



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

DOMINIQUE A. LINDSEY,)
)
 Appellant,) **WD84035**
)
 v.) **OPINION FILED: October 5, 2021**
)
 STATE OF MISSOURI,)
)
 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, Karen King Mitchell,
Judge and Gary D. Witt, Judge

Dominique Lindsey ("Lindsey") brings this appeal from the Jackson County Circuit Court ("motion court") challenging the motion court's denial, following an evidentiary hearing, of his Rule 29.15¹ motion alleging ineffective assistance of counsel. Lindsey argues the motion court erred in denying his Rule 29.15 motion because his trial counsel ("trial counsel") was ineffective in failing to adequately investigate a potential

¹ All rule references are to Missouri Supreme Court Rules (2018), unless otherwise indicated.

alibi witness and then call that witness to testify during trial. We affirm the decision of the motion court.

Statement of Facts

At all relevant times, Lindsey lived with his mother, Stephanie Wright, and her husband, Ewon Wright, who was Lindsey's step-father, at the Wright's house in Kansas City. Mr. Wright had an ongoing frustration with Lindsey because Lindsey did not work or support himself. The Wrights provided for Lindsey and frequently tried to persuade him to find a job and take care of himself.

On July 14, 2015, Mr. and Ms. Wright were preparing to take a trip to visit Mr. Wright's family. They informed Lindsey he would have to stay somewhere else during their trip because he had previously caused a fire in the house, and they did not trust him to be alone in the home. Lindsey became upset they were leaving to visit Mr. Wright's family, and he began arguing with his mother in front of Mr. Wright. Mr. Wright ordered Lindsey to stop arguing with his mother, which then led to a verbal altercation between Lindsey and Mr. Wright. Mr. Wright told Lindsey to "grow up" and "get up off of your mother's tit." This statement angered Lindsey, and he left Mr. and Ms. Wright's bedroom for a moment. Lindsey returned to the bedroom with his hand behind his back, and Ms. Wright could see he was holding a weapon. She asked Lindsey what he was doing, and she reached toward him to try to retrieve the weapon. Lindsey pushed her out of the way and shot Mr. Wright three times.

After shooting Mr. Wright, Lindsey ran out of the house and down the street. Ms. Wright called 9-1-1 and told the dispatcher that Lindsey had shot her husband, and she

followed their advice to hold pressure on Mr. Wright's wounds. After police and medical personnel had arrived, Mr. Wright was transported to the hospital, and after multiple surgeries, he died as a result of complications from the gunshot wounds.

Lindsey was arrested on January 21, 2016. Lindsey was charged with second-degree murder, Section 565.021,² and armed criminal action, Section 571.015. The case proceeded to a bench trial, and trial counsel argued the State never investigated Ms. Wright as a potential suspect, never connected the physical evidence found at the scene to Lindsey, and relied solely on the testimony of a single eyewitness.

The trial court found Lindsey guilty of murder in the second degree and armed criminal action and sentenced Lindsey to twenty years' imprisonment for murder in the second degree and a concurrent term of three years for armed criminal action. Lindsey appealed, and this Court affirmed the judgment in a *per curiam* order in *State v. Lindsey*, 575 S.W.3d 789 (Mo. App. W.D. 2019).

Lindsey filed a timely *pro se* Rule 29.15 motion arguing ineffective assistance of counsel which was later timely amended by appointed counsel. In Lindsey's Amended Motion, he argued his trial counsel was ineffective for failing to investigate a potential alibi witness, Damon Williams ("Williams"), and then call Williams as a witness during trial. The motion court held an evidentiary hearing. Williams testified at the evidentiary hearing that he was Lindsey's father and had informed trial counsel on two separate occasions of his availability to be an alibi witness if needed. Although he never provided trial counsel with the details of the alibi, Williams testified at the evidentiary hearing that

² All references are to R.S.Mo. 2016, as currently updated by supplement, unless otherwise noted.

on the day of the shooting, Lindsey was with him cleaning mold at one of Williams's rental properties in Raytown. Williams testified that he was available and willing to testify at trial that Lindsey was with him on the day of the shooting.

Trial counsel also testified at the evidentiary hearing and stated Williams had only informed her once about his availability to be an alibi witness, just weeks before trial. Trial counsel did not investigate Williams's purported alibi because she did not find it to be credible. Rather, she believed Williams's desire to be an alibi witness was "a desperate attempt of a father who cared very much for his child to make an effort to provide a defense that we otherwise may not have." Trial counsel testified Williams never told her he had an alibi for Lindsey, rather "he suggested that in the event an alibi defense would be helpful to his son, that he would be willing to offer that." Trial counsel stated, "It was simply posed to me in the form of a question regarding whether or not that would be something to potentially help [Lindsey] if an alibi was created."

The motion court denied Lindsey's Amended Motion for failing to "convince the Court trial counsel's performance 'fell below an objective standard of reasonableness' under *Strickland*." Lindsey appeals the decision of the motion court.

Standard of Review

"When reviewing a motion court's denial of a claim of ineffective assistance of counsel, the reviewing court is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous." *Hays v. State*, 360 S.W.3d 304, 309 (Mo. App. W.D. 2012) (internal quotation marks omitted); Rule 29.15(k). The judgment is clearly erroneous when "the court is left with a definite and firm impression that a

mistake has been made." *Jindra v. State*, 580 S.W.3d 635, 640 (Mo. App. W.D. 2019) (quoting *Middleton v. State*, 80 S.W.3d 799, 804 (Mo. banc 2002)). We defer to the motion court's determinations of credibility. *Morgan v. State*, 319 S.W.3d 514, 517 (Mo. App. S.D. 2010).

Analysis

Lindsey's sole point on appeal argues "trial counsel failed to adequately investigate when [Lindsey's] father told her that he could provide an alibi and then call [Lindsey's] father as a witness to testify that [Lindsey] was with him, working at a home in Raytown, at the time of the shooting in Kansas City."

To be entitled to post-conviction relief for ineffective assistance of counsel, the movant must satisfy the two-pronged *Strickland* test. *Jindra*, 580 S.W.3d at 641; *Strickland v. Washington*, 466 U.S. 668 (1984). First, the movant must show counsel failed to perform to the degree of skill, care, and diligence that a reasonably competent attorney would under similar circumstances. *Jindra*, 580 S.W.3d at 641; *Strickland*, 466 U.S. at 687. This requires that the movant show that counsel's representation "fell below an objective standard of reasonableness." *Jindra*, 580 S.W.3d at 641; *Strickland*, 466 U.S. at 688. The movant must then show that he was prejudiced by this failure. *Jindra*, 580 S.W.3d at 641. "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.* (quoting *Johnson v. State*, 406 S.W.3d 892, 899 (Mo. banc 2013)). "A movant must overcome the strong presumption that counsel's conduct was reasonable and effective." *Id.*

"The selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim." *Jindra*, 580 S.W.3d at 641. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "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." *Id.* at 691. "To succeed on a claim of ineffective assistance of counsel for failure to call a witness, [Lindsey] must show that: (1) counsel knew or should have known of the existence of the witness, (2) the witness could be located through a reasonable investigation, (3) the witness would testify, and (4) the testimony of the witness would have produced a viable defense." *Hays*, 360 S.W.3d at 309-10.

Lindsey contends that after Williams told trial counsel he was available to be an alibi witness, trial counsel did not interview Williams and rule out the alibi after an investigation of the facts. "Without any follow up investigation or questions regarding the alibi," Lindsey argues, "counsel's determination regarding the alibi was not informed or reasonable." Trial counsel's failure to investigate Williams's alibi defense, according to Lindsey, falls below the objective standard of reasonableness.

Lindsey cites *Perkins-Bey v. State*, 735 S.W.2d 170, 172 (Mo. App. E.D. 1987), to support his contention that trial counsel's failure to investigate Williams's alibi rendered

Lindsey's trial counsel ineffective. In *Perkins-Bey*,³ the defendant informed his trial counsel he was "at home with his mother at the time the crimes charged were committed." *Id.* at 171. "[The defendant's] testimony that he informed his appointed counsel of his alibi defense and the name of his mother as a witness is undisputed." *Id.* The trial counsel never investigated defendant's claims or elicited any information pertaining to the alibi from the supposed witness, defendant's mother. *Id.* at 171 ("There is no testimony that [trial counsel] asked about the details of the alibi defense or that [trial counsel] obtained any information from defendant's mother which would have confirmed or refuted the alibi."). The court held trial counsel's failure to investigate defendant's alibi fell below the objective standard of reasonableness because "all reasonable steps to investigate and present favorable evidence were not taken for the failure of which there is a 'probability' the result of the proceeding would have been different." *Id.* at 172.

Lindsey's reliance on *Perkins-Bey* is misplaced. Here, Lindsey never informed trial counsel he had an alibi. Trial counsel only learned of a potential alibi from Lindsey's father, Williams. Williams retained trial counsel on his son's behalf. Williams's statements to trial counsel did not in any way set forth what the nature of the alibi testimony would be, only that he could be available to provide an alibi if it were helpful to Lindsey's case. Trial counsel understood this proposition as a "desperate father trying to help his son," rather than a viable defense worth investigating, and the motion court found trial counsel's testimony credible. Trial counsel cited her 19-year career as a

³ *Perkins-Bey* involved a claim of ineffective assistance of counsel under Rule 27.26, which was the 1987 analogue to Rule 29.15. The appellate court standard of review for both rules is identical.

criminal defense attorney during the evidentiary hearing as part of her basis for not further exploring Williams's supposed alibi defense because she believed it did not exist or would not have been supported by evidence that she was comfortable moving forward with in trial.

Further, the motion court heard the testimony of Williams at the motion hearing. While Williams testified at the motion hearing that he was sure Lindsey was with him working at a rental house on the day of the murder, he could not provide any documentation or other support for this assertion merely stating "I could have possibly found something. I could have looked for receipts for the work that we did at my property."

The motion court found trial counsel's testimony credible when she stated that Williams merely asked her if he provided an alibi for his son if it would be something that would potentially help, but failed to state that he could in fact provide an alibi for Lindsey and failed to provide any details as to what that alibi might be and she did not find his suggestion to be legitimate.

Instead of pursuing this defense, trial counsel chose to argue the State's failure to connect the physical evidence to Lindsey, the State's failure to rule out Ms. Wright as a potential suspect, and the State's limited evidence of only one eyewitness to the shooting (who may have in fact been the shooter). This defense strategy was reasonable under the circumstances and does not fall below the objective standard of reasonableness under *Strickland*.


Lindsey was also not prejudiced by trial counsel's decision to not call Williams as a witness during trial. "Failure to call a witness to testify does not amount to ineffective assistance of counsel unless that witness's testimony would unqualifiedly support the movant." *Hays*, 360 S.W.3d at 310 (internal quotation marks omitted). Failure to call a witness to testify is sound trial strategy when the testimony may have hurt the defendant more than it would have helped. *See State v. Kelly*, 885 S.W.2d 730, 735 (Mo. App. W.D. 1994).

Here, trial counsel determined Williams was desperately attempting to help his son and would not have been a credible witness. Williams is Lindsey's father and Ms. Wright's ex-partner. Ms. Wright identified Lindsey as the man who shot Mr. Wright, her new husband. Trial counsel considered the tenor of Williams's offer to be an alibi witness and the potential risks associated with calling Ms. Wright's ex-partner to the stand when deciding not to have Williams testify. It was reasonable for trial counsel to conclude that calling Williams may have hurt Lindsey's case more than it would have helped. And as a matter of trial strategy, trial counsel argued other theories during closing argument rather than pursuing an alibi defense. Williams's alibi testimony would not have unqualifiedly supported Lindsey; therefore, Lindsey was not prejudiced. Accordingly, the motion court's decision to deny Lindsey's Amended Motion was not clearly erroneous.

Appellant's point is denied.

Conclusion

For all of the above-stated reasons, we affirm the judgment of the motion court.



Gary D. Witt, Judge

All concur