



**In the Missouri Court of Appeals
Eastern District**

DIVISION THREE

RICKY JOHN HARDING, JR.,)	No. ED108113
)	
Appellant)	Appeal from the Circuit Court of
)	Warren County
vs.)	17BB-CC00126
)	
STATE OF MISSOURI,)	Honorable Keith M. Sutherland
)	
Respondent)	Filed: December 29, 2020

Angela T. Quigless, P.J., Kurt S. Odenwald, J., and James M. Dowd, J.

Introduction

Ricky John Harding, Jr., appeals the judgment denying his Rule 29.15 motion for post-conviction relief following his felony convictions for second-degree murder, third-degree domestic assault, four counts of second-degree endangering the welfare of a child, and unlawful possession of a firearm, for which he was sentenced to an aggregate of 45 years.

Factual Background

Harding was convicted following a five-day jury trial for the May 2014 shooting death of Summer Harding (“Victim”). At trial the State proved that Harding killed Victim in her residence by shooting her with a firearm he illegally possessed, namely, a 1911 Colt .45 Pistol, with Victim’s four minor children in the home. Harding’s defense was that Victim died as a result of an accidental shooting and that Harding was not the proximate cause of her death.

Harding and Victim previously cohabitated and had one child together. That child, as well as Victim's other three minor children, resided with Victim. Just before the murder, Harding and Victim became engaged in an argument at Victim's home near a couch in the family room. Victim's 12-year-old daughter ("Daughter") peeked out from her room into the family room and saw Victim reach into the cushions of the couch for a gun that Harding had hidden there. Daughter saw Victim and Harding struggle over the gun. When Daughter heard a gunshot, she ran out into the family room and saw Victim on the floor bleeding. Daughter did not see Harding shoot Victim. At that point, Harding fled the scene leaving Victim *in extremis* with the four minor children still in the home.

Harding appealed his convictions and we affirmed the judgment and sentences in *State v. Harding*, 528 S.W.3d 362 (Mo. App. E.D. 2017) and issued our mandate on October 20, 2017. Harding timely filed his *pro se* Rule 29.15 motion in October 2017 and appointed post-conviction counsel timely filed an amended motion in March 2017.

Harding's amended motion raised numerous claims for post-conviction relief. After an evidentiary hearing in July 2018, the motion court overruled Harding's amended motion, issued its findings of fact and conclusions of law, and entered its judgment in June 2019.

This appeal follows. Harding claims that the State committed a *Brady* violation and prosecutorial misconduct in connection with a pre-trial meeting among Daughter, Prosecutor Ashley Turner ("Turner"), and Daughter's Guardian ad Litem. As far as his claims of ineffective assistance of counsel, Harding asserts that counsel was ineffective: (1) in connection with the cross examination and impeachment of Daughter's testimony; (2) for failing to call Becky Shaw to impeach Daughter's testimony; (3) for agreeing to a stipulation that identified Harding's prior felony conviction as a burglary; (4) for not objecting to counselor Timothy Taylor's trial

testimony regarding the children's mental health and Harding's abuse of them; and (5) for failing to object to statements made by the prosecutor during closing argument. Finding no error, we affirm.

Standard of Review

Appellate review of a judgment overruling a motion for post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law issued by the motion court are "clearly erroneous." Rule 29.15(k); *see also Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000). The motion court's findings and conclusions are presumptively correct and will only be considered clearly erroneous if, after a full review of the record, the appellate court is left with the definite and firm impression that a mistake was made. *Id.*; *see also State v. Johnson*, 968 S.W.2d 686, 695 (Mo. banc 1998). A movant holds the burden of proving his post-conviction claims by a preponderance of the evidence. *State v. Ervin*, 423 S.W.3d 789, 793 (Mo. App. E.D. 2013).

Strickland v. Washington, 466 U.S. 668 (1984)

To succeed on a motion for post-conviction relief due to ineffective assistance of counsel, a movant must show by a preponderance of the evidence: (1) that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform in a similar circumstance, and (2) that he was thereby prejudiced. *Johnson v. State*, 388 S.W.3d 159, 165-66 (Mo. banc 2012) (citing *Strickland*, 466 U.S. at 687). If a movant fails to establish either prong, "then we need not consider the other and the claim of ineffective assistance must fail." *Roberts v. State*, 535 S.W.3d 789, 797 (Mo. App. E.D. 2017).

To satisfy *Strickland's* performance prong, a movant must overcome the strong presumption that trial counsel's conduct was reasonable and effective by showing counsel's

specific acts or omissions that, under the circumstances, fell outside the wide range of effective assistance. *Johnson*, 388 S.W.3d at 165; *see also Marshall v. State*, 567 S.W.3d 283, 290 (Mo. App. E.D. 2019). To establish *Strickland's* prejudice prong, a movant must show there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Johnson*, 388 at 165; *see also McLaughlin v. State*, 378 S.W.3d 328, 337.

Discussion

I. The State did not commit a Brady violation or prosecutorial misconduct.

In point one, Harding makes somewhat convoluted claims of prosecutorial misconduct and a violation of *Brady v. Maryland*, 373 U.S. 83 (1963)¹. His claims stem from an October 24, 2014, pre-trial meeting among prosecutor Turner, Daughter, and Daughter's GAL at the GAL's request because Daughter was nervous about her upcoming testimony at trial.

Harding claims that Turner deliberately failed to disclose this meeting in her response to his motion to compel disclosure of any statements made to prosecutors by any of the children. Harding moved to disqualify Turner on this basis. That motion was denied.

Harding alleges the State's failure to disclose the fact and substance of this meeting violated *Brady* and Turner's representation that the disclosures were complete was prosecutorial

¹ Before we can proceed to the merits of Harding's *Brady* violation claim, we must determine whether it is cognizable in a Rule 29.15 proceeding. As a general rule, a post-conviction relief motion is not a substitute to consider matters that should have been raised on direct appeal. *Schneider v. State*, 787 S.W.2d 718, 721 (Mo. banc 1990). Issues that could have been raised on direct appeal, including constitutional claims, may only be raised in post-conviction proceedings in rare and exceptional circumstances as fundamental fairness requires. *Id.* Here, we find that Harding has satisfied this exception and that fundamental fairness requires that we consider his *Brady* violation claim involving the prosecutor failure to disclose the meeting with Daughter because Harding was not aware of these facts at the time his direct appeal was pending. He only became aware of the October 24th meeting when post-conviction counsel discovered it while preparing for the evidentiary hearing in this case.

misconduct. Harding also argues that the October 24th meeting was material because it was the subject of his motion to disqualify, and that Turner would have been disqualified if the meeting had been disclosed. For its part, the State argues that *Brady* is inapplicable and no misconduct occurred because Turner testified on this motion that there was nothing material discussed during the meeting, so there was no *Brady* information requiring disclosure. We agree.

A. Brady is inapplicable.

Pursuant to *Brady*, due process is violated where the State fails to disclose evidence in its possession which is favorable to the accused and is material to either guilt or punishment. 373 U.S. at 1196 (citing U.S.C.A. Const. Amend. 14); *see also* Mo. Sup. Ct. R. 25.03(A)(9). In order to make a successful *Brady* claim, a movant must prove by a preponderance of the evidence: 1) that the evidence is exculpatory or impeaching; 2) that the evidence was willfully or inadvertently suppressed; and 3) that the defendant was prejudiced as a result of its suppression, i.e., the evidence is material to guilt or punishment. *State v. Smith*, 491 S.W.3d 286, 298 (Mo. App. E.D. 2016) (citing *Brady*, 373 U.S.); *see also Gittemeier v. State*, 527 S.W.3d 64, 71 (Mo. banc 2017). Under *Brady*, withheld or suppressed evidence may be considered material if would have provided a movant with additional plausible, persuasive evidence to support his defense at trial, or if it would have enabled him to present a different plausible and persuasive defense. *Smith*, 491 S.W.3d at 298.

We reject Harding's *Brady* violation claims because *Brady* does not apply here. The information allegedly withheld from him was simply about a pretrial meeting among Turner, Daughter, and the GAL where nothing material was discussed. Harding points to no substantive statements or facts from that meeting that would have supported his defense or would have

provided him with a different defense. Since no *Brady* violation has been shown, Harding's misconduct claim also fails. Point one is denied.

II. Trial counsel's strategic decisions not to impeach Daughter or to call witness Becky Shaw do not constitute ineffective assistance of counsel.

In point two, Harding makes four claims of ineffective assistance of counsel. The first two claims involve counsel's cross-examination of Daughter. Harding claims counsel was ineffective for failing to impeach Daughter: (1) with her prior inconsistent statements about Harding's alleged abuse of Victim, and (2) with her prior inconsistent statements about the location of the gun in relation to the couch's cushions.

Harding's other two ineffective assistance claims involve counsel's failure to call Becky Shaw, who was Victim's friend and with whom the children resided after their mother's death. Harding claims counsel should have called Shaw: (1) to impeach Daughter with her prior inconsistent statements regarding the night her mother was killed, and (2) to testify about Daughter's reputation for truth in the community.

Counsel's decisions whether to impeach, cross-examine, and to call a witness constitute reasonable trial strategy and do not rise to the level of ineffective assistance under the performance prong of the *Strickland* test. See *State v. Simmons*, 955 S.W.2d 729 (Mo. banc 1997). To satisfy the performance prong of *Strickland*, the movant must overcome the strong presumption that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment. *Id.* at 746.; see also U.S.C.A. Const. Amend. 6. The allegation that counsel pursued one reasonable trial strategy to the exclusion of another is not enough to meet the requirements of this heavy burden. *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006).

The extent and manner of impeachment, as well as the extent of cross-examination, are all matters of trial strategy. *See id.* The mere failure to impeach a witness does not entitle a movant to post-conviction relief. *Polk v. State*, 539 S.W.3d 808, 822 (Mo. App. W.D. 2017). Nor is counsel required to present evidence of questionable or dubious impeachment value, particularly if the evidence would be considered merely cumulative. U.S.C.A. Const. Amend. 6; *see also Steele v. State*, 551 S.W.3d 538, 549 (Mo. App. E.D. 2018) (citing *State v. Twenter*, 818 S.W.2d 628, 643 (Mo. banc 1991)). In fact, counsel may fairly determine that the use of certain impeachment evidence may cause his or her client more harm than benefit. *King v. State*, 505 S.W.3d 419, 424-25 (Mo. App. E.D. 2016). Instead, a movant bears the burden of establishing that the impeachment would have provided him with a different defense or would have changed the outcome of the trial. *Polk*, 539 S.W.3d at 822.

Likewise, the selection of witnesses is a matter of trial strategy, and virtually unchallengeable in an ineffective assistance claim. *Anderson*, 196 S.W.3d at 33. Trial counsel's decision not to call a witness, alone, ordinarily will not support a claim of ineffective assistance of counsel. *McDaniel v. State*, 460 S.W.3d 18, 29 (Mo. App. E.D. 2014). When the testimony of a potential witness would only impeach the State's witnesses, relief on a claim of ineffective assistance of counsel is not warranted. *Hays v. State*, 360 S.W.3d 304, 310 (Mo. App. W.D. 2012).

Harding's claims fail the performance prong of the *Strickland* test. With respect to the cross-examination of Daughter, the record shows that counsel *did* in fact cross-examine Daughter about her prior inconsistent statements. But counsel testified at the evidentiary hearing that she made strategic decisions to limit the extent of her cross-examination, and it was within her strategic prerogative to do so. In fact, we find counsel's decisions to be reasonable because

to aggressively cross-examine a traumatized young girl at the trial regarding her mother's murder may have risked alienating the jury and harming Harding's defense. Instead, counsel made the reasonable determination that Daughter had been sufficiently cross-examined and that any further testimony would merely be cumulative and dubious in value.

Likewise, with regard to the decision not to call Shaw as a witness, counsel explained that since Shaw was Victim's friend, she was concerned Shaw's testimony might open the door to evidence of other altercations between Harding and Victim, or to other alleged abusive behavior by Harding in the past, and she viewed Shaw as an overall negative and hostile witness against Harding. Moreover, Harding has failed to show how the decision not to call Shaw harmed his defense. The record shows the opposite.

Point two is denied.

III. Trial counsel's agreement to a stipulation that identified to the jury that Harding's prior felony was for burglary does not constitute ineffective assistance.

Since Harding was charged with being a felon in possession of a weapon under § 570.071.1(1), the State was entitled to inform the jury of his status as a felon but was not entitled to identify the felony to which he had been convicted. *see U.S. v. Old Chief*, 519 U.S. 172 (1997). *Old Chief* recognized that when evidence of a prior felony conviction is an element of the crime charged, disclosing to the jury the "name and nature" of that felony can create the risk of unfair prejudice. *Old Chief*, at 174. So, the Supreme Court created the right of criminal defendants to stipulate to the existence of their prior felony convictions without naming the specific crime. *Id.* at 174.

While Harding is correct that under *Old Chief* he had the right to stipulate to the existence of his prior felony conviction *without* including the name or nature of that conviction, we find

that Counsel made the permissible strategic decision to include in the stipulation that Harding's prior felony was the class C felony of burglary. Counsel testified here that her strategic reason to identify Harding's prior felony as a burglary was so that the jury might consider that Harding's prior conviction was not a violent offense or a weapons-related offense. We presume that counsel's choices at trial fall under the wide range of reasonableness and professionalism granted to her; and reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot alone serve as a basis for a claim of ineffective assistance. *Anderson*, 196 S.W.3d at 33 (citing U.S.C.A. Const. Amend. 6).

Harding has presented no facts, nor are there any in the record, that overcome the presumption that counsel's strategy was reasonable. We decline Harding's invitation to speculate that the jury considered burglary to be a violent crime perhaps involving weapons and therefore that Harding was a violent man. Mere conjecture or speculation is *not* sufficient to satisfy *Strickland*. *State v. Patterson*, 824 S.W. 2d 117, 123 (Mo. App. E.D. 1992) (citing *Guinan v. State*, 769 S.W.2d 427, 429 (Mo. banc 1989)).

Point three is denied.

IV. Trial counsel's failure to assert a meritless objection to the admissible testimony of licensed professional counselor Timothy Taylor does not support a finding of ineffective assistance.

At trial, licensed professional counselor Timothy Taylor, who provided therapy to Victim's minor children after Victim's death, testified regarding the children's overall mental health, their fear of Harding, and that Harding had subjected them to emotional and physical abuse. He also testified the children suffered from multiple psychological conditions, including post-traumatic stress disorder.

Harding claims that since Taylor's testimony constituted inadmissible prior bad acts evidence and evidence of Harding's bad character that inflamed the passions of the jury against him, counsel was ineffective for failing to object to the testimony. We disagree because Taylor's testimony was admissible evidence and counsel's failure to make a meritless objection cannot constitute the ineffective assistance of counsel.

As a general rule, evidence of prior uncharged misconduct is inadmissible for the purpose of showing propensity to commit such crimes. *State v. Barriner*, 34 S.W.3d 139, 145 (Mo. banc 2000). However, if evidence of prior misconduct is logically and legally relevant to prove the charged crime, it is admissible. *Id.* Here, Taylor's testimony was admissible because it was relevant to the four endangering-the-welfare-of-a-child charges brought against Harding pursuant to Section 568.045.1(1)(A):

A person commits the offense of endangering the welfare of a child in the first degree if they: (1) Knowingly act in a manner that creates a substantial risk to the life, body, or health of a child less than seventeen years of age.

"Health, as used in section 568.045.1(1), includes a child's physical, mental, emotional, or psychological condition." *State v. Smith*, 505 S.W.3d 852, 857 (Mo. App. E.D. 2016). The State bears the burden of proving that Harding acted in a manner that created risk to the minor children's health, including their emotional, mental, and psychological health. *Id.* Therefore, Taylor's testimony regarding the children's mental health and Harding's alleged physical and psychological abuse of them was relevant.

Point four is denied.

V. Trial counsel's failure to object during closing argument to the prosecutor's statements that Victim's children feared Harding was not ineffective assistance.

In his final point on appeal, Harding claims counsel should have objected to the prosecutor's inflammatory statements in closing argument that Harding abused the Victim's children and that they were afraid of him. Harding takes issue with two remarks made by the prosecutor: 1) that, according to counselor Taylor's testimony, the children feared Harding and that Taylor had to reassure Daughter that Harding would not be able to come back and hurt them after trial, and 2) that Daughter was so fearful of Harding while testifying that the prosecutor positioned herself to block her view of Harding.

Closing argument is designed to advise the jury and opposing counsel of each party's position, and to advocate to the jury what that party believes the jury should do. *State v. McFadden*, 369 S.W.3d 727, 747 (Mo. banc 2012). The State has wide latitude in closing argument and is allowed to argue the evidence and all reasonable inferences. *State v. Walter*, 479 S.W.3d 118, 123 (Mo. banc 2016). The prosecutor has the right to comment on the evidence and the witnesses, including their demeanor and credibility, presented at trial from the State's viewpoint. *Adams v. State*, 509 S.W.3d 880, 884 (Mo. App. E.D. 2017).

Furthermore, whether or when to object is left to the broad judgment of counsel. *Helmig v. State*, 42 S.W.3d 658, 679 (Mo. App. E.D. 2001). The failure to object alone, even to objectionable arguments, does not establish ineffective assistance. *State v. Taylor*, 831 S.W.2d 266, 272 (Mo. App. E.D. 1992) (citing *Zink v. State*, 278 S.W.3d 170, 187 (Mo. banc 2009)). Counsel's decision not to object during closing argument can be made for a myriad of strategic reasons; for example, in many instances, seasoned trial counsel might not object to otherwise improper questions or arguments for purposes such as fear that frequent objections may highlight the statements complained of, resulting in more harm than good. *Helmig*, 42 S.W.3d at 678-79 (Mo. App. E.D. 2001) (citing *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. banc 1996)). *Strickland*

will only be satisfied if a closing argument had a decisive effect on the jury's determination, and if it's effect on the outcome of the trial amounts to manifest injustice; the burden is on the movant to demonstrate that decisiveness. *Walter*, 479 S.W.3d at 124.

We find the prosecutor's argument in these regards falls well within the wide range of what is permitted during closing argument. Based on both Taylor's and Daughter's testimony, the issues of Harding's abuse of the children and their fear of him was properly before the jury. So, the prosecutor's comments on that evidence and the demeanor of the witnesses while testifying is well within the bounds of proper argument. Harding has presented no facts, nor is there anything in the record, to contradict that. Counsel's decision not to object to permissible argument is not ineffective assistance of counsel.

Point five is denied.

Conclusion

For the reasons set forth above, we affirm the judgment of the motion court.



James M. Dowd, Judge

Angela T. Quigless, P.J., and
Kurt S. Odenwald, J., concur.