

No. ED103834

IN THE
Missouri Court of Appeals
Eastern District

JEFFREY WEINHAUS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Franklin County Circuit Court
Twentieth Judicial Circuit
The Honorable Keith M. Sutherland, Judge

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
STATEMENT OF FACTS.....	4
ARGUMENT.....	17
I.	17
The motion court did not clearly err in denying Mr. Weinhaus’s claim that trial counsel was ineffective for failing to call an expert like Gene Gietzen to testify at trial.	17
II.....	24
The motion court did not clearly err in denying Mr. Weinhaus’s claim that trial counsel was ineffective for failing to call FBI agents, Michael Maruscak and Patrick Cunningham, to testify at trial.....	24
III.....	32
The motion court did not clearly err in denying Mr. Weinhaus’s claim that trial counsel was ineffective for failing to call Levi Weinhaus to testify at trial.	32

IV.	36
The motion court did not clearly err in denying Mr. Weinhaus’s claim that trial counsel was ineffective for failing to call an expert like Jim Byrne to testify at trial.	36
CONCLUSION.....	42
CERTIFICATE OF COMPLIANCE AND SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Barnett v. State</i> , 103 S.W.3d 765 (Mo. 2003).....	passim
<i>Clay v. State</i> , 468 S.W.3d 914 (Mo.App. E.D. 2015).....	26, 34
<i>Johnson v. State</i> , 333 S.W.3d 459 (Mo. banc 2011).....	28
<i>Johnson v. State</i> , 406 S.W.3d 892 (Mo. 2013)	21
<i>McLaughlin v. State</i> , 378 S.W.3d 328 (Mo. 2012).....	28, 31
<i>Morrow v. State</i> , 21 S.W.3d 819 (Mo. 2000)	18, 25, 33, 37
<i>Moss v. State</i> , 10 S.W.3d 510 (Mo. 2000)	17, 24, 32, 36
<i>State v. Bowman</i> , 337 S.W.3d 679 (Mo. 2011).....	20, 39
<i>State v. Ervin</i> , 848 S.W.2d 476 (Mo. 1993).....	20, 39
<i>State v. Maxie</i> , 513 S.W.2d 338 (Mo. 1974)	20, 39
<i>State v. Presberry</i> , 128 S.W.3d 80 (Mo.App. E.D. 2003)	21, 40
<i>State v. Weinhaus</i> , 459 S.W.3d 916 (Mo.App. E.D. 2015).....	4, 15
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	18, 25, 33, 37
<i>Tucker v. State</i> , 468 S.W.3d 468 (Mo.App. E.D. 2015).....	23, 27, 35

Rules

Rule 29.15(g)	16
Rule 44.01(a)	16

STATEMENT OF FACTS

Mr. Weinhaus appeals the denial of his Rule 29.15 motion, in which he alleged, *inter alia*, that trial counsel was ineffective for failing to present the testimony of various witnesses who allegedly would have offered testimony to impeach two law enforcement officers' testimony about Mr. Weinhaus's actions in drawing his gun and saying, "You're going to have to shoot me" (see PCR L.F. 21-22, 26-27). The motion court denied Mr. Weinhaus's motion without an evidentiary hearing (PCR L.F. 35-37).

* * *

A jury found Mr. Weinhaus guilty of the class C felony of possession of a controlled substance, the class A misdemeanor of possession of thirty-five grams or less of marijuana, the class A felony of assault of a law enforcement officer in the first degree, and the unclassified felony of armed criminal action (Tr. 651-652; L.F. 195-197). *See State v. Weinhaus*, 459 S.W.3d 916 (Mo.App. E.D. 2015) (per curiam order). In a light favorable to the verdicts, the State's evidence showed the following.

On August 18, 2012, Judge Kelly Parker contacted Sergeant Henry Folsom about a YouTube video that had been posted by Mr. Weinhaus, in which Mr. Weinhaus "allegedly threatened some judicial officers" (Tr. 168-169). Judge Parker felt threatened by the video (Tr. 169). Sergeant Folsom viewed Mr. Weinhaus's videos and made copies of them (Tr. 169).

In a video recorded on August 16, 2012, Mr. Weinhaus recited various societal problems and stated, “The America that I grew up in is long gone” (State’s Ex. 1). He then stated that the “good news” was that America could be restored (State’s Ex. 1). He stated that it could be done peacefully, but he also referred to his “right to go in there and blast you motherf---ers out of there if we have to” (State’s Ex. 1). He cited specific examples of perceived injustice and said, “You’re motherf---ers, and you’re going down one way or another” (State’s Ex. 1). He stated that he did not want to use force, and he said he did not intend to go out and kill them, but he warned the prosecutor, the judges, and everyone down to the dispatcher, that he was not “playing games” (State’s Ex. 1). He stated that he had a right to throw off government, and that the people had a right to establish a new government and remove government officials by “whatever means necessary” (State’s Ex. 1).

After discussing perceived problems with the criminal justice system and society in general, Mr. Weinhaus issued an ultimatum, stating that the state court’s administrator, the circuit judge, lawyers, judges, and police officers were “fired” and had to “stand down” by September 17, 2012—Constitution Day (State’s Ex. 1). He stated that he would like to see them “go peaceably,” but he stated that if they wanted to resist, they would meet their “fate” and be tried and “executed for the crimes [they had] committed against the American people” (State’s Ex. 1). He concluded by saying, “This is the

bulletin man. I love you enough to tell you the truth. The gig is up, the news is out, we finally found you. You thought you had it made. Well, the party's over. See ya" (State's Ex. 1). Mr. Weinhaus delivered his message in a soft-spoken voice, smiling at various times (State's Ex. 1).

Sergeant Folsom also viewed another version of the same video that had captions added to it (Tr. 169). At the point where Mr. Weinhaus talked about his right to "blast you motherf---ers," a caption included the following: "The Courtroom is the battle ground. The Judge, Pa are the enemy and your lawyer is the enemy spy" (State's Ex. 1A). Another caption stated, "Sorry though that is the reason why we have the right to keep and bare [sic] arms. It is the last resort" (State's Ex. 1A). As Mr. Weinhaus discussed the right to use force, a caption stated, "Be peaceful, be courteous, obey the law, respect everyone; but if someone puts his hand on you, send him to the cemetery" (State's Ex. 1A).

When Mr. Weinhaus listed the officials who had been "fired," a caption listed various people, including Judge Kelly Parker (State's Ex. 1A). When Mr. Weinhaus issued his September 17 ultimatum, a caption stated, "The Last Day for the Defacto Court and Police will be Friday September 14th (State's Ex. 1A). A caption shortly thereafter stated, "The People's Court will be convened after Labor Day. The Redress and Revocation Petition will be recorded on 9-11-12" (State's Ex. 1A).

After viewing the videos, Sergeant Folsom consulted with various state, federal, and county law enforcement officers to assess the validity of Mr. Weinhaus's threats (Tr. 171). He learned that some of them had heightened their security in response to Mr. Weinhaus's actions and threats (Tr. 171). They concluded, however, that "most of the things that [he] had said were under the free speech," and they decided that Sergeant Folsom would contact Mr. Weinhaus to "discuss with him the video and see if he had actually intended to harm anyone or himself," or whether he "possibly was a danger to anyone" (Tr. 172).

On August 22, Sergeant Folsom and Corporal Scott Mertens located Mr. Weinhaus at his home (Tr. 173, 375-376). Mr. Weinhaus stepped outside to speak to the officers, and Sergeant Folsom smelled marijuana (Tr. 173, 377). There was a very strong odor of marijuana coming from the house and from Mr. Weinhaus (Tr. 173). They walked over to the carport and talked about the videos that Mr. Weinhaus had posted on YouTube and the threats he had made (Tr. 174, 376-377). Mr. Weinhaus said that he was "a peaceful person," but he also said that "a situation like this was exactly what the Second Amendment was created for" (Tr. 174-175). He also accused several judicial officials of treason, and he stated that "death is the punishment for treason" (Tr. 175).

After they had talked to him about the videos, Sergeant Folsom asked

if there was marijuana in the house, and Mr. Weinhaus said there was not (Tr. 176). Mr. Weinhaus tried to step around Sergeant Folsom and go toward the house, but Sergeant Folsom stepped in front of him and told him to turn around because Sergeant Folsom was going to handcuff him (Tr. 176). Mr. Weinhaus complied, and Sergeant Folsom put him in handcuffs (Tr. 176). As Sergeant Folsom put him in handcuffs, Mr. Weinhaus “was screaming for someone in the house to come and help him, that the cops were going to search the house, they were looking for drugs” (Tr. 177). Sergeant Folsom then obtained a search warrant and searched the house (Tr. 177-180, 378).

During the search of the main floor and master bedroom, the officers observed computer equipment, video cameras, and a nine millimeter handgun with paperwork indicating that it belonged to Judy Kropf Weinhaus (Mr. Weinhaus’s wife) (Tr. 180, 379-380). Because the gun was legally registered, it was not seized (Tr. 181, 380).

The basement was “cluttered with boxes” and there was “a lot of personal belongings” (Tr. 182). On the right side of the main part of the basement, there were cameras, a desk with a computer, and “a lot of the banners and things that [were] in the video where Mr. Weinhaus was running for coroner and the backdrop basically for where he had made the videos” (Tr. 183, 381). Mr. Weinhaus described that area as his “command center” (Tr. 183).

In the desk in the “command center,” Sergeant Folsom found “some drug paraphernalia, a set of scales, rubber type Tupperware tub containing some marijuana as well as smoking pipes and other instruments” (Tr. 184, 382-383). There was also “a small Camel tin . . . like a tin that Sucrets or something comes in, a small metal tin” (Tr. 184, 383). The tin contained a pink pill and pieces of two other pills (Tr. 185). Subsequent testing revealed that the pills were morphine (Tr. 196, 204-205). Just outside the “command center” the officers also found another bag of marijuana (Tr. 384).

After conducting the search, Sergeant Folsom gave Mr. Weinhaus a business card that had his email address on it (Tr. 206). Mr. Weinhaus then began sending emails asking where he could serve Sergeant Folsom with papers (Tr. 207). Mr. Weinhaus also sent him a writ of replevin asking for the return of his computers (Tr. 207).

On September 10, 2012, Sergeant Folsom met with his supervisors at the highway patrol (Tr. 207). They decided to arrest Mr. Weinhaus for the drugs and for tampering (Tr. 207). They also discussed whether to arrest Mr. Weinhaus immediately or whether to “further monitor his movements before September 17th” (Tr. 207). After obtaining an arrest warrant, Sergeant Folsom contacted the Franklin County Sheriff’s Department, but they were too busy to assist with the arrest (Tr. 208). Sergeant Folsom then contacted two FBI agents and obtained their assistance (Tr. 208, 385). They wanted to

arrest Mr. Weinhaus before September 17—the day Mr. Weinhaus had said he was going “to occupy the courthouse” (Tr. 385-386).

On September 11, 2012, Sergeant Folsom contacted Mr. Weinhaus to set up a meeting for the ostensible purpose of returning Mr. Weinhaus’s computer equipment to him (Tr. 209, 218, 385; *see* State’s Ex. 15). Mr. Weinhaus expressed his distrust of Sergeant Folsom and said he wanted to meet in a public place (Tr. 209, 218). They agreed to meet at an MFA gas station on Highway K (Tr. 209-210). Although Sergeant Folsom believed Mr. Weinhaus was at home, he did not want to go there to arrest him because Mr. Weinhaus had previously “made several threats against” Sergeant Folsom (Tr. 209). In one internet video, Mr. Weinhaus had said he “should have placed a bullet in [Sergeant Folsom’s] head” (Tr. 209). Mr. Weinhaus had also said in one of his videos that he was “at home with his guns loaded on Def-Con 4” (Tr. 210).

The officers arrived at the gas station before Mr. Weinhaus (Tr. 210). Sergeant Folsom and Corporal Mertens parked their vehicle in a highly visible place (Tr. 210). When Mr. Weinhaus arrived, he passed the officers at a high rate of speed (Tr. 213). He then he turned around and “slid on the gravel to a stationary position” (Tr. 213). As Mr. Weinhaus drove by the officers, he was removing his seatbelt and it “looked that he was in a hurry to get out” (Tr. 214).

Sergeant Folsom exited his vehicle and told Corporal Mertens to go to the trunk and open it in an attempt to suggest to Mr. Weinhaus that they had brought the computer equipment (Tr. 218, 390). Sergeant Folsom had a folder in one hand, which contained a copy of the arrest warrant, and he went around to talk to Mr. Weinhaus (Tr. 217, 391).

When Sergeant Folsom came around the car, he saw Mr. Weinhaus standing sideways (Tr. 219). Mr. Weinhaus was wearing a large green Army holster on his hip, and he had a gun in the holster (Tr. 219). Sergeant Folsom asked Mr. Weinhaus what he was doing with that gun (Tr. 219, 391; State's Ex. 15). When Corporal Mertens heard that, he drew his own weapon and held it at the "high ready" position (Tr. 391). Sergeant Folsom also drew his gun and placed it at "the low ready" position, meaning it was down by his side, in front of his hip (Tr. 220). Mr. Weinhaus told the officers he was authorized to have the gun, or words to that effect (Tr. 220; State's Ex. 15). Sergeant Folsom stated that he was also authorized, or words to that effect (Tr. 220; State's Ex. 15).

Mr. Weinhaus then reached down and "manipulated the flap on the holster that he was wearing" (Tr. 220, 391). Mr. Weinhaus disengaged the "safety ring" of the holster, opened the flap, and "placed his hand on the buttstock of the weapon" (Tr. 221). Corporal Mertens observed Mr. Weinhaus tremble, like he had experienced a "cold chill," and Corporal Mertens

thought, “this is bad” (Tr. 391-392). Sergeant Folsom told Mr. Weinhaus to get down on the ground, but Mr. Weinhaus turned toward Sergeant Folsom and stood “squared face to face” (Tr. 221). Corporal Mertens aimed his gun at Mr. Weinhaus’s head (Tr. 392).

Sergeant Folsom raised his weapon, thinking that Mr. Weinhaus was going to draw his weapon (Tr. 221-222). Sergeant Folsom saw that his line of fire might endanger people at the gas station, so he stepped to the left to change his “angle of contact with Mr. Weinhaus” (Tr. 222). Mr. Weinhaus continued to manipulate the holster (Tr. 222). Sergeant Folsom again told Mr. Weinhaus to get down on the ground, and Mr. Weinhaus said, “You’re going to have to shoot me” (Tr. 222). Mr. Weinhaus “continued to draw the weapon out,” and he lowered his center of gravity, like he was going into “a firing position” (Tr. 222-223, 324-325).

When Mr. Weinhaus’s gun was almost out of the holster, Sergeant Folsom “fired two shots to his chest and one to his head to incapacitate him” (Tr. 223). When Sergeant Folsom fired the shot at his head, Mr. Weinhaus was holding his gun in his right hand (Tr. 227). Corporal Mertens also fired his gun when he saw Mr. Weinhaus pulling out his gun (Tr. 393). Corporal Mertens thought that Mr. Weinhaus presented a threat to Sergeant Folsom (Tr. 428). When Sergeant Folsom heard Corporal Mertens’s shot, he fired another shot at Mr. Weinhaus (Tr. 227, 332). Mr. Weinhaus “flinched back

and he dropped violently straight towards the ground” (Tr. 227). Sergeant Folsom thought he had killed Mr. Weinhaus (Tr. 224).

Sergeant Folsom asked one of the FBI agents to “cover him” as he moved forward and rolled Mr. Weinhaus over (Tr. 228, 393; State’s Ex. 15). The gun was beneath Mr. Weinhaus, “just out of the holster” (Tr. 228). The butt of the gun was still in Mr. Weinhaus’s fingertips, but none of his fingers was near the trigger guard (Tr. 228). Sergeant Folsom said, “he still has his hand on the gun,” or words to that effect (Tr. 393; State’s Ex. 15). Sergeant Folsom picked up the gun and “jammed it down into the holster” to secure it (Tr. 228). He then removed the holster and threw it away from Mr. Weinhaus (Tr. 229, 393). He handcuffed Mr. Weinhaus (Tr. 229, 394). Corporal Mertens called an ambulance, but he initially thought Mr. Weinhaus was dead (Tr. 394). Mr. Weinhaus was wearing a hidden camera in his watch that recorded the incident (Tr. 229-230; State’s Ex. 15). Mr. Weinhaus started to regain consciousness at the scene, and some medical aid was provided to him there (Tr. 356-358; *see* State’s Ex. 15).

A search of Mr. Weinhaus’s car revealed that he had other weapons in his car, including a loaded .22 caliber pistol, and a loaded 12-gauge shotgun (Tr. 454-455). The gun Mr. Weinhaus had been wearing was seized, and subsequent testing revealed that the gun was functional (Tr. 456, 471).

The State charged Mr. Weinhaus with the class C felony of possession

of a controlled substance (morphine), the class C felony of tampering with a judicial officer, the class A misdemeanor of possession of up to thirty-five grams of marijuana, the class A felony of assault of a law enforcement officer in the first degree, the class A felony of attempted assault of a law enforcement officer in the first degree, two counts of the unclassified felony of armed criminal action, and the class D felony of resisting arrest (LF. 23-24).

At trial, after the State had presented its case-in-chief, the trial court granted Mr. Weinhaus's motion for judgment of acquittal as to two counts—the class C felony of tampering with a judicial officer, and the class D felony of resisting arrest (Tr. 544-545, 548-549). The trial court concluded that Mr. Weinhaus's video threats against Judge Kelly were not sufficient, without something more, to support the charge of tampering (Tr. 544-545). The court also concluded that there was no evidence that Mr. Weinhaus knew that he was being arrested at the time he met the officers (Tr. 548-549).

Mr. Weinhaus presented the testimony of three witnesses (Tr. 563, 581, 593). Marty Leach, who was present at the scene of the shooting, testified that he saw Mr. Weinhaus falling after the first shot, that his hands were down at his sides, and that he did not see a gun in Mr. Weinhaus's hand (Tr. 569-570). Steve Everhart, who was also present, testified that he heard five or six shots (Tr. 587). He said that when he turned to look, "it was already over" (Tr. 587). Heather Clark, the gas station attendant, testified that she

saw Mr. Weinhaus falling after the first shot, that his hands were “in the air pointing towards the store,” and that he did not have a gun in his hands (Tr. 598-599). She testified that after Mr. Weinhaus was on the ground, “then the officer took a couple of steps and shot him six more times while he was laying there” (Tr. 599).

The jury found Mr. Weinhaus guilty of possession of a controlled substance (morphine), possession of not more than thirty-five grams of marijuana, assault of a law enforcement officer in the first degree (against Sergeant Folsom), and armed criminal action (Tr. 651-652; L.F. 195-197). The jury found Mr. Weinhaus not guilty of the other count of assault of a law enforcement officer (against Corporal Mertens) and its associated count of armed criminal action (Tr. 652).

After hearing additional evidence in the penalty phase, the jury assessed punishment as follows: two years for possession of morphine, one year for possession of marijuana, thirty years for assault of a law enforcement officer in the first degree, and thirty years for armed criminal action (Tr. 682-683). On November 25, 2013, the trial court sentenced Mr. Weinhaus in accordance with the jury’s assessment (Sent.Tr. 43-44). The court ordered the sentences to run concurrently (Sent.Tr. 44).

On direct appeal, this Court affirmed Mr. Weinhaus’s convictions and sentences. *State v. Weinhaus*, 459 S.W.3d at 916-917. The Court issued its

mandate on April 30, 2015.

On May 11, 2015, Mr. Weinhaus filed a *pro se* motion pursuant to Rule 29.15 (PCR L.F. 1, 5). On May 26, 2015, the motion court appointed counsel to represent Mr. Weinhaus (PCR L.F. 1). The motion court also granted Mr. Weinhaus a thirty-day extension of time to file an amended motion (PCR L.F. 1). Thus, Mr. Weinhaus's amended motion was due by August 26, 2015. *See* Rule 29.15(g); Rule 44.01(a).

On August 24, 2015, Mr. Weinhaus filed an amended motion (PCR L.F. 2, 20). In his motion, Mr. Weinhaus alleged, *inter alia*, that trial counsel was ineffective for (1) failing to call a forensic expert, such as Gene Gietzen, "to testify that the video from the watch showed [Mr. Weinhaus's] movements to be inconsistent with police officer testimony"; (2) failing to call FBI agents Michael Maruscak and Patrick Cunningham, to testify that they "did not see a holster on [Mr. Weinhaus's right hip]; (3) failing to call Levi Weinhaus "to testify that [Mr. Weinhaus] usually wore his holster on his left hip when he was driving"; and (4) failing to call a video expert, such as Jim Byrne, "to testify that [Mr. Weinhaus] said 'you don't have to shoot me' " (PCR L.F. 21-22, 26-27).

On November 12, 2015, the motion court denied Mr. Weinhaus's motion without an evidentiary hearing (PCR L.F. 35-37). The motion court concluded that Mr. Weinhaus failed to allege facts showing prejudice (PCR L.F. 37).

ARGUMENT

I.

The motion court did not clearly err in denying Mr. Weinhaus's claim that trial counsel was ineffective for failing to call an expert like Gene Gietzen to testify at trial.

In his first point, Mr. Weinhaus asserts that the motion court clearly erred in denying his claim that trial counsel was ineffective for failing "to call as a witness a crime scene forensic expert, such as Gene Gietzen, whose testimony would have supported [Mr. Weinhaus's] defense by establishing that [his] movements on the video of the incident were inconsistent with the testimony of state witness Sergeant James Folsom" (App.Br. 18).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted

by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id.*

B. Mr. Weinhaus failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, the movant must “show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also “affirmatively prove prejudice.” *Id.* at 693. To show prejudice, the movant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*

“To obtain an evidentiary hearing for claims related to the ineffective assistance of counsel, the movant must allege facts, not refuted by the record, showing that counsel’s performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney and that the movant was thereby prejudiced.” *Morrow v. State*, 21 S.W.3d 819, 823 (Mo. 2000).

In his amended motion, Mr. Weinhaus alleged that trial counsel was ineffective for failing to present the testimony of an expert like Gene Gietzen, “to testify that the video from the watch showed [Mr. Weinhaus’s] movements to be inconsistent with police officer testimony” (PCR L.F. 22). Mr. Weinhaus alleged that Officer Folsom had testified at trial that “just prior to [Mr. Weinhaus] attempting to draw his weapon and getting shot,” Mr. Weinhaus

had changed from a “bladed” or sideways position to facing toward Officer Folsom or “squared face to face, toe to toe” (PCR L.F. 24). Mr. Weinhaus alleged that Mr. Gietzen “would have testified that the movement of [Mr. Weinhaus’s] left arm is inconsistent with him blading and then facing off with Fulsom” (PCR L.F. 25).

In denying this claim, the motion court concluded that Mr. Weinhaus failed to allege facts showing prejudice (PCR L.F. 37). The motion court did not clearly err.

Mr. Gietzen’s alleged testimony—“that the movement of [Mr. Weinhaus’s] left arm [was] inconsistent with him blading and then facing off with Fulsom”—was wholly conclusory and, ultimately, speculative because the amended motion failed to include any specific factual allegations that would have supported the conclusion that the movement of Mr. Weinhaus’s arm was “inconsistent” with Officer Folsom’s testimony. The evidence at trial showed that the video was captured by a camera inside of Mr. Weinhaus’s watch (*see* Tr. 229-230). The amended motion did not allege where the watch was located on Mr. Weinhaus’s arm, whether the watch was on the outside or inside of his wrist, and or where the camera was situated on the watch.

It is a matter of common knowledge that a wrist can twist, that an arm can bend at the elbow, and that an arm can bend at the shoulder, *i.e.*, that a watch camera on the wrist is capable of capturing images in virtually any

location around the wearer of the watch. However, the amended motion alleged no facts about the manner in which Mr. Weinhaus might have moved or positioned his left arm so as to make it impossible for the watch to capture the images it captured while Mr. Weinhaus moved from a sideways position in relation to Officer Folsom to a forward-facing position. The complete lack of any factual allegations to support Mr. Gietzen's conclusion was sufficient to render Mr. Gietzen's alleged opinion inadmissible as mere speculation. *See generally State v. Bowman*, 337 S.W.3d 679, 690-691 (Mo. 2011) (failing to state that an opinion "is to 'a reasonable degree of scientific certainty' does not render the testimony inadmissible," but an expert must establish that the opinion is "based on reasonable certainty and not on speculation"); *State v. Maxie*, 513 S.W.2d 338, 344-345 (Mo. 1974) (in upholding expert testimony about a piece of trace evidence, the Court observed that "[t]he opinion of an expert need not rise to absolute certainty but must be supported by a *substantial factual evidentiary base*, as is the case here" (emphasis added)).

Mr. Weinhaus's amended motion also failed to allege that Mr. Gietzen employed any forensic methods that were accepted in the relevant scientific community. Thus, to the extent that Mr. Weinhaus was suggesting that Mr. Gietzen would have offered an opinion supported by forensic science, he failed to allege facts showing that Mr. Gietzen's opinion was admissible. *See generally State v. Ervin*, 848 S.W.2d 476, 480 (Mo. 1993) ("Admission of an

expert's opinion concerning scientific evidence depends upon wide acceptance in the relevant scientific community of its reliability.”¹

Moreover, absent any allegations showing how forensic expertise would have been employed by Mr. Gietzen, Mr. Gietzen was the equivalent of a lay witness who lacked any specialized knowledge, and his testimony would not have been admissible because “the jury and lay witness[es] ‘are in equal positions to form an accurate opinion.’” *See State v. Presberry*, 128 S.W.3d 80, 86 (Mo.App. E.D. 2003) (holding that two officers’ identification testimony after viewing a video was erroneously admitted because the officers “were in no better position than the jury to identify the person or clothing in the photographs and videotapes in evidence”).

¹ Mr. Weinhaus asserts that “[a]n evidentiary hearing would allow [him] to establish . . . how [Mr. Gietzen’s] testimony would have aided the defense by establishing that [his] movements on the video of the incident were inconsistent with the testimony of state witness Sergeant James Folsom” (App.Br. 23-24). But “[a]ny allegation that [Mr. Weinhaus] should be granted an evidentiary hearing to develop his arguments also fails.” *Johnson v. State*, 406 S.W.3d 892, 908 (Mo. 2013). “ ‘The purpose of an evidentiary hearing is to determine whether the facts alleged in the motion are accurate, not to provide [Movant] with an opportunity to produce new facts.’ ” *Id.*

Finally, even if Mr. Gietzen had been permitted to testify that the video was “inconsistent” with Officer Folsom’s testimony about Mr. Wienhaus’s turning from a sideways position to a forward-facing position, there is no reasonable probability that such testimony would have persuaded the jury to reach a different verdict.

First, absent any substantial factual basis for Mr. Gietzen’s opinion, there is no reason to believe that the jury would have credited his bald assertion that the video was “inconsistent” with Officer Folsom’s testimony. The jury was capable of viewing the video and drawing its own conclusions; and, absent some reason to credit an opinion offered by Mr. Gietzen, it is reasonably probable that the jury would have concluded that the video was *consistent* with Officer Folsom’s testimony. The images in the video pan from left to right, moving from Officer Mertens to Officer Folsom, who was standing on Officer Mertens’s left-hand side (*see* State’s Ex. 15). Thus, it appears from the video that the watch moved generally from left to right, which is consistent with Mr. Weinhaus turning to his right and facing toward Officer Folsom.²

² Officer Folsom testified that Mr. Weinhaus’s holster was visible and on his right hip (*see* Tr. 219); thus, when Mr. Weinhaus was in the “bladed” position, his right side was apparently facing Officer Folsom.

Second, impeaching Officer Folsom about Mr. Weinhaus's turning movement would not have provided a viable defense. The most material parts of Officer Folsom's testimony were that Mr. Weinhaus almost completely drew his weapon from its holster, and that Mr. Weinhaus said the officer (or officers) were going to have to shoot him (*see* Tr. 221-227). Officer Mertens testified that he also fired his gun when he saw Mr. Weinhaus pulling out his gun (Tr. 393). Corporal Mertens said that he thought that Mr. Weinhaus presented a threat to Sergeant Folsom (Tr. 428). In short, merely impeaching Officer Folsom's testimony about Mr. Weinhaus's turning movement would not have provided a viable defense. "[T]rial counsel's failure to impeach a witness, without something more, does not warrant post-conviction relief." *Tucker v. State*, 468 S.W.3d 468, 474 (Mo.App. E.D. 2015).

In sum, the motion court did not clearly err in concluding that that Mr. Weinhaus failed to allege facts showing that he was prejudiced by counsel's alleged error. Mr. Gietzen's alleged testimony was merely a speculative, unsupported opinion that the video was "inconsistent" with Officer Folsom's testimony. Accordingly, Mr. Gietzen's testimony was neither admissible nor probative, and, consequently, there is no reasonable probability that his bald assertion would have produced a different verdict. This point should be denied.

II.

The motion court did not clearly err in denying Mr. Weinhaus's claim that trial counsel was ineffective for failing to call FBI agents, Michael Maruscak and Patrick Cunningham, to testify at trial.

In his second point, Mr. Weinhaus asserts that the motion court clearly erred in denying his claim that trial counsel was ineffective for failing to call two FBI agents, Michael Maruscak and Patrick Cunningham, to testify that "they did not see a holster on [Mr. Weinhaus's] right hip, thereby supporting [his] defense by contradicting the testimony of state witnesses Sergeant James Folsom and Corporal Scott Mertens" (App.Br. 26).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have

resulted in prejudice to the movant. *Id.*

B. Mr. Weinhaus failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, the movant must “show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also “affirmatively prove prejudice.” *Id.* at 693. To show prejudice, the movant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*

“To obtain an evidentiary hearing for claims related to the ineffective assistance of counsel, the movant must allege facts, not refuted by the record, showing that counsel’s performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney and that the movant was thereby prejudiced.” *Morrow v. State*, 21 S.W.3d 819, 823 (Mo. 2000).

In his amended motion, Mr. Weinhaus alleged that trial counsel was ineffective for failing to present the testimony of the two FBI agents who provided backup (PCR L.F. 26-27). He alleged that each agent “testified in deposition that he did not see a holster on [Mr. Weinhaus’s] right hip” (PCR L.F. 26-27). He alleged that “[t]his holster would have been visible to [each agent] from his perspective had [Mr. Weinhaus] been ‘bladed’ or toe-to-toe with Mertens” (PCR L.F. 26-27).

In denying these claims, the motion court concluded that Mr. Weinhaus failed to allege facts showing prejudice (PCR L.F. 37). The motion court did not clearly err.

“The decision of whether to call a witness is presumptively a matter of trial strategy and ordinarily will not support a claim of ineffective assistance of counsel.” *Clay v. State*, 468 S.W.3d 914, 920 (Mo.App. E.D. 2015). “To warrant an evidentiary hearing on a claim that trial counsel was ineffective for failing to call a witness to testify, a movant must allege, (1) the identity of the witness; (2) what the testimony of the witness would have been; (3) that trial counsel was informed of the existence of the witness; (4) the witness was available and would have testified; and (5) the witness’s testimony would have provided movant with a viable defense.” *Id.* “A witness’s testimony provides a movant with a viable defense when it negates an element of the crime for which the movant was convicted.” *Id.*

Here, testimony from the FBI agents that they did not see the gun on Mr. Weinhaus’s right hip would not have provided a viable defense. First, the fact that they did not see the gun on Mr. Weinhaus’s right hip did not prove that there was no gun, and it did not prove that Mr. Weinhaus did not draw his weapon before he was shot. There was overwhelming evidence that Mr. Weinhaus was armed with a gun, and two officers testified that he drew his weapon during the confrontation (see Tr. 221-227, 393). There was no

allegation that the FBI agents would have testified that there was no gun recovered at the scene; thus, their testimony would not have negated any element of the offense and provided a viable defense. At most, their testimony would have served to impeach part of the State's evidence.³ "[T]rial counsel's failure to impeach a witness, without something more, does not warrant post-conviction relief." *Tucker v. State*, 468 S.W.3d 468, 474 (Mo.App. E.D. 2015).

Second, the allegations in the amended motion failed to allege facts showing that the agents would have actually impeached the State's case. As outlined above, the amended motion alleged that a gun on the right hip would have been "visible to [each agent] from his perspective had [Mr. Weinhaus] been 'bladed' or toe-to-toe with Mertens" (PCR L.F. 26-27). But there was no evidence that Mr. Weinhaus was "bladed" with Officer Mertens, or that he stood "toe-to-toe" with Officer Mertens. To the contrary, Officer Mertens testified that he "did not see [Mr. Weinhaus] bladed" because he was

³ One of Mr. Weinhaus's recurrent claims has been that his gun was on his left hip (*see* Sent.Tr. 24; *see also* Point III, below). But because Mr. Weinhaus could have drawn his weapon either way, the exact location of his gun was a secondary issue. Proof that his gun was not on his right hip would have merely impeached part of the officers' testimony. Officer Mertens testified that the gun was on "the right front" of Mr. Weinhaus's body (Tr. 406).

standing in a different position than Officer Folsom (*see* Tr. 407; *see also* Tr. 409). He also testified that Mr. Weinhaus was “squared with Sergeant Folsom” immediately before the shooting (*see* Tr. 409). In short, there was no evidence that Mr. Weinhaus was ever “bladed” or standing “toe-to-toe” with Officer Mertens; thus, the allegation in the amended motion failed to allege facts showing that the FBI agents’ testimony actually would have impeached the State’s case.

Mr. Weinhaus glosses over this aspect of his allegations by asserting in his brief on appeal that “the holster would have been visible to the Agents from their perspective *of where [Mr. Weinhaus] was located*” (App.Br. 28) (emphasis added). But this less-specific allegation about Mr. Weinhaus’s location was not included in the amended motion; thus, it is a new allegation that cannot be considered in determining whether the motion court should have granted an evidentiary hearing. Under Rule 29.15, “ ‘any allegations or issues that are not raised in the [post-conviction] motion are waived on appeal.’ ” *See McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. 2012) (quoting *Johnson v. State*, 333 S.W.3d 459, 471 (Mo. 2011) (citation omitted)). “ ‘Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal.’ ” *Id.*

In any event, there is no reasonable probability that the agents’ testimony would have produced a different verdict. The evidence showed that

the FBI agents were not stationed in close proximity to the actual rendezvous point where the shooting occurred. Rather, the evidence showed that the FBI agents were parked “across the parking lot” (Tr. 386-387). Defense counsel made a point of highlighting the evidence of the distance, and he remarked upon the distance in closing argument. Counsel argued, “If [Mr. Weinhaus] was so dangerous, why did they have the FBI *all the way down here* with gas pumps, propane tanks, civilians, a building in between, is that safe, does that make sense?” (Tr. 628-629) (emphasis added).

Given the location of the agents across the parking lot, it is reasonably probable that the jury would have concluded that they simply did not see the location of the gun on Mr. Weinhaus’s hip, despite the fact that it was there. In other words, the agents’ ability to perceive the gun was questionable due to distance and obstructions, and, consequently, their testimony lacked any substantial impeachment value. Again, there was no allegation that the agents would have refuted the other overwhelming evidence showing that Mr. Weinhaus actually had a gun that he started to draw before he was shot.

Finally, although not the basis of the motion court’s judgment, Mr. Weinhaus’s conclusory allegations that reasonable counsel would have “investigated” the agents, and that “No reasonable trial strategy can account for the failure to call [each agent] to testify” (PCR L.F. 26-27) were refuted by the record.

In his amended motion, Mr. Weinhaus alleged that the agents were deposed (PCR L.F. 26-27); thus, the substance of their testimony was known to defense counsel. In fact, at sentencing, Mr. Weinhaus repeatedly informed the court that they had deposed the FBI agents and paid for the depositions (*see* Sent.Tr. 26-28, 54). Mr. Weinhaus also told the court that the agents had testified in their depositions that “they didn’t even see a weapon on [him]” (Sent.Tr. 27, 54). In addition, during the trial, defense counsel pointed out that the FBI agents were present, and that counsel had expected the State to call them as witnesses (Tr. 535). Thus, Mr. Weinhaus’s suggestion that counsel did not investigate the agents was refuted by the record.

The record also shows that, in light of the questionable impeachment value of the agents’ testimony, defense counsel employed a reasonable strategy in deciding not to call them. In fact, in closing argument, defense counsel repeatedly drew an adverse inference from the absence of the FBI agents (*see* Tr. 632, 635). On balance, given the scant probative value of their testimony (and because the agents undoubtedly would have confirmed some aspects of the State’s case), it cannot be said that counsel’s decision to attempt an adverse inference instead of calling them to testify fell below an objective standard of reasonableness.

Mr. Weinhaus asserts on appeal that “the decision in this case to not call FBI agents Maruscak and Cunningham could have just as easily been an

inadvertent mistake on the part of trial counsel” (App.Br. 31). But there was no allegation in the amended motion along those lines (PCR L.F. 26-27); and, as stated above, “ ‘any allegations or issues that are not raised in the [post-conviction] motion are waived on appeal.’ ” *See McLaughlin v. State*, 378 S.W.3d at 340. “ ‘Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal.’ ” *Id.*

In sum, Mr. Weinhaus’s allegations failed to allege facts showing that he was prejudiced by counsel’s decision not to call the FBI agents, or that counsel’s evident decision not to call the agents was anything other than a strategic decision. This point should be denied.

III.

The motion court did not clearly err in denying Mr. Weinhaus's claim that trial counsel was ineffective for failing to call Levi Weinhaus to testify at trial.

In his third point, Mr. Weinhaus asserts that the motion court clearly erred in denying his claim that trial counsel was ineffective for failing to call Levi Weinhaus to testify that Mr. Weinhaus “would always wear his holster on his left hip when he was driving because the holster would interfere with the seatbelt when worn on the right hip” (App.Br. 32).⁴

A. The standard of review

“Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous.” *Moss v. State*, 10 S.W.3d 510, 511 (Mo. 2000). “Findings and conclusions are clearly erroneous if, after a review of the

⁴ Mr. Weinhaus attempts to refine and enhance his claim on appeal by asserting that Levi Weinhaus would have testified that he “always” wore his gun on his left when he drove, and that he “informed” counsel that Levi was prepared to offer such testimony (*see* App.Br. 34). The amended motion did not allege “always,” however, and it did not allege that Mr. Weinhaus “informed” counsel about the testimony (PCR L.F. 28-29).

entire record, the court is left with the definite and firm impression that a mistake has been made.” *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id.*

B. Mr. Weinhaus failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, the movant must “show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also “affirmatively prove prejudice.” *Id.* at 693. To show prejudice, the movant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*

“To obtain an evidentiary hearing for claims related to the ineffective assistance of counsel, the movant must allege facts, not refuted by the record, showing that counsel’s performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney and that the movant was thereby prejudiced.” *Morrow v. State*, 21 S.W.3d 819, 823 (Mo. 2000).

In his amended motion, Mr. Weinhaus alleged that trial counsel was

ineffective for failing to present the testimony of Levi Weinhaus, who would have testified that Mr. Weinhaus “would wear his holster on his left hip when he was driving – the holster would interfere with the seatbelt when wore [sic] on the right hip” (PCR L.F. 29).

In denying this claim, the motion court concluded that Mr. Weinhaus failed to allege facts showing prejudice (PCR L.F. 37). The motion court did not clearly err.

“The decision of whether to call a witness is presumptively a matter of trial strategy and ordinarily will not support a claim of ineffective assistance of counsel.” *Clay v. State*, 468 S.W.3d 914, 920 (Mo.App. E.D. 2015). “To warrant an evidentiary hearing on a claim that trial counsel was ineffective for failing to call a witness to testify, a movant must allege, (1) the identity of the witness; (2) what the testimony of the witness would have been; (3) that trial counsel was informed of the existence of the witness; (4) the witness was available and would have testified; and (5) the witness’s testimony would have provided movant with a viable defense.” *Id.* “A witness’s testimony provides a movant with a viable defense when it negates an element of the crime for which the movant was convicted.” *Id.*

Here, the amended motion did not allege facts showing that Levi Weinhaus’s testimony would have provided a viable defense. The amended motion did not allege that Levi Weinhaus actually saw Mr. Weinhaus and the

location of his gun before the shooting, *i.e.*, he was not a fact witness who could have established that Mr. Weinhaus actually wore his gun on his left hip on the day of the shooting. As such, his testimony did not directly impeach the testimony of Officer Folsom or Officer Mertens. Rather, to have any impeachment value, the jury would have had to infer, based on a reported *habit*, that Mr. Weinhaus did not wear his gun on his right hip. Such a possibility was not sufficient to demonstrate *Strickland* prejudice, particularly where the inference merely would have impeached only one aspect of the State's case. "[T]rial counsel's failure to impeach a witness, without something more, does not warrant post-conviction relief." *Tucker v. State*, 468 S.W.3d 468, 474 (Mo.App. E.D. 2015).

In sum, there was strong evidence of Mr. Weinhaus's guilt of the assault, and there was strong evidence that he was wearing his gun on the day in question on his right hip (contrary to the alleged habit). Thus, the jury could have credited the habit evidence but still concluded that, on the day of the shooting, Mr. Weinhaus decided to wear his gun on his right hip (*e.g.*, to make it more accessible during the confrontation). But even if the jury had been persuaded to infer that Mr. Weinhaus was wearing his gun on his left side, there is no reasonable probability that the jury would have additionally found that Mr. Weinhaus did not draw his gun against Officer Folsom. This point should be denied.

IV.

The motion court did not clearly err in denying Mr. Weinhaus's claim that trial counsel was ineffective for failing to call an expert like Jim Byrne to testify at trial.

In his fourth point, Mr. Weinhaus asserts that the motion court clearly erred in denying his claim that trial counsel was ineffective for failing to call "a video forensic expert, such as Jim Byrne," to contradict the testimony of Officer Folsom and establish that Mr. Weinhaus said, "You don't have to shoot me" (App.Br. 38).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id.*

B. Mr. Weinhaus failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, the movant must “show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also “affirmatively prove prejudice.” *Id.* at 693. To show prejudice, the movant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*

“To obtain an evidentiary hearing for claims related to the ineffective assistance of counsel, the movant must allege facts, not refuted by the record, showing that counsel’s performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney and that the movant was thereby prejudiced.” *Morrow v. State*, 21 S.W.3d 819, 823 (Mo. 2000).

In his amended motion, Mr. Weinhaus alleged that the State’s evidence showed that Mr. Weinhaus “said you’re going to have to shoot me, and then attempted to draw his gun” (PCR L.F. 32). He alleged that “Jim Byrne analyzed the video and determined [Mr. Weinhaus] said, ‘you don’t have to shoot me’ ” (PCR L.F. 32).

In denying this claim, the motion court concluded that Mr. Weinhaus failed to allege facts showing prejudice (PCR L.F. 37). The motion court did not clearly err.

Mr. Byrne's alleged testimony—that he “analyzed the video and determined [Mr. Weinhaus] said, ‘you don’t have to shoot me’”—was wholly conclusory and, ultimately, speculative because the amended motion failed to include any specific factual allegations that would have supported the conclusion that Mr. Weinhaus said, “you don’t have to shoot me” instead of “you’re gonna have to shoot me” (as testified to by Officer Folsom).

At trial, Officer Folsom testified that he heard Mr. Weinhaus say, “You’re going to have to shoot me” (Tr. 222). The video of the encounter corroborated Officer Folsom’s testimony, as, immediately before the shooting, Mr. Weinhaus stated, “You’re gonna have to shoot me” (State’s Ex. 15). On cross-examination, Officer Folsom confirmed that he had watched and listened to the video recording, and that he had heard Mr. Weinhaus say, “You’re going to have to shoot me” (Tr. 326-327). He testified that there was no way Mr. Weinhaus said, “you don’t have to shoot me” (Tr. 326-327).

Absent some reason to believe otherwise (*e.g.*, a faulty recording device), it is a generally accepted fact that an audiovisual recording device will accurately record what a person says. Here, the amended motion did not allege that there were any facts or circumstances that would support Mr. Byrne’s personal “determination” that Mr. Weinhaus said something other than what was apparent in the video. There was no allegation that the video recording had been altered in some fashion, or that it was not sufficiently

clear for a person of ordinary hearing to understand. The complete lack of any factual allegations to support Mr. Byrne's conclusion was, therefore, sufficient to render Mr. Byrne's alleged opinion inadmissible as mere speculation. *See generally State v. Bowman*, 337 S.W.3d 679, 690-691 (Mo. 2011) (failing to state that an opinion "is to 'a reasonable degree of scientific certainty' does not render the testimony inadmissible," but an expert must establish that the opinion is "based on reasonable certainty and not on speculation"); *State v. Maxie*, 513 S.W.2d 338, 344-345 (Mo. 1974) (in upholding expert testimony about a piece of trace evidence, the Court observed that "[t]he opinion of an expert need not rise to absolute certainty but must be supported by a substantial factual evidentiary base, as is the case here" (emphasis added)).

Mr. Weinhaus's amended motion also failed to allege that Mr. Byrne employed any forensic methods that were accepted in the relevant scientific community. Thus, to the extent that Mr. Weinhaus was suggesting that Mr. Byrne would have offered an opinion supported by forensic science, he failed to allege facts showing that Mr. Byrne's opinion was admissible. *See generally State v. Ervin*, 848 S.W.2d 476, 480 (Mo. 1993) ("Admission of an expert's opinion concerning scientific evidence depends upon wide acceptance in the relevant scientific community of its reliability.").

Moreover, absent any allegations showing how forensic expertise would

have been employed by Mr. Byrne, Mr. Byrne was the equivalent of a lay witness who lacked any specialized knowledge, and his testimony would not have been admissible because “the jury and lay witness[es] ‘are in equal positions to form an accurate opinion.’” *See State v. Presberry*, 128 S.W.3d 80, 86 (Mo.App. E.D. 2003) (holding that two officers’ identification testimony after viewing a video was erroneously admitted because the officers “were in no better position than the jury to identify the person or clothing in the photographs and videotapes in evidence”).

Finally, even if Mr. Byrne had been permitted to testify that he thought Mr. Weinhaus said, “You don’t have to shoot me,” there is no reasonable probability that such testimony would have persuaded the jury to reach a different verdict.

Absent any substantial factual basis for Mr. Byrne’s opinion, there is no reason to believe that the jury would have credited his bald assertion that the video said something different from what was apparent to an ordinary listener (and reported by Officer Folsom). The jury was capable of listening to the video and drawing its own conclusions; and, absent some reason to credit an opinion offered by Mr. Byrne, it is reasonably probable that the jury would have concluded that the video was consistent with Officer Folsom’s testimony. Indeed, as outlined above, it was apparent from the video itself that Mr. Weinhaus said, “You’re gonna have to shoot me” (State’s Ex. 15).

In sum, the motion court did not clearly err in concluding that Mr. Weinhaus failed to allege facts showing that he was prejudiced by counsel's alleged error. Mr. Byrne's alleged testimony about the video was merely a speculative, unsupported opinion. Accordingly, Mr. Byrne's testimony was neither admissible nor probative; and, consequently, there is no reasonable probability that his testimony would have produced a different verdict. This point should be denied.

CONCLUSION

The Court should affirm the denial of Mr. Weinhaus's Rule 29.15 motion.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the attached brief complies with Rule 84.06(b) and Eastern District Rule 360 and contains 8,898 words, excluding the cover, the table of contents, the table of authorities, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 17th day of August, 2016, to:

MARK A. GROTHOFF
Woodrail Centre
1000 W. Nifong, Bldg. 7, Suite 100
Columbia, Missouri 65203
Tel.: (573) 777-9977
Fax: (573) 777-9973
Mark.Grothoff@mspd.mo.gov

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent