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No. SC97878

IN THE
Supreme Court of Missouri

ANDREW L. LEMASTERS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Newton County
40th Judicial Circuit
The Honorable Timothy W. Perigo, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. Andrew Lemasters (Defendant) appeals from a Newton County Circuit Court judgment denying his Rule 29.15 motion for postconviction relief seeking to set aside his conviction for first-degree statutory sodomy. (D66).

In the underlying criminal case, Defendant was charged with the unclassified felony of statutory sodomy in the first degree in Counts I and II, for having deviate sexual intercourse with H.L., who was less than 12 years old; for events occurring on or between April 1, 2001, and November 30, 2002. (D95, p. 16). Defendant waived his right to jury sentencing. (D95, pp. 9, 33). The State dismissed Count II before it was submitted to the jury. (Tr. 421; D66, p. 4). The jury found Defendant guilty as charged. (D95, pp. 9, 46, 49; Tr. 445). The trial court subsequently sentenced Defendant to 31 years' imprisonment. (D95, pp. 10, 53; Tr. 471).

Viewed in the light most favorable to the verdict, the evidence presented at trial showed the following:

H.L. (Victim) was born in June 1992. (Tr. 213, 278, 325). Defendant was Victim's biological father. (Tr. 281, 359). Victim testified that Defendant sexually abused her throughout her life, at times as often as twice a month. (Tr. 204-05, 207, 295-96, 301-02, 314, 326).

In the spring of 2001, when Victim was 8 years old, Defendant called Victim into his bedroom and told her to get on the bed. (Tr. 205, 207, 282). Defendant was lying naked on the bed. (Tr. 282-84). Defendant told Victim to get lotion from beside the bed, put some on her hands, and rub it on his penis, which she did. (Tr. 207, 284-85). Defendant told Victim not to be scared, that it was natural, but not to tell her mother. (Tr. 284, 286).

A few months later, Defendant called Victim into his room again and told her to take off her clothes and get on the bed. (Tr. 207, 287-88). Defendant, who was naked, then got on top of Victim and put his finger inside her vagina. (Tr. 207, 287-89). Victim cried, and Defendant told her that it was okay because he was her father. (Tr. 288-90). Defendant tried to put his penis into Victim's vagina, but Victim was "freaking out" and told him to stop. (Tr. 289-90). Defendant again told Victim not to tell her mother. (Tr. 290).

Later during that same time period, Defendant brought his wife, P.L. (Stepmother), and Victim into the bedroom and forced Stepmother to have sexual intercourse with him while Victim watched for the stated purpose of teaching Victim how to have sex. (Tr. 205, 239-41, 291-92, 323). When Stepmother resisted and said, "[T]his isn't right," Defendant threatened to "take the kids." (Tr. 239). Defendant told Stepmother, "[D]on't act like it

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hurts, because you'll scare her." (Tr. 240-41). Defendant told Victim not to look away and that "this is how you do it." (Tr. 292).

Stepmother testified that when Victim was an infant, Defendant commented during a diaper change that "somebody ha[d] messed with [Victim]" and that "[Victim's] mom's boyfriend must have messed with her," though Stepmother did not notice anything "wrong with [Victim] down there" in her "vagina[l] area." (Tr. 225). Stepmother testified that "[w]henever [Victim] had any kind of problems down there, . . . [Defendant] would always want to be the one that checked her" and that he examined her vaginal area several times. (Tr. 226, 329). When Victim was 12 or 13 years old, she fell on a cinder block between her legs. (Tr. 294). Victim asked Stepmother to look at her injury, but Defendant insisted on looking at it and touching her vaginal area. (Tr. 294-95).

When Victim was in the eighth grade, Defendant "would always have [Stepmother] take the boys" out, bring Victim into his bedroom, and lock the door. (Tr. 242, 298). Defendant made Victim run on a treadmill without wearing any clothes, allegedly as a "punishment" in order to lose weight. (Tr. 242, 298-99). Defendant then proceeded to sexually abuse Victim. (Tr. 299).

Stepmother testified that whenever Victim used makeup, Defendant would tell her that she looked like a "whore" and would make "lewd comments." (Tr. 230). Defendant talked about "how big [Victim's] boobs are."

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(Tr. 297). Stepmother testified that Defendant asked Victim if she masturbated, and he frequently told her that it was normal to talk about such things with her family. (Tr. 230-31).

Defendant also used scriptures from the Bible to justify his actions, including telling Victim that she should "honor [her] father" and that she would be "going against God" if she didn't. (Tr. 233-34, 290, 300). Defendant further gave Stepmother a scripture about a man who had intercourse with his daughters but was forgiven. (Tr. 238-39, 300).

In addition to sexually abusing Victim, Defendant also physically abused her. (Tr. 307-08, 311). Defendant punched Victim with his fist, shoved her against the wall, and struck her with numerous objects, including a stick, toys, and his belt. (Tr. 228, 307). Defendant made a teenaged Victim take off her pants and spanked her bare bottom. (Tr. 228-29). When Stepmother tried to stop Defendant from abusing Victim, "[i]t got worse on her." (Tr. 308). Defendant also told Stepmother and the children "what to say, what not to say," and that "what happens in our family needs to stay within our family, because you can be taken off and go into foster care and get raped." (Tr. 243). When Victim was 18 years old and came home late, Defendant grabbed his cane with the apparent intent of hitting her with it. (Tr. 246, 302-04). Victim then left and moved out of the house. (Tr. 246-47, 280, 302, 304).

Victim disclosed the sexual abuse in April 2012, after her brother was talking about being molested by another individual, saying, "At least your dad didn't do it to you, and you didn't have to go through it for as many years as I had to go through it." (Tr. 248-49, 315-16, 319-21, 335). Victim testified that she disclosed the sexual abuse when she did "[b]ecause [she] was away, . . . [she] knew he couldn't get to [her]. [She] felt protected." (Tr. 318). Stepmother then reported it to law enforcement. (Tr. 203-08, 249, 316).

Defendant testified in his own defense. (Tr. 354). Defendant denied touching Victim's vagina or ever telling Victim to touch his penis. (Tr. 362, 364, 367-68, 379, 382, 400, 402, 413). Defendant denied that Victim had witnessed him having sexual intercourse with Stepmother. (Tr. 373). Defendant admitted that he had spanked Victim, including with a belt, but he denied hitting her in any other way. (Tr. 363-64).

Postconviction Proceedings

This Court affirmed the judgment as to one count of first-degree statutory sodomy, vacated the judgment as to the second count in *State v. Lemasters*, 456 S.W.3d 416, 426 (Mo. banc 2015), and issued its mandate on March 12, 2015. (D56, p. 28; D66, p. 4). Defendant filed his pro se Rule 29.15 motion on June 17, 2015, 97 days after the mandate affirming the judgment had been issued. (D56, p. 7; D57). On June 29, 2015, the motion court appointed the Public Defender to represent Defendant on his postconviction

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motion and granted a 30-day extension to file an amended motion. (D56, p. 7; D59; D62). Postconviction counsel filed a motion on August 28, 2015, asking the motion court to treat Defendant's pro se motion as timely filed. (D56, p. 8; D63). In support, postconviction counsel claimed that "[a] notary public was not made available until June 10, 2015, at no fault of [Defendant]" and that the delay in filing the pro se motion "in part resulted from" "third party interference." (D63, pp. 2-3). The motion court found that the delay in filing the pro se motion was "the result of third party interference" and sustained Defendant's motion to consider his pro se motion as timely filed. (D56, p. 8; D66, p. 5; PCR Tr. 5). On September 24, 2015, postconviction counsel filed an amended motion. (D56, p. 8; D64).

Defendant's amended motion raised six claims, two of which are at issue on appeal. First, the amended motion claimed that trial counsel was ineffective for "fail[ing] to request a continuance of the trial when [Defendant's] medical physician recommended [Defendant] not travel and participate at trial due to his then current medical condition and the effects of the medication he was taking." (D64, pp. 2-6).

Second, the amended motion claimed that trial counsel was ineffective for "fail[ing] to object to testimony by [Stepmother] regarding abuse she and her sons sustained at the hand[s] of [Defendant] in violation of the trial court's pretrial ruling on [Defendant']s motion in limine." (D64, pp. 2-3, 8-9).

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Defendant testified during the evidentiary hearing that he was under doctors' care while he was awaiting trial and that he had been "put . . . on a lot of meds" after suffering "sudden cardiac death five different times." (PCR Tr. 23). Defendant testified that "[he] was on so many meds when [he] was at trial, [he] didn't even know what was going on half the time." (PCR Tr. 25). Specifically, Defendant testified that he had been prescribed mexiletine, Xanax, and Percocet. (PCR Tr. 29). Defendant testified that as a result he was "probably high as a kite" and "passed out and fell asleep several times." (PCR Tr. 30-31). Defendant testified that he "would go to write [something that was said] down and [he] would forget what [he] was trying to write down." (PCR Tr. 31).

During cross-examination, Defendant admitted that he did not tell his attorney that he had passed out or fallen asleep because "[he was] sure [counsel] saw it" and "[t]here was no reason to [tell him]." (PCR Tr. 43). Defendant denied that his head hit the table or that he "sprawl[ed] out on the floor." (PCR Tr. 43). Defendant also admitted that his medical records stated that his "cardiac CT scan was normal" and that he had no other records to present at the hearing regarding his heart condition within six months of the trial. (PCR Tr. 46-48). Defendant further denied that he had to be hospitalized or that he experienced any medical emergencies after the trial. (PCR Tr. 49).

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Defendant told the motion court that he was under the influence of drugs when he testified at trial, but he was unable to identify anything in his testimony that was false. (PCR Tr. 52-53). The motion court asked Defendant, "[D]o you believe that at the time of trial your health conditions . . . and in addition the medications you were on impacted your ability to participate and deal with that situation at that time?" and Defendant answered, "Oh, yeah. I was out of it." (PCR Tr. 55). Defendant testified that he was "dizzy and sick and not feeling good." (PCR Tr. 55).

In contrast, on the morning of trial, the trial court asked Defendant, "Are you on any drugs that affect your ability to think today?" and Defendant answered, "Nothing different I ain't been on most of my life, you know what I mean?" (Tr. 36). The trial court responded, "No. I don't know what you mean. Are you on any psychotropic drugs?" and Defendant answered, "Oh, no, no. I'm not." (Tr. 36). The trial court asked, "Are you on any narcotics?" and Defendant answered, "Not anything that [sic] strong enough to mess with anything, or anything different than I've been on the last 30 years." (Tr. 37). The trial court then asked defense counsel, "[T]oday have you been able to communicate with [Defendant]?" and defense counsel answered, "Yes. He spoke to me a few moments ago at counsel table." (Tr. 37).

Defendant later apologized for falling asleep during the evidentiary hearing on his postconviction motion. (PCR Tr. 73).

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Trial counsel, William Fleischaker, testified that he had been a practicing criminal attorney for 45 years and had taken between 300 and 400 cases to jury trial. (PCR Tr. 89).

Trial counsel testified that he had been aware that Defendant had a continuing medical condition regarding his heart and that he had a regular physician. (PCR Tr. 72-73). Trial counsel testified that he recalled having discussions with Defendant regarding his ability to travel from Kansas City to Newton County for the trial and that he didn't think it "was going to be a significant enough problem to prevent the trial from going forward." (PCR Tr. 74). Trial counsel testified that "[he] was looking for some kind of communication from one of [Defendant's] doctors that would indicate that [Defendant] could not undergo . . . the stress of actually sitting through a trial and testifying . . . without risking his health, and [his] recollection is that [he] could never get medical confirmation of that – actually participating in the trial would be dangerous to [Defendant's] health." (PCR Tr. 74-75). Trial counsel denied that "[he] ever ha[d] any concerns that [Defendant] was unable to understand [him] or that [Defendant] wasn't able to assist [him] because of a medical disability." (PCR Tr. 92-93). Trial counsel also denied that Defendant had collapsed in the courtroom. (PCR Tr. 94). Trial counsel agreed that "had [he] noticed or had [he] had any concerns about the general

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wellbeing or [Defendant's] ability to assist in his own defense at trial, . . . [he] would . . . have brought those to the court's attention." (PCR Tr. 103).

Trial counsel testified that he might not object at trial "depending upon how damaging you consider the testimony is, . . . how irritating your objection might be to a jury" or if "the benefit to be gained from objecting would not have justified the possibility of alienating the jury." (PCR Tr. 77-79). Trial counsel further explained that he thought it was "important for a defense attorney . . . to try to maintain rapport with the jury, and . . . that you can object to the point where you're damaging your credibility with the jury by overly objecting." (PCR Tr. 102).

Trial counsel testified, "I do recall that I thought that [Stepmother] was overly dramatic and overly emphasizing the negative to the point where I believed that she was actually damaging her own credibility with the jury by some of her extreme statements and the fact that it—her hostility towards the defendant was—would be obvious to the jury, and I felt—I recall feeling that just letting her run off at the mouth from a strategic standpoint probably helped us rather than hurt us." (PCR Tr. 81). Trial counsel further stated, "[S]he was just so extreme and she was destroying any credibility she had with the jury." (PCR Tr. 81-82). When specifically asked why he did not object to Stepmother's testimony regarding Defendant's abuse of her and their sons, trial counsel testified, "I believe that [Stepmother] had created an impression

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that she hated [Defendant], that she was going to do anything she could to try to hurt him, and that the jury had pretty well picked up on that." (PCR Tr. 85-86). Trial counsel continued, "[P]art of our defense was that I think that she had encouraged all of this and that she would stop at nothing to . . . try to make [Defendant] look bad." (PCR Tr. 86). Trial counsel stated, "[I]t reached a point where the jury wasn't even believing what she said, so it just wound up making her look bad." (PCR Tr. 86). When asked if when "looking back after the result of the jury's verdict" he thought the strategy had worked, trial counsel replied that "this was a difficult case to defend" and that "[he] d[id]n't think [Stepmother's] testimony had any impact on the jury." (PCR Tr. 86).

The motion court subsequently denied Defendant's postconviction motion. (D66, p. 8). The motion court expressly stated that "the claims raised in the Amended Motion are properly before the Court." (D66, p. 5). The motion court further noted that "[i]n his Amended Motion, [Defendant] raised six claims of ineffective assistance of counsel, [including] five against trial counsel." (D66, p. 4). The motion court also identified the claims of ineffective assistance of trial counsel as 8(a)-(e). (D66, p. 5). In its judgment, the motion court stated, "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." (D66, p. 8).

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The motion court specifically addressed Defendant's claim that trial counsel was ineffective for failing to request a continuance due to Defendant's medical condition within its "Conclusions of Law." (D66, pp. 6-7). The motion court acknowledged that "[t]he symptoms claimed by [Defendant] . . . could all interfere with [his] ability to assist his trial counsel." (D66, pp. 6-7). The motion court did not further explicitly address this claim, but the motion court did expressly state that it "does not find [Defendant's] testimony as credible and believes [trial counsel]." (D66, pp. 3, 7).

The motion court also specifically addressed Defendant's claim that trial counsel was ineffective for failing to object to Stepmother's testimony regarding Defendant's alleged abuse of her and their sons. (D66, pp. 7-8). The motion court noted that "[w]hen questioned here, [Defendant's] trial counsel responded that the jury had already discounted the credibility of [Stepmother] and he did not believe her testimony would harm [Defendant]." (D66, p. 8). The motion court explicitly found that "[c]learly this was trial strategy, and was reasonable." (D66, p. 8). Indeed, the motion court also found that "[Stepmother's] demeanor on the witness stand weakened the State's case." (D66, p. 7). The motion court further noted that "[trial counsel] is a very experienced attorney" and "highly skilled." (D66, pp. 3, 7).

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ARGUMENT

I. (Untimeliness of Pro Se Motion)

The motion court clearly erred in treating Defendant's pro se Rule 29.15 motion as timely filed and proceeding to hear his postconviction claims because the pro se motion was untimely filed 97 days after this Court's mandate was issued on direct appeal, neither the pro se motion nor the amended motion contained allegations that Defendant's circumstances fell within a recognized exception to the time limits, Defendant otherwise failed to allege sufficient facts to establish the applicability of the third-party interference exception, and Defendant failed to prove the applicability of such an exception with supporting evidence.

A. The record regarding timeliness.

On direct appeal, this Court affirmed the judgment as to one count of first-degree statutory sodomy and vacated the judgment as to the second count. *State v. Lemasters*, 456 S.W.3d 416, 426 (Mo. banc 2015). The mandate was issued on March 12, 2015. (D56, p. 28; D57, p. 18; D66, p. 4). Defendant filed his pro se motion to vacate, set aside or correct the judgment or sentence on June 17, 2015, 97 days after the mandate affirming the judgment had been issued. (D56, p. 7; D57). *See* Rule 29.15(b) (requiring the pro se motion to be filed within 90 days after the date the mandate of the appellate court is

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issued affirming the judgment or sentence). Included with the pro se motion was a Forma Pauperis Affidavit, which was dated June 10, 2015, the date on which the pro se motion was due. (D58, p. 1). The pro se motion did not claim that a recognized exception excused the apparent untimeliness of its filing or allege any facts to support such a claim. (D57).

On June 29, 2015, the motion court appointed the Public Defender to represent Defendant on his postconviction motion. (D56, p. 7; D59). Postconviction counsel entered his appearance on July 15, 2015, and requested a 30-day extension to file an amended motion, which the motion court granted. (D56, p. 8; D60; D61; D62).

On August 28, 2015, approximately a month before filing an amended motion, postconviction counsel filed a motion asking the motion court to treat Defendant's pro se motion as timely filed. (D56, p. 8; D63). The motion claimed that "[Defendant's] delay in finalizing his Form 40, with his signature, in part resulted from his having to wait for access to a notary public with [Crossroads Correctional Center]; and due to ongoing health issues associated with a major heart health issue. [Defendant] was scheduled for heart surgery on June 15, 2015, to replace a pacemaker, and was in such a state of health his preparation of his Form 40 was delayed." (D63, p. 2). The motion further claimed that "[Defendant] was at the mercy of the institution in which he was housed to have access to a notary public. A notary public was

not made available until June 10, 2015, at no fault of [Defendant].” (D63, pp. 2-3).

On September 24, 2015, postconviction counsel timely filed an amended motion. (D56, p. 8; D64). *See* Rule 29.15(g) (requiring the amended motion to be filed within 60 days of both the issuance of the appellate court’s mandate and appointment of counsel, with one 30-day extension permitted). The amended motion did not allege that a recognized exception to the time limits applied to the untimely filing of Defendant’s pro se motion. (D64).

A docket entry dated the next day, September 25, 2015, stated, “Motion filed 08-28-15 is sustained.” (D56, p. 8).

At the beginning of the postconviction evidentiary hearing, postconviction counsel stated, “I just wanted to be clear on the record” that the motion court had previously sustained Defendant’s motion to treat the pro se motion as having been timely filed. (PCR Tr. 5). The motion court confirmed that it had sustained the motion and that the record would so reflect. (PCR Tr. 5). The record does not show that the State made any comment on the issue of timeliness. (D56, p. 8; PCR Tr. 5). Defendant did not thereafter present any evidence regarding the circumstances of the filing of his pro se motion. (PCR Tr. 5-105).

In its judgment denying Defendant’s postconviction motion, the motion court relied on the allegations made in Defendant’s motion to treat the pro se

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motion as timely filed in finding that the delay in filing the pro se motion was "the result of third party interference" and in treating the pro se motion as timely filed. (D66, pp. 4-5).

B. Standard of review.

"Review of a Rule 29.15 judgment is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous." *Moore v. State*, 328 S.W.3d 700, 702 (Mo. banc 2010); *see* Rule 29.15(k). "Findings and conclusions are clearly erroneous if, after reviewing the entire record, there is a definite and firm impression that a mistake has been made." *Moore*, 328 S.W.3d at 702.

"Pursuant to Rule 29.15, an evidentiary hearing is not mandatory when the motion and record conclusively show that the movant is not entitled to relief." *Johnson v. State*, 406 S.W.3d 892, 898 (Mo. banc 2013). "Courts 'will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief.'" *Id.* (quoting *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000)). "To be entitled to an evidentiary hearing, Movant's motion must: (1) allege facts, not conclusions, warranting relief; (2) raise factual matters that are not refuted by the file and record; and (3) raise allegations that resulted in prejudice." *Id.*

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C. Defendant failed to allege in either his pro se or amended motion that he fell within a recognized exception to the time limits, and he therefore completely waived any postconviction claim by failing to timely file his pro se motion.

"It is the court's duty to enforce the mandatory time limits and the resulting complete waiver in the post-conviction rules—even if the State does not raise the issue." *Dorris v. State*, 360 S.W.3d 260, 268 (Mo. banc 2012). "The State cannot waive movant's noncompliance with the time limits in Rule 29.15[.]" *Id.* "If the timely filing of an original post-conviction motion is not proven, the motion court will regard the untimely motion as a 'complete waiver' of any right to proceed[.]" *Vogl v. State*, 437 S.W.3d 218, 226-27 (Mo. banc 2014); *see* Rule 29.15(b) ("Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15.").

"In a motion filed pursuant to Rule 29.15, the movant must allege facts showing a basis for relief to entitle the movant to an evidentiary hearing. The movant also must allege facts establishing that the motion is timely filed. The movant then must prove his allegations." *Dorris*, 360 S.W.3d at 267. Thus, "[i]n addition to proving his substantive claims, the movant must show he filed his motion within the time limits provided in the Rules." *Id.*

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> The burden of alleging and proving that the motion is timely filed can be met by the movant in one of three ways: (1) by filing the original *pro se* motion timely so that the file stamp on the motion reflects that it is filed within the time limits proscribed in the rule; (2) alleging in the original *pro se* motion and proving by a preponderance of the evidence that the movant's circumstances fall within a recognized exception to the time limits; or (3) alleging in the amended motion and proving by a preponderance of the evidence that the circuit court misfiled the motion.

Vogl, 437 S.W.3d at 226 (citing *Dorris*, 360 S.W.3d at 267).

Here, the file stamp on Defendant's pro se motion showed that it was not filed within the time limits proscribed in the rule. (D56, p. 7; D57). *See* Rule 29.15(b) (requiring the pro se motion to be filed within 90 days after the date the mandate of the appellate court is issued affirming the judgment or sentence). Additionally, Defendant's pro se motion wholly failed to allege that a recognized exception applied to his otherwise untimely filing. (D57). Finally, the amended motion did not allege that the circuit court misfiled the pro se motion. (D64). Therefore, under *Dorris* and *Vogl*, Defendant failed to properly allege facts establishing that the pro se motion was timely filed, resulting in a complete waiver of his postconviction claims. *See Dorris*, 360 S.W.3d at 270; *Henson v. State*, 518 S.W.3d 828, 834 (Mo. App. S.D. 2017)

(“The facts necessary to support the application of a recognized exception to the time limits must be alleged in the *pro se* motion itself.”); *Baird v. State*, 512 S.W.3d 867, 869 (Mo. App. S.D. 2017) (“The [pro se] motion did not allege or purport to establish that Movant could file a motion for post-conviction relief outside the time limits . . . under a recognized exception to such time limits. The motion was therefore untimely, and the motion court correctly dismissed it.”); *Lenoir v. State*, 475 S.W.3d 139, 142 (Mo. App. E.D. 2014) (holding that the movant failed to prove the timeliness of his pro se motion through one of three methods recognized in *Vogl* and therefore waived his right to proceed with his postconviction motion).

Vogl noted that “[i]t is possible that a movant would not be aware that [his] circumstances fall within a recognized exception to the filing time limits of the post-conviction rules at the time that the *pro se* motion was filed. Accordingly, a movant is given the opportunity to raise those allegations in an amended motion.” *Vogl*, 437 S.W.3d at 226 n. 12; *see also Naylor v. State*, 569 S.W.3d 28, 31-32 (Mo. App. W.D. 2018) (“Movant’s counsel may raise an exception to the filing time limits for the first time in an amended motion, as the movant may not have been aware that his circumstances fell within such an exception.”); *Coy v. State*, 577 S.W.3d 814, 815 (Mo. App. W.D. 2019) (“Although a threshold to achieving post-conviction relief is the timely filing of a *pro se* motion, movant’s counsel may raise an exception to the filing time

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limits in an amended motion that the movant may not have realized was applicable."). This is consistent with the third method of alleging timeliness, regarding a misfiling of the pro se motion by the circuit court, because "at the time [the movant] drafted his *pro se* post-conviction motion, he could not have been aware of that fact." *Vogl*, 437 S.W.3d at 227.

But, here, the factual circumstances allegedly excusing the untimely filing of Defendant's pro se motion were known to Defendant at the time that it was filed. In his subsequently filed motion to treat the pro se motion as timely filed, Defendant alleged that the delay in filing the pro se motion "resulted from his having to wait for access to a notary public . . . and due to ongoing health issues associated with a major heart health issue," both of which would have been known to Defendant when he filed the pro se motion. (D63, p. 2). Moreover, Defendant had been informed by the trial court that he had to file his pro se motion within 90 days after the appellate court's mandate was issued,[1] he was aware that the mandate was issued on March 12, 2015, and he was aware that he hadn't yet filed the motion 90 days later on June 10, 2015, when he signed the Forma Pauperis Affidavit. (Tr. 460-61; D57, p.

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[1] Further, Defendant alleged in his motion to treat his pro se motion as timely filed that his appellate counsel thrice instructed him regarding the deadline for filing his pro se motion. (D63, p. 2).

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18; D58). Therefore, Defendant cannot rely on the limited exception noted in *Vogl* for his failure to allege in the pro se motion the factual circumstances that resulted in the untimely filing of his pro se motion because those factual circumstances were known to him at the time of the filing.

While adhering to the three methods of alleging timeliness that were announced in *Dorris*, *Vogl* recognized that "appointed counsel is charged with the duty to 'ascertain' whether the *pro se* motion asserts sufficient facts to support the movant's claims for relief[.]" *Vogl*, 437 S.W.3d at 227; *see* Rule 29.15(e). Additionally, "[i]f the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims." Rule 29.15(e). Moreover, *Vogl* recognized that "[i]nherent in the 'sufficient facts to support the movant's claims for relief' are facts that would prove the timely filing of the original *pro se* motion because a movant is prohibited from proceeding in a post-conviction action if the original motion was filed untimely." *Vogl*, 437 S.W.3d at 227. It would therefore appear to follow that, even if the movant fails to allege in the pro se motion those facts known to him at the time that would tend to excuse the untimely filing of the motion, appointed counsel should be permitted to allege such facts for the first time in an amended motion. *See id.* at 226 ("[A]ppointed counsel must file either an amended motion to compensate for any deficiencies in the *pro se* motion or, in the

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alternative, a statement explaining the actions counsel took to ensure that no amended motion is needed."); *Rennick v. State*, 392 S.W.3d 537, 540 (Mo. App. W.D. 2013) (noting that a failure to allege in the pro se motion the date that the appellate court's mandate had been issued "could be corrected by the amended motion"); *Bullard v. State*, 853 S.W.2d 921, 923 (Mo. banc 1993) ("The original motion is not held to any level of strict formality and serves mostly to give notice that an individual desires to pursue relief under Rule 29.15.").

Should this Court determine that appointed counsel can satisfy a movant's burden of alleging sufficient facts to establish the timeliness of the pro se motion by alleging such facts for the first time in the amended motion, the Court should clarify that the amended motion is the only proper vehicle, following the pro se motion, for alleging such facts under the postconviction rules. Rule 29.15(e) provided that "[c]ounsel shall ascertain whether sufficient facts supporting the claims are asserted in the [pro se] motion" and that "[i]f the motion does not assert sufficient facts . . ., counsel shall file *an amended motion* that sufficiently alleges the additional facts[.]" Rule 29.15(e) (emphasis added). Further, as recognized in *Vogl*, "Inherent in the 'sufficient facts to support the movant's claims for relief' are facts that would prove the timely filing of the original *pro se* motion because a movant is prohibited from proceeding in a post-conviction action if the original motion was filed

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untimely." *Vogl*, 437 S.W.3d at 227. Therefore, under Rule 29.15, the only acceptable methods for alleging that a movant's circumstances fall within a recognized exception to the time limits are via an original pro se motion or a subsequent amended motion. *See Green v. State*, 481 S.W.3d 589, 592 (Mo. App. S.D. 2015) (holding that the movant failed to properly plead facts establishing timeliness through either his initial motion or his amended motion, even though he testified at a hearing regarding the issue of timeliness and subsequently filed a motion to accept his pro se motion as timely filed); *but see Wiley v. State*, 368 S.W.3d 236, 237-40 & 239 n. 4 (Mo. App. E.D. 2012) (finding that the movant's allegations regarding an applicable exception that were raised for the first time in a response to the State's motion to dismiss after the amended motion had been filed were sufficient to entitle him to a hearing on the issue of timeliness).

Furthermore, requiring any such allegations to be made in an amended motion, as opposed to some other method, would "serve the legitimate end of avoiding delay in the processing of prisoner's claims and prevent the litigation of stale claims" that is otherwise achieved by the time limits in Rule 29.15. *Dorris*, 360 S.W.3d at 269 (quoting *Swofford v. State*, 323 S.W.3d 60, 64 (Mo. App. E.D. 2010)). "While the Rules allow an attack on a final judgment, post-conviction relief proceedings were not designed for 'duplicative and unending challenges to the finality of a judgment.'" *Id.*

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(quoting *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993)). "If the movant was not required to timely file, finality would be undermined and scarce public resources will be expended to 'investigate vague and often illusory claims, followed by unwarranted courtroom hearings.'" *Id.* (quoting *White v. State*, 939 S.W.2d 887, 893 (Mo. banc 1997)). *See, e.g., Lucious v. State*, 460 S.W.3d 35, 37-38 (Mo. App. E.D. 2015) (finding that the movant "adequately alleged" the applicability of the active-interference exception when it was raised for the first time in a "motion to reopen" that was filed approximately 11 years after the pro se and amended motions had been filed and the motion court had dismissed the case due to the untimely pro se motion).

Here, the only allegations regarding the applicability of the third-party interference exception were made in Defendant's "Motion to Treat Movant's Rule 29.15 Criminal Procedure Form 40 as Timely Filed." (D63; D64). Those allegations were not made in the "Rule 29.15 Amended Motion" that was subsequently filed approximately a month later by appointed counsel. (D56, p. 8; D64). Moreover, the motion court did not sustain the "Motion to Treat Movant's Rule 29.15 Criminal Procedure Form 40 as Timely Filed" until after the amended motion had been filed. (D56, p. 8). Therefore, Defendant failed to properly allege an applicable exception to the time limits in either his pro se or amended motion. *See also* Rule 29.15(i) ("The hearing . . . shall be

confined to the claims contained in the last timely filed motion."). As a result, coupled with his failure to timely file his pro se motion, Defendant completely waived his right to proceed on his claims for postconviction relief. *See Green*, 481 S.W.3d at 592.

D. Defendant failed to allege sufficient facts regarding the applicability of the third-party interference exception to entitle him to an evidentiary hearing, and he failed to prove such allegations.

Even if this Court were to find that Defendant was not required to allege the applicability of an exception to the time limits in his amended motion, Defendant failed to allege sufficient facts to entitle him to an evidentiary hearing on the issue of timeliness. Specifically, Defendant failed to allege sufficient facts regarding his preparation of the motion and that he did all that he reasonably could do to ensure that his motion would be timely filed. "[W]hen an inmate prepares the motion and does all he reasonably can do to ensure that it is timely filed under Rule 29.15(b), any tardiness that results solely from the active interference of a third party beyond the inmate's control may be excused and the waivers imposed by Rule 29.15(b) not enforced." *Price v. State*, 422 S.W.3d 292, 301 (Mo. banc 2014). This exception "arises out of the practical reality that an inmate cannot comply with Rule 29.15 without relying on a third party to some extent." *Id*. at 302.

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Here, Defendant alleged that he did not sign the pro se motion and mail it until June 10, 2015, the day the motion was due. (D63, pp. 2). Defendant alleged that "[his] delay in finalizing his Form 40, with his signature, in part resulted from his having to wait for access to a notary public with the institution; and due to ongoing health issues associated with a major heart health issue." (D63, p. 2). In regard to the "ongoing health issues," Defendant further alleged that "[he] was scheduled for heart surgery on June 15, 2015, to replace a pacemaker, and was in such a state of health his preparation of his Form 40 was delayed." (D63, p. 2). In regard to the notary, Defendant alleged that "[he] was required to submit a Forma Pauperis Affidavit as part of his Form 40," that "the signature [for the affidavit is to be] acknowledged by a notary public," and that "[a] notary public was not made available until June 10, 2015, at no fault of [Defendant]." (D63, pp. 2-3).

As an initial matter, Defendant was not required to rely on a notary public in order to timely file his pro se Rule 29.15 motion. Neither the Rule nor Criminal Procedure Form No. 40 required the motion itself to be notarized. *See* Rule 29.15; Form No. 40. Indeed, the Form merely required the movant's signature, acknowledging that "the above information is, to the best of [the movant's] knowledge, true and correct." Form No. 40. While notarization is required for the Forma Pauperis Affidavit, which sets forth information establishing that the movant will be unable to pay the costs of the

proceedings, it was not necessary for the movant to complete the affidavit in order to file the pro se Rule 29.15 motion because the Rule expressly stated that "[n]o cost deposit shall be required" to file the Rule 29.15 motion. Rule 29.15(b); Form No. 40; *see also Trice v. State*, 792 S.W.2d 672, 674 (Mo. App. W.D. 1990) (holding that "payment is not a jurisdictional requirement" and that "the petition is deemed filed without payment of the filing fee"); *Jameson v. State*, 125 S.W.3d 885, 889 n. 2 (Mo. App. E.D. 2004). Moreover, Rule 29.15(d) established that the "[c]ontents of [the] [m]otion" "shall include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence," yet it did not similarly identify a Forma Pauperis Affidavit as a necessary component of the contents of the motion. Rule 29.15(d). Thus, the Forma Pauperis Affidavit was both structurally and functionally separate from the pro se Rule 29.15 motion, and Defendant was not required to rely on the assistance of a notary public in order to timely file his pro se Rule 29.15 motion. *See* (D56, p. 7) (filing the Motion to Proceed in Forma Pauperis separately from the Motion to Set Aside).

But even assuming *arguendo* that Defendant was required to submit a notarized Forma Pauperis Affidavit in order to file his pro se Rule 29.15 motion, Defendant failed to allege that he had done all that he reasonably could do to otherwise prepare the motion for filing and that he would have timely filed the motion but for the unavailability of a notary public. (D63, pp.

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2-3). Indeed, Defendant's allegations acknowledged that "[his] delay in finalizing his Form 40" only "*in part* resulted from his having to wait for access to a notary public" and that he didn't sign his Form 40 until the date that it was due. (D63, p. 2) (emphasis added). Defendant failed to allege sufficient facts to establish that he had taken every step that he reasonably could take to ensure that the motion would be timely filed or that the delay resulted *solely* from the active interference of a third party beyond his control. Therefore, the motion court clearly erred in proceeding on Defendant's untimely motion, and this Court should reverse the judgment and dismiss Defendant's motion with prejudice. *See Price*, 422 S.W.3d at 307.

Even if this Court were to find that Defendant alleged sufficient facts to establish that the third-party interference exception excused the otherwise untimely filing of his pro se motion, he nevertheless failed to meet his burden in proving those allegations. *See Vogl*, 437 S.W.3d at 226 ("In addition to making said factual allegations, the movant also must *prove* those allegations."); *Hall v. State*, 528 S.W.3d 360, 362 (Mo. banc 2017) ("*Dorris* plainly holds that the burden of pleading *and* proving facts showing the motion was timely filed rests with the movant."); *Gittemeier v. State*, 527 S.W.3d 64, 71 (Mo. banc 2017) ("Allegations in a postconviction motion are not self-proving[.]").

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The record does not contain sufficient evidentiary support for the motion court's determination that the delayed filing of Defendant's pro se motion was the result of third-party interference. (D66, p. 5; PCR Tr. 5-105). Instead, the record shows only that Defendant alleged facts regarding third-party interference in a motion to consider his pro se motion as timely filed, that the motion court thereafter sustained that motion, and that postconviction counsel and the motion court simply confirmed those events at the evidentiary hearing without the presentation of any supporting evidence. (D56, p. 8; D63; PCR Tr. 5-105).

Generally, the "[f]ailure to present evidence at a hearing in support of factual claims in a post-conviction motion constitutes abandonment of that claim." *Gittemeier*, 527 S.W.3d at 71 (quoting *State v. Nunley*, 980 S.W.2d 290, 293 (Mo. banc 1998)). But this Court, followed by the Court of Appeals, under circumstances similar to those present here, has remanded with instructions for the motion court to hold an evidentiary hearing to determine whether the movant timely filed his postconviction motion. *See Dorris*, 360 S.W.3d at 270; *Hall*, 528 S.W.3d at 361-62 (remanding for an evidentiary hearing when the movant "claim[ed] the only reason she failed to prove her motion was timely filed is that neither the state nor the motion court . . . question[ed] her allegation concerning her date of delivery to DOC"); *Graves v. State*, 372 S.W.3d 546, 549 (Mo. App. W.D. 2012) (remanding for an

evidentiary hearing because "the motion court denied [the movant] the opportunity to present his evidence related to the timeliness of the motion").

Accordingly, if this Court were to find that Defendant sufficiently alleged that the third-party interference exception excused the untimely filing of his pro se motion, this Court would be required to vacate the motion court's judgment and remand for an evidentiary hearing regarding the circumstances of the preparation and filing of Defendant's pro se motion and a subsequent factual determination by the motion court as to whether Defendant's pro se motion was timely filed.

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II. (Allegedly Premature Rule 29.15 Proceedings)

The motion court did not clearly err in finding that this Court's issuance of a mandate affirming the judgment of conviction on direct appeal triggered the time limits for the filing of a Rule 29.15 motion to vacate, set aside, or correct that judgment of conviction. (Responds to Defendant's Point I.)

A. The record regarding this claim.

On direct appeal, this Court found that "[t]he written judgment in this case does not reflect what occurred during [Defendant's] trial and sentencing." *Lemasters*, 456 S.W.3d at 426. The Court explained that even though Defendant was initially charged with two counts of first-degree statutory sodomy, the State dismissed one of the counts during the instruction conference, and Defendant was thereafter convicted and sentenced on only one count. *Id.* "Accordingly, this is a proper circumstance—indeed, the prototypical circumstance—for an order *nunc pro tunc* correcting the written judgment to reflect what actually occurred." *Id.* In support, the Court stated that "Rule 29.12(c) allows the court to 'amend its records according to the truth, so that they should accurately express the history of the proceedings which actually occurred prior to the appeal.'" *Id.* (quoting *McGuire v. Kenoma, LLC*, 447 S.W.3d 659, 663 (Mo. banc 2014)). The Court concluded: "[T]he judgment as to one count of first-degree statutory sodomy is

affirmed. The judgment as to the second count of first-degree statutory sodomy is vacated. The case is remanded with directions that the trial court vacate its judgment with respect to the second count of statutory sodomy." *Id.*

The Court's mandate stated, "[T]he judgment . . . by the said Circuit Court of Newton County rendered 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, p. 3).

On July 14, 2014, the trial court signed an amended judgment that properly showed that Count II had been dismissed by the State. (D76).

B. Standard of review.

The standard of review applicable to this claim is outlined in Point I. *See supra* at 23.

C. The motion court did not clearly err in finding that the judgment of conviction that Defendant's Rule 29.15 motion sought to have set aside was final under Rule 29.15 upon the issuance of this Court's mandate affirming such judgment.

Defendant claims that "[t]he motion court clearly erred in proceeding on, and denying, [Defendant's] Rule 29.15 motion because . . . the post-conviction relief proceeding is premature, in that the judgment and sentence in the

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criminal case is not yet final." (Def's Br. 14). Defendant claims that "the trial court has not yet carried out the Court's mandate that [Defendant] be brought to the trial court for entry of a new judgment removing the second count." (Def's Br. 14). Defendant argues that "[t]he July 14, 2014, amended judgment is void because the trial court did not have authority to enter it while the criminal case was pending on direct appeal" and "did not request leave of the appellate courts." (Def's Br. 22). Defendant thus argues that "the trial court's July 14, 2014, amended judgment was a nullity, and it cannot serve as the triggering event for the deadline in [Defendant's] post-conviction relief case." (Def's Br. 22-23). Defendant argues that "[t]he judgment will become final when the trial court complies with the Court's mandate and [Defendant] either appeals the new judgment or allows it to become final by declining to appeal." (Def's Br. 24). Defendant asks this Court to "remand the case to the motion court for further proceedings to be had once a final judgment in the underlying criminal case is reached." (Def's Br. 24).

As an initial matter, Defendant cannot claim for the first time on appeal that the motion court erred in proceeding on his Rule 29.15 claim when postconviction counsel both expressly asked the motion court to treat Defendant's pro se motion as timely filed and allow the case to proceed and told the motion court that they were "ready to proceed" on the postconviction motion. (D56, p. 8; D63, p. 3; PCR Tr. 5). At no time did Defendant raise this

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claim before the motion court, and thus he has waived appellate review of any alleged error by the motion court in proceeding on his postconviction motion. (D64). *See Hoskins v. State*, 329 S.W.3d 695, 699 (Mo. banc 2010) ("Plain error review . . . does not apply on appeal to review of claims that were not raised in the Rule [29.15] motion."); *Lowery v. State*, 520 S.W.3d 474, 478 (Mo. App. S.D. 2017) ("[The defendant] cannot claim error by the motion court in forgoing an evidentiary hearing because post-conviction counsel asked the court to take the motion under advisement without an evidentiary hearing. A party may not take advantage of self-invited error.").

Even if this claim were preserved for appellate review, Defendant would not be entitled to relief. "If an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence." Rule 29.15(b). Defendant appealed the judgment of his conviction for first-degree statutory sodomy, and this Court issued a mandate affirming that judgment. (D56, pp. 20-21, 28; D66, p. 4; D75; D111); *See Lemasters*, 456 S.W.3d at 418 & 426. Therefore, for the purposes of triggering postconviction proceedings under Rule 29.15, Defendant's judgment of conviction was final upon this Court's mandate affirming that judgment, and the motion court did not clearly err in proceeding on Defendant's Rule 29.15 motion. *See Clark v. State*, 261 S.W.3d 565, 569 (Mo.

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App. E.D. 2008) ("[T]he issuance of the appellate court's mandate is the event that triggers the 90-day limitation.").

Defendant relies in part on *McKay v. State* in arguing that it was "premature" for the motion court to proceed on Defendant's Rule 29.15 motion. (Def's Br. 14, 23). But in *McKay*, this Court found the "absence of a final mandate" because "[a]n appellate court cannot 'affirm in part' a conviction it is remanding for further hearing and possible vacation," thereby "splitting the single judgment of conviction." *McKay v. State*, 520 S.W.3d 782, 785-86 (Mo. banc 2017). Here, the sole judgment of conviction that Defendant sought to have set aside was affirmed by this Court, and thus there was no further possibility that the conviction would be vacated on direct appeal. (PCR Tr. 7-8); *See Lemasters*, 456 S.W.3d at 426. While Defendant claims that "[t]he judgment will become final when the trial court complies with the Court's mandate and [Defendant] either appeals the new judgment or allows it to become final by declining to appeal," he fails to identify the authority he would have to pursue a successive appeal of a judgment that this Court has already affirmed. (Def's Br. 24). The motion court therefore did not clearly err in proceeding on Defendant's Rule 29.15 motion to set aside the judgment of conviction after this Court had issued its mandate affirming that judgment of conviction.

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Defendant also claims that the trial court's "amended judgment," which was entered on July 14, 2014, and which correctly showed that Count II had been dismissed by the State, was "void" and "a nullity" because it was entered while the case was pending on direct appeal and allegedly without leave of the appellate court. (Def's Br. 22-23; D76). But, as Defendant acknowledges, even though "[a]s a general matter, upon filing of a notice of appeal, a trial court loses almost all jurisdiction over a case," "[t]he trial court does retain some jurisdiction over the judgment," in that it "can still enter nunc pro tunc orders to correct clerical errors." (Def's Br. 22). *Foraker v. Foraker*, 133 S.W.3d 84, 92-93 (Mo. App. W.D. 2004) (quoting *State ex rel. Stickelber v. Nixon*, 54 S.W.3d 219, 223 (Mo. App. W.D. 2001)); *see also* Rule 29.12(c); *State v. McCauley*, 496 S.W.3d 593, 594 (Mo. App. S.D. 2016) (quoting *Pirtle v. Cook*, 956 S.W.2d 235, 240 (Mo. banc 2014)) ("[*N*]*unc pro tunc* relief lies 'at any time,' . . . because a court is deemed 'to have continuing jurisdiction over its records.'"). "*Nunc pro tunc* relief is so narrowly prescribed and so strictly confined to the record that it creates no new judgment, but relates back to the original judgment." *McCauley*, 496 S.W.3d at 595. This Court held on direct appeal that "[t]he written judgment in this case does not reflect what occurred during [Defendant's] trial and sentencing" and that "this is a proper circumstance—indeed, the prototypical circumstance—for an order *nunc pro tunc* correcting the written judgment to reflect what actually occurred."

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Lemasters, 456 S.W.3d at 426. The trial court therefore had the authority over its own records to enter the *nunc pro tunc* order and correct the written judgment so that it reflected what had actually occurred prior to the appeal.

Moreover, while Defendant cites Rule 74.06(a), a rule applying to civil procedure, for the proposition that the trial court was required to seek the appellate court's leave before entering an order *nunc pro tunc*, Rule 29.12(c), the rule applying to criminal procedure, did not contain such a requirement, stating only that "[c]lerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time after such notice, if any, as the court orders." (Def's Br. 22-23); Rule 29.12(c). Therefore, the applicable rule of criminal procedure did not require the trial court to seek leave of the appellate court before entering an order *nunc pro tunc*. Indeed, as this Court noted on direct appeal, "Rule 29.12(c) allows the court to 'amend its records according to the truth, so that they should accurately express the history of the proceedings which actually occurred prior to the appeal.'" *Lemasters*, 456 S.W.3d at 426 (quoting *McGuire*, 447 S.W.3d at 663). Consistent with this Court's finding that an order *nunc pro tunc* was appropriate here, the trial court's "amended judgment" was not void or a nullity.

Furthermore, even if the "amended judgment" entered by the trial court were prematurely entered, Defendant fails to explain why remanding the

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case would be necessary in order to comply with this Court's direct-appeal mandate. Defendant does not claim that the trial court failed to accurately correct the written record in accordance with this Court's opinion. (Def's Br. 17-25). Therefore, even if the "amended judgment" were entered prematurely, as with a prematurely filed appeal or postconviction motion, it should be deemed to have been entered immediately following the issuance of this Court's mandate. *See McKay*, 520 S.W.3d at 787; Rule 81.05(b) ("In any case in which a notice of appeal has been filed prematurely, such notice shall be considered as filed immediately after the time the judgment becomes final for the purpose of appeal.").

Defendant's first point should be denied.

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III. (Allegedly Inadequate Findings)

The motion court did not fail to adjudicate all of the claims in Defendant's amended motion, its judgment was therefore final, and any alleged error as to the form or language of the motion court's findings of fact and conclusions of law was not preserved for appellate review. (Responds to Defendant's Point II.)

A. Standard of review.

The standard of review applicable to this claim is outlined in Point I. *See supra* at 23.

B. The motion court's judgment was final and any alleged error as to the motion court's findings of fact and conclusions of law was not preserved for appellate review.

Defendant claims that "[t]he motion court clearly erred in denying [Defendant's] Rule 29.15 motion because . . . the court's findings of fact and conclusions of law violated 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 [Defendant's] medical problems." (Def's Br. 15). Defendant recognizes that the motion court "recited the allegation," but he claims that it "never affirmatively resolved the claim

one way or the other." (Def's Br. 27). Defendant argues that "[b]ecause the judgment here is not final, the appeal should be dismissed." (Def's Br. 29).

"Rule 29.15(j) require[s] a motion court to 'issue findings of fact and conclusions of law on all issues presented.'" *Watson v. State*, 545 S.W.3d 909, 913 (Mo. App. W.D. 2018) (quoting Rule 29.15(j)). "Written findings and conclusions are required because appellate review of a motion court's disposition of a post-conviction motion is limited to determining whether the trial court's findings and conclusions are clearly erroneous." *Id.*

But "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." Rule 78.07(c); *see also Mercer v. State*, 512 S.W.3d 748, 753 (Mo. banc 2017). "The purpose of Rule 78.07(c) 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." *Mercer*, 512 S.W.3d at 753; *see also Atchison v. State*, 420 S.W.3d 559, 561 (Mo. App. S.D. 2013) ("Rule 78.07(c) is applicable in the post-conviction context because it prevents delay by bringing errors to the attention of the motion court at a time when those errors can be easily corrected."). "If the party challenging the failure to make statutorily required findings does not file a motion to amend the judgment, the issue is not

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preserved for appellate review," and "[t]he appropriate course of action in such circumstances is to dismiss the point and affirm the motion court's judgment." *Atchison*, 420 S.W.3d at 561-62; *see also Mercer*, 512 S.W.3d at 753.

In this case, Defendant did not file a motion to amend the judgment under Rule 78.07(c), nor does Defendant claim that he did. (D56, p. 11; Def's Br. 31-33). Because Defendant failed to file such a motion, his claim on appeal that the motion court violated Rule 29.15(j) when it allegedly failed to address one of the claims in his amended motion is not preserved for appellate review and should be denied. *See Atchison*, 420 S.W.3d at 562.

Defendant nevertheless claims that the motion court wholly failed to adjudicate his claim, that the judgment was not final as a result, and that his appeal should therefore be dismissed. (Def's Br. 15, 31-33). Defendant relies on *Green v. State*, 494 S.W.3d 525 (Mo. banc 2016), but *Green* is distinguishable from the present case. (Def's Br. 31-32). In *Green*, the motion court explicitly stated that there were only five claims before the court and that those claims were alleged in the defendant's amended motion. *Green*, 494 S.W.3d at 527. While the motion court made specific findings of fact and conclusions of law on those five claims, "[t]he judgment contained no acknowledgment, discussion, or adjudication of the *pro se* claims." *Id.* The Court emphasized that "there was no mention in the motion court's judgment

of [the pro se claims] and no statement by the motion court denying all claims in *both the pro se and amended motions*." *Id.* at 530. The Court therefore found that "the two *pro se* claims were never adjudicated by the motion court." *Id.* at 530.

Here, in contrast, the motion court's judgment explicitly identified "the claims raised in the Amended Motion," including the "claims raised" in "paragraphs 8(a)-(f)," which "allege[d] ineffective assistance of counsel," as "properly before the Court." (D66, p. 5). The judgment also specifically recognized that "[c]laims 8(a)-(e) target trial counsel." (D66, p. 5). Moreover, the motion court specifically outlined the claim at issue alleging that trial counsel was ineffective for failing to request a continuance due to Defendant's medical condition. (D66, pp. 6-7). Thus, unlike in *Green*, the motion court expressly and accurately identified all of the claims that were subject to its ruling, and further, it acknowledged, mentioned, and discussed the relevant claims. *See Green*, 494 S.W.3d at 527, 530. While the motion court's judgment did not make express findings of fact or conclusions of law as to the particular claim at issue here, other than to note that "[t]here was no motion to continue the trial setting in June, 2013," it did explicitly find that Defendant was not credible, that it "believe[d] [trial counsel]," and that trial counsel was "a very experienced" and "highly skilled" attorney. (D66, pp. 3, 7). The motion court therefore implicitly disbelieved Defendant's testimony "that at the time of

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trial [Defendant's] health conditions . . . and in addition the medications [he] w[as] on impacted [his] ability to participate and deal with that situation at that time" and instead credited trial counsel's testimony that "[he] [n]ever ha[d] any concerns that [Defendant] was unable to understand [him] or that [Defendant] wasn't able to assist [him] because of a medical disability." (PCR Tr. 55, 92-93). Further, the judgment concluded: "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." (D66, p. 8). The judgment ordered that "Movant's motion to vacate and set aside in Case No. 12NW-CR00817-01 is DENIED." (D66, p. 8). The motion court's judgment therefore adjudicated all of Defendant's claims, and Defendant's failure to move for an amended judgment under Rule 78.07(c) due to any alleged error by the motion court to "include unambiguous findings of fact or conclusions of law on an adjudicated claim" requires this Court to affirm the motion court's judgment. *See Green*, 494 S.W.3d at 530; *Cummings v. State*, 535 S.W.3d 410, 417 n. 4 (Mo. App. S.D. 2017).

Defendant's second point should be denied.

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IV. (IAC – Failure to Object to Evidence of Physical Abuse of Others)

The motion court did not clearly err in denying, after an evidentiary hearing, Defendant's Rule 29.15 claim that trial counsel was ineffective for failing to object to Stepmother's testimony regarding Defendant's abuse of her and their sons because Defendant failed to overcome the presumption that counsel was exercising a reasonable trial strategy. (Responds to Defendant's Point III.)

A. The record regarding this claim.

Defense counsel made an oral motion in limine before opening statements, asking that the court exclude any evidence that Defendant had physically abused Stepmother or their sons. (Tr. 164-65). The prosecutor stated that the abuse of Stepmother and Defendant's sons "also includes" abuse suffered by Victim and that it therefore "shows a complete picture of the circumstances surrounding the events that happened in this child's life." (Tr. 165). Defense counsel acknowledged "that it's going to come in that the complaining party is going to be able to testify about her being physically abused and other sexual acts." (Tr. 166). But defense counsel argued that evidence of any physical abuse of Defendant's wife or his sons was "evidence of other crimes" that did not "fall into any of the traditional exceptions." (Tr. 166). Defense

counsel argued that "any probative value it might theoretically have is outweighed by the highly prejudicial [sic]." (Tr. 166-67).

The trial court preliminarily ruled that evidence of physical abuse involving Victim was "legally and logically relevant," but that the evidence of abuse against the others was "right now . . . too prejudicial." (Tr. 167). The trial court explained that "during the trial it may become more probative than it is here at the beginning[,] [s]o for motion in limine purposes it's sustained." (Tr. 167). When the prosecutor asked whether Victim would be allowed to testify about "what she saw occurring in her home as to her [step]mother and brothers," the court replied that it "would like to hear an offer of proof on that." (Tr. 168). The court stated, "You'll let me listen to what her testimony is and then I'll rule." (Tr. 168). The State then presented Victim's testimony, before opening statements, as an offer of proof. (Tr. 172-85).

Victim testified during the offer of proof both that she was physically abused by Defendant and that she witnessed Defendant abuse Stepmother and her brothers. (Tr. 173-74, 177). Victim testified that Defendant had even forced her and her brothers to abuse Stepmother. (Tr. 179). Victim testified that the physical abuse had happened all of her life, until she moved out of the house, and that she was being sexually abused by Defendant during the same period of time. (Tr. 173-74, 176). Victim testified that if she or

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Stepmother attempted to stop or report the abuse, it "got worse." (Tr. 174, 178-79). Victim testified that she was afraid of Defendant and that there was "an environment of fear within [her] family." (Tr. 176). Victim testified that she did not disclose the sexual abuse until after she had left the house because she was afraid of Defendant and what he would do. (Tr. 180, 182).

The trial court thereafter ruled that "[t]he State will be allowed to introduce evidence as to physical abuse witnessed by the alleged victim, verbal abuse to herself, but not verbal abuse to others, any physical abuse she saw, and physical abuse to herself." (Tr. 185).

During Defendant's opening statement, defense counsel stated, "[Defendant] will tell you that he never physically abused [Stepmother], he never stabbed her, he never shot her, he never did any of these things that she is alleging that he did." (Tr. 197). Defense counsel later stated, "[Defendant] will tell you that at no time did he ever inappropriately touch, hit, strike, other than perhaps what a parent might do in disciplining a child." (Tr. 201).

Defense counsel also noted during opening statement that "[d]uring that time period [of late 2001 to early 2002] there was no police report. There was no indication of a 911 call, or any kind of physical or emotional abuse taking place in the household." (Tr. 196). Defense counsel further stated that "[Victim] will tell you herself that if a call was made to the police because of

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the domestic problems, or if there was a call made to Children's Services, and they were called in to investigate something, that she would tell them—she would never tell them about any of the physical or sexual abuse that she says was taking place." (Tr. 197-98).

During cross-examination of the detective who took Victim's initial statement regarding the alleged sexual abuse, defense counsel confirmed that Victim had not told Stepmother about the sexual abuse Defendant had allegedly committed against her over many years until the spring of 2012. (Tr. 207-08). Defense counsel also confirmed that Victim did not speak to the detective until "a couple of months" after she told Stepmother about the abuse. (Tr. 207-08).

During redirect examination, the detective testified that based on his training and experience "[t]he majority of [cases involving sexual abuse against children] are delayed disclosures." (Tr. 210). During recross-examination, defense counsel asked, "What percentage of the ones that are delayed disclosures are eleven year delays?" (Tr. 211). The detective answered, "Maybe 10 or 15 percent of the time that are ten years plus." (Tr. 211).

Stepmother testified that she witnessed Defendant physically abuse Victim from the time she was "little" to "[t]he day she left [the] house." (Tr. 228-29). Stepmother testified that Defendant hit Victim with "anything he

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could find," including a stick, a toy, and a belt. (Tr. 228). Stepmother testified that Defendant left bruises on Victim. (Tr. 229). Stepmother testified that she tried to stop Defendant from physically abusing Victim, but "[i]t would make it worse on [Victim]." (Tr. 232).

Stepmother testified that in addition to abusing Victim, Defendant abused her and her sons throughout the time that they lived together. (Tr. 239-40). Stepmother testified that the abuse made her afraid of Defendant. (Tr. 240). Stepmother testified that when Defendant forced her to have intercourse in front of Victim, "[she] was crying on the inside, but [she] could not on the outside, because [she] could not show any emotion or nothing because it wouldn't have been pretty." (Tr. 241). Stepmother testified that Defendant cut her, stabbed her, shot her in the leg, ran her over with a car, and beat her with various objects. (Tr. 262). Stepmother also testified that Defendant had threatened to kill her and her family. (Tr. 242).

The prosecutor asked, "And you never took [Victim] away from him?" to which Stepmother answered, "That's right, because I would be threatened. I would be threatened with my life." (Tr. 229). Similarly, the prosecutor asked, "[D]id you contact the police or Children's Division . . . about the abuse you witnessed at the hands of this defendant?" and Stepmother answered, "No, ma'am" and again explained that she was afraid because Defendant had threatened to kill her and her family. (Tr. 231, 242-43). Stepmother testified

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that when Children's Division made contact with her, she did not tell them the truth about the abuse that Victim had suffered because of her fear of Defendant. (Tr. 231-32, 243). Stepmother testified that the same fear prevented her from taking Victim to the doctor. (Tr. 232, 243). Stepmother testified that while she worked, she had the capability of telling somebody "what was going on in [her] home," but she didn't "because [she] was scared; extremely scared." (Tr. 245).

After Stepmother testified that she became "suicidal" because "[she] didn't feel like [she] could protect [her] kids in any way," defense counsel objected to the relevancy of her depression. (Tr. 244-45). The trial court sustained the objection, stating, "If it's opened up, you can go further, but I think you've gone far enough on those issues." (Tr. 245).

During cross-examination, defense counsel confirmed that Stepmother's father, mother, brothers, and sister all lived nearby. (Tr. 252). Defense counsel elicited from Stepmother that from the time she got married to Defendant in 1992 until she moved out in 2002, Defendant physically abused her. (Tr. 256). Defense counsel then confirmed that Stepmother's testimony was that Defendant abused her before she gave birth to both of her sons. (Tr. 256). Defense counsel asked, "What you are telling this jury is after and during almost ten years of physical abuse here . . . where you had parents, where you had brothers, where you had all kinds of people who could help

you, you went ahead and voluntarily left with him, went to Mississippi and had another child with him, is that correct?" (Tr. 257-58). Stepmother answered, "It wasn't actually voluntary." (Tr. 258). Defense counsel asked, "But your family knew how to take care of themselves, and they knew how to take care of you if you had asked them." (Tr. 258). Defense counsel confirmed that Stepmother's brothers were adults and asked if there was anything physically wrong with them. (Tr. 260). Defense counsel asked if Stepmother had any friends and if her father had any friends that lived nearby. (Tr. 260). Defense counsel then asked, "And you never went to any of them and asked them to help?" to which Stepmother replied, "No. I was always threatened." (Tr. 261).

Defense counsel also asked, "Now, I think you said you've been cut, stabbed, stabbed in your leg, shot in your leg, run over with a car, beat with numerous things?" and Stepmother answered, "That's correct." (Tr. 262). Defense counsel then confirmed that "none of those incidents were ever reported to law enforcement." (Tr. 262). Stepmother testified that "[Defendant] would take [her] to the hospital, stay right beside [her], and he would say what had happened. He always blamed it on [her] brain tumor." (Tr. 262-63).

Defense counsel also confirmed that Stepmother could have called the police or family services for help while she was at work but didn't. (Tr. 263-

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64). Defense counsel confirmed that Stepmother was "able to call Family Services and ask them if it was okay for [her] to take the kids" when she ultimately decided to leave Defendant, "[b]ut for the previous ten plus years [she] w[as] never able to call Family Services and report that [her] and [her] kids were being physically abused." (Tr. 266).

During redirect examination, Stepmother admitted that she was "a little flustered" "because everybody is acting like [she's] the bad person, but [she] lived in fear for 19 years of [her] life." (Tr. 268). Stepmother confirmed that she was "in fear for [her] children every day." (Tr. 269). Stepmother testified that she "finally left [Defendant]" after her son got a knife and threatened to kill himself in response to Defendant having told him that "it would be no great loss" if he died. (Tr. 270-71).

During recross-examination, defense counsel confirmed that Stepmother "lied to the police" and "lied to the doctors." (Tr. 274-75). Defense counsel confirmed that her son stayed at scout camp for a week before joining Stepmother in moving away from Defendant. (Tr. 276). Defense counsel asked, "Weren't you afraid [Defendant] would go out to the scout camp and capture him and bring him back?" and Stepmother replied, "No, because there was protection." (Tr. 276). Defense counsel asked, "You didn't have protection from the police for eleven years, and you were afraid they couldn't protect you and your family, isn't that correct?" and Stepmother answered,

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"That is correct." (Tr. 276-77). Defense counsel then asked, "But after you left you figured the scout leaders could protect [Stepmother's son], is that correct?" (Tr. 277).

Victim testified that she was "too scared to say anything" about the sexual abuse because "[she] never knew when the next time him [sic] and [Stepmother] would fight." (Tr. 306). Victim testified that she saw Defendant abuse Stepmother for "[a]s long as [she] can remember" and that he had hit her with his fist, stabbed her, and shot her in the leg. (Tr. 306, 334). Victim testified that she had tried to stop Defendant from abusing Stepmother, but "[she] learned [her] lesson real quick," that "[i]t would just get worse no matter," and that "[she] would become the next target." (Tr. 308). Victim testified that "everybody [was] a target." (Tr. 308). Victim testified that she had seen Defendant abuse her little brother. (Tr. 312). Victim testified that Defendant handcuffed Stepmother to the bed and made Victim and her brothers hit Stepmother with a baseball bat. (Tr. 311-12).

Victim admitted during cross-examination that despite allegedly having visible bruises when she went to school, nobody ever confronted her about them or questioned her about potential abuse in the home. (Tr. 341-42). Victim also admitted that she told people that her bruises were the result of accidents. (Tr. 342). Victim agreed that she never spoke to counselors about

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being abused. (Tr. 342). Victim admitted that "none of the physical abuse was ever reported to authorities." (Tr. 343).

During his testimony, Defendant denied ever striking, stabbing, or shooting Stepmother. (Tr. 362, 374, 413). Defendant claimed that he "was the abused one in the marriage, not [Stepmother]." (Tr. 374). Defendant acknowledged that Stepmother might have a scar on her arm but only because she had cut herself while she was coming at him with a knife. (Tr. 374). Defendant denied knowing why Stepmother would have a second scar, though he testified that she "ran [a metal stake] through her leg one night." (Tr. 375-76).

In rebuttal, Stepmother testified that she had scars on her arms and legs from where Defendant had stabbed and shot her, and she showed them to the jury. (Tr. 416-17). On cross-examination, defense counsel confirmed that Stepmother had gone to the hospital for the stab and gunshot wounds. (Tr. 417-18). Stepmother testified that Defendant had provided alternative explanations for the wounds at the hospital. (Tr. 417-18). Defense counsel asked, "You are saying nobody at the hospital questioned as to whether or not it was a bullet wound?" and Stepmother answered, "No, sir. They didn't even clean it or nothing. And I got a staph infection in it because they didn't clean it properly." (Tr. 419-20).

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During closing argument, the prosecutor told the jury, "[Victim] told you about the abuse. And she told you about what she thought would happen if she told. And that's the key, ladies and gentlemen. You'll remember a lot of questions about why didn't you tell. [Stepmother] had to answer that question . . . . You heard why nobody told, ladies and gentlemen. It was because of fear [of] retribution. [Victim] testified that she was afraid that if she told she would get hurt worse." (Tr. 425). The prosecutor stated, "That's how she was molded, and that's how she was manipulated. And that's how he was able to molest her." (Tr. 426).

Defense counsel told the jury during closing argument, "You remember, I talked to you early on when we had voir dire, and I said to you, is there anyone that believes if someone delays reporting a case they must not be telling the truth? And everybody agreed, no, that's not the case. But everybody did agree that this delay was a factor to consider. And I understand, we've all read about people not reporting things because they are afraid . . . . But one of the things you have to do is you have to determine the reasonableness of that fear." (Tr. 435). Defense counsel argued, "Think about the fact all of these things were going on, that [Defendant] was supposedly shooting and stabbing [Stepmother], and [Victim] was so afraid that something might happen to her or to her mother or her kids [sic] that she was afraid to tell anybody about what happened. She acknowledges there were

occasions when the police were there. She had opportunity at school. She had multiple opportunities to come forward . . . yet she avoided every opportunity to open up and tell the authorities if this was really happening to her." (Tr. 435-36).

B. Standard of review.

The standard of review applicable to this claim is outlined in Point I. *See supra* at 23.

Additionally, "[d]eterminations concerning credibility are exclusively for the motion court which is free to believe or disbelieve any evidence, whether contradicted or undisputed, and we defer to the credibility determinations of the motion court." *Gold v. State*, 341 S.W.3d 177, 180 (Mo. App. S.D. 2011). "We view the record in the light most favorable to the motion court's judgment, accepting as true all evidence and inferences that support the judgment and disregarding evidence and inferences that are contrary to the judgment." *Winans v. State*, 456 S.W.3d 912, 916 (Mo. App. S.D. 2015) (quoting *Smith v. State*, 443 S.W.3d 730, 733 (Mo. App. S.D. 2014)).

C. The law applicable to this claim.

Generally, for a claim of ineffective assistance of counsel, Defendant "must show (1) that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar

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circumstances, and (2) that he was thereby prejudiced." *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Appellate inquiry into an attorney's performance "must be highly deferential." *Strickland*, 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* "To satisfy the performance prong, a movant must overcome a strong presumption that counsel's conduct was reasonable and effective trial strategy." *Shelton v. State*, 440 S.W.3d 464, 469 (Mo. App. E.D. 2014). "Defense counsel has wide discretion in determining what strategy to use in defending his or her client." *Id.* (quoting *Worthington v. State*, 166 S.W.3d 566, 578 (Mo. banc 2005)). "It is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy." *Borst v. State*, 337 S.W.3d 95, 105 (Mo. App. W.D. 2011) (quoting *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006)). "Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." *Shelton*, 440 S.W.3d at 470 (quoting *Anderson*, 196 S.W.3d at 33); *see also Francis v. State*, 183 S.W.3d 288, 301 (Mo. App. W.D. 2005) ("[A] reasonable trial strategy is not ineffective assistance, even if, in hindsight, it was not the best strategy available."). "Strategic choices made after a thorough

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investigation of the law and the facts relevant to plausible opinions are virtually unchallengeable." *Shelton*, 440 S.W.3d at 470 (quoting *Anderson*, 196 S.W.3d at 33).

Prejudice is established if Defendant shows "a reasonable probability . . . that, but for counsel's errors, the result of the proceeding would have been different." *Collis v. State*, 334 S.W.3d 459, 463-64 (Mo. App. S.D. 2011); *see also Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693.

D. The motion court did not clearly err in finding that trial counsel's alleged failure to object was a reasonable trial strategy.

Defendant claims that "he was denied effective assistance of counsel . . ., in that trial counsel . . . failed to object to [Stepmother's] testimony [regarding] abuse that she and her sons allegedly sustained at the hands of [Defendant]." (Def's Br. 16). Defendant further claims that such testimony was "in violation of the trial court's pretrial ruling in limine." (Def's Br. 16). Defendant argues that "[t]he 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" because "[trial counsel's] speculative reason

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was refuted by the record." (Def's Br. 36-37). Defendant therefore argues that "the specific factual finding in question is clearly erroneous." (Def's Br. 38).

"A trial counsel's failure to object is ordinarily trial strategy and therefore afforded considerable deference." *Shelton*, 440 S.W.3d at 470; *see also Helmig v. State*, 42 S.W.3d 658, 679 (Mo. App. E.D. 2001) ("In arguing ineffectiveness a movant must overcome a strong presumption that counsel's failure to object was sound trial strategy."). "[A] trial attorney's failure to object to otherwise inadmissible evidence may constitute reasonable trial strategy." *Riley v. State*, 475 S.W.3d 153, 160-61 (Mo. App. E.D. 2014). "Ineffective assistance of counsel is not to be determined by a post-trial academic determination that counsel could have successfully objected to evidence in a given number of instances." *Hays v. State*, 484 S.W.3d 121, 128 (Mo. App. W.D. 2015) (quoting *Helmig*, 42 S.W.3d at 678). "[T]rial counsel may sometimes *want* to interject otherwise objectionable evidence into a case if it can assist defense counsel in supporting the defense theme of the case." *Id*. at 131. "[A] failure to object is rarely found to be ineffective assistance of counsel." *Nigro v. State*, 467 S.W.3d 881, 886 (Mo. App. W.D. 2015).

Trial counsel in this case testified at the postconviction evidentiary hearing that "[he] thought that [Stepmother] was overly dramatic and overly emphasizing the negative to the point where [he] believed that she was actually damaging her own credibility with the jury by some of her extreme

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statements and . . . that just letting her run off at the mouth from a strategic standpoint probably helped us rather than hurt us." (PCR Tr. 81). Further, trial counsel testified that "part of [their] defense was that . . . [Stepmother] had encouraged all of this and that she would stop at nothing to . . . try to make [Defendant] look bad." (PCR Tr. 86). The motion court, having already found that it believed trial counsel and that he was "a very experienced attorney" and "highly skilled," explicitly concluded that "[c]learly [trial counsel's failure to object to Stepmother's testimony] was trial strategy, and was reasonable." (D66, pp. 3, 7-8). Indeed, the motion court also expressly found that "[Stepmother's] demeanor on the witness stand weakened the State's case." (D66, p. 7).

The motion court did not clearly err in crediting trial counsel's testimony that he did not object to Stepmother's testimony for strategic reasons. Contrary to Defendant's claim, the record supports the motion court's finding that defense counsel was utilizing a trial strategy in choosing not to object to Stepmother's claims of abuse. (Def's Br. 36-39). Trial counsel told the jury during opening statement at the beginning of trial that "[Defendant] will tell you that he never physically abused [Stepmother], he never stabbed her, he never shot her, he never did any of these things that she is alleging that he did," and trial counsel also emphasized to the jury at that time that "there was no police report . . . [and] no indication of a 911 call, or any kind of

physical or emotional abuse taking place in the household." (Tr. 196-98). Throughout the trial, defense counsel questioned Stepmother's credibility regarding the alleged physical abuse, and he used that evidence to challenge the veracity of the delayed allegations of sexual abuse. (Tr. 197-98, 207-08, 211, 257-66, 274-77, 341-43, 417-20, 435-36). The strategy was also consistent with Defendant's denials on the stand that he had committed any abuse. (Tr. 362-64, 374, 413). The record therefore supports trial counsel's testimony that he did not object to such evidence for strategic reasons. But even if the record did not support trial counsel's testimony at the evidentiary hearing, "the motion court is free to believe or disbelieve any evidence, whether contradicted or undisputed, . . . and this court defers to the motion court on matters of credibility." *Francis*, 183 S.W.3d at 302. The motion court therefore did not clearly err in finding that trial counsel's failure to object to Stepmother's testimony was trial strategy. (D66, p. 8).

Moreover, that trial strategy was reasonable. Trial counsel's strategy was to use Stepmother's claims that Defendant had abused her to convince the jury that she was not credible and that her extreme hatred of Defendant had influenced Victim to make similarly false allegations against Defendant. (PCR Tr. 85-86). For example, while Stepmother claimed that Defendant had shot her, trial counsel effectively elicited from her that no medical personnel that had treated her had identified her injury as a gunshot wound. (Tr. 417-

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20). Indeed, the motion court expressly found that "[Stepmother's] demeanor on the witness stand weakened the State's case." (D66, p. 7). Defendant therefore failed to overcome the presumption that trial counsel's strategy was reasonable. *See State v. Basile*, 942 S.W.2d 342, 356 (Mo. banc 1997) ("The trial court did not clearly err in finding [that trial counsel's strategic decision not to object in order to promote the defense theory that the defendant was being framed as a murderer] to be within the range of permissible strategic decisions"); *Shelton*, 440 S.W.3d at 471 ("Trial counsel's decision not to object to a co-defendant's guilty plea in order to attack his credibility is a reasonable trial strategy."). Nor was trial counsel ineffective simply for choosing one strategy over another. *See Borst*, 337 S.W.3d at 106 ("The motion court clearly erred in second-guessing co-counsel's reasonable decision to pursue this course of action even though other strategies might have been available.").

"Because [Defendant] did not satisfy the performance prong of the *Strickland* test, his ineffective assistance of counsel claim fails and we need not consider [Defendant's] assertion that he was prejudiced." *Shelton*, 440 S.W.3d at 471.

Defendant's third point should be denied.

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CONCLUSION

For the foregoing reasons, Respondent submits that the motion court's judgment denying Defendant's Rule 29.15 motion should be vacated and that Defendant's motion should be dismissed with prejudice due to the untimely filing of Defendant's pro se motion. Should this Court find that Defendant sufficiently alleged that the third-party interference exception excused the untimely filing of his pro se motion, it should vacate the motion court's judgment and remand for an evidentiary hearing and a factual determination by the motion court as to whether the pro se motion was timely filed. Should this Court find no error in the motion court's finding regarding timeliness, this Court should further find that the motion court did not clearly err in denying Defendant's Rule 29.15 motion and affirm the judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with Missouri Supreme Court Rule 84.06(b) and contains 15,598 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word 2016 software; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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