

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