

No. SC90021

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*In the  
Missouri Supreme Court*

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**PAUL WESLEY McCURRY-BEY,**

**Appellant.**

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**Appeal from St. Louis City Circuit Court  
Twenty-Second Judicial Circuit  
The Honorable Julian L. Bush, Judge**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... 2

JURISDICTIONAL STATEMENT..... 5

STATEMENT OF FACTS..... 6

ARGUMENT..... 11

    Point I – The trial court correctly found that Appellant was competent to stand trial  
and be sentenced..... 11

    Point II – State’s expert did not give opinion on victim’s credibility ..... 28

CONCLUSION ..... 37

CERTIFICATE OF COMPLIANCE ..... 39

## TABLE OF AUTHORITIES

### Cases

<i>Azbell v. State</i> , 144 S.W.3d 863 (Mo. App. S.D. 2004) .....	20
<i>Balfour v. Haws</i> , 892 F.2d 556 (7 <sup>th</sup> Cir. 1989) .....	22
<i>Clayton v. Roper</i> , 515 F.3d 784 (8th Cir. 2008) .....	20, 22, 26-27
<i>Galowski v. Berge</i> , 78 F.3d 1176 (7 <sup>th</sup> Cir. 1996) .....	20
<i>Gilbert v. State</i> , 951 P.2d 98 (Okla. Crim. App. 1997) .....	19
<i>Hall v. Catoe</i> , 601 S.E.2d 335 (S.C. 2004) .....	26
<i>Hubbard v. State</i> , 31 S.W.3d 25 (Mo. App. W.D. 2000) .....	17, 20
<i>Kansas v. Crane</i> , 534 U.S. 407 (2002) .....	19
<i>Matheny v. State</i> , 688 N.E.2d 883 (Ind. 1997) .....	19
<i>Medina v. California</i> , 505 U.S. 437 (1992) .....	22
<i>Muhammed v. State</i> , 494 So. 2d 969 (Fla. 1986) .....	19
<i>People v. Baugh</i> , 832 N.E.2d 903 (Ill. Ct. App. 2005) .....	21
<i>People v. Marshall</i> , 931 P.2d 262 (Cal. 1997) .....	19
<i>People v. Mulero</i> , 680 N.E.2d 1329 (Ill. 1997) .....	19, 21
<i>People v. Zapotocky</i> , 869 P.2d 1234 (Colo. 1994) .....	18
<i>State v. Anderson</i> , 79 S.W.3d 420 (Mo. banc 2002) .....	16
<i>State v. Brown</i> , 665 S.W.2d 945 (Mo. App. S.D. 1984) .....	19
<i>State v. Calvert</i> , 879 S.W.2d 546 (Mo. App. W.D. 1994) .....	36
<i>State v. Campbell</i> , 122 S.W.3d 736 (Mo. App. S.D. 2004) .....	36

<i>State v. Castleberry</i> , 758 So. 2d 749 (La. 1999) .....	19
<i>State v. Chambers</i> , 234 S.W.3d 501 (Mo. App. E.D. 2007) .....	30
<i>State v. Churchill</i> , 98 S.W.3d 536 (Mo. banc 2003) .....	33
<i>State v. Collins</i> , 163 S.W.3d 614 (Mo. App. S.D. 2005) .....	33, 34
<i>State v. Cone</i> , 3 S.W.3d 833 (Mo. App. W.D. 1999) .....	33, 34
<i>State v. Elam</i> , 89 S.W.3d 517 (Mo. App. W.D. 2002) .....	16, 21
<i>State v. Fewell</i> , 198 S.W.3d 691 (Mo. App. S.D. 2006) .....	35
<i>State v. Galindo</i> , 973 S.W.2d 574 (Mo. App. S.D. 1998) .....	34, 36
<i>State v. Garrett</i> , 595 S.W.2d 422 (Mo. App. S.D. 1980) .....	25
<i>State v. Hicks</i> , 716 S.W.2d 387 (Mo. App. E.D. 1986) .....	36
<i>State v. Irby</i> , 254 S.W.3d 181 (Mo. App. E.D. 2008) .....	30, 31, 32, 33, 36
<i>State v. Lee</i> , 654 S.W.2d 876 (Mo. banc 1983) .....	19
<i>State v. Middleton</i> , 995 S.W.2d 443 (Mo. banc 1999) .....	33, 34
<i>State v. Middleton</i> , 854 S.W.2d 504 (Mo. App. W.D. 1993) .....	36
<i>State v. Perkins</i> , 518 A.2d 715 (Me. 1986) .....	19
<i>State v. Petty</i> , 856 S.W.2d 351 (Mo. App. S.D. 1993) .....	23
<i>State v. Pointer</i> , 638 S.E.2d 909 (N.C. Ct. App. 2007) .....	19
<i>State v. Poole</i> , 216 S.W.2d 271 (Mo. App. S.D. 2007) .....	19
<i>State v. Silvey</i> , 894 S.W.2d 662 (Mo. banc 1995) .....	35
<i>State v. Tyra</i> , 153 S.W.3d 341 (Mo. App. S.D. 2005) .....	33, 35
<i>State v. Williams</i> , 858 S.W.2d 796 (Mo. App. E.D. 1993) .....	35
<i>United States v. Denton</i> , 434 F.3d 1104 (8th Cir. 2006) .....	22

<i>United States v. Wiggin</i> , 429 F.3d 31 (1st Cir. 2005).....	21, 22, 24
<i>Wilson v. State</i> , 813 S.W.2d 833 (Mo. banc 1991) .....	20
<i>Zink v. State</i> , 2009 WL 454283 (Mo. banc, Feb. 24, 2009) .....	20

**Statutes and Constitution**

Section 552.020, RSMo 2000.....	16
Section 557.031, RSMo 2000.....	12
Section 566.032, RSMo 2000.....	5, 6
Section 566.062, RSMo 2000.....	5, 6
Section 568.020, RSMo 2000.....	5, 6
Mo. Const. art. V, § 10 .....	5

**Court Rules**

Supreme Court Rule 83.02 .....	5
Supreme Court Rule 84.04 .....	6 n.2

## **JURISDICTIONAL STATEMENT**

This appeal is from a conviction obtained in the Circuit Court of the City of St. Louis for one count each of statutory rape in the first degree, section 566.032, RSMo;<sup>1</sup> statutory sodomy in the first degree, section 566.062, RSMo; and incest, section 568.020, RSMo, for which Appellant was sentenced to twenty years imprisonment. This appeal was transferred to this Court by order of the Missouri Court of Appeals Eastern District pursuant to Supreme Court Rule 83.02. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10.

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<sup>1</sup> All statutory references are to RSMo 2000 unless otherwise indicated.

## STATEMENT OF FACTS

Appellant was indicted as a prior and persistent felony offender on one count each of statutory rape in the first degree, section 566.032, RSMo; statutory sodomy in the first degree, section 566.062, RSMo; and incest, section 568.020, RSMo. (L.F. 2, 14-15).

Appellant was tried by a jury on June 11-13, 2007, before Judge Julian L. Bush. (L.F. 6).

Appellant does not contest the sufficiency of the evidence to support his conviction.<sup>2</sup>

Viewed in the light most favorable to the verdict, the evidence at trial showed:

Appellant has a daughter (hereinafter referred to as “the victim”) who was born on January 29, 2001. (Tr. 213-15). Appellant did not marry the victim’s mother. (Tr. 215). In early August of 2005, Appellant began staying at the house where the victim lived with her mother and grandmother. (Tr. 218-20). The victim’s mother worked the overnight shift at a gas station, and she and the victim’s grandmother attended classes at a

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<sup>2</sup> Although Appellant does not challenge the sufficiency of the evidence to support his convictions, the statement of facts in his brief contains numerous detailed evidentiary facts, many of which do not support the jury’s verdict. Furthermore, the statement of facts contains some statements that can be construed as argumentative in nature, such as characterizing the prosecutor as “begging” a witness to give testimony, or that a State’s witness “speculated” in his testimony. (Appellant’s Brf., pp. 7, 10). Rule 84.04(c) requires that a statement of facts be “fair and concise” and “without argument.” Supreme Court Rule 84.04(c). Respondent has not attempted to respond to the numerous detailed evidentiary facts not supporting the jury’s verdict that are outlined in Appellant’s brief.

community college. (Tr. 220-21). Appellant was responsible for watching the victim when her mother and grandmother were attending classes. (Tr. 222).

The victim's mother was giving the victim and the victim's two-year-old male cousin a bath when the victim remarked that Appellant's "ding ding" was bigger than her cousin's "ding ding." (Tr. 214, 222-23). The victim's mother did not think anything about the comment at the time, but a couple of days later she asked the victim how she knew how Appellant looked. (Tr. 224-25). The victim replied, "He put his ding-ding on my coochi." (Tr. 226). "Ding ding" was the term that the victim used to describe a penis, and "coochi" was the word she used to describe the vagina. (Tr. 231-32, 297-98).

The victim's mother called the police, and then asked a neighbor to get Appellant, who was working on a neighboring house. (Tr. 226). When Appellant arrived, the victim's mother asked the victim to repeat what she had said. (Tr. 227). The victim said, "My daddy put his ding-ding on my coochi." (Tr. 227). The victim's mother asked Appellant if the victim was lying. (Tr. 227). Appellant replied, "Why would I do that? That's my daughter." (Tr. 227). Dissatisfied with that response, the victim's mother hit Appellant with a small steel baseball bat. (Tr. 227). Appellant left. (Tr. 227). The police arrived sometime later and talked with both the victim and her mother. (Tr. 228-29).

The victim was then taken to Cardinal Glennon Children's Hospital and examined. (Tr. 230, 250, 274). That examination showed a notch, or indentation, in the hymen, so a SAFE exam was conducted sixteen days later. (Tr. 250-52, 254-56). That examination showed that the hymen was normal and did not show any evidence of a new or healed

injury. (Tr. 259). The supervising doctor testified that despite the absence of any physical signs of abuse, the victim's statements, behavior, and exam were consistent with a child that had been abused. (Tr. 263).

Following the initial emergency room examination, the victim was interviewed at the Children's Advocacy Center. (Tr. 231, 274, 287). The victim told the interviewer that Appellant put his "ding ding" in her coochi and that he also put his "ding ding" in her butt. (State's Ex. 4). The victim also described "spit" coming out of Appellant's "ding ding." (State's Ex. 4). The victim used two stuffed animals to simulate Appellant having intercourse with her. (State's Ex. 4).

At trial, the victim testified that Appellant "put his stuff in my stuff." (Tr. 206, 208-09). She also testified that another word that she used for her "stuff" was "coochi." (Tr. 206).

The victim's grandmother testified for the defense about an incident where she caught a teenage cousin of the victim "getting ready to mess with her." (Tr. 311-13). On cross-examination, the grandmother said that the incident involving the cousin happened about five months after the victim reported being molested by Appellant. (Tr. 328). She also testified that Appellant had stayed at her house during August and September of 2005, and that he babysat the victim when the grandmother and the victim's mother were at school. (Tr. 316-17).

Appellant testified that he was in a church-run drug treatment program in El Paso, Texas between June and October of 2005, and that he had no contact with the victim or her mother during that time period. (Tr. 333-36, 343). Appellant said he was discharged

from the program after successfully completing it. (Tr. 344). Appellant also denied that the victim's mother attacked him with a baseball bat, and he denied having any sexual contact with the victim. (Tr. 336-37).

The State presented two rebuttal witnesses from the drug treatment program. (Tr. 352, 363). They testified that Appellant went to El Paso on July 4<sup>th</sup> and arrived back in St. Louis on July 30<sup>th</sup>. (Tr. 355, 366). They also testified that Appellant did not successfully complete the program, but was instead asked to leave because while in El Paso he was drinking, smoking, and fighting, all in violation of program rules. (Tr. 357, 362, 365). Appellant did not return to the treatment program. (Tr. 360, 366).

The jury found Appellant guilty beyond a reasonable doubt on all three counts of the indictment. (Tr. 396; L.F. 6). Prior to the case being submitted to the jury, the court found beyond a reasonable doubt that Appellant was a prior and persistent felony offender, after Appellant waived proof of those facts based on his admissions during his testimony. (Tr. 371-72; L.F. 6). The court sentenced Appellant to concurrent terms of twenty years imprisonment for statutory rape in the first degree, twenty years imprisonment for statutory sodomy and five years imprisonment for incest. (L.F. 102-04). This appeal follows. (L.F. 10, 107-08). Additional facts specific to Appellant's claims of error will be set forth in the argument portion of the brief.

## ARGUMENT

### I.

**The trial court correctly found that Appellant was competent to stand trial and be sentenced.**

Appellant alleges that the trial court erred in finding that he was competent to stand trial and competent to be sentenced. However, the trial court properly found after weighing the evidence that Appellant failed to carry his burden of showing by a preponderance of the evidence that he was incompetent to stand trial or to be sentenced.

#### **A. Underlying Facts.**

At the sentencing hearing on July 27, 2007, defense counsel asked the court to delay sentencing and to order a Chapter 552 evaluation of Appellant. (Tr. 401). Counsel told the court that he had been shown records that day indicating that Appellant had an IQ of 55, and was thus moderately mentally retarded. (Tr. 401). The records that counsel reviewed were provided by Robert Cambridge from an organization called Options for Justice. (Tr. 401-02). Cambridge told the court that Appellant had contacted his organization the day after he was found guilty, and that he then met with Appellant and obtained his school records. (Tr. 402, 406). Those records included an IQ test performed in 1982, when Appellant was 16 years old, that showed his IQ as 55. (Tr. 403). The court expressed surprise, noting that Appellant did not seem to be possessed of such a low IQ when he testified. (Tr. 407). The court nevertheless ordered an evaluation under the provisions of section 557.031, RSMo. (Tr. 410; L.F. 7, 81). The order also directed an evaluation of Appellant's competency to stand trial. (L.F. 7, 81).

The court received an evaluation report from Dr. Richard Scott on December 27, 2007. (L.F. 8). The State filed objections to the report and requested an additional psychiatric examination. (L.F. 8, 89-90). The order was granted, and a report from Dr. Michael Armour was filed on March 24, 2008. (L.F. 8-9). The court conducted a hearing on April 4, 2008, to determine Appellant's competence to proceed. (L.F. 9; Tr. 412-14).

Dr. Michael Armour was hired by the prosecutor's office to conduct a second evaluation of Appellant's competency to proceed. (Tr. 421-22). Armour testified that he was a psychologist with a private practice in Clayton, and was also employed by the Missouri Department of Mental Health as a unit director at the St. Louis Psychiatric Rehabilitation Center. (Tr. 421). Dr. Armour diagnosed Appellant with mild mental retardation based on two IQ tests performed while Appellant was a public school student, and on a test given by Dr. Armour two months prior to the hearing, which showed a verbal IQ of 58. (Tr. 425). Dr. Armour testified that it was his opinion that Appellant was not competent to be sentenced and had not been competent to stand trial. (Tr. 427).

Dr. Armour testified that his questioning of Appellant showed that Appellant did not understand the nature of the charges against him or the nature of the court proceedings. (Tr. 429-30). Dr. Armour admitted that a person who is mentally retarded can be competent to stand trial. (Tr. 433, 449). He also admitted that his determination of Appellant's competency to stand trial was based on Appellant's condition at the time of the February evaluation, and not from conversations with anyone who observed or dealt with Appellant at the time of trial. (Tr. 445). Dr. Armour testified that Appellant

could regain his fitness to proceed through education about the court system. (Tr. 451-52). Dr. Armour testified that Appellant would be a passive participant at sentencing and would not be able to suggest that his attorney provide particular information to the judge. (Tr. 447-48).

Dr. Richard Scott, a psychologist employed by the Missouri Department of Mental Health, conducted the court-ordered evaluation of Appellant. (Tr. 454-56). Based on his testing Dr. Scott concluded that Appellant suffered from mild mental retardation, with a full scale IQ of 55. (Tr. 457-59). Dr. Scott testified that it was his opinion that Appellant was not competent to be sentenced and had not been competent to stand trial. (Tr. 463). Dr. Scott also testified that he did not speak to anyone who had dealt with Appellant at the time of trial, and did not review the transcript of Appellant's trial testimony. (Tr. 470-72). Dr. Scott testified that a mentally retarded person can be educated to be competent to proceed, but that he did not specifically evaluate that in Appellant's case. (Tr. 483-84). Dr. Scott also said that it was possible that Appellant's capacity to understand the proceedings were better at the time of trial than they were when he evaluated him, but that would be wholly dependant on what people were doing at the time to educate and prepare Appellant for trial. (Tr. 485). Defense counsel declined to put on any evidence as to what steps were taken to educate Appellant about the trial proceedings. (Tr. 489-90).

Dr. Scott testified that Appellant would not be able to actively participate in sentencing. (Tr. 465). He said that Appellant would have difficulty providing

information about what factors could mitigate the sentence or in responding to aggravating factors. (Tr. 465).

The court issued an order on April 8, 2008, finding that Appellant failed to carry his burden of showing by a preponderance of the evidence that he was not competent to stand trial, and finding that Appellant was competent to be sentenced. (L.F. 98-100).

The court found that the weight of Dr. Scott and Dr. Armour's opinions about Appellant's competency to stand trial was diminished by the fact that their examinations were conducted many months after trial. (Tr. 98-99). The court also noted the testimony that Appellant had sufficient intelligence to understand a criminal proceeding and to assist counsel, if properly educated as to those proceedings. (L.F. 99).

The court also found a number of facts counseled against accepting the opinions of Drs. Scott and Armour that Appellant was not competent to stand trial. (L.F. 99). The court noted that defense counsel at trial was very experienced and able, yet did not suspect that Appellant did not understand the proceedings nor believe that Appellant was not providing the assistance that would be expected. (L.F. 99). The court found that its own observations during trial confirmed that Appellant did assist his defense by testifying and providing an alibi. (L.F. 99). The court further found that Appellant's actions in attacking the verdicts on the basis of retardation in the immediate wake of those verdicts suggested a degree of guile inconsistent with the proposition that he was incapable of assisting in his defense. (L.F. 99). The court additionally noted that Appellant's many previous experiences with the court system suggested that there may have been some malingering in his responses to Drs. Scott and Armour. (L.F. 99).

On the issue of competency to be sentenced, the court stated that it had no doubt that Appellant understood what sentencing was. (L.F. 99-100). The court found that the opinions of Drs. Armour and Scott were based on an exaggerated notion of the contribution that a defendant typically makes to his counsel's presentation at sentencing. (L.F. 100). The court concluded that defense counsel was fully advised of the nature of the crimes committed and as to everything in Appellant's biography and circumstances that could be used to argue for leniency. (L.F. 100).

**B. Standard of Review.**

A defendant is competent to stand trial and to be sentenced when he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him. *State v. Anderson*, 79 S.W.3d 420, 432 (Mo. banc 2002). A defendant is presumed competent and has the burden of proving incompetence by a preponderance of the evidence. *Id.* at 432-33; § 552.020.8, RSMo 2000.

The trial court's determination of competency is one of fact, and must stand unless there is no substantial evidence to support it. *Anderson*, 79 S.W.3d at 433. In assessing the sufficiency of evidence, this Court does not independently weigh the evidence, but accepts as true all evidence and reasonable inferences that tend to support the trial court's finding. *Id.* The trial court's factual determinations are entitled to deference because it is in the best position to assess credibility and weigh the evidence. *State v. Elam*, 89 S.W.3d 517, 523 (Mo. App. W.D. 2002).

**C. Analysis.**

Evidence of Appellant's mild mental retardation does not automatically lead to a finding of incompetency. The actual presence of some degree of mental illness does not equate with competency to stand trial, and an accused may be mentally retarded in some degree and still be competent to stand trial. *Hubbard v. State*, 31 S.W.3d 25, 34 (Mo. App. W.D. 2000). Defense counsel even conceded that he had represented numerous clients who were mildly mentally retarded, yet still competent to stand trial. (Tr. 401). The question before the Court is thus whether substantial evidence supports the trial court's finding that Appellant was competent to stand trial and be sentenced, despite the evidence of his mental retardation and the opinion testimony of the two experts who evaluated Appellant and concluded that he was not competent.

1. Appellant's argument improperly seeks to place the burden of proof on the State.

Contrary to the standard of review cited above, Appellant's argument seeks to have this Court reweigh the evidence, and argues inferences from the evidence that are contrary to the trial court's finding. Appellant also seeks to shift the burden of proof to the State, contrary to the statutorily-mandated burden of proof and the long-standing legal presumption of competence to proceed. Just one example is Appellant's argument that the trial court's finding is erroneous because no evidence was presented that Appellant had been properly educated to understand the trial court proceedings. (Appellant's Brf., p. 27). Following Dr. Scott's testimony that Appellant could be competent to stand trial if properly educated, the court asked defense counsel if he had more evidence to present.

(Tr. 489). Counsel stated that he could tell the court how much education Appellant had received, if the court wanted to hear it. (Tr. 489). The court responded that it was up to counsel whether to present more evidence, and reminded counsel that he had the burden of proof. (Tr. 489). Counsel decided not to present any further evidence. (Tr. 490). The lack of evidence on that issue, as well as other gaps in the evidence that Appellant cites to, thus go to Appellant's failure to meet his burden of proof and therefore support the trial court's findings.

2. Trial court not bound by expert opinion, even if uncontradicted.

Appellant was evaluated by two experts who concluded that he was incompetent to stand trial. However, "competency to stand trial is a matter for judicial determination; it is not a finding made on the basis of rubber-stamping the report of a psychiatrist." *People v. Zapotocky*, 869 P.2d 1234, 1245 (Colo. 1994). The United States Supreme Court has recognized that psychiatry "informs but does not control ultimate legal determinations." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). Courts in numerous jurisdictions have emphasized the court's independent duty to make the competency determination and the non-binding effect of expert opinions, even those that stand uncontradicted. *See, e.g., State v. Pointer*, 638 S.E.2d 909, 912 (N.C. Ct. App. 2007); *State v. Castleberry*, 758 So. 2d 749, 758 (La. 1999); *Gilbert v. State*, 951 P.2d 98, 104 (Okla. Crim. App. 1997); *Matheny v. State*, 688 N.E.2d 883, 893 (Ind. 1997); *People v. Mulero*, 680 N.E.2d 1329, 1345 (Ill. 1997); *People v. Marshall*, 931 P.2d 262, 278 (Cal. 1997); *Muhammad v. State*, 494 So. 2d 969, 973 (Fla. 1986); *State v. Perkins*, 518 A.2d 715, 716 (Me. 1986).

Undersigned counsel has not found any Missouri cases addressing the non-binding effect of expert opinion testimony on the trial court's determination of competency to stand trial. However, Missouri courts have generally found that the trier of fact is to decide the probative value, if any, of expert testimony. *State v. Poole*, 216 S.W.2d 271, 275 (Mo. App. S.D. 2007). And in the context of whether a defendant suffered from a mental disease or defect excluding responsibility for their conduct, Missouri courts have found that the trier of fact is not bound by unrebutted expert medical evidence. *State v. Lee*, 654 S.W.2d 876, 881 (Mo. banc 1983); *State v. Brown*, 665 S.W.2d 945, 958 (Mo. App. S.D. 1984). It thus appears that Missouri, like the jurisdictions cited in the preceding paragraph, does not require trial courts to blindly follow expert opinion, even if uncontradicted. The court's role, rather, is to analyze all the evidence, including its own observations of the defendant; make credibility determinations; and exercise discretion in fulfilling its fact-finding responsibility. *Wilson v. State*, 813 S.W.2d 833, 843 (Mo. banc 1991). The record demonstrates that the trial court in this case properly exercised that responsibility.

3. Trial court properly weighed the evidence.

Expert opinion on competency rises no higher than the reasons on which it is based. *Clayton v. Roper*, 515 F.3d 784, 791 (8th Cir. 2008).

In evaluating the opinions of Drs. Armour and Scott, the court concluded that the weight to be given to those opinions was diminished by the fact that the examinations were conducted several months after trial. (L.F. 98-99). The trial court could properly allocate less weight to a retrospective competency determination. *Galowski v. Berge*, 78 F.3d

1176, 1182 (7<sup>th</sup> Cir. 1996). Because the experts did not evaluate Appellant at the time of trial, the court properly gave greater weight to its own observations of Appellant at trial, and the contemporaneous actions of Appellant's counsel. (L.F. 99).

It is within the court's discretion to consider its own observations of a defendant's demeanor when determining competency and to give it the weight that it deems appropriate. *Hubbard*, 31 S.W.3d at 36; *Azbell v. State*, 144 S.W.3d 863, 872 (Mo. App. S.D. 2004) *see also* *Zink v. State*, 2009 WL 454283 at \*11 (Mo. banc, Feb. 24, 2009) (trial court relied in part on its observation of defendant during the case in finding him competent); *Elam*, 89 S.W.3d at 522-23 (upholding competency determination based in part on the court's opportunity to observe the defendant in the courtroom). Drs. Armour and Scott both admitted that they had not talked with anyone who observed or interacted with Appellant at the time of trial. (Tr. 445, 470-72). Dr. Scott even admitted that Appellant's capacity to understand the proceedings might have been better at the time of trial than at the time of his evaluation. (Tr. 485). The trial court, unlike the experts, had actually seen Appellant and his counsel interact at trial. *United States v. Wiggin*, 429 F.3d 31, 37 (1<sup>st</sup> Cir. 2005). Therefore, the trial court was entitled to rely on its own observations and credibility determinations even in the face of unrebutted expert opinion testimony that the defendant was incompetent to stand trial. *Mulero*, 680 N.E.2d at 1345-46; *People v. Baugh*, 832 N.E.2d 903, 916-17 (Ill. Ct. App. 2005).

The court also noted that defense counsel had not suspected that Appellant did not understand the proceedings or believe that Appellant was not adequately aiding in the defense. (L.F. 99). Appellant argues that trial counsel's failure to suspect any

competency problem is irrelevant because counsel is not a psychologist. However, “[t]rial counsel’s opinion should receive significant weight since ‘[c]ounsel, perhaps more than any other party or the court, is in a position to evaluate a defendant’s ability to understand the proceedings . . . .’” *United States v. Denton*, 434 F.3d 1104, 1112 (8th Cir. 2006) (quoting *Balfour v. Haws*, 892 F.2d 556, 561 (7<sup>th</sup> Cir. 1989)) *see also Medina v. California*, 505 U.S. 437, 450 (1992) (stating that defense counsel will often have the best-informed view of the defendant’s ability to participate in his own defense). Counsel’s failure to suggest any competency problems during trial is a factor that supports a finding of competency. *Wiggin*, 429 F.3d at 38. The trial court in this case thus properly took into account defense counsel’s experience and the fact that counsel had not noticed any problems with Appellant during the course of the trial.

Related to that finding is another finding by the trial court that Drs. Armour and Scott had acknowledged that Appellant had sufficient intelligence to understand a criminal proceeding and to assist counsel, if properly educated about the proceedings. (L.F. 99). A defendant’s failure to understand every detail of the legal process does not render him incompetent to stand trial. *State v. Petty*, 856 S.W.2d 351, 355 (Mo. App. S.D. 1993). In *Clayton*, the Eighth Circuit upheld the court’s competency finding where the evidence showed that the defendant could understand the legal proceedings and communicate with counsel, provided that counsel was patient in eliciting information. *Clayton*, 515 F.3d at 791. The trial court’s finding in this case is similar to that in *Clayton*, and is supported by the evidence.

Drs. Armour and Scott both expressed concern that Appellant did not display an understanding of the legal system and the trial process when they questioned him on those subjects. (Tr. 429-30, 464). However, Dr. Scott testified that Appellant's capacity to understand the proceedings might have been better at the time of trial, depending on what was being done at the time to educate and prepare him for trial. (Tr. 485). Dr. Armour also testified that Appellant could be competent to stand trial if properly educated about the court system. (Tr. 451-52). Appellant, despite having the burden of proof, failed to present evidence at the competency hearing on the issue of whether he had been sufficiently educated about trial procedures. (Tr. 489-90).

The trial court could properly consider the testimony that Appellant could gain competency through education and the lack of evidence that Appellant had not been sufficiently educated, and evaluate those factors in light of: (1) defense counsel's failure to recognize any problems with competency during trial; and (2) the fact that Appellant's demeanor and testimony at trial did not raise any questions with the court about competency. From that analysis, the court could reasonably conclude that Appellant had been sufficiently educated at the time of trial so as to be competent to proceed.

It is significant that Appellant did not present any evidence at the competency hearing from trial counsel that demonstrated Appellant's alleged inability to understand legal concepts or that indicated that Appellant was unable to provide counsel with information that would help in the defense. There is also nothing in the record to suggest any bizarre or inappropriate behavior by Appellant during the trial.

While Dr. Armour concluded from reviewing the transcript that Appellant's testimony was "simplistic" and "hard to follow" (Tr. 430), another person could view the testimony as appropriate to the questions being asked. (Tr. 329-50). The trial court, of course, not only had the opportunity to hear Appellant's testimony, but could also to observe him as he testified. Based on that superior ability to observe, the court's implicit conclusion that Appellant testified appropriately is deserving of greater weight than Dr. Armour's opinion that is based on the reading of a cold transcript.

Appellant argues that his low IQ contributed to his making the "detrimental" decision to testify at trial. That presumably refers to the decision to testify to an alibi defense that the State was able to refute. Regardless of how inadvisable that decision may have been, the mere fact that Appellant made a poor choice does not render him incompetent. "Competent people can and do make decisions which others consider irrational." *Wiggin*, 429 F.3d at 37.

Another piece of evidence that the trial court found probative was that Appellant began attacking his competency immediately after the guilty verdicts were returned. (L.F. 99). In *State v. Garrett*, the Southern District noted that no suggestion of incompetency had been raised until after the motion for new trial was filed. *State v. Garrett*, 595 S.W.2d 422, 434 (Mo. App. S.D. 1980). The Southern District found that the trial court could have concluded that the motion seeking a competency evaluation was the result of the defendant's personal strategy. *Id.* A similar factual scenario exists in this case, and the trial court's finding that Appellant appeared to be pursuing a deliberate strategy is thus supported by the record.

4. Trial court applied the proper standard of proof.

Appellant argues that the court's ruling was erroneous because it found that Appellant had not shown incompetence by a preponderance of the evidence, but also stated that it was not convinced beyond a reasonable doubt that Appellant was competent to stand trial. (L.F. 99). The court's comments, in context, appear to state that if the State carried the burden of showing competence beyond a reasonable doubt, or even a probability of competence, that burden would not have been met. The court then noted that the burden of proof lay with the Appellant to show incompetence by a preponderance of the evidence, and that Appellant had failed to carry that burden. (L.F. 99). The court thus applied the correct burden of proof, and the additional comments that Appellant points to are mere dicta. *See Hall v. Catoe*, 601 S.E.2d 335, 338 (S.C. 2004) (competency finding upheld where court made reference to an incorrect standard, but the order in its entirety showed that the court applied the proper burden of proof standard).

5. Appellant has not demonstrated that he was incompetent to be sentenced.

The only attack that Appellant makes on the court's finding that he was competent to be sentenced is that he was incompetent to stand trial, and that therefore the question of competency for sentencing is moot. Appellant offers no argument that he should be found incompetent to be sentenced even if he was competent to stand trial, and he does not refute the trial court's conclusion that he understands what sentencing is. (L.F. 100). Appellant has thus failed to meet his burden of showing that he is incompetent to be sentenced.

The trial court also found that the opinion of Drs. Scott and Armour that Appellant could not assist counsel at sentencing was based on an exaggerated notion of the contributions that a defendant makes to counsel's presentation of mitigating evidence. (L.F. 100). The Eighth Circuit similarly upheld a trial court's determination that a defendant was competent to proceed in a habeas claim because the defendant's participation in that stage of the proceedings did not require him to make any major decisions. *Clayton*, 515 F.3d at 791. Appellant likewise did not need to make any major decisions at the sentencing hearing, and the trial court properly concluded that counsel was informed of all the circumstances that could be used to argue for leniency and thus could fulfill his responsibility of making those arguments to the court. (L.F. 100). The trial court correctly weighed the evidence in finding that Appellant was competent to be sentenced.

The trial court's finding of competency to be tried and to be sentenced is supported by substantial evidence and Appellant's point should be denied.

## II.

### **State's expert did not give opinion on victim's credibility.**

Appellant complains that the testimony of Dr. Timothy Kutz improperly bolstered and vouched for the victim's testimony. However, Dr. Kutz's testimony was permissible because it did not express an opinion as to the victim's credibility as a witness or as to her overall credibility.

#### **A. Underlying Facts.**

Dr. Timothy Kutz, a pediatrician at Cardinal Glennon Children's Hospital, testified for the State. (Tr. 247). In addition to his pediatric training, Dr. Kutz received two years of fellowship training in child abuse, followed by ten years of practice, first at the University of Utah Children's Hospital, and then at Cardinal Glennon. (Tr. 248). Dr. Kutz was director of the child protection program, which involved supervising other physicians, teaching at the medical school, and training other physicians across Missouri on evaluating suspected abuse victims. (Tr. 248-49). Dr. Kutz testified that he had seen thousands of child sex abuse victims during the course of his practice. (Tr. 249).

Dr. Kutz was the supervising physician for the SAFE exam performed on the victim in this case. (Tr. 250, 252-53). He testified that when the victim was first seen in the emergency room, the examining doctors noticed a notch or indentation in the victim's hymen and requested an additional examination. (Tr. 254). The SAFE exam was performed sixteen days later, and showed no evidence of physical injury. (Tr. 250, 259). Dr. Kutz testified without objection that the absence of physical findings does not rule out sexual abuse. (Tr. 259-62).

The prosecutor then asked:

Q. Thank you. Last question. With regard to [the victim]'s history and also the exam and based on your experience and training as a physician, do you have an opinion as to whether or not [the victim]'s history was consistent or inconsistent with sexual abuse?

[DEFENSE COUNSEL]: I'm going to object. Invades the province of the jury.

THE COURT: The objection is overruled.

A. I can try. I think, based on the statements and the terminology that [the victim] used and some of her behavior changes, those are certainly consistent and would be similar to what children her age use to describe sexual abuse, and behaviors are similar behaviors seen in children who have been sexually abused. In an examination that's normal no way rules out sexual abuse. In the vast majority of children who are abused have examinations that are normal for the reasons we talked about. In my opinion her statement, behavior, and exam is consistent with a child who has been abused.

(Tr. 263). Appellant's new trial motion contained a claim that the trial court "erred in over ruling the defendant's objection to the opinion of Dr. Kutz that sexual contact occurred in this case. The opinion invaded the province of the jury and there was also insufficient foundation for his opinion in that there was no physical evidence that a rape had occurred." (L.F. 59).

**B. Standard of Review.**

Appellant's Point Relied On claims that several pieces of evidence were improperly admitted. The claim regarding one item of evidence is arguably preserved. The claims regarding the other pieces of evidence are clearly not preserved. To preserve an evidentiary question for review, counsel must make a specific objection at the time the evidence is sought to be introduced, the same objection must be set out in the motion for new trial, and it must be carried forward in the appellate brief. *State v. Irby*, 254 S.W.3d 181, 189 (Mo. App. E.D. 2008); *State v. Chambers*, 234 S.W.3d 501, 512 (Mo. App. E.D. 2007). An objection made at trial cannot be broadened by arguing a new theory on appeal. *Irby*, 254 S.W.3d at 188.

Defense counsel objected to Dr. Kutz's testimony that the victim's statement, behavior, and exam were consistent with a child who has been abused, on the basis that the testimony invaded the province of the jury. (Tr. 263). That objection was set out in the new trial motion. (L.F. 59). Appellant's Point Relied On does not use the phrase "invade the province of the jury," but instead alleges that the totality of Dr. Kutz's testimony bolstered and vouched for the victim's testimony. (Appellant's Brf., p. 19).

To the extent that bolstering and vouching can be considered synonymous with invading the province of the jury, the claim that the trial court erred in overruling the objection is preserved. A properly preserved claim of error in the introduction of evidence is reviewed for abuse of discretion. *Irby*, 254 S.W.3d at 187. A trial court's decision to admit evidence is an abuse of discretion when it is clearly against the logic of

the circumstances then before the court, and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. *Id.*

Appellant includes additional claims of error in his Point Relied On that were not presented to the trial court. The Point claims error in permitting Dr. Kutz to testify without objection that young children who are abused by family members do not receive serious injury, and in permitting various statements that Dr. Kutz made while being cross-examined by defense counsel. (Appellant's Brf., p. 19). Since none of the testimony cited above was objected to at trial, any claim of error in admitting that testimony is not preserved. *Id.*

Appellant's claim concerning that evidence can only be reviewed, if at all, for plain error. *Id.* at 192. Under that standard, this Court will reverse only if a plain error affecting a substantial right results in manifest injustice or miscarriage of justice. *Id.* A defendant bears the burden of demonstrating manifest injustice or miscarriage of justice. *Id.* Plain errors are evident, obvious, and clear. *Id.* Whether such errors exist is determined based on the facts and circumstances of each case. *Id.*

The plain error rule is to be used sparingly and does not justify review of every point that has not been properly preserved. *Id.* A request for plain error review triggers the commencement of a two-step analysis by this Court. *Id.* The first step is to determine whether the asserted claim of plain error facially establishes substantial grounds for believing a manifest injustice or miscarriage of justice has occurred. *Id.* If facially substantial grounds are not found to exist, the appellate court should decline to exercise its discretion to review the claim of plain error. *Id.* If facially substantial

grounds are found to exist, the appellate court should then move to the second step of the analysis and engage in plain error review to determine whether manifest injustice or miscarriage of justice has actually occurred. *Id.* To find manifest injustice, this Court must also find that the trial court's error in admitting the evidence was outcome determinative. *Id.*

### **C. Analysis.**

#### **1. Trial court properly allowed opinion testimony.**

In cases involving the sexual abuse of a child, two types of expert testimony typically give rise to a challenge: general and particularized. *State v. Churchill*, 98 S.W.3d 536, 539 (Mo. banc 2003). General testimony describes a generalization of behaviors and characteristics commonly found in those who have been victims of sexual abuse. *Id.* Particularized testimony concerns a specific victim's credibility as to whether they have been abused. *Id.* Trial courts have broad discretion in admitting general testimony, but particularized testimony is inadmissible. *Id.*

The rule against admitting particularized testimony has been limited, however, to situations where the expert is testifying as to the credibility of the victim's trial testimony, or the victim's overall credibility as a witness. *State v. Collins*, 163 S.W.3d 614, 623 (Mo. App. S.D. 2005); *State v. Tyra*, 153 S.W.3d 341, 349 (Mo. App. S.D. 2005); *State v. Cone*, 3 S.W.3d 833, 844 (Mo. App. W.D. 1999) *see also State v. Middleton*, 995 S.W.2d 443, 459 (Mo. banc 1999) (expert not asked to give opinion on defendant's credibility as a witness). Experts are allowed to testify as to their assessment of the credibility of statements made to them, and can explain to the jury how that

credibility assessment forms a basis for their underlying opinion. *Middleton*, 995 S.W.2d at 459; *Collins*, 163 S.W.3d at 623; *Cone*, 3 S.W.3d at 844. An expert's evaluation of the statements made to them has been found to be "necessary to establish a firm factual basis for the proffered opinion, and therefore, a critical part of the expert's evaluation." *Cone*, 3 S.W.3d at 844.

Dr. Kutz testified that the victim's statements and terminology, as well as her behavior changes, were consistent and similar to terminology and behaviors seen in other sexually abused children of a similar age. (Tr. 263). He also testified that a normal physical examination does not rule out sexual abuse. (Tr. 263). All of that testimony was permissible general testimony. Dr. Kutz concluded that the victim's statements, behavior, and physical exam were consistent with a child who has been abused. (Tr. 263). Dr. Kutz never explicitly stated that he found the victim to be credible, and he did not express any opinion as to the credibility of the victim's trial testimony. He also did not render any opinion about whether the sexual abuse was committed by Appellant. *State v. Galindo*, 973 S.W.2d 574, 576-77 (Mo. App. S.D. 1998). In fact, Dr. Kutz agreed with defense counsel on cross-examination that the lack of physical evidence of rape also meant that there was no physical evidence that a particular person committed the rape. (Tr. 271). Dr. Kutz permissibly identified the factors that he found to be consistent with sexual abuse. The jury was free to give that testimony the weight it thought it deserved. *Tyra*, 153 S.W.3d at 349.

Appellant attempts to liken Dr. Kutz's testimony to that which was found inadmissible in *State v. Williams*, 858 S.W.2d 796 (Mo. App. E.D. 1993). That case is

inapposite, however, and has been distinguished on grounds fully applicable here. The doctor in *Williams* testified that children about the same age as the victim in that case very rarely lied about sexual abuse. *Id.* at 800. This Court has found that testimony that a victim exhibited behaviors that were consistent with being sexually abused did not comment on the victim's credibility, but clearly fell within the province of allowable expert testimony. *State v. Silvey*, 894 S.W.2d 662, 671 (Mo. banc 1995). That is exactly the type of opinion stated by Dr. Kutz, and the trial court did not abuse its discretion in overruling Appellant's objection.

2. No plain error in admission of unobjected to evidence.

Appellant claims error in the admission of Dr. Kutz's unobjected-to testimony explaining how a child can be sexually abused but not show any physical signs of abuse. That is a form of general profile evidence that has been found admissible in other cases. *State v. Fewell*, 198 S.W.3d 691, 698 (Mo. App. S.D. 2006). The testimony was based on Dr. Kutz's education, training, and experience, and aided the jurors, who were untrained in medical matters, in evaluating and weighing the significance of a lack of physical injury in an abuse victim. *State v. Calvert*, 879 S.W.2d 546, 549 (Mo. App. W.D. 1994). Even if the testimony had the effect of bolstering the victim's testimony, the admission of such evidence without objection does not constitute plain error. *Galindo*, 973 S.W.2d at 577.

Appellant's Point Relied On refers to testimony elicited by defense counsel during his cross-examination of Dr. Kutz. (Appellant's Brf., p. 19). The argument portion of Appellant's brief does not identify the testimony that is claimed to be erroneous and

offers no argument as to why that testimony constitutes a manifest injustice. An argument raised in the Point Relied On but not developed in the argument section is deemed abandoned. *Irby*, 254 S.W.3d at 195. Appellant would not have been entitled to relief in any event, since he cannot charge prejudice from testimony elicited by his own counsel on cross-examination. *State v. Campbell*, 122 S.W.3d 736, 742 (Mo. App. S.D. 2004); *State v. Middleton*, 854 S.W.2d 504, 516 (Mo. App. W.D. 1993); *State v. Hicks*, 716 S.W.2d 387, 389 (Mo. App. E.D. 1986).

The trial court did not err, plainly or otherwise, in permitting Dr. Kutz's testimony. Appellant's point should be denied.

## CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and contains 7,652 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 24<sup>th</sup> day of April, 2009, to:

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