

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES..... 3

JURISDICTIONAL STATEMENT..... 5

STATEMENT OF FACTS 6

ARGUMENT 14

 I 14

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..... 14

 II. 28

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..... 28

CONCLUSION 36

CERTIFICATE OF COMPLIANCE 37

APPENDIX 38

TABLE OF AUTHORITIES

Cases

| | |
|--|--------|
| <u>Cole v. State</u> , 573 S.W.2d 397 (Mo. App. 1978) | 17 |
| <u>Crews v. State</u> , 7 S.W.3d 563 (Mo. App., E.D. 1999)..... | 27 |
| <u>Dismang v. State</u> , 207 S.W.3d 663 (Mo. App., S.D. 2006) | 25 |
| <u>Garret v. State</u> , 814 S.W.2d 325 (Mo. App., S.D. 1991)..... | 33 |
| <u>Leisure v. State</u> , 828 S.W.2d 872 (Mo. banc 1992), <u>cert. denied</u> , 506 U.S. 923 (1992) | 19 |
| <u>State v. Carter</u> , 71 S.W.3d 267 (Mo. App., S.D. 2002)..... | 34 |
| <u>State v. Case</u> , 140 S.W.3d 80 (Mo. App., W.D. 2004) | 12, 13 |
| <u>State v. Colbert</u> , 949 S.W.2d 932 (Mo. App., W.D.1997) | 27 |
| <u>State v. Huggans</u> , 868 S.W.2d 523 (Mo. App., E.D. 1993)..... | 33 |
| <u>State v. Kinder</u> , 942 S.W.2d 313 (Mo. banc 1996), <u>cert. denied</u> 118 S.Ct. 149 (1997) | 19, 32 |
| <u>State v. Lynch</u> , 131 S.W.3d 422 (Mo. App., W.D. 2004) | 17 |
| <u>State v. Mahoney</u> , 165 S.W.3d 563 (Mo. App., S.D. 2005)..... | 19 |
| <u>State v. Parker</u> , 886 S.W.2d 908 (Mo. banc 1994) | 18, 31 |
| <u>State v. Pounders</u> , 913 S.W.2d 904 (Mo. App., S.D. 1996) | 18, 31 |
| <u>State v. Stewart</u> , 859 S.W.2d 913 (Mo. App., E.D. 1993)..... | 33 |
| <u>State v. Zimmerman</u> , 886 S.W.2d 684 (Mo. App., S.D. 1994)..... | 19, 32 |
| <u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, | |

| | |
|--|----------------|
| 80 L.Ed.2d 684 (1984) | 18, 31 |
| <u>Stufflebean v. State</u> , 986 S.W.2d 189 (Mo. App., W.D. 1999) | 33 |
| <u>Vogel v. State</u> , 21 S.W.3d 130 (Mo.App. 2000)..... | 17, 19, 31, 32 |

Rules

| | |
|--|-----------|
| Article V, §3, Missouri Constitution (as amended 1982) | 5 |
| Section 477.070, RSMo 2000 | 5 |
| Section 491.205, RSMo 2000 | 9 |
| Section 565.020.1, RSMo 2000 | 6 |
| Section 571.015, RSMo 2000 | 6 |
| Supreme Court Rule 29.15..... | 5, 18, 31 |

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.