In the
Missouri Court of Appeals
Western District

DERIK T. DAVIS,	
Appellant,	**WD83193**
v.	**OPINION FILED:**
STATE OF MISSOURI,	**NOVEMBER 10, 2020**
Respondent.	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Joel P. Fahnestock, Judge

Before Division Four: Cynthia L. Martin, Chief Judge, Presiding, Gary D. Witt, Judge, Anthony Rex Gabbert, Judge

Derik T. Davis appeals the denial, after an evidentiary hearing, of his Rule 29.15 motion for post-conviction relief. He contends the motion court, 1) clearly erred in denying Davis's claim that trial counsel was prejudicially ineffective by failing to object to the prosecutor's reference, in closing argument, to Davis not testifying, and 2) clearly erred in denying Davis's claim that appellate counsel was prejudicially ineffective for failing to raise the issue on appeal that, Shana Hawkins's testimony violated Davis's right to confrontation. We affirm.

Factual and Procedural Background[1]

Prior to the February 2015 incident underlying Davis's prosecution, the female Victim and Davis had been in a romantic relationship since 2005. The Victim and Davis had lived together on and off until they broke off their relationship in August 2014. The couple have a daughter together, who was six years old at the time of Davis's crimes.

The Victim and Davis continued to have contact after he moved out, when he would come over to visit their daughter. According to the Victim, she last had consensual sexual relations with Davis in November 2014.

Because the Victim had "prior issues" with Davis, she obtained an ex parte order of protection against him. That order had not been served on Davis on the date of the underlying incident.

On February 28, 2015, the Victim came home from a family party she had hosted at a nearby restaurant. Her daughter was spending the night with other family members, so the Victim was alone at home. She fell asleep sometime between 8:00 and 9:00 p.m. At about 3:00 a.m. on the morning of March 1, the Victim awoke to use the restroom. After she went back to bed and checked the time on her cell phone, the Victim saw the silhouette of a person in the doorway of her bedroom. She recognized the person as Davis. The Victim texted the word "cupcake" to a female friend; that word was a pre-arranged signal that the friend should call 9-1-1 because the Victim was in trouble with Davis. When the Victim sent the text message, however, her friend was asleep; she did not see the text message until later that morning.

[1] We borrow extensively from the background information first stated in our Opinion *State v. Davis*, 533 S.W.3d 853, 857-859 (Mo. App. 2017), issued after Davis's direct appeal.

The Victim asked Davis what he was doing in her house. He said that he needed to talk to her about "taking the restraining order off of him." The Victim stated that she was unwilling to release the order. Davis then jumped on the Victim's bed and began tying her feet together with a shirt. The Victim told Davis that the reason she had obtained the order of protection was "because of this," what he was doing, "things like that."

The Victim kept asking Davis what he was doing, and he told her to shut up. Davis proceeded to "put his weight" on the Victim to hold her down, and grabbed her arms. The Victim tried to pull away, but because Davis was stronger than her, he was able to tie the Victim's arms together with another one of her shirts. The Victim testified that the binding on her arms was tight, and caused her fingers to swell. The Victim asked Davis why he was tying her up, and he repeatedly said that he needed her "to take the restraining order off because he didn't want to get in trouble."

After binding the Victim's arms and legs, Davis pulled her pants off; the Victim unsuccessfully attempted to shift her body to prevent Davis from undressing her. The Victim told Davis that she did not want to be intimate with him. Davis told her that she could "lay here and let [him] do what [he was] going to do, or it can hurt," and asked her which she preferred. The Victim testified that she laid still because she "didn't want him to hurt [her] any more than what [she] felt like he was hurting [her] already. [She] didn't want--[she] didn't know what he would do more than what he was already doing." The Victim did not "want to be hit, like he said, it could hurt. [She] didn't know what he meant by that, but [she] didn't want any part of that."

Davis engaged in vaginal intercourse with the Victim. When he was done, he again complained about the order of protection. The Victim repeated that she would not release it. Davis got upset, grabbed a sock, and stuffed it in the Victim's mouth. He then took a belt and wrapped it

around her head to hold the sock in place. Davis continued to "rant" about the order of protection and how he would get in trouble, and demanded that the Victim do what he asked her to do. Davis would periodically remove the belt and sock to let the Victim respond. When she would again refuse his request, he would replace the sock and belt.

Davis remained in bed with the Victim. The Victim testified that she could not leave because she was bound, and because Davis was bigger than her and had already used his body weight to pin her down on the bed. The Victim was ultimately able to free her legs, but could not untie her hands, which were bound more tightly. Both Davis and the Victim eventually fell asleep. As they slept, Davis continued to hold the Victim. The Victim's arms were numb by the time she awoke. She decided to tell Davis what he wanted to hear so that he would untie her arms. The Victim had bruises on her wrists when Davis eventually unbound her.

By around 8:00 a.m., the Victim's friend woke up and saw the text message with the signal "cupcake" from earlier in the morning. She called the Victim but got no answer. Davis grabbed the Victim's phone and saw who had called. He told the Victim to call her friend back. Instead of calling her friend, the Victim texted "cupcake" again. That message was sent at 8:56 a.m. The friend called 9-1-1.

When the police arrived, the Victim ran to the door. She told the police that Davis was inside, that she had an order of protection that needed to be served on him, and that she did not want him in her home. The officers found Davis hiding in a closet in their daughter's bedroom, and arrested him.

The Victim was taken to a hospital and a forensic sexual assault examination was conducted. The Victim had no vaginal or other injuries. The nurse who performed the examination observed redness around the Victim's wrists.

Davis was interrogated by police on the afternoon of March 1, 2015. He claimed that he had been dropped off at the Victim's house in the early morning, and that the Victim let him in. Davis denied any sexual contact with the Victim that day. Police swabbed Davis's penis for purposes of obtaining a DNA sample.

A forensic specialist tested the vaginal and cervical swabs collected during the Victim's examination, as well as her shirts and underwear. No semen or spermatozoa were found on the Victim's clothing or on the swabs. There were no hairs or skin cells found in the pubic combing. Both Davis's and the Victim's DNA was found on the swab taken from Davis's penis.

Davis was charged by indictment with one count of first-degree rape in violation of § 566.030[2] (Count I), one count of first-degree burglary in violation of § 569.160 (Count II), and one count of felonious restraint in violation of § 565.120 (Count III).

A jury trial was held in February 2015. Davis did not testify or present any evidence in his own defense. During the State's rebuttal closing argument, the prosecutor made a reference to Davis's failure to testify. Defense counsel made no objection.

The jury found Davis guilty of first-degree rape and felonious restraint. On Count II, the jury convicted Davis of first-degree trespass, which was submitted as a lesser-included offense to the charged crime of first-degree burglary. In its oral pronouncement of judgment regarding Count II, the court acknowledged the jury's verdict convicting Davis of first-degree trespass, but referred to the offense as a class C felony, even though under § 569.140 it is a class B misdemeanor. In addition, the court sentenced Davis to one year's incarceration in the county jail on Count II, even

[2] All statutory citations refer to the 2000 edition of the Revised Statutes of Missouri, as updated through 2014, unless otherwise indicated.

though the maximum authorized sentence for a class B misdemeanor at the time was six months. § 558.011.1(6). The court's written judgment varied from its oral pronouncement with respect to Count II: the written judgment states that Davis was convicted on Count II of the original charge of first-degree burglary, a class B felony, rather than of first-degree trespass. The court's written judgment sentenced Davis to consecutive sentences of fifteen years' imprisonment for rape, one year in jail for first-degree burglary, and five years' imprisonment for felonious restraint. Davis appealed.

On direct appeal, Davis argued that, 1) the evidence was insufficient to establish his guilt of felonious restraint beyond a reasonable doubt, 2) the court plainly erred in failing to declare a mistrial after the prosecution referred to his failure to testify during closing argument, and 3) the circuit court erroneously convicted and sentenced him for first-degree burglary on Count II, when the jury convicted him of the lesser included offense of first-degree trespass. *Davis*, 533 S.W.3d at 856. This court affirmed Davis's convictions and sentences for first-degree rape and forcible restraint. *Id.* at 865. All parties conceded that the circuit court erroneously entered a conviction and sentence of first-degree burglary, when the jury convicted him of a lesser offense. *Id.* at 856. Accordingly, we reversed the circuit court's conviction and sentence on Count II, and remanded to the circuit court for resentencing and entry of a new judgment with respect to that count. *Id.* at 865. The mandate issued on December 20, 2017. On January 9, 2018, an Amended Judgment was entered and Davis was sentenced to six months in the Jackson County Department of Corrections on Count II, which was amended to Trespass in the First Degree. This sentence was ordered to run concurrent with Count I.

On March 9, 2018, Davis filed a pro se Motion to Vacate, Set Aside or Correct the Judgment or Sentence under Supreme Court Rule 29.15. Davis was appointed counsel, and time extensions

to file an amended motion were thereafter granted by the motion court. An amended motion was timely filed on July 10, 2018. The amended motion alleged, in relevant part, that 1) trial counsel was ineffective for failing to object to the prosecutor's direct reference in closing argument to Davis's failure to testify, and 2) that direct appeal counsel was ineffective for failing to raise a claim that the trial court erred in allowing Shana Hawkins to testify about a lab report that she did not prepare, in violation of the Confrontation Clause. The motion court denied the claims following an evidentiary hearing. This appeal follows.

Standard of Review

Our review of the denial of a Rule 29.15 motion is limited to determining whether the circuit court's findings of fact and conclusions of law are clearly erroneous. Rule 29.15(k). We view the facts in the light most favorable to the verdict and judgment. *Ervin v. State*, 80 S.W.3d 817, 820 n.1 (Mo. banc 2002). We presume the findings to be correct and will reverse only with a definite and firm impression that a mistake was made. *Zink v. State*, 278 S.W.3d 170, 175 (Mo. banc 2009).

To prove ineffective assistance of counsel, Davis must meet the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Gennetten v. State*, 96 S.W.3d 143, 147 (Mo. App. 2003). Under *Strickland*, Davis must establish that (1) his counsel failed to exercise the skill and diligence of a reasonably competent attorney under similar circumstances, and (2) his counsel's deficient performance prejudiced him. *Id*. at 147-148; *Johnson v. State*, 333 S.W.3d 459, 463 (Mo. banc 2011). "Should a movant fail to satisfy either element, the appellate court on review need not consider the other." *Slater v. State*, 147 S.W. 3d 97, 101 (Mo. App. 2004). "To demonstrate prejudice, a movant must show that, but for counsel's poor performance, there is a reasonable probability that the outcome of the court proceeding would

have been different." *Williams v. State*, 386 S.W.3d 750, 752 (Mo. banc 2012) (internal quotations and citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Deck v. State*, 68 S.W.3d 418, 426 (Mo. banc 2002). We presume counsel acted professionally and that counsel's actions were based on sound trial strategy. *Williams*, 386 S.W.3d at 753. To overcome this presumption, Davis must prove his claim for relief by a preponderance of the evidence. Rule 29.15(i); *Brock v. State*, 242 S.W.3d 430, 433 (Mo. App. 2007).

To prevail on a claim on ineffective assistance of appellate counsel, Davis must show that his counsel failed to raise a claim of error "so obvious that a competent and effective lawyer would have recognized and asserted." *Meiners v. State*, 540 S.W.3d 832, 836 (Mo. banc 2018) (internal quotation marks and citation omitted).

Point I – Failure to Object to Prosecutor's Closing Argument

In his first point on appeal, Davis contends the motion court clearly erred in denying his claim that he was denied effective assistance of counsel when trial counsel failed to object to the prosecutor's reference in closing argument to Davis not testifying. He contends that no reasonably competent attorney would have failed to object to the comment and given the trial court the opportunity to take corrective action. He argues that, had trial counsel made the objection, there is a reasonable probability the result of the trial would have been different.

Davis did not testify at trial. The prosecution opened its closing argument by discussing that DNA evidence does not lie, and that the Victim's DNA was on Davis's penis. The State then discussed that Davis did lie, however, and the jury observed those lies in a videotaped interview taken within hours of when Davis raped the Victim. The State discussed that Davis first lied to police about presently living with the victim, later admitting he did not. The State discussed that,

Davis lied to police about being dropped off at the Victims home by "Little Ronnie," as Davis could not produce any additional details regarding "Little Ronnie" to police, such as his full name, telephone number, contact information, or where he lived. The State then pointed out that Davis told police that he arrived at the Victim's home at 6:00 a.m. and that he knocked and she let him in the house**,** but later told police he rang the doorbell. Further, Davis told police that it had been a month since he had had sexual intercourse with the Victim, but the Victim's DNA was on Davis's penis. The State argued that, when police arrived after the Victim sent a covert text message to a friend indicating she needed help (first at 3:01 a.m. and again at 8:56 a.m. after the friend attempted to call the Victim), Davis was hiding in a closet, evidencing a consciousness of guilt.

Defense counsel opened closing argument by telling the jury that it heard Davis's side of the story in his recorded interrogation by police. Defense counsel argued that the Victim had made inconsistent statements before and during trial, that she had a motive to lie, and that the physical evidence did not support a finding of guilt.

The State then argued in rebuttal that the evidence was consistent, and the DNA evidence did not lie. The State discussed each allegation made by defense counsel to attack the Victim's credibility, and disputed those allegations. The prosecutor then argued the following:

> Ladies and gentlemen, you've seen the witnesses presented here the last few days, 10 witnesses. And one through 10, they told you exactly what happened. February 28th until she woke up at 3:00 a.m. throughout the day of March 1, 2015. In fact, you didn't have the benefit of seeing the defendant try to explain himself by not saying he did it. But you know what is a benefit, the lies that he told within a 30 to 45-minute period. Lie, lie, lie. And why was he lying? Because he was guilty and he knew it. And he was hiding in the closet trying to avoid it. But he couldn't hide well enough to avoid being taken into custody by Officer Cowan. Thank goodness for that.

Davis's counsel did not object or request any relief, and did not include a claim of error in his motion for new trial.

On direct appeal, Davis contended that the trial court plainly erred in failing to sua sponte declare a mistrial after the State referenced Davis's failure to testify during rebuttal closing argument. This court found that the prosecutor's comment was improper, but that there was no plain error. We stated:

> There was no plain error in the circumstances of this case. The prosecutor's comment was brief, and it was made in the context of emphasizing the strength of the State's evidence and Davis's pretrial statements and actions which attempted to conceal his guilt. The challenged statement was garbled, and may have been confusing to the jury. Davis's counsel questioned the jurors during *voir dire* as to whether they would hold Davis's failure to testify against him, and none responded that they would. Further, the jury was instructed in accordance with MAI-CR 3d 308.14 that it should draw no adverse inference from Davis's failure to testify. Finally, the fact that the jury convicted Davis of a lesser offense on Count II provides some indication that the challenged comment did not severely prejudice Davis in the jury's eyes.

Davis, 533 S.W.3d at 864.

In Davis's amended Rule 29.15 motion, he alleged that the trial judge could have taken appropriate steps to correct the situation had trial counsel objected to the prosecutor's remark. Noting that a prompt instruction to the jury to disregard the comment may cure the error, the motion alleged that the court did not get that opportunity due to counsel's failure to object. The motion alleged that counsel's failure left the jury with the prosecutor's assertion that it could and should take Davis's failure to testify as a sign of his guilt.

At the evidentiary hearing, trial counsel testified that she did not object to the prosecutor's comment because she did not hear the prosecutor's comment.

The motion court denied Davis's claim of ineffective assistance of counsel. The court found that trial counsel testified credibly that she had not heard the statement, and therefore had

no strategic reason for not objecting. The motion court quoted the part of our direct appeal opinion cited above, *supra*, and stated that Davis had "failed to meet his burden to prove that, but for trial counsel's failure to object to the statement, there is a reasonable probability the result of the trial would have been different."

Davis argues in this appeal that, because our plain error review on direct appeal "was the major, if not *the*, reason" the motion court denied Davis's Rule 29.15 motion on this issue, pursuant to *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002), the motion court's analysis was flawed.[3] We disagree.

Although Davis contends the motion court misapplied the *Strickland* standard under *Deck*, we find this case similar to *Sidebottom v. State*, 781 S.W.2d 791 (Mo. banc 1989), which was distinguished in *Deck*. *Deck* noted:

> *Sidebottom* involved the effect of defense counsel's failure to object to an exhibit that made reference to an uncharged rape and burglary. After setting forth the applicable *Strickland* standard, *Sidebottom* noted that the error was raised on direct appeal, but was determined not to have resulted in plain error. 781 S.W.2d at 796-97. It then determined that, '[o]n the facts of the present case and the law as applied to them, *the bases for* the Court's finding of no manifest injustice on direct appeal serve now to establish a finding of no prejudice under the *Strickland* test.' *Sidebottom*, 781 S.W.2d at 796 (emphasis added).

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[3] The State contends that Davis's claim is unreviewable, referencing *Shifkowski v. State*, 136 S.W.3d 588, 590-591 (Mo. App. 2004) and *Cornelious v. State*, 351 S.W.3d 36, 42 (Mo. App. 2011), because this court conducted a plain error review on direct appeal and concluded that an error occurred, but it was harmless and caused no prejudice to Davis. The State argues that, even if reviewable, Davis has failed to demonstrate that he suffered *Strickland* prejudice from counsel's failure to object.

Davis responds by contending that his claim is reviewable, arguing no prejudice was found after plain error review on direct appeal in *Deck v. State*, but our Missouri Supreme Court still granted *Strickland* relief. Further, because this court did not conclude that there was no prejudice to Davis, but concluded there was no "severe" prejudice, this claim is reviewable even under the State's interpretation of reviewability.

As it is apparent to us from the face of the record that the motion court did not clearly err in denying Davis's claim under the *Strickland* standard, we need not delve into this dispute and address the claim on its merits.

> As is evident, *Sidebottom* did not state that a finding of no plain error on direct appeal necessarily equates to a finding of no prejudice under *Strickland*. It simply held that the facts that formed the *bases of* its finding of no plain error in that case also formed *the bases of* the finding of no *Strickland* prejudice on the post-conviction motion. In so doing, it properly applied the *Strickland* standard, not the plain error standard, stating, '*movant fails to show that, but for trial counsel's failure to object and then to request a mistrial, there was a 'reasonable probability that the result would have been different.*' *Sidebottom*, 781 S.W.2d at 797 (emphasis added).

Deck, 68 S.W.3d at 426-427.

We find that, our reasoning for concluding that no plain error occurred on direct appeal also explains why there is no reasonable probability that the outcome of Davis's trial would have been different had trial counsel objected to the prosecutor's statement. Although Davis contends that an objection by counsel would have allowed the court to declare a mistrial or issue a curative instruction, Davis states he "***is not arguing that with an objection there is a reasonable probability the trial court would have granted a mistrial.*** Rather, [Davis] is arguing there is a reasonably probability the result would have been *different*." (Emphases original). Davis explains that, if trial counsel had objected, a mistrial would have been declared, the trial court would have overruled the objection, or the trial court would have sustained the objection and given a curative instruction. In the first two options, Davis argues he would have received a new trial. In the third option, he argues the trial court could have redirected the jury back to the written instructions and told the jury to disregard the prosecutor's comment. He contends that, because the jury did not get that direction, there is a reasonable probability that the court's written instruction to draw no inference from Davis's lack of testimony went unheeded. To support this, Davis makes substantially the same arguments defense counsel made to the jury at trial, in closing, regarding alleged discrepancies in the Victim's statements, the fact that the Victim had no vaginal injuries,

the fact that no spermatozoa was found on the vaginal swabs, etc. Although the jury heard all of the same arguments Davis makes in this appeal, Davis maintains that there is a reasonable probability that the jury concluded, based on the prosecutor's statement in closing, that Davis's silence at trial proved his guilt for rape, felonious restraint, and trespass. We cannot agree.

In order for the jury to draw such a conclusion, there would have had to also be a reasonable probability that, had the comment not been made, the jury would have discounted the DNA evidence which showed that Davis had the Victim's DNA on his penis, believe Davis's claim to police that he had not had recent sex with the Victim, believe that Davis showed up at 6:00 a.m. at the Victim's residence and discount the Victim's 3:01 a.m. text to a friend alerting that Davis was in her home, discount that Davis was hiding in a closet when police arrived, although he claimed to have been invited in the home by the Victim, ignore the marks on the Victim's wrists and believe Davis's statement to the police that he had not restrained the Victim, etc. Moreover, counsel's failure to object to the prosecutor's statement would have had to have created the reasonable probability that the jury would find the Victim lacked credibility; DNA evidence *and* the Victim's credibility were essential to proving the charged crimes. Given the record, we find no reasonable probability that any of the aforesaid would have occurred such that the result would have been different.

Moreover, we cannot find that counsel's failure to object to the statement undermined our confidence in the fairness of the proceeding, or that Davis suffered a genuine deprivation of his right to effective assistance of counsel. *See Deck*, 68 S.W.3d at 428. This is due, in part, because (as stated in our Opinion on direct appeal), the prosecutor's comment was brief, and was made in the context of emphasizing the strength of the State's evidence and Davis's pretrial statements and actions which attempted to conceal his guilt. The challenged statement was garbled, and may have

been confusing to the jury. Indeed, even defense counsel did not hear the comment and immediately recognize it as damaging at trial, although counsel acknowledged when presented the transcript at the 29.15 evidentiary hearing that the statement was made and objectionable. The motion court found trial counsel's testimony credible with regard to not hearing the comment. Davis's counsel did question jurors during *voir dire* as to whether they would hold Davis's failure to testify against him, and none responded that they would. The jury was, in fact, instructed in accordance with MAI-CR 3d 308.14 that it should draw no adverse inference from Davis's failure to testify. (We disagree with Davis that, this particular comment by the prosecutor was the equivalent of the prosecutor stating to the jury that it could disregard the instruction that it should draw no adverse inference from Davis's failure to testify.) Finally, the fact that the jury convicted Davis of a lesser offense on Count II shows that the jury did not conclude, as Davis contends on appeal, that based on the prosecutor's comment, Davis's silence meant Davis was guilty of the crimes as charged.

The motion court did not clearly err in concluding that**,** Davis failed to meet his burden to prove that, but for trial counsel's failure to object to the statement, there is a reasonable probability the result of the trial would have been different.

Point I is denied.

Point II – Ineffective Assistance of Appellate Counsel

In his second point on appeal, Davis contends that the motion court clearly erred in denying his Rule 29.15 claim that he was denied effective assistance of appellate counsel when appellate counsel did not raise the issue on appeal that, Davis's right to confrontation was violated when Shana Hawkins was allowed to testify at trial. He argues there is a reasonable probability the result

of Davis's appeal would have resulted in a new trial if appellate counsel had raised this preserved issue on appeal.

Prior to Shana Hawkins testifying at trial, Davis objected to her testimony on the basis that Hawkins only analyzed the data results of DNA laboratory testing of swabs taken from Davis's scrotum and penis, but did not perform the preliminary laboratory work which led to the DNA being placed in the machine which produced the data. He argued that he had a constitutional right to cross-examine the individual who performed the laboratory work because there may have been errors in that process. The State argued that Hawkins's testimony was admissible**,** and Davis made an offer of proof.

In Davis's offer of proof, Hawkins testified that the laboratory work required to ultimately obtain data first entails extracting DNA out of a cell, determining how much DNA is present (quantitation), copying the DNA and adding a fluorescent tag so it can be detected on an instrument (amplification), and finally putting the DNA through an instrument (injection) which ultimately produces data. After the laboratory work is done, a "batch review" is performed which entails another qualified analyst reviewing the work to ensure there are no errors and that everything was documented properly.

After the batch review was complete, Hawkins analyzed the data. Hawkins was not present for the laboratory work, performed by Jennifer Howard, and Howard's work was not included in Hawkins's final report. Hawkins testified that, if something went wrong in the laboratory setting, there would have been no DNA for Hawkins to analyze. Hawkins testified that**,** everything Howard did was correct, because it passed the batch review "which means that everything went fine with the laboratory work and that the data that we – that we developed was ready to be analyzed." Hawkins stated that she was not relying on the opinions of anyone else in reaching her

conclusions regarding the data. Further, the DNA data that she relied upon was typical in her industry for the types of information experts in that field rely upon in reaching opinions. Hawkins testified that, it is not uncommon for one person to complete the lab work and another analyze those results.

The court concluded that, experts are permitted to rely on underlying data and work of others when it is traditionally done within that field. The court ruled that, Hawkins could testify regarding her own opinions, but not the opinions of anyone else. Further, Davis could cross-examine Hawkins about any concerns regarding the laboratory process.

Immediately before Hawkins testified, Davis renewed his objection to her testimony on constitutional grounds. The trial court overruled the objection. Appellate counsel did not raise this issue on direct appeal.

Davis's amended Rule 29.15 motion included a claim that direct appeal counsel was ineffective for failing to raise the properly preserved claim that**,** the trial court erred in allowing Shana Hawkins to testify about a lab report she did not prepare in violation of the confrontation clause. At the evidentiary hearing, direct appeal counsel testified:

> I did some research and it appeared to me that under the circumstances, the particular circumstances of Mr. Davis's case, I thought that her opinion was probably proper. She was stating her own opinion based on someone else's raw data, but that she was using that to indicate her own opinion.
>
> And I also recall that it had been peer-reviewed. I believe that the Court also took a recess and did some research of its own. And I believe that that would not have been a successful claim.

Citing *State v. Sauerbry*, 447 S.W.3d 780, 788 (Mo. App. 2014), the motion court denied the claim. The court stated that the confrontation clause is not violated when an expert testifies to his or her

own conclusions, even if they are based on other people's observations. Consequently, appellate counsel was not ineffective for strategically declining to raise a non-meritorious claim.

The Sixth Amendment bars the admission in criminal cases of testimonial out-of-court statements where the declarant does not testify, except in cases where the declarant is unavailable and the accused has had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 51, 53-54 (2004). Our Missouri Supreme Court determined in *State v. March*, 216 S.W.3d 663, 667 (Mo. banc 2007), that, if a laboratory report prepared for the sole purpose of prosecution is admitted into evidence, a defendant's rights under the Confrontation Clause are violated unless the author is subject to cross-examination at trial, or is unavailable and the accused had a prior opportunity to cross-examine. However, if an expert other than the author of the report testifies to his or her own opinion derived from the factual matters contained in the report, the Confrontation Clause is not violated. *Sauerbry*, 447 S.W.3d at 785; *State v. Ivy*, 531 S.W.3d 108, 121-122.

In facts nearly identical to those before us, the Eastern District in *Littleton v. State*, 372 S.W.3d 926, 931 (Mo. App. 2012), concluded:

> We are not persuaded that Littleton's rights under the Confrontation Clause were violated. The facts presented in the record are significantly distinguishable from those facts in *March*. Here, the laboratory report prepared by the absent technician was not admitted into evidence. Instead, the State offered Karr's testimony as to her own findings relating to the DNA identification evidence recovered from Galbreath's vehicle. This distinction is noteworthy because Littleton had the opportunity to cross-examine Karr during a hearing on his motion in limine and again at trial. Had Karr's testimony merely recited the findings presented in the laboratory report, we would have Confrontation Clause concerns as Karr would be testifying as to findings made by a technician who was not available to the accused for cross-examination. But such is not the case here. Instead, Karr's testimony was based on her personal knowledge of the DNA testing and results. Karr specifically testified that the conclusions she made regarding the DNA found in Galbreath's vehicle were independent of the findings of the technician who drafted the laboratory report, and of the report itself. As recently

> noted by the U.S. Supreme Court, the Confrontation Clause, as interpreted in *Crawford*, bars only testimonial statements by declarants who are not subject to cross-examination. *Williams v. Illinois*, --- U.S. ----, 132 S.Ct. 2221, 2238, 183 L.Ed.2d 89 (2012). Given the facts before us, we find no Sixth Amendment Confrontation Clause violation. Any objection that trial counsel may have made to the admission of Karr's testimony would have been without merit. Failure of trial counsel to make a non-meritorious objection does not constitute ineffective assistance of counsel. *Barnes v. State*, 334 S.W.3d 717, 723 (Mo. App. E.D. 2011).

Littleton, 372 S.W.3d at 931.

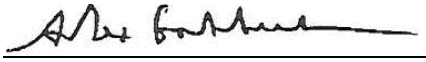
Given that *Littleton* was decided in 2012, and direct appeal counsel testified at the Rule 29.15 evidentiary hearing that Counsel researched the issue prior to Davis's 2015 appeal, determined that it would not have been a successful claim, and consequently chose not to pursue that claim, Davis has failed to meet his burden of proving that his counsel failed to raise a claim of error so obvious that a competent and effective lawyer would have recognized and asserted.

Given that precedent holds that admission of this type of evidence is no error at all, we can find no clear error in the motion court's conclusion that appellate counsel was not ineffective for strategically declining to raise this claim on direct appeal.

Point II is denied.

Conclusion

The motion court's judgment is affirmed.



Anthony Rex Gabbert, Judge

All concur.