Missouri Court of Appeals
Southern District

In Division

NICHOLAS J. BEROS,

Movant-Appellant,

v.

STATE OF MISSOURI,

Respondent-Respondent.

Number SD39203

Filed: September 24, 2026

APPEAL FROM THE CIRCUIT COURT OF BUTLER COUNTY

Honorable Steven F. Lynxwiler, Judge

AFFIRMED

Nicholas J. Beros ("Movant") appeals the motion court's denial of his Rule 29.15[1] motion for post-conviction relief following his conviction for one count of second-

[1] Unless otherwise indicated, all rule references are to Missouri Court Rules (2022). "Post-conviction relief proceedings are governed by the provisions of Rule 29.15 in effect on the date of a movant's sentencing." ***State ex rel. Hanaway v. Curless***, 722 S.W.3d 842, 844 n.2 (Mo. App. S.D. 2025). Movant was sentenced on August 9, 2022.

degree domestic assault (§ 565.073).[2] In his sole point on appeal, Movant alleges trial counsel provided ineffective assistance by failing to object to questions on cross-examination asking him to opine on the truth of other witnesses' testimony. Finding the motion court's denial of post-conviction relief was not clearly erroneous, we affirm.

Factual Background and Procedural History

Movant was charged with second-degree domestic assault and armed criminal action for his acts towards Victim at Victim's mother's house on or about April 30, 2021. Following an argument, Movant became physically violent towards Victim as she tried to leave the house, choking her and jabbing her with a baseball bat.

At trial, the State presented the testimony of Victim recounting the assault by Movant. The State also adduced the testimony of Victim's mother, who was not present at the time of the assault but later saw Movant standing over Victim "slinging his arms and yelling." Finally, the State called the responding Sheriff's deputy who testified to, *inter alia*, observing injuries on Victim consistent with her account of the assault. Photographs of Victim's injuries and the baseball bat were admitted into evidence and published to the jury without objection.

Movant also testified at trial, denying that he choked Victim, struck her with a baseball bat, or otherwise assaulted her. Instead, Movant claimed that, following their argument, Victim left the house and returned with three others, resulting in Movant

[2] Unless otherwise indicated, all statutory references are to RSMo 2016, as amended through April 30, 2021.

purportedly being attacked as he was leaving the house. During Movant's cross-examination, the following exchange occurred:

> **[Prosecutor:]** When did [Victim's] mom pick her up?
>
> **[Movant:]** I have no idea when [Victim's] mom picked her up. I have no idea when [Victim] even left.
>
> **[Prosecutor:]** You heard her mom's testimony then?
>
> **[Movant:]** I heard her mom's testimony absolutely.
>
> **[Prosecutor:]** She was just lying then?
>
> ***
>
> **[Movant:]** Yes. She's lying.
>
> **[Prosecutor:]** And [Victim] is lying?
>
> **[Movant:]** Yes. …
>
> **[Prosecutor:]** So [Victim] is also lying about seeing you standing over the top of [Victim] while she's laying [sic] in bed?
>
> **[Movant:]** I don't -- I don't recall whether she is lying about me standing over the bed. …
>
> ***
>
> **[Prosecutor:]** Okay. [Victim] is lying then about entering the house and seeing you stand over [Victim] while [she] was laying in bed?
>
> **[Movant:]** I was in the -- she wasn't in bed. She was in a guest bedroom where there is no bed.
>
> **[Prosecutor:]** So only the facts that you are telling us today, those are the only ones that we need to worry about?

[Movant:] Yes. Well, there is also -- I didn't say that.

[Prosecutor:] Is the Deputy in on this conspiracy as well?

[Movant:] When am I allowed to enter my evidence? That's the one thing I'm confused about.

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[Prosecutor:] Sir, again, my question to you was is the Deputy in on this conspiracy as well?

[Movant:] Oh, now it's a conspiracy. There is a large group of people there out to get me.

Movant was found guilty of second-degree domestic assault but acquitted of the attendant armed criminal action charge. This Court affirmed Movant's convictions on direct appeal via Rule 30.25(b) order and statement issued in Case No. SD37689 on July 7, 2023.

Movant timely filed his *pro se* motion for post-conviction relief on August 21, 2023. *See* 29.15(b). The following day, the motion court entered its order appointing the State Public Defender to represent Movant, and motion counsel entered an appearance on September 11, 2023.[3]

[3] Motion counsel untimely filed an amended motion for post-conviction relief on January 9, 2024. Following the entry of the motion court's original judgment, motion counsel filed an affidavit attesting that the untimely filing of the amended motion was a result of counsel's miscalculation of the due date and not any negligence or misconduct by Movant. Ultimately, the motion court entered an amended judgment finding Movant had been abandoned, deeming the amended motion to have been timely filed and adjudicating the claims raised therein. "Abandonment by post-conviction counsel is a narrow exception to a motion court's loss of jurisdiction once post-conviction relief is final." ***Alexander v. State***, 568 S.W.3d 496, 499 (Mo. App. E.D. 2019). Here, the trial court's amended judgment expressly considered motion

A hearing on Movant's amended motion was held on December 3, 2024. Of note, trial counsel testified on direct examination to being aware of the prohibition on "ask[ing] witnesses whether other witnesses are lying." The following exchange then occurred:

> **[Motion Counsel:]** [Movant] was asked repeatedly, "So you're saying these people are lying".
>
> **[Trial Counsel:]** And I didn't object? Is [that] what you're saying?
>
> **[Motion Counsel:]** Yes, you did not. And it happened repeatedly.
>
> **[Trial Counsel:]** Trial strategy, yes, sir.
>
> **[Motion Counsel:]** Trial strategy?
>
> **[Trial Counsel:]** Yes.
>
> ***
>
> **[Motion Counsel:]** So if, at any point during the trial, you choose not to object, is that trial strategy?
>
> **[Trial Counsel:]** Depending on the situation.
>
> **[Motion Counsel:]** Okay. Would it be reasonable for you to say, "oh, I don't think I should object" when a person is asked to comment on the credibility of another witness and place himself in the position of incriminating himself? Would you say that's reasonable?
>
> **[Trial Counsel:]** No.

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counsel's affidavit in concluding Movant had been abandoned. This is a sufficient record of "an independent inquiry into abandonment." *See* ***Schilling v. State***, 628 S.W.3d 452, 456-57 (Mo. App. E.D. 2021).

When asked on cross-examination to elaborate on the "trial strategy" behind his decision to not object to the improper questioning, trial counsel testified as follows:

> [I]n southeast Missouri, when you're trying a case in front of a jury of individuals, the last thing you want to do is bring attention to questions and answers that are brought out by the prosecution. You don't want to jump up and strenuously object about what has been brought up, because then the jury will fixate on it, as is clear from the situation. That's my belief. That's how I've always approached it. I've talked to numerous prosecutors in southeast Missouri and numerous defense attorneys. They all have a different strategy, but that's what I believe in the trial strategy because nothing that was -- I was going to do was going to change the -- the way that the -- the testimony was coming across, other than to emphasize what the questions were being asked by the prosecution.

Reviewing Movant's amended motion on the merits, the motion court determined Movant did not receive ineffective assistance of counsel and was not entitled to post-conviction relief, specifically finding that trial counsel's failure to object was trial strategy and that Movant failed to demonstrate the outcome of the trial would have been different had trial counsel objected or requested a mistrial. This appeal followed.

Standard of Review

Under Rule 29.15(k), "[a]ppellate review of the [motion] court's action on the motion filed under this Rule 29.15 shall be limited to a determination of whether the findings and conclusions of the [motion] court are clearly erroneous." This Court presumes the motion court's findings are correct, and a judgment is clearly erroneous only "when, in light of the entire record, the court is left with the definite and firm impression that a mistake has been made." ***Flaherty v. State***, 694 S.W.3d 413, 416 (Mo.

banc 2024) (citing ***Davis v. State***, 486 S.W.3d 898, 905 (Mo. banc 2016)). We conduct a *de novo* review for:

> errors of law, rejection of factual findings for which there is no substantial evidence, and – in the rarest of cases – rejection of factual findings for which there may be substantial evidence but regarding which the reviewing court, nevertheless, on the entire record, is left with a definite and firm conviction (or impression) that a mistake has been made.

Id. at 419. "In applying this standard, appellate courts should defer to the motion court's superior opportunity to judge the credibility of witnesses and recognize the [motion] court is entitled to believe all, part, or none of the evidence presented at the post-conviction hearing." ***Id***. (citation and internal quotations omitted).

Analysis

To establish entitlement to post-conviction relief on the basis of ineffective assistance of counsel, a movant must prove by a preponderance of the evidence that "(1) his or her counsel failed to exercise the level of skill and diligence that a reasonably competent attorney would in a similar situation (performance prong), and (2) the movant was prejudiced by that failure (prejudice prong)." ***Blade v. State***, 685 S.W.3d 633, 637-38 (Mo. App. S.D. 2024) (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). Under the performance prong, the movant must "overcome the strong presumption that trial counsel's assistance was reasonable and effective." ***Hosier v. State***, 593 S.W.3d 75, 81 (Mo. banc 2019) (citing ***Davis***, 486 S.W.3d at 906). To prove prejudice, "the movant is required to show a reasonable probability that, but for

counsel's [unprofessional] errors, the result of the proceeding would have been different." ***Spradling v. State***, 708 S.W.3d 185, 193 (Mo. App. S.D. 2025) (quoting ***McCauley v. State***, 380 S.W.3d 657, 662 (Mo. App. S.D. 2012)). "A reasonable probability exists when there is a probability sufficient to undermine confidence in the outcome." ***Id***. at 193–94 (quoting ***Southern v. State***, 572 S.W.3d 104, 108 (Mo. App. S.D. 2019)). If the movant fails to satisfy either prong of the ***Strickland*** test, we need not consider the other. ***Blade***, 685 S.W.3d at 637-38 (citing ***Anderson v. State***, 66 S.W.3d 770, 775 (Mo. App. W.D. 2002)).

In his sole point on appeal, Movant contends trial counsel was ineffective in failing to object to the improper questioning by the State recited above and that such failure was not reasonable trial strategy. "Decisions about whether or when to make objections at trial are left to the judgment of counsel." ***Hays v. State***, 484 S.W.3d 121, 128 (Mo. App. W.D. 2015) (quoting ***Helmig v. State***, 42 S.W.3d 658, 678 (Mo. App. E.D. 2001)). There is "a strong presumption that counsel's failure to object was sound trial strategy," ***Hays***, 484 S.W.3d at 128, and "[i]neffective assistance of counsel is rarely found in cases of a failure to object," ***Gurley v. State***, 431 S.W.3d 511, 516 (Mo. App. E.D. 2014) (quoting ***Worthington v. State***, 166 S.W.3d 566, 581 (Mo. banc 2005)). Thus, "[i]n order to prevail on a claim of ineffective assistance of counsel for failure to object to evidence, [the movant] bears the burden of proving, among other things, that the

failure to object was not strategic and was prejudicial." ***Blade***, 685 S.W.3d at 638 (quoting ***Tucker v. State***, 633 S.W.3d 539, 542 (Mo. App. S.D. 2021).

Here, there is no dispute that the prosecutor's questions calling upon Movant to directly opine on the credibility of other witnesses were improper. ***State v. Bescher***, 247 S.W.3d 135, 140-41 (Mo. App. S.D. 2008) ("The law in Missouri is clear that witnesses may not be asked to give their opinion on the truth or veracity of another witness' testimony."). Nonetheless, as recited above, Movant's trial counsel testified that his decision not to object was to avoid attracting additional attention to the improper questions and corresponding responses. This is a commonly recognized and accepted trial strategy. *See* ***Helmig v. State***, 42 S.W.3d 658, 679 (Mo. App. E.D. 2001) ("In many instances, seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes … [such as] fear[] that frequent objections [will] irritate the jury and highlight the statements complained of, resulting in more harm than good."). "Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." ***Anderson v. State***, 196 S.W.3d 28, 33 (Mo. banc 2006).

Movant's reliance on conflicting portions of trial counsel's testimony is unavailing because it ignores our standard of review. The rule in the post-conviction relief context "is that [d]eterminations concerning credibility are *exclusively* for the motion court and [the court] is free to believe or disbelieve *any* evidence, whether contradicted or

undisputed." ***Durst v. State***, 584 S.W.3d 817, 821 (Mo. App. S.D. 2019) (quoting ***Cross v. State***, 454 S.W.3d 365, 369 (Mo. App. S.D. 2015)) (internal quotations omitted). Appellate courts generally defer to the fact-finder's "superior position to weigh and value the evidence, determine the witnesses' credibility and resolve any inconsistencies in their testimony." ***State v. Hilleman***, 634 S.W.3d 709, 713 (Mo. App. S.D. 2021) (quoting ***State v. Lopez-McCurdy***, 266 S.W.3d 874, 876 (Mo. App. S.D. 2008)); *see also* ***Steger v. State***, 467 S.W.3d 887, 892 (Mo. App. E.D. 2015) (During his deposition, Movant gave conflicting testimony. ... The motion court did not believe Movant's [deposition] testimony, and it was under no obligation to do so.").

Here, the motion court gave more weight to trial counsel's more detailed testimony that his decision not to object was for strategic purposes. Such determination was well within the motion court's purview as fact-finder and we defer to its "superior opportunity to judge the credibility of witnesses." ***Flaherty***, 694 S.W.3d at 419*; see also* ***Betts v. State***, 876 S.W.2d 802, 806 (Mo. App. W.D. 1994) ("The motion court [is] free to believe or disbelieve any portion of [movant]'s testimony."). The motion court did not clearly err in finding that Movant's trial counsel was not ineffective.

Because Movant failed to overcome the presumption that he received reasonable and effective assistance from his counsel, we need not address his claims that counsel's conduct prejudiced his defense. ***Blade***, 685 S.W.3d at 637-38. Point 1 is denied.

Conclusion

The motion court's judgment is affirmed.

MATTHEW P. HAMNER, J. – OPINION AUTHOR

BRYAN E. NICKELL, J. – CONCURS

JOSEPH L. HENSLEY, J. – CONCURS