IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

RICHARD L. KERKSIEK,	)	
	)	
Appellant,	)	
	)	**WD87889**
v.	)	
	)	**OPINION FILED:**
	)	**August 4, 2026**
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Johnson County, Missouri
The Honorable R. Michael Wagner, Judge

Before Division One: Gary D. Witt, Presiding Judge, Mark D. Pfeiffer, Judge, and Thomas N. Chapman, Judge

Mr. Richard Kerksiek ("Kerksiek") appeals from the judgment of the Circuit Court of Johnson County, Missouri ("motion court"), which denied his amended Rule 29.15[1] motion for post-conviction relief ("PCR") based on alleged constitutionally ineffective assistance of counsel following an evidentiary hearing. We affirm.

[1] All rule references are to I MISSOURI COURT RULES – STATE 2025.

Factual and Procedural History[2]

This appeal relates to Kerksiek's convictions for first-degree statutory sodomy and incest involving his nine-year-old daughter ("Victim").[3]

In March 2019, Kerksiek and Victim lived with Kerksiek's girlfriend ("Girlfriend") in Johnson County, Missouri.[4] One night in early March, Kerksiek entered Victim's bedroom, woke Victim, and told her to flip onto her stomach. He removed Victim's shorts and tank top and inserted his penis into her anus.

Around the same time, Kerksiek's father, R.R., and father's girlfriend, V.M., briefly lived with Kerksiek and Victim. Victim told V.M. that something had happened between Kerksiek and Victim. When V.M. asked Victim if anything inappropriate had happened, Victim responded that she did not want to say anything because she did not want to get into trouble.

A month prior, Girlfriend and Kerksiek were sleeping in their bedroom when Kerksiek went to the restroom. When Kerksiek did not return, Girlfriend awoke to find him sleeping in Victim's bed while Victim was laying on the floor. Girlfriend told

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[2] "On appeal from the motion court's denial of a Rule 29.15 motion, we view the facts in the light most favorable to the underlying criminal conviction as those facts bear upon the motion court's judgment." *Morrison v. State*, 619 S.W.3d 605, 607 n.1 (Mo. App. W.D. 2021) (citing *McFadden v. State*, 553 S.W.3d 289, 296 n.2 (Mo. banc 2018)).

[3] Pursuant to the directive of section 509.520.1(4), (7) (Supp. IV 2025), we do not use the names of any victims or minors in this opinion. All statutory references are to THE REVISED STATUTES OF MISSOURI (2016), as supplemented through October 19, 2023, unless otherwise indicated.

[4] Many of the underlying facts are taken directly from the published opinion issued in Kerksiek's direct appeal, *State v. Kerksiek*, 670 S.W.3d 32 (Mo. App. W.D. 2023), without further attribution.

Victim to go sleep in Girlfriend's bedroom. Girlfriend slept on the couch, which was between the two rooms, so that she could ensure Kerksiek did not re-enter the room where Victim was sleeping.

When Girlfriend and Kerksiek broke up near the end of March 2019, Kerksiek and Victim moved to Morgan County, Missouri, where they lived with Kerksiek's stepfather and stepfather's girlfriend ("Stepfriend"). Victim told Stepfriend that Kerksiek had hurt her at the Johnson County house when he tried to put his penis in her anus. Stepfriend later confronted Kerksiek in Victim's presence. Kerksiek fell to the ground, and Stepfriend administered oxygen to him. Out of fear that she had hurt Kerksiek, Victim recanted her allegations to Stepfriend.

In May 2019, Victim disclosed the same sexual misconduct by Kerksiek to a school counselor. Victim told the school counselor that she had told Stepfriend about what Kerksiek had done. Victim told the school counselor that she had previously lied to Stepfriend when she recanted her abuse allegations involving Kerksiek and that, upon recanting the allegations, Stepfriend rewarded her with a bicycle.

Law enforcement was notified of the alleged abuse, and in a subsequent forensic interview with the Child Advocacy Center, Victim again stated that Kerksiek had sexually abused her. Victim said it had happened twice: once in the home in Morgan County and once in the home in Johnson County.

Victim possessed a laptop to use at the Johnson County house, and she would frequently find inappropriate videos or images on it after Kerksiek had used it. An examination of the laptop by law enforcement showed a search history including terms

like, “my little daughter sex” and “[f]ather fucks daughter,” among many other similar search terms. Most of those searches occurred late at night after 11:00 p.m.; Victim normally went to bed at 8:00 p.m. on weekdays and 10:00 p.m. on weekends.

Kerksiek was charged in both Johnson County and Morgan County with first-degree statutory sodomy and incest. Before trial, the State filed two requests for disclosure under Rule 25.05, seeking the identities and last known addresses of all witnesses Kerksiek intended to call at trial. Kerksiek did not respond to either request, so the day before trial, the State filed a motion to exclude any defense witnesses as a sanction for Kerksiek’s discovery violation. The trial court overruled the State’s objection but directed Kerksiek to provide a list of anticipated witnesses to the State immediately thereafter so that the State would have time to talk to Kerksiek’s intended witnesses before trial began the following day. Kerksiek’s counsel (“trial counsel”) disclosed only the names of V.M. and Stepfriend as witnesses he intended to call at trial on behalf of Kerksiek.

At trial, the State presented evidence from eight witnesses, including Victim. After the State rested, Kerksiek presented testimony from the two witnesses that had been disclosed the day prior and himself. At the close of Kerksiek’s case-in-chief, but before resting, trial counsel asked to approach the bench; there, he advised the court that, despite trial counsel not endorsing or intending to call the witness, Kerksiek insisted that trial counsel present testimony from Kerksiek’s father, R.R., who had not previously been disclosed as a defense witness:

> Judge, I didn't have any—I never had any intent on calling this next person, I mean, didn't endorse them, I know the State endorsed them. His name is [R.R.], he is his father. I am not quite—I have spoken with him in the past, I have told him I did not need him and I have discussed that with my client this morning, and he wasn't even here this morning and this morning my client says, Well, I really want him to testify. I am going to make a guess there is an objection coming, which I would not at all blame the State for.

As anticipated, the State objected, arguing that R.R. was a surprise witness and that his testimony should be excluded. The trial court sustained the objection but permitted trial counsel to make an offer of proof.

In the offer of proof, R.R. testified that he briefly lived with Kerksiek and Victim in Johnson County. R.R. testified that he never saw Kerksiek use Victim's laptop, but he witnessed Kerksiek remove Victim's bedroom door as a consequence for Victim "[k]eeping her door locked not letting him in the room," "doing things that she knew she wasn't supposed to be doing," and not "minding or listening." R.R. testified that Victim would "start telling stories" when she got in trouble with Kerksiek. R.R. further testified that the only time he saw Kerksiek with Victim's laptop was when he took it from Victim as punishment and put it either on the refrigerator or on a shelf outside of Victim's room where Victim could not access it. R.R. admitted that he had not spoken to law enforcement about any of these factual details and that he did not know what Victim looked at on her laptop.

After the close of all of the evidence, the trial court read verdict-directing instructions to the jury. Instructions number six and seven provided in pertinent part:

> As to Count I, if you find and believe from the evidence beyond a reasonable doubt: . . . that on or between March 1, 2019, and May 3, 2019,

> *in the State of Missouri*, the defendant knowingly had deviate sexual intercourse with [Victim], by his penis being in [Victim's] anus . . . .
>
> . . . .
>
> As to Count II, if you find and believe from the evidence beyond a reasonable doubt: . . . that on or between March 1, 2019, and May 3, 2019, *in the State of Missouri*, the defendant engaged in deviate sexual intercourse . . . with [Victim] . . . [who] was a descendant of defendant by blood . . . .

(Emphasis added.) Trial counsel approached the bench and asked, "Should the instruction not be County of Johnson, State of Missouri?" The State responded that the Missouri Approved Instructions ("MAI") pattern verdict directors had changed several years earlier to only say "State of Missouri." Thereafter, the case was submitted to the jury without further objection.

The jury found Kerksiek guilty as charged, and the trial court sentenced him as a persistent offender to consecutive terms of twenty years for statutory sodomy and seven years for incest.

Kerksiek raised three points on his direct appeal, arguing (1) that the trial court abused its discretion in excluding R.R.'s testimony; and that the trial court plainly erred in providing instructions to the jury that failed to require the jury find that the conduct relevant to the verdict-directing instructions occurred in Johnson County because that omission (2) created a fatal variance between the felony information and the verdict director; and (3) resulted in a violation of his right to due process. *See State v. Kerksiek*, 670 S.W.3d 32, 38 (Mo. App. W.D. 2023).

We denied all three points of Kerksiek's direct appeal. Regarding point one, we held that the trial court did not abuse its discretion in excluding R.R.'s testimony as a discovery sanction because Kerksiek's counsel had failed to timely disclose R.R. as a witness and the exclusion of R.R.'s testimony did not result in fundamental unfairness. *Id.* at 39-40. Regarding Kerksiek's second and third points—which both pertained to the language of the jury instructions—we held that the trial court did not err, plainly or otherwise, in submitting instructions number six and seven to the jury because both verdict directors complied with the applicable MAI and the jury was made well aware that Kerksiek had been charged with separate criminal acts in Morgan County and those Morgan County charges were not the criminal acts that Kerksiek was being prosecuted for in Johnson County with regard to the verdict directors in the Johnson County case. *Id.* at 42-43. We affirmed Kerksiek's convictions and issued our mandate on July 21, 2023.

On October 19, 2023, Kerksiek timely filed his *pro se* motion to vacate, set aside, or correct the judgment or sentence pursuant to Rule 29.15 ("PCR motion"). Kerksiek raised three claims in his initial motion, arguing that trial counsel rendered ineffective assistance of counsel by: (1) failing to respond to the State's discovery requests; (2) failing to object to the verdict director's omission of the county where the conduct occurred; and (3) failing to investigate and call further witnesses. On the same day, Kerksiek's present counsel ("PCR counsel") entered his appearance.

On February 16, 2024, PCR counsel filed an amended motion, which raised the same three claims appearing in his initial motion along with a new claim that trial counsel

rendered constitutionally ineffective assistance of counsel by failing to object to evidence of Kerksiek's similar sexual abuse of Victim in Morgan County during his Johnson County trial.

The motion court held an evidentiary hearing where trial counsel testified. Trial counsel testified that he did not disclose R.R. as a witness because he never intended to call R.R. as a witness. Trial counsel stated that through his investigation, he discovered that R.R. had a criminal conviction for burglary and he believed this conviction would negatively impact R.R.'s credibility. Trial counsel further stated that it did not seem like R.R. had "much to say" to help Kerksiek's case and that his testimony could have been detrimental to Kerksiek.

Following the evidentiary hearing, the motion court entered its judgment with finding of facts and conclusions of law denying Kerksiek's amended PCR motion.

Kerksiek appealed, raising three points on appeal. He argues that the motion court clearly erred in denying his claims that trial counsel rendered ineffective assistance of counsel by (1) failing to respond to the State's discovery requests; (2) failing to object to the admission of the Morgan County allegations; and (3) failing to object to the language of the verdict director, which resulted in a due process violation. We address his arguments out of order for ease of analysis.

Standard of Review

"Appellate review of the trial court's action on the motion filed under . . . Rule 29.15 [is] limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous." *Wood v. State*, 728 S.W.3d 416, 423 (Mo. banc 2026)

(quoting Rule 29.15(k)). "Appellate courts presume the motion court's findings are correct and a judgment is clearly erroneous when, in light of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.* (quoting *Scott v. State*, 719 S.W.3d 723, 725 (Mo. banc 2025)). "We defer to the motion court's factual findings and credibility determinations. As such, this Court accepts the motion court's findings as to trial counsel's knowledge and strategic decisions." *Ellis v. State*, 709 S.W.3d 459, 465 (Mo. App. W.D. 2025) (citation modified) (quoting *Zink v. State*, 278 S.W.3d 170, 178 (Mo. banc 2009)).

"Where the judge finding no prejudice in a postconviction relief proceeding was also the presiding judge at trial, as here, our Supreme Court has recently concluded, 'this vantage can give the motion court powerful insight into the issues raised in a postconviction proceeding.'" *Id.* (quoting *Flaherty v. State*, 694 S.W.3d 413, 423 (Mo. banc 2024)). "The additional deference due a judge who also presided over the criminal trial weighs strongly in favor of affirming the motion court's finding that [the movant in a postconviction relief proceeding] was not prejudiced by counsel's deficient performance." *Id.* (alteration in original) (quoting *Flaherty*, 694 S.W.3d at 423).

Timeliness of Amended Motion

In each of Kerksiek's points on appeal, he argues the motion court clearly erred in denying his amended PCR motion because he demonstrated his trial counsel rendered constitutionally ineffective assistance of counsel. However, "[b]efore addressing the merits of [Kerksiek's] claims on appeal, we are required to determine whether his

Amended Motion for postconviction relief was timely filed." *Taylor v. State*, 497 S.W.3d 342, 346 (Mo. App. W.D. 2016).

"The time limits for filing a post-conviction motion are mandatory. The movant is responsible for timely filing the initial motion, and appointed counsel must timely file either an amended motion or a statement that the pro se motion is sufficient." *Scott*, 719 S.W.3d at 726 (quoting *Stanley v. State*, 420 S.W.3d 532, 540 (Mo. banc 2014)). "Generally, the failure to file a timely amended motion for post-conviction relief results in the waiver of any claims asserted in that amended motion." *Ward v. State*, 705 S.W.3d 727, 733 (Mo. App. W.D. 2025); Rule 29.15(b).

Kerksiek was sentenced for his convictions on August 30, 2021. Because Kerksiek appealed his convictions, the applicable version of Rule 29.15 at that time[5] provided that an initial PCR motion "shall be filed within 90 days after the date the mandate of the appellate court issues affirming such judgment or sentence." Rule 29.15(b) (2021). It further directed that "an amended motion must be filed within 60 days of the earlier of both: (1) the date the mandate issues from the court of appeals, and (2) appointment of counsel or entry of appearance on behalf of the movant by any counsel who is not appointed." *Sisemore v. State*, 731 S.W.3d 261, 266 (Mo. App. W.D. 2026) (quoting *Scott*, 719 S.W.3d at 727); *see* Rule 29.15(g) (2021).

[5] "[T]he applicable post-conviction rule is the one in effect at the time of the movant's sentencing." *Sisemore v. State*, 731 S.W.3d 261, 266 n.4 (Mo. App. W.D. 2026).

Here, Kerksiek timely filed his initial PCR motion on October 19, 2023, ninety days after this Court issued its mandate affirming Kerksiek's convictions. However, Kerksiek's amended motion was not timely filed. Kerksiek's retained PCR counsel entered his appearance on October 19, 2023, so an amended motion was due on or before December 22, 2023. The amended motion was not filed until February 16, 2024.[6] Thus, the motion court should have only considered the claims raised in Kerksiek's initial motion, which was timely filed. *See Gittemeier v. State*, 527 S.W.3d 64, 71 (Mo. banc 2017).

Kerksiek does not deny that his amended motion was untimely; instead, he argues that waiver does not apply to the additional claim because "[t]he amended motion did not introduce a new claim; it refined the legal theory" that he raised in his initial PCR motion. We disagree.

Kerksiek's second claim in his initial PCR motion argued that trial counsel was constitutionally ineffective for failing to object to the verdict director's omission of the county where the conduct occurred, Johnson County. His amended motion raised the same claim, but it also raised another claim—that trial counsel rendered ineffective

[6] "[The Missouri Supreme] Court has recognized narrow exceptions to the time limits in th[e] Court's rules for filing amended post-conviction motions." *Stanley v. State*, 420 S.W.3d 532, 541 (Mo. banc 2014). Exceptions lie "(1) when post-conviction counsel abandons the movant; and (2) when rare circumstances outside the movant's control justify late receipt of the motion." *Moore v. State*, 328 S.W.3d 700, 702 (Mo. banc 2010). The abandonment doctrine "applies only to situations involving appointed postconviction counsel." *Gittemeier v. State*, 527 S.W.3d 64, 71 (Mo. banc 2017). Kerksiek has neither argued nor proved that either exception applies to his untimely amended motion.

assistance of counsel by failing to object to evidence of Kerksiek's abuse of Victim in Morgan County during his Johnson County trial.

Simply put, these two claims are based on separate instances of alleged constitutionally deficient performance of trial counsel. The claim in the initial motion argues trial counsel rendered ineffective assistance "by failing to object to *the verdict directing instructions*[,]" while the claim in the amended motion argues trial counsel rendered ineffective assistance by "failing to object to . . . *evidence*." That both claims of ineffective assistance of counsel pertained to conduct alleged to have occurred in Morgan County is of no consequence. These two claims clearly challenge two separate alleged constitutionally deficient omissions of trial counsel, which occurred over the course of the trial.

The fact that Kerksiek raised the additional argument of counsel ineffectiveness in a separate claim *at all* further illustrates the point. Claim three of his amended motion restates the argument made in his initial motion regarding failure to object to the jury instructions, while claim two raises the additional argument of failure to object to evidence by trial counsel in a wholly separate claim. Kerksiek's amended motion thus appreciates the distinction between these two discrete claimed omissions by trial counsel and that they must be evaluated separately.

Because Point II invites this Court's review of a claim only made in his untimely filed amended motion, the claim is waived and Point II is denied.[7]

[7] *Ex gratia*, we note that trial counsel did not render ineffective assistance by failing to object because the evidence was, in fact, admissible. "Numerous cases in

Having determined that this Court can only review the claims of ineffective assistance raised in Kerksiek's initial motion, we confine our appellate review to Points I and III.

Analysis

"To be entitled to post-conviction relief for ineffective assistance of counsel, a movant must show by a preponderance of the evidence that his or her trial counsel failed to meet the *Strickland* test." *Watson v. State*, 520 S.W.3d 423, 435 (Mo. banc 2017) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). "To show ineffective assistance of counsel, [Kerksiek] must prove: (1) 'counsel's performance was deficient' and (2) 'the deficient performance prejudiced the defense.'" *Wood*, 728 S.W.3d at 423 (quoting *Strickland*, 466 U.S. at 687).

"To show deficient performance, [Kerksiek] must identify 'specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of professional competent assistance.'" *Id.* (quoting *Shockley v. State*, 579 S.W.3d 881, 892 (Mo. banc 2019)). "This is an objective standard, and this Court employs a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *Id.* (citation modified) (quoting *Flaherty*, 694 S.W.3d at 421). "Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as

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Missouri involving sexual crimes against a child have held that 'prior sexual conduct by a defendant toward the victim is admissible as it tends to establish a motive, that is satisfaction of defendant's sexual desire for the victim.'" *State v. Primm*, 347 S.W.3d 66, 70 (Mo. banc 2011). "Counsel is not ineffective for declining to pursue a meritless argument." *Wood v. State*, 728 S.W.3d 416, 430 (Mo. banc 2026).

a basis for a claim of ineffective assistance." *Shockley*, 579 S.W.3d at 898 (quoting *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006)).

To demonstrate prejudice, Kerksiek "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Tatham v. State*, 715 S.W.3d 235, 241 (Mo. App. W.D. 2025) (quoting *Strickland*, 466 U.S. at 694). "Simply showing that the alleged error had a conceivable effect on the trial outcome is not sufficient; instead the movant must show that, absent the error, there is a reasonable probability that he would have been found not guilty." *Id.* (citation modified) (quoting *Johnson v. State*, 189 S.W.3d 640, 645 (Mo. App. W.D. 2006)). In making its prejudice determination, this Court "considers the totality of the evidence as to whether a reasonable probability exists and in so doing, we can consider the strength of the evidence of guilt in evaluating any prejudice to a defendant as a result of counsel's alleged ineffectiveness." *Stewart v. State*, 387 S.W.3d 424, 429 (Mo. App. S.D. 2012) (internal quotation marks omitted) (quoting *Anderson v. State*, 66 S.W.3d 770, 775-76 (Mo. App. W.D. 2002)).

"A movant must satisfy both prongs of the *Strickland* standard to obtain postconviction relief as a result of ineffective assistance of counsel." *Cooper v. State*, 621 S.W.3d 624, 632 (Mo. App. W.D. 2021) (quoting *Hounihan v. State*, 592 S.W.3d 343, 348 n.3 (Mo. banc 2019)). "Because a claim of ineffective assistance of counsel must be rejected if the movant fails to satisfy *either* the performance or prejudice prong, 'there is no reason for a court deciding an ineffective assistance claim . . . to address both

components of the inquiry if the defendant makes an insufficient showing on one.'" *Id.* (omission in original) (quoting *Strickland*, 466 U.S. at 697).

I.

In Point I, Kerksiek argues that trial counsel was constitutionally ineffective for "fail[ing] to respond to the State's discovery requests for the identity of [defense] witnesses[,]" which led to the exclusion of R.R.'s testimony as a discovery sanction. We disagree.

Prejudice Prong

First, the record before us shows that on the day before trial, trial counsel *did* disclose the identity of all defense witnesses he intended to call in compliance with the trial court's order. All of the witnesses that trial counsel disclosed to the State the day before trial were permitted to testify. Thus, it is not trial counsel's failure to disclose witnesses *generally* that Kerksiek takes issue with—it is counsel's failure to disclose *R.R.* as a defense witness.[8] Because Kerksiek cannot meet his burden of proving *Strickland*

[8] "Ordinarily the choice of witnesses is a matter of trial strategy and will support no claim of ineffective assistance of counsel." *Shockley v. State*, 579 S.W.3d 881, 906 (Mo. banc 2019) (quoting *Barton v. State*, 432 S.W.3d 741, 750 (Mo. banc 2014)). "This is because strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* (citation modified) (quoting *Barton*, 432 S.W.3d at 750-51).

Here, trial counsel knew that R.R. had a previous criminal conviction that would likely impact his credibility and that R.R.'s testimony would serve to corroborate the notion that only Kerksiek had access to Victim's laptop when the "father-daughter sex" internet searches were made—which would have been detrimental to Kerksiek's defense at trial. *See Jones v. State*, 519 S.W.3d 879, 885 (Mo. App. E.D. 2017) (holding movant "failed to overcome the presumption that counsel's failure to endorse, subpoena, and call these witnesses was a matter of reasonable trial strategy" when trial counsel testified that he did not believe the witness's testimony would be helpful to movant's case).

prejudice irrespective of trial counsel's trial strategy relating to R.R.'s testimony, we address the dispositive issue relating to the prejudice prong.

There is no reasonable probability that, had R.R. been allowed to testify before the jury, the result would have been different. In the proceedings below, the motion court found that Kerksiek was not prejudiced by the exclusion of R.R.'s testimony because "[R.R.]'s testimony in the offer of proof . . . tended to prove movant was the person making the searches for inappropriate materials on the laptop when he said movant put the laptop in places only movant could retrieve it[,]" and because R.R. "never testified to anything which would have attacked victim's credibility." In light of the fact that the same judge presided over both Kerksiek's criminal trial and his post-conviction proceeding, the motion court's findings as to prejudice are entitled to "additional deference," which "weighs strongly in favor of affirming the motion court's finding that [Kerksiek] was not prejudiced" by trial counsel's performance. *See Flaherty*, 694 S.W.3d at 423.

Moreover, we also discussed the merits of this issue at length in the direct appeal and arrived at the same conclusion on the topic of prejudice. *See Kerksiek*, 670 S.W.3d at 39-40. In the direct appeal, Kerksiek argued that the trial court abused its discretion in excluding R.R.'s testimony. We reviewed Kerksiek's claim for "fundamental unfairness[,]" which is found when exclusion of the testimony "substantively alters the outcome of the trial." *Id.* at 39 (citation modified). We concluded that Kerksiek had failed to demonstrate the trial court abused its discretion and, as relevant to this appeal,

the exclusion of R.R.'s testimony did not result in fundamental unfairness, and thus, we denied his point on appeal. *Id.* at 39-40.

"A Rule 29.15 motion for postconviction relief is not a substitute for direct appeal, so claims adjudicated on direct appeal generally cannot be the basis for postconviction relief." *Wood*, 728 S.W.3d at 429. Where an appellate court reviews a claim of error on direct appeal and concludes that no error occurred, the movant is barred from relitigating the same issue in a post-conviction proceeding. *Linzie v. State*, 727 S.W.3d 800, 805 (Mo. App. W.D. 2025); *Ringo v. State*, 120 S.W.3d 743, 746 (Mo. banc 2003) ("[O]n direct appeal this Court found no error, plain or otherwise, with the trial court's decision to restrict jury instructions to those already given. . . . This point, having already been determined on direct appeal cannot be raised again in a post-conviction relief motion."). And, where an appellate court has reviewed a claim of error for "fundamental unfairness" and has determined that the party did not suffer reversible prejudice, a movant is barred from relitigating the same issue in a post-conviction proceeding. *See Lawrence v. State*, 628 S.W.3d 777, 785-86 (Mo. App. S.D. 2021). This is because "fundamental unfairness in the context of a preserved error on direct appeal is a lower standard of review for reversible prejudice than the standard for reversible prejudice in a post-conviction relief proceeding." *Id.* at 786. Thus, because "we found no reversible prejudice from the exclusion of [the witness's] testimony on direct appeal, that exclusion cannot support a finding of prejudice in this post-conviction relief proceeding." *Id.*

Kerksiek has failed to meet his burden of proving *Strickland* prejudice.

Point I is denied.

III.

Kerksiek argues in his third point on appeal that trial counsel was constitutionally ineffective for failing to object to the jury instructions because they improperly failed to instruct the jury that it could only base any verdict on the allegations relating to Johnson County. Kerksiek claims that the omission of the specific county where the alleged conduct occurred in the verdict-directing instructions resulted in a violation of his right to due process.

In his direct appeal, Kerksiek raised the identical issue—that the trial court plainly erred in omitting the county where the alleged conduct occurred from the verdict director because that omission violated his right to due process. "[W]here a plain error point is reviewed on direct appeal and the appellate court concludes that no error occurred, the issue cannot be relitigated in a postconviction proceeding." *Linzie*, 727 S.W.3d at 805 (quoting *Cornelious v. State*, 351 S.W.3d 36, 43 (Mo. App. W.D. 2011)). "To determine whether [Kerksiek's] claim of ineffective assistance . . . is cognizable, we examine how this Court decided [Kerksiek's] plain error claim on direct appeal." *Id.* at 804.

> [A]n appellate court confronted with a request to grant relief applying plain error review may resolve the claim in one of five ways under the Rule 30.20 framework:
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> > 1. Declining plain error review when an appellant fails to facially establish substantial grounds that the circuit court committed plain error, *i.e.*, evident, obvious, and clear error;
> >
> > 2. Declining plain error review when an appellant fails to facially establish substantial grounds that the circuit court committed an error affecting substantial rights;

> 3. Declining plain error review when an appellant fails to facially establish substantial grounds that any alleged error the circuit court committed resulted in manifest injustice or miscarriage of justice;
>
> 4. Declining to exercise its discretionary authority to review for plain error; or
>
> 5. Determining an appellant facially established substantial grounds that the circuit court committed plain error affecting substantial rights resulting in manifest injustice or miscarriage of justice, warranting exercise of the appellate court's discretion to review and grant relief.

State v. Jones, 725 S.W.3d 577, 585 (Mo. banc 2025); *see also Linzie*, 727 S.W.3d at 805 (quoting *Cornelious*, 351 S.W.3d at 42).

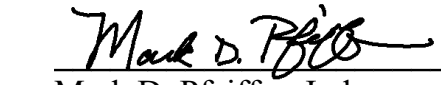
In the direct appeal, we reviewed Kerksiek's claim of error and concluded that he "ha[d] failed to establish the existence of any error, much less plain error, in the language of the MAI-compliant verdict directors." *Kerksiek*, 670 S.W.3d at 43. "Because this Court reviewed [Kerksiek's] plain error point on direct appeal and this Court found that no error—plain or otherwise—occurred, [he] is barred from relitigating the same issue in a postconviction proceeding." *Linzie*, 727 S.W.3d at 805; *Wood*, 728 S.W.3d at 429; *Burst v. State*, 731 S.W.3d 888, 896 (Mo. App. E.D. 2026); *Shifkowski v. State*, 136 S.W.3d 588, 591 (Mo. App. S.D. 2004).[9]

[9] *Ex gratia*, we also note that, since there was no error in the verdict director, trial counsel cannot be found ineffective for failing to pursue an objection to the verdict director. *See Wood*, 728 S.W.3d at 430 ("Counsel is not ineffective for declining to pursue a meritless argument."). Further, there is no reasonable probability that the jury instructions stating "County of Johnson, State of Missouri," instead of "State of Missouri" would have led to a different result. The record demonstrates that the jury was made aware that the only charges relevant to the verdict-directing instructions in the Johnson County case were those alleged to have occurred in Johnson County. In the State's closing argument, the prosecutor emphasized that the State "ha[d] to show it

Point III is denied.

Conclusion

The judgment of the motion court is affirmed.



Mark D. Pfeiffer, Judge

Gary D. Witt, Presiding Judge, and Thomas N. Chapman, Judge, concur.

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happened here," referring to Johnson County, and trial counsel also reminded the jury: "[W]e are here about the incident here in Johnson County and what happens in Johnson County." Furthermore, the jury sent a question to the trial court during deliberations requesting "any & all evidence relative to the Johnson County allegations[.]" Finally, in denying Kerksiek's claim, the motion court found that the underlying criminal case was "not a weak evidence case," and we agree. As the motion court artfully summarized in its judgment:

> The evidence of victim combined with the internet searches which use terms normally beyond the knowledge of a 9-year-old, the specific search "my little daughter sex", the searches occurring late at night after victim went to bed and movant's collapse when being confronted by the allegations coupled with the movant's family giving gifts to victim to bribe her to recant shows this to be a conviction strongly supported by the record.