



Respondent.

OPINION FILED: June 29, 2021

¹All rule references are to the Missouri Supreme Court Rules (2019), as applicable at the time Webber filed his Rule 29.15 motion, unless otherwise indicated.

counsel's performance fell below that of a reasonably competent attorney or to prove that there is a reasonable likelihood the outcome of his case would have been different had the statute of limitations been raised as a defense at trial, we affirm.

Factual and Procedural History

In May 2015, a jury found Webber guilty of three counts of forcible rape, three counts of forcible sodomy, and one count of attempted forcible sodomy based on his participation in the September 2, 1991 rape, sodomy, and attempted sodomy of L.O. ("Victim") in Kansas City, Missouri. The trial court sentenced Webber to a total of thirty-four years' imprisonment: twenty-four years' imprisonment for each of the rape counts, two of the sodomy counts, and the attempted sodomy count, with the sentences to run concurrently, and ten years' imprisonment for the remaining sodomy count, to run consecutively to the other sentences. On direct appeal, we affirmed the convictions, vacated the sentences, and remanded for the purpose of resentencing. *State v. Webber*, 504 S.W.3d 221 (Mo. App. W.D. 2016). We issued our mandate on December 28, 2016.

Webber prematurely filed a *pro se* Rule 29.15 post-conviction motion on February 27, 2017, while his remanded case was still pending. See *McKay v. State*, 520 S.W.3d 782, 785-86 (Mo. banc 2017) (holding that a Rule 29.15 motion is premature if filed before the final mandate in the case, including the entry of sentence). The motion court nonetheless appointed counsel to represent Webber and afforded a thirty-day extension of time to file an amended motion. On July 20, 2017, appointed counsel filed an amended motion ("Amended Motion") that alleged Webber's trial counsel was ineffective for failing to raise as a defense that the statute of limitations had expired for each of Webber's charges.

Specifically, the Amended Motion contended that section 556.037, RSMo Supp. 1997, was the statute of limitations applicable to each of Webber's offenses, that this statute of limitations had expired by the time Webber was indicted, and that the outcome of Webber's case would have been different had the statute of limitations been asserted as a defense.

While the Amended Motion was pending, Webber waived jury sentencing in his remanded case, and on November 21, 2018, the trial court entered a judgment sentencing Webber to twenty years' incarceration on each of the forcible rape and forcible sodomy counts, with the terms to run concurrently. The State dismissed the attempted forcible sodomy count. Webber did not appeal this judgment.

Accordingly, Webber's prematurely filed *pro se* Rule 29.15 motion was deemed filed on November 21, 2018. *See* Rule 29.15(b) ("If the motion is filed prematurely, such motion shall be considered as filed immediately after sentence is entered if no appeal is taken, including if no appeal is taken after any remand of the judgment or sentence following a prior appeal"). On January 8, 2019, Webber and the State agreed that, pursuant to guidance in *McKay*, Webber should be allowed to file another amended motion. Webber's appointed counsel filed a second amended motion ("Second Amended Motion") the same day. The Second Amended Motion set forth the same claim of ineffective assistance of counsel as the Amended Motion.

The motion court held an evidentiary hearing on the Second Amended Motion on August 29, 2019. The parties stipulated that Victim was born on November 4, 1973, making her seventeen years old at the time of Webber's offenses on September 2, 1991. In

addition, the motion court took judicial notice of the file in Webber's underlying criminal proceedings. Webber and his trial counsel testified.

Webber testified that he twice asked his trial counsel about a statute-of-limitations defense. Webber testified that trial counsel first said he would have to research the issue, and then said that the statute of limitations was not available as a defense to Webber's crimes. Webber's trial counsel testified that he was sure that he had discussed the possibility of a statute-of-limitations defense with Webber, and that he had ultimately concluded, based on his research, that the defense had no merit. Webber's trial counsel was not asked which statute of limitations he researched, or why he reached the conclusion that the statute of limitations was not an available defense.

The motion court issued its findings of fact, conclusions of law, and judgment denying the Second Amended Motion on January 23, 2020 ("Judgment"). The Judgment found that Webber had been charged with and convicted of the class A felonies of forcible rape pursuant to section 566.030, RSMo Supp. 1990, and forcible sodomy pursuant to section 566.060, RSMo Supp. 1990. The motion court concluded that the statute of limitations applicable to Webber's crimes was section 556.036.1, RSMo 1986, which provided that a prosecution for murder or any class A felony "may be commenced at any time." As such, the motion court rejected Webber's contention that section 556.037, RSMo Supp. 1997, described the statute of limitations applicable to Webber's offenses. The motion court concluded that Webber failed to sustain his burden to prove that trial counsel's performance was deficient or that he suffered prejudice from trial counsel's performance.

Webber appeals.

Standard of Review

Our review of a motion court's denial of a Rule 29.15 post-conviction motion is "limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous." Rule 29.15(k). "A judgment is clearly erroneous when, in light of the entire record, [we are] left with the definite and firm impression that a mistake has been made." *Morrison v. State*, 619 S.W.3d 605, 609 (Mo. App. W.D. 2021) (quoting *Shockley v. State*, 579 S.W.3d 881, 892 (Mo. banc 2019)). "Even if the stated reason for a motion court's ruling is incorrect, this Court will affirm the judgment if it is sustainable on other grounds." *Dorsey v. State*, 448 S.W.3d 276, 282 (Mo. banc 2014) (citing *State v. Swallow*, 398 S.W.3d 1, 3 (Mo. banc 2013)).

Analysis

Webber argues in a single point on appeal that the motion court clearly erred when it denied the Second Amended Motion because section 556.037, RSMo Supp. 1997, and not section 556.036.1, RSMo 1986, was the statute of limitations applicable to the crimes Webber committed. According to Webber, if section 556.037, RSMo Supp. 1997, applied to his offenses, the statute of limitations expired on November 4, 2001, ten years after Victim turned eighteen years old, and well before the State charged Webber via indictment on August 22, 2014. Because the statute of limitations would have afforded Webber with a viable defense, Webber argues that trial counsel was ineffective for failing to raise the defense and that Webber suffered prejudice as a result.

We need not determine whether the motion court committed clear error when it reached the legal conclusion that section 556.036.1, RSMo 1986, applied to Webber's

offenses instead of section 556.037, RSMo Supp. 1997. The motion court's Judgment denying the Second Amended Motion can be sustained on other grounds established by the record. *Dorsey*, 448 S.W.3d at 282.

The standard for proving ineffective assistance of counsel

The standard for a claim of ineffective assistance of counsel was announced in *Strickland v. Washington*, 466 U.S. 668 (1984). A claim of ineffective assistance of counsel requires the movant to prove by a preponderance of the evidence both that: (1) "his or her counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation"; and (2) "he or she was prejudiced by that failure." *Kelley v. State*, 618 S.W.3d 722, 731 (Mo. App. W.D. 2021) (quoting *Johnson v. State*, 406 S.W.3d 892, 898-99 (Mo. banc 2013)). The performance prong requires the movant to overcome the strong presumption that his trial counsel's actions were reasonable and effective. *Id.* " The prejudice prong requires the movant to establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 732 (quoting *Johnson*, 406 S.W.3d at 898-99). If the movant fails to establish either the performance prong or the prejudice prong, we need not address or consider the other. *State v. Dawson*, 611 S.W.3d 761, 769 (Mo. App. W.D. 2020).

Webber's claim of ineffective assistance of counsel would require us to determine that section 556.037, RSMo Supp. 1997, describes the statute of limitations applicable to his offenses, and not section 556.036.1, RSMo 1986, as the motion court found. Whether a statute of limitations applies in a criminal case is a question of law. *State v. Donelson*,

343 S.W.3d 729, 733 (Mo. App. E.D. 2011) (citing *State v. Maples*, 306 S.W.3d 153, 155 (Mo. App. W.D. 2010)).

Section 556.036, RSMo 1986, was in effect on September 2, 1991, the date Webber's offenses were committed. The statute sets forth in separate subsections the statute of limitations applicable to various classifications of offenses, when the running of a statute of limitations commences, when a prosecution is deemed commenced for purposes of calculating the statute of limitations, and when the running of a statute of limitations is tolled. Pertinent to this case, section 556.036.1, RSMo 1986, provides that "[a] prosecution for murder or any class A felony may be commenced any time." Though section 556.036.1 was periodically amended between the date of Webber's offenses and August 22, 2014, the date of Webber's indictment, the statute consistently authorized throughout that time frame an unlimited statute of limitations for class A felonies.

Webber was charged with forcible rape and forcible sodomy pursuant, respectively, to sections 566.030, RSMo Supp. 1990, and 566.060, RSMo Supp. 1990. His charges were class A felonies under both statutes because Victim was subjected to sexual intercourse and deviate sexual intercourse with more than one person. *See* section 566.030, RSMo Supp. 1990 (classifying forcible rape as a class A felony if the defendant "subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person"); section 566.060, RSMo Supp. 1990 (classifying forcible sodomy as a class A felony if the defendant "subjects the victim to deviate sexual intercourse or sexual intercourse with more than one person").

Though section 556.036.1, RSMo 1986, applies by its plain terms to Webber's class A felony offenses, Webber argues that section 556.036.1, RSMo 1986, must yield to the more specific statute of limitations set forth in section 556.037, RSMo Supp. 1997, which describes the statute of limitations applicable to "prosecutions for unlawful sexual offenses" involving minor victims. Webber is correct that as a general proposition, "the rules of statutory construction are clear that in situations where the same subject matter is addressed in general terms in one statute [of limitations] and in specific terms in another, and there is a 'necessary repugnancy' between statutes, the more specific statute [of limitations] controls over the more general." *Robinson v. Health Midwest Dev. Grp.*, 58 S.W.3d 519, 522 (Mo. banc 2001).

Section 556.037 was first enacted in 1987. The version of section 556.037, RSMo Supp. 1991, in effect on the date of Webber's offenses provides:

The provisions of section 556.036, to the contrary notwithstanding, prosecutions for unlawful sexual offenses involving a person seventeen years of age or under must be commenced within ten years after commission of the offense.

If section 556.037, RSMo Supp. 1991, applied to Webber's case, the statute of limitations for Webber's offenses would have expired on September 2, 2001, ten years after his offenses were committed. Webber acknowledges, however, that Missouri courts have long held that "when a statute is amended prior to the expiration of the original limitations period," the "new limitations period set forth in the amended statute applies to the original cause of action." *Ferdinand v. State*, 480 S.W.3d 330, 333 (Mo. App. W.D. 2016). Before

the limitations period described in section 556.037, RSMo Supp. 1991, could have expired as to Webber's offenses, the statute was amended to provide:

The provisions of section 556.036, to the contrary notwithstanding, prosecutions for unlawful sexual offenses involving a person eighteen years of age or under must be commenced within ten years after the victim reaches the age of eighteen.

Section 556.037, RSMo Supp. 1997. If section 556.037, RSMo Supp. 1997, applied to Webber's offenses, then (according to Webber) the statute of limitations expired on November 4, 2001, ten years after Victim turned eighteen, and more than a decade before Webber's August 22, 2014 indictment.

The class A offenses of forcible rape and forcible sodomy pursuant to section 566.030, RSMo Supp. 1990, and section 566.060, RSMo Supp. 1990, are indisputably sexual offenses.² And the State stipulated that Victim was under the age of eighteen when Webber committed the class A offenses of forcible rape and forcible sodomy. Further, it is plain that section 556.037, RSMo Supp. 1997, is a more specific statute of limitations than section 556.036, RSMo 1986. The question, therefore, is whether there is a "necessary repugnancy" between the general statute of limitations for all crimes set forth in section 556.036, RSMo 1986, and the more specific statute of limitations for "unlawful sexual offenses involving a person eighteen years of age or under" set forth in section 556.037, RSMo Supp. 1997, that would require application of the more specific statute to Webber's offenses.

²Those offenses are found in Chapter 566, "Sexual Offenses." See section 566.030, RSMo Supp. 1990 (criminalizing forcible rape); section 566.060, RSMo Supp. 1990 (criminalizing forcible sodomy).

The motion court concluded that section 556.037, RSMo Supp. 1997, did not apply to the sexual offenses of forcible rape and forcible sodomy, whether or not charged as class A felonies. Though unstated, the motion court effectively concluded that there was no "necessary repugnancy" between section 556.036.1, RSMo 1986, and section 556.037, RSMo Supp. 1997, at least with respect to class A felonies. The motion court reached this conclusion by construing two phrases in section 556.037, RSMo Supp. 1997: (i) "unlawful sexual offenses involving a person eighteen years of age or under," and (ii) "[t]he provisions of section 556.036, to the contrary notwithstanding."

First, the motion court reasoned that the phrase "unlawful sexual offenses involving a person eighteen years of age or under" refers **only** to criminal offenses where the age of the victim is an element of the sexual offense. The motion court thus effectively construed the word "involving" to limit the phrase "unlawful sexual offenses" to those offenses that require proof of the age of the victim as an essential element of the crime. Second, the motion court reasoned that the phrase "[t]he provisions of section 556.036, to the contrary notwithstanding" only requires application of the more specific statute of limitations in section 556.037, RSMo Supp. 1997, when the effect would be "to **extend** the statute of limitations for crimes that involve the victim's age as an element of the offense and where a period of limitations would otherwise exist under [section 556.036.2, RSMo 1986]." The motion court thus concluded that "the legislature did not intend to **create** a period of limitations for class A felonies committed against persons under the age of [eighteen]." And the motion court effectively concluded that section 556.037, RSMo Supp. 1997, and section 556.036, RSMo 1986, are only "necessarily repugnant" as to require application of

the more specific statute of limitations when the sexual offense charged includes the victim's age as an essential element, and even then, only where the more specific statute of limitations would result in a longer statute of limitations for the offense than that contemplated by section 556.036.2, RSMo 1986.³ To support its construction of section 556.037, RSMo Supp. 1997, the motion court reasoned that it would be an absurd result to conclude that the General Assembly intended to authorize a shorter statute of limitations for a sexual offense if the victim is a child instead of an adult.

The State effectively concedes that it was error for the motion court to construe section 556.037, RSMo Supp. 1997, as limited in its application to unlawful sexual offenses where age is an essential element of the crime. However, the State argues that the phrase "[t]he provisions of section 556.036, to the contrary notwithstanding" in section 556.037, RSMo Supp. 1997, should be construed (as the motion court found) to require application of the more specific statute of limitations set forth in section 556.037, RSMo 1997, only where that statute would result in a longer statute of limitations than that contemplated by section 556.036.2, RSMo 1986, a conclusion that would have the practical effect of never applying section 556.037, RSMo Supp. 1997, to unlawful sexual offenses that qualify as class A felonies.

We need not resolve this issue of statutory interpretation, however. The State also argues that even if section 556.037, RSMo Supp. 1997, applies to unlawful sexual offenses that are class A felonies, Webber nonetheless failed to sustain his burden to establish

³Section 556.036.2, RSMo 1986, authorizes a three-year statute of limitations for any felony; a one-year statute of limitations for any misdemeanor; and a six-month statute of limitations for any infraction.

ineffective assistance of counsel. The State notes that it would have raised the issue of tolling had the statute of limitations been raised as a defense by Webber at trial, and that Webber did nothing during the hearing on his Second Amended Motion to negate the effect of tolling on the running of his statute of limitations. The State argues that evidence in the record established that Webber's statute of limitations would have tolled for three years while Webber was out of state, and that section 556.037, RSMo Supp. 1997, was amended in 2004 to provide for an unlimited statute of limitations for Webber's offenses before his tolled statute of limitations expired. We agree.

Webber's burden to establish ineffective assistance of counsel warranting relief from his convictions requires more than simply demonstrating that section 556.037, RSMo Supp. 1997, was the statute of limitations applicable to his offenses. Webber also has the burden to prove that his trial counsel's decision not to raise the statute-of-limitations defense fell below an objective standard of reasonableness, and that Webber was prejudiced because, had the statute-of-limitations defense been raised, there is a reasonable probability that the outcome of his case would have been different. *Kelley*, 618 S.W.3d at 731-32. Webber has not sustained this burden.

Had Webber raised the affirmative defense of the statute of limitations at trial, the burden would have shifted to the State to show that the statute of limitations had not expired because it had tolled or was subject to exception. *State v. Cotton*, 295 S.W.3d 487, 492 (Mo. App. E.D. 2009) ("Requiring a criminal defendant to raise the defense [of the statute of limitations] in the trial court affords the State an opportunity to respond to the defense, showing that the statute has not run, that it has been tolled, or that an exception applies.").

However, "[t]he State is not afforded this opportunity if the issue is raised for the first time on appeal." *Id.*

During Webber's direct appeal, Webber attempted to assert a claim of ineffective assistance of counsel based on trial counsel's failure to raise the statute of limitations as a defense. *Webber*, 504 S.W.3d at 230. We held that the "exclusive procedure" to raise the ineffective assistance of counsel claim would be through Rule 29.15. *Id.* at 233. In so concluding, we noted:

[W]e have no way of determining [from the present record] if the defense even applies and thus whether Mr. Webber can show prejudice. Addressing Mr. Webber's substantive argument that changes to the statute of limitations for a sexual offense involving a minor were not made before they expired in his case, the State contends that periods of tolling, i.e., when and if he was absent from the jurisdiction, extended the limitations period. ***These matters, as well as the victim's birthdate, a fact we are asked to assume, must be established by proof during an evidentiary hearing.***

Id. (Emphasis added.) In short, we concluded that "[n]ot only do we reject the contention that an ineffectiveness claim may be asserted on direct appeal in Missouri, we also lack a sufficient record to make a determination on the merits of the statute-of-limitations issue in this case." *Id.* at 234.

Section 556.036.6, RSMo 1986, describes the circumstances where a period of limitations does not run in connection with a criminal offense because it is tolled. Relevant to this case, section 556.036.6(1), RSMo 1986, provides that, "[t]he period of limitation does not run[] . . . [d]uring any time when the accused is absent from the state, but in no

case shall this provision extend the period of limitation otherwise applicable by more than three years."⁴

Webber knew when the Second Amended Motion was filed that had the statute of limitations been raised at trial, the State would have raised in response that the statute's running was tolled, and that the statute of limitations on which Webber relied had been amended to become unlimited in duration for his offenses before the tolled statute of limitations expired. *Webber*, 504 S.W.3d at 233. And Webber knew that it would be his burden to establish in connection with his ineffective assistance of counsel claim that section 556.037, RSMo Supp. 1997, in fact applied to provide him with a viable defense given the State's tolling contention. *Id.*; see Rule 29.15(i) (recognizing the movant has the burden to prove post-conviction claims for relief by a preponderance of the evidence); *Campbell v. State*, 598 S.W.3d 611, 613 (Mo. App. S.D. 2020) (recognizing that the movant has the burden of demonstrating reversible error in an appeal from the motion court's denial of post-conviction relief). Yet, despite this knowledge, Webber did not address the issue of tolling during the evidentiary hearing on his Second Amended Motion.

However, Webber's underlying criminal case file, of which the motion court took judicial notice, included testimony from Webber's mother during a bond hearing, and testimony from Webber himself during the sentencing phase of trial, that established that Webber was enlisted in the United States Marine Corps from 1992 to 1996, and was stationed in Japan and California during that four-year period of time. Thus, the record

⁴This tolling provision has not been amended by the General Assembly since Webber's September 2, 1991 commission of forcible rape and forcible sodomy against the victim.

established that, for approximately four years while the period of limitations pursuant to section 556.037, RSMo Supp. 1997, was running, Webber was absent from the state.

Section 556.036.6(1), RSMo 1986, thus would have operated to toll the running of the statute of limitations set forth in section 556.037, RSMo Supp. 1997, for three of the four years that Webber was enlisted in the Marine Corps and stationed out of state. Rather than expiring on November 4, 2001 (ten years after Victim turned eighteen years old), the ten-year period of limitations described in section 556.037, RSMo Supp. 1997, would not have expired until November 4, 2004. Before that date, though, the General Assembly amended section 556.037, effective August 28, 2004, to extend the statute of limitations for "prosecutions for unlawful sexual offenses involving a person eighteen years of age or under" to "twenty years after the victim reaches the age of eighteen unless the prosecutions are for forcible rape, attempted forcible rape, forcible sodomy, kidnapping, or attempted forcible sodomy in which case such prosecutions may be commenced at any time." Section 556.037, RSMo Supp. 2004. Webber concedes that a criminal defendant has no vested right in a statute of limitations unless that statute of limitations expires before the defendant is criminally charged. *Ferdinand*, 480 S.W.3d at 333 (holding that "when a statute is amended prior to the expiration of the original limitations period," the "new limitations period set forth in the amended statute applies to the original cause of action"). Webber thus concedes that if section 556.036.6(1), RSMo 1986, applied to toll the statute of limitations in section 556.037, RSMo Supp. 1997, for three years, then section 556.037, RSMo Supp. 2004, is the statute of limitations applicable to his offenses, and his

prosecution for the class A felonies of forcible rape and forcible sodomy could have been commenced at any time.

Webber's trial counsel testified during Webber's evidentiary hearing that he discussed the statute of limitations with Webber, that he researched the statute of limitations, and that he determined and reported to Webber that the defense was not available. Webber did not elicit testimony from his trial counsel about why trial counsel reached this conclusion. However, trial counsel's conclusion can be readily explained by the fact the statute of limitations set forth in section 556.037, RSMo Supp. 1997, tolled for three years while Webber was out of state, and was amended before it expired to authorize an unlimited statute of limitations for Webber's sexual offenses. There is a strong presumption that trial counsel's actions were reasonable and effective. *Kelley*, 618 S.W.3d at 731. Webber did not overcome that presumption. Instead, it appears that trial counsel's determination that Webber did not have an available statute of limitations defense was legally correct. Trial counsel is not ineffective for failing to assert a defense that would not be meritorious. *See Wickizer v. State*, 617 S.W.3d 885, 891 (Mo. App. W.D. 2021) ("Counsel will not be deemed ineffective for failing to make nonmeritorious objections." (quoting *Hays v. State*, 484 S.W.3d 121, 136 (Mo. App. W.D. 2015))). Correspondingly, Webber did not sustain his burden to establish prejudice, as he cannot demonstrate that had trial counsel raised the defense of the statute of limitations, the outcome of his case would have been different.

Webber does not contest that evidence in the record presented to the motion court established that he was out of state for four years while the statute of limitations described

in section 556.037, RSMo Supp. 1997, was running. And he does not contest that it was his burden to negate the issue of tolling in connection with his claim of ineffective assistance of counsel based on a failure to raise the affirmative defense of the statute of limitations at trial. Instead, Webber argues in his reply brief ⁵ that section 556.036.6(1), RSMo 1986, did not apply to toll the statute of limitations in section 556.037, RSMo Supp. 1997, because every version of section 556.037 since its enactment in 1987 includes either the phrase "[t]he provisions of section 556.036, to the contrary notwithstanding," or "[n]otwithstanding the provisions of section 556.036." Webber reasons that notwithstanding means notwithstanding, and that as a result, no subsection of section 556.036, RSMo 1986, is applicable to calculating the statute of limitations under section 556.037, RSMo Supp. 1997. We disagree.

The phrase "[t]he provisions of section 556.036, to the contrary notwithstanding" signifies the General Assembly's intent to apply section 556.037, RSMo Supp. 1997, when its provisions are in **direct** conflict with section 556.036, RSMo 1986. *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 632 (Mo. banc 2007) ("[T]o say that a statute applies 'notwithstanding any other provision of the law' is to say that no other provisions of law

⁵Though the State raised the issue of tolling in Webber's 2016 direct appeal of his convictions and Webber's claim for post-conviction relief hinged on his ability to establish that the period of limitations for bringing a prosecution for the September 2, 1991 forcible rape and forcible sodomy of Victim had expired, Webber did not address why the period of limitations did not toll while he was enlisted in the Marine Corps and stationed in Japan and California with the motion court or in his appellant's brief. Webber bore both the burden to establish that he is entitled to post-conviction relief and the burden to demonstrate on appeal that the motion court committed reversible error. See Rule 29.15(i) (recognizing the movant has the burden to prove post-conviction claims for relief by a preponderance of the evidence); *Campbell v. State*, 598 S.W.3d 611, 613 (Mo. App. S.D. 2020) (recognizing that the movant has the burden of demonstrating reversible error in an appeal from the motion court's denial of post-conviction relief.). Despite this fact, Webber made no effort to address this potential basis for rejecting his claim of ineffective assistance of counsel until his reply brief.

can be held in conflict with it."), *superseded on unrelated grounds by rule as stated in State ex rel. Vacation Mgmt. Sols., LLC v. Moriarty*, 610 S.W.3d 700, 702 n.2 (Mo. banc 2020). General provisions of section 556.036, RSMo 1986, that define when an offense is deemed committed for the purpose of determining when a period of limitations begins to run (subsection 4); when a prosecution is deemed commenced for the purpose of calculating whether the statute of limitations has already expired (subsection 5); and when a period of limitation is tolled for the purpose of calculating whether a period of limitations temporarily stops running (subsection 6), are not in direct conflict with any provision of section 556.037, RSMo Supp. 1997. The generally applicable subsections of section 556.036, RSMo 1986, are thus not subject to the "notwithstanding" clause in section 556.037, RSMo Supp. 1997. In fact, to hold otherwise would afford a meaning to the "notwithstanding" clause that is not supported by case law or the plain and ordinary meaning of the term. And to hold otherwise would create, in lieu of resolving, conflict, as there would no guidance available to determine how to calculate the period of limitations described in section 556.037, RSMo Supp. 1997, while the statute of limitations applicable to all other criminal offenses would be subject to consistent calculation pursuant to guidance provided by sections 556.036.4, .5, and .6, RSMo 1986.⁶

⁶We therefore need not address, and do not decide, whether the period of limitations for class A felonies set forth in section 556.036.1, RSMo 1986 (unlimited), and the period of limitations for all other felonies set forth in section 556.036.2, RSMo 1986 (three years), directly conflict with the more specific period of limitations set forth in section 556.037, RSMo Supp. 1997, for unlawful sexual offenses involving any person eighteen years of age or under (ten years after the victim turns eighteen). It is enough to hold, as we do, that even if said provisions are in direct conflict, section 556.036.6, RSMo 1986, is *not* in direct conflict with section 556.037, RSMo Supp. 1997, requiring the conclusion that the general tolling provision applies to all statutes of limitation, whether set forth in sections 556.036.1 and .2, RSMo 1986, or in section 556.037, RSMo. Supp. 1997.

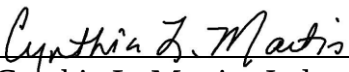
We therefore reject Webber's contention that section 556.036.6, RSMo 1986, is not applicable to section 556.037, RSMo Supp. 1997, because of the "notwithstanding" clause. Because section 556.036.6(1), RSMo 1986, applies to toll the statute of limitations described in section 556.037, RSMo Supp. 1997, and because Webber did not establish that the statute of limitations in section 556.037, RSMo Supp. 1997, did not toll as to his offenses, or expire before it was amended by section 556.037, RSMo Supp. 2004, the record supports the conclusion that Webber's offenses were subject to the unlimited statute of limitations described in section 556.037, RSMo Supp. 2004. Webber failed to meet his burden to establish that trial counsel's failure to raise the defense of the statute of limitations fell below an objective level of reasonableness, and to establish that he suffered prejudice therefrom.

The motion court did not clearly err when it denied Webber's Second Amended Motion, though we reach that conclusion for a different reason supported by the record than that relied on by the motion court in its Judgment.

Webber's point on appeal is denied.

Conclusion

The Judgment is affirmed.


Cynthia L. Martin, Judge

All concur