IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC100676
	)	
ANTHONY TATE,	)	
	)	
Respondent.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 12
THE HONORABLE STANLEY J. WALLACH, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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I. Points One and Two – Insufficient Evidence of Serious Physical Injury

A. Relevant Facts

In his opening brief, Anthony Tate argued the state failed to present sufficient evidence to convict him of the class A felony of assault in the first degree in Count V (related to M.E.'s gunshot wound) and Count VII (related to A.H.'s gunshot wound) where the state affirmatively told the trial court it was only publishing one page of each victim's medical record and where these single pages of the medical records were insufficient to prove either victim suffered "serious physical injury."

The state published only page 28 of State's Exhibit 21 and page 22 of State's Exhibit 23.[1] (Tr. 220).

Page 28 of State's Exhibit 21 states that M.E. arrived at the hospital by ambulance with a gunshot wound to his left thigh and his left hand. (Ex. 21:28). He was discharged several hours later to "home or self-care." (Ex. 21:28). Follow-up information provided the contact information of an orthopedic surgeon. (Ex. 21:28). However, no details or reason why this information was provided was given. (Ex. 21:28).

Page 22 of State's Exhibit 23 states that A.H. arrived at the hospital by ambulance with a gunshot wound to his left lower leg. (Ex. 23:22). He was

[1] Several citations in Appellant's opening brief erroneously refer to page 26 of State's Exhibit 23. *See* App. Br. at 28. These citations should refer to page 22.

discharged in "stable" condition to "home or self-care." (Ex. 23:22). No information was provided regarding any upcoming appointments. (Ex. 23:22).

B. The state presented insufficient evidence to find either victim suffered serious physical injury

To convict a person of assault in the first degree, the state must prove the defendant "attempt[ed] to kill or knowingly cause[d] or attempt[ed] to cause serious physical injury to another person." Section 565.050.1, RSMo. The offense is a class B felony unless the defendant actually "inflicts serious physical injury on the victim . . . in which case it is a class A felony." Section 565.050.2, RSMo. Serious physical injury is defined as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body[.]" Section 556.061(44), RSMo 2017.

"Proof that a deadly weapon was fired at the victim, wounding him, is enough evidence for a jury to find the class B felony of assault in the first degree." *State v. Nguyen*, 880 S.W.2d 627, 635 (Mo. App. W.D. 1994), *overruled on other grounds by State v. Driver*, 912 S.W.2d 52 (Mo. banc 1995). "To raise [an] offense [of assault in the first degree] from a class B felony to a class A felony, there must be additional proof that serious physical injury was actually inflicted." *Id.* Merely being taken to the hospital with a gunshot wound is not enough to support a finding of serious physical injury. *Id.* at 631.

Here, the state presented sufficient evidence that both M.E. and A.H. suffered gun shot wounds. Thus, this evidence was sufficient to convict Mr. Tate of the class B felony of assault in the first degree.

However, based on the evidence published to the jury, the state failed to present any "additional proof" that M.E.'s gunshot wound to his left thigh or to his left hand "create[d] a substantial risk of death" or "cause[d] serious disfigurement or protracted loss or impairment of the function of any part of [his] body[.]" Likewise, the state failed to present sufficient evidence A.H.'s gunshot wound to his left lower leg "create[d] a substantial risk of death" or "cause[d] serious disfigurement or protracted loss or impairment of the function of any part of [his] body[.]" Without this additional evidence, the state failed to present sufficient evidence that Mr. Tate was guilty of the class A felony of assault in the first degree for Count V or VII.

In fact, the state does not contend that the two published pages of the medical records along with the other evidence at trial is sufficient to support a finding of serious physical injury for either M.E. or A.H. Instead, the state argues this Court should be able to consider the entirety of M.E.'s and A.H.'s medical records in determining the sufficiency of the evidence because they were "admitted" into evidence even though the state never published them to the jury.

C. A court's *discretion* to send admitted but unpublished exhibits to the jury is not relevant to the standard to a sufficiency of the evidence standard

The state's argument rests on the premise that because a trial court has discretion to send admitted but unpublished evidence to a jury during deliberations, all admitted evidence must be considered when reviewing the sufficiency of the evidence because the jury could have requested it. The state's argument is fundamentally flawed because in Missouri a court's *discretion* to send admitted but unpublished evidence to the jury does not create a bright line rule that a court *must* send this evidence to a jury.

For example, when admitted medical records contain matters not discussed at trial, a court does not abuse its discretion by refusing to send the medical records to the jury upon request. *State v. Roberts*, 948 S.W.2d 577, 596-97 (Mo. banc 1997). In *Roberts*, the trial court admitted without objection over 1,000 pages of unredacted medical records offered by the defense. *Id.* at 596. Defense counsel published only part of these medical records to the jury. *Id.* at 596-97. When the jury requested to review the medical records during deliberations, the trial court refused to send the exhibits. *Id.* at 596.

On appeal, this Court held the trial court did not abuse its discretion by refusing to send the properly admitted but unpublished exhibits to the jury. *Id.* at 596-97. This Court reasoned that because the records were voluminous, contained matters not discussed at trial, hearsay, and information that could have been misconstrued by the jury, the trial court was well within its discretion to decline to provide the medical records to the jury. *Id.*

Likewise, here, where the state affirmatively stated in open court it was only publishing one page of each victim's medical records, and, therefore, where defense counsel seemingly relied on the state's affirmative attestation and offered no argument or evidence to counter the almost 250 pages of medical records the state chose not to publish to the jury, it is plausible the trial court would have used its discretion and declined to send the medical records to the jury during deliberations.

Of course, the trial court's discretion to send the medical records to the jury is not the issue before this Court, but it illustrates the flaw in the state's reasoning. In Missouri, the mere "admission" of evidence at trial does not equate to the jury's "right" to review all admitted but unpublished evidence. Accordingly, because the jury may not have been able to review the medical records during jury deliberations, this Court cannot review the unpublished records to determine the sufficiency of the evidence.

When determining the sufficiency of the evidence, the reviewing Court must not "act as a 'super juror'" and instead, must continue to "give[] great deference to the trier of fact." *State v. Nash*, 339 S.W.3d 500, 509 (Mo. banc 2011); *Jackson v. Virginia*, 443 U.S. 307, 321 (1979). Thus, because in Missouri the jury has no absolute "right" to review all admitted evidence, and because no "reasonable factfinder" can determine facts they do not know, this Court cannot extend the principles developed in *State v. Graham*, 641 S.W.2d 102 (Mo. banc

1982), to create a bright line rule that all admitted evidence must be considered when reviewing the sufficiency of the evidence.

Notably, the overwhelming majority of the cases cited by the state relate – like *Graham* – only to the discretion a court has to send admitted but unpublished evidence to the jury upon the jury's request during jury deliberations and not to the use of unpublished exhibits when reviewing the sufficiency of the evidence. This in itself should certainly give this Court pause, given the state's insistence that this is a well-established rule.[2]

D. Tennessee law is inapposite to Missouri law because Tennessee mandates that jury's receive all exhibits received into evidence unless for good cause the court determines otherwise

The state cites several cases from Tennessee, most relevantly *State v. Pollard*, No. W201607788CCAR3D at *2, 4-6. In *Pollard*, the Court considered whether it could consider the portions of a video that were admitted into evidence without objection but not published to the jury when reviewing the sufficiency of the evidence. The Court concluded it could consider the entire contents of the video, reasoning that "[s]ince the jury could have properly considered the recording in its entirety in determining the Defendant's guilty, we may likewise

[2] Also notably, of the cases cited by the state, *Nelson v. Kansas*, No. 10-3135-RDR, 2011 WL 2462495 (D Kan. June 17, 2011); *Guilfoy v. Parris*, No. 3:18-CV-01371, 2023 WL 2601925 (M.D. Tenn. Mar. 22, 2023); *State v. Pollard*, No. W201601788CCAR3CD, 2017 WL 4877458 (Tenn. Crim. App. Oct. 30, 2017); *State v. Kennedy*, No. E2013-00260-CCA-R3CD, 2014 WL 3764178 (Tenn. Crim. App July 30, 2014); and *State v. Jenkins*, No. M202200693CCAR3CD, 2023 WL 5813706 (Tenn. Crim. App. Sept. 8, 2023), are all unpublished cases. As such, this Court should afford these cases little if any persuasive weight.

consider the entire recording in examining the sufficiency of the evidence." *Id.* at *5. The Court's holding, however, is narrowly premised on the specifics of Tennessee law and is, therefore, not broadly applicable.

Tennessee Rule of Criminal Procedure Rule 30.1, provides, "Unless for good cause the court determines otherwise, the jury shall take to the jury room for examination during deliberations all exhibits and writings, except depositions, that have been received into evidence." Thus, unlike in Missouri, Tennessee has created a "right" for the jury to consider all admitted evidence during jury deliberations. Thus, in *Pollard*, the Court found that because the state did not "limit the jury's consideration of the recording . . . to that portion of the recording that it published" and "the entire recording . . . was readily available for the jury to view during deliberations" under Rule 30.1, this evidence could be considered when determining the sufficiency of the evidence.

As discussed above, here it is unknown whether the trial court would have permitted the jury to review the entirety of the victims' medical records where the jury had no "right" to view unpublished evidence and the trial court had "discretion" to decide as such. Therefore, unlike in Tennessee, this Court cannot reason that because the unpublished portions of the medical records were "readily available" to the jury during deliberations that this Court can likewise consider them when determining the sufficiency of the evidence.

In fact, the law in Missouri leads to the opposite conclusion. Because admitted, unpublished evidence is *not* "readily available" to the jury during

deliberations but is only available at the discretion of the trial court, this Court cannot consider it when determining the sufficiency of the evidence.[3] As such, here, when properly considering the evidence the state actually presented to the jury at trial, the state failed to present sufficient "additional evidence" that M.E. or A.H. suffered serious physical injury from their bullet wounds. Accordingly, this Court should reverse Mr. Tate's convictions for his two counts of assault in the first degree (Counts V and VII) as well as the two related counts of armed criminal action (Counts VI and VIII).

[1] While it remains an open question whether admitted evidence that is unpublished at trial but is later given to the jury during deliberations at the discretion of the trial court can be considered when determining the sufficiency of the evidence, this Court need not answer this question given that here, the jury did not request or receive the victims' entire medical records.

CONCLUSION

Anthony Tate respectfully requests this Court to reverse his convictions for Counts V and VII for assault in the first degree as well as Counts VI and VIII for armed criminal and discharge him from these charges. As argued in Point Relied On III, Mr. Tate also respectfully requests this Court to reverse his convictions for murder in the first degree and the related armed criminal action count. In the alternative, as argued in Point Relied On IV, Mr. Tate requests this Court reverse all of his charges and remand his case for a new and fair trial.

Respectfully submitted,

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Certificate of Service

I, Carol D. Jansen, hereby certify to the following. The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, 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 2,284 words, which does not exceed the words allowed for an appellant's brief.

On this 5th day of December, 2024, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Greg Barnes, Assistant Attorney General, at Greg.Barnes@ago.mo.gov.

/s/ Carol D. Jansen

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