No. SC95363

IN THE

SUPREME COURT OF MISSOURI

STEVEN D. GREEN,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Circuit Court of Greene County
31st Judicial Circuit
The Honorable Thomas Mountjoy, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

Appellant, Steven Green, was charged in the Circuit Court of Greene County with statutory rape in the first degree and incest (L.F. 10-11). The information further alleged that appellant was a prior and persistent offender (L.F. 11). On December 14 through December 17, 2009, appellant was tried before a jury, the Honorable Thomas E. Mountjoy presiding (Tr. 244-1022). Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

In 2007, appellant married M.G. (Tr. 578). In March of 2008, four children lived with appellant and M.G.: M.G.'s two daughters from a prior relationship, M.G.'s and appellant's son, and appellant's twelve-year-old daughter, T.G. (Tr. 581-583). In the evening of March 1, 2008, appellant and M.G. went out and left T.G. at home to babysit her younger siblings (Tr. 584-585). M.G. and appellant went to two establishments, the Electric Cowboy and the Confetti (Tr. 586-588). They left the Confetti around 1:45 a.m. and went to pick up appellant's car from appellant's cousin's residence (Tr. 588-589).

At appellant's cousin's residence, appellant got into his car and sped up in the opposite direction from his house (Tr. 589-590). M.G. tried to call appellant, but he did not answer his cellular phone (Tr. 590). M.G. drove home and checked on the children (Tr. 590). She found the three younger

children asleep in the girls' bedroom, and T.G. sleeping on the floor of her brother's bedroom (Tr. 590-591). T.G. was sleeping on a pallet of bedding set on the floor (Tr. 590-591). M.G. turned off the light in the bedroom where T.G. was sleeping and left the bedroom door open (Tr. 590-591).

M.G. went to sleep (Tr. 591). She woke up around 4:30 a.m. and she saw appellant's car in the driveway (Tr. 591). M.G. began looking for appellant throughout the house, and she noticed that the bedroom door where T.G. was sleeping was closed and that the light in the room was turned on (Tr. 593-595). M.G. opened the door and found appellant lying on top of T.G., having sexual intercourse with T.G. (Tr. 596). Appellant and T.G. were lying on the pallet of bedding and both were completely unclothed (Tr. 596). T.G. grabbed a blanket and covered herself when she saw M.G. (Tr. 596). Appellant shut the door (Tr. 596).

Appellant left the bedroom shortly thereafter and walked past M.G. (Tr. 598). He said: "I'll be back in the morning, and you guys better be here." (Tr. 598-599). M.G. took the children to a safe place and took T.G. to the hospital (Tr. 605-606).

M.G. spoke to the police at the hospital (Tr. 686-687). While she was talking to a police officer, appellant kept calling her cellular phone (Tr. 607, 687-688).

The police collected the comforter where T.G. was lying and obtained a search warrant for appellant's DNA (Tr. 611, 710, 719-720). Appellant was uncooperative when the authorities tried to collect a DNA sample (Tr. 725-726). He spit on the floor the end of the instrument during the first attempt to take his DNA, he bit the end of the second swab and tried to swallow it, and only the third attempt was successful (Tr. 726). The DNA analysis of the comforter showed that there was a mixture of DNA from three individuals (Tr. 763). Appellant could not be excluded as the major contributor to the DNA mixture, and T.G.'s DNA was also present in the DNA mixture (Tr. 773).

T.G. testified at trial that on the night of March 1, 2008, she babysat her siblings and that she fell asleep on a pallet of bedding on the floor in her brother's bedroom (Tr. 546-547). T.G. testified that appellant came in the bedroom, started kissing her, and had sexual intercourse with her (Tr. 551). T.G. said that appellant stopped when M.G. opened the door, and that he told T.G. "if the police come, tell them we was showing each other scars." (Tr. 552-553).

T.G. was interviewed at the child advocacy center and the recording of the interview was played to the jury (State's Exhibit 18, Tr. 817-822). In this interview, T.G. gave a similar description of the events (State's Exhibit 18).

Appellant did not testify (Tr. 906-908). He called four witnesses in his defense (Tr. 834-929). Appellant's cousin, Linda Green, testified that she saw appellant at Club Neon around 2:30 am on March 2, 2008, that appellant got into a fight with Steven Hill, and that the security closed the club (Tr. 839-840). Linda Green testified that she saw appellant get into his car, that she followed him to the Waffle House, and that it was shortly before 4:00 am when appellant reached the Waffle House (Tr. 840, 850).

Anne Hill, also appellant's cousin, testified that she saw appellant at Neon Club, that he was engaged in a fight, and that he left the club around 4:45 a.m. (Tr. 860-862).

Mandy Hale, a friend of appellant, testified that she spoke with appellant on the phone around 3:00 am on March 2, 2008, and that appellant agreed to meet her at her apartment (Tr. 883-885). Hale testified that she drove by the Waffle House and saw appellant inside, and that appellant came to her apartment later (Tr. 885-888).

Lance Hill testified that he met appellant around 3:00 a.m. on March 2, 2008, at the Waffle House to try to "squash some beef that he and [his] brother had" (Tr. 915-917). Hill testified that it was "daylight" when he and appellant left the Waffle House (Tr. 921). Hill testified that appellant had a scar on his forehead when he saw him (Tr. 919).

In rebuttal, the state called Detective Robert Dante, who testified that appellant's witnesses told him a different story when he spoke with them (Tr. 937-951).

At the close of all the evidence, the jury found appellant guilty of statutory rape in the first degree and incest (L.F. 25-26). The court sentenced appellant, as a prior and persistent offender to life in prison for the rape and concurrent term of seven years for the incest (L.F. 35-38).

On November 9, 2011, the Court of Appeals affirmed appellant's convictions and sentences. *State v. Green*, No. SD30605 (Mo. App., S.D. November 11, 2011). The Court of Appeals issued its mandate on November 28, 2011.

On January 27, 2012, appellant timely filed a pro se motion for postconviction relief (PCR L.F. 1). On January 31, 2012, the motion court appointed the public defender to represent appellant and granted an additional thirty days to file an amended motion (PCR L.F. 1). On April 30, 2012, appointed counsel timely filed an amended motion (PCR L.F. 2). On March 20, 2014, the motion court held an evidentiary hearing (PCR Tr. 1-132). On September 12, 2014, the motion court issued findings of fact and conclusions of law, denying appellant's postconviction motion (PCR L.F. 5).

On October 8, 2015, the Court of Appeals dismissed this appeal for lack of final, appealable judgment. *Green v. State*, SD33574 (Mo.App.S.D. October

8, 2015). On December 22, 2015, this Court granted respondent's application for transfer.

ARGUMENT

I.

Appellant waived his claim that the motion court clearly erred in failing to issue findings of fact and conclusions of law on claims 8.C.2 and 8.C.3 of appellant's pro se motion (which were included in the amended motion) because he failed to file a motion to amend the motion court's findings of fact and conclusions of law pursuant to Rule 78.07(c).

In his first point, appellant claims that the motion court clearly erred in failing to issue findings of fact and conclusions of law on Claims 8.C.2 and 8.C.3 of appellant's pro se motion (App. Br. 18-27). These claims were included in the amended motion (PCR L.F. 42-64).

This Court should deny appellant's request for a remand to the motion court for findings of fact and conclusions of law. While the motion court's findings of fact and conclusions of law did not address appellant's pro se claims which were attached to the amended motion, appellant failed to move to amend the findings of fact and conclusions of law as required by Rule 78.07(c).

Rule 78.07(c) mandates that "[i]n all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." "The purpose of Rule

78.07(c) is to ensure that complaints about the form and language of judgments are brought to the attention of the trial court where they can be easily corrected, alleviating needless appeals, reversals, and rehearings." *Gerlt v. State*, 339 S.W.3d 578, 584 (Mo. App., W.D. 2011).

Numerous cases hold that a postconviction movant must file a motion to amend the judgment under Rule 78.07(c) when the motion court fails to issue findings of fact and conclusions of law on all claims. *See Dunlap v. State*, 452 S.W.3d 257, 263 (Mo.App.W.D. 2015) (the defendant was required to seek an amendment of the judgment under Rule 78.07(c) where the motion court did not issue findings of fact and conclusions of law on a claim); *Atchison v. State*, 420 S.W.3d 559, 562-563 (Mo.App.S.D. 2013) (Rule 78.07(c) precluded appellate review of a claim of ineffective assistance of counsel where the defendant did not seek an amendment of the judgment for failing to issue findings of fact and conclusions of law on this claim); *McCoy v. State*, 456 S.W.3d 887, 896, n. 5 (Mo.App.W.D. 2015) (the defendant did not file a motion to amend the judgment in the circuit court under Rule 78.07(c), asking the court to make explicit findings concerning one of his postconviction claims, and he waived any claim of error based on the circuit court's failure to make express findings on that issue).

Appellant argues that in *Moore v. State*, 458 S.W.3d 822 (Mo.banc 2015), this Court overruled the cases holding that the failure to file a motion

to amend the judgment pursuant to Rule 78.07(c) constituted a waiver of a claim of lack of factual findings (App.Br. 21-23). But the Court in *Moore* did not address the requirement for filing of a motion to amend the judgment pursuant to Rule 78.07(c). The Court examined the record to determine whether the movant was abandoned by postconviction counsel who filed an untimely amended motion. *Id.* at 825. The Court found that the motion court had a duty to undertake an independent inquiry into whether the movant was abandoned by appointed counsel and remanded the case for such inquiry. *Id.* at 825-826. Thus, the issue was not whether the motion court failed to make necessary findings on a claim when it denied the postconviction motion; rather, the issue was whether the motion court had adjudicated the correct motion. Only if there was abandonment by counsel would it have been proper in *Moore* for the motion court to adjudicate the amended motion.

Here, postconviction counsel timely filed an amended motion and there is no question of abandonment that needs to be addressed by the motion court. Accordingly, this Court's review is limited to determining whether the motion court clearly erred in denying appellant's amended motion. And because appellant failed to file a motion to amend the judgment, he failed to preserve his claim that the motion court omitted required findings of fact and conclusions of law. *Gerlt*, 339 S.W.3d at 584.

Appellant further argues that Rule 78.07(c) only applied when the motion court fails to issue statutorily required findings of fact and conclusions of law, and that it does not apply to the failure to issue findings of fact and conclusions of law in postconviction proceedings under Rule 29.15 (App. Br. 22-24). But the rule does not apply only to statutorily required findings. The rule provides that "[i]n all cases, allegations of error relating to the form or language of the judgment, *including* the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." Rule 78.07(c). Generally, in interpreting statutory language the objective is to ascertain the intent and to give effect to that intent as it is reflected in the plain language of the statute. See *State v. Slavens*, 375 S.W.3d 915 (Mo.App.S.D. 2012). "While the plain meaning of the word 'include' may vary according to its context in a statute, it is ordinarily used as a term of enlargement, rather than a term of limitation." *State ex rel. Nixon v. Estes*, 108 S.W.3d 795, 798 (Mo.App. W.D.2003). Missouri courts have consistently interpreted the word "include" in the context of statutes as a term of enlargement, as providing an illustrative, non-exclusive, example, or as both. *Short v. Southern Union Co.*, 372 S.W.3d 502, 533 (Mo.App.W.D. 2012). The use of the term "including" in this instance is intended to illustrate an example of circumstances in which the rule applies, not to limit the rule's application. See *State ex rel. Nixon v.*

Estes, 108 S.W.3d. at 798 (the court interpreted the term "include" in section 407.010(7) which defined the terms trade or commerce to "include any trade or commerce directly or indirectly affecting the people of this state" as a term of enlargement and not as an expression of legislative intent to "mean only economic activity having such effects"). Here, the motion court denied the amended motion, but did not issue findings of fact and conclusions of law specific to the pro se claims included in it. This is an alleged error that falls within the scope of Rule 78.07(c).

The adoption of Rule 78.07(c) in 2005 had the apparent purpose of limiting or eliminating the need for remands by providing a mechanism to timely challenge the form and language of judgment. If the motion court's failure to issue findings of fact and conclusions of law on all issues excuses a party from filing a motion to amend the judgment under Rule 78.07(c), this would defeat the rule's purpose which is "to ensure that complaints about the form and language of judgments are brought to the attention of the trial court where they can be easily corrected, alleviating needless appeals, reversals, and rehearings." *Gerlt v. State*, 339 S.W.3d at 584. Appellant was aware that the court did not address his pro se claims but he did not seek to amend the findings of fact and conclusions of law. Accordingly he waived the right to challenge the absence of findings on appeal.

Moreover, the Court of Appeals' holding that there was no final appealable judgment is misplaced. The motion court denied appellant's amended motion which incorporated the pro se claims by attaching them (PCR L.F. 65-75). By denying the amended motion, the motion court necessarily denied the pro claims that were included in it. See *McCoy v. State*, 456 S.W.3d at 896 (the Court of Appeals presumes that he motion court denied the defendant's claim of affirmative misrepresentation where the motion court did not specifically address the claim in its findings of fact and conclusions of law, but denied the postconviction motion). See also Rule 73.01(c) ("All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached"). Because appellant failed to file a motion to amend the judgment, he preserved nothing for review. Appellant's claim should be denied.

II.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's claim of ineffective assistance of counsel for failing to call Dr. Samuel Alexander as a witness.

In his second point, appellant claims that his trial counsel was ineffective for failing to call Dr. Samuel Alexander as a witness to testify that he did not observe bruises on the victim's neck when he examined her (App. Br. 28-31). Appellant alleged in his amended motion that he wanted counsel to call a number of witnesses, including Dr. Alexander (PCR L.F. 45-46). Appellant's motion alleged that Dr. Alexander would have testified that he did not see bruising on the victim's neck (PCR L.F. 46).

At the evidentiary hearing, appellant admitted into evidence a deposition of Dr. Alexander (PCR Tr. 3-4, Movant's Exhibit 15-A). Dr. Alexander testified that he did not observe bruising on the victim's neck when he examined her in the emergency room (Movant's Exhibit 15-A p. 6). Dr. Alexander further testified that it took 24 to 48 hours before bruising showed on a person's skin and that sometimes it could take up to three days for bruising to show (Movant's Exhibit 15-A p. 7-8). Dr. Alexander testified that it would be possible that he did not see bruising, but that bruising could have developed later (Movant's Exhibit 15-A p. 9).

The motion court denied appellant's claim, finding that he failed to prove that counsel was ineffective or that he was prejudiced (PCR L.F. 73).

Appellate review of denial of postconviction relief under Rule 29.15 is limited to determining whether the motion court's findings of fact and conclusions of law are clearly erroneous. *McFadden v. State*, 256 S.W.3d 103, 105-106 (Mo. banc 2008). "The appellate court will disturb the motion court's disposition only if the reviewing court is left with the definite and firm impression that a mistake has been made." *Id.*

In order to establish ineffective assistance of counsel, appellant must show (1) that counsel's performance was so deficient that it fell below an objective standard of reasonable competence, and (2) that counsel's deficient performance prejudiced appellant's defense. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 684 (1984). There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment. *Strickland*, 466 U.S. at 689-690. To show prejudice, appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Appellant bears the burden of proving his claim by a preponderance of the evidence. Rule 29.15(i).

"The selection of witnesses and the introduction of evidence are questions of trial strategy and the mere choice of trial strategy is not a

foundation for finding ineffective assistance of counsel." *Ringo v. State,* 120 S.W.3d 743, 748 (Mo. banc 2003). To show ineffective assistance of counsel for failure to call a witness, appellant must show that: (1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would have testified at trial; and (4) the witness's testimony would have produced a viable defense. *Edwards v. State*, 200 S.W.3d 500, 518 (Mo. banc 2006).

Appellant in the present case failed to show that counsel was ineffective for failing to call Dr. Alexander as a witness. Counsel established through the cross-examination of nurse Diane Gwin that the victim had no visible bruises when she was examined in the emergency room on the morning of March 2, 2008 (Tr. 655, 672). Ms. Gwin was the nurse who assisted Dr. Alexander during the victim's examination (Tr. 673). Dr. Alexander's testimony that he did not observe bruises on the victim's neck on the morning of March 2, 2008, would have been merely cumulative to Ms. Gwen's testimony. Counsel is not ineffective for failing to present cumulative evidence. *Johnson v. State*, 388 S.W.3d 159, 167 (Mo.banc 2012).

Additionally, Dr. Alexander's testimony would not have aided appellant's defense. Dr. Alexander testified that it took 24 to 48 hours for the bruising to reach its peak, and that while he did not observe bruises on the victim's neck, bruising could have developed later (Movant's Exhibit 15-A p.

3-9). Kim Chapman, the nurse practitioner who examined the victim on the following day at the Child Advocacy Center, saw bruises on the victim's neck (Movant's exhibits 16 and 16A p. 7-8). See Point III. Thus, Dr. Alexander's testimony would not have established, as appellant argues, that there were no physical findings consistent with sexual abuse.

Additionally, the existence of bruises on the victim's neck would not have provided appellant with a defense. Appellant was not charged with assaulting the victim in any other manner than having sexual intercourse with her. Even if Dr. Alexander's testimony established that there were no bruises on the victim's neck, that would not have provided a defense to the charge of statutory rape.

Moreover, appellant cannot show prejudice from the absence of Dr. Alexander's testimony because there was overwhelming evidence of guilt. The victim testified that appellant walked into the bedroom where she was asleep and raped her (Tr. 551). The victim's interview at the Child Advocacy Center was shown to the jury, and in this interview the victim gave a similar description of the events (State's Exhibit 18). M.G. saw appellant raping the victim, and she testified at trial (Tr. 596). Appellant was uncooperative when law enforcement attempt to collect DNA (Tr. 725-726). Appellant could not be excluded as a contributor of DNA found on the bedding where T.G. was raped (Tr. 773). In light of the overwhelming evidence of guilt, appellant cannot

show a reasonable probability of a different result had the jury heard Dr. Alexander's testimony that he did not see bruises on the victim's neck. Appellant's claim should be denied.

III.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's claim of ineffective assistance of counsel for failing to call Kim Chapman as a witness.

In his third point, appellant claims that his trial counsel was ineffective for failing to call Kim Chapman as a witness to testify that she did not observe any recent injuries to the victim's genitalia (App. Br. 32-36). Appellant alleged in his amended motion that he wanted counsel to call a number of witnesses, including Kim Chapman (PCR L.F. 45-46). He alleged that Ms. Chapman would testify that she did not observe any physical injuries consistent with recent abuse (PCR L.F. 45-46).

Kim Chapman testified at the evidentiary hearing via a deposition (Movant's Exhibit 16A). Ms. Chapman testified that she was a nurse practitioner conducting sexual assault examinations at the Child Advocacy Center (Movant's Exhibit 16A p. 4-5). Ms. Chapman testified that she examined the victim in March of 2008 and that she saw bruising on her neck (Movant's Exhibit 16A p. 7-8). Ms. Chapman testified that she prepared a report on the day of the exam and she identified Movant's exhibit 16 as the report she prepared (Movant's Exhibit 16A p. 5, 9). Ms. Chapman testified that she did not know how old was the bruising on the victim's neck and that she would have she had seen "fresh abrasion to go with the bruise" she would

have indicated that in her report (Movant's Exhibit 16A p. 9-10). Appellant admitted Ms. Chapman's report into evidence (Movant's Exhibit 16). The report indicated that Ms. Chapman saw physical injury to the victim's hymen consistent with sexual abuse (Movant's Exhibit 16).

Counsel testified that Ms. Chapman found a tear in the victim's hymen which was consistent with the allegations (PCR Tr. 117). Counsel did not believe that Ms. Chapman's testimony would have been beneficial (PCR Tr. 117).

The motion court denied appellant's claim, finding that Ms. Chapman observed injuries consistent with abuse (PCR L.F. 73).

Appellate review of denial of postconviction relief under Rule 29.15 is limited to determining whether the motion court's findings of fact and conclusions of law are clearly erroneous. *McFadden v. State*, 256 S.W.3d 103, 105-106 (Mo. banc 2008). "The appellate court will disturb the motion court's disposition only if the reviewing court is left with the definite and firm impression that a mistake has been made." *Id.*

In order to establish ineffective assistance of counsel, appellant must show (1) that counsel's performance was so deficient that it fell below an objective standard of reasonable competence, and that (2) that counsel's deficient performance prejudiced appellant's defense. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 684 (1984). There

is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment. *Strickland*, 466 U.S. at 689-690. To show prejudice, appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Appellant bears the burden of proving his claim by a preponderance of the evidence. Rule 29.15(i).

"The selection of witnesses and the introduction of evidence are questions of trial strategy and the mere choice of trial strategy is not a foundation for finding ineffective assistance of counsel." *Ringo v. State,* 120 S.W.3d 743, 748 (Mo. banc 2003). To show ineffective assistance of counsel for failure to call a witness, appellant must show that: (1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would have testified at trial; and (4) the witness's testimony would have produced a viable defense. *Edwards v. State*, 200 S.W.3d 500, 518 (Mo. banc 2006).

Appellant cannot show that counsel was ineffective for failing to call Kim Chapman as a witness. Ms. Chapman would have testified that she observed a tear in the victim's hymen and bruising on the victim's neck, which would have been incriminating evidence (PCR Tr. 117, Movant's Exhibit 16A p. 7-8). To support a claim of ineffective assistance of counsel, appellant must show that the witness counsel failed to call would have

unqualifiedly supported the defense. *Phillips v. State*, 214 S.W.3d 361, 366 (Mo.App.S.D. 2007). Strategic choices made after a thorough investigation of the law and the facts relevant to plausible opinions are virtually unchallengeable. *McLaughlin v. State*, 378 S.W.3d 328, 337 (Mo. banc 2012). Appellant failed to show that counsel was ineffective for failing to call Ms. Chapman.

Appellant argues that Ms. Chapman's findings of abnormality to the victim's hymen could have been explained by showing that the injury to the victim's genitals was a result of the prior sexual assault by an uncle (App. Br. 34). But trial counsel's decision not to call a witness is "presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise." *Williams v. State*, 168 S.W.3d 433, 441 (Mo.banc 2005). When defense counsel believes a witness's testimony would not unequivocally support his client's position, it is a matter of trial strategy not to call that witness, and the failure to call such witness does not constitute ineffective assistance of counsel. *Phillips v. State*, 214 S.W.3d 361, 367 (Mo.App.S.D. 2007). Here, Ms. Chapman's testimony would have been damaging to appellant's defense as it would have shown that there were physical injuries consistent with sexual abuse. It was reasonable for counsel to decide not to call Ms. Chapman as a witness. See *Wilson v. State*, 226 S.W.3d 257, 261 (Mo.App.S.D. 2007) (counsel's decision

not to call the defendant's ex-wife to testify that the co-defendant made a statement that he and the defendant "went and took somebody out" was reasonable trial strategy because the statement could have potentially been damaging to the defense).

Additionally, counsel would not have been able to introduce evidence of the victim's prior sexual conduct to negate the findings of injury to the victim's hymen. Evidence that the victim had been sexually assaulted by someone else is inadmissible at trial unless it falls within narrowly defined exceptions which are not present here. *See* §491.015 RSMo; *State v. Smith*, 996 S.W.2d 518, 522 (Mo. App., W.D. 1999) (evidence of the victim's prior sexual conduct is inadmissible).

Furthermore, appellant presented no evidence at the evidentiary hearing to support his claim that the injury to the victim's genitals was an old injury and that it could not be attributed to appellant. Allegations in a postconviction motion are not self-proving, and appellant bears the burden of proving his claims by a preponderance of the evidence. *Nunley v. State*, 56 S.W.3d 468, 470 (Mo. App., S.D. 2001). Without presenting evidence at the evidentiary hearing showing a lack of recent injury appellant cannot show that Chapman would have provided favorable testimony.

Moreover, there was overwhelming evidence of guilt. The victim testified that appellant walked into the bedroom where she was asleep and

raped her (Tr. 551). The victim's interview at the Child Advocacy Center was shown to the jury, and in this interview the victim gave a similar description of the events (State's Exhibit 18). M.G. saw appellant raping the victim, and she testified at trial (Tr. 596). Appellant was uncooperative when law enforcement attempt to collect DNA (Tr. 725-726). Appellant could not be excluded as a contributor of DNA found on the bedding where T.G. was lying when appellant had sexual intercourse with her (Tr. 773). In light of the overwhelming evidence of guilt, appellant cannot show a reasonable probability of a different result had the jury heard Ms. Chapman's testimony. Appellant's claim should be denied.

IV.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's claim of ineffective assistance of counsel for failing to call Kelly Halphin as a witness.

In his fourth point, appellant claims that his trial counsel was ineffective for failing to call Kelly Halphin to testify that she was with appellant at the Waffle House at the time of the crime (App. Br. 36-39). Appellant's amended motion alleged that counsel failed to call Kelly Halphin, Lance Hill's girlfriend, to corroborate Lance Hill's testimony that he was with appellant at the Waffle House (PCR L.F. 46).

Ms. Halphin testified at the evidentiary hearing that appellant came to her and Hill's residence on the night of crime, and that she, Lance Hill, and appellant went to the Waffle House (PCR Tr. 8). Ms. Halphin testified that they stayed at the Waffle House until the sun came out (PCR Tr. 8). Ms. Halphin testified that Lance Hill was called as a witness at appellant's trial (PCR Tr. 6, 11). She testified that no one contacted her about testifying (PCR Tr. 10).

Counsel testified at the evidentiary hearing that he attempted to locate Ms. Halphin, but that he was unable to find her (PCR Tr. 104).

The motion court denied appellant's claim, finding that appellant failed to prove that counsel knew or should have known about Ms. Halphin or that

she would have provided appellant with a defense (PCR L.F. 73). The motion court held that the jury heard evidence that appellant was at the Waffle House and rejected the alibi defense (PCR L.F. 73).

"Review of denial of post-conviction relief under Rule 29.15 is limited to determining whether the motion court's findings of fact and conclusions of law are clearly erroneous." *McFadden v. State*, 256 S.W.3d 103, 105-106 (Mo. banc 2008). "The appellate court will disturb the motion court's disposition only if the reviewing court is left with the definite and firm impression that a mistake has been made." *Id.*

In order to establish ineffective assistance of counsel, appellant must show (1) that counsel's performance was so deficient that it fell below an objective standard of reasonable competence, and (2) that counsel's deficient performance prejudiced appellant's defense. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 684 (1984). There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment. *Strickland*, 466 U.S. at 689-690. To show prejudice, appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Appellant bears the burden of proving his claim by a preponderance of the evidence. Rule 29.15 (i).

"The selection of witnesses and the introduction of evidence are questions of trial strategy and the mere choice of trial strategy is not a foundation for finding ineffective assistance of counsel." *Ringo v. State,* 120 S.W.3d 743, 748 (Mo. banc 2003). To show ineffective assistance of counsel for failure to call a witness, appellant must show that: (1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would have testified at trial; and (4) the witness's testimony would have produced a viable defense. *Edwards v. State*, 200 S.W.3d 500, 518 (Mo. banc 2006).

Appellant in the present case cannot show that counsel was ineffective for failing to call Ms. Halphan. Counsel testified that he investigated Ms. Halphan but that he could not locate her (PCR Tr. 104). The motion court credited counsel's testimony (PCR L.F. 73). Accordingly, appellant cannot show that counsel was ineffective for failing to call Ms. Halphin as a witness. *See State v. Fuller*, 880 S.W.2d 589, 595 (Mo.App.W.D. 1994) (counsel was not ineffective for failing to call a witness where counsel investigated the witness but was unable to locate her).

Additionally, there was no reasonable probability of a different result had counsel called Ms. Halphin. Counsel called Ms. Halphin's boyfriend, Lance Hill, who testified that he was with appellant at the Waffle House (Tr. 915-917). Mr. Hill testified that it was "daylight" when he and appellant left

the Waffle House (Tr. 921). Ms. Halphin's testimony that appellant was in the Waffle House until the sun came out would have been merely cumulative to Lance Hill's testimony (PCR Tr. 8). Counsel is not ineffective for failing to present cumulative evidence. *Johnson v. State*, 388 S.W.3d 159, 167 (Mo.banc 2012).

In addition to Lance Hill, counsel called Linda Green, who testified that she saw appellant get into his car, that she followed him to the Waffle House, and that it was shortly before 4:00 am when appellant reached the Waffle House (Tr. 840, 850). Anne Hill also testified that she saw appellant at Neon Club and that he left the club around 4:45 a.m. (Tr. 860-862). Mandy Hale testified that she spoke with appellant on the phone around 3:00 am on March 2, 2008, and that appellant agreed to meet her at her apartment (Tr. 883-885). Ms. Hale also testified that she drove by the Waffle House and saw appellant inside, and that appellant came to her apartment later (Tr. 885-888). Because counsel presented the testimony of four alibi witness, appellant cannot show that counsel was ineffective or that he was prejudiced by counsel's failure to call Ms. Halphin. Appellant's claim should be denied.

V.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's claim of ineffective assistance of counsel for failing to seek sanctions for the alleged non-disclosure of a recording of the preliminary hearing.

In his fifth point, appellant claims that his trial counsel was ineffective for failing to seek sanctions when the state failed to disclose recordings of the preliminary hearing (App. Br. 40-43).

Appellant's amended motion alleged that counsel was ineffective for failing to request remedies for the state's failure to provide appellant with a recording of the preliminary hearing (PCR L.F. 47-48). Appellant alleged that counsel requested the recording of the preliminary hearing, and that the state responded that the hearing was not recorded (PCR L.F. 47). Appellant alleged that counsel stated at trial that the hearing was recorded (PCR L.F. 47). Appellant alleged that the state maintained that there was no recording, and that the court asked counsel if he wanted to say anything else for the record, but counsel had nothing to add (PCR L.F. 48). Appellant alleged that counsel failed to request any relief from the state's failure to comply with the discovery rules (PCR L.F. 48).

Appellant's trial counsel testified at the evidentiary hearing that he believed that it would have been in appellant's best interest to waive the

preliminary hearing because counsel feared that the state could use the victim's testimony from the preliminary hearing at trial if the victim did not come to trial (PCR Tr. 69-70). Counsel stated that he advised appellant to waive preliminary hearing, but appellant disagreed (PCR Tr. 70).

Counsel testified that he did not record the hearing to avoid the recording being used by the state at trial (PCR Tr. 70, 76-77). Counsel believed that the prosecutor recorded it (PCR Tr. 70, 76-77). Counsel testified that he wrote a memorandum to the case file indicating that the prosecutor recorded the hearing (PCR Tr. 70-71). Counsel testified that he requested the recording from the prosecutor's office, and that the prosecutor stated that she would look for a recording, but that she ultimately did not find a recording (Tr. 74-75). Counsel stated that the issue was brought to the court's attention, and that the prosecutor advised the court that she used her best efforts to find a recording and that she could not find one (PCR Tr. 106). Counsel stated that he did not ask for sanctions because he did not believe that there was an appropriate sanction available (PCR Tr. 106-107). Counsel testified that he did not believe that the court would have granted a motion to exclude the victim's testimony (PCR Tr. 107).

Appellant testified at the evidentiary hearing that the preliminary hearing was recorded with a tape recorder that was placed on the witness stand (PCR Tr. 14-15).

The motion court denied appellant's claim finding that appellant failed to prove that a recording of the preliminary hearing existed and that he failed to show prejudice (PCR L.F. 74).

"Review of denial of post-conviction relief under Rule 29.15 is limited to determining whether the motion court's findings of fact and conclusions of law are clearly erroneous." *McFadden v. State*, 256 S.W.3d 103, 105-106 (Mo. banc 2008). "The appellate court will disturb the motion court's disposition only if the reviewing court is left with the definite and firm impression that a mistake has been made." *Id.*

In order to establish ineffective assistance of counsel, appellant must show (1) that counsel's performance was so deficient that it fell below an objective standard of reasonable competence, and (2) that counsel's deficient performance prejudiced appellant's defense. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 684 (1984). There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment. *Strickland*, 466 U.S. at 689-690. To show prejudice, appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Appellant bears the burden of proving his claim by a preponderance of the evidence. Rule 29.15 (i).

Appellant in the present case cannot show that counsel was ineffective or that he was prejudiced. At trial, the court heard a lengthy discussion about a possible transcript from the preliminary hearing (Tr. 193-203). The prosecutor told the court that she did not remember recording the preliminary hearing and that a thorough search of the case file did not reveal a tape (Tr. 194-195, 199-201). The court directed the prosecutor to continue looking for a possible tape from the preliminary hearing (Tr. 193-203). Appellant insisted that there was a recording of the preliminary hearing, and the court told him the following: "All I'm doing is trying to deal with what's being presented to me. If we have further information, we'll deal with that as well." (Tr. 203).

At the postconviction hearing, appellant presented a memorandum from defense counsel about possible recording of the hearing and he testified that the hearing was recorded (PCR Tr.14-15, 70-71). The motion court did not find appellant's evidence credible and concluded that appellant did not prove that there was a recording of the preliminary hearing (PCR L.F. 74). In postconviction proceedings, the motion court determines the credibility of the witnesses and is free to believe or disbelieve the testimony of any witness, including that of the movant. *Hurst v. State*, 301 S.W.3d 112, 117 (Mo. App., E.D. 2010). Because the motion court determined that there was no recording of the preliminary hearing, appellant cannot show that counsel was

ineffective for failing to seek sanctions for the non-disclosure of such recording.

Additionally, appellant failed to show prejudice. Appellant did not present any evidence showing what was said at the preliminary hearing and how it would have been beneficial to his defense. Appellant also failed to prove that a specific sanction would have been available if counsel had persuaded the court to order one and that there was a reasonable probability of a different outcome if such sanction was imposed. Appellant bears the burden of proving his claim by a preponderance of the evidence. Rule 29.15 (i); *Cothran v. State*, 436 S.W.3d 247, 251 (Mo. App., W.D. 2014). Without presenting evidence showing that a recording of the preliminary hearing would have aided his defense, or that an unspecified sanction would have aided his defense, appellant cannot show that there was a reasonable probability of a different result. Appellant's claim should be denied.

CONCLUSION

For the foregoing reasons, the denial of Appellant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.0, and contains 7,154 words as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on March 23, 2016, to Samuel Buffalo, Woodrail Centre, Bldg. 7, Suite 100, 1000 West Nifong, Columbia, MO 65203.

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