SUPREME COURT OF MISSOURI
en banc

RONALD MCLEMORE,	)	*Opinion issued December 21, 2021*
	)	
Appellant,	)	
	)	
v.	)	No. SC98987
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF TANEY COUNTY
The Honorable Eric D. Eighmy, Judge

Ronald McLemore appeals from the circuit court's judgment overruling his Rule 29.15 motion for postconviction relief without an evidentiary hearing. Mr. McLemore failed to show on appeal that the circuit court clearly erred in overruling his Rule 29.15 motion without an evidentiary hearing. While the record does not refute his claims that trial counsel's failure to object to statistics not in evidence, elicitation of unfavorable testimony, and presentation of a deficient opening statement were not reasonably competent, trial counsel's actions did not prejudice Mr. McLemore, and the record refutes his claim that trial counsel failed to present a coherent theory of defense in closing argument. The circuit court, therefore, did not clearly err in determining Mr. McLemore

failed to plead facts not refuted by the record that, if true, resulted in prejudice entitling him to an evidentiary hearing. The judgment is affirmed.

Factual and Procedural Background

In 2016, the state charged Mr. McLemore with six felony sexual offenses: count I, enticement of Victim 1, a child younger than 14; count II, sexual misconduct by exposing his genitals to Victim 1, a child younger than 15; count III, enticement of Victim 2, a child younger than 14; count IV, sexual misconduct by exposing his genitals to Victim 2, a child younger than 15; count V, attempted sodomy in the first degree by trying to make Victim 1 touch his penis; and count VI, attempted sodomy in the first degree by trying to make Victim 2 touch his penis.

At trial, Mr. McLemore's counsel reserved his opening statement until after the close of the state's case-in-chief. During the defense's case, trial counsel called the victims' mother, grandmother, and great-grandmother and elicited testimony from the grandmother and great-grandmother that Victim 1 did not have a reputation for truthfulness. The victims' mother, however, testified Victim 1 did have a reputation for truthfulness.

During the state's closing argument, the prosecutor referred to statistics that one in four girls and one in six boys are sexually molested as children; roughly 90 percent of offenders are male acquaintances; and only 3 to 5 percent of perpetrators are prosecuted or convicted. These statistics were not in evidence, but trial counsel did not object to the reference. Instead, trial counsel responded during closing argument that, although the state was right as to the statistics, the jury was obligated to decide the case on its facts.

The jury found Mr. McLemore guilty of Counts I, II, IV, and V but acquitted him of Counts III and VI. Mr. McLemore waived jury sentencing, and the circuit court sentenced him to 10 years' imprisonment for Count I and Count V, to be served consecutively, and four years' imprisonment for Count II and Count IV, to be served concurrently.

In 2018, the office of chief disciplinary counsel filed an information against Mr. McLemore's trial counsel that included allegations trial counsel "failed to present evidence on Mr. McLemore's behalf" and "purposely let the prosecutor put it all out there so when it came to retrial, [Mr.] McLemore would have a better defense." The information also alleged trial counsel failed to file Mr. McLemore's direct appeal, and Mr. McLemore was unable to contact him for three months after sentencing. Trial counsel never filed a response to the information, so its allegations were deemed admitted, and he was disbarred in 2019.

Represented by new counsel, Mr. McLemore appealed, and the court of appeals affirmed the convictions. *See State v. McLemore*, 574 S.W.3d 342, 346 (Mo. App. 2019). Mr. McLemore then filed a Rule 29.15 motion to vacate, set aside, or correct the judgment, alleging trial counsel was ineffective for: (1) failing to object to the prosecutor's use during closing argument of statistics not in evidence, (2) eliciting testimony from the victims' mother that Victim 1, who provided most of the evidence against Mr. McLemore, had a reputation for truthfulness; and (3) failing to present a coherent theory of defense in his opening statement and closing argument, failing to discuss Victim 1's reputation for untruthfulness in his opening statement and closing argument, and arguing in closing that

he had no idea how the victims knew about ejaculation, supporting the state's theory of the case.[1]

The circuit court overruled Mr. McLemore's motion without an evidentiary hearing, concluding:

> Here, Movant's claims of ineffective assistance all derive from the trial record and can be analyzed without additional evidence. The record shows that all of the claims lack merit. In none of these claims did Movant demonstrate both incompetence and prejudice. Movant failed to overcome the legal presumption that trial counsel behaved reasonably.

Mr. McLemore appealed the circuit court's judgment, and this Court granted transfer after an opinion by the court of appeals. Mo. Const. art. V, sec. 10. On appeal, Mr. McLemore asserts the circuit court erred in overruling his ineffective assistance of counsel claims without an evidentiary hearing.

Standard of Review

Appellate review of the circuit court's ruling is limited to determining whether the circuit court's findings and conclusions are clearly erroneous, Rule 29.15(k), and a "movant is entitled to an evidentiary hearing only if: (1) [the movant] pleaded facts, not conclusions, warranting relief; (2) the facts alleged are not refuted by the record; and (3) the matters complained of resulted in prejudice to the movant," *Booker v. State*, 552 S.W.3d 522, 526 (Mo. banc 2018). The facts Mr. McLemore asserts warrant relief are trial

[1] Mr. McLemore raised two other claims in his motion: (1) that the circuit court's judgment failed to accurately describe the crime for which the jury found him guilty and (2) that trial counsel was ineffective for eliciting and failing to object to inadmissible expert testimony. Mr. McLemore withdrew the first claim prior to the circuit court's judgment and abandoned the second claim by failing to raise it on appeal. *See* Rule 84.13(a).

counsel's actions allegedly resulting in ineffective assistance of counsel. To state a claim for ineffective assistance of counsel, the movant must allege facts "demonstrating: (1) that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and (2) that counsel's deficient performance actually prejudiced the movant." *Id.* at 531.

In determining whether a movant has met his or her burden to show ineffective assistance of counsel, courts must indulge a strong presumption "that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (internal quotation omitted). And whether counsel's performance conformed to the degree of skill, care, and diligence of a reasonably competent attorney is an "inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington v. Richter*, 562 U.S. 86, 110 (2011). Because the inquiry is an objective inquiry into the reasonableness of counsel's performance, an evidentiary hearing will not always be necessary to adjudicate claims of ineffective assistance of counsel.[2]

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[2] In its opinion handed down prior to transfer, the court of appeals reversed the circuit court's judgment and remanded the cause for an evidentiary hearing, holding Mr. McLemore should be afforded the opportunity to present evidence his trial counsel's actions were not the result of strategic choices. Trial counsel's subjective state of mind is irrelevant, however, to whether his actions were objectively reasonable. *Harrington*, 562 U.S. at 110. As long as trial counsel's actions could be considered sound trial strategy – as they are presumed to be – then trial counsel's performance was competent. *Strickland*, 466 U.S. at 689. In other cases, whether trial counsel's actions could be considered sound trial strategy may depend on facts outside the record, such as the extent and fruits of trial counsel's pretrial investigation. In such cases, an evidentiary hearing is necessary to establish such facts because they do not appear in the record. *Cf.* Rule 29.15(h). But

Analysis

In Mr. McLemore's first claim of error, he asserts the circuit court clearly erred in overruling his amended motion without an evidentiary hearing because his trial counsel provided ineffective assistance when he failed to object to the state reciting to the jury statistics not in evidence about the prevalence of the sexual abuse of children. During closing argument, the prosecutor stated:

> Most of our population doesn't understand why an adult would want to do that to two little kids. And perhaps that's part of why it makes these cases difficult to prosecute. Part of our brains perhaps don't [sic] want to accept that this happens in our society, but we need to get over that as a society, because it's prevalent. In 2005 the center for disease control released findings from a study. And those findings were that one in four girls will be sexually molested or sexually abused before they turn 18. One in six boys. The Department of Justice tell [sic] us that 90 percent roughly of offenders are males who are acquaintances of the child. And that 3 to 5 percent of sexual abusers are ever prosecuted or convicted, 3 to 5 percent. People that each of us knows has [sic] been a victim of sexual abuse as a child in the past. We may not know it, but they're all around us.

These statements were harmful to Mr. McLemore's defense because the prosecutor was using statistics not in evidence to suggest to the jury it was likely Mr. McLemore committed the offenses with which he was charged.

Mr. McLemore claims his trial counsel was ineffective for failing to object, but the circuit court found trial counsel was not because counsel responded with "well-reasoned argument." The circuit court was correct that it can be reasonable trial strategy not to object to improper statements in the state's closing argument. *Tisius v. State*, 519 S.W.3d 413,

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Mr. McLemore does not allege any such facts that would change the analysis. As a result, he did not have a right to an evidentiary hearing to decide whether trial counsel's conduct was objectively reasonable.

428 (Mo. banc 2017). Trial counsel may decide to forego an objection in favor of later responding in the defendant's closing argument to avoid creating the impression that the defense is concealing evidence from the jury.

But the record shows trial counsel did not respond to the state's improperly argued statistics with "well-reasoned argument." Trial counsel's response was as follows:

> The State's right. This – these sort of things, and these accusations and allegations, my goodness, what's our society gone to or where has it been? You know, where's our morality? I agree. I agree. Those statistics that Mr. Merrell was talking about, those are just statistics. This is this case. This case is to be decided on the facts as you see them in this case. This fact – this case will not join those statistics in – in showing, uh, that there was an error of parallax, because I am sure that you are looking straight on now.

It is questionable whether failing to object, agreeing with the accuracy of the statistics, and then merely reminding the jury to decide the case on the facts conforms to "the degree of skill, care, and diligence of a reasonably competent attorney." *Booker*, 552 S.W.3d at 531.

Nevertheless, even assuming trial counsel's response was not reasonably competent, Mr. McLemore did not suffer sufficient prejudice to warrant reversal of the judgment denying him relief. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. For that reason, a movant must show "that counsel's deficient performance actually prejudiced the movant." *Booker*, 552 S.W.3d at 531. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Strickland*, 466 U.S. at 693 (internal citation

omitted). A movant must show there is a probability sufficient to undermine confidence in the outcome "that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Because the prosecutor's reference to the statistics was isolated and brief and the jury found Mr. McLemore not guilty of two offenses, the circuit court did not clearly err in finding trial counsel's failure to object did not result in prejudice.

Likewise, the circuit court did not clearly err in overruling Mr. McLemore's second claim – that he received ineffective assistance of counsel when his counsel elicited testimony from the victims' mother that Victim 1 had a reputation for truthfulness. While the record confirms trial counsel elicited testimony from the mother that Victim 1 has a reputation in the community for truthfulness, trial counsel had previously elicited testimony from the victims' grandmother and great-grandmother that Victim 1 did not have a reputation for truthfulness. As the circuit court noted, "Counsel's quest for reputation evidence to impeach [Victim 1] was successful with two witnesses and unsuccessful with one." The fact two witnesses, both of whom were also Victim 1's family members, testified that Victim 1 had a reputation for untruthfulness mitigated the possibility that prejudice resulted from the mother's contrary testimony. The circuit court, therefore, did not clearly err in determining Mr. McLemore failed to show a reasonable probability that, but for trial counsel's elicitation of the mother's testimony, the outcome of the trial would have been different. *See id.*

In his last claim of error, Mr. McLemore asserts the circuit court clearly erred in overruling his amended motion for postconviction relief without an evidentiary hearing

because his trial counsel provided ineffective assistance when he reserved opening statement and failed to present a coherent theory of defense in either his opening statement or closing argument. After the state's case in chief, trial counsel delivered the following opening statement:

> It's good to see you today. Uh, I was think [sic] about this case. I – the weather's moving in. I was watching the weather today, Griffey, the weather dog. What's bothered me about this case, I'm going to present testimony here today, and I want you to know it's just kind of make sure that everybody is still looking at things in the right way.
>
> I was a meteorologist at one time. I don't know if you know about the air of parallax. A barometer, when one reads a barometer, the needle is in front of a mirror.
>
> See, when you read your barometer reading, if you are not standing right there looking at it just right, your altimeter setting in an airplane is going to be off. Because you can be looking at like this, could be like this (gesturing).
>
> All right. So – and so very important, and you'd say [] why – what kind of analogy are you trying to draw? This is what I'm talking about.
>
> To insure [sic] that you are not looking this way or that way, this is called to correct and make sure that you are looking at that barometer correct to give that airplane the proper altimeter setting, so he may land and not crash, you must be looking straight at it. All right.
>
> How do – how do I relate that to a jury? Well, I relate that to a jury in this way: I feel as though that that method, that standard of looking at something, all right, I would call it impartiality.
>
> You could be a little too far to this side, during this stage especially, or too far to this side, as you view this evidence. Because I know, and you know too, that you haven't made your mind up about this case. Okay.
>
> So I'm going to present testimony here today in the defense of Ron McLemore and the allegations that have been made against him. What do I intend to show? I believe that the evidence will show that Mr. McLemore

> and his paramour, Ms. Cheryl Mick, cohabited together for eight years in somewhat peacefully beside – close to in proximity to the grandchildren.
>
> They were not married. However, Mr. McLemore was in these children's lives, basically since they were either born or as they were growing up very much. There was a change, though, in the relationships. Um, and it happened when Mr. McLemore was watching the children, I suppose. And I don't know if the change came in, uh, one of the children, or perhaps it was Mr. McLemore, perhaps a change in him was after his operation, perhaps he did change. He no longer worked. Perhaps he was depressed.
>
> So, therefore, what I was to show the jury is that these events that happened to this family – and I'm saying that all the parties that you have seen here today, even though they weren't married, I would consider them family inasmuch as they have been sharing their lives here together – and you hear their testimony about how it's kind of really put a strain on that.
>
> You are going to hear Mr. McLemore defend himself against the accusations in which you have heard in these past two days. And after hearing that, then you will be instructed after a closing argument to render a verdict. And that's where we go.
>
> So at this time I would like to start presenting my evidence. Thank you.

Mr. McLemore claims trial counsel was ineffective due to his failure to provide the jury with a coherent theory of defense in his opening statement. He avers the jury "was never given a roadmap on what evidence to look for, or the importance of the evidence as it was being adduced because counsel did not, at any point in the trial, articulate a coherent theory of defense." The circuit court found trial counsel was not ineffective for reserving opening statement until after the state's case-in-chief, trial counsel "did present a competent opening statement," and the record rebutted the claim that trial counsel failed to present a coherent theory of defense during closing argument. The circuit court was correct to find trial counsel was not ineffective merely for reserving opening statement, but the

record does not show "that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689.

At best, trial counsel's opening statement reminded the jury to be impartial, stated Mr. McLemore would testify in his defense, informed the jury Mr. McLemore had a close relationship with the children, and suggested Mr. McLemore became depressed after surgery. Those facts, if true, do not make it any less likely Mr. McLemore committed the offenses with which he was charged, and the fact he was depressed after surgery could be found to make it more likely he committed the offenses. Trial counsel's statement that there was a change in Mr. McLemore's relationship with the children when he was watching the children and trial counsel's inability to explain the change tended to support the state's theory of the case rather than a defense. Additionally, the fact trial counsel had so little to say on Mr. McLemore's behalf and in his defense would have been apparent to the jury and reflected negatively on Mr. McLemore. While a defendant is not required to present an opening statement, when trial counsel chooses to do so, it should not harm the defense. The record, therefore, does not clearly refute Mr. McLemore's claim that trial counsel's opening statement was objectively unreasonable.

Nevertheless, the circuit court correctly found Mr. McLemore did not establish prejudice entitling him to postconviction relief. In his amended motion, Mr. McLemore alleges only the conclusion that he "was prejudiced because had counsel articulated his theory of defense to the jury during the trial there was a reasonable probability of a different outcome at trial." Without more, a conclusory allegation is insufficient to establish a claim of ineffective assistance of counsel. *State v. Starks*, 856 S.W.2d 334, 336 (Mo. banc 1993).

Furthermore, the fact the jury acquitted Mr. McLemore of two charges shows the deficient opening statement did not influence the jury to find him guilty regardless of the evidence. The circuit court, therefore, did not clearly err in finding counsel was not ineffective for an incoherent opening statement.

The second ground for Mr. McLemore's third claim relates to his trial counsel's closing argument. He alleges trial counsel provided ineffective assistance of counsel when he failed to present a coherent theory of defense in closing argument and argued a point that supported the state's theory of the case.[3] The circuit court found the record rebutted the claim because trial counsel made "multiple, reasonable points during closing," including:

> (a) The [forensic] interviewer lacked impartiality and had planted the descriptions of Movant's genitalia in the victims' mind by showing them pictures of male anatomy during the interview;
> (b) The forensic interviewer and the State were predisposed to look for a "negative" or "the bad" in everything;

[3] In his brief's final point relied on, Mr. McLemore also alleges his trial counsel provided ineffective assistance of counsel by "failing to mention to the jury the most important evidence in Mr. McLemore's defense in his opening statement and closing argument" – that Victim 1 had a reputation for untruthfulness. He claims the allegations of professional misconduct resulting in his trial counsel's disbarment show his failure to mention important evidence to the jury in closing argument was an intentional ploy to give Mr. McLemore "a better defense" on retrial. This claim goes beyond the issue Mr. McLemore raised in his motion, which was that trial counsel failed to mention evidence to the jury only in his opening statement. Whether trial counsel was also ineffective for failing to mention evidence in closing argument is an issue raised for the first time on appeal, and "[i]ssues raised for the first time on appeal are not preserved for appellate review." *Heifetz v. Apex Clayton, Inc.*, 554 S.W.3d 389, 397 n.10 (Mo. banc 2018). The Court also notes the allegations of professional misconduct were not that trial counsel intentionally failed to mention important evidence to the jury in closing argument. The allegations were that he "failed to present evidence on Mr. McLemore's behalf" and "let the prosecutor put it all out there" so Mr. McLemore would have "a better defense" on retrial.

> (c) Movant's lack of questions for the investigator, which the State had implied to be evidence of guilt, were in reality due to the facts that Movant loved the children and was already aware of their accusations, which the family was addressing;
> (d) An increase in false accusations of sexual abuse as children are increasingly exposed to pornography on electronic devices, which was an alternative explanation for the victims' knowledge of mature sexual matters;
> (e) An excessive similarity in the victims' statements, suggestive of coordination;
> (f) The defense's explanation for the victims' motivation to falsely accuse Movant, which was that Movant had scolded them;
> (g) The testimony of the victims' older sister, who denied witnessing any abuse or inappropriate behavior despite having been often present in Movant's home with the victims;
> (h) The victims' exposure to sexual activity by animals, as an alternative source for knowing a penis's appearance, and their comparison of [Mr. McLemore's] anatomy to a dog's penis;
> (i) The victims' failure to ever describe the penis as erect despite claiming to have seen ejaculation—as a matter of common sense, Movant's penis would have been erect prior to ejaculation and victims should have been able to see that if they had observed this activity in real life; instead they had obtained their incomplete sexual education elsewhere;
> (j) The victims may have seen Movant's flaccid penis while spying on him in the bathroom;
> (k) Mere accusations are not evidence;
> (l) Movant's paramour and her mother, who were both related to the victims[,] had stood by Movant;
> (m) A final, renewed call for impartiality, which tied back to counsel's opening statement.

(Internal citations to the transcript omitted). In view of these detailed findings, it was not clearly erroneous for the circuit court to conclude the record rebutted Mr. McLemore's claim that his trial counsel failed to present a coherent theory of defense during closing argument. Even assuming other "arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them." *Yarborough v. Gentry*, 540 U.S. 1, 7 (2003).

The only portion of the record Mr. McLemore cites to demonstrate trial counsel failed to provide a coherent theory of defense in closing is trial counsel's following statement to the jury:

> I had not heard one bit of testimony describing that penis as erect. However, there is one fact that would state that that penis should have been erect and should have been described as an erect penis in as much as it was said there was ejaculation. Uh-oh. That must make it true. How could these children know about ejaculation? I don't know. God, I don't know. But I guaranty [sic] you their grandmothers would like to know.

As the circuit court found, however, this argument emphasized the "victims' failure to ever describe the penis as erect despite claiming to have seen ejaculation—as a matter of common sense, Movant's penis would have been erect prior to ejaculation and victims should have been able to see that if they had observed this activity in real life." Trial counsel's argument, therefore, presented a coherent theory of defense – that however the victims knew about ejaculation it was not because Mr. McLemore engaged in sexual misconduct with the victims or else they would have described an erect penis.[4]

[4] Mr. McLemore recasts this argument on appeal as an ineffective assistance of counsel claim based on arguing a point that "undercut the evidence he produced suggesting the children learned about sexual matters from their fascination with sex and animals' genitalia." Mr. McLemore did not allege in his motion that trial counsel's argument undercut the evidence he produced to explain the victims' knowledge of sexual matters. Rather, he included trial counsel's argument in his motion to demonstrate his failure to present a coherent theory of defense – that trial counsel, in Mr. McLemore's words, "ha[d] no idea how the children would have knowledge of ejaculation." This Court, therefore, analyzes the claim as whether trial counsel failed to present a coherent theory of defense, as it was presented to the circuit court.

Conclusion

Trial counsel's failure to object to statistics not in evidence, elicitation of unfavorable testimony, and presentation of a deficient opening statement did not give rise to a reasonable probability that, but for trial counsel's actions, the result of the proceeding would have been different. And the record refutes the claim that trial counsel failed to present a coherent theory of defense in closing argument. The circuit court, therefore, did not clearly err in denying Mr. McLemore's postconviction claims without an evidentiary hearing. The circuit court's judgment is affirmed.

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PATRICIA BRECKENRIDGE, JUDGE

Russell, Ransom and Draper, JJ., concur;
Fischer, J., concurs in separate opinion filed;
Wilson, C.J., and Powell, J., concur in opinion
of Fischer, J.

SUPREME COURT OF MISSOURI
en banc

RONALD MCLEMORE,	)	
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APPELLANT,	)	
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v.	)	No. SC98987
	)	
STATE OF MISSOURI,	)	
	)	
RESPONDENT.	)	

CONCURRING OPINION

I agree with the majority opinion's conclusion that the motion court did not clearly err in overruling Ronald McLemore's Rule 29.15 motion without an evidentiary hearing.

Standard of Review

"This Court reviews [McLemore's] claims for the limited purpose of determining whether the circuit court clearly erred in making its findings of fact and conclusions of law." *Barton v. State*, 432 S.W.3d 741, 748 (Mo. banc 2014); Rule 29.15(k). "A judgment is clearly erroneous when, after reviewing the entire record, the court is left with the definite and firm impression the motion court made a mistake." *Barton,* 432 S.W.3d at 748. "This Court presumes the motion court's findings are correct." *Id*.

> A motion court clearly erred in overruling a Rule 29.15 motion's request for an evidentiary hearing only if movant can show 1) that his motion alleged facts, not conclusions, warranting relief; 2) the facts alleged were not

> conclusively refuted by the files and records in the case; and 3) the matters complained of resulted in prejudice to the movant.

Williams v. State, 386 S.W.3d 750, 752 (Mo. banc 2012) (alterations omitted).

To be entitled to post-conviction relief for ineffective assistance of counsel, a movant must show by a preponderance of the evidence that (1) his or her trial counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation, and (2) he or she was prejudiced by that failure. *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.

The majority opinion correctly concluded defense counsel's performance did not prejudice McLemore and the analysis should have ended with that conclusion. In *Strickland*, the bedrock ineffective assistance of counsel case, the United States Supreme Court specifically instructed:

> [T]here is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. **The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.** Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Id. at 697 (emphasis added). In this case, the motion court found defense counsel's performance did not prejudice McLemore. The Supreme Court of the United States in

Strickland instructs that is where the analysis should end.

It can be tempting Monday morning quarterback, meaning in this context to look back at defense counsel's performance and imagine what could have been done better, but that is not this Court's role. In this case, the jury acquitted McLemore of two of the six felony charges. The motion court's findings, that defense counsel was not ineffective, are presumed correct and this presumption exists because it possesses the great advantage of having witnessed in-person trial counsel's performance.

Conclusion

For these reasons, I concur.

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Zel M. Fischer, Judge