Summary of SC98987, *Ronald McLemore v. State of Missouri*
Appeal from the Taney County circuit court, Judge Eric D. Eighmy
Argued and submitted September 29, 2021; opinion issued December 21, 2021

Attorneys: McLemore was represented by Katie Curry of the public defender's office in Columbia, (573) 777-9977. The state was represented by Garrick Aplin of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It is provided by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: An offender appeals from the circuit court's judgment overruling his postconviction relief motion without an evidentiary hearing. In a decision written by Judge Patricia Breckenridge and joined by three other judges, the Supreme Court of Missouri affirms the judgment. Although the record does not refute the offender's claims that his trial counsel's failure to object to statistics not in evidence, elicitation of unfavorable testimony and deficient opening statement were not reasonably competent, he was not entitled to postconviction relief or an evidentiary hearing because he was not prejudiced by counsel's performance, and the record refutes his claim trial counsel failed to present a coherent theory of defense in closing argument.

In an opinion joined by two other judges, Judge Zel M. Fischer concurs. He agrees the circuit court did not clearly err in overruling the offender's postconviction relief motion without an evidentiary hearing, but would end the analysis there. It is not necessary to evaluate both components of an ineffective assistance of trial counsel claim when the offender makes an insufficient showing as to one of the components.

Facts: In 2016, the state charged Ronald McLemore with six felony sexual offenses after two of his girlfriend's granddaughters made allegations against him. He was found guilty of one count of enticement of a child, two counts of sexual misconduct involving a child by indecent exposure and one count of attempted first-degree sodomy. His judgments of conviction were affirmed on appeal. McLemore's trial counsel subsequently was disbarred. McLemore then sought postconviction relief alleging ineffective assistance of trial counsel. The state moved to forego an evidentiary hearing. The circuit court sustained the state's motion and denied McLemore postconviction relief without conducting an evidentiary hearing. McLemore appeals.

AFFIRMED.

Court en banc holds: (1) Although it is questionable whether trial counsel's response to the state's use of statistics not in evidence was reasonable trial strategy, the record refutes McLemore's claim that using the statistics during closing argument prejudiced him and warrants reversal. Trial counsel did not object when the state recited to the jury statistics regarding the prevalence of child sex abuse that were otherwise not in evidence. Instead, trial counsel acknowledged the truth of the statistics and merely reminded the jury it must decide the case on the facts before it. Nevertheless, the state's reference to the statistics was isolated and brief, and

the jury found McLemore not guilty of two other offenses. Accordingly, trial counsel's failure to object to the statistics was not prejudicial.

(2) While the record confirms trial counsel elicited testimony from the victims' mother that one of the victims has a reputation for truthfulness, trial counsel previously elicited testimony to the contrary from the victims' grandmother and great-grandmother. The fact two witnesses, both of whom were also family members of the victims, testified that one of the victims had a reputation for untruthfulness mitigated the possibility that prejudice resulted from the mother's conflicting testimony. McLemore, therefore, failed to show a reasonable probability that, but for trial counsel's elicitation of the mother's testimony, the trial's outcome would have been different.

(3) Although the record does not clearly refute McLemore's claim that trial counsel's opening statement was objectively unreasonable, he failed to establish prejudice resulted entitling him to relief. At best, trial counsel's opening statement reminded the jury to be impartial. But other statements made tended to support the state's theory, and trial counsel's brief statement on McLemore's behalf reflected negatively on him. Nonetheless, the record refutes any claim of prejudice in that the jury found McLemore not guilty of two other charges. Furthermore, to the extent McLemore claims trial counsel was ineffective in closing argument, the fact that other arguments unquestionably would have supported his defense does not mean trial counsel was incompetent for failing to include them in closing argument.

Concurring opinion by Judge Fischer: Although the author concurs the circuit court did not err in overruling McLemore's postconviction motion without an evidentiary hearing, he would have ended the Court's analysis upon the finding McLemore failed to establish prejudice. He emphasizes that, although it can be tempting to play Monday-morning quarterback, that is not the Court's role in reviewing postconviction relief motions. Rather, he would have presumed the circuit court's findings that trial counsel was not ineffective were correct.