IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC93074**
	)	
JERRY OUSLEY,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
22ND JUDICIAL CIRCUIT, DIVISION 7
THE HONORABLE JOHN RILEY, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

ROXANNA A. MASON, MOBar #61210
Assistant Public Defender
1010 Market Street, Suite 1100
Saint Louis, Missouri 63101
Phone: (314)340-7662
FAX: (314)340-7685
Roxy.Mason@mspd.mo.gov

ATTORNEY FOR APPELLANT

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JURISDICTIONAL STATEMENT

A City of Saint Louis jury convicted Jerry Ousley of forcible rape, and the trial court sentenced him to a term of fifteen years in the custody of the Missouri Department of Corrections (LF 65-66). Jerry appealed his conviction to the Missouri Court of Appeals—Eastern District in case number ED97047. The Court of Appeals affirmed his conviction. He then filed a motion for rehearing or transfer in the Court of Appeals, which was denied. Jerry filed an application for transfer in this Court, which was granted on February 26, 2013. The Court has jurisdiction over this appeal pursuant to Article V, Section 10 of the Missouri Constitution and Rule 83.04.

STATEMENT OF FACTS

On December 26, 1999, fourteen-year-old L.M. went to two malls in downtown St. Louis (Tr. 334, 465). She met up with her friend Barbara Nelson, and a boy named Shawn (Tr. 335). This was the first time her mother had allowed L.M. to go out on her own (Tr. 336). She was supposed to return home by dark, but she did not call her mother until around 7:00 p.m. to tell her she was on her way home (Tr. 336). L.M.'s mother was strict (Tr. 358). L.M. knew she would be in trouble for remaining out after dark (Tr. 358). Also, she had lied to her mother about her purpose in going to the mall—she was going to meet a boy (Tr. 436). She was afraid of getting into trouble (Tr. 435).

When she got home, she ran straight to the bathroom (Tr. 301). Her mother began "hollering in the bathroom, went to the bathroom and asked her to come out" (Tr. 301). Then L.M. claimed she had been raped (Tr. 374). L.M.'s mother testified to corroborate some collateral details of L.M.'s story, but she did not claim to have actually witnessed a rape (Tr. 297-317).

Over ten years later, the State charged Jerry Ousley with forcible rape for having sex with L.M. that night (Tr. 10-13). In the meantime, L.M. was convicted in federal court of fraud and identity theft (Tr. 366).

Indications that L.M. Admitted to Detective Horton That She Lied

The trial court was aware police reports indicate that shortly after that night, L.M. told Detective Horton that on her way home she walked into an alley with a boy (Tr. 334, 427). She told Horton she let the boy unfasten her pants (Tr. 428). Then she told him that she and the boy had sex but "He didn't do it for long because it was hurting me; I told him to stop and he did" (Tr. 428).

However, Detective Horton did not testify at trial (Tr. 427-28, *passim*). The defense investigator found him in southern Missouri (Tr. 606-07). A second investigator then determined Horton had moved to Illinois by speaking with neighbors (Tr. 607). The defense was able to get Horton on the phone, but Horton did not testify (Tr. 607, *passim*).

Evidence Jerry was Incapable of Forcible Compulsion

In December of 1999, Jerry was living with his grandmother, Yvonne Coburn, and his mother, Karen Coburn (Tr. 474). In the first part of that month, someone shot Jerry (Tr. 474). His grandmother saw him every day that month (Tr. 475). He spent most of the month on crutches or in bed (Tr. 475). He was in bed for about two weeks after the shooting, and then he was able to get around a little better (Tr. 475). However, he still was not getting around well on December 26 (Tr. 475). Jerry's grandmother would have testified to all of this information, but

the trial court would not let her (Tr. 16, 474-75, 529). Defense counsel made an offer of proof (Tr. 474-75).

Karen, Jerry's mother, also would have testified to similar facts, but the trial court prevented her from doing so (Tr. 16, 476-78, 529). She would have told the jury she lived with her son after he was shot that December (Tr. 477). She would have testified her son had lain around a lot and couldn't move around much (Tr. 477). She specifically remembered that he was laying around, in everyone's way, on Christmas day (Tr. 478). She knew he was on crutches at that time (Tr. 478).

The trial court prevented Yvonne and Karen from testifying twice (Tr. 16, 529). The first time was because of the State's motion in limine (Tr. 10-16). The State complained that defense counsel had not disclosed the women as witnesses until the Friday before the trial was to begin on Monday (Tr. 10). Defense counsel explained that he had not had any contact with the witnesses until the week before trial (Tr. 12). He explained that he intended to use a consent defense, and that these women would substantiate the defense claim that Jerry was physically unable to use the force the victim claimed he had used (Tr. 11). Their testimony would have shown that Jerry was physically incapable of grabbing L.M., dragging her into an alley, throwing her over a car, and raping her (Tr. 11).

The State complained that the late disclosure put it in a "position of not being able to talk to any medical personnel about what the effects of this gunshot

wound [would] have been, what [Jerry's] position would have been on the 26th as opposed to on the 2nd with regard to mobility, whether or not he received any follow-up treatment, whether or not he went to work" (Tr. 14). However, the State not only had time to speak with the very doctor who treated Jerry over a decade earlier, but was able to put her on the stand to testify about those issues in the rebuttal stage of the case (Tr. 511-29).

Defense counsel suggested that, if the State felt prejudiced, the trial could be continued a couple of weeks (Tr. 15). The State acknowledged that a continuance would be "one remedy" (Tr. 16). It provided no reasons or explanation for why a continuance would not suffice (Tr. 16). Neither did the trial court (Tr. 16). But rather than continuing the case, the trial court excluded Jerry's witnesses (Tr. 16). Jerry raised this issue in his motion for a new trial (LF 61).

The Trial Court Prohibited Jerry from Asking About Consent in Voir Dire

The trial court then moved on to voir dire (Tr. 25). During voir dire the State was allowed to question the jurors about different types of evidence it might put on at trial (Tr. 106-110). For example, it was allowed to ask, over objection, about whether the jurors would require medical evidence to find the defendant guilty (Tr. 106). It also asked the potential jurors, over objection, whether they could convict even if only one witness testified (Tr. 110-12). It even got to ask a juror whether he would automatically believe the sex was consensual if the

defendant and the accuser were close in age (Tr. 138). Jerry, however, was not allowed to question the potential jurors about biases they may have regarding his consent defense given the accuser's age (Tr. 263). The following transpired during defense counsel's voir dire:

Defense: Has anybody ruled out the possibility here of two teenagers, two young teenagers—

State: Objection, Your Honor. It's an improper question.

Court: Well, we haven't heard it, but maybe we should hear it at sidebar

(The following proceedings were had at the bench:)

Court: What are you going to ask the potential jurors?

Defense: Whether they can consider the possibility or do they automatically rule out the possibility of two teenagers that had consensual sex.

State: It's essentially the theory of his defense. It's an improper question. It's not going into any theory of bias or prejudice.

Court: That goes to—I'm not going to let you ask the question. What's your second question? You said you had two.

Defense: I'm sorry. One is whether anybody rules out the possibility of whether the witness is lying about the rape.

Court: Can't do that either. Haven't heard any evidence yet.

Defense: Okay.

Court: I'm not going to let you do that one. That's trying the case. Anything else?

Defense: No.

Court: Well, you didn't object to the second one, but I'm assuming you would.

State: I would.

Court: And I'm sustaining the objection.

State: Are you going to get into the priors?

Defense: No, I've already explained that, I think it's been overruled.

State: All right.

Court: That's that.

Defense: No, I have to think of another question. All right. I'm finished. I'll ask the closed question. Here's my issue. He was 19 at the time and she was 14. Sex occurred.

He's not charged with statutory rape. He's charged with forcible.

Court: Yes.

Defense: But I should be able to say, at least to the jury, if you hear evidence, you know, that two teenagers close in age had sexual intercourse and you believe that, does that automatically in your mind—does that mean automatically you're going to find somebody guilty of forcible rape. [sic]

Court: I think the question gets into why we're here in terms of the jury finding the facts. The question that you're proposing is designed to alert the jury as to what they're going to be hearing, and I don't think that's what voir dire is all about. And also, I believe to some extent, it's asking these people to make a commitment, which would certainly help you in the selection of who should hear the case. But I think that it goes beyond a neutral question to find out bias and prejudice, so I'm not going to let you ask the question.

(Tr. 263-65). Jerry challenged this ruling in his motion for a new trial (LF 61).

Jerry's Testimony

Eventually, after making an offer of proof as to what Yvonne and Karen would have testified about and introducing his medical records into evidence, Jerry testified (Tr. 462-79). He explained that someone shot him in December 1999 (Tr. 480). When he was shot he went to the hospital (Tr. 482). The bullet chipped his "pelvis bone" (Tr. 482). He believed the bullet was lodged near his spine (Tr. 482). He was scared that if he moved the wrong way the bullet would move and he could damage his spine (Tr. 483). So, he mainly laid around for a couple of months, although he got around on crutches after a couple of weeks (Tr. 483).

Jerry also explained that he did not specifically remember having sex with L.M., but that as a teenager he slept with many girls (Tr. 484-85). He testified he never in his life raped anyone (Tr. 487). And while he could not rule out having had sex with L.M., he never had sex with anyone in the ally where she claimed he raped her (Tr. 487).

Because Jerry testified, he also had to admit to the jury that he had prior convictions for robbery, attempted robbery, burglary, stealing, possession of a controlled substance, and possession of a firearm (Tr. 485-86).

Doctor Aft Eliminated the Prejudice from Jerry's Late Disclosure

After the defense rested, the State called Dr. Rebecca Aft as a rebuttal witness (Tr. 511). Dr. Aft was the doctor who treated Jerry for his gunshot wound

(Tr. 511). The State questioned her extensively about Jerry's injuries and tried to impeach his testimony about the nature of his injuries and his condition on December 26 (Tr. 511-26). Dr. Aft testified that a person with Jerry's injuries usually would have fully recovered from his pain between December 2nd and December 26th (Tr. 526).

The Trial Court Prohibited Jerry from Rebutting the Doctor

The defense then asked to call Yvonne and Karen in surrebuttal (Tr. 527). Trial counsel explained that these witnesses would "rebut the testimony from the doctor that their expectation would be that the patient would not be experiencing pain and would be ambulatory. Their testimony would rebut that presumption in her experience by their own personal observations of his condition from December 2nd until December 25th, December 26th" (Tr. 527).

The State objected, claiming this was an end run around the trial court's previous ruling excluding the witnesses, and that the witnesses had been in the courtroom during Dr. Aft's testimony (Tr. 527-28). The trial court dismissed the State's concern about the witnesses hearing the doctor's testimony because they had already testified in the offer of proof. The judge was "not worried about them changing the testimony" (Tr. 528).

The trial court then explained, "The issue in my mind is whether he can now call them if he was precluded from doing it, so—because of the scheduling order

and the other issues that came up. If their testimony hadn't been—if they hadn't been precluded from being called in the defendant's case because of the procedural issue, if that wasn't the situation, and he didn't call them in his case, I'm not sure he can call them now to rebut the medical report from your doctor" (Tr. 528).

Then the State complained that Jerry should not "get the benefit of surrebuttal because he didn't follow the rules of disclosure" (Tr. 529). The trial court confirmed with defense counsel that the witnesses' testimony would be the same in surrebuttal as it was in the offer of proof (Tr. 529). It then sustained the State's objection, and barred the witnesses from testifying in front of the jury (Tr. 529). Jerry challenged this ruling in his motion for a new trial (LF 61, Tr. 574-75).

The Court Omitted an Element from the Verdict Director

The trial court then held an instruction conference (Tr. 531). At the State's request, the trial court decided to use a verdict director the State claimed was in use in 1995 (Tr. 532). Defense counsel said he had no objections (Tr. 532). The verdict director, Instruction 6, only included two elements of forcible rape:

> If you find and believe from the evidence, beyond a reasonable doubt:
>
> First, that on or about December 26, 1999, in the City of St. Louis, State of Missouri, the defendant had sexual intercourse with [L.M.], and

> Second, that defendant did so by the use of forcible compulsion,
>
> Then you will find the defendant guilty of forcible rape.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(LF 53). The instruction then went on to define "forcible compulsion" and "sexual intercourse" (LF 53). The instruction did not require the jury to determine that Jerry acted knowingly in order to convict him (LF 53).

The State's Emphasis on the Accuser's Age in Closing Argument

The prosecutor in Jerry's case said at the beginning of closing argument, "All the while knowing that at 14 she got dragged into an alley, pushed over the hood of a car, and raped by a stranger. [L.M.] was barely 14 years old" (Tr. 536). Later the State argued, "And this is [L.M.] at that age. She was skinny. You heard Lance Coats tell you she was a knobby-kneed looking little girl. These pants would fit on my thigh, ladies and gentlemen. She was tiny. She was a little, knobby-kneed girl" (Tr. 539). The prosecutor brought up L.M.'s age at least seven more times during closing argument (Tr. 542, 558, 560, 563, 564).

The Last Thing the Jury Heard

The State talked about Jerry's gunshot wound in closing argument (Tr. 564-65). Specifically, it argued:

> He told you this whole song and dance about how he was hurt, and basically it couldn't have even been him, but for the DNA. Not true. You heard the doctor who treated him. He would have been fine. Probably would have had a little pain. She told you she was dragged into an alley. After 10 years [L.M.] deserves the justice she's been waiting for, and she only gets that when you find him guilty.

(Tr. 564-65). The jury heard this immediately before it deliberated (Tr. 565).

The jury deliberated from 3:38 p.m. until 6:10 pm (Tr. 565-68). It then returned to deliberate for another hour the next morning, before ultimately finding Jerry guilty (LF 56, Tr. 569). Jerry is now serving a fifteen year sentence in the Department of Corrections for that conviction (LF 65-66).

POINTS RELIED ON

I. The trial court erred by excluding Yvonne and Karen Coburn's testimony in both Jerry's case-in-chief and surrebuttal as a discovery sanction, because doing so denied Jerry his rights to present a defense and to due process[1], in that (1) the late disclosure did not prejudice the State, and (2) the testimony was essential to prove Jerry's defense that he was incapable of using forcible compulsion in December 1999, so the sex must have been consensual.

State v. Hopper, 315 S.W.3d 361 (Mo. App. S.D. 2010)

State v. Simonton, 49 S.W.3d 766 (Mo. App. W.D. 2001)

State v. Williams, 119 S.W.3d 674 (Mo. App. S.D. 2003)

Mo. Const. Art. I. § 10

U.S. Const., Amends. V, VI, and XIV

[1] As guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution.

II. The trial court erred by prohibiting Jerry from asking the venire persons whether they could consider the possibility that two teenagers had consensual sex or if they would automatically rule out such a possibility, because the prohibition denied Jerry his right to a fair and impartial jury and due process[2], in that the question did not seek an improper commitment and was not phrased to inject prejudice into voir dire, but instead was crafted so as to uncover bias and prejudice the potential jurors may have had regarding teenagers' ability to consent to sex.

State v. Clark, 981 S.W.2d 143 (Mo. banc 1998)

State v. Ezell, 233 S.W.3d 251 (Mo. App. W.D. 2007)

State v. Leisure, 749 S.W.2d 366 (Mo. banc 1988)

State v. Reed, 629 S.W.2d 424 (Mo. App. W.D. 1981)

Mo. Const. Art. I. §§ 10 and 18(a)

U.S. Const., Amends. V, VI, and XIV

[2] As guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

III. The trial court erred by instructing the jury with Instruction 6, because the instruction the trial court used denied Jerry of his right to due process of law and a fair trial[3], in that the instruction failed to comply with MAI-CR 3d 320.02 and Mo. Rev. Stat. § 566.030, in that it completely omitted the necessary element of the offense that the defendant acted knowingly.

State v. Bryant, 756 S.W.2d 594 (Mo. App. W.D. 1988)

State v. Neal, 328 S.W.3d 374 (Mo. App. W.D. 2010)

Mo. Rev. Stat. § 562.021

Mo. Rev. Stat. § 566.030

Mo. Const. Art. I. §§ 10 and 18(a)

U.S. Const., Amends. V, VI, and XIV

Rule 28.02

Rule 30.20

MAI-CR 3d 320.02

[3] As guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

ARGUMENT

I. The trial court erred by excluding Yvonne and Karen Coburn's testimony in both Jerry's case-in-chief and surrebuttal as a discovery sanction, because doing so denied Jerry his rights to present a defense and to due process[4], in that (1) the late disclosure did not prejudice the State, and (2) the testimony was essential to prove Jerry's defense that he was incapable of using forcible compulsion in December 1999, so the sex must have been consensual.

Standard of Review

Whether to exclude evidence as a sanction for a discovery violation is within the trial court's discretion. *State v. Hopper*, 315 S.W.3d 361, 366 (Mo. App. S.D. 2010). However, because the trial court has a **duty** to ensure a fair trial by allowing the defendant to put on a complete defense, this sanction should be used sparingly. *Id.* (emphasis added) The Court will reverse where the trial court's action "resulted in fundamental unfairness to the defendant." *Id.* at 368. To determine whether the exclusion resulted in fundamental unfairness, the Court will consider (1) the harm to the State as a result of the discovery violation, and (2) the prejudice to the defendant as a result of the exclusion of the testimony, considering

[4] As guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution.

the nature of the charges, evidence presented, and role of the excluded evidence in the defense theory. *Id.* at 369-70. "When it comes to applying evidentiary principles or rules, the erroneous exclusion of evidence in a criminal case creates a rebuttable presumption of prejudice" *Id.* at 367. The State can rebut this presumption by proving the error was harmless beyond a reasonable doubt. *Id.* at 367.

Analysis

Trial counsel disclosed Yvonne and Karen as witnesses after the deadline the trial court set. But the trial court abused its discretion when it excluded those witnesses, and then excluded them again during surrebuttal. The late disclosure did not prejudice the State in any way, but the exclusion of the witnesses significantly prejudiced Jerry, resulting in fundamental unfairness.

The Trial Court's Initial Exclusion of the Witnesses

The trial court originally prohibited Yvonne and Karen from testifying because of the State's motion in limine (Tr. 10-16). The State complained that defense counsel had not disclosed the women as witnesses until the Friday before the trial was to begin on Monday (Tr. 10). Defense counsel explained that he had not had any contact with the women until the week before trial (Tr. 12). He explained that he intended to use a consent defense, and that these women would

substantiate the defense claim that Jerry was physically unable to use the force the victim claimed he had used, meaning the sex must have been consensual (Tr. 11).

The State claimed that the late disclosure put it in a "position of not being able to talk to any medical personnel about what the effects of this gunshot wound [would] have been, what [Jerry's] position would have been on the 26th as opposed to on the 2nd with regard to mobility, whether or not he received any follow-up treatment, whether or not he went to work" (Tr. 14).

Defense counsel suggested a continuance if the State felt prejudiced (Tr. 15). The State acknowledged that a continuance would be "one remedy" (Tr. 16). It provided no reasons or explanation for why a continuance would not be a sufficient remedy (Tr. 16). The trial court did not express any reasons why a continuance would not be a sufficient remedy (Tr. 16). But rather than continuing the case, the trial court excluded Jerry's witnesses.

Without his Witnesses, the Only Way to Present the Defense was Through Jerry's Testimony

This meant that the only evidence Jerry could present in his case-in-chief that he was still suffering on December 26th and thus was physically incapable of forcible compulsion was his own testimony. The lack of corroboration created three problems. First, Jerry was the defendant. In a criminal prosecution, reasonable jurors are aware guilty defendants have incentives to lie. Second, in all

likelihood he was extremely nervous about testifying and that nervousness could easily be interpreted as deception. And third, Jerry had prior convictions for robbery, attempted robbery, burglary, stealing, possession of a controlled substance, and possession of a firearm (Tr. 485-86). Jurors are allowed to consider past convictions when making credibility determinations. And, despite the instructions, a juror could have believed Jerry was more likely to be guilty this time because he had committed so many other crimes.

When more than one witness testifies, consistent versions of events corroborate one another. In Jerry's case, the accuser's mother was called not because she was an eye witness to the sex, but instead to corroborate parts of her daughter's story (Tr. 297-317). Corroboration makes evidence more credible.

Without Jerry's mother and grandmother's testimony, Jerry's testimony seemed less credible. After all, if he was completely laid up throughout the holiday season, a jury would quite rightfully wonder why he did not have a single person who could confirm his story. Prosecutors are even allowed to argue that a defendant's lack of corroborating evidence makes his story incredible. *State v. Macon*, 845 S.W.2d 695, 696 (Mo. App. E.D. 1993).

Dr. Aft's Testimony Eliminated all Prejudice from the Late Disclosure

The State called Dr. Rebecca Aft as a rebuttal witness (Tr. 511). Despite the State's early claims that it had been prejudiced by the late disclosure because it

would "not being able to talk to any medical personnel," it was able to find the very doctor who treated Jerry over a decade earlier (Tr. 14, 511). The State questioned her extensively about Jerry's injuries and tried to impeach his testimony about the nature of his injuries and his condition on December 26th (Tr. 511-26). Dr. Aft testified that a person with Jerry's injuries usually would have fully recovered from his pain between December 2nd and December 26th (Tr. 526).

Prejudice Eliminated, Jerry Tries Again to Call his Witnesses

Since any prejudice caused by the late disclosure had been eliminated, the defense then asked to call Yvonne and Karen in surrebuttal (Tr. 527). The defense explained that these witnesses would "rebut the testimony from the doctor that their expectation would be that the patient would not be experiencing pain and would be ambulatory. Their testimony would rebut that presumption in her experience by their own personal observations of his condition from December 2nd until December 25th, December 26th" (Tr. 527).

Jerry's offer of proof backs up defense counsel's assertions. Jerry's grandmother Yvonne would have testified that back in December of 1999, Jerry was living with her and his mother, Karen Coburn (Tr. 474). In the first part of that month, someone shot Jerry (Tr. 474). Yvonne saw Jerry every day that month (Tr. 475). He spent most of the month on crutches or in bed (Tr. 475). He was in bed for about two weeks after the shooting, and then he was able to get around a

little better (Tr. 475). However, he still was not getting around well on December 26 (Tr. 475). Karen, Jerry's mother, would have told the jurors her son laid around a lot and couldn't move around much (Tr. 477). She specifically remembered that he was laying around, in everyone's way, on Christmas day (Tr. 478). She knew he was on crutches at that time (Tr. 478).

The State objected to Jerry calling Yvonne and Karen in the rebuttal stage, claiming this was an end run around the trial court's previous ruling excluding the witnesses, and that the witnesses had been in the courtroom during Dr. Aft's testimony (Tr. 527-28). The trial court dismissed the State's concern about the witnesses having been in the courtroom during the doctor's testimony because they had already testified in the offer of proof, so he was "not worried about them changing the testimony" (Tr. 528).

The trial court then explained, "The issue in my mind is whether he can now call them if he was precluded from doing it, so—because of the scheduling order and the other issues that came up. If their testimony hadn't been—if they hadn't been precluded from being called in the defendant's case because of the procedural issue, if that wasn't the situation, and he didn't call them in his case, I'm not sure he can call them now to rebut the medical report from your doctor" (Tr. 528).

Then the State complained that Jerry should not "get the benefit of surrebuttal because he didn't following the rules of disclosure" (Tr. 529). The trial

court confirmed with defense counsel that the witnesses' testimony would be the same in surrebuttal as it was in the offer of proof (Tr. 529). It then sustained the State's objection, and prevented the witnesses from testifying in front of the jury (Tr. 529).

Under the Hopper Test, the Trial Court Abused its Discretion

Under the *Hopper* test, this violated Jerry's right to present a defense. The first prong of the test is the harm to the State as a result of the discovery violation. Here, the late disclosure caused no prejudice. The only prejudice the State ever asserted was that it did not have time to talk to a doctor. But the Dr. Aft's testimony proves not only that the State got to Jerry's treating physician, but that it had time to get her in to court and have her testify at length, even though she had treated Jerry over a decade earlier.

The second prong of the *Hopper* test is the prejudice to the defendant as a result of the exclusion of the testimony, considering the nature of the charges, evidence presented, and rule of the excluded evidence in the defense theory. This was a forcible rape case, and Jerry's defense was consent. The only other evidence Jerry could present to prove consent was his testimony, which the jury was not likely to believe without corroboration.

This violation of Jerry's rights was an abuse of discretion. A trial court's "refusal to allow testimony in a criminal case is a 'drastic remedy.'" *State v.*

Anderson, 18 S.W.3d 11, 16 (Mo. App. W.D. 2000) (quoting *State v. Mansfield*, 637 S.W.2d 699, 703 (Mo. banc 1982)). When a trial court fashions sanctions for a defendant's discovery violations, it tries to remove or ameliorate any prejudice suffered by the State. *State v. Simonton*, 49 S.W.3d 766, 781 (Mo. App. W.D. 2001).

"The mere fact of late endorsement does not in itself show prejudice." *State v. Cameron*, 604 S.W.2d 653, 657-59 (Mo. App. E.D. 1980). Here the prejudice was completely cured by the State's calling Jerry's treating physician as a witness in rebuttal. If the prejudice to the State is nonexistent or negligible, witness exclusion is inappropriate. *State v. Martin*, 103 S.W.3d 255, 260 (Mo. App. W.D. 2003).

Even if the prejudice had not been eliminated, a continuance would have completely cured it, while the "remedy of disallowing the relevant and material testimony of a defense witness essentially deprives the defendant of his right to call witnesses in his defense." *Mansfield*, 637 S.W.2d at 703. If the State needs more time to prepare, it can ask for a continuance. *Simonton*, 49 S.W.3d at 782-83.

The State compounded the violation of Jerry's rights. At the end of its last closing argument, it said:

> He told you this whole song and dance about how he was hurt, and basically it couldn't have even been him, but for the DNA. Not true.

> You heard the doctor who treated him. He would have been fine. Probably would have had a little pain. She told you she was dragged into an alley. After 10 years [L.M.] deserves the justice she's been waiting for, and she only gets that when you find him guilty.

(Tr. 564-65). The State convinced the trial court to exclude Jerry's evidence that he was not fine, and then argued in closing that he was fine.

No Discovery Violation in Rebuttal Stage

Missouri law does not require disclosure of rebuttal evidence. *State v. Williams*, 119 S.W.3d 674, 677 (Mo. App. S.D. 2003). So Jerry could have just remained silent about his mother and grandmother, testified himself, waited for the State to call the doctor in rebuttal, and then called his relatives in surrebuttal without violating any rules at all. Therefore, even if the trial court did not err in initially excluding the witnesses, doing so in the surrebuttal stage constituted an abuse of discretion.

Because the State suffered no prejudice, and because the witnesses were vital to Jerry's defense, the trial court abused its discretion by excluding their testimony. That abuse resulted in fundamental unfairness and violated Jerry's rights to present a defense and to due process of law. Jerry should get a new trial.

II. The trial court erred by prohibiting Jerry from asking the venire persons whether they could consider the possibility that two teenagers had consensual sex or if they would automatically rule out such a possibility, because the prohibition denied Jerry his right to a fair and impartial jury and due process[5], in that the question did not seek an improper commitment and was not phrased to inject prejudice into voir dire, but instead was crafted so as to uncover bias and prejudice the potential jurors may have had regarding teenagers' ability to consent to sex.

Standard of Review

Rulings in voir dire are reviewed for an abuse of discretion. *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1998). "A liberal latitude should be afforded as venirepersons do not always recognize or easily give up their biases or predispositions." *State v. Ezell*, 233 S.W.3d 251, 253 (Mo. App. W.D. 2007).

Analysis

Jerry tried to question the potential jurors about his consent defense. He wanted to discover whether any of the venire had any ingrained biases or prejudices about a consent defense as it applied to two teenagers having sex.

[5] As guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

However, the trial court would not allow him to ask even one question about the issue (Tr. 263).

The Questioning

During voir dire the State was allowed to question the jurors about different types of evidence it might put on at trial (Tr. 106-110). For example, it was allowed to ask, over objection, about whether the jurors would require medical evidence to find the defendant guilty (Tr. 106). It also asked the potential jurors, over objection, whether they could convict even if only one witness testified (Tr. 110-12). It even got to ask a juror whether he would automatically believe the sex was consensual if the defendant and the accuser were close in age (Tr. 138). Jerry, however, was not allowed to question the potential jurors regarding biases they may have regarding his evidence (Tr. 263). The following transpired during defense counsel's voir dire:

Defense: Has anybody ruled out the possibility here of two teenagers, two young teenagers—

State: Objection, Your Honor. It's an improper question.

Court: Well, we haven't heard it, but maybe we should hear it at sidebar

(The following proceedings were had at the bench:)

Court: What are you going to ask the potential jurors?

Defense: Whether they can consider the possibility or do they automatically rule out the possibility of two teenagers that had consensual sex.

State: It's essentially the theory of his defense. It's an improper question. It's not going into any theory of bias or prejudice.

Court: That goes to—I'm not going to let you ask the question. What's your second question? You said you had two.

Defense: I'm sorry. One is whether anybody rules out the possibility of whether the witness is lying about the rape.

Court: Can't do that either. Haven't heard any evidence yet.

Defense: Okay.

Court: I'm not going to let you do that one. That's trying the case. Anything else?

Defense: No.

Court: Well, you didn't object to the second one, but I'm assuming you would.

State: I would.

Court: And I'm sustaining the objection.

State: Are you going to get into the priors?

Defense: No, I've already explained that, I think it's been overruled.

State: All right.

Court: That's that.

Defense: No, I have to think of another question. All right. I'm finished. I'll ask the closed question. Here's my issue. He was 19 at the time and she was 14. Sex occurred. He's not charged with statutory rape. He's charged with forcible.

Court: Yes.

Defense: But I should be able to say, at least to the jury, if you hear evidence, you know, that two teenagers close in age had sexual intercourse and you believe that, does that automatically in your mind—does that mean automatically you're going to find somebody guilty of forcible rape. [sic]

Court: I think the question gets into why we're here in terms of the jury finding the facts. The question that you're proposing is designed to alert the jury as to what they're going to be hearing, and I don't think that's what voir

> dire is all about. And also, I believe to some extent, it's asking these people to make a commitment, which would certainly help you in the selection of who should hear the case. But I think that it goes beyond a neutral question to find out bias and prejudice, so I'm not going to let you ask the question.

(Tr. 263-65).

The trial court abused its discretion by not allowing Jerry to ask the question about teenagers and consent. To find potential jurors' bias, counsel must inquire into relevant and critical facts of the case. *State v. Antwine*, 743 S.W.2d 51, 58 (Mo. banc 1987). The prosecutor's objection, "It's essentially the theory of his defense," was misinformed. That consent was Jerry's defense is exactly why he had to inquire about prejudices the jurors may have regarding that issue.

To Find Fair Jurors the Venire Must be Told Some Facts

The trial court's reasoning demonstrates it abused its discretion. It gave two reasons for its ruling. The first was that the question was "designed to alert the jury as to what they're going to be hearing, and I don't think that's what voir dire is all about" (Tr. 265). But if a trial court does not allow counsel to mention some evidence during voir dire, the right to an impartial jury lacks meaning. *See Clark*, 981 S.W.2d at 147. Voir dire requires "the revelation of some portion of the facts

of the case." *State v. Leisure*, 749 S.W.2d 366, 373 (Mo. banc 1988). The "jury is required to know something about the case in order to allow the court and all parties to ferret out bias." *Id.* at 374. So voir dire has to alert the potential jurors to what they will be hearing, in a general way, to determine if they have biases about those facts and issues.

While the jury does not need to know every fact, that the complaining witness and the defendant were teenagers when they had sex and that the defendant claimed it was consensual are important facts in this case. Consensual teenage sex is controversial. Jurors could have had biases about the issue based on their own experiences or their religious or moral beliefs. Some members of the venire panel, because of their experiences or beliefs, may have believed a fourteen-year-old girl could never truly consent to sex. While that may be a reasonable moral belief, it is not the law. Jerry needed to know if any of the venirepersons had that bias. But the trial court would not let him find out.

The Question Did not Ask for an Improper Commitment

The second reason the trial court gave for forbidding the question was a belief that it was asking for a commitment. In *State v. Ezell*, the Court recognized that there "is a tendency by counsel and sometimes by courts, to jump to the conclusion that every question containing the words 'would you believe/disbelieve automatically,' connected to some fact of the case, improperly seeks a

commitment" from the jurors. 233 S.W.3d at 253. The State and the trial court fell victim to that tendency. What the trial court should have considered is the relationship of the question to a critical fact in the case and if it was phrased so as to uncover bias rather than inject it. *Id.*

The question Jerry sought to ask was whether the prospective jurors could "consider the possibility or [would] they automatically rule out the possibility of two teenagers [having] consensual sex" (Tr. 263). He was clear that he did not intend to go into any of the facts that proved the sex was in fact consensual, and he only had two questions of that type (Tr. 263-65).

In *State v. Reed*, the Court evaluated whether a question asked for an improper commitment by asking whether it committed a juror to convicting or acquitting, or whether it committed the jurors to credibility determinations. 629 S.W.2d 424, 426-27 (Mo. App. W.D. 1981). However a juror answered Jerry's proposed question, it would not commit her to acquitting or finding guilt. And the question had nothing to do with credibility. The only commitment the question required was a commitment to consider all of the evidence and follow the law, which is appropriate.

This Case is Like Clark

Jerry was prejudiced because he was not allowed to ferret out jurors who categorically could not consider his consent defense. His case is analogous to

Clark. 981 S.W.2d at 147-48. The *Clark* court explained that if "only generic questions are asked, biased jurors 'could respond affirmatively, personally confident that [there] dogmatic views are fair and impartial, while leaving the specific concern unprobed.'" *Id.* at 147, *quoting Morgan v. Illinois*, 504 U.S. 719, 735 (1992) (brackets in original). It also explained that "some inquiry into the critical facts of the case is essential to a defendant's right to search for bias and prejudice in the jury who will determine guilt . . ." *Id.*

In *Clark* the trial court would not allow counsel to question the venire about the fact that the alleged victim was only three years old. This Court stated a "case involving a child victim can implicate personal bias and disqualify prospective jurors." *Id.* citing *State v. Wacaser*, 794 S.W.2d 190 (Mo. banc 1990). It went on to explain that trial courts are required to strike for cause prospective jurors when they are biased because of a child victim. *Id.* Here defense counsel was trying to determine whether the jurors would be biased because of the young age of the alleged victim—whether they would not be able to even consider a consent defense. The generic question about whether jurors could consider the testimony in light of all of the evidence could not root out such a specific bias. Whether a juror can consider a witness's inconsistencies as evidence relating to credibility has absolutely nothing to do with this specific bias. And the State's question of one juror as to whether that juror could convict a young person of forcibly raping

another young person only uncovers the opposite bias, not the bias Jerry was entitled to root out.

Jerry's case is also similar to *Clark* in that both prosecutors emphasized the youth of the victim in closing argument. This Court considered the prosecutor's emphasis on the victim's youth in determining Clark was prejudiced. *Id.* The prosecutor in Jerry's case said at the beginning of closing argument, "All the while knowing that at 14 she got dragged into an alley, pushed over the hood of a car, and raped by a stranger. [L.M.] was barely 14 years old" (Tr. 536). Later the State argued, "And this is [L.M.] at that age. She was skinny. You heard Lance Coats tell you she was a knobby-kneed looking little girl. These pants would fit on my thigh, ladies and gentlemen. She was tiny. She was a little, knobby-kneed girl" (Tr. 539). The prosecutor brought up L.M.'s age at least seven more times during closing argument (Tr. 542, 558, 560, 563, 564).

Jerry's proposed voir dire question was proper, and the trial court's not allowing him to ask it was an abuse of discretion. Because Jerry could not ask the question, he could not ferret out those potential jurors who, because of their biases, could not consider the defense that teenagers had consensual sex. This deprived Jerry of his rights to a fair and impartial jury and due process of law, entitling him to a new trial.

III. The trial court erred by instructing the jury with Instruction 6, because the instruction the trial court used denied Jerry of his right to due process of law and a fair trial[6], in that the instruction failed to comply with MAI-CR 3d 320.02 and Mo. Rev. Stat. § 566.030, in that it completely omitted the necessary element of the offense that the defendant acted knowingly.

Standard of Review

Jerry requests plain error review as allowed under Rule 30.20.

Analysis

The trial court used the wrong verdict director. It used a verdict director that omitted an element of the offense[7]. At the State's request, the trial court decided to use a verdict director the State claimed was in use in 1995 (Tr. 532). Defense counsel said he had no objections (Tr. 532). The verdict director said:

> If you find and believe from the evidence, beyond a reasonable doubt:

[6] As guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

[7] Jerry acknowledges that Missouri courts have previously disagreed with this argument, for example, in *State v. Dennis*, 153 S.W.3d 910 (Mo. App. W.D. 2005).

> First, that on or about December 26, 1999, in the City of St. Louis, State of Missouri, the defendant had sexual intercourse with [L.M.], and
>
> Second, that defendant did so by the use of forcible compulsion,
>
> Then you will find the defendant guilty of forcible rape.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(LF 53). The instruction then went on to define "forcible compulsion" and "sexual intercourse" (LF 53). The instruction did not require the jury to determine that Jerry acted knowingly in order to convict him (LF 53).

This was the wrong verdict director to use in Jerry's trial. Note on Use 1 of MAI-CR 3d 320.02 says, "This instruction applies to offenses committed on or after January 1, 1995…" As Instruction 6 noted, the crime in Jerry's case was alleged to have occurred in 1999 (LF 53). So the trial court should have used MAI-CR 3d 320.02.

The correct MAI and the instruction the trial court used differ in that the MAI includes a third element. The instruction should have said:

> If you find and believe from the evidence, beyond a reasonable doubt:
>
> First, that on or about December 26, 1999, in the City of St. Louis, State of Missouri, the defendant had sexual intercourse with [L.M.], and
>
> Second, that defendant did so by the use of forcible compulsion, and
>
> **Third, that the defendant did so knowingly,**
>
> Then you will find the defendant guilty of forcible rape.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR 3d 320.02 (emphasis added). The definition portions of Instruction 6 were correct. Just one essential element was missing.

"A verdict director must contain each element of the crime charged and failure to comply with approved instructions constitutes error." *State v. Neal*, 328 S.W.3d 374, 381 (Mo. App. W.D. 2010); Rule 28.02(f). "A verdict-directing instruction must contain each element of the offense charged and must require the jury to find every fact necessary to constitute essential elements of the offense charged." *State v. Doolittle,* 896 S.W.2d 27, 30 (Mo. banc 1995).

The *Neal* court considered two situations where leaving an element out of a verdict director may not cause plain error: (1) where the other instructions make it clear that the jury found the missing element beyond a reasonable doubt, and (2) where the missing element was not contested at trial. 328 S.W. 3d at 381. Neither situation applies in Jerry's case. None of the other instructions discuss or define any mental state, let alone a knowing state of mind (LF 47-55). Jerry was only charged with one count.

Further, the "knowing" element was contested at trial. In *Neal* the primary defense was that the victim was incredible and was lying about what had happened. *Id.* The State argued that this meant Neal was not contesting the allegations that he threatened to use a deadly weapon in connection with the robbery. *Id.* The Court said that this argument "strains the bounds of credibility." *Id.* "[I]t would be ludicrous to require a defendant to dispute every element of the crime of which he is charged, when he claims he did not commit the crime." *State v. Roe*, 6 S.W.3d 411, 416 (Mo. App. E.D. 1999).

Jerry claimed he did not commit the crime. He specifically testified that he had never in his life raped anyone (Tr. 487). He also specifically denied having had sex with anyone in the alley where L.M. claimed she was raped (Tr. 487).

That the jury found forcible compulsion does not necessarily mean it would have found that Jerry acted knowingly. *State v. Bryant* is instructive. 756 S.W.2d

594, 597 (Mo. App. W.D. 1988). *Bryant* dealt with a rape that allegedly occurred in 1986. *Id.* In 1986, forcible compulsion was an element of rape. *Id.* However, in 1986 rape could be committed either knowingly or recklessly. *Id.*

The law has changed regarding the required mental state. Both now and in 1999 recklessness was not enough—now the defendant must act knowingly to commit forcible rape due to a change in Mo. Rev. Stat. § 562.021 in 1993. *See, State v. Crenshaw*, 59 S.W.3d 45 (Mo. App. E.D. 2001); MAI-CR 3d 320.02. *Bryant* demonstrates that using forcible compulsion can be a reckless, rather than knowing, act. So the jury's finding that Jerry used forcible compulsion does not necessarily mean it would have found he acted knowingly, if asked.

Because the jury instruction completely omitted a necessary element of the charged offense, manifest injustice has resulted. The jury convicted Jerry without finding him guilty of each necessary element. Therefore, Jerry should get a new trial with a properly instructed jury.

CONCLUSION

Because Jerry was not allowed to present part of his defense or ferret out prospective jurors' prejudices, his trial was unconstitutionally unfair. Additionally, the jury could not find him guilty of each and every element of the crime, because it was mis-instructed. Therefore, Jerry requests the Court reverse his conviction and remand for a fair trial.

Respectfully submitted,

/s/ *Roxanna A. Mason*
Roxanna A. Mason, MOBar #61210
Assistant Public Defender
1010 Market Street, Suite 1100
Saint Louis, Missouri 63101
Phone: (314)340-7662
FAX: (314)340-7685
Email: Roxy.Mason@mspd.mo.gov

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on this 18th day of March, 2013, the foregoing and a copy of Appellant's Appendix were served to the Office of the Attorney General via the Missouri Electronic Filing System. I also certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 14 point font. The word-processing software indicated that this brief contains 8936 words. In addition, I hereby certify that I scanned this document and the appendix document for viruses with Symantec Endpoint Protection Anti-Virus software and both are virus-free.

/s/ *Roxanna A. Mason*