

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

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MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

DOMINICK KENNEDY,)
)
Movant,)
) No. 1722-CC00511
vs.)
) Division No. 3
STATE OF MISSOURI)
)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Movant timely filed his motion in the present cause pursuant to Rule 29.15 on February 14, 2017.¹ Counsel was appointed to represent movant on February 23, 2017, counsel was granted an additional thirty days in which to file an amended motion, and an amended motion was timely filed on May 24, 2017.

A hearing was held before the Honorable Robert H. Dierker, Jr., who retired before issuing a ruling in this case. The parties have agreed that his successor on the bench may address movant's motion based on a transcript of the hearing before Judge Dierker. This Court has reviewed the records of the underlying criminal case and has reviewed the transcript of the evidentiary hearing, and the Court now rules as follows:

¹ The mandate from his direct appeal was issued on November 18, 2016.

FINDINGS OF FACT

1. Movant was charged as a prior and persistent offender in Cause No. 1322-CR05255 with robbery first degree and armed criminal action. Movant was charged as acting jointly with co-defendant Larell Murphy.

2. During the victim's trial testimony she was asked whether she had identified anyone when she was shown a photo lineup. She responded she did not because she did not want to guess if she was not sure, and if she got it wrong she might get someone in trouble who did not have anything to do with the robbery. She was asked who she would have guessed, and she identified movant. Trial counsel objected as to speculation and the objection was sustained. During his closing argument, defense counsel argued against the credibility of the identification and pointed out the victim was not able to make an identification shortly after the crimes occurred.

3. The victim was asked during the trial whether she remembered telling the police that the first perpetrator was armed with a silver handgun and she responded, "correct."

4. The victim was cross-examined extensively regarding her description of and identifications of the perpetrators, including through the use of her deposition testimony.

5. Following the jury trial movant was found guilty of robbery first degree and not guilty of armed criminal action.

6. Movant was sentenced as a prior and persistent offender to a term of twenty-five years.

7. Movant's conviction was affirmed on appeal. State v. Kennedy, 502 SW3d 76 (Mo.App.E.D. 2016). In his sole point on appeal, movant claimed the trial court erred in refusing to give his proffered jury instruction on eye witness identification.

8. Movant now seeks post-conviction relief pursuant to Rule 29.15. Movant claims his attorney was ineffective for failing to object when the prosecutor asked the victim to "guess" about the perpetrator's identification in a photo lineup; his attorney was ineffective for failing to impeach the victim with a prior inconsistent statement describing the gun displayed during the robbery; his attorney was ineffective for failing to establish that a witness never saw a gun during the robbery; and counsel erroneously told movant he would not be entitled to an instruction on the lesser included offense of robbery second degree.

9. Richard Kroeger, movant's trial attorney, was called as a witness at the evidentiary hearing. Mr. Kroeger testified that the defense strategy was misidentification. Mr. Kroeger agreed

that he cross-examined the victim about her not identifying anyone in the photo lineup. When asked why he did not object when the prosecutor asked the witness during redirect examination whether she had a guess, Mr. Kroeger said "I don't know that he was asking what her guess was." When asked why he did not object until after the witness answered when the prosecutor asked who is it you would have guessed, Mr. Kroeger said it was his recollection that his objection, reflected in the transcript as following the answer, was simultaneous with the answer. When asked why he did not ask that the answer be stricken Mr. Kroeger said "it didn't seem like something I actually wanted to highlight at that point."

10. Mr. Kroeger was shown the initial report by the police in which the victim described the gun as a silver semi-automatic, and the victim's deposition in which she described the gun as like a Glock kind of revolver. The victim agreed at trial with counsel for movant's co-defendant that the gun was silver. Mr. Kroeger said he did not have a reason for not asking the victim about her inconsistent statement about the color of the gun.

11. Mr. Kroeger was asked about the deposition of witness [REDACTED] in which she states she never saw a gun. Mr. Kroeger said he could not recall a reason for not asking the

witness at the trial about her deposition statement. Mr. Kroeger said the defense was misidentification and that the description of the gun might have been important to the identification, but he acknowledged movant was found not guilty of the armed criminal action charge.

12. Mr. Kroeger testified that he discussed the issue of submitting lesser included offense instructions with movant prior to the trial, though he could not recall how often, and he also would have discussed the issue during the trial. Mr. Kroeger testified that the decision not to submit an instruction on robbery second degree was based on the fact that his identification was based on the clothing the perpetrator wore, his co-defendant was identified by two people and movant was not, and they did not want to give the jury another option. The defense was an all or nothing strategy.

13. Movant wrote a letter to the Court, filed on October 4, 2017, in which he asked that the claims in his pro se motion be considered.

CONCLUSIONS OF LAW

1. The first claim in movant's amended motion is that his attorney was ineffective for failing to object when the prosecutor asked the victim to "guess" about the perpetrator's identification in a photo lineup.

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that his counsel's performance failed to conform to the degree of skill, care and diligence of a reasonably competent attorney and that he was thereby prejudiced. Williams v. State, 168 S.W.3d 433, 439 (Mo.banc 2005); Wilkes v. State, 82 S.W.3d 925, 927 (Mo.banc 2002). The movant must satisfy both the performance prong and the prejudice prong. State v. Boyce, 913 S.W.2d 425, 429 (Mo.App.E.D. 1996). A movant bears a heavy burden when attempting to show that counsel was ineffective. Giammanco v. State, 416 S.W.3d 833, 838 (Mo.App.E.D. 2013). To demonstrate prejudice movant must establish that but for counsel's errors there is a reasonable probability that the outcome of the trial would have been different. Wilkes, supra at 927-928; Guese v. State, 248 S.W.3d 69, 72 (Mo.App.S.D. 2008).

No matter how ill-fated it may appear in hindsight, a reasonable choice of trial strategy cannot serve as a basis for

a claim of ineffective assistance. Cole v. State, 152 S.W.3d 267, 270 (Mo.banc 2004); Hudson v. State, 563 S.W.3d 834, 839 (Mo.App.E.D. 2018). A reasonable trial strategy does not become ineffective assistance of counsel because it did not work as hoped. Patterson v. State, 467 S.W.3d 395, 406 (Mo.App.E.D. 2015).

Allegations contained in a post-conviction relief motion are not self-proving and the movant has the burden of proving his asserted grounds by a preponderance of the evidence. Cole v. State, 223 S.W.3d 927, 931 (Mo.App.S.D. 2007); Alhamoud v. State, 91 S.W.3d 119, 120 (Mo.App.E.D. 2002).

Ineffectiveness of counsel is rarely found in cases where trial counsel has failed to object. Johnson v. State, 330 S.W.3d 132, 139 (Mo.App.W.D. 2010). Failure to object does not rise to the level of ineffective assistance of counsel unless movant has suffered a substantial deprivation of the right to a fair trial. Williams v. State, 783 S.W.2d 457 (Mo.App. 1990); Chambers v. State, 781 S.W.2d 116, 118 (Mo.App. 1989)

The Court finds this claim is without merit because counsel objected that the question called for speculation, it is clear from the record that the witness was only guessing in picking someone out of the photo lineup, this was highlighted during

defense counsel's closing argument, and counsel's explanation for not seeking further relief, because he did not want to highlight the exchange, was not unreasonable.

2. Movant next claims his attorney was ineffective for failing to impeach the victim with a prior inconsistent statement describing the gun displayed during the robbery.

The extent of cross-examination is generally a matter of trial strategy. Kelley v. State, 24 S.W.3d 228, 233 (Mo.App.S.D. 2000). See also, Thomas v. State, 761 S.W.2d 246, 252 (Mo.App. 1988); Swearingin v. State, 629 S.W.2d 560, 563 (Mo.App. 1981).

The Court does not believe cross-examining the victim about the description of the gun would have changed the outcome of the trial. Movant was found not guilty of armed criminal action, suggesting the jury was not convinced he had a gun, and bringing out deposition testimony regarding his having a gun could have caused the jury to be more likely to find him guilty of armed criminal action.

3. Movant next claims his attorney was ineffective for failing to establish that a witness never saw a gun during the robbery.

The Court finds this claim is without merit because any prejudice from failing to ask ██████████ whether she saw a gun was minimal. Mr. Kroeger testified the defense was misidentification and whether either perpetrator had a gun would have been of limited value regarding the identification of movant. Also, the Court notes movant was found not guilty of armed criminal action suggesting the jury did not believe he had a gun.

4. Movant's final claim is that his attorney erroneously told movant he would not be entitled to an instruction on the lesser included offense of robbery second degree.

The Court finds this claim is without merit because Mr. Kroger articulated a reasonable strategic reason for not submitting an instruction on robbery second degree, and his testimony that he discussed this with movant is plausible. The decision whether to request a lesser-included offense instruction is a tactical decision. Oplinger v. State, 350 S.W.3d 474, 477 (Mo.App.S.D. 2011); Neal v. State, 99 S.W.3d 571, 576 (Mo.App.S.D. 2003). Where counsel makes an objectively reasonable decision not to request a lesser included offense instruction, there is no ineffectiveness of counsel. Hendrix v. State, 369 S.W.3d 93, 100 (Mo.App.W.D. 2012). All or nothing

defenses have been upheld as reasonable trial strategy. Hudson v. State, 563 S.W.3d 834, 839 (Mo.App.E.D. 2018).


5. Movant wrote a letter asking that his pro se claims be addressed. The subsequent filing by counsel of an amended motion supersedes movant's pro se motions and rendered them nullities. See, Tinsley v. State, 258 S.W.3d 920, 927 (Mo.App.S.D. 2008). Therefore, the Court will not address such claims.

ORDER

Movant has the burden to establish by a preponderance of the evidence the basis on which he seeks to obtain relief. This Court has considered each allegation set forth in movant's Rule 29.15 Motion, has reviewed the records from movant's trial and the evidentiary hearing, and the Court finds that movant has failed to establish that he is entitled to relief.

THEREFORE, the Court orders, adjudges and decrees that the Motion made pursuant to Supreme Court Rule 29.15 is DENIED.

SO ORDERED:



Joseph P. Whyte, Judge

Dated: December 6, 2019