No. 84331

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IN THE
MISSOURI SUPREME COURT

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JAMES WASHINGTON, JR.,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

_____

Appeal from the Circuit Court of Clay County, Missouri
The Honorable Michael J. Maloney, Judge

_____

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

_____

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of Clay County. The conviction sought to be vacated was for first degree robbery, ' 569.020, RSMo 2000, for which the sentence was twenty years imprisonment. The Missouri Court of Appeals, Western District, affirmed the denial of appellant=s Rule 29.15 motion by order. ***Washington v. State***, No. WD59123 (Mo.App.W.D., January 22, 2002). The Court of Appeals, Western District, denied appellant=s motion for rehearing on March 5, 2002.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On June 3, 2002, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this court now has jurisdiction of this appeal pursuant to Article V, ' 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, James Washington, was charged via indictment on March 5, 1997 with first degree robbery (L.F. 1, 12). A substitute information in lieu of indictment was filed on October 24, 1997, adding allegations that appellant was a prior and persistent offender (L.F. 4, 15-16). On December 15, 1998, this cause went to trial before a jury in Clay County, the Honorable Michael J. Maloney presiding (L.F. 7; Tr. 151). The jury was selected on December 15, but the case was continued due to the prosecutor's illness until January 5, 1998, at which time opening statements were made and evidence was adduced (Tr. 254, *et. seq.;* Tr. 264).

Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

On November 25, 1996, Janice Siegried was working as manager of the apparel departments of the Montgomery Wards in the Metro North Mall on Barry Road and Highway 169 in Clay County (Tr. 336-337, 446). Siegried observed appellant, about 20 or 30 feet from her, walking out of the store, carrying a box from the electronics department -- either a CD player or a VCR (Tr. 378, 446-447). Appellant was continually looking around and over his shoulder (Tr. 446). Once appellant left the store, Siegried went over to the electronics department to check whether they had just sold a piece of merchandise, but they had not (Tr. 447). Siegried paged security (Tr. 447). Alan Lowry, a Platte City policeman who was working as a security officer at the store, was coming up the back stairwell of the store, where there were no speakers for the paging system, and so did not hear the page (Tr. 336-337, 379-381). Lowry returned to the security office, and spoke via phone with Louie Lyons, an employee in the electronics section, about the theft (Tr. 379-381). Lowry came to the electronics department (Tr. 448).

He asked Siegried to describe appellant and then advised the employees to keep an eye out and notify him in case appellant returned to the store (Tr. 379, 448).

Siegried returned to the men's wear department, which was directly adjacent to the electronics department (Tr. 448-449). Later that evening, appellant returned and Lyons saw appellant pick up a VCR from a stack on a small display by the main aisle, and walk out of the store (Tr. 461). Lyons immediately paged security and told Lowry that appellant had returned to the store (Tr. 385-387, 462). Lyons followed appellant to the edge of the store to make sure he was actually taking the VCR out of the store, as opposed to just another department (Tr. 462).

Siegried also saw appellant come out of the electronics department carrying a blue and white box and walk through the men's wear department toward the exit (Tr. 449). Siegried also paged security (Tr. 449). Lowry immediately left the security office and came out into the men's section of the store (Tr. 387-388). As Lowry came through the men's area, Siegried pointed out appellant (Tr. 389). Appellant was about 30-40 feet from Lowry, heading quickly toward the exit doors, carrying a box (Tr. 390). Lyons walked with Lowry and briefed him as they followed appellant to the exit (Tr. 449, 462-463).

Passing by another man, Lowry ran after appellant, through the double exit doors of the store (Tr. 390). A white Ford Aerostar van was parked next to the curb (Tr. 390, 397, 463). Appellant threw the box he was carrying into the back of the van and then went around to the driver's side (Tr. 390, 392, 393). Lowry got in the passenger side of the van (Tr. 392, 464). Appellant looked at Lowry and said, "Get out of my van." (Tr. 393). Lowry answered, "Give me back the merchandise." (Tr. 393). Other items other than the box were in the back of the van (Tr. 394). Appellant started the engine and started driving across

the parking lot (Tr. 393, 452). Lowry reached over and turned the ignition off, bringing the van to a stop (Tr. 395).

The passenger door was opened by the man Lowry had passed in the store as he had chased appellant (Tr. 395). This individual was a black man, taller than appellant, wearing a black coat with red and gold on the sleeves and a Kansas City Chiefs' cap (Tr. 391-392). The second man grabbed Lowry's arm, trying to pull him from the seat, while appellant kicked Lowry (Tr. 395). Appellant yelled at his accomplice to shoot Lowry (Tr. 395). The accomplice did not appear to have a gun, however (Tr. 395). They continued to struggle, and then the accomplice used an ice hook or meat hook or similar implement to pierce Lowry's arm and pull him out of the van (Tr. 395-396, 453). Lowry hit the ground, the accomplice got in the passenger seat, the van started, and appellant and his accomplice drove off (Tr. 396, 453). Lowry managed to get a partial license plate number, 1-2-some letter or number-2-5-J (Tr. 397). Lowry returned to the store and Siegried again gave him a description of appellant (Tr. 453). Lowry called the police (Tr. 400). Siegried also gave a description to the police when they arrived (Tr. 453). The case was assigned to detective Eric Anderson for investigation (Tr. 296-297, 308).

On December 9, Missouri Highway Patrolman Daniel Sesley stopped appellant and Walter White in a white Ford van with license plate 1-P-1-2-5-G on Interstate 29 at HH Highway in Platte County (Tr. 372-373). Appellant told Sesley that he had pumped gas and realized that he did not have enough money to pay for it (Tr. 374-375). Appellant said he was embarrassed, so he left without paying for the gas (Tr. 375). Appellant made a written statement saying that the drive-off had been a mistake (Tr. 375).

On December 10, 1996, Detective Anderson met with appellant in the Buchanan County Jail (Tr. 317, 320). Anderson began by taking a picture of appellant (Tr. 321-322). Anderson then performed a

"Detective Investigation Report", which consists of gathering the person's name, aliases or nicknames, race, sex, date of birth, height, weight, addresses, family members, and other general background information (Tr. 323). Appellant stated his height as 5'11" and his weight as 215 pounds (Tr. 324). Anderson then advised appellant of his ***Miranda*** rights by having appellant read a ***Miranda*** waiver form (Tr. 327). Appellant read the form aloud and then waived his rights by signing it (Tr. 327). Anderson asked appellant about the van he had been in (Tr. 328). Appellant had rented the white Aerostar van, Missouri license number 1-P-1-2-5-G, from Alonzo Wyatt for some crack cocaine (Tr. 333-334). Appellant said he frequently drove the van, but denied committing any robberies (Tr. 334). Anderson questioned appellant regarding the robbery that occurred at the Metro North Mall, and appellant asked whether it involved a shoplifting (Tr. 336).

Anderson met with Alan Lowry on December 13, 1996, at which time he took Lowry's statement and showed him photo spreads (Tr. 337). The photo spread included appellant's picture along with five other pictures of black males with similar descriptions (Tr. 339). Lowry picked appellant and his accomplice out of the lineup (Tr. 340, 398-99). Lowry also positively identified appellant in court as the robber, as did Siegried and Lyons (Tr. 378, 399, 447, 462).

Appellant did not exercise his right to testify (Tr. 547), but did put on evidence in his own defense, in an attempt to discredit Janice Siegried's identification and to support his defense of alibi that he was working at New Fashioneer's Boutique, a clothing and alterations store, on the night of November 25, 1996 when the robbery occurred (L.F. 8; Tr. 492, 493-506, 520-543). The state put on rebuttal evidence by asking the court to take judicial notice of the fact that November 23, 24, and 25, 1996 fell on Saturday, Sunday, and Monday, respectively (L.F. 8; Tr. 558). At the close of evidence, instructions, and arguments

by counsel, the jury found appellant guilty of first degree robbery (L.F. 9, 81; Tr. 611). The trial court found beyond a reasonable doubt that appellant was a prior and persistent offender (L.F. 10, 54, 127; Tr. 597). The court sentenced appellant to twenty years in the Missouri Department of Corrections (L.F. 10, 127; Tr. 643).

This Court affirmed appellant=s conviction and sentence on direct appeal. ***State v. Washington***, 39 S.W.3d 111 (Mo.App.W.D. 1999). Appellant timely filed a *pro se* motion for postconviction relief pursuant to Supreme Court Rule 29.15 (LF 1-25). Appointed counsel filed an amended Rule 29.15 motion on appellant=s behalf (LF 33-75). An evidentiary hearing was held on August 18, 2000 (PCRTR 3)[1]. Ultimately, the motion court issued findings of fact and conclusions of law denying appellant=s Rule 29.15 motion (PCRLF 87-93).

The Missouri Court of Appeals, Western District, affirmed the denial of appellant=s Rule 29.15 motion by order. ***Washington v. State***, No. WD59123 (Mo.App.W.D., January 22, 2002). The Court of Appeals, Western District, denied appellant=s motion for rehearing on March 5, 2002. On June 3, 2002, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court.

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[1]To avoid unnecessary repetition, any specific facts adduced at the evidentiary hearing, to the extent they are pertinent to the argument, shall be set out as necessary in respondent's argument, ***infra.***

ARGUMENT

I.

THE MOTION COURT DID NOT CLEARLY ERR IN OVERRULING APPELLANT=S RULE 29.15 MOTION, IN WHICH HE CLAIMED THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO AN ALLEGED VARIANCE BETWEEN THE CHARGING DOCUMENT AND THE VERDICT DIRECTOR REGARDING WHETHER THE ITEM STOLEN WAS A CD PLAYER OR A VCR BECAUSE THE VARIANCE WAS NOT FATAL IN THAT IT DID NOT PREJUDICE APPELLANT=S DEFENSE OF ALIBI AND MISIDENTIFICATION, WHICH WOULD HAVE WORKED NO MATTER WHAT THE ITEM STOLEN WAS, NOR DID APPELLANT OTHERWISE EXPLAIN HOW THE VARIANCE HAD PREJUDICED HIS DEFENSE.

Appellant argues that the motion court erred in overruling his motion because he was entitled to relief in that his trial counsel was allegedly ineffective for failing to object to an apparent variance between the verdict director and the charging document.

Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." ***State v. Tokar***, 918 S.W.2d 753, 761 (Mo. banc 1996), *cert. denied* 117 S.Ct. 307 (1996); Supreme Court Rule 24.035(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. ***State v. Taylor***, 929 S.W.2d 209, 224

(Mo. banc 1996), *cert. denied* 117 S.Ct. 1088 (1997). On review, the motion court's findings and conclusions are presumptively correct. ***Wilson v. State***, 813 S.W.2d 833, 835 (Mo. banc 1991).

To show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to competently perform. ***Id.*** Prejudice exists when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068.

Appellant was charged by indictment as follows:

> [D]efendant, in violation of Section 569.020, RSMo, committed the Class A felony of robbery in the first degree . . . in that on or about November 25, 1996, in the County of Clay, State of Missouri, the defendant forcibly stole a compact disc player in the possession of Montgomery Wards, and in course thereof, another participant in the crime used a dangerous instrument against Alan Lowry.

(LF 12).

The jury was instructed as to this charge, in pertinent part as follows:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about November 25, 1996, at or about 8:00 p.m., in the County of Clay, State of Missouri, the defendant retained possession of a
>
> compact disk player or VCR which was property owned by Montgomery Wards . . .

To begin, it is appellant=s burden to overcome the presumption that any omissions by counsel were sound trial strategy. ***State v. Tokar***, 918 S.W.2d 753, 766 (Mo.banc 1996) *cert. denied* 117 S.Ct. 307 (1996). Appellant has failed to do so in that he has presented no evidence regarding trial counsel=s failure to object to the variance, despite the fact that he questioned trial counsel about other matters during the postconviction evidentiary hearing. ***Tokar***, ***supra*** at 768.

In any event, counsel was not ineffective for failing to object to the variance. There is a variance between the indictment and the instruction in that the indictment charges appellant with stealing a compact disk player and the instruction states that he took a compact disk player or a VCR. However, a variance between an indictment and the instruction to the jury is not necessarily fatal. ***State v. Madison***, 997 S.W.2d 16, 19 (Mo.banc 1999). A variance must submit a new and distinct offense from that with which the defendant was charged. ***State v. Clark***, 782 S.W.2d 105, 108 (Mo.App.E.D. 1989). AAdditionally, the defendant must be prejudiced by the variance and the variance must be material.@ ***Id.; State v. Lee***, 841 S.W.2d 648, 650 (Mo.banc 1992), citing ***State v. Crossman***, 464 S.W.2d 36 (Mo. 1971). The standard for determining prejudice is that Aunless the defendant can be said to have been prejudiced in that he would have been better able to defend had the information contained the phrase . . . , he should not be entitled to relief on account of the variance.@ ***Lee, supra***, citing ***Crossman***, 464 S.W.2d at 42. AA variance is prejudicial only if it affects the appellant=s ability adequately to defend against the charges presented in the information and given to the jury in the instructions.@ ***Lee, supra.*** A defendant must show actual prejudice in order to be entitled to relief. ***State v. Madison***, ***supra***.

Appellant has made no showing of prejudice from the variance in this case. He has not even argued that he was not able to adequately defend against the charges. Moreover, his defense of alibi and

misidentification was adequate to disprove the state=s case either as submitted in the indictment or as submitted in the instruction, had the jury believed his theory of the case. ***See Lee,*** 841 S.W.2d at 651 (appellant=s theory of defense that someone else had shot victim was adequate to disprove charges in both information and instruction, so no prejudice); ***State v. Jones***, 892 S.W.2d 737 (Mo.App.W.D. 1994) (defendant charged under '565.083.1(1) but convicted under '565.083.1(5); no reversal because defendant failed to show how his ability to prepare defense was prejudiced by variance); ***State v. Stamps***, 865 S.W.2d 393 (Mo.App.E.D. 1993) (defendant charged with driving under the influence of Aalcohol@; instruction stated Aunder the influence of alcohol . . or drug or any combination thereof@ but defendant did defend himself against either charge).

Appellant argues that the difference between the indictment and the instruction Awas significant in light of the evidence presented.@ (App.Br. 27). Apparently appellant is concerned because the evidence showed that appellant took an item from the store earlier in the day (a CD player or VCR) and then returned in the evening and took a VCR. However, it is clear from the indictment *and* the instruction that the only incident that the state was charging was the incident that occurred that evening as that was the only incident that involved the use of force. This is not a case like ***State v. Weekley***, 967 S.W.2d 190 (Mo.App.S.D. 1998), to which appellant cites, where the defendant was charged in two separate counts with two separate thefts of two separate trucks and the defendant was convicted of only one count. ***Weekley***, which is expressly limited to the unique facts of that case, did not involve a variance but a rather a question of sufficiency of the evidence, particularly whether the state proved which, if either, of the two trucks, identified by their VIN numbers, had been stolen by the defendant. ***Id.*** at 194.

The Supreme Court cases appellant cites are also inapposite. In ***State v. Kennedy***, 396 S.W.2d 595 (Mo. 1965), the issue was instructional error arising from an improperly drafted instruction which did not specify *any* of the property purportedly stolen by the defendant. ***Id.*** at 599-600. In the present case, the jury was not given a roving commission to find appellant guilty if they found he had retained possession of any property whatsoever. Rather, the jury was specifically instructed as to what items of property were at issue.

In ***State v. White***, 431 S.W.2d 182, 186 (Mo. 1968), the defendant was charged with stealing by deceit, but the jury was instructed on a theory that defendant stole Awithout consent of the owner.@ In ***White***, the jury was submitted an entirely new method of committing the crime, differing from the method for which defendant had been charged. In the present case, the variance did not submit a new and separate method of committing the crime which could have had any apparent effect on appellant=s ability to defend himself.

In sum, while there was a variance between the indictment and the instruction, appellant failed to show how this variance prejudiced his defense at trial. He thus has failed to show how counsel=s failure to object to the variance prejudiced him. He has therefore failed to show ineffective assistance of counsel with respect to this claim, and his point on appeal should be denied.

II.

THE MOTION COURT DID NOT CLEARLY ERR IN OVERRULING APPELLANT=S RULE 29.15 MOTION, IN WHICH HE ALLEGED THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST AND RECEIVE A CONTINUANCE FOR THE PURPOSE OF OBTAINING AN ALLEGED SURVEILLANCE VIDEO FROM MONTGOMERY WARDS WHICH PURPORTED TO DEPICT THE PERSON COMMITTING THE ROBBERY BECAUSE APPELLANT HAS FAILED TO SHOW THAT REASONABLE COUNSEL WOULD HAVE ASKED FOR A CONTINUANCE OR THAT HE WAS PREJUDICED BY THE LACK OF A CONTINUANCE IN THAT A CONTINUANCE WAS NOT NECESSARY IN ORDER TO OBTAIN THE VIDEOTAPE, APPELLANT HAS FAILED TO SHOW THAT THE TRIAL COURT WOULD HAVE GRANTED A CONTINUANCE, AND APPELLANT HAS FAILED TO SHOW THAT THERE WAS A VIDEOTAPE AT ALL, LET ALONE A TAPE THAT CONTAINED EXCULPATORY EVIDENCE WHICH WOULD HAVE AIDED HIS DEFENSE.

Appellant contends that the motion court clearly erred in overruling his Rule 29.15 motion because he was entitled to relief on the grounds that trial counsel was allegedly ineffective for failing to request and receive a continuance for the purpose of obtaining an alleged surveillance videotape from Montgomery Wards. Said tape purportedly would have shown the person who actually committed the robbery.

Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." ***State v. Tokar***, 918 S.W.2d 753, 761 (Mo. banc 1996), *cert. denied* 117 S.Ct. 307 (1996); Supreme Court Rule 24.035(k). Findings of fact

and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. ***State v. Taylor***, 929 S.W.2d 209, 224 (Mo. banc 1996), *cert. denied* 117 S.Ct. 1088 (1997). On review, the motion court's findings and conclusions are presumptively correct. ***Wilson v. State***, 813 S.W.2d 833, 835 (Mo. banc 1991).

To show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to competently perform. ***Id.*** Prejudice exists when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068.

Randy Tennison, the Loss Prevention Manager at Montgomery Wards, stated in a deposition that loss prevention officer Alan Lowry had shown him a surveillance video tape from November 25, 1996, the day of the incident (Tr. 95, 97). In that deposition, Tennison said that he thought the tape depicted appellant (Tr. 97).

At a pretrial hearing, Alan Lowry, the loss prevention officer on duty at the time of the robbery, testified that there were video cameras in the store, but that none of the suspects were caught on video tape (Tr. 38). Lowry explained that there are multiple cameras, that the tape is only done on the cameras they happen to be watching at any given time, and at the time appellant entered the store, Lowry was watching a woman in the ladies= clothing area of the store (Tr. 38-39). Lowry testified that appellant was not captured on tape in the store that day (Tr. 39). Lowry admitted that he had shown Randy Tennison, the Security Supervisor for the store, a tape from November 25, 1996, the day of the robbery (Tr. 39).

However, Lowry said that this was a tape of a different man involved in a different incident (Tr. 39-40). Lowry believed that the tape was stored in a file cabinet in the Wards store (Tr. 40).

Appellant contends that counsel was ineffective in that he failed to request a continuance in order to obtain the video tape, assuming it even existed. Appellant has failed, however, to show that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances. ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

First of all, granting a continuance is within the sound discretion of the trial court. ***State v. Timmons***, 956 S.W.2d 277, 284 (Mo.App.W.D. 1997). Appellant has made no showing whatsoever that the trial court would have granted a continuance, nor that he would even have been entitled to one.

John Tennison, the Loss Prevention Manager, gave a deposition on June 26, 1997, and mentioned the possible existence of a videotape (Tr. 95). Appellant=s trial counsel had not entered an appearance in the case at that time (LF 4). However, appellant=s trial counsel was on the case at the October 31, 1997 pretrial hearing where he questioned Alan Lowry about the existence of any videotapes and where trial counsel actually said, A[W]e=ll have to see about getting that.@ (Tr. 40). The case did not go to trial until December 15, 1998, at which time a jury was selected (Tr. 151). The case was continued until January 5, 1998, due to the prosecutor=s illness (Tr. 254, *et. seq.;* Tr. 264).

The record indicates there was no need to request a continuance; there was ample time to obtain a tape, if such a tape existed. Appellant has made no showing that there was any need for a continuance. Counsel cannot be deemed ineffective for failing to request a continuance that he did not need and that he did not and cannot prove that he would have received or have been entitled to.

Nor has appellant shown any prejudice in that he has not shown that there was, in fact, a video tape which contained exculpatory evidence. No such tape was presented at the evidentiary hearing. If one believes John Tennison=s testimony, then the video tape in question shows appellant and therefore is not exculpatory. If one believes Alan Lowry=s testimony, then the tape is not even relevant because it is not a tape of the crime in question. Moreover, Alan Lowry=s testimony at trial, explaining how the security camera system in the store worked, further established that they never taped the thefts from the electronics department that day as the cameras being recorded were focused on other parts of the store at the times in question (Tr. 380 -385, 387-388). There was no tape of the crime.

Appellant=s claim is analogous to a claim of ineffective assistance based on counsel=s failure to discover or present evidence. In such an instance, movant must show that counsel failed to discover or present evidence "that would be material and admissible to establish reasonable doubt as to [the] defendant's guilt." ***State v. Twenter***, 818 S.W.2d 628, 635 (Mo. banc 1991); *see also* ***State v. Middleton***, 854 S.W.2d 504, 517 (Mo.App. W.D. 1993) (*citing* ***Twenter***, *supra* at 637, 640, and holding that "[w]here the record fails to reflect that the evidence the attorney neglected to present would have provided [the movant] with a viable defense, [movant's] claim of ineffectiveness will be denied"); ***State v. Harris***, 868 S.W.2d 203, 209 (Mo.App. W.D. 1994) (to succeed on a claim that counsel was ineffective for failing to investigate evidence, a movant must show the specific information counsel failed to discover, that reasonable investigation would have uncovered the information, and that the information would have provided the movant with a viable defense). Attorneys= decisions as to whether to pursue evidence Aare reasonable to the extent that reasonable professional judgments support limitations on investigations. . . . In the real world containing real limitations of time and human resources, criminal defense

counsel is given a heavy measure of deference in deciding what witnesses and evidence are worth of pursuit.@ ***Twenter, supra***, at 635.

In the present case, there is no evidence that a tape of the robbery even existed, let alone whether such tape was exculpatory. Appellant has thus failed to show that counsel failed to discover evidence that would have provided him with a viable defense.

In sum, the motion court did not err in overruling appellant=s Rule 29.15 motion because counsel cannot be ineffective for failing to request a continuance appellant did not need to obtain a tape which either did not exist or, if it did, was not exculpatory. Appellant=s claim is bereft of merit and should be denied.

III.

THE MOTION COURT DID NOT CLEARLY ERR IN OVERRULING APPELLANT=S RULE 29.15 MOTION, IN WHICH HE ALLEGED THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INTERVIEW AND DEPOSE STATE=S WITNESS LOUIS LYONS PRIOR TO TRIAL, AND TO OBJECT TO LYON=S TESTIMONY AT TRIAL ON THE GROUNDS THAT LYON=S IDENTIFICATION OF APPELLANT WAS THE PRODUCT OF OTHER WITNESSES POINTING APPELLANT OUT TO LYONS AT A PRETRIAL HEARING BECAUSE THERE WAS NO EVIDENCE THAT A MOTION TO SUPPRESS WOULD HAVE HAD MERIT AND THERE WAS NO EVIDENCE THAT APPELLANT WAS PREJUDICED BY THE FAILURE TO SUPPRESS THE EVIDENCE IN THAT THERE WAS NO EVIDENCE THAT LYONS=S IDENTIFICATION WAS TAINTED, LYONS=S ABILITY TO IDENTIFY APPELLANT WAS IMPEACHED, AND IN ANY EVENT, APPELLANT WAS POSITIVELY IDENTIFIED BY TWO OTHER EYEWITNESSES.

Appellant contends that trial counsel was ineffective because he failed to interview and depose state=s witness Louis Lyons prior to trial and did not object to Lyons=s testimony at trial (App.Br. 33).

A. Standard of Review.

Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." ***State v. Tokar***, 918 S.W.2d 753, 761 (Mo. banc 1996), *cert. denied* 117 S.Ct. 307 (1996); Supreme Court Rule 24.035(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with

the definite and firm impression that a mistake has been made. ***State v. Taylor***, 929 S.W.2d 209, 224 (Mo. banc 1996), *cert. denied* 117 S.Ct. 1088 (1997). On review, the motion court's findings and conclusions are presumptively correct. ***Wilson v. State***, 813 S.W.2d 833, 835 (Mo. banc 1991).

To show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to competently perform. ***Id.*** Prejudice exists when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068.

B. Relevant facts.

Louis Lyons was working at Montgomery Wards on the night of the robbery in the electronics department (Tr. 461). Lyons saw appellant pick up the VCR and walk out of the door of the store (Tr. 461-462). Lyons identified appellant in court (Tr. 462).

Appellant alleged in his Rule 29.15 motion that trial counsel should have objected to Lyons=s testimony (PCRLF 46). Appellant contends that trial counsel should have objected because trial counsel was aware that during pretrial motions on the day of trial, Lyons was allegedly in the vestibule of the courtroom with Jan Siegfried and Randy Tennison, and they allegedly pointed appellant out to Lyons (PCRLF 46). Thus, appellant claims, Lyons=s in-court identification was tainted.

At the evidentiary hearing for the Rule 29.15 motion, appellant testified that at some pretrial hearing (he could not recall which one), Lyons was back in the vestibule with Randy Tennison and Jan Siegried and

that appellant saw them point him out to Lyons (H.Tr. 19-20). Appellant that sometime before or after this incident, defense counsel got a statement from Lyons, but did not depose him (H.Tr. 20).

Defense counsel, Stuart Kahn, also testified at the evidentiary hearing. He believed that Lyons was present at the motion to suppress identification hearing (H.Tr. 39-40). Kahn testified that Lyons was in the vestibule of the courtroom with Tennison and Siegried and they were pointing through the windows of the doors of the courtroom at appellant (H.Tr. 40). Kahn said that he told his investigator to contact Lyons, and Kahn himself spoke with Lyons Aat a later date.@ (H.Tr. 44). Kahn testified that he should have shown Lyons a photo spread to see if he could identify appellant (H.Tr. 44).

At trial, Lyons testified that he saw appellant pick up a VCR and walk out the door of the store (Tr. 461). Lyons identified appellant in the courtroom (Tr. 462, 464). Lyons testified that he followed appellant through the store to make sure that he was actually taking the VCR out of the store (Tr. 462).

On cross-examination, Lyons admitted that he had never given a description to the police, but that was because he had never spoken to the police (Tr. 465), not, as appellant suggests, because he only saw the suspect for a short period of time or because he could not describe appellant (App.Br. 28). Lyons said he gave a vague description to the prosecutor when he took his statement (Tr. 465). Lyons had told defense counsel that he Adidn=t really get a good look@ at the suspect (Tr. 466). Lyons admitted that Aa majority of the time I saw him from the back@ as he was following the suspect out of the store (Tr. 466). Defense counsel then engaged in the following cross-examination of Lyons:

> Q. Now you were back in **B** we were originally set to go on December 22nd, a couple of weeks ago. Right?
>
> A. Yes, sir.

Q. And you were here?

A. Yes, sir.

Q. And Jan Siegried was here?

A. Yes, sir.

Q. Randy Tennison was here?

A. Yes, sir.

Q. You stood out there in the middle area?

A. Yes, sir.

Q. While they pointed at James Washington?

A. No, sir.

Q. I saw them over there pointing at him when you were there.

(Tr. 467).

At this point, the prosecutor objected and defense counsel was instructed not to testify (Tr. 467-468).

C. Analysis

Appellant=s analysis treats counsel=s alleged error as a failure to investigate and as a failure to object to or suppress Lyons=s testimony (App.Br. 35). As far as trial counsel=s alleged failure to investigate, appellant suggests that counsel should have Atake[n] steps to see whether Lyons would independently identify@ appellant (App.Br. 35). As far as objecting to or trying to suppress Lyons=s testimony, appellant contends that counsel should have done so on the grounds that other witnesses pointed out appellant to Lyons at a preliminary hearing or the first day of trial (App.Br. 35).

"To demonstrate a counsel's ineffectiveness in failing to seek suppression of evidence, a defendant must establish that his claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." ***State v. Neal***, 849 S.W.2d 250, 258 (Mo.App.W.D. 1993) (quotations omitted). Appellant's allegations are not self-proving and appellant has the burden of establishing his claim by a preponderance of the evidence. ***Kennedy v. State***, 771 S.W.2d 852, 858 (Mo.App.S.D. 1989).

Appellant has failed to show that his claim would have been meritorious in that the record in this case does not support the claim of a tainted identification. The only testimony presented was that of appellant and defense counsel, who claimed that at some pretrial hearing, perhaps on the initial day of trial, they saw Lyons standing in the vestibule of the courtroom with Siegried and Tennison and that Siegried and/or Tennison pointed in the general direction of appellant, who was in the courtroom (H.Tr. 19-20, 40). There was no evidence as to what the witnesses actually were discussing or whether they were, in fact, pointing to appellant, as opposed to pointing out anything or anyone else in the courtroom. Appellant did not present any testimony from Siegried, Tennison, or Lyons at the postconviction motion evidentiary hearing. Moreover, when Lyons was asked about the incident at trial, he denied it (Tr. 467). The motion court did not find appellant or defense counsel's testimony as to the alleged "taint" credible, as shown by its finding that there was no proof at the trial that appellant was pointed out to Lyons by anyone (PCRLF 90). The motion court, of course, is free to believe all, part or none of appellant's evidence and may totally reject movant's evidence even if no contrary evidence is presented for the motion court's consideration. ***Milner v. State***, 968 S.W.2d 229, 230 (Mo.App.S.D. 1998); ***Dean v. State***, 950 S.W.2d 873 (Mo.App.W.D. 1997).

It was appellant=s burden to show that a motion to suppress Lyons=s in-court identification would have had merit, and he has failed to do that as he has failed to put on evidence demonstrating that Lyons=s identification was tainted. Even if Lyons=s identification were tainted, appellant=s claim still fails because he has failed to show actual prejudice by demonstrating that there was a reasonable probability that the verdict would have been different absent the allegedly excludable evidence. ***Neal***, ***supra***.

The record reflects that Jan Siegried and Alan Lowry also identified appellant as the man who took an item from the electronics department of Montgomery Wards that night. Lowry testified that Jan Siegried pointed out appellant to him, that appellant had a box under his arm and was headed quickly toward the doors, and that Lowry followed appellant out into the parking lot to a van (Tr. 389-390). Lowry testified that he saw appellant throw the box into the back of the van and get into the driver=s seat of the van (Tr. 390, 392-393). Lowry got in the van with appellant had demanded the return of the merchandise (Tr. 393). Lowry ultimately engaged in a struggle with appellant and appellant=s accomplice and Lowry was pierced in the arm by a meat hook or similar implement and pulled out of the van and thrown to the ground, at which point the van drove off (Tr. 395-396, 453). Lowry picked both appellant and his accomplice from a photo lineup (Tr. 397-398). Lowry said he had no doubt that appellant was the man who robbed the store (Tr. 399).

Siegried testified that she twice saw appellant take boxes from the electronics department and leave the store (Tr. 447-449). Siegried made an in-court identification of appellant and said she had no doubt that he was the man (Tr. 447, 454).

In light of Siegried and Lowry=s testimony, it cannot be said that there was a reasonable probability that the verdict would have been different absent Lyons=s in-court identification of appellant. There was

still the identification by Siegried, who observed appellant on two occasions removing merchandise from the store, and the identification by Lowry, who actually pursued appellant out to the van, sat in the van with appellant, and struggled with him. Furthermore, trial counsel did impeach Lyons=s identification of appellant by bringing out on cross-examination that Lyons Adidn=t really get a good look@ at the suspect, that he had only seen him from behind for Aa majority of the time@ and was only able to give a vague description to the prosecutor when he took his statement (Tr. 465-466).

D. Conclusion.

In sum, the motion court did not clearly err in overruling appellant=s Rule 29.15 motion because appellant failed to prove that a motion to suppress Louis Lyons=s in-court identification of him would have been successful, nor did he prove that a different result would have occurred had the identification been suppressed. There was no evidence that Lyons=s identification was tainted, Lyons=s identification was impeached, and in any event, appellant was positively identified by two other eyewitnesses. Appellant=s point is without merit and should be denied.

IV.

THE MOTION COURT DID NOT CLEARLY ERR IN OVERRULING APPELLANT=S RULE 29.15 MOTION, IN WHICH HE ALLEGED THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT DURING JANICE SIEGRIED=S DEPOSITION WHEN THE PROSECUTOR SHOWED SIEGRIED A SINGLE PHOTOGRAPH OF APPELLANT AND ASKED HER WHETHER SHE HAD SEEN THAT MAN BECAUSE THIS ISSUE HAD ALREADY BEEN RAISED ON DIRECT APPEAL AND THIS COURT RULED THAT NO ERROR, PLAIN OR OTHERWISE, RESULTED FROM SIEGRIED=S IDENTIFICATION OF APPELLANT FROM ONE PHOTOGRAPH AS THERE WAS NOTHING SUGGESTIVE ABOUT THE PROCESS.

Appellant contends that counsel was ineffective for failing to object when the prosecutor handed Jan Siegried a picture of appellant at her deposition and asked her if she knew him. Appellant contends that there was a less suggestive photo spread available and that could have been used. Appellant believes that Siegried=s in-court identification was based on the single photo, not her recollection of the day of the crime.

Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." ***State v. Tokar***, 918 S.W.2d 753, 761 (Mo. banc 1996), *cert. denied* 117 S.Ct. 307 (1996); Supreme Court Rule 24.035(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. ***State v. Taylor***, 929 S.W.2d 209, 224

(Mo. banc 1996), *cert. denied* 117 S.Ct. 1088 (1997). On review, the motion court's findings and conclusions are presumptively correct. ***Wilson v. State***, 813 S.W.2d 833, 835 (Mo. banc 1991).

To show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to competently perform. ***Id.*** Prejudice exists when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068.

Appellant contends that counsel should have objected to Siegried=s identification at the deposition because the identification was Ainherently unreliable@ since Siegried was shown a single photograph of appellant (App.Br. 33). The question, then, is whether Siegried=s identification was the result of impermissibly suggestive procedures.

This issue has already been decided on direct appeal. On direct, the Court of Appeals was faced with the issue of whether Siegried=s identification of appellant should have been suppressed on the grounds that it was the result of allegedly suggestive procedures. On direct appeal, appellant had argued that Siegried=s out-of-court identification of appellant was unduly suggestive and thus unreliable, thereby tainting her in-court identification of appellant. ***State v. Washington***, WD55671, slip op. at 7 (July 13, 1999). Appellant argued on direct appeal, as he does now on this appeal, that Siegried=s identification was allegedly tainted by suggestive procedures because she was shown only one photograph when she initially identified him at her deposition. ***State v. Washington***, WD55671, slip op. at 11, 12 (July 13, 1999). The Court of Appeals found, in pertinent part, as follows:

The crux of Mr. Washington=s argument is that Ms. Siegried=s identification was tainted by suggestive procedures because she was shown only one photograph when she initially identified him at her deposition. Ms. Siegried testified that she observed Mr. Washington twice in the Montgomery Ward=s store on the day of the theft. She was approximately twenty to thirty feet from him and she watched him the entire time as he walked from the electronics area out the door. During her deposition, the prosecuting attorney showed Ms. Siegried a photograph of Mr. Washington and asked her if she recognized the person depicted. Ms. Siegried identified the picture of Mr. Washington as the person who robbed Montgomery Wards. Ms. Siegried again identified Mr. Washington at the trial. Mr. Washington argues that the presentation of a single photograph of him to Ms. Siegried was unduly suggestive, and that her identification was, therefore, unreliable.

. . . [W]hen challenging the admissibility of identification evidence, the defendant must first show that the procedure was unduly suggestive. [***State v. Timmons***, 956 S.W.2d 277, 282 (Mo.App. 1997)]. Only if the procedure was unduly suggestive will the court consider the reliability of the identification in deciding its admissibility. ***Id.*** Missouri law indicates that a photographic line-up of only one photograph is not unduly suggestive absent other circumstances indicating the contrary. [***State v. Winston***, 959 S.W.2d 874, 878 (Mo.App.1997). AThe showing of a single photograph of a suspect to a witness, where there is no improper comment or activity on the part of the police in showing the photograph, does not result in impermissible suggestiveness.@ ***State v. Morant***, 758

S.W.2d 110, 117 (Mo.App. 1988). Additionally, there is no requirement that the State conduct a line-up prior to presenting a witness with a the defendant personally or a picture of the defendant for identification. ***State v. Jackson***, 750 S.W.2d 644, 647 (Mo.App. 1988). AIdentification testimony will be excluded only when the procedure was so suggestive that it gave rise to a very substantial likelihood of irreparable misidentification.@ ***State v. Smith***, 949 S.W.2d 901, 904 (Mo.App. 1997).

In this case, Mr. Washington relies upon the fact that only one photograph was presented to Ms. Siegried, arguing that the identification procedure was unduly suggestive. Ms. Siegried had previously described a man of similar characteristics. The prosecutor made no importer comment and the circumstances under which Ms. Siegried was presented the photograph were not unduly suggestive. ***See State v. McGrath***, 603 S.W.2d 518, 520 (Mo. 1980); ***State v. Thomas***, 705 S.W.2d 579, 582 (Mo.App. 1986). Based upon the record, we do not find the likelihood of Airreparable misidentification@ as a result of the identification procedure. Again, in the absence of a suggestive procedure procuring the identification, reliability is not an admissibility issue, but the reliability factors go to the weight given to the evidence. [***State v. Glover***, 951 S.W.2d 359, 363-364 (Mo.App. 1997)]. The trial court committed ***no error, plain or otherwise,*** in admitting Ms. Siegried=s testimony identifying Mr. Washington.

Slip op. at 11-13 (emphasis added).

Although the face of the issue before the court is now characterized as whether counsel was ineffective for failing to object at the deposition, as opposed to whether the trial court erred in admitting

Siegried=s in-court identification, the underlying issue is still the same: did showing one photograph to Siegried at the deposition cause her to make a tainted identification? This issue has already been categorically decided on direct appeal: there was no error, plain or otherwise, because the circumstances under which Siegried was shown the picture were not unduly suggestive.

Issues decided in the direct appeal of a case cannot be relitigated in a postconviction proceeding on the theory of ineffective assistance of counsel. ***O=Neal v. State***, 766 S.W.2d 91, 92 (Mo.banc 1989). AThis is true even though the issue is cloaked in a different theory.@ ***Id.***

In the present case, the underlying issue is exactly the same. The Court of Appeals already determined on direct appeal that there was no error.[2] Appellant cannot relitigate the matter again. Even

[2]This is ***not*** a situation like that presented in ***Deck v. State***, 68 S.W.3d 418 (Mo.banc 2002), where no *plain* error was found on direct appeal. In the present case, the trial court found no error, plain ***or otherwise*** B no error at all B and thus, since there was no error, there is no need to determine whether there was prejudice of any type, ***Strickland*** or otherwise. A prejudice analysis, of course, is premised first on found error of some sort.

if he could, the Court of Appeals=s analysis, as set out above, amply demonstrates that there was no error, and thus no ineffective assistance of counsel. Appellant=s claim is bereft of merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that the motion court=s overruling of appellant=s Rule 29.15 motion for postconviction relief be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of August, 2001.

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_____

IN THE
MISSOURI SUPREME COURT

_____

JAMES WASHINGTON, JR.,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

_____

Appeal from the Circuit Court of Clay County, Missouri
The Honorable Michael J. Maloney, Judge

_____

RESPONDENT'S APPENDIX

_____