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IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

CHRISTOPHER W. KENNEDY,)	
)	
Appellant,)	WD 65218
)	
v.)	Filed: June 30, 2006
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

MEMORANDUM SUPPLEMENTING ORDER
AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

<p>THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.</p>
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Christopher Kennedy appeals from the denial of his Rule 29.15 motion for post-conviction relief following an evidentiary hearing. For the following reasons, we affirm.

As noted by this court on direct appeal:

This case stems from a shooting that occurred outside of a Kansas City, Missouri, nightclub. On October 3, 1999, Frederick Darrington, Ryan Pearson, Rodja Pearson, and Raphael Pearson attended a comedy show at the Beaumont Club. As they walked away from the club after the show, shots rang out. Three bullets struck Frederick Darrington, who died at the scene. One bullet struck Ryan Pearson in the head. He died three days later at a hospital. Rodja Pearson suffered a gunshot wound to the leg but died of unrelated injuries before trial. Raphael Pearson escaped physical injury.

Several people witnessed the shootings, and three of them identified Mr. Kennedy as the culprit. Raphael Pearson identified Mr. Kennedy from a police photographic array four days after the shooting. At trial, he recalled seeing two people brandishing a large gun and firing it. He harbored "no doubt" that Mr. Kennedy was one of the people shooting the gun and that Mr. Kennedy was the person who murdered his brother. He testified that he had seen Mr. Kennedy in the nightclub earlier in the evening and had known Mr. Kennedy several years earlier as a "drinking buddy."

Darren Miller identified Mr. Kennedy from a police photographic array on the evening after the shooting. On the night of the shooting, Mr. Miller was a bystander in the area. Unlike Raphael Pearson, Mr. Miller saw only one shooter. But he was positive that Mr. Kennedy was the shooter. He observed Mr. Kennedy's face from a distance of four to five feet and between fifteen and thirty seconds.

In an interview with police Sergeant Jay Pruetting on the morning after the shooting, Rodja Pearson also identified Mr. Kennedy as the killer. Although the trial court recognized that Rodja Pearson's statement to Sergeant Pruetting would be hearsay if offered to prove the truth of the matter asserted, the trial court allowed the admission of the statement for the limited purpose of explaining why the police developed Mr. Kennedy as a suspect in the case.

Over Mr. Kennedy's objection, the trial court also allowed the State to present motive evidence pertaining to a 1992 shooting in which Mr. Kennedy was the victim. Although the police never charged a suspect or determined who shot Mr. Kennedy in 1992, they did identify Rodja Pearson as a suspect in that case. The State reasoned that this evidence suggested a possible motive for the 1999 shootings, in which Rodja Pearson was one of the victims.

After hearing the evidence, the jury convicted Mr. Kennedy of two counts of second-degree murder, one count of first-degree assault, and

three counts of armed criminal action. The trial court imposed the following sentence: (1) life imprisonment for second-degree murder (Count I); (2) twenty-five years' imprisonment for armed criminal action (Count II), to run concurrently with Count I; (3) life imprisonment for second-degree murder (Count III), to run consecutively to Counts I and II; (4) twenty-five years' imprisonment for armed criminal action (Count IV), to run concurrently with Count III and consecutively to Counts I and II; (5) fifteen years' imprisonment for first-degree assault (Count VII), to run consecutively to Counts I, II, III, and IV; and (6) twenty-five years' imprisonment for armed criminal action (Count VIII), to run concurrently with Count VII and consecutively to Counts I, II, III, and IV.

State v. Kennedy, 107 S.W.3d 306, 309-10 (Mo. App. W.D. 2003).

After this Court affirmed Appellant's convictions on direct appeal, *id.* at 316, Appellant timely filed a *pro se* motion for post-conviction relief pursuant to Rule 29.15. An amended motion was subsequently filed by appointed counsel. The motion court ultimately denied Appellant's motion following an evidentiary hearing. Appellant brings nine points on appeal challenging the denial of his motion.

Our review of the motion court's denial of a Rule 29.15 motion is limited to determining whether the findings and conclusion of the motion court are clearly erroneous.

Rule 29.15(k). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." ***Moss v. State***, 10 S.W.3d 508, 511 (Mo. banc 2000).

Appellant contends on appeal that the trial court erred in finding that he received effective assistance of counsel for nine different reasons. "To prevail on an ineffective assistance of counsel claim, [Appellant] must show that (1) trial counsel's performance was deficient in that he failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances and (2) the deficient

performance prejudiced [Appellant].” *State v. Rich*, 950 S.W.2d 337, 339 (Mo. App. W.D. 1997) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Regarding counsel’s performance, “[w]e presume counsel to be competent, requiring proof to the contrary by a preponderance of the evidence.” *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996). As to prejudice, a claimant must demonstrate prejudice by showing that “there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *Slater v. State*, 147 S.W.3d 97, 100 (Mo. App. W.D. 2004). “There is no presumption of prejudice merely because counsel’s performance was deficient.” *Id.* Appellant must establish both the performance and prejudice prongs of this test in order to prevail on a claim of ineffective assistance, “and if he fails to satisfy either prong, we need not consider the other.” *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997).

In his first point, Appellant contends that the motion court erred in finding that he did not receive ineffective assistance of counsel when counsel failed to investigate and present evidence to the jury linking some of the bullet shells found at the murder scene to bullet shells found at the scene of a 1998 assault committed by another individual. Appellant argues that such evidence would have linked someone other than Appellant to the murders at the Beaumont Club and that, had such evidence been presented at trial, there is a reasonable likelihood that the outcome of the trial would have been different.

“In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of

deference to counsel's judgments."¹ *Ervin v. State*, 80 S.W.3d 817, 824 (Mo. banc 2002) (quoting *Strickland*, 466 U.S. at 691, 1044 S.Ct. at 2066). "To succeed on his claim of ineffective assistance of counsel for failure to investigate, the appellant was required to specifically allege and prove what information his attorney failed to discover, that a reasonable investigation would have revealed it, and how the information would have aided his position." *Anderson v. State*, 66 S.W.3d 770, 776 (Mo. App. W.D. 2002) (quoting *Jones v. State*, 24 S.W.3d 701, 704 (Mo. App. E.D. 1999)).

The record reflects that two police reports in defense counsel's possession indicated that the shell casings recovered at the scene of the murder matched shell casings found at the scene of an assault that had occurred on October 15, 1998. The reports stated that, when questioned about the assault, Jermaine Mitchell told police officers that he had borrowed a 9mm handgun from Kareem Johnson and fired it in the air five times while confronting a man that had previously assaulted him.² Mitchell stated that he gave the gun back to Johnson after firing it.

Defense counsel testified that he was aware of the ballistics match to the October 15, 1998 assault but that he did not think it necessary or helpful to his alibi defense. Counsel stated that he believed evidence of this type would muddy the waters for the alibi defense and that he specifically chose not to present that evidence.

Appellant contends that counsel was ineffective for failing to further investigate the

¹ "When pursuing evidence, trial counsel has a duty to make a reasonable professional investigation, or make a reasonable decision that the particular investigation is unnecessary." *Alhamoud v. State*, 91 S.W.3d 119, 121 (Mo. App. E.D. 2002). Accordingly, "[i]n instances where counsel fails to properly investigate, counsel may be found to have provided ineffective assistance of counsel." *Anderson v. State*, 66 S.W.3d 770, 776 (Mo. App. W.D. 2002).

² When Johnson was interviewed, he denied having loaned a gun to Mitchell.

ballistics evidence and for neglecting to present this evidence to the jury. Appellant argues that the motion court clearly erred in determining that counsel's decision not to further investigate the ballistics angle was reasonable trial strategy and that the evidence would not have provided Appellant with a viable defense in the murder case.

Because we find that Appellant failed to establish prejudice resulting from counsel's failure to present the ballistics evidence, we need not determine whether a reasonably competent attorney would have presented that evidence. The evidence relied upon by Appellant was, at best, minimally probative in this case. The fact that a weapon used in this murder was also used in an assault involving one or two other individuals approximately one year prior to the murder does not establish that Appellant was not the shooter in the case at bar. Two witnesses, one disinterested and another who knew Appellant, unequivocally identified Appellant as the shooter in this case. Given the weight of the evidence against Appellant, the motion court reasonably determined that there was no reasonable probability that, but for counsel's failure to present the ballistics evidence, the result of the proceeding would have been different. *Slater*, 147 S.W.3d at 100. Point denied.

In his second point, Appellant claims that the motion court clearly erred in rejecting his claim that he received ineffective assistance of counsel because the private investigator employed by counsel had a conflict of interest. Counsel employed a private investigator, John Weaver, to find and interview potential witnesses to support Appellant's claim that he was with a woman at a hotel when the shooting occurred. Later, prior to trial, a man who lived with Weaver's daughter and who was the father of Weaver's grandchild was

murdered in a house rented by Appellant. Appellant soon became a suspect in that murder. In his post-conviction motion, Appellant asserted that the investigator had a conflict of interest and that this conflict caused him to receive ineffective assistance of counsel.

“To prevail on a claim of ineffective assistance of counsel founded on a conflict of interest, the movant must show that an actual conflict of interest adversely affected counsel’s performance.” *Price v. State*, 171 S.W.3d 154, 157 (Mo. App. E.D. 2005). “In order to prove a conflict of interest, something must have been done by counsel or something must have been forgone by counsel and lost to defendant, which was detrimental to the interests of defendant and advantageous to another.” *Id.* (quoting *Helmig v. State*, 42 S.W.3d 658, 680 (Mo. App. E.D. 2001)). “Furthermore, the mere existence of a possible conflict of interest does not automatically preclude effective representation.” *Helmig*, 42 S.W.3d at 680.

Appellant fails to identify any negative effect that the alleged conflict of interest had upon his representation by counsel. While Appellant claims that counsel’s failure to attend the State’s depositions of two of his alibi witnesses was detrimental to his interests, Appellant wholly fails to explain how counsel’s failure to attend those depositions resulted from Weaver’s alleged conflict of interest. Since Appellant failed to show any action or inaction on the part of counsel that appears tied in any way to Weaver’s alleged conflict of interest, Appellant failed to prove that he received ineffective assistance of counsel as a result of this alleged conflict of interest.

Appellant also contends that a conflict of interest of a non-attorney aiding the

defense team may be sufficient to support a claim of ineffective assistance of counsel. Even assuming, *arguendo*, that a conflict of interest on the part of Weaver could warrant post-conviction relief, the motion court was entitled to accept as credible testimony from the evidentiary hearing reflecting that all of the investigating performed by Weaver on the case was finished prior to this other murder, that Weaver timely informed Appellant and counsel of his relationship with the victim, and that Weaver told Appellant and counsel that, although he believed he could be fair and continue to work on the case, he would stop working on the case. After that point, the only involvement Weaver had with the case was to silently attend, but not assume any role in, the State's depositions of the two alibi witnesses. Appellant has not identified, and the record does not reflect, any behavior on the part of Weaver that could be deemed as having negatively impacted upon his defense. Point denied.

In his third point, Appellant contends that the motion court clearly erred in finding counsel was not ineffective in the manner in which he investigated and presented Appellant's alibi defense. Specifically, Appellant claims that counsel was ineffective for failing to attend the depositions of two defense witnesses conducted by the State, failing to prepare those witnesses for the depositions, and failing to review the deposition transcripts prior to trial.

Even assuming that a reasonably competent attorney would have attended the depositions, prepared the witnesses beforehand, and reviewed the witnesses' testimony prior to trial, Appellant has once again wholly failed to establish prejudice resulting from counsel's acts. Appellant merely claims, without any evidentiary support, that, had counsel

prepared the witnesses and/or attended the depositions, the witnesses would not have provided the State with the testimony from which they were impeached at trial. Nothing in the record establishes that the witnesses' testimony would have been any different had counsel done these things. As to Appellant's claims that he was prejudiced by counsel being caught off-guard by the testimony at trial, Appellant fails to explain how counsel's rehabilitation of these witnesses would have been any different if he had prior knowledge of the testimony. Furthermore, while Appellant claims that counsel could have presented "other exculpatory evidence" at trial if he had known that the witnesses could be impeached by their deposition testimony, he fails to identify any such evidence. Thus, the motion court did not clearly err in determining that Appellant was not prejudiced by counsel's actions related to the depositions. Point denied.

In his fourth point, Appellant claims that the motion court erred in finding that counsel was not ineffective for failing to lodge a proper objection to testimony offered by police sergeant Jay Pruetting indicating that a deceased witness, Rodja Pearson, had identified Appellant as the shooter. Appellant claims that counsel could have requested that Sgt. Pruetting's answer, which was admitted over counsel's hearsay objection under the subsequent police conduct exception, be limited in scope so as not to reveal that Pearson identified Kennedy as the shooter. Appellant further contends that counsel was ineffective for failing to properly preserve this issue for appeal by failing to include it in his motion for new trial.

We initially note that "claims for post-conviction relief based on trial counsel's failure to adequately preserve issues for appeal are not cognizable under Rule 29.15." *State v.*

Broseman, 947 S.W.2d 520, 528 (Mo. App. W.D. 1997) (quoting *State v. Lay*, 896 S.W.2d 693, 702 (Mo. App. W.D. 1995)). "Relief predicated upon ineffective assistance of counsel is limited to those errors prejudicing a movant's right to a fair trial." *Id.* Thus, Appellant's claim that counsel was ineffective for failing to preserve the issue for appeal is not cognizable on appeal.

We next turn to Appellant's claim that counsel should have asked the court to limit the response allowed by the witness. Counsel properly objected to testimony from Sgt. Pruetting indicating that Pearson had identified Appellant as the shooter on the basis that this testimony was hearsay. The State then argued that the testimony was being introduced solely for the purpose of explaining the subsequent actions of the police in assembling a photographic lineup to be viewed by the other witnesses in the case and that it should be admitted for that purpose. The trial court admitted the testimony solely for the purpose of explaining subsequent police conduct.

"[A]n out-of-court statement offered not for the truth of the matter asserted, but to explain subsequent police conduct, is not hearsay and is, therefore, admissible, assuming it is relevant." *State v. Douglas*, 131 S.W.3d 818, 824 (Mo. App. W.D. 2004). "Such testimony is justified on the basis it allows for a portrayal of the chain of events which is 'more likely to serve the ends of justice in that the jury is not called upon to speculate on the cause or reasons for the officer's subsequent activities.'" *State v. Shigemura*, 680 S.W.2d 256, 257 (Mo. App. E.D. 1984) (quoting *State v. Brooks*, 618 S.W.2d 22, 25 (Mo. banc 1981)). "However, when such out-of-court statements go beyond what is necessary to explain subsequent police conduct, they are hearsay." *Douglas*, 131 S.W.3d at 824.

Appellant claims that, once the court ruled that the testimony was admissible under the subsequent police conduct exception, counsel should have asked the court to limit the witness' response "to state something to the effect that 'based upon information received from Rodja Pearson, a photo array was put together and shown to the other eyewitnesses to the homicide.'" Appellant argues that, had Sgt. Pruetting's testimony been so restricted, there is a reasonable likelihood that the result of the proceeding would have been different.

We initially note that Pearson's identification of Appellant was arguably necessary to explain the inclusion of Appellant's picture in the photographic array presented to the other witnesses. See *State v. Lockett*, 165 S.W.3d 199, 204-05 (Mo. App. E.D. 2005) (holding hearsay statements admissible to explain the actions of the police in assembling a photographic array). Moreover, even had Sgt. Pruetting's testimony been restricted in the manner proposed by Appellant, Pearson's identification of Appellant would most likely have been presumed by the jury. In any event, given the strength of the other evidence against Appellant, which included two other witnesses positively identifying Appellant as the shooter, the motion court cannot be deemed to have clearly erred in finding that Appellant failed to establish that there was a reasonable likelihood that the result of the trial would have been different if Sgt. Pruetting's testimony had been so limited. Point denied.

In his fifth point, Appellant claims that the motion court clearly erred in finding he did not receive ineffective assistance of counsel when counsel failed to object to comments by the State during closing argument and in failing to preserve those objections for appellate review by including them in his motion for new trial. During closing argument, the prosecutor made the following comments:

It's significant that on October 4th, 1999 . . . Darren Miller initialed this

photograph as this is the man that he saw doing the shooting just the night before at about 10:30 on October 3rd.

Then Rodja Pearson, who is now deceased, on October 5th initialed the same photograph, saying, This is the guy that did the shooting. This is the guy that shot him. Then Raphael Pearson on October 7th, within three or four days after the shooting, said, That's the guy. He's the one that did the shooting. So it's significant that right away after the shooting occurred three people say this is the man that did the shooting.

* * *

Now, it's interesting that within days after the event the State's witnesses came to police headquarters before trained detectives and picked out the defendant as the man who did the shooting, three of them picked him out, and their initials are on the back of this photograph.

After this final comment, counsel objected to the State's reference to three identifications because the hearsay evidence of Rodja Pearson's identification had been admitted solely for the purpose of explaining subsequent actions by the police. The trial court sustained that objection, and counsel did not request any further relief.

Appellant also takes issue with the following comments made by the prosecutor during the rebuttal portion of the State's closing argument:

Mr. Talking Loud But Saying Nothing tells you that on October 11th he surrenders his client and tells him not to say anything. And I join Mr. Humphrey. If the police are accusing you, or you or any of you, of a double murder, you got nothing to say? Incredible. Incredible.

* * *

Ladies and gentlemen, if you do anything close to acquitting this executioner, you will be a part of a sham. Your jury service will be something to be embarrassed about. You will have made a mockery of the concept of justice that this beloved family, families have been waiting on since October 3rd, 1999. You will have perverted justice to let an executioner get away with it.

* * *

The only thing necessary for evil to triumph over good is for good people to do nothing. There is a great deal of evil in this courtroom, and he's in the manifestation of Christopher Kennedy. And for you good people to turn your backs and let him go is a perversion of justice.

Appellant claims that counsel was ineffective in failing to object to all of the aforementioned

comments during closing argument and should have renewed those objections in his motion for new trial.

Appellant previously challenged the bulk of the State's comments during closing argument on direct appeal. This court held that the State's argument was permissible insofar as it referred to counsel "talking loudly but saying nothing" and characterized Appellant as "evil" and an "executioner". *Kennedy*, 107 S.W.3d at 313-14. Appellant's counsel cannot be deemed ineffective for failing to make meritless objections to those comments. *Middleton v. State*, 103 S.W.3d 726, 741 (Mo. banc 2003).

This court did find, however, that the State's comments encouraging the jury to accept Rodja Pearson's statement for the truth of the matter asserted and gratuitously referring to the fact that he had initialed the same photograph of Appellant as the other witnesses were improper. Appellant's claim was rejected on the basis that "the unfortunate remarks did not create manifest injustice or have a decisive effect on the jury, in light of the other significant evidence of guilty." *Kennedy*, 107 S.W.3d at 315. Likewise, this Court found that the State's argument that the jury should feel embarrassed if they failed to find Appellant guilty was improper, but we found that Appellant was not prejudiced by those remarks given the substantial evidence of guilt presented at trial. *Id.*

Even if counsel's failure to object to the aforementioned statements fell below the standard of what a reasonably competent attorney would have done, Appellant has failed to satisfy the prejudice prong of his claim. Appellant claims that sufficient prejudice is established by the fact that proper objections would have been sustained by the trial court and the jury would have either been instructed to disregard the statements or a mistrial

would have been granted. Contrary to Appellant's apparent belief, "[i]neffective assistance of counsel is not to be determined by a post-trial academic determination that counsel could have successfully objected to evidence in a given number of instances." *Neal v. State*, 99 S.W.3d 571, 578 (Mo. App. S.D. 2003) (internal quotations omitted). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* (internal quotations omitted). "The defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (internal quotations omitted). Given the weight of the evidence against Appellant, the record simply does not establish that the result of the trial would have been different had such objections been made. Point denied.

In his sixth point, Appellant contends that the motion court clearly erred in finding that counsel was not ineffective for failing to object to testimony elicited from Sherice Banks, Appellant's girlfriend and alibi witness, that Appellant was the father of one of her three children and that he did not pay court-ordered child support for that child. Appellant argues that this testimony could have been excluded from evidence as "prejudicial and irrelevant bad character evidence" against both Appellant and Banks.

On cross-examination, the State elicited testimony from Banks that Appellant was the father of one of her children. She stated that Appellant does not pay any court-ordered support, but that he does give her money to support the child. On re-direct examination, Banks testified that Appellant takes care of his child and that the amount he provides varies from month to month, depending upon the child's needs.

Any objection to the testimony that Appellant had a child with one of his key alibi

witnesses and that he was providing some support to that child would clearly have been unsuccessful. "A witness's relationship with the defendant is a relevant subject of cross-examination to show the witness's bias or prejudice in favor of or against a defendant." **State v. Weaver**, 912 S.W.2d 499, 516 (Mo. banc 1995). "Counsel cannot be deemed to be ineffective for failing to make a meritless objection." **Middleton**, 103 S.W.3d at 741. Moreover, any negative light that this testimony cast on Appellant or Banks was exceedingly minimal, and there is no reasonable likelihood that the exclusion of this testimony would have any effect on the outcome of the trial. Point denied.

In his seventh point, Appellant asserts that the motion court clearly erred in finding that counsel was not ineffective for failing to investigate and impeach the credibility of eyewitness Raphael Pearson. Appellant contends that counsel could have discovered and presented at trial evidence impeaching Pearson's testimony that he had not been drinking on the night of the shooting, that there was no record of him making a 911 call contrary to his testimony, and that he did not identify Appellant as the shooter until four days after the shooting.

Pearson testified at trial that he didn't drink anything on the night of the shooting. On cross-examination, Pearson stated that he had stopped drinking approximately three years prior to the date of trial when he had decided to become a professional boxer.

Contrary to Appellant's assertions on appeal, Pearson offered no testimony indicating that his brother had also been sober on the night of the shooting or that his brother had stopped drinking when he too decided to pursue a professional boxing career. Thus, Appellant's claim that Pearson's testimony could have been impeached by an

autopsy report indicating that Pearson's brother was intoxicated is wholly without merit.

Appellant next claims that a reasonable investigation of Pearson would have disclosed to counsel that he had a municipal court DUI conviction for which he was on probation at the time of the shooting and that counsel was ineffective for failing to use that conviction to impeach Pearson. Even assuming, arguendo, that evidence of this DUI conviction was admissible³ and that counsel would have discovered it as a result of a reasonable investigation, Appellant could not have been prejudiced by counsel's failure to discover and impeach Pearson with it. The municipal court records reflect that Pearson's DUI citation was issued on August 8, 1998. Pearson offered his testimony at Appellant's trial on April 17, 2001, two years and seven months after the citation was issued. Thus, his municipal court violation would not have effectively impeached his testimony that he had stopped drinking about three years prior to the date of trial, and it does absolutely nothing to impeach his testimony that he was not drinking on the night of the shooting.

Appellant also claims that counsel should have discovered and utilized a transcript of 911 calls that were received on the night of the shooting to discredit Pearson's testimony that he called 911 on the night of the shooting. At trial, Pearson testified that he made a 911 call to the police with his cellular phone on the night of the shooting. He further stated that his call was placed on hold due to the high volume of calls that night and that he did not speak with the police about the incident until four days later. Appellant argues that the transcript would have shown that Pearson did not call 911 on the night in question and

³ "It is well-established in Missouri that a witness can be questioned regarding prior criminal convictions for purposes of impeachment. . . . It is equally well-established, however, that this rule does not extend to convictions of violations of municipal ordinances, so that 'a party cannot impeach a witness with a municipal ordinance violation.'" *State v. Albanese*, 920 S.W.2d 917, 926 (Mo. App. W.D. 1996) (overruled on other grounds in *State v. Beeler*, 12 S.W.3d 294 (Mo. banc 2000)).

thereby called his overall credibility into question.

The transcript purports to be a transcript of calls made related to the shooting. From Pearson's testimony, it is unclear whether he ever spoke to anyone at all after he was placed on hold. If Pearson hung up after being placed on hold by 911, there would be no transcript of his call. Thus, the transcript arguably fails to impeach Pearson's testimony at all. Moreover, even if counsel could have called into question the credibility of Pearson's assertion that he called 911 that night, there is no reasonable likelihood that the inclusion of this evidence would have changed the outcome of the trial.

Finally, Appellant contends that counsel was ineffective for failing to impeach Pearson with evidence that he did not identify Appellant as the shooter until four days after the shooting. "It is well-settled that counsel's failure to impeach a witness will not constitute ineffective assistance of counsel unless this action would have provided the defendant with a viable defense or changed the outcome of the trial." *Coday v. State*, 179 S.W.3d 343, 352 (Mo. App. S.D. 2005).

Pearson offered testimony that he first identified Appellant as the shooter four days after the shooting during direct examination. In fact, the timing of Pearson's identification was noted again in the State's closing argument. While counsel might have been able to call further emphasis to this testimony by again asking about the timing of Pearson's identification on cross-examination, such testimony would merely have been cumulative to prior testimony. "[C]ounsel will not be found ineffective for failing to present cumulative impeachment evidence." *Id.* Point denied.

In his eighth point, Appellant claims that the trial court clearly erred in finding that

counsel was not ineffective for failing to advise Appellant of health problems that impaired his ability to prepare Appellant's case. Appellant contends that counsel should have withdrawn from the case and that, had counsel informed him of his poor health, he would have retained different counsel to represent him at trial.

At the evidentiary hearing, counsel testified that, during the course of his representation of Appellant, he suffered from some complications related to his diabetes, including vision problems, kidney problems, and high blood pressure. Counsel further testified, however, that he informed Appellant of the health problems he was facing and that his health problems had not effected his ability to investigate and try Appellant's case.

The motion court found that Appellant failed to demonstrate that counsel "suffered from a physical ailment that rendered him unable to perform his duties as a reasonably competent attorney." The motion court found credible counsel's testimony that counsel had informed Appellant of his health problems and that counsel's health problems did not effect his ability to communicate with Appellant or to prepare for trial. "This Court must defer to the motion court's determination on matters of credibility." *White v. State*, 122 S.W.3d 118, 119 (Mo. App. S.D. 2003). Point denied.

In his final point, Appellant contends that the motion court clearly erred in finding that counsel was not ineffective as a result of the cumulative effect of all the actions attacked in his previous points. "If counsel's conduct is not constitutionally ineffective in any individual instance, counsel cannot be held ineffective on the whole." *State v. Brooks*, 960 S.W.2d 479, 500 (Mo. banc 1997). Point denied.

The judgment is affirmed.