No. SC89142

In the
Missouri Supreme Court

BRYAN DICKERSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of St. Francois County
Twenty-Fourth Judicial Circuit, Division II
The Honorable Kenneth W. Pratte, Judge

RESPONDENT'S SUBSTITUTE BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
richard.starnes@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

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 St. Francois County. The conviction sought to be vacated was for voluntary manslaughter, § 565.023, RSMo 2000, for which appellant was sentenced as a persistent offender to life in the custody of the Department of Corrections. The Missouri Court of Appeals, Eastern District, affirmed appellant's conviction and sentence pursuant to Rule 30.25(b). Bryan Dickerson v. State of Missouri, ED89381, order and memorandum opinion (Mo. App., E.D. January 15, 2008). On May 20, 2008, this Court sustained appellant's application for transfer pursuant to Supreme Court Rule 83.04, and therefore has jurisdiction over this case. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Bryan Dickerson, was charged by indictment with second-degree murder (L.F. 19-20). A substitute information was later filed charging appellant as a prior and persistent offender (L.F. 38-39). This cause went to trial by jury beginning on May 10, 2005, in the Circuit Court of St. Francois County, the Honorable Kenneth W. Pratte presiding (Tr. 1).

The facts of the underlying criminal case, in the light most favorable to the verdict, were stated by the Eastern District Court of Appeals in its memorandum opinion on direct appeal as follows:

> Around 2:00 p.m. on June 3, 2003, Appellant entered Cuzzin's Sports Bar (Cuzzin's) where he had some drinks and played some "pull tabs" for about an hour, then left.
>
> Later that day, Appellant visited another bar called Terry and Margie's. At Terry and Margie's, Kevin Propst (Propst) approached Appellant and asked him to leave a number of other bar patrons alone. Appellant responded by threatening to shoot Propst, who returned to his table and sat back down. Appellant then punched Propst in the face and knocked him off his bar stool. Appellant then left the bar.
>
> Around 8:00 p.m., Appellant returned to Cuzzin's. As Appellant walked through the bar, he announced "that he was

going to kick some ass," and that he "had just whooped some ass at another bar." Appellant began telling other customers, "I'm going to kill you," and started "talking about their moms" using vulgar language.

Sixty-one-year-old Frederick "Buddy" Jones (Jones) was also in the bar at this time.[1] Appellant was seated near Jones and another man, Al Sumakeris (Sumakeris). An altercation between Appellant and Jones erupted, but the two were separated before any contact was made. Even after being separated from Jones, Appellant continued to swing at Jones a number of times. Jamie Berghaus (Berghaus), another customer at the bar, testified that Appellant appeared "outraged," and was "just trying to hit anybody he could." Other bar patrons told Appellant to leave, and that they were going to call the police. Appellant picked up a bar stool and began "jabbing it at people as they approached him," but someone managed to take the stool from him before he hit anyone with it.

The bar's bouncer, Tony Boyer (Boyer), led Appellant toward the back door of the bar so that he could leave without

[1] Jones was 6'0" and weighed 260-270 pounds. Appellant was 5'11" and weighed 220 pounds (Footnote in original).

any further altercation. Jones went to another part of the bar to get away from the situation, and stood between a pool table and the back wall of the bar, leaning on the pool table. As Boyer led Appellant by Jones on his way to the door, Appellant struck Jones hard in the face with his fist. Boyer said that Jones "went down hard like a sack of potatoes" and hit his head on the floor. Boyer and some other bar patrons pulled Appellant away from Jones, and restrained him until the police arrived. Jones, who was unconscious, began to convulse on the floor and make a snoring sound. Even while restrained, Appellant continued to say, "I'm going to kill you," to the unconscious Jones. Police and medical responders arrived shortly.

Jones remained in a coma from the time Appellant hit him until he died on October 10, 2003, from complications of blunt head trauma.

The State charged Appellant with second-degree murder. At trial, Appellant testified in his own defense. Appellant testified that when he returned to Cuzzin's for the second time, around 8:00 p.m., Jones and Sumakeris sat down near him and started a conversation about a $90 pull tab lottery prize he had won earlier. Appellant testified that Jones told him that he

> should buy the house a drink, and when Appellant refused Sumakeris said that his refusal could be a real problem. Appellant testified that he told Jones and the other man about the prior incident at Terry's and Margie's, and that he did not like to be threatened. Appellant testified that Jones and Sumakeris called him a liar and that Sumakeris poked Appellant in the shoulder with his fingers, at which point Appellant testified that he punched Sumakeris in the face. Appellant testified that a fight broke out, and he tried to get to an exit of the bar. Appellant testified that as he attempted to get to the back door of the bar he tried to pass Jones, who appeared to be winding up to strike Appellant. Appellant testified that in order to prevent Jones from striking him, he punched Jones in the face first.

State of Missouri v. Bryan Dickerson, ED86658, memo. op. at 2-4 (Mo.App., E.D. June 13, 2006).

The jury found appellant guilty of the lesser included offense of voluntary manslaughter (L.F. 59; Tr. 369). The court sentenced appellant as a persistent offender to life imprisonment (L.F. 66; Tr. 400). On direct appeal, the Eastern District affirmed appellant's conviction and sentence pursuant to Rule 30.25(b). State v. Dickerson, 193 S.W.3d 797 (Mo.App., E.D. 2006).

On September 8, 2006, appellant timely filed his *pro se* Motion to Vacate, Set Aside, or Correct Judgment and Sentence (PCR L.F. 4-16). Appointed counsel filed an amended motion, raising two claims of ineffective assistance of trial counsel and one claim of ineffective assistance of appellant counsel (PCR L.F. 18-45). On January 8, 2007, the motion court submitted findings of fact and conclusions of law denying appellant's motion without an evidentiary hearing (PCR L.F. 46-49). The Eastern District affirmed appellant's conviction and sentence pursuant to Rule 30.25(b). Bryan Dickerson v. State of Missouri, ED89381, order and memorandum opinion (Mo. App., E.D. January 15, 2008). On May 20, 2008, this Court sustained appellant's application for transfer pursuant to Supreme Court Rule 83.04.

ARGUMENT

I.

The motion court did not clearly err in denying, without an evidentiary hearing, appellant's post-conviction claim that trial counsel was ineffective for failing to object to medical examiner Dr. Russell Deidiker's testimony that the manner of the victim's death was "homicide" because that evidence was admissible and merely cumulative to other evidence establishing that appellant caused the victim's death.

Appellant claims that the motion court clearly erred in denying his claim, without a hearing, that trial counsel was ineffective for failing to object to Dr. Deidiker's testimony that the manner of the victim's death was "homicide," arguing that this testimony was unqualified testimony on the "ultimate issue" of an element of the crime (App.Br. 19-24). But because an expert witness may testify about an ultimate issue, and because appellant failed to plead facts showing prejudice, as the testimony was merely cumulative to abundant evidence, including appellant's own testimony, that appellant intentionally struck the victim, which led to his death, the motion court did not clearly err in refusing to find counsel ineffective for failing to make that meritless objection.

A. Facts

At trial, Dr. Deidiker, the forensic pathologist who conducted the autopsy on the victim, testified that the term "cause of death" referred to the "disease or physiologic derangement or injury that results in death; for example, a heart attack could be a cause of death. A gunshot wound to the head could be a cause of death" (Tr. 117). He then defined

"manner of death" as "the circumstances to bring about the cause," and gave the examples of shooting himself in the head being suicide and someone else shooting him in the head being a "homicide" (Tr. 118). He testified that the victim was in a comatose state from the date of the crime until October10, 2003, the date of death (Tr. 120). He testified that the victim had suffered bleeding an injury to the head and brain caused by trauma consistent with the events surrounding the crime (Tr. 121-123). He testified, without objection, that the manner of death was "homicide" and that the cause of death was "complications of blunt head trauma" (Tr. 124). He later testified that the victim had additional health problems which contributed to his eventual death, but that those problems would not have occurred or caused his death at that time if not for the head injury (Tr. 131).

In his amended motion, appellant claimed that trial counsel was ineffective for failing to object to the testimony that the manner of death was "homicide" (PCR L.F. 22-23). He alleged that this testimony was objectionable because it was improper expert testimony on an ultimate issue of the case (PCR L.F. 25). He alleged prejudice in that the use of the term "homicide," while technically encompassing his trial defense of self-defense and accident, had a "singularly sinister connotation," and in that there was a question as to whether the "proximal cause" of death was the criminal act or a "combination of pneumonia and other health problems" (PCR L.F. 27-28). Thus, appellant concluded, the outcome of the trial would have been different but for counsel's failure to object.

The motion court denied this claim, stating that Dr. Deideker's testimony as to the manner of death was relevant and permissible to establish that the victim died due to the

blunt head trauma inflicted by the defendant as opposed to other causes (PCR L.F. 46-48). The motion court also noted that there was other evidence supporting this conclusion, as the evidence showed "trauma inflicted on the victim" by appellant and the victim's subsequent unconsciousness after that trauma from which he never regained consciousness (PCR L.F. 47-48).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(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 a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

C. Appellant was Not Entitled to an Evidentiary Hearing

The motion court is not required to hold an evidentiary hearing where the motion and the files and records of the case conclusively show that the movant is not entitled to relief. Nicklasson, 105 S.W.3d at 486; Supreme Court Rule 29.15(h). That burden is met only when (1) the movant alleges facts, not conclusions, which would warrant relief, (2) the allegations of fact raise matters not refuted by the record, and (3) the matters complained of resulted in prejudice to movant. Ringo v. State, 120 S.W.3d 743, 745 (Mo. banc 2003).

To demonstrate ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To demonstrate prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483.

Here, appellant failed to plead facts establishing that counsel was ineffective. First, he failed to plead facts showing that this evidence was actually inadmissible, thus requiring counsel to object. Despite appellant's assertion to the contrary (App.Br. 20-21), an expert witness is permitted to testify to an ultimate issue in the case, so long as the expert does not express an opinion as to the guilt or innocence of the defendant. State v. Jaco, 156 S.W.3d 775, 780 (Mo. banc 2005); State v. Fairow, 991 S.W.2d 712, 715 (Mo.App., E.D. 1999). Dr. Deideker's testimony was clear: the manner of death of homicide simply meant that the victim's death was caused by the act of another person, and specifically in this case meant that the death was caused by injuries to the victim's head caused by another person (Tr. 118). Nothing in this testimony expressed an opinion that appellant was the one who inflicted the injuries, that the person who caused the injuries had any specific intent to cause death or serious physical injury when inflicting the injuries, or that the person causing the death was not properly defending himself when the injuries were caused. Therefore, the testimony did not improperly state an opinion as to appellant's guilt, and thus was admissible. Counsel is

not ineffective for failing to make a meritless objection. Middleton v. State, 103 S.W.3d 726, 741 (Mo. banc 2003).

Second, appellant failed to plead facts demonstrating that he suffered any prejudice from this testimony, as this testimony was merely cumulative in effect to other testimony establishing that the victim died due to injuries suffered when appellant punched him in the head. Several witnesses testified that appellant struck the victim in the head, which caused the victim to fall to the ground, hit his head on the floor, and lose consciousness (Tr. 186-187, 203-205, 226-229, 238, 258). Even appellant admitted in his own testimony that he intentionally hit the victim in an effort to protect himself from what he believed was an impending blow, thus admitting that he struck the blow leading to the victim's injuries (Tr. 295-296). Dr. Deideker testified that the head injuries due to the blow were the ultimate cause of death, and that any other complications contributing to the death were due to or exacerbated by that blow (Tr. 121-124, 131). Therefore, testimony that the victim's death was due to the acts of another person—i.e., that it was a "homicide"—was merely cumulative to abundant evidence establishing the same thing. Thus, there was not a reasonable probability of a different result but for counsel's failure to object to this evidence.

For the foregoing reasons, appellant's first point on appeal must fail.

II.

The motion court did not clearly err in denying, without an evidentiary hearing, appellant's post-conviction claim that trial counsel was ineffective for failing to object to appellant having to wear shackles during the trial because appellant failed to plead facts warranting relief in that he failed to plead that counsel was aware of any violation of appellant's rights or that he suffered Strickland prejudice, and the record refuted his claim of prejudice.

Appellant claims that the motion court clearly erred in denying his claim, without a hearing, that trial counsel was ineffective for failing to object to his having to wear shackles during the trial, arguing that the record failed to refute his claim that he was visibly shackled during trial and that there was no justification for the shackling (App.Br. 25-30). But because appellant failed to allege facts demonstrating that counsel knew or should have known that appellant's shackles were visible to the jury or that he suffered Strickland prejudice, and because the record refuted his claim of prejudice, appellant was not entitled to a hearing on his claim.

A. Facts

Prior to trial, trial counsel filed a motion to prohibit the use of physical restraints on appellant during trial, asking for any shackles or restraints to be removed before appellant had to appear before the jury (PCR L.F. 43-45). There was never any ruling on the record on this motion, and no one made any record at trial as to the use of visible restraints.

In his amended motion, appellant claimed that counsel was ineffective for failing to object to appellant having to wear "steel anklets" while in the courtroom and for being "paraded into court past assembling jurors while handcuffed as well" (PCR L.F. 28-29). Appellant claimed that, while counsel did file the pretrial motion, counsel abandoned the objection by failing to seek a ruling on the motion or make a record at trial of the shackling (PCR L.F. 29, 31-32). He alleged that his "ankles were secured in locking steel anklets Movant believes were visible to jurors" and that he "recalls that the anklet was visible to jurors during trial," but counsel made no record of the presence of the shackles (PCR L.F. 30). Appellant claims that the failure to object to the shackles prejudiced him because it made it appear that he was a "violent person who could not be counted on to control his behavior," thus leading the jury to reject his claim of self-defense (PCR L.F. 32).

The motion court denied the claim, finding that appellant failed to allege that the record demonstrated that any shackling was visible or that he advised counsel that any shackling was visible (PCR L.F. 48).

B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(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 a definite and firm impression that a mistake has been made. Id. On

review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

C. Appellant was Not Entitled to an Evidentiary Hearing

The motion court is not required to hold an evidentiary hearing where the motion and the files and records of the case conclusively show that the movant is not entitled to relief. Nicklasson, 105 S.W.3d at 486; Supreme Court Rule 29.15(h). That burden is met only when (1) the movant alleges facts, not conclusions, which would warrant relief, (2) the allegations of fact raise matters not refuted by the record, and (3) the matters complained of resulted in prejudice to movant. Ringo v. State, 120 S.W.3d 743, 745 (Mo. banc 2003).

To demonstrate ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To demonstrate prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483.

Here, appellant was not entitled to a hearing on his claim of ineffective assistance of counsel because he failed to plead facts demonstrating that counsel's failure to object was deficient. Specifically, while he alleged that he was wearing restraints on his ankle(s) during trial and that he "believed" the jury could see the restraints, he never alleged that ***counsel*** saw the restraints or was even aware appellant was wearing them (PCR L.F. 28-32). Counsel

cannot be deemed ineffective for failing to object to the alleged use of restraints when counsel did not know his client was in fact wearing such restraints. See State v. Lopez, 836 S.W.2d 28, 36 (Mo. App., E.D. 1992)(counsel cannot be deemed ineffective for failing to timely endorse a witness of which she was unaware); State v. Cobb, 820 S.W.2d 704 (Mo. App., S.D. 1991)(counsel cannot be found ineffective for failing to object to a false statement made during closing argument when counsel was unaware of the statement's falsity).

Appellant makes much of the fact that appellant should not be held to have the responsibility to "point out a legal objection concerning a due process violation to his counsel because Appellant—a lay person—would have no reason to know his counsel could object" (App.Br. 28). But appellant misunderstands the meaning of the court's finding. The motion court was not saying that appellant had the duty to advise his counsel of the ***law***, but that he should have advised his counsel of a ***fact*** known to him but not to counsel. The record supports the conclusion that counsel did not know about the restraint: based on counsel's earlier motion, it is reasonable to believe that counsel would have renewed his objection if appellant was wearing restraints visible to him, and thus must not have known about the shackles (PCR L.F. 43-44). Further, the motion court's reference to appellant not telling counsel about the restraints also suggests that the motion court, which also presided over appellant's trial, also did not believe appellant was visibly shackled during trial (PCR L.F. 48). To merit an evidentiary hearing on his claim, appellant had to allege that counsel knew or should have known about what he should have objected to. See Morrow v. State, 21 S.W.3d 819, 823-24 (Mo. banc 2000)(no hearing warranted where movant failed to allege

that counsel should have discovered the information that counsel allegedly should have produced). Because appellant failed to allege an essential fact—that counsel knew or was aware of the alleged shackling he should have objected to—appellant's pleading was deficient, and he was not entitled to an evidentiary hearing on this claim.

Further, appellant failed to plead facts demonstrating that the presence of any allegedly visible restraints resulted in Strickland prejudice. First, while appellant pled that he "believed" the shackles were "visible" to the jury, i.e. ***could*** have been seen by members of the jury, he did not actually plead that the restraints were ***actually seen*** by any member of the jury. See Nicklasson, 105 S.W.3d at 485-86. In Nicklasson, the court held that the motion court did not clearly err in failing to hold an evidentiary hearing and in rejecting a post-conviction claim that appellate counsel was ineffective for not challenging on appeal the movant's wearing of shackles during trial. Id. at 486. Although the movant in Nicklasson alleged that the shackles could be heard throughout the courtroom and that the attempts made to conceal them only drew attention to the fact that they were being used, the court held that the movant "would not have been able to succeed on appeal because there was no evidence in the trial record indicating that any juror was aware of the shackling." Id. Likewise, in this case, appellant's failure to plead that his alleged restraints were actually seen by any juror failed to plead facts demonstrating prejudice: if jurors did not actually see the restraints, then appellant would have suffered no prejudice whatsoever. Thus, appellant's failure to include this essential fact must defeat his claim.

Respondent is not hair-splitting, but only trying to show that the motion court's denial of appellant's claim is justified by the purposes of Rule 29.15's pleading requirements. The purpose of a post-conviction motion is to provide the motion court with allegations sufficient to enable the court to decide whether relief is warranted. Morrow, 21 S.W.3d at 824. Courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief. Id. at 822. The requirement that a movant directly allege facts in a post-conviction motion with specificity is more than a technicality. White v. State, 939 S.W.2d 887, 896 (Mo. banc 1997). Requiring timely pleading containing reasonably precise factual allegations is not an undue burden on a movant and is necessary to bring about finality. Id. at 893. Here, appellant's failure to plead all of the substantive facts necessary to determine whether or not counsel's actions were reasonable regarding his alleged shackling prevented the motion court from being able to determine whether appellant's claim as pled was sufficient to justify relief

Finally, the record refutes appellant's claim of prejudice that any visible restraints caused the jury to convict him because he was a dangerous man instead of convicting him based on the evidence. Had the jury wanted to convict appellant simply because he appeared to be a dangerous murderer, it simply could have convicted him of second-degree murder. It did not, instead convicting appellant of a lesser included offense (L.F. 59). By convicting him of only voluntary manslaughter, the jury showed not only that it was not swayed simply by the appearance of appellant in restraints, but that it was willing to believe appellant's testimony about other people in the bar assaulting him to the extent that it provided him

adequate cause for sudden passion. Thus, because the jury's verdict shows that it was not swayed from its duty to presume appellant innocent and convict him of only that crime supported by the evidence, there was not a "reasonable probability of a different result" had some objection been made to the allegedly visible shackles.

For the foregoing reasons, appellant's second point on appeal must fail.

III.

The motion court's failure to include findings of fact and conclusions of law as to appellant's claim of ineffective assistance of appellate counsel does not require an unnecessary remand, as the failure dealt with an isolated issue and the record conclusively shows that the motion court's actions were correct. Moreover, the motion court did not clearly err in denying, without an evidentiary hearing, appellant's post-conviction claim that trial counsel was ineffective for failing to raise a claim of trial court error for admitting evidence of a fight appellant had earlier that night because appellant would not have been entitled to relief on direct appeal had the claim been raised.

Appellant claims that the motion court clearly erred in denying his claim, without a hearing, that appellate counsel was ineffective for failing to raise on appeal the introduction of evidence of appellant's fight at another bar earlier on the evening of the crime, arguing that this was inadmissible evidence of an uncharged prior bad act (App.Br. 31-35). But because appellant would not have been entitled to relief on direct appeal on this claim, as the evidence was admissible to show intent, motive, and absence of mistake or accident, and was cumulative to appellant's own testimony about the fight, this evidence was admissible and not objectionable. Thus, appellant counsel was not ineffective for failing to raise this claim.

A. Facts

Prior to trial, appellant moved to exclude evidence that appellant "allegedly hit Kevin Propst at Terry and Margie's Bar" the night of the crime as improper propensity evidence

(L.F. 32-34). At a pretrial hearing, the prosecutor argued that the evidence was relevant to negate appellant's claims of self-defense and provocation and was part of the complete story of the evening, since it happened just before appellant came to the scene of the crime and appellant made statements about it at the scene of the crime shortly before striking the victim in this case (Tr. 20-21). The court found that the evidence would be probative and relevant (Tr. 22).

Kevin Propst testified, over objection, that, while he was at Terry and Margie's, he approached appellant and asked him to leave some of the other bar patrons alone (Tr. 167). Appellant responded by saying that he would shoot Propst (Tr. 167). When Propst returned to his table and sat down, appellant "sucker punched" him in the face, knocking him from his bar stool , and then left (Tr. 168-169). Other witnesses testified that when appellant came into Cuzzin's, the scene of the crime, he said that was going to "kick some ass" and that he had "just whooped somebody's ass at another bar," directing these comments toward the victim and his friend Sumakeris (Tr. 149, 152-155, 255). Appellant testified that he did get into an altercation with Propst, which he claimed Propst started, and gave Propst "a little jab in the lip" (Tr. 280). He also testified that he told the victim and Sumakeris that someone over at Terry and Margie's threatened him and that he "had to deter him" (Tr. 285).

Appellant included his objection in his motion for new trial (L.F. 60-61). Appellate counsel, however, did not include the claim in appellant's direct appeal (ED86685 App.Br.).

In his amended motion, appellant claimed that appellate counsel was ineffective for failing to include this claim in appellant's brief (PCR L.F. 33). Appellant alleged that the

evidence was improper evidence of an uncharged bad act admitted solely to prove appellant's propensity to get into bar fights (PCR L.F. 34-35). He alleged that the claim was properly preserved for appeal, apparent from the record, was meritorious, and would have resulted in a different outcome on appeal had it been raised (PCR L.F. 34-35, 37).

The motion court denied appellant's motion, but issued no specific findings of fact and conclusions of law as to this claim (PCR L.F. 46-49).

B. Remand for Findings and Conclusions is Not Necessary

The motion court is required to submit findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. Breeden v. State, 15 S.W.3d 46, 48 (Mo.App., W.D. 2000); Supreme Court Rule 29.15(j). There is no precise formula to which findings of fact and conclusions of law must follow. State v. Taylor, 929 S.W.2d 209, 223 (Mo. banc 1996). Findings of fact and conclusions of law are sufficient if they permit meaningful appellate review. State v. Oris, 892 S.W.2d 770, 773 (Mo.App., W.D. 1995). Even if the findings and conclusions are deficient, there is no need to remand the case for more specific findings and conclusions where it is clear from the record that the motion court's action was correct if the issue with missing findings was an isolated issue. Breeden, 15 S.W.2d at 49. This exception to the requirement applies where only one issue of "many" in the post-conviction motion was overlooked by the motion court. Clayton v. State, 164 S.W.3d 111, 116 (Mo.App., E.D. 2005). This exception should apply in this case, as the motion court did enter findings and conclusions as to the other two claims raised in the amended motion, omitting mention of only this issue; thus, this is an "isolated issue" (PCR

L.F.). But see Griffith v. State, 233 S.W.3d 774, 777 (Mo.App., E.D. 2007)(finding without explanation that the omission of one of four issues from findings and conclusions did not constitute an isolated issue). Thus, even though the motion court did not specifically address this claim in the findings and conclusions, a remand is unnecessary because, as will be shown, the record shows that appellant was not entitled to relief on his claim.

C. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 29.15(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 a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

D. Appellant was Not Entitled to an Evidentiary Hearing

The motion court is not required to hold an evidentiary hearing where the motion and the files and records of the case conclusively show that the movant is not entitled to relief. Nicklasson, 105 S.W.3d at 486; Supreme Court Rule 29.15(h). That burden is met only when (1) the movant alleges facts, not conclusions, which would warrant relief, (2) the allegations of fact raise matters not refuted by the record, and (3) the matters complained of resulted in prejudice to movant. Ringo v. State, 120 S.W.3d 743, 745 (Mo. banc 2003).

To demonstrate ineffective assistance of counsel, the post-conviction movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Nicklasson, 105 S.W.3d at 483. To demonstrate prejudice, the movant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694; Nicklasson, 105 S.W.3d at 483. To prevail on a claim of ineffective assistance of appellate counsel, strong grounds must exist which show that counsel failed to assert a claim of error which would have required reversal had it been asserted on appeal and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it. Hall v. State, 16 S.W.3d 582, 587 (Mo. banc 2000). The right to relief due to ineffective assistance of appellate counsel "inevitably tracks" the plain error rule—the error that was not raised on appeal must have been so substantial as to amount to a manifest injustice or miscarriage of justice.'" Moss v. State, 10 S.W.3d 508, 514-15 (Mo. banc 2000).

Here, appellant failed to plead facts warranting relief because this claim was not so substantial that it would have required reversal on appeal had it been raised. First, the evidence was admissible. The general rule is that evidence of uncharged misconduct is inadmissible to show the defendant's propensity to commit the charged crimes. State v. Bernard, 849 S.W.2d 10, 13 (Mo.banc 1993). There are, however, exceptions, and proof of prior bad acts is admissible if it tends to establish motive, intent, absence of mistake or

accident, identity, a common scheme or plan, or a signature *modus operandi*. State v. Gilyard, 979 S.W.2d 138, 140 (Mo. banc 1998). The State is also entitled to present evidence of uncharged acts to present a clear and coherent picture of the offense that transpired. State v. Harris, 870 S.W.2d 798, 810 (Mo. banc 1994). This includes presenting evidence of uncharged acts that are part of the circumstances or sequence of events surrounding the crime. Id. Evidence is logically relevant if it has some legitimate tendency to directly establish the accused's guilt of the charges for which he is on trial. State v. Sladek, 835 S.W.2d 308, 311 (Mo. banc 1992). Evidence is legally relevant if its probative value outweighs its prejudicial effect. State v. Mallet, 732 S.W.2d 527, 534 (Mo. banc 1987). The balancing of the effect and value of evidence rests within the sound discretion of the trial court. Bernard, 849 S.W.2d at 13. Where the evidence fits into one of the exceptions, however, the evidence is considered both logically and legally relevant to proving the defendant's guilt for the charged offense. State v. Roberts, 948 S.W.2d 577, 591 (Mo. banc 1997).

The evidence in this case fit into several of these exceptions. First, the evidence was relevant to show appellant's intent. The State had to prove that appellant purposely attempted to cause serious physical injury when he struck the victim, knocking him to the ground (L.F. 46). § 565.021.1(1), RSMo 2000. A large part of appellant's defense, and a claim appellant made even at sentencing, was that he was "absolutely not" trying to injure the victim by hitting him "one time" and that he did not know the damage he could cause with "just" one punch (Tr. 116, 295, 306, 351, 359, 396, 398-399). The fact that appellant

had, just prior to the assault of the victim, punched another large person hard enough to knock him from a bar stool onto the floor tended to demonstrate that appellant was well aware that his punching the victim caused sufficient force to cause serious physical injury, supporting the inference that this was his intent when he punched the victim. See State v. Johnson, 207 S.W.3d 24, 42 (Mo. banc 2006)(evidence that a child murderer was stalking other neighborhood children two days prior to the murder admissible to establish intent and the context of the offense).

Second, the evidence was admissible to demonstrate appellant's motive. Because appellant claimed that his punching the victim was done in self-defense, his motive was also squarely at issue (Tr. 295-296, 301, 306, 350, 355, 357-358, 360; L.F. 46, 49-50). State v. Tolliver, 101 S.W.3d 313, 315-16 (Mo.App., E.D. 2003). The State "is entitled to wide latitude in developing evidence of motive." State v. Phillips, 939 S.W.2d 502, 506 (Mo.App., W.D. 1997). Here, appellant's behavior at the other bar shortly before the crime tended to negate his claim that he was acting in self-defense during the crime: his desire to unilaterally enter into a "fight" unprovoked just minutes before tended to show that he also unilaterally decided to enter into a "fight" with the victim without provocation. Further, appellant's motive was also at issue because of the submission of voluntary manslaughter—thus, the State had to prove that appellant was not laboring under the influence of sudden passion arising from adequate cause (L.F. 46). § 565.023.1, RSMo 2000. Because appellant's state of mind—that he was looking to start trouble and pick a fight or simply haul off and hit anyone who slighted him—would reasonably have been similar at both bars, as

almost no time at all expired between the two altercations, the first assault was highly relevant to establish that appellant intended to cause injury to just about anyone that night, that he was the initial aggressor, that he did not withdraw from the fight he started, and that he was not acting under sudden passion, but had been in a fighting mood prior to entering the bar. Thus, the evidence was admissible to establish motive.

Third, and similarly, the evidence was relevant to establish the absence of accident. Part of appellant's defense was that the victim's death was an unintended consequence of the punch: "It's like an accidental death, okay, by hitting him one time" (Tr. 359). Evidence of prior assaultive behavior is admissible to refute a claim of accident in a subsequent assault. See State v. Martinelli, 972 S.W.3d 424, 436 (Mo.App., E.D. 1998). Therefore, the fact that appellant was intentionally assaultive just prior to the events at Cuzzin's tended to establish that appellant was intentionally assaultive towards the victim, and that the victim's injuries were not, as appellant claimed, "accidental."

Further, appellant would not have succeeded on appeal of this claim because, regardless of whether or not there was error, appellant did not suffer prejudice. The evidence of appellant hitting Propst was merely cumulative to testimony that appellant said he had "whooped somebody's ass" earlier that evening, which was clearly admissible to show the events leading up to the punching of the victim (Tr. 149, 152-155, 255). It was also cumulative to appellant's own testimony that he punched Propst and made statements about the earlier confrontation to the victim (Tr. 280, 285). A party is not prejudiced from the admission of cumulative evidence. Williams v. State, 226 S.W.3d 871, 875 (Mo.App., S.D.

2007). Also, appellant was acquitted of second-degree murder and instead convicted of voluntary manslaughter (L.F. 59). By making that finding, the jury necessarily must have concluded that, while appellant was criminally responsible for his acts, he was sufficiently provoked prior to the crime to create adequate cause for sudden passion. Thus, the jury rejected the prejudicial effect of this evidence appellant now claims—that the evidence showed he had a propensity to assault people and, behaving in conformity with that propensity, attacked the victim without provocation. Therefore, appellant was not prejudiced by this evidence, and reversal would not have been required had this issue been raised on direct appeal.

Because the evidence of appellant's punching of Propst was admissible to establish appellant's intent and motive and the absence of accident, and appellant suffered no prejudice, appellant would not have succeeded on direct appeal this claim been raised. Thus, appellate counsel could not have been ineffective for failing to raise the claim on direct appeal, and appellant's third and final point on appeal must fail.

CONCLUSION

In view of the foregoing, the denial of appellant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122

P. O. Box 899
Jefferson City, MO 65102
(573) 751-332l
Fax (573) 751-5391
richard.starnes@ago.mo.gov
Attorneys for Respondent

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) and contains 7162 words, excluding the cover, this certification and the appendix, as determined by Microsoft Word 2003 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 30th day of June, 2008, to:

Scott Thompson
Office of the State Public Defender
1000 St. Louis Union Station, Suite 300
St. Louis, Missouri 63103

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
richard.starnes@ago.mo.gov
Attorneys for Respondent

APPENDIX