventually testify that Mr. Lemasters shot her, stabbed her, and hit her with his car, and that she lived in constant fear for her life and the lives of her children due to Mr. Lemasters abusing them for 19 years (Tr. 262, 268-69).

On redirect, P.L. testified in more detail about the alleged abuse Mr. Lemasters inflicted on the boys (Tr. 269). There was one instance when Mr. Lemasters made D.L. go outside in a dangerous neighborhood to determine what a suspicious noise was, and when D.L. protested that he could get killed, Mr. Lemasters allegedly said that it would be no great loss, which made D.L. suicidal (Tr. 270-71). P.L. determined that A.L. was not as abused as the two older children because he was little, and it was not until more recently that Mr. Lemasters started abusing A.L. (Tr. 273). Trial counsel did not object to these statements, but he did object to an instance of the prosecutor leading the witness P.L. (Tr. 274). The jury found Mr. Lemasters guilty.

Amended motion Claim E alleged that trial counsel was ineffective for failing to object to testimony of P.L. regarding abuse that she and her sons sustained at the hand of Mr. Lemasters, in violation of the trial court's pretrial order in limine barring such testimony (D64:8). At the evidentiary hearing, the motion court took judicial notice of the trial transcript (P.Tr. 6). Trial counsel testified that he had no independent recollection of the motion in limine or the trial testimony on this subject (P.Tr. 84-86). He speculated that he would not have objected when the state elicited P.L.'s testimony on this subject because he reached a point in P.L.'s testimony where he stopped

objecting “because the jury wasn’t even believing what she said, so it just wound up making her look bad” (P.Tr. 86). The motion court denied the claim as reasonable trial strategy (D66:8).

Standard of Review

A successful claim of ineffective assistance of counsel entails a two-part showing. First, the post-conviction movant must demonstrate counsel’s performance was deficient, that is, counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. at 687. This requires a showing that counsel’s performance did not conform to the degree of skill, care and diligence of a reasonably competent attorney, and that the movant was thereby prejudiced. *Id.* To prove prejudice, a movant must show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *State v. Butler*, 951 S.W.2d 600, 608 (Mo. banc 1997). A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. *State v. Johnson*, 968 S.W.2d 686, 695 (Mo. banc 1998). The motion court’s findings and conclusions are reviewed for clear error. *Id.* The trial court’s findings and conclusions are clearly erroneous only if, after a review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *Id.*

Analysis

The motion court’s finding that trial counsel failed to object for the strategic reason offered leaves a definite and firm impression that a mistake has been made. Trial counsel did not have a recollection of the motion in limine or the failure to object. He was only speculating as to why he did not object. He speculated that he stopped objecting to P.L.’s testimony when her

testimony reached a point where the jury stopped believing everything she said. His speculative reason was refuted by the record because trial counsel did continue to object to P.L.'s testimony on other grounds around the same time and after the testimony in question.

Matters of trial strategy are “virtually unchallengeable.” *Zink v. State*, 278 S.W.3d 170, 176 (Mo. banc 2009) (quoting *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006); *Strickland*, 466 U.S. at 690). The only exception is that *unreasonable* trial strategy decisions may serve as a basis of ineffective assistance of counsel. *Zink*, 278 S.W.3d at 176. When faced with a question of arguably unreasonable strategy, “[t]he relevant question for the motion court is not whether counsel's choices were strategic, but whether they were reasonable.” *Seals v. State*, 551 S.W.3d 653, 660–61 (Mo. App. 2018) (quoting *Sanders v. State*, 535 S.W.3d 403, 410 (Mo. App. 2017)) (discussing appellate strategy). When the error is “sufficiently serious that it created a reasonable probability that had it been raised, the outcome of the appeal [or trial] would have been different[,]” the failure to raise the issue in such circumstances is “not a reasonable legal strategy.” *Seals*, 551 S.W.3d at 661.

Here, any imaginable strategy not to object would not have been reasonable. The trial court had already indicated through its ruling on the motion in limine that it would sustain an objection to P.L.'s testimony that Mr. Lemasters abused her and her sons.

However, the denial of Claim E cannot be grounded on a finding that trial counsel had already stopped objecting to P.L.'s testimony because the transcript conclusively reveals that trial counsel had not stopped objecting to her testimony. P.L.'s testimony ran from transcript pages 212 to 278. Her direct examination testimony specifically ran from pages 212 to 250. The first violations of the order in limine occurred at pages 239, 241, and 248. Trial

counsel lodged unrelated objections at pages 235, 245, 250, 268 (re-direct), and 274 (re-direct). Trial counsel's guess as to his reason cannot be contradicted by the record.

Trial counsel even admitted that he did not have an independent recollection of the issue. After proposing his possible strategy reason he concluded, "That would have been my thought" (P.Tr. 86). "Would have" made clear that it was hypothetical and speculative. While such speculation may undercut a claim of ineffectiveness when it fits with the facts, it cannot destroy the claim here, where trial counsel misremembered the sequence of events. As such, the failure to object could not have been based on the strategy in question, and it was clearly erroneous for the motion court to adopt trial counsel's false memory about the sequence of events during trial.

Because the tendered strategy reason is belied by the transcript, analyzing this claim squarely under the reasonable trial strategy line of cases would be a red herring. This is not an argument about whether trial counsel's strategy was reasonable, but whether the tendered reason really was the reason. Although the trial court found it was, and this Court generally defers to the trial court's factual findings, the specific factual finding in question is clearly erroneous.

In this regard, this case is analogous to the holding in *Blankenship v. State*, 23 S.W.3d 848 (Mo. App. 2000). In *Blankenship*, the trial attorney did not prepare for trial because he thought a request for continuance would be granted, and when it was not, he improvised his way through trial. 23 S.W.3d at 850-51. The attorney had planned to call an expert witness at the trial, but he had not yet interviewed his expert because he thought the trial would be continued. *Id.* at 850. When the request for continuance was denied, the attorney hastily interviewed the expert but decided not to call him,

“negotiating a ‘deal’ with the prosecutor that he would not call [the expert] and the prosecutor would not call a police officer as a rebuttal witness.” *Id.* at 851. The motion court “brushed counsel’s mistakes off as ‘trial strategy,’ pointing to the agreement negotiated with the prosecution.” *Id.* This Court held that the motion court’s factual finding that there was a trial strategy was clearly erroneous. *Id.* at 852.

Here, the motion court also “brushed counsel’s mistakes off as ‘trial strategy,’” but the transcript makes clear that the tendered explanation could not have been the reason. Without a plausible strategic reason, we are left with a scenario where trial counsel obtained a favorable order in limine because the evidence in question was so unfairly prejudicial as to outweigh any probative value, but trial counsel failed to follow through with an objection when the state violated the order. The failure to object fell below an objective standard of reasonableness.

In addressing prejudice, the trial court turned the standard inside out, finding, “There is a reasonable probability that the result at trial would not have been different if counsel had objected more at trial” (P.Tr. 88) (emphasis added). The motion court’s statement leaves open a reasonable, possibly greater, probability that the result at trial would have been different. The correct standard is that, “[t]o prove prejudice, a movant must show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *State v. Butler*, 951 S.W.2d at 608.

The same judge presided over both the underlying criminal case and the post-conviction relief case, and the court already found at the hearing on the motion in limine that P.L.’s testimony on this subject was legally irrelevant—*i.e.*, that the probative value of the evidence would be substantially outweighed by unfair prejudice. It would be disingenuous now,

after the same evidence was admitted, and Mr. Lemasters was in fact found guilty, to conclude that the evidence did not affect the verdict. A fair trial would have consisted mainly of H.L. making the sexual abuse allegation, and the state could have even potentially submitted evidence that Mr. Lemasters physically abused H.L. to support its theory about why H.L. did not report the sexual abuse sooner. Instead, the trial turned into a question of whether Mr. Lemasters was an oppressive tyrant over his household, verbally and physically abusing the entire family to maintain his power over them. The jury found he was.

Mr. Lemasters' defense attorney and the trial court were correct to foresee such a result when they analyzed the legal relevance before trial, and nothing changed in the short timespan before the prosecutor asked the prohibited questions. The trial court's initial assessment of prejudice still rings true now that Mr. Lemasters has been convicted.

Because the motion court's findings are clearly erroneous, this Court should reverse and grant a new trial.

CONCLUSION

For the reasons stated herein, Mr. Lemasters respectfully requests that this Court reverse the findings of the motion court and remand the case until a final judgment is entered in the underlying criminal case. If the Court believes the amended motion was untimely, the Court should remand the case for a hearing on the issue of third-party interference. If the Court reaches the amended motion, this Court should grant a new trial based on Claim E or dismiss the appeal so the motion court can issue written findings of fact and conclusions of law on Claim B.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Tyler P. Coyle, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Century Schoolbook size 13 point font. Excluding the cover page, the signature block, this certificate of compliance, and appendix, the brief contains 10,694 words, which does not exceed the 31,000 words allowed for an appellant's brief.

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