

## 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.