MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DERRY BECK II

APPELLANT,

v.

STATE OF MISSOURI

RESPONDENT.

DOCKET NUMBER WD84004

DATE: November 16, 2021

Appeal From:

Jackson County Circuit Court
The Honorable Marco Roldan, Judge

Appellate Judges:

Division Three: Lisa White Hardwick, Presiding Judge, Gary D. Witt, Judge and Edward R. Ardini, Jr., Judge

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Attorneys:

Elizabeth Unger Carlyle, Kansas City, MO, for appellant.

Gregory L. Barnes, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DERRY BECK II, APPELLANT,
v.
STATE OF MISSOURI, RESPONDENT.

WD84004 Jackson County

Before Division Three: Lisa White Hardwick, Presiding Judge, Gary D. Witt, Judge and Edward R. Ardini, Jr., Judge

Derry Beck II ("Beck"), who was convicted of statutory sodomy, appeals the judgment of the Circuit Court of Jackson County, Missouri ("motion court"), denying, after an evidentiary hearing, his motion for post-conviction relief pursuant to Rule 29.15. On appeal, Beck argues that the motion court erred in: (1) failing to find his trial counsel ("Counsel") ineffective for not interviewing and calling certain fact witnesses at trial; (2) failing to find Counsel ineffective for not calling a particular expert witness; (3) failing to find Counsel ineffective for not objecting to the improper testimony of a physician who examined the child victim based on the finding on direct appeal that the admission of this testimony was not plain error; (4) failing to find Counsel ineffective for failing to properly impeach the testimony of the victim with her prior inconsistent statements; (5) failing to find Counsel ineffective for presenting the victim's forensic interview; (6) failing to find Counsel ineffective for failing to allow Beck to review his police interview so that he could point out inconsistencies in the detective's trial testimony; (7) failing to find Counsel ineffective for failing to further question or challenge one of the jurors; (8) failing to find Counsel ineffective for failing to seek a mistrial or a curative instruction following a comment from a venireperson; (9) failing to consider his amended 29.15 motion timely in violation of his rights to due process and equal protection of the law; and (10) failing to consider the argument in his untimely amended 29.15 motion that Counsel was ineffective for failing to investigate and call a healthcare provider who examined victim as a witness at his trial.

AFFIRMED.

Division Three holds:

The Missouri Supreme Court has ruled that the time limits of Rule 29.15 are mandatory and the motion court does not have the authority to extend them, even if the court has attempted to do so. *Gittemeier v. State*, 527 S.W.3d 64 (Mo. banc 2017). Also, the abandonment doctrine does not apply to retained counsel so as to excuse a movant's failure to file an amended motion within the time allowed. *Id.* Accordingly, the motion court did not err in finding Beck's amended motion was untimely, nor did it err in failing to consider the argument in his amended motion that Counsel was ineffective in failing to investigate and call as a witness at his trial a healthcare provider who had previously examined the victim.

The motion court did not clearly err in failing to find Counsel ineffective for failing to call two fact witnesses who would have testified that Beck was living with them out of state for part of the relevant time period because their testimony would have been cumulative to other evidence, because their testimony would have been unclear as to the dates Beck stayed with them, and because they both acknowledged that Beck did travel home to Missouri to see his family periodically while he lived with them, so as not to provide an alibi for the charged offenses. The motion court also did not clearly err in failing to find Counsel ineffective for failing to call a particular expert witness at his trial because Beck did not show that Counsel knew or should have known about the existence of the expert and because the expert would not have offered Beck a viable defense at his trial.

The motion court did not clearly err in failing to find Counsel ineffective for failing to object to the opinion testimony of a physician who examined the child victim because Counsel believed the physician would have been allowed to testify that she had diagnosed child sexual abuse even absent physical findings and she did not comment on the veracity of the child victim or state that Beck was guilty of a crime. The motion court did not clearly err in failing to find Counsel ineffective for failing to sufficiently impeach the child victim because Counsel did impeach the victim with her prior inconsistent statements and ended his cross-examination when he believed, in his experience, that he had enough information to show the jury that the victim was lying without risking alienating or offending the jury.

The motion court did not clearly err in failing to find Counsel ineffective for failing to object to the admission of the victim's forensic interview because Beck wanted the interview to be admitted into evidence at his trial to show the inconsistencies in the victim's various statements and Counsel agreed as a matter of trial strategy.

The motion court did not clearly err in failing to find Counsel ineffective for failing to allow Beck to review his interview with police detectives in preparation for trial because Beck showed no prejudice in that his brief did not allege any specific relevant statements of the detective that were inconsistent with his trial testimony, just implications that the statements were at odds with Beck's admittedly unclear memory of the interview.

The motion court did not clearly err in failing to find Counsel ineffective for failing to adequately question a juror who answered during voir dire that she had been abused when she was young. Both Counsel and Co-counsel had testified that the totality of the juror's voir dire responses, including that she did not believe her experience would prevent her from being fair and impartial, did not establish that she was disqualified as a juror because of prejudice. The motion court also did not clearly err in failing to find Counsel ineffective for failing to request a mistrial or a curative instruction following a possibly inflammatory statement from another venireperson. The venire person was not chosen for the jury, and Co-Counsel testified that he believed "continuing to hammer away at it and pick at it" would only make it worse, which was reasonable trial strategy.

Opinion by: Gary D. Witt, Judge November 16, 2021

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