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JURISDICTIONAL STATEMENT

This is an appeal from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 after an evidentiary hearing in the Circuit of Jackson County. The convictions sought to be vacated are for one count of murder in the first degree (Count I) and one count of armed criminal action (Count II), for which appellant was sentenced to life imprisonment without the possibility of probation or parole on Count I, and a concurrent sentence of life imprisonment on Count II. This appeal involves no issues reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction lies in the Missouri Court of Appeals, Western District. Article V, §3, Missouri Constitution (as amended 1982); §477.070, RSMo 2000.

STATEMENT OF FACTS

Appellant, Byron Case, was charged in the Circuit Court of Jackson County as a prior offender with one count of murder in the first degree (Count I), in violation of §565.020.1, RSMo 2000; and one count of armed criminal action (Count II), in violation of § 571.015, RSMo 2000 (L.F. 5). On April 26, 2002, appellant's cause came before a jury, the Honorable Charles E. Atwell presiding (Tr. i, iii).

On direct appeal, this Court summarized the evidence adduced at trial as follows:

In the fall of 1997, Anastasia Witbols Feugen ("Anastasia") was shot and killed in Lincoln Cemetery, located between Independence and Kansas City. Her body was found on October 23, 1997, with a large gunshot wound to her face. Anastasia was shot with either a rifle, shotgun, or high-powered handgun fired less than six inches away from her face. If Anastasia's head were upright when she was shot, the angle of the gun would have been slightly upward. Anastasia was five feet, two inches tall.

Late in the evening of October 22, 1997, Anastasia had been riding in a car with Justin Bruton ("Justin"), her former fiancé, who had had an on-again, off-again relationship with

Anastasia and who had broken off their engagement in the summer of 1997; Justin's friend, [appellant], who is five feet, eight inches tall; and Kelly Moffett (Kelly), [appellant's] then-girlfriend. The day after Anastasia's body was found, [appellant] and Kelly gave a statement to the police in which they said: On October 22, 1997, Justin, Kelly and [appellant] picked Anastasia up at a Dairy Queen in Independence and drove to Washington Cemetery, which was across the street from Lincoln Cemetery. The four left Washington Cemetery after the groundskeeper signaled to the four that they had to leave. En route to Kansas City, the car stopped at the I-435 and Truman Road intersection and Anastasia jumped out, because she was upset with Justin. Anastasia had asked Justin why he didn't love her anymore, and Justin had said he didn't know. According to [appellant] and Kelly's statement, that was the last time they had seen or heard from Anastasia.

The next day, Justin killed himself with a shotgun.

For a long while, Kelly and [appellant's] version of events gelled. Kelly repeated her initial statement to the police on November 20 and December 10, 1997, and on August 22 and August 25, 1998. In July 1999, with his lawyer present and

after being informally granted limited use immunity (the prosecutor agreed not to use [appellant's] statement unless [appellant] knowingly provided false information to the police), [appellant] did the same.

However, in March 2000, three years after her original statement to the police, Kelly--an admitted crack addict and alcoholic who was living in crackhouses, having been kicked out of her parents home--changed her story. She called her mother from a crackhouse and said that she saw Justin kill Anastasia. Sometime later, she told her father that it was [appellant] who had killed Anastasia. Then, while in drug rehabilitation, she told her counselor it was Justin. Confronted by her mother, who said, "But Kelly you told your dad that [appellant] killed Anastasia," Kelly flip-flopped yet again, saying that [appellant] had killed Anastasia.

Kelly eventually told the police, in September 2000, that [appellant] was Anastasia's killer. She told the police that she had seen [appellant] shoot and kill Anastasia at Lincoln Cemetery. Kelly made this statement to the police a few days after she learned that [appellant] had moved to St. Louis and

had attempted to end all contact with her, refusing to give her his new phone number and address.

At the urging of the police and after being granted transactional immunity pursuant to Section 491.205, Kelly agreed to phone [appellant] and record her conversations with him. On June 25 and June 27, 2001, she did this, using equipment supplied by the police. In the June 5th conversation, which happened around 1:30 a.m., Kelly told [appellant], who was at his residence:

[The police have] called a bunch again. They called while I was in re-hab, they showed up out here. Yeah. I don't understand, like seriously, what all went on or whatever, and I seriously, I hate to say this, but why, seriously, why did you have to kill her? What was the whole fucking big deal? Could you explain that to me? Because I don't get it. Seriously. Justin's dead for no reason, she's dead for no reason. It's just all fucked up. And for some reason they're talking to me, because you won't talk. So I'm fucked. And it makes me look horrible because everybody already knows that I'm a fucking crack-head, that I'm a coke-head, that I'm an alcoholic and don't remember shit. And if I tried to talk to them, nothing's going to add up. So,

I mean if you could seriously explain to me as to why you actually felt the need to kill her, then that would really help me feel better about the whole fucking thing. I mean, was there seriously any reason to all this?

[Appellant] responded by saying, "We shouldn't talk about this." Kelly said, "Why?" [appellant] then repeated, "probably because we shouldn't talk about this."

In the June 7th conversation, Kelly told [appellant]:

They've been calling me like every single day to come in, and I need to get the story straight and figure something out because they've literally been calling me every single day for the past week bugging me, like when can I come in, when can I come in, and if I can't come in out there, they'll come to me and all this stuff.

[Appellant] responded by saying, "I mean the only advice that I can give is start everything with I think, or the best I can remember is ... there."

[Appellant] was arrested and tried for murder in the first degree and armed criminal action. At trial, [appellant's] responses were admitted, over defense counsel's objection, as tacit admissions of guilt. Kelly testified to the following: On the

night of October 22, 1997, after Kelly got into Justin's car, [appellant] and Justin told her that [appellant] had agreed to kill Anastasia for Justin because Justin thought it would be "better, easier if she were gone." According to Kelly, Justin said that [appellant]-and not Justin-would kill Anastasia because Justin didn't think he could do it, whereas [appellant], who had a "weird fascination with death," had always wanted to kill somebody. When they arrived at Lincoln Cemetery, [appellant] and Kelly were sitting in the back seat, [appellant] behind the driver's seat. Anastasia and Justin got out, to talk about their relationship. Kelly then asked [appellant] "why on earth" [appellant] was going to kill Anastasia. [Appellant] said, "We [meaning Justin and he] have been talking about it all day, and Justin asked me to do it. And I want to do it, so I'm going to do it." [Appellant] stepped out of the car, popped the trunk, and pulled out a long gun. Justin yelled at [appellant] to stop. [Appellant] didn't. He put the gun on his shoulder, aimed at Anastasia, and fired, causing her to fall to the ground. Justin and [appellant] got in the car, and drove off, later discarding the murder weapon in an industrial area near railroad tracks.

On cross-examination, Kelly admitted that Justin had been on LSD shortly before Anastasia was shot, that, in the past, Justin had hatched some "odd plans about hurting people," including a robbery scheme and a scheme to blow up a church, and that two weeks before Anastasia was shot, Justin had been hearing voices. In addition to suggesting that Justin might have killed Anastasia, the defense counsel also argued that Anastasia was the victim of a "random act of violence from some unknown stranger"-the very words used by defense counsel in his opening statement. In his testimony, [appellant] repeated, in substance, his earlier statements to the police. A mechanic who worked at a gas station located 100 feet from the Truman Road-I-435 intersection confirmed [appellant's] story, testifying that the evening of October 22, 1997, he saw an attractive young woman, approximately five foot, six or seven inches tall, get out of a car at the intersection and walk in the direction of Lincoln Cemetery. The mechanic also testified that on either the 23rd or the 24th, he identified Anastasia as the girl in question after being shown two pictures (one of Anastasia) by the police.

State v. Case, 140 S.W.3d 80, 82-85 (Mo. App., W.D. 2004).

At the close of all the evidence, the jury found appellant guilty of murder in the first degree (Count I), and armed criminal action (Count II) (Tr. 1243-1244). On June 28, 2002, appellant was sentenced to life imprisonment without the possibility of probation or parole on Count I, and a concurrent sentence of life imprisonment on Count II (Tr. 1249, 1285).

On April 13, 2004, this Court affirmed appellant's judgment and sentence. State v. Case, 140 S.W.3d 80. This Court's mandate was issued on August 26, 2004.

On November 8, 2004, appellant timely filed a *pro se* motion for postconviction relief (PCR L.F. 3). On April 5, 2005, appellant's postconviction counsel filed an amended motion for postconviction relief (PCR L.F. 11-39). On October 7, 2005, the motion court held an evidentiary hearing (PCR L.F. 40). On March 1, 2006, the motion court issued findings of fact and conclusions of law, denying appellant's postconviction motion (PCR L.F. 40-57). This appeal follows.

ARGUMENT

I

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's claim of ineffective assistance of counsel for failing to impeach Kelly Moffett with details about her statements to the police in which she told the police that she last saw Anastasia get out of the car at Truman and I-435 because counsel acted as a reasonably competent attorney by impeaching Kelly Moffett extensively about her statements to the police, including the fact that she told the police for three years that she last saw Anastasia get out of the car at Truman and I-435 and appellant was not prejudiced by counsel's actions.

In his first point, appellant claims that trial counsel was ineffective for failing to impeach Kelly Moffett in detail about each time she told the police that she last saw Anastasia get out of the car at Truman and I-435 and that counsel should have used more appropriate wording during Kelly Moffett's cross-examination (App. Br. 26-40).

Appellant's amended motion alleged that Kelly Moffett was the only eyewitness of the crime to testify at trial and that her credibility was a critical issue (PCR L.F. 17). According to appellant's motion, Kelly gave statements to the police, in which she stated that she last saw Anastasia

walk out of the car at an intersection near Erotic City, but at trial she testified that she witnessed Anastasia's murder (PCR L.F. 17). Appellant's motion alleged that counsel should have cross-examined Kelly more extensively about the details of her statements to the police in which she claimed to have seen Anastasia last when she got out of the car (PCR L.F. 17-20). Appellant's motion further alleged that counsel worded his questions during cross-examination poorly, and that counsel referred to Kelly's statement that Anastasia got out of the car at an intersection as a "story," and that this bolstered Kelly's credibility because this statement was not a "story," but was the truth (PCR L.F. 21-22).

Counsel testified at the evidentiary hearing that his strategy was to discredit Kelly's testimony by using a "hammer strategy" of lengthy cross-examination, exposing the many inconsistencies in Kelly's statements to the police (PCR Tr. 19, 28, 35). Counsel testified that the use of the word "story" during Kelly's cross-examination was a poor word choice and that if counsel had another chance to cross-examine Kelly Moffett, he would have cross-examined her further about the details of her statements to the police (PCR Tr. 38, 59).

In denying appellant's claim, the motion court held as follows:

1. The Court finds that Movant has failed to show ineffective assistance of trial counsel regarding counsel's cross-examination of State's witness, Kelly Moffett.

2. Trial counsel recognized her credibility was a critical issue in the case. He questioned her about each of the times she spoke to the police and pointed out that she told the police the same each time; i.e. that the victim exited the car at Truman Road towards the gas station and they never saw her again.

3. Trial counsel also questioned Moffett about the timing of her disclosure to the police that Movant killed the victim. He highlighted that Movant had just moved out of town and stopped taking Moffett's calls, thus angering her and giving her a motive to change her story and implicate Movant in the victim's death...

4. Trial counsel testified that his trial strategy in handling this witness was to use what he described as a hammer approach. (Tr. 28-29).

5. Additionally, trial counsel produced Don Rand as a witness and presented his testimony to the jury.

6. Rand's testimony arguably corroborated Moffett's early statements to the investigating officers. (Tr. 987-89).

7. The extent of cross examination is almost always a matter of trial strategy. Trial counsel is not to be faulted because another attorney may have used a different technique. Cole v. State, 573 S.W.2d 397 (Mo. App. 1978).

8. This Court presumes that any action of trial counsel was a matter of sound trial strategy and that counsel used professional judgment in making his decisions on how to proceed. Vogel v. State, 21 S.W.3d 130 (Mo.App. 2000). Movant has failed to overcome the presumption that counsel acted in a competent manner.

9. The credibility or weight afforded to the evidence is an issue for the jury. State v. Lynch, 131 S.W.3d 422 [Mo. App., W.D. 2004].

10. This Court finds that trial counsel cross-examined Moffett consistent with his trial strategy. He specifically questioned her about the details of what she told the police, when she changed her story and suggested a motive for her to change her story to implicate Movant. Counsel even produced a witness, Don Rand, to support his efforts to discredit Moffett and reinforce Movant's version of events.

11. This Court finds that trial counsel's efforts to discredit Moffett during cross-examination conformed with the degree of skill, care and diligence of a reasonable competent attorney. There is no reasonable probability that had trial counsel asked his cross-examination of questions in the fashion suggested by Movant, the jury would have reached a different result.

12. The jury as the ultimate fact finder, by its verdict, chose to believe Moffet's trial testimony and rejected the testimony of Movant and Don Rand.

(PCR L.F. 48-50).

Appellate review of the motion court's findings of fact and conclusions of law is for clear error. Supreme Court Rule 29.15(k); State v. Parker, 886 S.W.2d 908, 929 (Mo. banc 1994). A motion court's "[f]indings and conclusions are clearly erroneous only if, after a review of the entire record, the appellate court is left with the definite impression that a mistake has been made." Id. A Rule 29.15 movant bears the burden of proving his ineffectiveness claims by a preponderance of the evidence. State v. Pounders, 913 S.W.2d 904, 908 (Mo. App., S.D. 1996).

In order to establish ineffective assistance of counsel, appellant must show that (1) counsel's performance was so deficient that it fell below an objective standard of reasonable competence, and that (2) counsel's

deficient performance prejudiced appellant's defense. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 684 (1984). Appellant must overcome both the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment and the presumption that the challenged action was sound trial strategy. State v. Kinder, 942 S.W.2d 313, 335 (Mo. banc 1996), cert. denied 118 S.Ct. 149 (1997).

In the context of counsel's performance, the selection of witnesses and the presentation of evidence are matters of trial strategy. Leisure v. State, 828 S.W.2d 872, 874 (Mo. banc 1992), cert. denied, 506 U.S. 923 (1992). "Subjects covered during cross-examination are generally matters of trial strategy and left to the judgment of counsel." State v. Mahoney, 165 S.W.3d 563, 567 (Mo. App., S.D. 2005). In determining whether counsel's performance was deficient, the courts must refrain from second-guessing decisions of reasonable trial strategy. Vogel v State, 31 S.W.3d at 135-136. Reasonable trial strategy is not subject to a claim of ineffective assistance of counsel. Id. at 136. To satisfy the prejudice prong of the test, it is not enough for a movant to show that an error by counsel might have had some conceivable effect on the outcome of the case, but rather, it must be shown that there is a reasonable probability that, but for counsel's ineffectiveness,

the result of the trial would have been different. State v. Zimmerman, 886 S.W.2d 684, 692 (Mo. App., S.D. 1994).

Appellant in the present case cannot show that counsel's performance was deficient or that he was prejudiced. Counsel extensively impeached Kelly Moffett and questioned her about the different statements she gave to the police (Tr. 541-602). Specifically, counsel asked Kelly the following:

Q. Do you agree that, when you met the police first in October of '97, you told the police Anastasia got out of the car and walked away?

A. Yes.

Q. And you're telling the jury today what you told the police that day was a lie?

A. Yes.

Q. So you agree that you lied to the police?

A. Yes, I did.

Q. I just want to make sure I have this straight. You lied to your mother and you lied to the police, but you're here today to tell the jury the truth?

A. Yes.

Q. Okay. I need to ask you about October 24, 1997. I believe that's the day you first met with Sergeant Gary Kilgore?

A. It was the following Friday.

Q. And that was the day you told Officer Kilgore you said Anastasia got out of the car at Truman Road and I 435 and walked away from the car?

A. Yes.

Q. Do you recall that you met with Sergeant Gary Kilgore again on November 20th of that year?

A. Yeah.

Q. It was a day that you actually got into a vehicle with Sergeant Kilgore and you drove around Mount Washington cemetery?

A. Yes.

Q. So it would have been November 20th 1997, a second meeting with Sergeant Kilgore. And at this second meeting, you're still going with the story that Anastasia got out of the car and walked away?

A. Yes.

Q. Do you recall on December 10th, 1997 you spoke on the phone with Officer Gary Kilgore?

A. I don't really recall that day. I talked to him so many different times.

Q. If I, for example, produced a police report of the date of December 10th '97 and a phone call, do you disagree with that?

A. No.

Q. So by December 10th of '97, you would have spoken to the police at least three times?

A. Yes.

Q. And up to that date you're consistent with Anastasia's got out the car at the stoplight and walked away?

A. Yes.

Q. And they took another tape recorded statement of you?

A. Yes.

Q. And this is the fourth contact with Kilgore, right?

A. Yes.

Q. And at that point, August 22nd of '98, you're still telling everyone, "Anastasia got out of the car and walked away. I don't know who killed her?"

A. Yeah, because that was the story the police already assumed that is what actually happened.

Q. So the police -- you had the impression the police believed you?

A. Yes.

Q. And shortly after this face-to-face meeting with Mr. Kilgore, then three days later, on August 25th, you spoke on the phone with Mr. Kilgore again?

A. I don't know the date, but yeah, I talked to him on the phone quite a few times.

Q. *So, if I'm counting correctly, that's at least five times you spoke with the police, right?*

A. Yes.

Q. *And maintained you did not know who killed Anastasia?*

A. Yes.

Q. And I think you're telling the jury there are probably other phone calls not documented in the police reports where you spoke with Kilgore?

A. I don't recall. I met with him a bunch of times, and we would talk on the phone, too.

Q. But you would agree from the dates I listed it was at least five times you spoke with the police?

A. Yes.

Q. *And at least five times you told police that Byron Case [appellant] is telling the truth; Anastasia got out of the car and walked away?*

A. Yes.

Q. *For almost three years?*

A. Yes.

Q. During those three years, was it made clear to you that no one had ever been arrested for the homicide of Anastasia WithbolsFeugen?

A. Yes.

(Tr. 543-544, 545-548)(Emphasis added).

Counsel also impeached Kelly Moffett with the fact that she was a heavy drug user, that she went to a rehabilitation center and underwent counseling, that she told the counselor that Justin committed the murder, that she lied to her parents to obtain money for drugs, that she implicated appellant in the murder only after she separated from appellant, after appellant moved to St. Louis and attempted to end all contact with her (Tr. 549-550, 594-596, 644-645). This record supports the motion court's findings that counsel acted as a reasonably competent attorney in conducting Kelly Moffett's cross-examination.

In a similar case, Dismang v. State, 207 S.W.3d 663 (Mo. App., S.D. 2006), the defendant claimed that counsel was ineffective for failing to cross-examine the victim further about details about her statements to the police in which she claimed that some unknown women, not the defendant, assaulted her. Id. at 667. At trial, the victim testified that the defendant was the person who assaulted her and admitted that she lied to the police. Id. The Court of Appeals, Southern District, held that counsel was not ineffective for failing to cross-examination the victim further about details of her statements to the police because counsel cross-examined the victim for almost two hours, effectively impeached her with the fact that she told another story to the police than what she testified to at trial, elicited an admission from the victim that she lied to the police, impeached her with her alcohol consumption at the time of the crime, and counsel went to great lengths to illustrate how the victim was not credible and that her testimony should be afforded little weight. Id. The court stated that any further impeachment would have been cumulative and unnecessary. Id.

Similarly, in the present case, counsel impeached Kelly Moffett extensively about the fact that she maintained for three years that she last saw the victim walk away from the car at the intersection of Truman Road and I-435, exposed her drug and alcohol abuse, and her lies to her parents, and showed her bias and her motive to implicate appellant (Tr. 549-550,

594-596, 644-645). Any further impeachment with the fact that Kelly Moffett maintained that she last saw the victim walk away from the car would have been cumulative and would not have established any additional grounds for discrediting this witness.

Moreover, there was no reasonable probability that the additional impeachment would have changed the outcome of the trial. In addition to counsel's extensive impeachment of Kelly's credibility, counsel presented independent evidence supporting appellant's trial testimony and Kelly's statements to the police that Anastasia walked away on Truman Road (Tr. 484, 631-632, 1024-1033, 1123-1125). Counsel called an unbiased witness, Don Rand, who testified that he was working at the Amoco station on Truman Road and saw a young woman he believed to be Anastasia at the stop light of Truman Road and I-435 on the day of the murder (Tr. 987-994). Counsel emphasized the fact that Kelly maintained for three years that Anastasia got out of the car at the stop light of Truman Road and I-435 on the day of the murder and exposed Kelly's bias to implicate appellant in the murder (Tr. 549-550, 594-596, 644-645). In light of counsel's extensive impeachment of Kelly's credibility and his presentation of independent evidence and appellant's trial testimony corroborating Kelly's initial statements to the police that Anastasia got out of the car at the stop light of Truman Road and I-435 on the day of the murder, appellant cannot show a

II.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's claim of ineffective assistance of counsel for failing to request a mistrial after Kelly Moffett testified that she agreed to take the lie detector test because counsel acted as a reasonably competent attorney under the circumstances and appellant was not prejudiced.

In his second point, appellant claims that counsel was ineffective for failing to request a mistrial after Kelly Moffett testified that she agreed to take the lie detector test (App. Br. 41-45).

Appellant's amended motion alleged that the state and the defense agreed prior to trial that the evidence of Kelly Moffett's lie detector test was inadmissible, but Kelly Moffett still testified that she took the lie detector test (PCR L.F. 26-27). Appellant's motion alleged that the trial court commented that the statement was prejudicial to appellant and gave a limited instruction, but that counsel was ineffective for failing to request a mistrial because the court's instruction could not have cured the harm from the statement (PCR L.F. 27).

Counsel testified at the evidentiary hearing that he objected to Kelly Moffett's statement that she took the lie detector test and asked for a recess to discuss the issue of mistrial with appellant (PCR Tr. 21-22). Counsel

testified that he discussed the "pros and cons" of a mistrial with appellant and that they decided not seek a mistrial (PCR Tr. 23-26). Counsel testified that he was concerned that two of appellant's witnesses, Abraham Kneisley and Tara McDowell, had come from out-of-state, that there were scheduling difficulties with these witnesses, and that there was uncertainty of whether they could secure these witnesses' presence during another trial (PCR Tr. 23-26). Counsel stated that appellant also expressed a concern that he had been in jail for a long time on a high bond and that he did not want a mistrial (PCR Tr. 25, 44).

Appellant testified at the evidentiary hearing that he discussed the issue of mistrial with counsel and that he told counsel to request a mistrial (PCR Tr. 67).

In denying appellant's claim, the motion court held as follows:

1. Before trial, the state and the defense agreed that testimony about Moffett taking a lie detector test would not be introduced into evidence.

2. During the testimony, Moffett made an unsolicited statement that she took the lie detector test or a voice stress test (Tr. 494). This Court acknowledged that to leave an impression that Moffett passed a lie detector test would be unfair to the defense (Tr. 499).

3. After an extensive conversation with both parties, trial counsel testified that this Court recessed to give counsel and Movant the opportunity to discuss their options and to decide on what their request of the Court would be (Tr. 22, 26, 43-44).

4. Trial counsel testified that he and Movant discussed various concerns they had regarding the availability of witnesses, future trial dates and Movant's desire to move forward with the case as soon as possible because he was in custody with a high bond (Tr. 22-26). All of these things are legitimate concerns in deciding whether or not to request a mistrial.

5. Trial counsel testified that he and his client talked about the options and together decided that they would not request a mistrial (Tr. 44-45).

6. This Court took strong curative action so as to prevent the jury from speculating about the results and the reliability of a lie detector test (Tr. 507).

7. This Court finds that trial counsel's testimony shows that he exercised due diligence as well as the degree of skill and care a reasonably competent attorney would have under the circumstances. He discussed this matter with his client,

considered all the options available in light of his trial strategy and made a decision, together with his client, not to request a mistrial. Any concerns about a possible lingering effect of Moffett's testimony were eliminated by the curative instruction given by this Court. There has been no showing by Movant that trial counsel's actions fell below the standard articulated by Vogel and Strickland.

(PCR L.F 46-47).

Appellate review of the motion court's findings of fact and conclusions of law is for clear error. Supreme Court Rule 29.15(k); State v. Parker, 886 S.W.2d 908, 929 (Mo. banc 1994). A motion court's "[f]indings and conclusions are clearly erroneous only if, after a review of the entire record, the appellate court is left with the definite impression that a mistake has been made." Id. A Rule 29.15 movant bears the burden of proving his ineffectiveness claims by a preponderance of the evidence. State v. Pounders, 913 S.W.2d 904, 908 (Mo. App., S.D. 1996).

In order to establish ineffective assistance of counsel, appellant must show that (1) counsel's performance was so deficient that it fell below an objective standard of reasonable competence, and that (2) counsel's deficient performance prejudiced appellant's defense. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 684 (1984).

Appellant must overcome both the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment and the presumption that the challenged action was sound trial strategy. State v. Kinder, 942 S.W.2d 313, 335 (Mo. banc 1996), cert. denied 118 S.Ct. 149 (1997).

In determining whether counsel's performance was deficient, the courts must refrain from second-guessing decisions of reasonable trial strategy. Vogel v State, 31 S.W.3d at 135-136. To satisfy the prejudice prong of the test, it is not enough for a movant to show that an error by counsel might have had some conceivable effect on the outcome of the case, but rather, it must be shown that there is a reasonable probability that, but for counsel's ineffectiveness, the result of the trial would have been different. State v. Zimmerman, 886 S.W.2d 684, 692 (Mo. App., S.D. 1994).

Appellant in the present case cannot show that counsel was ineffective or that he was prejudiced by counsel's actions. Counsel testified that he discussed the decision of whether or not to request a mistrial with appellant, that they decided not to request a mistrial because two of appellant's witnesses, Abraham Kneisley and Tara McDowell, had traveled from out-of-state, that there were scheduling difficulties with these witnesses, that counsel feared that they may lose these witnesses if mistrial was granted and appellant was concerned that he was incarcerated on a

high bond (PCR Tr. 24-26). Counsel's strategic decision not to request a mistrial after a discussion with appellant was a reasonable strategy and the motion court did not clearly err in determining that counsel acted as a reasonably competent attorney under the circumstances. See State v. Huggans, 868 S.W.2d 523, 526 (Mo. App., E.D. 1993)(counsel's decision not to request a mistrial after one of the jurors recognized the codefendant's mother was a strategic decision and was not a basis for finding ineffective assistance of counsel despite the fact that counsel failed to consult with the defendant regarding this decision).

Furthermore, the motion court credited counsel's testimony that appellant agreed with the decision not to seek a mistrial (PCR L.F 46-47). The determination of the credibility of witnesses is for the motion court's determination in postconviction proceedings. State v. Stewart, 859 S.W.2d 913, 918 (Mo. App., E.D. 1993); Garret v. State, 814 S.W.2d 325, 327 (Mo. App., S.D. 1991). The motion court is not required to believe the testimony of a movant and an appellate court must defer to the motion court's determination of credibility. Stufflebean v. State, 986 S.W.2d 189, 193 (Mo. App., W.D. 1999). In light of the motion court's determination that appellant did want to seek a mistrial, appellant cannot show that counsel was ineffective for failing to request a mistrial.

Lastly, appellant cannot show prejudice from counsel's actions. Kelly Moffett never testified that she passed a lie detector test; she only stated that she took the test (Tr. 494). The court gave the jury a cautionary instruction, which cured any danger of prejudice. The court instructed the jury as follows:

Ladies and gentlemen, I have an instruction I would like to give to you, and I would like you to listen carefully, if you would.

There is no witness in this case that has ever taken any test with conclusive results regarding their truthfulness or untruthfulness.

Furthermore, such tests are deemed inadmissible and incompetent as evidence in the state and federal courts throughout this country.

To consider any such evidence in this case for or against either side would be horribly unfair. For that reason, you should disregard any testimony regarding such evidence.

(Tr. 507-508).

The court's instruction was sufficient to cure any prejudice from Kelly Moffett's isolated statement, and appellant cannot show prejudice from counsel's actions. See State v. Carter, 71 S.W.3d 267, 271 (Mo. App., S.D. 2002) (under most circumstances, the trial court can cure errors in the

admission of evidence by withdrawing the improper evidence and instructing the jury to disregard it, rather than declaring a mistrial). Therefore, appellant's claim should be denied.