



In the Missouri Court of Appeals Eastern District

DIVISION FOUR

████████████████████)	No. ED108449
)	
Appellant,)	Appeal from the Circuit Court
)	of the City of St. Louis
vs.)	
)	Honorable Annette Llewellyn
STATE OF MISSOURI,)	
)	
Respondent.)	FILED: December 15, 2020

████████████████████ (“Movant”) appeals from the motion court’s judgment denying his Rule 29.15¹ amended motion for post-conviction relief after an evidentiary hearing. Movant asserts the motion court clearly erred because (1) his trial counsel was ineffective in failing to object on the ground of “burden shifting” when the prosecutor asked Movant’s alibi witness why she did not tell the police about his alibi, (2) his trial counsel was ineffective in failing to object to the admission of an exhibit that contained recorded phone calls on the ground that it lacked foundation, and (3) his appellate counsel was ineffective in failing to challenge the trial court’s rulings with regard to the prosecutor’s questioning of Movant’s alibi witness as to her relationship with Movant’s trial counsel. The judgment is affirmed.

¹ All Rule references are to the Missouri Supreme Court Rules (2019).

Factual and Procedural Background

The State charged Movant with first-degree assault, first-degree robbery and two counts of armed criminal action. At trial, the victim testified that he met with Movant for the purpose of selling him a stolen car and that Movant shot him repeatedly. ██████████ who was Movant's girlfriend, told the jury that Movant had been with her at her home on the night in question. During cross-examination, the prosecutor questioned ██████████ about the fact that she did not inform the police of Movant's alibi after he had been indicted. She answered, without objection, "No, I called a lawyer, an attorney." The prosecutor then elicited from ██████████ that she had hired Movant's trial counsel, met with him, and talked to him regularly. The prosecutor also brought up a phone conversation ██████████ had with Movant while he was incarcerated, and asked if Movant became upset with her because she had not told trial counsel about Movant's alibi. ██████████ responded that Movant did not become upset and had simply asked her if she had told trial counsel about his alibi. The prosecutor asked, "And you told him no?" and ██████████ responded, "He asked me why, and I said, because I'm not credible." The prosecutor subsequently asked, "And he was mad at you because now he's been indicted for six months . . . [a]nd you haven't told anyone that you're his alibi?" and ██████████ answered, "He wasn't mad." Trial counsel then objected and stated to the trial court:

[I]n continued . . . cross-examination, [the prosecutor] has attempted to inject me into the mix as a witness to these events, as a witness to alibi discussions. And I'm not going to be drawn into that as a witness, and it is improper for her to suggest to this jury through cross-examination that somehow I should be goaded into testifying about what was discussed with ██████████ when there was a discussion about alibis, when that was discussed with [Movant], and that's what all these questions were meant to raise.

The trial court overruled the objection and denied trial counsel's request for a mistrial.

During rebuttal, the State moved for the admission of Exhibit 31, which contained recordings of phone calls made by Movant while he was incarcerated. Trial counsel stipulated to the admission of the exhibit as a business record, noting that he “was agreeing that [the State] didn’t have to bring anybody from Jefferson City as to those calls.” The trial court admitted the exhibit into evidence, and the prosecutor played several portions of it to the jury.

The jury found Movant guilty of first-degree assault and armed criminal action, but acquitted him of the remaining charges. The trial court sentenced Movant, as a prior and persistent offender, to a total of 30 years in prison. This Court affirmed Movant’s convictions and sentences on direct appeal. *See State v. ██████████* 547 S.W.3d 829 (Mo. App. E.D. 2018).

Movant filed a *pro se* Rule 29.15 motion in which he sought post-conviction relief, and appointed counsel filed an amended motion, which the motion court denied following an evidentiary hearing. This appeal follows.

Standard of Review

We review a motion for post-conviction relief to determine whether the motion court’s findings of fact and conclusions of law are clearly erroneous. *Forrest v. State*, 290 S.W.3d 704, 708 (Mo. banc 2009); Rule 29.15(k). Findings and conclusions are clearly erroneous if, after reviewing the entire record, there is “a definite and firm impression that a mistake has been made.” *Id.* (quoting *Goodwin v. State*, 191 S.W.3d 20, 26 (Mo. banc 2006)).

Discussion

To prevail on a claim of ineffective assistance of counsel, a movant must demonstrate that: (1) counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would exercise in a similar situation; and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Prejudice occurs when “there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. If a movant fails to satisfy either the performance prong or the prejudice prong of the *Strickland* test, his or her claim fails, and it is not necessary for a reviewing court to address the other prong. *Bradley v. State*, 292 S.W.3d 561, 565 (Mo. App. E.D. 2009).

Point I

In his first point, Movant claims the motion court clearly erred in denying his claim that trial counsel was ineffective in failing to object "on the grounds of burden shifting" when the prosecutor asked ██████ why she did not inform the police of Movant's alibi. According to Movant, "the prosecutor attempted to discredit Ms. ██████ by implying that she had a duty to come forward that she did not actually have."

"To prevail on a claim of ineffective assistance of counsel for failure to object, a movant must show that counsel's objection would have been meritorious and the failure to object resulted in a substantial deprivation of his right to a fair trial." *Marshall v. State*, 567 S.W.3d 283, 291 (Mo. App. E.D. 2019).

Missouri courts generally allow prosecutors to impeach the credibility of alibi witnesses by asking them why they failed to inform the police of exculpatory information. *See State v. Hopkins*, 947 S.W.2d 826, 830 (Mo. App. W.D. 1997); *see also Marshall*, 567 S.W.3d at 291-92; *State v. Patterson*, 598 S.W.2d 483, 489 (Mo. App. E.D. 1980). Here, the prosecutor's line of questioning was a valid method of impeaching ██████ and did not shift the burden to Movant. Although ██████ obviously did not have a duty to inform the police of Movant's alibi, the fact that she did not do so was nevertheless relevant to her credibility in that the jury could believe she would have come forward with the information to help Movant if the alibi were true. *See Marshall*,

567 S.W.3d at 291-92. Because an objection on the basis of “burden shifting” would have had no merit, the motion court did not clearly err in denying this claim. *See id.* at 292. Point I is denied.

Point II

In his next point, Movant claims the motion court clearly erred in denying his claim that trial counsel was ineffective in failing to object to Exhibit 31, which contained recordings of phone calls made by Movant while he was incarcerated. Movant claims reasonably competent counsel would have objected on the ground that the exhibit lacked foundation for its admission.

“A stipulation is generally a matter of trial strategy and will not support a claim of ineffective assistance of counsel.” *State v. Holloway*, 877 S.W.2d 692, 697 (Mo. App. E.D. 1994). At the evidentiary hearing, trial counsel testified that he usually stipulated to the admission of certain records if they are routine, “if they are going to come in anyway,” and if he did not think the foundation was “a problem.” He explained that he stipulated to Exhibit 31’s admission in order to “streamline the process” so the State would not have to require a witness to travel from out of town. Trial counsel added that he thought the State would do the same for him. Highly competent attorneys frequently enter into stipulations during trial so that witnesses do not have to travel to testify for the purpose of laying foundation for exhibits. Trial counsel’s courtesy, which he expected the State would return, was reasonable trial strategy. *See id.*

Moreover, to prevail on a claim of ineffective assistance of counsel for failing to object to the admissibility of an exhibit based on lack of foundation, a movant must establish that the necessary foundation could not have been laid to overcome such an objection. *See Clay v. State*, 310 S.W.3d 733, 736 (Mo. App. W.D. 2010). Movant failed to show that even if trial counsel had objected to the admission of Exhibit 31, the State could not have otherwise laid the proper

foundation for its admission by having a witness testify at trial. *See id.* The motion court did not clearly err in denying this claim. Point II is denied.

Point III

Finally, Movant claims the motion court clearly erred in denying his claim that his appellate counsel was ineffective in failing to challenge the trial court's rulings as to the prosecutor's questioning of ██████ about her "relationship with trial counsel." Movant claims that line of questioning improperly injected trial counsel as a witness and that his appellate counsel should have raised the issue on appeal because it was preserved for appellate review and was "outcome determinative."

To prevail on a claim of ineffective assistance of appellate counsel, a movant "must establish that counsel failed to raise a claim of error that was so obvious that a competent and effective lawyer would have recognized and asserted it." *Tisius v. State*, 183 S.W.3d 207, 215 (Mo. banc 2006). "The claimed error must have been sufficiently serious to create a reasonable probability that, if it was raised, the outcome of the appeal would have been different." *Id.*

Movant's claim is without merit. The prosecutor's line of questioning was permissible for the purpose of impeaching ██████ credibility by showing her hesitation in identifying herself as an alibi witness, her own belief that she was not credible, and the fact that Movant had pressured her to come forward as an alibi witness. *See Marshall*, 567 S.W.3d at 291-92.

According to Movant, the prosecutor's cross-examination of ██████ "injected trial counsel into the case" in a manner that precluded him from acting in accordance with Rule 4-3.7(a) of the Missouri Rules of Professional Conduct, which prohibits a lawyer from acting as an "advocate at a trial in which the lawyer is likely to be a necessary witness" unless an exception to the rule applies. In support of this argument, Movant merely states that if ██████ "needed to be impeached

with details about the relationship, [trial counsel] would not be able to do it.” But Movant failed to establish it was in fact necessary for trial counsel to impeach ██████ testimony.

“Failing to raise a nonmeritorious claim does not convict counsel of being ineffective.” *Glover v. State*, 225 S.W.3d 425, 429 (Mo. banc 2007) (per curiam). Because the prosecutor’s cross-examination of ██████ about her relationship with trial counsel was permissible as a means of impeaching her credibility, Movant’s appellate counsel was not ineffective in not raising the issue on appeal. *See id.* The motion court did not clearly err in denying this claim. Point III is denied.

Conclusion

For the foregoing reasons, the judgment is affirmed.



MICHAEL E. GARDNER, Judge

Gary M. Gaertner, Jr., P.J., concurs.
Philip M. Hess, J., concurs.