In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

HARRY LITTLE,	)	No. ED113257
	)	
Appellant,	)	
	)	
vs.	)	Cause No. 2022-CC01063
	)	
STATE OF MISSOURI	)	
	)	
Respondent.	)	FILED: January 13, 2026

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
The Honorable Bryan L. Hettenbach

Opinion

Harry Little (Little) appeals from the motion court's judgment denying his Rule 29.15[1] amended motion for post-conviction relief from his convictions for murder in the second degree, armed criminal action, and unlawful possession of a firearm. In two points on appeal, Little argues the motion court clearly erred because Trial Counsel[2] were ineffective in (1) failing to call Michelle Madison (Madison) as an alibi witness to testify

[1] All rule references are to Mo. R. Civ P. (2017) unless otherwise indicated.
[2] Little's Trial Counsel were Charles Moreland (Attorney Moreland) and Thomas Marshall (Attorney Marshall) (collectively, Trial Counsel).

at trial, and (2) failing to argue Hewitt Nearing (Nearing) was an alternative perpetrator in closing argument. Because Madison would not have provided Little with a viable defense and Trial Counsel's decision not to call her as a witness was a matter of trial strategy, the motion court did not clearly err in denying post-conviction relief. Furthermore, Trial Counsel performed effectively in choosing not to argue in closing that Nearing was the actual perpetrator, and instead choosing to present a general alternate perpetrator theory as this was an equally reasonable trial strategy. Consequently, the motion court did not clearly err in denying post-conviction relief on these grounds. Accordingly, we affirm the motion court's judgment.

Background

On November 13, 2014, police received calls of shots fired around the 4100 block of California Avenue just a few minutes before 9:00 p.m. Police officers patrolled the neighborhood but did not see anything that grabbed their attention. The following day, around 6:45 a.m., police received another phone call—this time from Little—reporting he found Victim, his former girlfriend, whom he lived with, in his backyard. When officers arrived at Little's residence, he was standing on the back porch inside the gated backyard. When Little unlocked the gate for the officers to enter he told the officers he overdosed the previous night, and consequently did not remember what happened, and that when he got home that morning he found Victim's body in the backyard. Upon entering, the officers observed Victim's body lying in the corner of the backyard, lifeless, covered by a blanket. Little told the officers he covered her body because he believed she might have been cold. The officers also found a knife and shell casings by Victim's body.

Because it was cold, Little asked the officers if he could go inside the house, and the officers agreed and followed him inside. Upon entering the house, the officers observed a knife, blood in the foyer, and bloody rags in the kitchen, which all appeared to be evidence of a crime. Little then commented, "there must have been a struggle." The officers handcuffed Little and performed a protective sweep of the house.

When Lead Detective Amy Funk (Detective Funk) arrived to the scene, she observed evidence indicating Victim's body had been repositioned after her death. Furthermore, although the weather was cold, Victim was not wearing shoes, socks, pants, or a bra. Instead, Victim was wearing a nice blouse typically worn to work, not around the house or outdoors in November. Inside the house, Detective Funk noted there were blood stains on the carpet and a knife lying in the hallway "obviously out of place." She also observed blood in the kitchen and items in the kitchen also appearing out of place. Between the back door and where Victim's body was located, officers found a three-beaded, iridescent, black pearl earring, with a fishhook-style fastener. The earring was lying in the crevice between the rear porch area and the threshold to the rear door. Despite searching the yard and the home, no match for the earring was located. Police conducted forensic testing on several items discovered during the investigation and found Little's DNA on the handle of the knife lying in the hallway and Victim's DNA on the blade of the knife. The State charged Little with murder in the first degree, pursuant to section 565.020,[3] armed criminal action, pursuant to section 571.015 RSMo (1979),

[3] All statutory references are to RSMo (1990) unless otherwise indicated.

tampering with evidence in a felony prosecution, pursuant to section 575.100, and unlawful possession of a firearm, pursuant to section 571.070 RSMo (1979). The case proceeded to a bench trial.

Bench Trial

At trial, the State called Calvin Martin (Martin) and Kenya Henderson (Henderson), a son and mother, and next-door neighbors to Little and Victim, to testify. Martin, then fifteen years old, and Henderson lived with Hewitt Nearing, Henderson's father. On the day of the murder, Martin was in his bedroom from where he could see Little's yard. Martin heard a woman yelling for help and also heard her yell "Huey." Martin believed she was calling for his grandfather, whose nickname was Huey. Martin then heard gunshots but no longer heard the woman yelling. Martin told Henderson he had "just heard someone most likely get killed." Martin then called 911 and reported the shooting, but before he could give the dispatcher more information, Nearing, Martin's grandfather, told him to hang up the phone, which he did. Soon after, Martin witnessed Little walking back and forth between Little's house and car before seeing Little leave the house in his vehicle. Martin also stated that in his home there was a basement door that opened to the outside rear of the house.

Henderson testified she also heard the gunshots. After Martin told her what happened, she told him to call the police. Henderson went to get Nearing who was in the basement. When she found Nearing, he was coming from the basement steps and had just reached the first floor.

Closing Argument

During closing argument, Trial Counsel stated, "[s]omebody else killed [Victim]." Trial Counsel referenced the earring found lying on the porch directly between Victim's body in the backyard and the blood evidence inside the home. Trial Counsel further proffered, "[p]erhaps [Victim] and another lady were in a bedroom – were in her bedroom when a dispute arose. A dispute that led to the kitchen. Led to that knife block on the kitchen counter. Then led to the backyard where [Victim] was shot and killed … the evidence certainly suggests that that is a possibility." Trial Counsel never specifically argued Nearing was an alternative perpetrator of the crime.

The trial court found Little guilty of murder in the second degree,[4] section 565.030, armed criminal action, and unlawful possession of a firearm, and acquitted him of tampering with physical evidence. The trial court sentenced Little to two life sentences on the murder and armed criminal action charges, and fifteen years' imprisonment on the unlawful possession of a firearm charge—all sentences to be served consecutively. Little appealed his conviction and sentences, and this Court affirmed the judgment in *State v. Little*, 604 S.W.3d 708 (Mo. App. E.D. 2020).

Post-Conviction Proceedings

[4] A charge of first-degree murder was submitted to the trial court pursuant to the indictment, however, the trial court found Little guilty only of the lesser-included offense of second-degree murder pursuant to section 565.021 (1984).

In Little's amended Rule 29.15 motion,[5] he argued, in relevant part, Trial Counsel were ineffective for failing to call his alibi witness, Madison, to testify at trial and in failing to argue in closing argument that Nearing, and not Little, was the perpetrator of the offenses. The motion court held an evidentiary hearing during which Madison, Attorney Moreland, Attorney Marshall, and Little all testified.

Testimony pertaining to Madison as an alibi witness

Madison testified that on November 13, 2014, she met her friend Little at a place known as "the Yard," a local hangout in the 2600 block of St. Louis Avenue around 7:00 p.m. Around 8:15 p.m., she and Little left the Yard in Little's car, drove around a bit and got some food—either Chinese or possibly Rally's, a fast-food hamburger place—and then returned to the Yard. Little left the Yard at about 9:00 p.m., but Madison stayed until 9:30 p.m. to catch a bus. Madison testified she and Little were together for a little over two hours, and Little was not out of her presence at any time during that period. Trial Counsel subpoenaed Madison to testify, but when she appeared at trial, no one called her to testify. Madison stated she would have testified consistent with her evidentiary hearing testimony had she been called at trial.

[5] Little prematurely filed a pro se Rule 29.15 motion. The motion court later appointed counsel to represent Little on his pro se motion, and appointed counsel subsequently filed an untimely amended motion for post-conviction relief and request for evidentiary hearing. Substitute postconviction counsel filed a motion asking the motion court to consider Little's untimely-filed amended motion as timely under *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991). The motion court found former and substitute post-conviction counsel had abandoned Little and accepted Little's amended motion for post-conviction relief as timely filed.

Little also testified at the hearing. Contrary to Madison's testimony that she and Little were always in each other's presence throughout the relevant time period, Little stated while they were driving around he stopped at a house to purchase crack and Madison "didn't know what I was doing in there or nothing like that." He believed they purchased barbecue food before returning to the Yard. Little said he was with Madison from about 7:15 p.m. to 9:00 p.m. After he left Madison, he picked up a prostitute and smoked crack with her. Little conceded that Attorney Moreland told him that he was not going to call Madison to testify because he "[did not] want her to get tripped up" and because he believed the State had not made its case, so there was no need to call an alibi witness.

Attorneys Moreland and Marshall both testified about the alibi witness issue. Attorney Moreland testified Madison was a potential witness, and he originally believed she could have been helpful because she was with Little the night of the murder. However, ultimately, he and Attorney Marshall decided that her testimony would not be sufficient to establish an alibi but instead could be helpful to the State and thus they made a conscious decision not to call her. Attorney Marshall testified that he also considered using Madison as an alibi witness. He stated he visited the Yard location himself, and his investigator interviewed Madison. Overall, Attorney Marshall thought the State's case was weak and circumstantial and he did not want to create unnecessary risk by presenting a shaky alibi at trial that could result in eliciting evidence harmful to Little.

Testimony pertaining to Nearing as an alternate perpetrator

Regarding Nearing, Little testified he and Trial Counsel discussed arguing Nearing was the actual perpetrator of the offenses. Little advocated for this trial strategy because (1) Victim was heard calling out Nearing's nickname "Huey" just before the gunshots were fired, (2) Nearing was seen coming up from the basement of his home right after the shots were fired, and (3) Nearing directed Martin to hang up during the 911 call reporting the shots. Little did concede that in closing argument Trial Counsel mentioned Nearing coming up from the basement and being uncooperative with the police, but never directly named Nearing as the murderer. Trial Counsel both testified they chose not to directly argue that Nearing was the perpetrator because there was no direct evidence implicating Nearing in the shooting.

Motion Court's Judgment

On December 13, 2024, the motion court issued its judgment denying Little's motion for postconviction relief. The motion court found Trial Counsel did not perform ineffectively by failing to call Madison as an alibi witness as it was reasonable trial strategy not to call her given her testimony would not have unqualifiedly supported Little. Moreover, the motion court found Trial Counsel did not perform ineffectively by failing to adduce evidence of Nearing as a specific alternate perpetrator because Little had not alleged any evidence directly connecting Nearing to the crimes, and Trial Counsel testified they knew of no direct evidence implicating Nearing. Little now appeals from the motion court's judgment.

Standard of Review

"Appellate review of the motion court's denial of a post-conviction relief motion is not a *de novo* review" instead "[t]he motion court's ruling is presumed correct." *Jones v. State*, 696 S.W.3d 450, 456 (Mo. App. E.D. 2024) (internal citation omitted) (citing *Greene v. State*, 585 S.W.3d 800, 803 (Mo. banc 2019)). This Court's review is limited "to a determination of whether the findings and conclusions of the [motion] court are clearly erroneous." Rule 29.15(k). "[A] judgment is clearly erroneous when, in light of the entire record, the [C]ourt is left with the definite and firm impression that a mistake has been made." *Scott v. State*, 719 S.W.3d 723, 725 (Mo. banc 2025) (quoting *Flaherty v. State*, 694 S.W.3d 413, 416 (Mo. banc 2024) (internal quotation omitted)). "The movant has the burden to prove grounds for relief by a preponderance of the evidence." *George v. State*, 973 S.W.2d 114, 115 (Mo. App. S.D. 1998) (citing *State v. Stepter*, 794 S.W.2d 649, 657 (Mo. banc 1990)).

Discussion

I. Strickland standard for post-conviction relief

Both of Little's points involve claims of ineffective assistance of counsel. To prevail, first, a movant must show counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "There is a presumption that counsel acted professionally and that any challenged action was part of counsel's sound trial strategy." *Williams v. State*, 168 S.W.3d 433, 439 (Mo. banc 2005); *Johnson v. State*, 406 S.W.3d 892, 899 (Mo. banc 2013) ("A movant must overcome the strong presumption that

counsel's conduct was reasonable and effective."). "Actions that constitute sound trial strategy are not grounds for ineffective assistance claims." *Helmig v. State*, 42 S.W.3d 658, 667 (Mo. App. E.D. 2001) (quoting *State v. Hall*, 982 S.W.2d 675, 680 (Mo. banc 1998).

Second, the movant must establish he was prejudiced by counsel's performance. *Strickland*, 466 U.S. at 687. To demonstrate prejudice a movant must establish that but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *McFadden v. State*, 619 S.W.3d 434, 445 (Mo. banc 2020). If a movant fails to meet one prong, then we need not consider the other. *Hendricks v. State*, 519 S.W.3d 510, 514 (Mo. App. E.D. 2017).

I. Trial Counsel were not ineffective for declining to call Madison as a witness because she would not have provided a viable alibi defense

"An alibi is [a] defense that places the defendant at the relevant time in a different place than the scene involved and so removed therefrom as to render it impossible for defendant to be the guilty party." *Vickers v. State*, 632 S.W.3d 781, 786 (Mo. App. W.D. 2021) (internal quotation omitted); *State v. Miner*, 639 S.W.2d 569, 571 (Mo. banc 1982). To succeed on a claim of ineffective assistance of counsel for failure to call a witness, the movant is required to show "(1) counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense." *Stewart v. State*, 640 S.W.3d 820, 825 (Mo. App. S.D. 2022) (quoting *McFadden v. State*, 553 S.W.3d at 305 (internal quotation marks omitted)).

"Ordinarily, the choice of witnesses is a matter of trial strategy and will support no claim of ineffective assistance of counsel." *Helmig*, 42 S.W.3d at 667 (quoting *State v. Harris*, 870 S.W.2d 798, 816 (Mo. banc 1994)). "This is because strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* (internal quotation marks omitted); *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006).

Here, the record reflects Little meets the first three requirements. As such, we turn to whether Madison's testimony would have produced a viable defense. At the post-conviction evidentiary hearing, Trial Counsel testified they made a strategic decision not to call Madison because they did not believe her testimony would have unqualifiedly supported Little's alibi. We agree.

Madison testified she was with Little from 7:00 p.m. to 9:00 p.m. on the evening of the murder, and that she and Little were together the entire time. However, by his own admission, Little left Madison's presence to visit a crack house at an unspecified location and for an unspecified amount of time during that period. As such, Madison cannot unqualifiedly account for Little's whereabouts. "If a potential witness's testimony would not unqualifiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance." *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. banc 2005) (internal citation omitted); *See State v Ivy*, S.W. 3d. 108, 116 (Mo. App. E.D. 2017) (holding defendant's girlfriend who testified she was asleep in her bed with defendant on the morning of an armed robbery, was not a true alibi witness because she could not definitively place defendant in her bed at the time of the crime, as she was

asleep). Moreover, discrepancies in Little's and Madison's proffered testimony about ridding around to get food—barbeque, Chinese, or a fast-food hamburger place—without mentioning the additional stop at the crack house before returning to the "Yard" "made alibi a shaky defense." *State v. Flieger*, 776 S.W.2d 25, 31 (Mo. App. E.D. 1989) (internal quotation marks omitted). *See State v. Johnson*, 901 S.W.2d 60, 63 (Mo. banc 1995) (finding trial counsel exercised reasonable strategy in declining to call a witness whose testimony "could have done more harm than good" because if the jury questioned the credibility of the witness, it might have also questioned the credibility of the defendant's entire theory of defense). Here, Trial Counsel expressed legitimate concern that a false alibi could support a conviction. The motion court's finding that Trial Counsel's decision not to call Madison as an alibi witness was reasonable trial strategy is not clearly erroneous.

II. Trial Counsel were not ineffective for declining to argue Nearing was the alternate perpetrator in closing argument

Little contends the evidence presented at trial directly connected Nearing to the *corpus delicti* of the offense and the evidence presented was sufficient to support a specific alternate perpetrator defense. "To establish an ineffective assistance of counsel claim based on failure to adduce evidence of an alternate perpetrator, a movant must demonstrate such evidence would have been admissible." *Russell v. State*, 699 S.W.3d 495, 501 (Mo. App. E.D. 2024) (internal citation omitted). Such evidence is only admissible if it includes "proof that the alternative perpetrator committed an act directly connecting that individual" with the "*corpus delicti*, and tends clearly to point out

someone besides [the defendant] as the guilty person." *Id.*; *State v. Whirley*, 698 S.W.3d 716, 721 (Mo. App. W.D. 2024). "The *corpus delicti* in a homicide case consists of two elements: (1) proof of the death of the victim and (2) evidence that the criminal agency of another was the cause of the victim's death." *Whirley*, 698 S.W.3d at 725 (quoting *State v. Edwards*, 116 S.W.3d 511, 544 (Mo. banc 2003).

Here, Little argues that Martin's and Henderson's testimony supported the specific alternate perpetrator defense, as their testimony established Nearing had the opportunity to commit the murder because he resided next door and could easily have accessed Victim and the crime scene on foot by walking through his downstairs basement door and into Little's backyard. Further, Little claims the evidence that Nearing thwarted Martin's attempt to obtain help for Victim by instructing Martin to end his call with the 911 operator, established Nearing also had motive and intent to kill Victim. Most notably, Little contends the evidence that Martin heard a woman yell "Huey" immediately prior to the gunshots directly connected and implicated Nearing in the charged offenses because Victim herself identified Nearing by name.

While Trial Counsel could have chosen to specifically name Nearing as the alternate perpetrator, and that argument may have been admissible, Trial Counsel were not ineffective for instead choosing to present a general alternate perpetrator defense. In closing argument, Trial Counsel argued "[s]omebody else killed [Victim]" and said this was plausible because of an earring found at the scene. Trial Counsel urged the jury to conclude that an unnamed woman—presumably the owner of the earring—was the actual murderer. While Trial Counsel did not specifically argue Nearing was the killer as Little

preferred, "[i]t is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy." *Martin v. State*, 655 S.W.3d 195, 201 (Mo. App. W.D. 2022) (quoting *Hosier*, 593 S.W.3d at 81). As Little failed to prove ineffective assistance of counsel, we need not and do not consider whether he was prejudiced by Trial Counsel's performance. *Russell v. State*, 721 S.W.3d 160, 164 (Mo. App. E.D. 2025). Point II is denied.

Conclusion

The motion court's judgment is affirmed.



Rebeca Navarro-McKelvey, P.J.

Gary M. Gaertner, Jr., J and
James M. Dowd, J., concur.