



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

ROLLAN WILLIAMS,)	No. ED95386
)	
Movant/Appellant,)	
)	Appeal from the Circuit
vs.)	Court of the City of St. Louis
)	
STATE OF MISSOURI,)	
)	Honorable Bryan L. Hettenbach
Respondent.)	
)	Filed: November 15, 2011

Rollan Williams (hereinafter, “Movant”) appeals from the motion court’s judgment denying his Rule 29.15 post-conviction motion without an evidentiary hearing. In the underlying case, Movant was found guilty of robbery in the first degree, Section 569.020 RSMo (2000)¹, armed criminal action, Section 571.015, and unlawful use of a weapon, Section 571.030. The trial court sentenced Movant to thirty years’ imprisonment. This Court affirmed his conviction. State v. Williams, 291 S.W.3d 373 (Mo. App. E.D. 2009). Movant thereafter filed his motion, pursuant to Rule 29.15, alleging his trial counsel failed to call a witness and his appellate counsel failed to raise a meritorious issue on appeal. We affirm, in part, and reverse and remand for an evidentiary hearing, in part.

The following facts were adduced at trial and judicially determined in Movant’s direct appeal: Movant went to the home of D.W., to whom he had been married for over

¹ All further statutory references herein are to RSMo (2000).

ten years, but was separated. After entering D.W.'s home, Movant and D.W. began arguing in the kitchen. At some point during the argument, Movant pulled out a gun and directed it at D.W.'s temple.

Both of D.W.'s adult sons heard the commotion. B.Z. and T.R. entered the kitchen and saw Movant holding a gun to their mother's head. Movant then directed the gun at B.Z. and T.R.. Movant searched D.W.'s purse. B.Z. asked Movant what he needed; Movant demanded money. Once B.Z. gave Movant money, Movant threatened to kill all of them and then he fled.

Movant was convicted of one count of first degree robbery, one count of armed criminal action, and one count of unlawful use of a weapon. Movant was sentenced as a prior and persistent offender to thirty years of imprisonment for first-degree robbery to run concurrently with a term of thirty years of imprisonment for armed criminal action, and a term of seven years of imprisonment for unlawful use of a weapon².

Appellate review of a post-conviction relief motion is limited to the determination of whether the findings and conclusions of law of the motion court are clearly erroneous. Rule 29.15(k); Morrow v. State, 21 S.W.3d 819, 822 (Mo. banc 2000). The motion court's judgment is clearly erroneous only if we are left with a definite and firm impression that a mistake has been made after review of the entire record. Morrow, 21 S.W.3d at 822.

Pursuant to Rule 29.15, an evidentiary hearing is not mandatory when the motion and record conclusively show that the movant is not entitled to relief. Lamastus v. State, 989 S.W.2d 235, 236 (Mo. App. E.D. 1999). Courts "will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief." Morrow, 21 S.W.3d at 822. To be entitled to an evidentiary hearing, Movant's motion

² Movant was acquitted of one count of third degree domestic assault.

must: (1) allege facts, not conclusions, warranting relief; (2) raise factual matters which are not refuted by the file and record; and (3) raise allegations which resulted in prejudice. Id. To receive an evidentiary hearing based upon ineffective assistance of counsel claims, Movant must make allegations which are not refuted by the record and show that his counsel's performance "did not conform to the degree of skill, care, and diligence of a reasonably competent attorney and that [Movant] was thereby prejudiced." Id. at 823; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Movant raises two points on appeal. In his first point, he alleges the motion court erred in denying his Rule 29.15 motion without an evidentiary hearing because his trial counsel should have called Earnest Basic (hereinafter, "Basic") to testify. Movant stated Basic was willing and available to testify at trial and his testimony would have provided him a viable alibi defense because it would have impeached the credibility of one of the State's witnesses.

Regarding a claim of ineffective assistance of counsel for failing to investigate and call witnesses, Movant must plead and prove that: "(1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense." Glass v. State, 227 S.W.3d 463, 468 (Mo. banc 2007)(*quoting Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004)). A trial counsel's decision to not call a witness to testify is presumptively a matter of trial strategy and will not support Movant's claim of ineffective assistance of counsel unless Movant clearly establishes otherwise. Whited v. State, 196 S.W.3d 79, 82 (Mo. App. E.D. 2006).

Movant believes his trial counsel should have called Basic to impeach one of the State's witnesses. "When the testimony of the witness would only impeach the [S]tate's witnesses, relief on a claim of ineffective assistance of counsel is not warranted." Collis v. State, 334 S.W.3d 459, 464 (Mo. App. S.D. 2011)(quoting Whited, 196 S.W.3d at 82). "However, when the testimony of the witness would also negate an element of the crime for which a movant was convicted, the testimony provides the movant with a viable defense." Ferguson v. State, 325 S.W.3d 400, 416-17 (Mo. App. W.D. 2010)(quoting Whited, *supra*).

In this case, Basic's proffered testimony does not negate an element of the crime. If found credible, Basic's testimony may have been relevant to cast some doubt upon one of the State's witnesses, but it would not produce a viable defense. Accordingly, trial counsel was not ineffective for failing to call Basic as a witness, and the motion court did not err in denying Movant's post-conviction motion without an evidentiary hearing. Point denied.

In his second point on appeal, Movant claims the motion court erred in denying his Rule 29.15 motion without an evidentiary hearing because his appellate counsel was ineffective in failing to challenge the sufficiency of the evidence supporting Movant's unlawful use of a weapon conviction. Movant alleges the State failed to prove the firearm Movant brandished was readily capable of lethal use. Hence, Movant avers his appellate counsel should have challenged this conviction on direct appeal.

"To prevail on a claim of ineffective assistance of appellate counsel, the [m]ovant must establish that counsel failed to raise a claim of error that was so obvious that a competent and effective lawyer would have recognized and asserted it." Taylor v. State,

262 S.W.3d 231, 253 (Mo. banc 2008)(quoting Williams v. State, 168 S.W.3d 433, 444 (Mo. banc 2005)). Movant must be able to show that if appellate counsel would have raised this claim on appeal, there is a reasonable probability the appeal's outcome would have been different. Zink v. State, 278 S.W.3d 170, 192 (Mo. banc 2009).

Movant claims there was insufficient evidence to support an unlawful use of a weapon conviction because the gun was never recovered. A person commits the crime of unlawful use of a weapon by knowingly exhibiting, in the presence of one or more persons, “any weapon readily capable of lethal use in an angry or threatening manner....” Section 571.030.1(4). Movant states there was no evidence that the gun was readily capable of lethal use. Hence, Movant avers the State failed to present sufficient evidence to meet its burden of proving every element of the unlawful use of a weapon charge.

Our review of a challenge to the sufficiency of the evidence supporting a criminal conviction is limited to a determination of whether the State presented sufficient evidence from which a reasonable fact finder could have found Movant guilty. State v. Nash, 339 S.W.3d 500, 509 (Mo. banc 2011). We consider the evidence and all reasonable inferences drawn therefrom in the light most favorable to the verdict, and disregard all contrary evidence and inferences. State v. Vandever, 175 S.W.3d 107, 108 (Mo. banc 2005).

However, this Court cannot provide missing evidence or give the State the benefit of speculative, unreasonable, or forced inferences. State v. Burton, 320 S.W.3d 170, 174 (Mo. App. E.D. 2010)(citing State v. Whalen, 49 S.W.3d 181, 184 (Mo. banc 2001)). The State has the burden of proving each and every element of the charged offense beyond a reasonable doubt. State v. Seeler, 316 S.W.3d 920, 925 (Mo. banc 2010). There cannot be a conviction ““except upon evidence that is sufficient to support a conclusion that every

element of the crime has been established beyond a reasonable doubt.” Woolford v. State, 58 S.W.3d 87, 89 (Mo. App. E.D. 2001)(*quoting* Jackson v. Virginia, 443 U.S. 307, 314-15, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)).

From the record it is clear Movant exhibited a weapon, in the presence of other people, and did so in a threatening manner. Movant’s actions demonstrated his knowledge that a gun could intimidate others to comply with his demands.³ The State’s assertion that a gun generally is capable of lethal use is not unreasonable. However, “a verdict cannot rest upon the piling of an inference upon an inference when there are no facts supporting the first inference.” Burton, 320 S.W.3d at 175 (*citing* State v. McMullin, 136 S.W.3d 566, 573 (Mo. App. S.D. 2004)). The State must adduce evidence that the gun used by Movant was capable of lethal use.

Accordingly, we reverse and remand upon this issue to determine whether appellate counsel were ineffective for failing to raise a sufficiency claim because it appears there is a reasonable probability the appeal’s outcome would have been different. Point granted.

The motion court’s judgment is affirmed, in part, and reversed and remanded, in part.

GEORGE W. DRAPER III, Sp.Judge

Patricia L. Cohen, P.J., and
Robert M. Clayton III, J., concur.

³ There are circumstances under the law where the appearance of a weapon is sufficient to complete the crime, e.g. robbery in the first degree, Section 569.020.