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JURISDICTIONAL STATEMENT

Mark E. Lewis, Appellant, was convicted of the class B felony of Child Molestation in the First Degree, § 566.067 RSMo 2000,¹ after a jury trial in Audrain County. The Honorable Keith M. Sutherland sentenced Appellant, as a prior and persistent offender, to a term of 30 years imprisonment. After the Missouri Court of Appeals, Eastern District, issued its opinion in ED 86961, it transferred the case to this Court pursuant to Rule 83.02. This Court has jurisdiction of this appeal under Article V, § 10, Mo. Const. (as amended 1982).

¹ All statutory references are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

On February 25, 2004, and again on July 15, 2004, the court read a “Memorandum on Non-Written Waiver of Counsel” to Appellant (L.F. 12, 17). The Public Defender had determined that Appellant did not qualify for Public Defender services and Appellant was financially unable to hire private counsel (Tr. 13).

Trial began on January 24, 2005 (Tr. 18). Over his objection, Appellant represented himself at all hearings, trial, and sentencing (Tr. 101).

A pretrial hearing was held on January 20, 2005. At that hearing the State was granted leave to file a Second Amended Information expanding the time of the alleged offense from October 13, 2003 to “between May 1, 2003 and October 13, 2003.” (L.F. 10, Tr. 18). The State was also granted leave to endorse three witnesses, one of whom was the victim’s counselor (Tr. 34). The trial court sustained the State’s motion which required Appellant to write out any cross examination questions he had for the victim, and the court would ask them (Tr. 23-24, 41). The prosecutor provided a “packet of DFS records” to the Appellant during the pretrial hearing, stating that he had received them the day before (Tr. 45).

On March 13, 2004, the State filed its “Notice of State’s Intention to Use Victim’s Statements Pursuant to Section 491.075 RSMo” (L.F. 13). The statement mentioned in that notice was made to Lynne Dressner (L.F. 13). On January 13, 2005, the State filed a second notice pursuant to § 491.075 adding statements the

victim allegedly made to her mother, Abigail Lewis, and her counselor Cynthia Mackey (L.F. 34). At the January 20th pretrial hearing, the State announced that it also intended to introduce the victim's alleged statements to Detective John Pehle (Tr. 55).

After an evidentiary hearing, the trial court found that all of the statements were admissible pursuant to § 491.075, noting that the child/victim would testify (Tr. 89).

Addie Martin was eight years old at the time of trial (Tr. 201). At one time she lived with her mother, Appellant, and her brothers Michael and Austin in a trailer (Tr. 202-203). She remembered being alone with Appellant sometimes while her mother slept or while her mother was working (Tr. 203). Addie testified that during these times, Appellant touched her "in [her] privates,"² with his hand (Tr. 204).

Addie testified that every time she and her mother would go somewhere, her mother would ask her if anybody had touched her (Tr. 204). She wanted to say yes, but she was scared of Appellant (Tr. 204). She did not want it to happen again (Tr. 205).

After direct examination, Appellant was called to the bench and the trial court, not wanting to take a recess, asked if he had his cross-examination questions ready (Tr. 206). Appellant had written three questions (L.F. 36). The State's objection to the first question, "[D]oes your mommy tell lies to people" was

² When she said this, Addie pointed between her legs.

sustained as being too broad (Tr. 206). The trial court helped reword the second question and asked the witness, “[H]as your mommy ever asked you to lie about Appellant touching you in your private area?” Addie answered “[N]o” (Tr. 209). The last question was, “[D]oes Mark have any tattoos, marks or scars around his hips or private area?” Addie didn’t know or didn’t remember (Tr. 210).

Appellant wanted to follow up on Addie’s testimony about her mother’s constant quizzing, but the prosecutor volunteered that “that’s a matter of cross-examination for other witnesses, Judge,” and the trial court apparently agreed, stating, “well, he can cross-examine Abigail Lewis about that” (Tr. 208).

Appellant was not permitted to formulate a question about Addie’s statement that whenever they went anywhere her mother asked her if anybody had touched her (Tr. 208-209).

Abigail Lewis, Addie’s mother and Appellant’s wife (Tr. 211), testified that Appellant was not the biological father of any of her children (Tr. 211-212). They had been together for three years, and married for two, when they separated (Tr. 212).

Lewis began working at Pizza Works on May 12, 2003 (Tr. 214). She worked from 4:00 p.m. until 10:00 p.m., leaving the children with Appellant in the evenings (Tr. 214). She normally returned home around 10:00 p.m., but on October 13, 2003 she got home early (Tr. 215). She found Michael and Austin playing in the rain (Tr. 216). She was surprised and angry because Michael had come home from school sick (Tr. 216). She took the boys into her bedroom and

dried them off (Tr. 216). Addie was inside but Lewis did not see her until she came out of the bedroom and she saw Appellant push Addie, who was in her underwear, off his lap (Tr. 217).

The next day Addie went to school as usual but when she got home, she cried and screamed to go to work with Lewis (Tr. 218). Lewis allowed her to come and on the drive asked Addie if anybody had been mean to her (Tr. 218). Addie told Lewis that Appellant had been touching and rubbing her (Tr. 219). When they got to Pizza Works, Lewis took Addie into the bathroom to have her show her what Appellant had done (Tr. 219). Addie put her hand between her legs and rubbed her hand up and down (Tr. 220). She told Lewis that Appellant made her put “it” in her mouth for a second (Tr. 220). Lewis took Addie to Phyllis Elams, Addie’s “surrogate” grandmother, and called DFS (Tr. 221).

Addie later told Lewis that Appellant did these things while she was at work and they were on the couch watching “Star Trek” (Tr. 221). Addie said that Appellant would beg her, saying “please, please, please, please come on” (Tr. 222). This was familiar to Lewis because Appellant reacted the same way when she was not in the mood for sex (Tr. 222).

On cross-examination, Lewis stated that she had Michael in the bedroom for five or ten minutes drying him off (Tr. 224). She did not remember seeing Addie and Appellant on the couch as she walked Michael through the living room into the bedroom (Tr. 224).

The Cass County Children's Division (formerly DFS) received a call from Abigail Lewis at 5:54 p.m. on October 14, 2003 (Tr. 227-228). Caseworker Monica Morgan was assigned to the case and the next morning she contacted Lewis and Det. John Pehle to set up an interview with Addie (Tr. 228). Lewis told Morgan that that Abigail said the abuse began when she started work at Pizza Works on May 12th (Tr. 229).

Morgan met with Appellant on December 4, 2003 (Tr. 230). When asked about the "couch incident," Appellant said he did not know what Morgan was talking about (Tr. 230). He said that Addie and he often sat together on the couch watching television (Tr. 230). Appellant described Addie as his "shadow" because she followed him around and could be clingy (Tr. 231).

The State asked Morgan about the SAFE exam findings of Dr. Thomas J. Selva (Tr. 231). Morgan reported that there were no specific findings (Tr. 231). There were a few things the doctor had noted as abnormal and Morgan called to check on those (Tr. 231). The main thing was a bruise on Addie's back (Tr. 231). Lewis had volunteered that Addie had a history of urinary tract infections (Tr. 233). The doctor felt those could be consistent with child abuse but they were non-specific and could be caused by numerous other things (Tr. 233). The doctor noted dryness in Addie's vaginal and anal areas that could be consistent with abuse, or poor hygiene (Tr. 233). There was no tearing anywhere, but the doctor indicated to Morgan that the absence of findings was not inconsistent with abuse

(Tr. 233). It is not unusual in child sex abuse cases to have a normal physical exam (Tr. 233).

When Appellant attempted to ask Morgan if the examination would still be normal if the child had been repeatedly penetrated, the State objected that Morgan was not qualified to answer that question and the objection was sustained (Tr. 234).

Detective John Pehle of the Audrain County Sheriff's Office was assigned to investigate Addie's complaint (Tr. 238). He spoke with Appellant on October 23, 2003 (Tr. 238). Appellant told Pehle that he thought everything was going "okay" between him and his wife (Tr. 241). He did say that Lewis was not interested in being a wife when it came to household chores, but their sex life was decent (Tr. 242). He again referred to Addie as his "shadow" and reported that they spent a lot of time together watching television (Tr. 242). The boys spent a lot of time playing video games and sometimes he made them play outdoors (Tr. 243).

Earlier in 2003, Appellant, Lewis, and Addie had crabs or body lice (Tr. 244). All three of the children were treated (Tr. 245) Appellant speculated that Addie got them from sitting on the couch (Tr. 245). When Pehle told Appellant

that Addie had sexual knowledge beyond her years, Appellant speculated that perhaps she had seen him and Lewis having sex (Tr. 246).³

In response to a series of leading questions, Pehle testified that Appellant did not demand to see the video tape of Addie's interview; did not demand to see the witness statements; did not demand to talk with Addie right then and there; did not pound the table with denial; did not say he didn't do it; and did not demand to have the whole thing straightened out right then (Tr. 247).

Pehle and Morgan met with Addie at her school (Tr. 247). Addie told them that Appellant had touched between her legs while pointing to her vaginal area (Tr. 247). She said that Appellant would tell her to go into the bedroom and he would take her clothes off (Tr. 248). He touched her with his hand (Tr. 248). Addie said that Appellant had to stop because her mother came home from work early (Tr. 248). She initially said her brothers were playing video games but corrected herself and said they were outside (Tr. 249).

On cross examination, Pehle testified that in October Lewis had said that she had gotten up from an afternoon nap and that was when she saw Addie on Appellant's lap (Tr. 250). In November, she said she had gotten home from work early and that is when she had seen Addie on Appellant's lap (Tr. 250). After

³ In her interview with Lynne Dressner, Addie mentions having seen Appellant and her mother having sex (St. Exh. 3).

being confronted with the contradiction, Lewis “stuck” with the second story (Tr. 250).

Cindy Mackey, a licensed clinical social worker, counseled Addie (Tr. 255). At the first session, with Lewis present, Lewis told Mackey that Appellant had rubbed Addie’s vagina, and put his penis in her mouth and in her rectum (Tr. 256). Addie said that was true and that Appellant had done it a “bunch of times” when Lewis was at work and her brothers were locked out or in their room (Tr. 256). Appellant told Addie that if she ever told, she would never see her mother again, and he would kill her grandmother and grandfather (Tr. 256).

According to Mackey, although Addie spoke about the abuse three or four other times, she did not say what was done (Tr. 257).

Addie’s nine year old brother Austin testified that while Lewis was at work, Appellant would tell the boys to go outside (Tr. 274). This happened more than once, and more than five times (Tr. 274).

Lynne Dressner, a self-employed social worker, conducts forensic interviews for Rainbow House Regional Child Advocacy Center (Tr. 276). She interviewed Addie on October 16, 2003 (Tr. 284). Addie told her that Appellant did the following things to her, starting when her mother began working on May 12, 2003: He touched and licked her privates and he put his pee pee in her mouth and in her bottom (Tr. 286). Addie saw white stuff come out of Appellant’s pee pee and he asked her to drink it, telling her it was healthy for her (Tr. 287).

Appellant told Addie if she told anyone she would never see her mother again and she would be in “big, big trouble” (Tr. 288).

Dressner’s interview with Addie was videotaped and the videotape was played for the jury (Tr. 299). On cross-examination Appellant attempted to ask Dressner if Addie had mentioned any marks or tattoos around his pelvis (Tr. 325). The State objected and Appellant remarked that it could be easily proved (Tr. 325). The court sustained the objection and directed Appellant to ask his next question (Tr. 325). He had none (Tr. 325).

After the State rested, Appellant informed the Court that three of his witnesses had left to get their children (Tr. 303). When asked if he had subpoenaed them, he said he had not, he had just asked them to be there and put them on the witness list (Tr. 303). The court indicated that if they were not subpoenaed, he was not going to continue the case or sit around for half an hour or an hour waiting for them to arrive (Tr. 303).

Appellant called his son, thirteen-year-old Michael (Tr. 328). He attempted to elicit Lewis’ reputation but was unable to lay the proper foundation and the State’s objection was sustained (Tr. 329). When the trial court asked Appellant if he intended to testify, he responded, “[n]ot without some form of cross you know being able to have somebody question me” (Tr. 330). The defense rested (Tr. 330).

The jury returned its verdict finding Appellant guilty of child molestation in the first degree (Tr. 358). Appellant did not file a motion for new trial, remarking

that: “I figured it would be a waste of the court’s time and the taxpayer’s money to go again without a lawyer” (Tr. 365).

When asked if he had any reason why sentence should not be pronounced, Appellant responded, “[n]ot other than not having an attorney, your honor” (Tr. 370). Appellant was sentenced, as a prior and persistent offender to 30 years imprisonment (Tr. 370, Supp. L.F. 9). The trial court granted Appellant leave to file notice of appeal as a poor person, finding that he was “totally without means or resources of any nature to pay costs or filing fees” (L.F. 57). Notice of Appeal was filed out of time with the Court of Appeal’s permission (Tr. 58), and this appeal follows.

POINTS RELIED ON

I.

The trial court plainly erred in refusing to appoint counsel to represent Appellant and forcing him to trial *pro se*, because this violated Appellant’s rights to due process and the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Appellant was entitled to representation, was misinformed as to the maximum penalty he was facing since the unsigned “Memorandum of Non-Written Waiver of Counsel” forms misstated the range of punishment, and he neither expressly nor impliedly waived his right to counsel. Appellant could not save enough money to hire an attorney and insisted that he was unqualified to proceed without counsel.

State v. Albright, 843 S.W.2d 400 (Mo.App., E.D. 1992);

Peterson v. State, 572 S.W.2d 475 (Mo. banc 1978);

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963);

State v. Dowdell, 583 S.W.2d 253 (Mo.App., W.D. 1979);

U.S. Const. Amends. VI and XIV;

Mo. Const. Article I, §§ 10 and 18(a);

§§ 558.016, 600.051, and 600.086;

Rules 30.20 and 31.02; and

18 CSR 10-3(2)(b) and 10-3(2)(A).

II.

The trial court plainly erred in refusing to appoint counsel to represent Appellant and forcing him to trial *pro se* because this violated Appellant's rights to due process and the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution in that Appellant was charged with a serious offense, the jury's guilty verdict resulted in a 30 year sentence, Appellant had no legal training or knowledge, he was financially unable to retain counsel, and forcing him to represent himself resulted in an unconstitutional breakdown of the adversarial process, resulting in a conviction and sentence that are fundamentally unreliable.

United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984);

Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972);

United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973);

U.S. Const. Amends. VI and XIV;

Mo. Const. Article I, §§ 10 and 18(a);

§ 491.075; and

Schaefer, *Federalism and State Criminal Procedure*, 70 Harv.L.Rev. 1 (1956)

III.

The trial court plainly erred in allowing the State to introduce Exhibit 8, a “list” written by Lynne Dressner during her interview with Addie Martin of things that Appellant allegedly did, because the admission of that exhibit violated Appellant’s constitutional rights to due process of law, to an impartial jury, and to be tried only for the crime with which he was charged, as guaranteed by the Sixth, and Fourteenth Amendments to the United States Constitution, and by Article I, §§ 10, 17 and 18(a) of the Missouri Constitution, in that the “list” included allegations that Appellant had punched Abigail Lewis, placed his knee on her neck, and pulled her hair, which was inadmissible evidence of other crimes which had no probative value in proving Appellant’s guilt or innocence of the charge of child molestation.

State v. Conley, 873 S.W.2d 233 (Mo. banc 1994);

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993);

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998);

State v. Gardner, 955 S.W. 2d 819 (Mo.App., E.D. 1997);

U.S. Const. Amends. VI and XIV;

Mo. Const. Article I, §§ 10, 17, and 18(a);

§491.075; and

Rule 30.20

ARGUMENT

I.

The trial court plainly erred in refusing to appoint counsel to represent Appellant and forcing him to trial *pro se*, because this violated Appellant's rights to due process and the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Appellant was entitled to representation, was misinformed as to the maximum penalty he was facing since the unsigned "Memorandum of Non-Written Waiver of Counsel" forms misstated the range of punishment, and he neither expressly nor impliedly waived his right to counsel. Appellant could not save enough money to hire an attorney and insisted that he was unqualified to proceed without counsel

The trial court plainly erred in forcing Appellant to go to trial unrepresented by counsel when it was clear that Appellant's earnings were insufficient for him to save enough money to hire an attorney. Appellant had made a good faith effort to find an attorney who would take his case but was unsuccessful due to a lack of funds, and he had neither the training nor the experience to defend himself against a serious criminal charge prosecuted by a skilled and experienced prosecutor. In addition, the trial court signed two "Memorand[a] of Non-Written Waiver of Counsel" forms which misstated the maximum possible sentence and there is nothing on the Waivers to indicate that copies were provided to Appellant or that

he was asked to sign a waiver of counsel (L.F. 12, 17). Because Appellant was forced to trial without counsel, his conviction and sentence are unconstitutional.

Preservation:

At every opportunity, Appellant made it known that he was not waiving counsel and did not want to proceed *pro se* (Tr. 7, 9, 13, 16, 40, 101, 330, 365, 370). Appellant did not file a motion for new trial, explaining to the court that it would be a waste of time to “go again” without a lawyer (Tr. 365). Therefore this issue must be reviewed for plain error. Rule 30.20.

Standard of Review:

The Courts of Appeal have frequently found plain error resulting in manifest injustice when a claim that the trial court erred in forcing a defendant to trial was not preserved because no motion for new trial was filed by the unrepresented defendant. *State v. Dowdell*, 583 S.W.2d 253 (Mo.App., W.D. 1979); *State v. Watson*, 687 S.W.2d 667 (Mo.App., E.D. 1985); *State v. Stark*, 706 S.W.2d 899 (Mo.App., E.D. 1986); *State v. Wilson*, 816 S.W.2d 301 (Mo.App., S.D. 1991); *State v. West*, 949 S.W.2d 914 (Mo.App., E.D. 1997); and *State v. Wilkerson*, 948 S.W.2d 440 (Mo.App., W.D. 1997).

The United States Supreme Court has identified the Sixth Amendment right to assistance of counsel as one of the rights so basic to a fair trial that violation of the right can never be deemed harmless error. *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

Facts:

At arraignment, Appellant requested that the Public Defender be appointed to represent him (L.F. 1). Bond was set at \$50,000 and Appellant was released on bond (L.F. 1). The Public Defender informed the Associate Circuit Court that Appellant was not indigent and did not qualify for Public Defender services (L.F. 1). Appellant requested an indigency hearing and one was held (L.F. 1), but it was not on the record.⁴ Appellant's appeal was denied (L.F. 1). Approximately one month later, the Associate Circuit Court determined that Appellant had waived his right to counsel and a "Memorandum of Non-Written Waiver of Counsel" was executed and Appellant given a copy (L.F. 2). But the copy provided to Appellant may or may not have been completed (L.F. 12). In addition, although the maximum punishment of fifteen years was correct at the time, the minimum was never one day (L.F. 12). The State amended the Information on January 3, 2005 charging Appellant as a prior and persistent offender, exposing him to a maximum sentence of thirty years (L.F. 6). But the amended Information misstated the range of punishment for an enhanced class B felony as between five and fifteen years

⁴ Appellant has obtained a letter from the Audrain County Associate Circuit Court clerk verifying that the January 5, 2004 indigency hearing was not recorded and that Appellant was not requested to submit an affidavit as required by § 600.086.3. (App. A-4).

(S.L.F. 7). Appellant was never informed that he was facing thirty years imprisonment.

On May 3, 2004, Appellant waived preliminary hearing and was bound over to circuit court (L.F. 2). At arraignment Appellant waived a reading of the Information and entered a plea of not guilty (L.F. 3). The trial court apparently gave the associate circuit court's finding that Appellant was not indigent binding effect since the record does not indicate that any independent inquiry into this issue was made by the circuit court. Appellant was subpoenaed to appear at the Audrain County Circuit Court on October 15, 2004 and to bring various financial documents for the purpose of an indigency hearing (Ap. 4). That hearing never took place (L.F. 5).

On July 2, 2004, a hearing was held on "counsel status." (L.F. 4).⁵ At that hearing Appellant informed the court that he could not save enough money to hire a lawyer (Tr. 7). The court remarked that the case had been pending for six months and Appellant was working (Tr. 7). The prosecuting attorney suggested the trial court read Appellant the perils of self-representation and set a trial date (Tr. 7). The trial court delayed for two weeks, giving Appellant until July 15, 2004 to retain counsel (Tr. 8).

⁵ The court noted that the docket entries for 5/3 and 6/1 were incorrect since they show Appellant appearing "with counsel" (Tr. 7). The docket sheets and Judgment and Sentence have now been corrected (Supp. L.F.).

At the July 15, 2004, hearing, Appellant was still without counsel (Tr. 9). He told the court that he could not hire an attorney because he was not making enough money (Tr. 9). He informed the court that he was working for a homeowner and doing some work at Dollar General through a temporary agency (Tr. 9). In the last month, he had averaged \$300-400 per week, gross (Tr. 9, 12). He paid \$74 a month in child support (Tr. 9). The court responded that he was above the Public Defender guidelines and therefore “they cannot represent you” (Tr. 10). When asked how many attorneys Appellant had contacted, he replied, “at least 15 – the biggest response is they are not interested in the case or they want more money than I can come up with” (Tr. 10). Appellant informed the court that he had a recent financial setback when his car broke down (Tr. 10).

The prosecuting attorney reminded the court that this was the fourth time the Appellant had appeared without counsel (Tr. 10). The court then read and completed a second “Memorandum of Non-Written Waiver of Counsel,” again informing Appellant that the maximum punishment was 15 years (L.F. 17). The trial court crossed out the line indicating that a copy of the “blank/completed form” had been provided to Appellant (L.F. 17).

After explaining the perils of self-representation, the trial court asked Appellant more questions, eliciting the fact that his work was part-time and the construction work he did would be full-time but for the weather (Tr. 12). Appellant stated that he had been grossing between \$300-400 per week for the previous month (Tr. 12). Appellant informed the court that his home was going

through repossession and the bondsman had claimed the car in payment for the bond (Tr. 13). He told the trial court he was currently homeless (Tr. 13). When Appellant told the court that he had filed a “couple of applications” with the Public Defender, the court responded that in its opinion Appellant was not going to qualify for Public Defender services (Tr. 13). It appears from the record that an Assistant Public Defender was in court because an unidentified Public Defender spoke up and volunteered that Appellant was out on a \$50,000 bond and if he was on that kind of bond, “we feel that he could probably hire an attorney.” (Tr. 13). Appellant reminded the court that no money was given to the bondsman (Tr. 13). The trial court stated that he understood that and asked Appellant if he realized it was dangerous to represent himself (Tr. 13). Appellant asked for a little more time to prepare for trial while still supporting himself and the court set the trial for October, but it did not begin until January 24, 2005 (Tr. 16, 90), with a pretrial hearing on January 20, 2005 (Tr. 18).

When the prosecuting attorney requested leave to voir dire on the fact that Appellant had chosen not to hire an attorney (Tr. 101), Appellant objected, stating “I haven’t chosen not to hire one, I just simply can’t afford one” (Tr. 101).

Argument:

The right of an accused to counsel at trial is of constitutional stature. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Sixth and Fourteenth Amendments of the United States Constitution guarantee a criminal defendant in a state proceeding the right to counsel. Absent a knowing

and intelligent waiver, no person may be imprisoned unless he was represented by counsel at trial. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

Appellant had the right to have counsel appointed

A person is eligible for representation by the Public Defender when it appears from all the circumstances of the case including his ability to make bond, his income and the number of persons dependent on him for support that the person **does not have the means at his disposal to obtain counsel** in his behalf.

§ 600.086.1 (emphasis added). § 600.086.2 provides that:

within the parameters set by subsection 1 of this section,
the commission may establish and enforce such further
rules for courts and defenders in determining indigency
as may be necessary.

(emphasis added). In other words, no single criterion can be used to deny representation. The Public Defender or court must determine “from all the circumstances” whether an accused does not “have the means to obtain counsel in his behalf.”

The court and Public Defender may consider an accused’s ability to make bond. § 600.086.1, 18 C.S.R. 10.3(2)(b) (2002). If the accused is released on any

bond over \$5,000, a presumption is created that he is not indigent.⁶ But “the ability to pay a professional bondsman does not dictate a finding [defendant] is financially able to hire his own attorney.” *State v. Hill*, 805 S.W.2d 329, 330 (Mo.App., W.D. 1991), *quoting*, *State v. Brown*, 557 S.W.2d 687, 690 (Mo.App., W.D. 1997). This would be especially true in Appellant’s case where the court knew that Appellant had not paid the bondsman any money, but had put his car and land up as collateral (Tr. 13).

While it is the Public Defender’s prerogative to determine eligibility, the statute provides that a defendant may appeal the determination to the trial court. § 600.086.3; *State v. Luleff*, 842 S.W.2d 895 (Mo.App., E.D. 1992). § 600.086.3 directs a defendant who is contesting the Public Defender’s denial of services to submit an affidavit detailing his expenses and income to the court. § 600.086.3.

The hearing on Appellant’s appeal from denial of Public Defender services was held in Associate Circuit Court and was not on the record. Therefore there is no basis for determining whether the Associate Circuit Court’s finding that Appellant had the means at his disposal to obtain counsel was based on substantial evidence. Appellant recognizes that it is his burden to prepare a complete record

⁶ The Public Defender Commission has eliminated the presumption of indigency created by 18 C.S.R. 10.3(2)(B) (2002). The ability to make bond is now one factor to be considered in determining whether an accused has the means at his disposal to obtain counsel. This change becomes effective January 30, 2007.

on appeal. *State v. Dunn*, 817 S.W.2d 241, 244 (Mo. banc 1991). But as noted earlier, the hearing in associate circuit court was not on the record, and Appellant was not told to file an affidavit. The substance of the hearing was that the associate circuit court judge prepared a “Memorandum on Non-Written Waiver of Counsel” (L.F. 12). The Public Defender’s stated reason for denying services was the fact that Appellant was out on a \$50,000 bond (Tr. 13). It can be inferred that the associate circuit court agreed with the Public Defender’s assessment.

An important factor in the *Dunn* case was the fact that the missing tape was irrelevant to any of Dunn’s claims on appeal. *Id.* at 244. Likewise in Appellant’s case, any finding by the associate circuit court would not be binding on the circuit court once the case was transferred. Therefore, while it would be helpful to know the full basis of the associate circuit court’s ruling, denying Appellant representation by the Public Defender, it is not crucial since the circuit court was required to make its own determination of whether or not to appoint counsel. The circuit court cancelled the only indigency hearing it had scheduled (L.F. 5, Ap. 4).

The circuit court knew that in the month before the July 15th hearing Appellant grossed between \$300 and \$400 a week working temporary jobs (Tr. 9), and paid \$74 a month in child support (Tr. 9). 18 C.S.R. 10-3(2)(A) (2002) provides that an accused may be considered indigent if his gross income (from pay and all other sources) does not exceed the federal poverty guidelines. Other than what he was earning in the month prior to the July 15th hearing, there is nothing in

the record to show what Appellant's yearly earnings were. The court was informed Appellant's house was being repossessed and he had suffered a financial set back when his car broke down (Tr. 10, 13). Based on this, the court expected Appellant to save enough money from his monthly income to retain private counsel.

That is completely unrealistic and is not supported by substantial evidence. It is telling that after sentencing, the trial court ordered that Appellant be allowed to appeal as a poor person, finding that "Mark E. Lewis is totally without means or resources of any nature to pay costs or filing fees for prosecuting his application for an appeal and is a poor person within the meaning of the law." (L.F. 57). In signing this Order, the trial court did not state that Appellant's financial situation had deteriorated substantially since before the trial. In fact, Appellant's financial situation was the same after trial as it had been before trial when the court found him ineligible for Public Defender services and refused to appoint counsel.

It is the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. *Powell v. Alabama*, 287 U.S. 45, 73, 53 S.Ct. 55, 65, 77 L.Ed.2d 158 (1932). In permitting the Public Defender to deny Appellant services, the trial court seemed to forget Appellant's constitutional right to counsel at all critical stages of the prosecution. Rule 31.02; *State v. Bibb*, 922 S.W.2d 798, 803 (Mo.App., E.D. 1996). Lawyers in criminal cases "are necessities, not luxuries." *Gideon*, 372 U.S. at 344, 83 S.Ct. at 796.

In *State v. Dowdell*, 583 S.W.2d 253 (Mo.App., K.C.D. 1979), the defendant was charged with perjury and initially appeared with private counsel. *Id.* at 254. Prior to trial, counsel was granted leave to withdraw due to “financial commitment[s] unfulfilled.” *Id.* at 255. After the case had been continued numerous times with defendant appearing without counsel, she informed the court that she had tentatively retained counsel subject to a fee agreement. *Id.* After reviewing the history of delay, the court appointed the public defender and informed defendant that the case would be tried at the next setting, either with private counsel, the public defender, or *pro se*. *Id.* Prior to trial, the court received a letter from the private attorney defendant was working with informing the court that he would not be representing the defendant. The public defender’s motion to withdraw was sustained, but no notice of that was provided to defendant. *Id.* On the day set for trial, defendant appeared and told the court she was not prepared to defend herself and asked for additional time to employ counsel. The trial court refused and trial proceeded with the defendant representing herself. *Id.*

The Court of Appeals found that the trial court had plainly erred and reversed the defendant’s conviction. *Id.* The Court held that the trial court was obligated to either: 1) secure a knowing and intelligent waiver of counsel; 2) appoint counsel; or 3) make a finding that the defendant could afford to pay counsel. Having done none of these things resulted in a manifest injustice when the defendant was compelled to proceed to trial without counsel. *Id.* Noting the

constitutional dictate that absent a knowing and intelligent waiver, no person may be imprisoned unless she was represented by counsel, the Court placed the burden on the State to show that the defendant voluntarily waived her right to counsel with an understanding of her rights and of the consequences. *Id.* at 256, *citing State v. Tilley*, 548 S.W.2d 199 (Mo.App., St. L.D. 1977).

The trial court in Appellant's case did none of the things required by *Dowdell*. The fact that Appellant was given ample time to retain counsel is irrelevant. If he could not afford to pay a private attorney, all the time in the world would not remedy that situation. Unless Appellant obtained an unexpected windfall, or found an attorney who was willing to represent him *pro bono*, the only solution to his dilemma was the appointment of counsel or money, not time.

Appellant recognizes that a circuit court lacks jurisdiction to appoint counsel for a non-indigent defendant. *State ex. rel. Tansey v. Richter*, 762 S.W.2d 857, (Mo.App., E.D. 1989). But Appellant's case is distinguishable from *Tansey*. In *Tansey*, after initially entering her appearance, the Public Defender learned that Tansey had lied on his application, and had transferred property valued at \$57,000 to his mother for \$1. *Id.* at 857. The Public Defender attempted to withdraw, and the defendant appealed. *Id.* The circuit court found that the defendant was not indigent, but because he refused to hire private counsel, the court appointed the Public Defender. *Id.* In granting the Public Defender's writ, the Eastern District held that under these circumstances, the trial court had erred in appointing the Public Defender. *Id.*

In Appellant's case, the Public Defender withdrew based on Appellant's release on a \$50,000 bond. There is nothing in the record to suggest that Appellant lied on his applications to the Public Defender and based on Appellant's assertions to the trial court, he had not paid the bondsman any money, but had put up his car and property as collateral for the bond. The trial court never independently investigated Appellant's ability to hire counsel, it just gave binding effect to the determination of non-indigency made by the associate circuit court. It did so despite the information provided to it by Appellant on more than one occasion that he had lost his home, his car had broken down, he was living with his parents, and he was working temporary jobs, and he had contacted numerous attorneys who refused his case. While the court did not have jurisdiction to appoint the Public Defender if Appellant "had the means at his disposal to obtain counsel," it did have the jurisdiction to find, based on the information it had before it, that Appellant did not have the means at his disposal to obtain counsel. Based on that finding, the trial court could have, and should have, appointed the Public Defender.

Appellant never waived his right to counsel

Even if this Court finds that Appellant did not qualify for Public Defender services, and the trial court was under no duty to appoint counsel, that is not the end of the inquiry. Appellant never made a knowing and intelligent waiver of counsel. He was forced to proceed *pro se* due to the Public Defender and court's erroneous determination that he had the means at his disposal to hire counsel.

§ 600.051.1 provides in relevant part:

1. Any judge of a court of competent jurisdiction may permit a waiver of counsel to be filed in any criminal case wherein a defendant may receive a jail sentence or confinement if the court first determines that defendant has made a knowledgeable and intelligent waiver of the right to assistance of counsel *and the waiver is signed before and witnessed by the judge or clerk of the court*, proving further that the waiver contains at least the following information which the defendant has read or which has been read to the defendant before the signing thereof: . . .

The written form of waiver prescribed in § 600.051.1 is mandatory.

Peterson v. State, 572 S.W.2d 475, 477 (Mo. banc 1978). The Court in *Peterson* insisted on strict compliance with the statute, holding that the failure to use the written form mandated reversal, even in the absence of prejudice. *Id.* at 476-477. The burden is on the State to prove that a waiver of counsel is valid. *State v. Hull*, 137 S.W.3d 508, 510 (Mo.App., E.D. 2004), citing *City of St. Peters v. Hodak*, 125 S.W.3d 892, 894 (Mo.App., E.D. 2004).

Appellant never signed a written waiver of counsel. Had he been presented with such a waiver, he may well have refused to sign it because he did not want to represent himself. But that must remain speculation since the court never provided Appellant with a written waiver of counsel form.

A case directly on point is *State v. Albright*, 843 S.W.2d 400 (Mo.App., E.D. 1992). In *Albright*, defendant requested, but was denied the services of the

Public Defender. *Id.* at 402. The Western District of this Court affirmed the finding of the Public Defender that Albright did not qualify for services. *Id.* at 403. But the Court went on to hold that “[a]bsent a knowing and intelligent waiver of counsel, no person may be imprisoned unless he was represented by counsel at trial. *Id.*, citing *State v. Watson*, 687 S.W.2d 667, 669 (Mo.App., E.D. 1985).

There was nothing in the record to indicate that Albright executed a written waiver as required by § 600.051. *Id.* at 404. In addition, there was nothing in the record to indicate that Albright was presented with a written waiver form to sign. *Id.* Thus, under *Peterson*, Albright’s conviction was reversed. *Id.*

Like Albright, Appellant was never presented with a written waiver of counsel. Since the first “Memorandum on Non-Written Waiver of Counsel” was signed by the Associate Circuit Court Judge on February 25, 2004, there is no record of what Appellant was told. But there is a check mark on the last line which reads, “[t]he court has provided defendant with a copy of this blank/completed form” (L.F. 12). It is impossible to tell whether the form was completed before the court gave Appellant a copy. Nevertheless, there is no place on that “Waiver” for Appellant to sign or to have his signature witnessed by the judge or the clerk as required by the statute.

The second “Memorandum on Non-Written Waiver of Counsel” does not even check the last line, indicating that Appellant was never provided a copy of that “Waiver” (L.F. 17). Again, there is no place for Appellant to sign the waiver.

Both of the Memoranda read to Appellant misstated the maximum penalty he faced upon conviction (L.F. 12, 17).

As noted above, the Court in *Peterson, supra*, held that the use of a written waiver of counsel as required by § 600.051 is mandatory. Only two exceptions to this rule have been recognized by the Missouri Supreme Court. The first is found in *May v. State*, 718 S.W.2d 495, 496 (Mo. banc 1986) in which the Court held that a written waiver is not necessary if the defendant demonstrates a “firm purpose in representing himself, where a written waiver was prepared in accordance with the statute and read into the record, and where defendant refused to sign the form.” *Id.* at 497. The second exception is from *State v. Hunter*, 840 S.W.2d 850, 860 (Mo. banc), *cert. denied*, 509 U.S. 926 (1993). If a defendant has “standby” or “hybrid” counsel, then no written waiver of counsel is mandated.

A third exception was recognized in *State v. Yardley*, 637 S.W.2d 293 (Mo.App., S.D. 1982). The Court in *Yardley* found an exception in those situations where a defendant is financially able to employ counsel but refuses to do so. *Id.* at 295.

There was no implied waiver in Appellant’s case

The Courts of Appeals have followed *Yardley* in holding that the waiver required by § 600.051 may be “implied by conduct” where a defendant refuses to hire counsel. *See e.g. State v. Clay*, 11 S.W.3d 706, 708 (Mo.App., W.D. 1999) (Clay refused the services of the Public Defender and when told private counsel would not be appointed, he left the courthouse and was tried in absentia.); *State v.*

Ehnes, 930 S.W.2d 441, 445-446 (Mo.App., S.D. 1996) (Ehnes refused to apply for Public Defender services, refused to hire private counsel, and refused to make an express waiver of counsel.); *State v. Bilyeu*, 867 S.W.2d 646, 647 (Mo.App., S.D. 1993) (Bilyeu appeared pro se at arraignment and at a pretrial hearing advised the court that he would be representing himself.); and *State v. Williams*, 679 S.W.2d 915, 917 (Mo.App., W.D. 1984) (Williams wrote on the “Request for Counsel” form that he did not want appointed counsel and was financially able to retain counsel. He then refused to retain counsel, stated repeatedly he wanted to represent himself, but refused to sign a waiver of counsel.).

The “*Yardley*” exception has not been recognized by this Court. *State v. Wilkerson*, 948 S.W.2d 440, 445 (Mo.App., W.D. 1997). An “implied waiver” is found where a defendant is not indigent, but “refuses” to hire an attorney. *State v. Yardley*, 637 S.W.2d at 295-296. In Appellant’s case, the trial court referred to the “Memorandum on Non-Written Waiver of Counsel” as the “implied waiver” form (Tr. 10).

Appellant did not refuse to hire counsel. He approached “at least” 15 attorneys and was turned down for lack of funds (Tr. 10). He never knowingly or voluntarily waived his right to counsel. There is nothing in this record to suggest that Appellant purposefully refused to hire an attorney in order to manipulate or delay the proceedings against him. *See, State v. Kilburn*, 941 S.W.2d 737 (Mo.App., E.D. 1997).

Appellant was constitutionally guaranteed the right to an attorney at trial. If the trial court wanted to find that Appellant did not qualify for Public Defender services, then it had a duty to appoint counsel to represent him. *See*, Rule 31.02; *Argersinger, supra*; *Dowdell, supra*. The record indicates that the trial court understood that Appellant had not paid the bondsman money that could have been used to hire an attorney (Tr. 13). This was not a case where a defendant chose pretrial freedom over hiring counsel. Appellant was out on bond with the court's expectation that he would be able to save enough money to retain counsel. But to expect someone grossing between \$300 and \$400 a week for one month from a temporary job, whose house had been repossessed, and whose car had broken down, to come up with attorney's fees sufficient to interest a lawyer in trying a B felony child molestation case is unrealistic. Appellant submits that the trial court abused its discretion by not overruling the Public Defender's finding that Appellant was ineligible for Public Defender services solely on the basis of his being released on a \$50,000 bond. The circuit court had a duty to look behind that fact to determine whether Appellant paid the bondsman money he could have used to hire counsel. If not, then the fact that Appellant was released on bond is irrelevant to a determination of whether he had the means at his disposal to obtain counsel.

State v. Davis, 934 S.W.2d 331 (Mo.App., E.D. 1996) is a case on point, Davis was initially represented by the Public Defender but as soon as he posted bond, the Public Defender was permitted to withdraw. *Id.* at 332. Davis hired

private counsel who also filed a motion to withdraw. *Id.* At the hearing on that motion, which the trial court granted, Davis informed the court that he was currently unemployed. The trial court suggested that Davis reapply with the Public Defender. *Id.* The Public Defender rejected his application because Davis' girlfriend's family had posted his bond. *Id.*

At the next hearing, Davis appeared without counsel. He told the court he was trying to hire an attorney but the least expensive one wanted \$3,500, and he did not have the money. *Id.* He was working part-time and taking care of his sick mother. *Id.* His pay went for food and to buy his mother's medications. *Id.*

The trial court informed Davis that it was setting a trial date and he could either employ counsel or represent himself. *Id.* at 333. Davis appeared the morning of trial without counsel. He again told the court he could not afford to hire an attorney. The trial court began the trial with Davis representing himself. *Id.* As the Eastern District noted, "[h]is self-representation was clearly inadequate." *Id.*

The Court reversed Davis' conviction, noting that it need not address his claim that the trial court erred in finding that he was financially able to retain counsel. *Id.* at 335. Instead, the Court reversed because Davis had never been adequately warned about the dangers of self-representation. *Id.* at 334. "A court is obligated to ensure that a waiver is knowing and intelligent even where the waiver is deduced from conduct." *Id.*, citing *State v. Bethel*, 896 S.W.2d 497, 500 (Mo.App., S.D. 1995).

Because of the strong presumption against waiver of counsel, “the trial judge must investigate ‘as long and as thoroughly as the circumstances of the case before him demand.’” *Id.*, quoting *Von Moltke v. Gillies*, 332 U.S. 708, 723-24, 68 S.Ct. 316, 323, 92 L.Ed. 309 (1948). For a waiver to be knowing and intelligent, the United States Supreme Court has stated:

[i]t must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused’s proffered waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all circumstances. . .

Id. at 724, 68 S.Ct. at 323.

The trial court plainly abused its discretion in forcing Appellant to proceed to trial without counsel. Appellant did not have the financial means to hire private counsel and he never waived, either expressly or impliedly, his constitutional right to counsel. The trial court never talked with Appellant about possible defenses or mitigating circumstances, Appellant was misinformed of the range of punishment, and the trial court engaged in no examination of all of the circumstances much less a penetrating and comprehensive one.

This Court should reverse Appellant's conviction, vacate his sentence, and remand his case for a new trial with directions that counsel be appointed to represent him.

II.

The trial court plainly erred in refusing to appoint counsel to represent Appellant and forcing him to trial *pro se* because this violated Appellant's rights to due process and the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution in that Appellant was charged with a serious offense, the jury's guilty verdict resulted in a 30 year sentence, Appellant had no legal training or knowledge, he was financially unable to retain counsel, and forcing him to represent himself resulted in an unconstitutional breakdown of the adversarial process, resulting in a conviction and sentence that are fundamentally unreliable.

To avoid redundancy, Appellant incorporates the Preservation, Standard of Review, and Facts sections of Point Relied On and Argument I at pages 22-25 here.

Argument:

As argued in Appellant's first point, the trial court plainly erred in forcing Appellant to go to trial without legal representation. Appellant was charged with a serious offense and was facing a substantial sentence (although he had been misadvised by the court that his exposure was half of what it turned out to be). Absent a knowing and intelligent waiver, no person may be imprisoned unless he was represented by counsel at trial. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The Sixth Amendment's guarantee that no citizen may be incarcerated unless he has been provided, or knowingly waived, counsel is necessary to insure that the result in any criminal trial is reliable since it was reached after a fair, adversarial process. "[T]he core purpose of the counsel guarantee was to assure 'assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Ash*, 413 U.S. 300, 309, 93 S.Ct. 2568, 2573, 37 L.Ed.2d 619 (1973).

There was an actual breakdown of the adversarial process at Appellant's trial

Even though Appellant is not required to show prejudice if he has been unconstitutionally denied his right to counsel, the fact is that Appellant was prejudiced when he was forced to trial without an attorney.

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984), *quoting*, Schaefer, *Federalism and State Criminal Procedure*, 70 Harv.L.Rev. 1, 8 (1956).

Our adversary system of criminal justice is based on the premise that advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. *Cronin*, 466 at 655, 104 S.Ct. at 2045, *citing Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975).

Appellant was convicted of child molestation in the first degree and sentenced to 30 years imprisonment at a trial where there was a complete breakdown of the adversarial testing required by the Constitution. The prosecuting attorney took advantage of Appellant's ignorance throughout the proceedings. For example, discovery was provided at the last minute when Appellant received a packet of materials from DFS over the weekend before the start of trial on Monday (Tr. 262). After the case had been pending for approximately nine months, the State was permitted to amend the Information to change the date of the offense from one day, October 13, 2003, to a period of nearly six months, May 1, 2003, through October 13, 2003 (Tr. 18; L.F. 10-11). The State filed its notice pursuant to § 491.075 on March 15, 2004 listing a single statement by the victim to Lynne Dressner. (L.F. 13-14). On January 13, 2005, the State was permitted to file a second notice, adding the victim's statements to Abigail Lewis and Cynthia Mackey (L.F. 34-35). Immediately prior to the § 491.075 hearing, the prosecuting attorney announced he was adding yet another statement, this one to Detective Pehle (Tr. 55).

The State succeeded in forcing Appellant to write out his cross-examination questions to Addie Martin before he had heard her direct testimony (Tr. 41). When Appellant attempted to add a question based on something Addie testified to on direct, both the prosecuting attorney and the trial court shut him down (Tr. 208-209).

The prosecutor elicited hearsay testimony from Monica Morgan concerning what Dr. Thomas J. Selva had found during the SAFE examination (Tr. 231-233). When Appellant attempted to cross-examine Morgan on the results of the SAFE examination, the prosecutor successfully objected that she was not qualified to answer medical questions (Tr. 234).

The prosecutor used leading questions throughout the trial. (See for example his direct examination of Det. Pehle at Tr. 237, 244, 247, 249, 253). The prosecutor was permitted to introduce writings that had been made by Lynne Dressner and Addie during the forensic interview. One of these writings was a list Dressner made of all of the things Addie accused Appellant of doing, including violent acts he allegedly perpetrated against her mother (State's Exh. 8).⁷

And finally, when Appellant attempted to prove that if Addie's allegations were true, she should have mentioned the tattoos and/or marks on his pelvic area, the prosecuting attorney successfully kept that evidence from the jury (Tr. 324-325).

As can be seen, Appellant was convicted and sentenced after a trial in which there was an unconstitutional breakdown of the adversarial process. Normally, an accused must bear the burden of showing such a violation. But there are certain circumstances "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658, 104 S.Ct. at 2046 (citations omitted). "Most obvious, of course, is the

⁷ See Point Relied On and Argument III

complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Id.* "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.*, fn. 25 (citations omitted).

Appellant was entitled to counsel at trial. He never waived his right to counsel, either expressly or impliedly. The result of the trial court's action in denying him counsel was a complete breakdown in the adversarial process which renders his conviction and sentence unconstitutional. Therefore, this Court should reverse his conviction, and remand his case with directions that he be provided counsel at his new trial.

III.

The trial court plainly erred in allowing the State to introduce Exhibit 8, a “list” written by Lynne Dressner during her interview with Addie Martin of things that Appellant allegedly did, because the admission of that exhibit violated Appellant’s constitutional rights to due process of law, to an impartial jury, and to be tried only for the crime with which he was charged, as guaranteed by the Sixth, and Fourteenth Amendments to the United States Constitution, and by Article I, §§ 10, 17 and 18(a) of the Missouri Constitution, in that the “list” included allegations that Appellant had punched Abigail Lewis, placed his knee on her neck, and pulled her hair, which was inadmissible evidence of other crimes which had no probative value in proving Appellant’s guilt or innocence of the charge of child molestation.

The trial court plainly erred and failed in its duty to see that Appellant, who was forced to proceed *pro se*, was given a fair trial when it permitted the State to introduce an irrelevant exhibit that included allegations of violent acts by Appellant directed at the victim’s mother.

Preservation:

Appellant, acting as his own attorney, made no objection to the introduction of State’s Exhibit 8 and he did not file a motion for new trial. Therefore, Appellant must ask this Court to review this claim for plain error. Rule 30.20.

Standard of Review:

Plain error review is limited to determining whether there was error affecting substantial rights that resulted in manifest injustice or a miscarriage of justice. *State v. Gardner*, 955 S.W.2d 819, 825 (Mo.App., E.D. 1997). This Court will reverse under plain error if it is established that the error had a decisive effect on the jury's verdict. *State v. Stewart*, 997 S.W.2d 36, 41 (Mo.App., W.D. 1999).

Facts:

After the § 491.075 hearing, the prosecuting attorney, out of fairness to Appellant, volunteered to edit the videotaped interview of Addie Martin to eliminate the child's references to Appellant's alleged violent acts toward her mother (Tr. 90).

During trial, Lynne Dressner was called to explain the making of the videotaped interview of Addie Martin (Tr. 276-284). The prosecuting attorney then showed Dressner State's Exhibits 4, 5, 6, 7, and 8 and asked her to identify them for the jury (Tr. 288). Exhibits 4 and 5 were anatomically correct drawings of a girl and a man and Addie was asked to identify the various parts of the body that Appellant had touched or had her touch (Tr. 289-290). Dressner identified Exhibits 6, 7, and 8 as papers she and Addie wrote during the interview (Tr. 291). Exhibit 8 was a list Dressner had written of what Addie told her Appellant had done (Tr. 291). Included on that list was "4) Punches mom, knees on neck, & pull hair" (Exh. 8). All of the exhibits were admitted without objection, and published to the jury (Tr. 293).

Argument:

“Showing the defendant’s propensity to commit a given crime is not a proper purpose for admitting evidence, because such evidence ‘may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crimes charged.’” *State v. Burns*, 978 S.W.2d 759, 761 (Mo. banc 1998), quoting *State v. Bernard*, 849 S.W.2d 10, 16 (Mo. banc 1993).

As a rule, evidence of uncharged crimes, wrongs, or acts is inadmissible to show an accused is predisposed or has a propensity to commit criminal acts. *State v. Goodwin*, 43 S.W.3d 805, 815 (Mo. banc), *cert. denied*, 534 U.S. 903 (2001).

“A most fundamental principle of our system of justice is that an accused may not be found guilty or punished for a crime other than the one on trial.” *State v. Conley*, 873 S.W.2d 233, 236 (Mo. banc 1994).

There are exceptions to the general rule, if the evidence is logically relevant “in that it has some legitimate tendency to establish directly the accused’s guilt of the charge for which he is on trial” and legally relevant, in that “its probative value outweighs its prejudicial effect.” *Burns*, 978 S.W.2d at 761. “Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors.” *State v. Clover*, 924 S.W.2d 853, 856 (Mo. banc 1991) (citation omitted). The admission of other crimes evidence which is “not properly related to the cause on trial violates the

defendant's right to be tried for the offense with which he is charged by the information. § 18(a), V.A.M.S. Const. of Missouri 1945." *State v. Dunn*, 309 S.W.2d 643, 645 (Mo. banc 1958).

Missouri courts have found evidence of other crimes to be logically relevant where the evidence shows motive, intent, the absence of mistake or accident, a common plan or scheme or identity. *State v. Danikas*, 11 S.W.3d 782, 788 (Mo.App., W.D. 1999).

In Appellant's case, the prosecuting attorney conceded that the evidence of Appellant's alleged violence toward his wife was not logically relevant when he volunteered to edit the tape to remove any mention of that conduct. If the prosecuting attorney recognized that it would not be fair to Appellant to have the jury hear Addie make those allegations, then he should also have recognized that introducing Exhibit 8 and publishing it to the jury was just as unfair.

The jury began its deliberations with the knowledge that Addie Martin had alleged that her step-father was physically abusive toward her mother. This knowledge would clearly undercut Appellant's defense that Abigail Lewis had initiated the allegations of sexual abuse and would place Appellant's apparent hostility towards his wife in a completely different context. Without this inadmissible evidence, the jury may have believed that Appellant's hostility was caused by his wife's attempt to frame him for child molestation. With this evidence, the jury could well have been convinced that Appellant's hostility

toward Abigail Lewis predated any allegations by Addie and therefore the chance that Lewis had coached Addie were decreased substantially.

Appellant's defense was adversely impacted by the introduction of evidence the prosecuting attorney recognized was prejudicial and irrelevant. The trial court made no attempt to look at the exhibit and weigh its probative value against its prejudicial effect. This was plain error.

For these reasons, this Court should reverse Appellant's conviction and remand his case for a new trial.

CONCLUSION

For the reasons stated in Points Relied On and Arguments I, II, and III, Appellant respectfully requests that this Court reverse his conviction and remand his case with directions that counsel be appointed to represent him at his new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Nancy A. McKerrow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 11,101 words, which does not exceed the 30,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan Enterprise 7.1.0, updated in December, 2006. According to that program, these disks are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this day of December, 2006, to Shaun Mackelprang, Chief, Criminal Division, Missouri Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Nancy A. McKerrow

APPENDIX

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