

**IN THE
SUPREME COURT OF MISSOURI**

STATE OF MISSOURI,)	
)	
Plaintiff-Respondent,)	
)	
v.)	No. SC88274
)	
ROBERT SALTER,)	
)	
Defendant-Appellant.)	

**On Appeal from the Circuit Court of St. Louis County
Division No. 15
Hon. John A. Ross, Circuit Judge
(Circuit Court No. 05CR-823A)**

**REPLY BRIEF FOR APPELLANT
ROBERT SALTER**

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INTRODUCTION

In this Reply Brief, defendant is responding to arguments made by the State in its Respondent's Brief, and does not reargue some issues (Point III - Continuance and Point V - Instructions) which we believe were adequately briefed in defendant's Original Brief. Any failure to address arguments made by the State should not be construed as an abandonment of defendant's original argument.

STATEMENT OF FACTS

The State has elected to file its own Statement of Facts, as authorized by Rule 84.04(f). Defendant believes, however, that the State's Statement of Facts does not comply with Rule 84.04(c) because it does not contain the "fair and concise statement of the facts relevant to the questions presented for determination without argument." There is no reference therein to any facts relevant to each of the six Points raised by defendant. Reference to facts in the Argument portion of Respondent's Brief does not satisfy the need for facts in the Statement of Facts.

Because of the State's failure to provide a proper Statement of Facts, defendant believes that the State's Statement of Facts should be disregarded and that the Court should consider defendant's Statement of Facts in Appellant's Brief.

POINTS RELIED ON

I.

The trial Court erred in overruling Defendant's Amended Motion to Dismiss the Indictment (LF 5-7) and the Information in Lieu of Indictment (LF 17-18), because the charges in this case were filed for alleged violation of § 287.128.5, RSMo, the provisions of which were adopted by the Legislature in violation of the Constitution of the State of Missouri, in that § 287.128 was enacted and applied in violation of Article I, Sections 10 and 11, and Article III, Section 23 of the Constitution of the State of Missouri, and the Fourteenth Amendment to the Constitution of the United States.

Authorities listed in Appellant's Opening Brief

and

Hammerschmidt v. Boone County, 877 S.W. 2d 98

(Mo. banc 1994);

State v. Brown, 660 S.W. 2d 694 (Mo. banc 1983);

Constitution of Missouri, Article III, § 23;

Section 287.128, RSMo.

II.

The trial Court erred in refusing at various stages of the trial to order the dismissal of the charge against defendant and to order his discharge, because there was an insufficiency of evidence and the State failed to produce any evidence that defendant violated the law in that there was no evidence that defendant had ever acted or engaged in any prohibited conduct and the only evidence in the case was that defendant did not acquire workers' compensation insurance for the employees at Housecalls, Inc. when there was no evidence that he was under any duty to do so as he was not the employer and had no personal obligation to acquire insurance, and there was no basis to impute or infer any illegal conduct by defendant under §§ 562.011 or 562.061, RSMo.

Authorities listed in Appellant's Opening Brief

and

People v. Parvin, 533 Ill. N.E. 2d 813 (Il. 1988);

Section 562.011, RSMo;

Section 562.061, RSMo.

IV.

The trial Court erred in refusing to order the State to refrain from producing specific details and the nature of his prior conviction in the event defendant

testified during the guilt phase of the trial, and in refusing to accept a stipulation by defendant, with an appropriate instruction by the Court, that defendant admitted the fact of his being guilty of a prior offense, because it was an abuse of discretion for the Court to deny defendant's request in that the purpose of developing the evidence at the guilt phase was for impeachment and to affect the credibility of defendant as a witness, and the prejudicial impact was a consequence of having the jury told of the specifics of his prior conviction, which in this instance was an offense similar to that which the jury was considering at the guilt phase, and such prejudicial impact outweighed any probative value in informing the jury at this stage of the proceedings of the exact nature of the prior conviction.

Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644,

136 L.Ed. 2d 574 (1997);

State v. Ellison, ___ S.W. 3d ___ (Mo. banc No. SC88468,

decided on December 4, 2007).

VI.

The trial Court erred in not taking remedial action for the State's belated production and concealment of evidence to contradict the State's unfounded accusation of adulterous misconduct by defendant and Ms. Uchechi Brown because the State not only violated the *Brady* rule of disclosure in that the

State had previously produced corporate documents of all other companies in which defendant was involved but apparently purposely withheld the corporate records of another company until the trial was completed, as a result of which defendant was prejudiced by not having access to the document which showed that there was no misconduct by defendant and Ms. Brown.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194,

10 L.Ed. 2d 215 (1963);

State v. Burson, 698 S.W. 2d 557 (Mo. App. E.D. 1985);

Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495,

30 L.Ed. 2d 421 (1971);

People v. Wantland, 78 Ill. App. 3d 741,

397 N.E. 2d 548 (1979);

Supreme Court Rule 25.03(C).

ARGUMENT

I.

The trial Court erred in overruling Defendant’s Amended Motion to Dismiss the Indictment (LF 5-7) and the Information in Lieu of Indictment (LF 17-18), because the charges in this case were filed for alleged violation of § 287.128.5, RSMo, the provisions of which were adopted by the Legislature in violation of the Constitution of the State of Missouri, in that § 287.128 was enacted and applied in violation of Article I, Sections 10 and 11, and Article III, Section 23 of the Constitution of the State of Missouri, and the Fourteenth Amendment to the Constitution of the United States.

In Section C.1 of Respondent’s Brief (pages 15-17), the State claims that defendant waived his constitutional claims by his alleged failure to present any argument or authority in support of the claim. The State cites three cases. In *State v. Nicklasson*, 967 S.W. 2d 596 (Mo. banc 1998), the defendant seems to have been content to state merely that the testimony of an FBI agent was “improper and highly prejudicial”, but apparently he presented nothing further. In Defendant’s Brief, we were specific as to the vagueness, failure to pay a debt, and denial of due process and set out the specific facts and allegations supporting those claims. See paragraphs 1) to 4) on pages 26 and 27.

Thummel v. King, 570 S.W. 2d 679 (Mo. banc 1978), is not applicable..

Thummel is a landmark decision which relates to deficiencies in the Brief, particularly in the Points Relied On, and has been often cited in that regard. The State points to no deficiencies in defendant's statement of the Point, and we believe the Point follows the teachings of *Thummel*.

Finally, the State cites *State v. Pullen*, 843 S.W. 2d 360 (Mo. banc 1992), emphasizing its contention that the questions must be adequately covered in the Brief. We believe that there was adequate coverage, albeit short, because this Court is directed to the specifics of each contention. Where the issues are simple and adequately explained in the Brief, as defendant did, there is no need to prolong the Argument. The issue is presented in the Point by reference to a specific section of the Constitution, and the specifics of the Argument is presented on pages 26-27, the standard of review is set forth on pages 27-28, and we expressed our viewpoint on page 28 that there was no need for further argument on the clearly presented issues. We did, however, cite *State v. Brown*, 660 S.W. 2d 694 (Mo. banc 1983) which indicates a simple approach to questions of vagueness.

In Section C.2 of Respondent's Brief (pages 17-23), the State cites a number of cases involving single-subject and clear-title constitutional challenges to various types of legislation. Most of those cases are discussed in *Trout v. State*, 231 S.W. 3d 140 (Mo. banc 2007). It is interesting that in the midst of discussing these

cases, this Court stated (213 S.W. 3d at 145): “That said, this title, like that in [*Jackson County Sports*] *Complex Authority* [*v. State*, 226 S.W. 3d 156 (Mo. banc 2007)], ‘may well represent the outer limit permitted.’ *Sports Complex Authority*, 226 S.W. 3d at 162.”

In view of the spate of cases addressing challenges to legislation under Article III, Section 23 of the Missouri Constitution, with the recognition by this Court that “the outer limit” may be at hand, perhaps it is time for this Court to reexamine the purposes of Article III, Section 23, discussed in *Hammerschmidt v. Boone County*, 877 S.W. 2d 98, 101-102 (Mo. banc 1994), and give direction to the Legislature to avoid constitutional challenges by a concerted effort to forego the amorphous titles and to return to truly single-subject legislation.

II.

The trial Court erred in refusing at various stages of the trial to order the dismissal of the charge against defendant and to order his discharge, because there was an insufficiency of evidence and the State failed to produce any evidence that defendant violated the law in that there was no evidence that defendant had ever acted or engaged in any prohibited conduct and the only evidence in the case was that defendant did not acquire workers' compensation insurance for the employees at Housecalls, Inc. when there was no evidence that he was under any duty to do so as he was not the employer and had no personal obligation to acquire insurance, and there was no basis to impute or infer any illegal conduct by defendant under §§ 562.011 or 562.061, RSMo.

In our opening Brief defendant discussed the history and sources of an employee's responsibility for conduct relating to the duties of the employer, in this case Housecalls, and the employee's responsibility, or lack of responsibility under Sections 562.011 and 562.061, RSMo. Defendant discussed the sources of the statutes and concluded that defendant was not responsible for a failure to perform an act required of the employer.

The State's response suggests liability under Section 562.061, and does not mention Section 562.011 in its Statement of this Point. (Respondent's Brief, page

27). On page 30, the State reverses the thrust of its Point by referring to Section 562.011. Its argument attempts to apply subsection 4 of Section 562.011 but ignores that subsection's language that "a person is not guilty of an offense based solely upon an omission to perform an act unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law." Here the State failed to show any duty of defendant to perform an omitted act. The State cannot prevail by saying defendant is an individual and the law says it applies to an individual. Defendant is not an individual who owns the business. The corporate owner is the only party who may be responsible, and the State cannot pierce the corporate veil.

The State's casual reference to *People v. Parvin*, 533 N.E. 2d 813 (Il. 1988), which clearly holds under a statute similar to Section 562.061 that the president and sole shareholder of a corporation could not be criminally responsible for the corporation's failure to pay a retailer's occupation tax. The instant case is stronger than the factual background considered by the Court in *Parvin*, because the Court did not consider reliance upon subsection 4 of Section 561.011, and *Parvin* was held not individually responsible for a violation of the Illinois criminal statute. The State's Brief fails to show a duty imposed by either the corporation or state law which would make the corporate officer criminally responsible for a failure to perform an act required of the corporation.

IV.

The trial Court erred in refusing to order the State to refrain from producing specific details and the nature of his prior conviction in the event defendant testified during the guilt phase of the trial, and in refusing to accept a stipulation by defendant, with an appropriate instruction by the Court, that defendant admitted the fact of his being guilty of a prior offense, because it was an abuse of discretion for the Court to deny defendant's request in that the purpose of developing the evidence at the guilt phase was for impeachment and to affect the credibility of defendant as a witness, and the prejudicial impact was a consequence of having the jury told of the specifics of his prior conviction, which in this instance was an offense similar to that which the jury was considering at the guilt phase, and such prejudicial impact outweighed any probative value in informing the jury at this stage of the proceedings of the exact nature of the prior conviction.

The State first asserts on page 43 of Respondent's Brief that this issue was not properly before the Court, apparently because defendant did not take the stand. There is no question as to his reason for not testifying; the State intended to cross-examine defendant not only about the fact that he had previously been convicted, which defendant was willing to admit, but the greater interest to the State was to fully expose the nature of the crime and also to question him about advice he

received from his then-trial counsel as to the elements of the crime (Tr. 114-116). The prosecutor was intent on poisoning the trial to a much greater extent than affecting defendant's credibility.

State v. Foster, 684 S.W. 2d 597 (Mo. App. E.D. 1985), cited by the State, is not relevant here because there was a different issue in *Foster* – whether a conviction as to which an appeal was pending was admissible for impeachment purposes. There is nothing in the *Foster* opinion to indicate that the State was going into the specifics of Foster's prior conviction. *State v. Oates*, 12 S.W. 3d 307 (Mo. banc 2000) is also beyond the scope of the issue in this case because Oates actually testified about prior specific misconduct of the victim, and this Court held that, inasmuch as defendant had opened up the issue, he was subject to cross-examination as to his own misconduct. *M.A.B. v. Nicely*, 909 S.W. 2d 669 (Mo. banc 1995), also cited by the State, discusses the issue of evidence of "prior convictions", but there is nothing in the opinion to indicate that the party was attempting to ask questions about the specifics of any conviction.

Defendant was aware in this case that if he testified, evidence of a conviction was admissible to affect his credibility, but the State wanted to go beyond the credibility effect and bring out the specifics of the conviction.

Respondent's Brief fails to make that distinction as to *M.A.B.* and other cases on which it relies. Those cases did not involve situations in which the defendant

was willing to stipulate to the fact of conviction, but objected to the details of the prior crime based upon the recognized fact that the sole purpose of cross-examination as to prior convictions is to affect credibility of the testifying defendant by the fact of a conviction.

Old Chief v. United States, 519 U.S. 172, 174, 117 S.Ct. 644, 647, 136 L.Ed. 2d 574 (1997) cited by defendant, held that it is an abuse of discretion because “the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction”.

State v. Toliver, 544 S.W. 2d 565, 568-569 (Mo. banc 1976), cited by the State, recognizes the appropriate limitation on the trial Court’s discretion: “The scope of such prior conviction inquiry is subject to the discretion of the trial judge to act, upon timely objection, to prevent probing of convictions for any purpose other than to affect the witness’s credibility.” [Emphasis supplied.]

This is exactly what defendant contended at the trial, that the judge’s discretion in a case of this nature must prohibit use of the specifics of the prior conviction, especially where the prosecutor was intent upon poisoning the record beyond the credibility effect by going into the nature of the prior offense. The trial Court’s ruling must be based upon a determination that the prejudicial impact outweighed any probative value, a standard which is clearly recognized in the *Old*

Chief case, not as a peculiarity of federal law but as a necessary correlary of a fair trial.

Because the United States Supreme Court in *Old Chief* clearly recognized and faced this issue, it provides as unassailable authority that defendant was improperly deprived of his right to testify by the threat of improper and prejudicial cross-examination.

Finally, we believe that *State v. Ellison*, ___ S.W. 3d ___ (Mo. banc No. SC 88468, decided December 4, 2007), is further conclusive support for defendant's position. In holding unconstitutional a statute authorizing evidence of crimes showing a propensity to commit the crime charged, this Court recognized certain statutory exceptions to the inadmissibility of prior criminal acts, such as motive, intent, absence of mistake or accident, a common scheme or plan, and the identity of the person charged. This Court did not discuss the exception contained in Section 491.050, RSMo, where convictions may be proved to affect credibility in a criminal case, but certainly that cannot be construed to make admissible the specifics of the criminal acts in a determination of credibility. This Court said: "Evidence of prior criminal acts is never admissible for the purpose of demonstrating the defendant's propensity to commit the crime of which he is presently charged. (Cases cited.) There are no exceptions to this rule."

With reference to the State's suggestion that the *Old Chief* decision is not applicable because it related to the admissibility of evidence under the Federal Rules of Evidence, and not to constitutional grounds, we believe that *Ellison* recognized the constitutional implications of evidence of prior crimes. To the extent that *Ellison* found the probative value/prejudicial effect consideration inapplicable to the propensity situation, this Court need not decide that issue here because the only purpose of prior crime evidence in this case was as to its effect upon the defendant's credibility. The prosecutor's statements as to what he wanted to do with the evidence goes far afield of any credibility effect. The probative value/prejudicial effect is applicable here, and certainly the prejudicial effect far outweighs any probative value.

VI.

The trial Court erred in not taking remedial action for the State's belated production and concealment of evidence to contradict the State's unfounded accusation of adulterous misconduct by defendant and Ms. Uchechi Brown because the State not only violated the *Brady* rule of disclosure in that the State had previously produced corporate documents of all other companies in which defendant was involved but apparently purposely withheld the corporate records of another company until the trial was completed, as a result of which defendant was prejudiced by not having access to the document which showed that there was no misconduct by defendant and Ms. Brown.

In defendant's post-trial Motion to Set Aside Jury Verdict and to Enter Judgment of Acquittal or, in the Alternative to Grant a New Trial (LF 58-86), paragraph 49 (LF 68-86) was a motion for a new trial based on newly discovered evidence . It was supported by an Affidavit and presented a clear and undisputed record of concealment of material which should have been disclosed by the State to defendant prior to trial, pursuant to Supreme Court Rule 25.03, and a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1983). Defendant's allegations were detailed, but the State filed no response and presented nothing to the trial Court when the motion was considered. Instead, the State now

presents an argument to this Court in Respondent's Brief, without corroboration of the State's contentions that relief should be denied by this Court.

That there was a violation of Rule 25.03 is clear because a crucial document was not produced prior to trial of the instant case, even though it was in the possession of the State, and the material was such that it should have been produced as *Brady* material pursuant to Rule 25.03(A)(9). The State argues that a crucial document was ultimately produced in a new case against the same defendant and that the State was represented by the Missouri Attorney General's office (Respondent's Brief, page 54). The State recognizes on page 55 of its Brief that defendant "seems to imply that the assistant Attorney General trying the *Day Star* case failed to comply with the rule, and that such failure should be imputed to the Assistant St. Louis County Prosecuting Attorney trying the instant case." On page 57 the State says that "appellant appears to treat the St. Louis County Prosecuting Attorney's Office and the Missouri Attorney General's Office as fungible entities, but he cites no authority to suggest that the actions taken by one governmental entity in a case it is prosecuting should be imputed to a different governmental entity prosecuting a separate case."

Defendant's position is not as preposterous as the State suggests; in fact it is the law in Missouri. See *State v. Burson*, 698 S.W. 2d 557 (Mo. App. E.D. 1985). The Court held that a deal made by a prosecutor in one county of the state is

binding on prosecutors in another county, and the Court said (698 S.W. 2d at 559:

“The office of prosecutor is integral and binds the sovereign in criminal proceedings no matter through which agent is speaks. A promise to the defense made by one prosecutor is imputable to the state and controls other prosecutors.”

Burson relied upon *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 421(1971), *Sims v. Wyrick*, 552 F. Supp. 748 (W.D. Mo. 1982), and *State v. Allen*, 530 S.W. 2d 415 (Mo. App. 1975). *Burson* also followed comparable Illinois law, citing *People v. Wantland*, 78 Ill. App. 3d 741, 34 Ill. Dec. 92, 397 N.E. 2d 548 (1979). *Burson*, quoting from *Santobello*, imposed a duty on government prosecutors (at p. 559-560):

“The staff lawyers in a prosecutor’s office have the burden of ‘letting the left hand know what the right hand is doing’ or has done. That the breach of agreement was inadvertent does not lessen its impact.”

The “prosecutor’s office” would include those in the Attorney General’s Office and the St. Louis County Prosecuting Attorney’s Office who were engaged in the investigation and prosecution of this defendant. In fact, Supreme Court Rule

25.03(C) requires disclosure of documents “in the possession or control of other governmental personnel”.

The Court in *Burson* concluded (698 S.W. 2d at 560), based upon *Santobello*, *Sims*, *Allen*, and *Wantland*, and we have taken the liberty of interpolating the Court’s language to include the instant case: “[T]he agreement [here, obligation to produce] binds every other prosecutor in the state to the extent necessary to fulfill the promise made by the state [here, to fulfill the obligation of the state to produce].”

CONCLUSION

For all of the reasons set forth in his Opening Brief and in this Reply Brief, defendant respectfully suggests that this Court should reverse the judgment of conviction in the Circuit Court, and remand this cause for further action consistent with the opinion to be filed herein.

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CERTIFICATE OF SERVICE

Irl B. Baris, the undersigned attorney for Appellant Robert Salter in this appeal, hereby certifies that on the _____ day of February, 2008, he caused to be deposited in the United States Mail, First Class Postage prepaid, two copies of the foregoing Reply Brief and a floppy disk, properly addressed to Office of the Attorney General, State of Missouri, P. O. Box 899, Jefferson City, MO 65102, Attention Mr. Daniel N. McPherson.

IRL B. BARIS