

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

SYLVESTER ROY SISCO II,
Movant,

v.

STATE OF MISSOURI,
Respondent.

Case No. 1516-CV15206
Division 9

JUDGMENT

Pending before the Court is Movant's timely Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence. Movant claims ineffective assistance of counsel and prosecutorial misconduct based on the following allegations: 1) prosecutorial misconduct by the Jackson County Prosecutor's Office due to: (a) false testimony through the State's expert witness, Ann Mallot, and (b) an improper closing argument by the State, which Movant alleges relied on false information when presenting said argument to the jury; 2) *Brady* violations and newly discovered evidence as follows: (c) exculpatory video of the crime scene not provided to trial counsel in a viewable format; (d) exculpatory reports tracking movement of the AR-15, which were not provided to trial counsel; (e) an exculpatory ATF report detailing the history of the AR-15, which was not provided to trial counsel; (f) lack of disclosure to trial counsel of the criminal convictions of Jacob Higgs, Reno Dillard, and Lucretia Neal; and (g) a report by the supervisor of the Homicide Unit, which was not provided to trial counsel; and 3) ineffective assistance of counsel for trial counsel's failure to investigate the surveillance video.¹ For the following reasons, Movant's Motion is denied.

¹ In addition to the claims raised by counsel in the Amended Motion, Movant raised fifteen pro se claims. In substance, pro se claims 1-5, 9-10, and 14-15 are either identical to those raised by counsel or arise out of the same factual allegations. Pro se claims 6-8 and 12 are conclusory

BACKGROUND

In *State of Missouri v. Sylvester Sisco II*, 0616-CR06361-02, Movant was charged with one count of Murder in the First Degree (Count I), one count of Assault in the First Degree (Count III), and two counts of Armed Criminal Action (Counts II and IV). Movant was represented by attorney Daniel Ross, and the State of Missouri was represented by then-Assistant Prosecuting Attorneys Bryan Krantz and Sydney Pacquette. A jury trial was held in Division 1 of the Jackson County Circuit Court in October 2009, and on October 13, 2009, Movant was found guilty on all counts. On February 17, 2010, Movant was sentenced to life in prison without parole on the count of Murder in the First Degree, and 30 years in prison on the remaining counts. The sentences on Counts I and II were ordered to run concurrently with one another and consecutively to Counts III and IV.

Movant appealed his convictions to the Western District Court of Appeals, which, on January 29, 2013, affirmed Movant's convictions. The Missouri Supreme Court granted transfer of Movant's case in December 2013, affirmed Movant's convictions on March 10, 2015, and issued its Mandate on April 28, 2015. Movant filed his *pro se* Motion to Vacate, Set Aside or Correct the Judgment or Sentence pursuant to Missouri Supreme Court Rule 29.15 on July 21, 2015. On July 31, 2015, the Appellate Public Defender was appointed to represent Movant and a 30-day extension was granted, giving appointed counsel 90 days to file an amended motion.

allegations with no factual bases cited in support. Pro se claims 11 and 13 have been previously adjudicated by the Missouri Supreme Court in case number SC93785. Accordingly, Movant's pro se claims are denied.

Movant's counsel timely filed an Amended Motion on October 29, 2015. The State of Missouri filed its response to Movant's Amended Motion on February 22, 2017.

An evidentiary hearing on Movant's Amended Motion were held on April 4, 11, and 16, 2018. Movant appeared via PolyCom and through counsel, Nicole Forsythe. The State of Missouri appeared through Assistant Prosecuting Attorney P. Benjamin Cox. Daniel Ross, Sydney Pacquette, Ann Mallot, and Detective Steve Morgan provided in-person testimony, and Jackson County Prosecutor Jean Peters-Baker provided testimony through deposition. After review of the pleadings and evidence, this Court finds as follows.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prosecutorial Misconduct -- Testimony of Ann Mallot/Improper Closing Argument

Movant first argues the State committed prosecutorial misconduct in violation of Movant's Constitutional rights when it "elicited and failed to correct testimony they knew to be false" from Ann Mallot ("Mallot"). Mot. 3.² As noted by Movant, "[a] freestanding claim of prosecutorial misconduct is generally not cognizable in a Rule 29.15 proceeding." *Tisius v. State*, 183 S.W.3d 207, 212 (Mo. 2006). "Claims of trial error will only be considered in a Rule 29.15 motion where fundamental fairness requires, and then, only in rare and exceptional circumstances." *Id.* (citation omitted). "If the alleged misconduct was apparent at trial, then it is an issue for direct appeal, not a Rule 29.15 proceeding." *Id.* Thus, the Court must determine whether there was misconduct, whether the alleged misconduct was serious, and whether it was not apparent during the trial. *Id.*

² All references to Movant's Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence will be cited as "Mot. ____".

Mallot, a forensic photographer and video analyst, analyzed and testified about the surveillance video at issue. Tr. 321-401.³ Mallot also “took select images from throughout the video and put it together to get kind of an overview of the events that occurred during the evening.” Movant’s Ex. 111(a) at 16.⁴ Mallot created a PDF slide show from still shots taken from the video that was used by the State in opening. That slide show and Mallot’s report about the slides were admitted into evidence as State’s Exhibit 111. Movant claims Mallot’s trial testimony—that she did not see the victims handling the rifle⁵ around the time of the shooting—was false and that at no time did the State correct that testimony or offer the jury evidence that the rifle was handed between the victims just before the shooting.

Mallot was directed by the State to capture still images of the individuals at the murder scene to aid in identification which would counter Movant’s defense that it was not him in the video committing the murder. Tr. 334, 362. On her own, she looked at the entire video, created a timeline and the PDF slideshow but again, the focus was “provid[ing] the best image of each individual who was in the video.” Tr. 334. She was not asked to track the rifle. Tr. 397-98 (only asked to provide still images not track rifle). Although Mallot recalled seeing the rifle at several points in the video, she testified she did not view any of the four gentlemen handling the object that appeared to be that rifle around the time of the shooting. Tr. 400, 401.

Mallot’s testimony was not that the rifle did not move from victim to victim but rather she did not see it move. Tr. 400, 401. Fatal to Movant’s claim is his failure to proffer any

³ All references to the Trial Transcript will be cited as “Tr. ____”.

⁴ All references to Movant’s electronic exhibits provided via flash drive will be cited as “Movant’s Ex. ____”.

⁵ During this proceeding and the underlying trial, the gun that is the primary focus of Movant’s claims was sometimes referred to as an AR-15, sometimes as an AK-47, and sometimes as an assault rifle. For consistency and clarity, Court will refer to it as “the rifle” throughout this Judgment.

evidence Mallot did in fact see the rifle handed between the victims at the time of the shooting and the State knew she was lying about it. *Ferguson v. State*, 325 S.W.3d 400, 406-07 (Mo. Ct. App. 2010) (to prevail Movant must show witness' testimony was false and the State knew it). Mallot's focus was identifying individuals rather than the rifle. The State had no basis upon which to declare Mallot did see the rifle handoff and thus, no duty to correct Mallot's testimony. Additionally, contrary to Movant's assertion, the video showing the rifle handoff was played to the jury during closing argument. Tr. 1217-25.

The Court finds there was no misconduct. Further, even assuming misconduct could be found, it would have been apparent at the time of trial. Trial counsel had Mallot's report containing no rifle description, he had her slideshow with no stills of the rifle, he was aware from the video the rifle was handed between the victims, and he elicited at trial Mallot's testimony that she did not see the rifle handoff. Tr. 400-01. Thus, Movant's claim is denied on this point. *Tisius*, 183 S.W.3d at 212.

Prosecutorial Misconduct -- Improper Closing Argument

Movant next argues the State engaged in prosecutorial misconduct by relying on false information during closing argument. Movant contends the State improperly argued the Movant could not claim self-defense, no one threatened him, and his life was not in danger. Movant contends it was improper because the State knew about the rifle handoff. While showing the video during closing, the State narrated the participants' movements—

It appears that he and Jacob Higgs are talking. You can see Mr. Higgs' hands. You can see one of Mr. Anthony Sisco's hands. No weapons. No guns. No physical threats being made. Reno Dillard, you can see both of his hands. Not pointing a weapon. Not swinging a knife. Not throwing a punch.

Tr. 1219. The State also argued in close "he [Movant] starts shooting, nobody is shooting at him. He is not under attack. He has not been threatened. His life is not in danger." Tr. 1225.

The State's description of the actions in the video was factually accurate⁶ save its conclusion the men were talking and Movant's life was not in danger. But, those conclusions are a reasonable inferences that could be drawn from the evidence. Importantly, the issue of self-defense was not submitted to the jury.⁷ There was no self-defense instruction given. Thus, the State's argument Movant could not claim self-defense was correct under the law as the case was instructed. The Court finds the State was not relying on false information and, thus, Movant's claim is denied.

***Brady* Violations -- Video In Viewable Format**

Movant next argues the State violated *Brady* by failing to provide to trial counsel the surveillance video in a viewable format. Movant further complains trial counsel was never shown video of the rifle in its entirety, in its clearest form. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "According to *Brady*, due process requires the prosecution to disclose evidence in its possession that is favorable to the accused and material to guilt or punishment." *State v. Goodwin*, 43 S.W.3d 805, 812 (Mo. 2001). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "*Brady*, however, only applies in situations

⁶ Movant does not contend the description was factually inaccurate. Plus, the jury was shown the video and had the opportunity to draw its own conclusions.

⁷ Movant claims self-defense should have been submitted, but those issues are addressed in the *Brady* and Ineffective Assistance of Counsel Sections below.

where, the defense discovers information after trial that had been known to the prosecution at trial.” *State v. West*, 551 S.W.3d 506, 521 (Mo Ct. App. 2018) (citation omitted).

There is no dispute the State provided the video to trial counsel, and “[i]f the defendant had knowledge of the evidence at the time of the trial, the State cannot be faulted for nondisclosure.” *Id.* (citation omitted). Movant attempts to circumvent this basic *Brady* tenant by contending trial counsel could not play the video so he was forced by the State to view the video in the Prosecutor’s Office and he was not shown the “exculpatory portions” of the video that were best seen when “enhanced” by changing the brightness and contrast. Movant’s concern centers on a segment of the video he contends shows an argument four minutes before the shooting and what everyone agrees shows the movement of the rifle from by Higgs to Dillard who put the rifle on the pool table two minutes before the shooting.

Movant would require the State not only to produce favorable evidence but also share with the defense potential enhancements of that evidence. *Brady*, however, does not require the State to ensure trial counsel views the “best version” of the evidence or views the evidence in the light most favorable to one side or the other. *Brady* requires production of the evidence and only production. *See West*, 551 S.W.3d at 521-22 (State produced photograph to defendant and no *Brady* violation when photograph could be cropped to more clearly depict exculpatory evidence). The State produced the video to trial counsel and *Brady* was satisfied.

Even assuming *Brady* was implicated, the evidence before the Court undercuts Movant’s underlying factual assertion in this instance. Trial counsel was provided the videos with the applicable players on the discs. Tr. 204-06 (State made a record trial counsel had the videos available and was able to see the PDF. No complaint from trial counsel was voiced to the Court); Tr. 348 (Mallot testified she provided everything and the new player to the defense. Trial counsel did not take issue with the testimony); Tr. 393 (trial counsel stated he had seen all 1533

video sections). Paquette and Mallot both testified trial counsel did not request assistance to play the videos on his own.⁸ The Court finds their testimony to be credible.

Both video players (the original and the updated version used by Mallot to capture screen shots) contained controls to lighten, brighten, change hue, and change contrast of the video.⁹ Tr. 365, 379 (first player controls described by Mallot). Trial counsel was well aware of those controls from the numerous hours spent with the State viewing the videos and from testimony concerning, and use of, those controls during the trial. Tr. 205 (not State's job to take trial counsel through 30 hours of video, "I have shown him how to do it," trial counsel did not object or make any record); Tr. 328 (Mallot testified sometimes you have to lighten and darken the video); Tr. 365, 371 (Mallot used controls to lighten); Tr. 381 (Mallot used controls to lighten the video for the jury); Tr. 872 (State stated "I have made a couple minor adjustments with the video control that Ann Mallot described in her testimony."); Tr. 913 (trial counsel directed State to re-lighten the video at time stamp 2:47 -- time just prior to the rifle handoff); Tr. 1048 (while video was played to the jury, trial counsel stated, "If you can lighten it up a bit, please."); Tr. 1055 (trial counsel directed someone to "[l]ighten up" the video); Tr. 1061 (State asked to "lighten things up for just a little bit"); Tr. 1072 (State told witness to "just lighten or darken the screen as needed to view that"). Trial counsel saw the portion of the video where the rifle was handed from Higgs to Dillard. Tr. 397 (Trial counsel asked "Were you ever asked by the State to track the positioning of a long object that appeared in the vicinity of where the muzzle flashes were shown? Were you asked to track anything that was being handled by Reno Dillard prior to

⁸ A review of the trial transcript revealed no complaints by trial counsel about not being able to view the video although trial counsel often vigorously objected and argued about other evidentiary issues. No emails were produced showing trial counsel complained about not being able to play the video.

⁹ Use of these controls were the only "enhancements" used/performed by the State. Tr. 327-39.

the muzzle flashes?”); Tr. 401 (Trial counsel asked “Is it fair to say, though, you do recall that subjects were moving something long in, moving it around the pool room area where the shooting occurred? And you have been – have you been given notice that the State believes that to be [the rifle]?” He also asked, “And then that was the object moved by one of the shooting victims to the location of a pool table?”); Tr. 914-15 (trial counsel questioned Morgan about the video showing the rifle handoff; trial counsel stated “during the argument Higgs walks away from Anthony Sisco . . . goes around the pool table, goes to the drink rail, comes back and hands the [rifle] . . . shortly after that, that the gunfire opens up”). Further, Paquette testified she showed trial counsel the portion of the video where the rifle is handed off. As they were viewing the video, she often used the controls to lighten or darken the clips. She observed trial counsel using the controls as well. The Court finds her testimony to be credible.

Brady applies only when the defense discovers information after trial that had been known to the prosecution at trial. *West*, 551 S.W.3d at 521. It does not apply if the defendant had knowledge of the evidence at the time of the trial. *Id.* Here, Movant had knowledge of the evidence. Trial counsel knew the video existed. He had copies of all the clips. He had the players. If he could not play the videos, he could have availed himself to the Court to seek relief. In any case, the State played the videos for him and assisted him in every request to find whatever timeframe or scene he wanted to see on the video. Hearing Tr. 12, 15.¹⁰ Trial counsel saw the clip of the rifle being handed off and he knew the video could be lightened. The Court finds there was no *Brady* violation and Movant’s claim is therefore denied.

¹⁰ Transcripts from the April 2018 hearings will be cited using “Hearing Tr. ____”.

***Brady* Violation – Reports Tracking Rifle Movement**

Movant next contends exculpatory reports authored by Mallot concerning the movement of the rifle were never turned over, and Morgan, who did track the rifle, did not put that information in his report. First, Movant provided no evidence Mallot created any report concerning the rifle handoff prior to trial and the evidence before the Court is to the contrary.¹¹ Second, as noted above, *Brady* does not require the State to investigate a defendant's case for him. Movant was provided the evidence—the video itself—and thus, *Brady* was satisfied.¹²

***Brady* Violation -- ATF Rifle Report/Criminal Histories/Homicide Argument Report**

Prior to Movant's trial, the ATF generated a report indicating the rifle at issue had been stolen and Sergeant Niemeir prepared a report listing the motive for the shooting as "argument" and noting Higgs had a "narcotics" record. Those reports were not produced to trial counsel. The State also did not produce to trial counsel the criminal convictions of the two victims and Lucretia Neal ("Neal") – one of the witnesses who testified Movant was at the bar the night of the shooting. The State is correct, Missouri Supreme Court Rule 25.03(b)(8)¹³ only requires production of criminal histories for witnesses they intend to call at trial. While this would include Neal, it would not apply to Higgs and Dillard, who did not testify. However, *Brady* has no such limitation.

There is no dispute the reports were not provided to trial counsel, thus the Court must determine whether the evidence was material and whether the failure to provide the reports resulted in prejudice. *Strickler*, 527 U.S. at 281-82; *West*, 551 S.W.3d at 521. "Evidence is

¹¹ It is not surprising Mallot produced such a report prior to the Anthony Sisco trial. By that time, the rifle handoff had been pointed out to her and Anthony Sisco had injected self-defense into his trial.

¹² The failure to address the rifle handoff in the reports merely created fertile ground for trial counsel's cross examination.

¹³ At the time the State filed its Response to Movant's Motion, the Rule was 25.03(a)(7).

material if it would have provided the defendant with plausible and persuasive evidence to support a theory of innocence or would have enabled the defendant to present a plausible, different theory of innocence.” *Duley v. State*, 304 S.W.3d 158, 163 (Mo. Ct. App. 2009) (citation and internal quotations omitted). “A finding of materiality depends upon the nature of the charge, the evidence presented by the State, and the role that the nonproduced evidence would likely have played.” *Id.* (citations and internal quotations omitted). “The *Brady* standard requires [courts] to consider whether the evidence would have been significant to the defendant in the way he tried his case.” *Id.* citing *State v. Parker*, 198 S.W.3d 178, 180 (Mo. Ct. App. 2006).

Here Movant’s defense at trial was that he was not at the bar and it was not him depicted in the video shooting the victims. Movant argues, however, he would have injected self-defense into the trial if trial counsel had access to the reports at issue. Even assuming these reports and convictions were significant to the issue of self-defense, Movant’s claim still fails.

To be entitled to an instruction regarding self-defense, there must be substantial evidence showing (1) the defendant was not the initial aggressor; (2) the defendant reasonably believed that he was faced with the necessity of defending himself from bodily harm; (3) the defendant used no more force than was necessary; and (4) the defendant attempted to avoid the confrontation.

State v. Hobson, 522 S.W.3d 270, 275 (Mo. Ct. App. 2016) (internal quotations and citations omitted). Further, deadly force was used in this instance, and it is “justified only when the defendant reasonably believes it is necessary to protect himself from immediate danger of serious bodily injury or death.” *State v. Crudup*, 415 S.W.3d 170, 175-76 (Mo. Ct. App. 2013) (citation omitted).

There is no evidence that had Movant received the withheld reports, he would have changed his trial strategy and would have produced evidence at trial supporting the submission of the self-defense instruction. There is no evidence before the Court that Movant “reasonably

believed that he was faced with the necessity of defending himself from bodily harm.” *Hobson*, 522 S.W.3d at 275 (internal quotation and citations omitted). Certainly the withheld reports could support a self-defense theory, but without reasonable belief evidence, the giving of the self-defense instruction would not have been triggered.

“A defendant has the burden of injecting the issue of self-defense into the case by substantial evidence.” *State v. Morrow*, 41 S.W.3d 56, 59 (interpreting Mo. Rev. Stat. § 563.031.5 (2009)). Movant did not testify at trial as to his reasonable belief and, significantly, he did not provide any testimony concerning his reasonable belief during the hearing on this Motion.¹⁴ Because Movant would not have been entitled to pursue self-defense at trial, the improperly withheld reports and convictions are not material. *State v. Smith*, 456 S.W.3d 849, 852 (Mo. 2015) (no evidence to establish defendant reasonably believed the use of deadly force was necessary; no error to refuse self-defense instruction); *Hobson*, 522 S.W.3d at 275-76 (self-defense fails because no evidence defendant reasonably believed he was faced with necessity of defending himself from bodily harm). For the same reason, the failure to produce these reports and convictions to trial counsel did not result in prejudice to Movant.¹⁵ Movant’s claim then must be denied.

¹⁴ Under certain factual scenarios, a defendant would not necessarily have to testify to establish his reasonable belief that deadly force was necessary. But, in this case there is no other evidence available to prove it. Movant’s brother, Anthony, did not testify at the trial. Higgs was killed and Dillard cannot remember the incident. Anthony Sisco’s case is completely distinguishable from this case. Anthony Sisco testified at his trial about his reasonable belief that deadly force was necessary. Because he proffered evidence in support of the self-defense elements, the self-defense instruction was properly given. Movant did not do so in this case.

¹⁵ Removing the consideration of the withheld information from the context of self-defense, Movant still cannot establish prejudice. Although Neal’s conviction was not produced, Erin Bridges also testified and identified Movant at trial. Tr. 1002-03. Dillard and Higgs obviously did not testify. The jury heard evidence and argument that there may have been a drug related motive and that the parties were arguing right before the shooting, Tr. 914-15, 1255.

Ineffective Assistance of Trial Counsel

Finally Movant claims trial counsel was ineffective for failing to investigate the surveillance video and failing to play the exculpatory portion of the video to the jury. To successfully assert a claim for ineffective assistance of trial counsel, a movant must satisfy a two-prong test. First, a movant must demonstrate counsel's performance "fell below an objective standard of reasonableness," and second, "the deficient performance" actually prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *see also State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997). Prejudice under the *Strickland* analysis is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Baumruk v. State*, 364 S.W.3d 518, 535 (Mo. banc 2012) (quoting *Strickland*, 466 U.S. at 694).

Movant's claim fails on several grounds. First, trial counsel did investigate the video. *See Brady Violations -- Video In Viewable Format Section* above. Based on his investigation, he used the video at trial to bolster Movant's defense he was not at the bar at the time of the shooting. *See, e.g.*, Tr. 1236-39 (not Defendant in the video); Tr. 1243 (cell phone use in video versus phone records); Tr. 1246-47, 1254-55 (lack of DNA evidence when video shows suspects touching things). Movant seems to argue that had trial counsel played the "argument"/rifle handoff portion of the video, self-defense would have been presented to the jury.¹⁶ But, as noted above, trial counsel did view the "argument"/rifle handoff portion of the video and he questioned witnesses about it at trial.

Second, Movant presented no evidence that had trial counsel done anything differently with the video, Movant would have wanted to change his trial strategy and offer evidence in

¹⁶ Movant's claim is failure to investigate the video, not failure to investigate or proffer self-defense.

support of a self-defense claim. With no evidence in support of a self-defense claim, the self-defense instruction would not have been given and thus, Movant was not prejudiced by trial counsel's alleged failure to do anything differently with the video. The Court finds trial counsel was not ineffective and Movant's claim is denied.

For the foregoing reasons, it is hereby

ORDERED Movant's Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence is denied.

IT IS FURTHER ORDERED the parties shall retrieve all exhibits within ten (10) days of the date of this Judgment. Exhibits that are not retrieved will be destroyed.

IT IS SO ORDERED.

October 17, 2018

Date



HONORABLE JOEL P FAHNESTOCK

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was duly delivered on:
17th day of October, 2018 to:

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Criminal Law Clerk, Division 9