

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC95094
)	
CLAUDE CHAMBERS,)	
)	
Appellant.)	

APPEAL TO THE MISSOURI SUPREME COURT
 FROM THE CIRCUIT COURT OF CRAWFORD COUNTY, MISSOURI
 42ND JUDICIAL CIRCUIT, DIVISION 2
 THE HONORABLE KELLY W. PARKER, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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CASES:

State v. Smith, 353 S.W.3d 100 (Mo. App. W.D. 2011)4-5

JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from his original brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from his original brief.

REPLY ARGUMENT

I.

Mr. Chambers' argument that he cannot be convicted of any manner of committing deviate sexual intercourse than that alleged in the verdict director is not an unpreserved claim of instructional error.

Mr. Chambers alleges that the evidence was insufficient to support his conviction as charged and instructed upon, and that allowing his conviction to stand places him in jeopardy of twice being convicted for the same act.

In *State v. Smith*, 353 S.W.3d 100, 109 (Mo. App. W.D. 2011), Smith was charged with first-degree statutory sodomy for "placing his hand on the anus" of the victim, and this same conduct was submitted to the jury in the verdict director. The state conceded that Smith's placing a hand on the victim's anus did not satisfy the definition of deviate sexual intercourse, but argued that the conviction should nevertheless be affirmed because the evidence at trial did establish that Smith, in fact, penetrated the victim's anus with his finger, and such conduct satisfied the definition of deviate sexual intercourse. *Id.* The *Smith* Court declined to uphold the conviction because the jury - although it was given the definition of "deviate sexual intercourse" and heard evidence of conduct fitting that definition - was

not asked to make the finding that Smith penetrated the victim's anus with his finger. *Id.* The jury instruction did not hypothesize the specific conduct that Smith penetrated the victim's anus; the state failed to submit the offense that it intended to charge. *Id.* Because the facts as alleged by the state and submitted to the jury by the state were insufficient to sustain his conviction for sodomy, his conviction for that offense was reversed. *Id.*

Just as analysis of the verdict director in *Smith* was relevant to that Court's ruling on the sufficiency of the evidence to support the conviction, the verdict director submitted to Mr. Chamber's jury is relevant, and its inclusion in Mr. Chambers' analysis is not a veiled claim of instructional error.

Mr. Chambers may only be convicted of the offense charged and instructed upon. The state instructed the jury that it was to find Mr. Chambers guilty of statutory sodomy in the first degree if it found that he knowingly put an "object" in CR's anus (LF 33). An "object" is "a thing that you can see and touch and that is not alive."¹ The state did not prove the offense it elected to prove because no evidence was presented that an

¹ Definition of "object" found on October 30, 2015 at www.merriam-webster.com/dictionary/object.

“object” was put into CR’s anus. Mr. Chambers’ conviction should be reversed.

II.

Mr. Chambers provided notice of the time the motion for a change of venue would be presented to the court; the court’s failure to take up the motion as noticed does not constitute a waiver of the motion by Mr. Chambers.

At Mr. Chambers’ arraignment, the court asked counsel whether the case should be set for trial or set for a “motions day” (3/19/13 Tr. 2).² Mr. Chambers’ counsel responded:

We should schedule a motions day, I have filed a motion for change of venue today. I would like that taken up with Mr. Evans though since he will be the new attorney on the case.

(3/19/13 Tr. 2-3). The court responded that on April 16, all motions would be heard and trial would be scheduled (3/19/13 Tr. 3).

² On October 30, 2015, Appellant filed a motion in this Court to supplement the record on appeal with a transcript of the March 19, 2013 arraignment hearing. This transcript is cited to as (3/19/13 Tr.).

Mr. Chambers gave notice to the court and to opposing counsel when he would call up his motion for a change of venue, and the state had the opportunity to contest that motion immediately at arraignment or at the motion hearing set for April 16. Clearly, on April 16, the court's and parties' full attention was on setting a Chapter 491 hearing, and the motion for a change of venue was not discussed on that day nor at the Chapter 491 evidentiary hearing (Tr. 5-6, 7-40). At both appearances, Mr. Chambers was represented by counsel Evans, who did not file the motion for a change of venue.

At the next appearance on June 19, 2013, the court announced its ruling on the Chapter 491 evidence and the first jury trial setting was scheduled with Mr. Chambers' case listed third on the trial docket (Tr. 38-39). At the conclusion of the short hearing, the court announced, "Cause continued to November 19, 2013 at 1:00 p.m. to hear all pending motions and for last plea." (Tr. 40). Yet on November 19, the motion for change of venue was still not taken up (Tr. 41).

On the Sunday afternoon of the day before trial, Mr. Chambers' counsel notified the court that he discovered the motion for change of venue that was never ruled on, and he requested a change of venue (Tr. 45). The court elected to take up the motion on the record the next

morning, which was the first morning of trial (Tr. 45). Counsel for Mr. Chambers noted that the motion for a change of venue was filed by prior counsel (Tr. 43). The court noted that the motion was filed on March 19, and the case was passed to April 16 “to hear all pending motions” (Tr. 43). On April 16, the case was passed to May 22 for a Chapter 491 hearing, and the motion for change of venue was not taken up at that time; the case was passed to June 19 for a ruling (Tr. 43). On June 19, the Chapter 491 ruling was entered and the case was set for trial without objection by counsel and without counsel calling up the motion for a change of venue (Tr. 43-44).

The trial court found that Mr. Chambers waived his right to a change of venue when counsel remained silent at the June 19, 2013 setting of trial (Tr. 47). The court also found that on November 19, 2013, when the matter was set to hear all pending motions, counsel’s failure to raise the request for a change of venue was also a waiver of the request (Tr. 47). The court opined that counsel was “using” the motion for a change of venue to circumvent the court’s denial of counsel’s request for a trial continuance (Tr. 47-48).

Clearly the court and opposing counsel were notified of Mr. Chambers’ request for a change of venue. The question presented here is: when the trial court schedules, at defense counsel’s request, a “motions

day” to take up a change of venue in order that subsequent counsel is present to discuss where the case will be tried, whether subsequent counsel “waives” the request for a change of venue by failing to request a ruling on the motion? Relevant to that question is the trial court and opposing counsel having notice of the motion, the trial court’s duty to immediately order the case transferred to some other county convenient to the parties, and the trial court’s scheduling of a “motions day” to hear all pending motions, including the change of venue.

Clearly Mr. Evans did not know about the motion for a change of venue when he first appeared on Mr. Chambers’ behalf, but the court and the prosecuting attorney did. Mr. Chambers should not be deprived of his automatic right to a change of venue due to counsel’s being unaware of the motion. It was the court’s duty to rule upon the timely-filed application, so it was the court’s duty to make sure it was ruled upon during one of the two hearings the court specifically set for ruling on all pending motions. Counsel’s silence does not waive the court’s duty to rule on the motion it had notice of and which it twice set for hearing on a date certain.

CONCLUSION

As discussed here and in Appellant's Substitute Brief, there was insufficient evidence presented at trial to prove the act charged, and Mr. Chambers' conviction should therefore be reversed and Mr. Chambers discharged (Point I). In the alternative, Mr. Chambers' conviction should be reversed and his case remanded for a new trial in a new venue because the trial court erred in overruling his application for a change of venue and ordered that he proceed to trial in Crawford County (Point II). Mr. Chambers' case also merits a remand for a new trial because the trial court abused its discretion in overruling counsel's motion for a continuance of the first trial setting (Point III).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Margaret M. Johnston, 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 2007, in Book Antiqua size 13 point font, which is no smaller than 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 1,523 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 30th day of October, 2015, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Dora Fichter, Assistant Attorney General, at Dora.Fichter@ago.mo.gov.

/s/ Margaret M. Johnston

Margaret M. Johnston