IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	**No. SC90775**
	)	
GEORGE BIGGS,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Greene County
The Honorable Thomas Mountjoy, Circuit Judge

APPELLANT'S REPLY BRIEF

MICHAEL BAKER
Attorney at Law
Missouri Bar No. 19893
3432 Culpepper Court, Suite A
Springfield, MO 65804
(417) 883-8200
(417) 883-3165 (Facsimile)

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

ARGUMENT I

The hearsay evidence introduced pursuant to Section 491.075 R.S.Mo. consisting of the testimony of Sheree Young, Carla Hancock, Officer Marvin Curtis Ringgold and Rachel Happell, and State's Exhibit 13 (video interview of LJY) was not independently admissible by reason of Sections 491.074 and 492.304 R.S.Mo.

Section 491.074 deals with the admission of prior inconsistent statements in a criminal case as substantive evidence and 492.304 deals with a video recording of a witness.

The prior inconsistent statements of a witness whether made in or out of court are admissible to impeach the witness's credibility Litton v. Kornburst, 85 S.W.3d 110, 114 (Mo. App. W.D. 2002). Evidence of the prior inconsistent statements "offered other than through the witness himself is extrinsic." State v. Foster, 854 S.W.2d 1, 8 (Mo. App. W.D. 1993). Before extrinsic evidence may be used to impeach a witness with regard to a prior inconsistent statement "the witness must be given a chance to refresh his recollection of the prior statement and admit, deny or explain it." Litton at 114. To impeach a witness with a prior inconsistent statement a proper foundation must be laid. Nichols v. Preferred Risk Group, 44 S.W.2d 886, 892 (Mo. App. S.D. 2001).

In this case the witness, LJY, had not made any statement which would qualify as a prior inconsistent statement. He had only stated that he could not remember. In most cases, in order to impeach one's own witness, the party has to show surprise by testimony and that the witness had essentially become a witness for the other side State v. Means, 797 S.W.2d 517 518-519 (Mo. App. E.D. 1990). While 491.075 exempts the State from this requirement, 491.074 has no such exemption, thus the hearsay statements of LJY, including those made in State's Exhibit 13, were not independently admissible for the reason that a proper foundation had not been laid. LJY was not given an opportunity to refresh his memory; admit, deny or explain; nor was it shown that he had surprised the State and had become a hostile witness or had become a witness for the defense.

The statements and exhibit were admitted under 491.075 and when Appellant objected that the State was impeaching its own witness, the prosecutor indicated he was not trying to impeach LJY (TR p 230-271), Appendix A-27). Had the State offered LJY hearsay statements as impeachment under 491.074 and Exhibit 13 under 492.304, Appellant would have been able to make an unconstitutional challenge as applied to these sections, as both are subject to the many of the same objections as Appellant has made to Section 491.075. They allow for the admission of hearsay as substantial evidence, although 492.304 does

not expressly state this, but does rely on 491.075; both allow bolstering of the witness. In fact, 492.304 expressly allows it.

491.074 R.S.Mo., unlike 491.075, is equally available for both sides. However, a criminal defendant through discovery is severely limited in discovering prior inconsistent statements of a witness under the age of 14 who is testifying in a case brought under Chapters 565, 566, 568 and 573 R.S.Mo. for the reason that 491.075 permits the unlimited admission of the child's statements and defense counsel would have to chose between deposing the witness and obtaining impeaching evidence or risk creating more evidence against the defendant.

Because of the peril of deposing such a witness, the Appellant was not aware that LJY was going to testify the way he did and unable to prepare. Had counsel been aware of the testimony, objection could have been made to the testimony of Sheree Young and Gayla Hancock because said testimony was introduced prior to LJY testifying.

Because the hearsay statements of LJY and Exhibit 13 were introduced under 491.075 R.S.Mo. and LJY had not made any statement contrary to those statements, the statements were not independently admissible as inconsistent statements. In addition, there was not a proper foundation laid for impeachment.

ARGUMENT II

The admission of hearsay statements under Section 491.075 R.S.Mo. does violate due process of law and equal protection of law, and State v. Wright, 751 S.W.2d 48, 53 (Mo. banc. 1988) was wrongly decided and should be overruled.

State v. Wright, 751 S.W.22d 48, 54 (Mo. banc. 1988) did hold that Section 491.075 R.S.Mo. did not violate due process of law or equal protection of law. It is Appellant's contention that as to due process and equal protection, it was wrongly decided.

Due Process.

In deciding that 491.075 did not violate due process, the opinion in Wright reasoned that since the Defendant had a trial and was able to present evidence, that this satisfies due process. The opinion does not deal with the issue of evidence or burden of proof other than to say that the statute allows the State to present relevant evidence. Id., at 53.

It is Appellant's contention that 491.075 violates due process because it permits the weakening or diluting of the State's burden of proving Appellant's guilt of the offense beyond a reasonable doubt. Proof beyond a reasonable doubt is included in the due process clause of the 5th and 14th Amendments to the United

States Constitution and in Article One, Section 10 of the Missouri Constitution. In re: Winship, 397 U.S., 358, 364 (1970). Proof and evidence, while not the same, are intertwined with each other.

Evidence has been defined as "any species of proof or probative matter legally presented at trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention." Black's Law Dictionary Revised Fourth Edition.

Proof is defined as "the effect of evidence; the establishment of a fact by evidence. Black's Law Dictionary Revised Fourth Edition.

It is a logical extension of due process to include evidence as a part because proof beyond a reasonable doubt is dependent of evidence.

Section 491.075 literally provides that in a case charged under Chapters 565, 566, 568 and 573 R.S.Mo. a witness 14 years of age and younger presented by the State is not subject to the rules of evidence and that such testimony, or out of court statements, are true. Counsel is not aware of any other such statute. The statute enables the admission of hearsay testimony either by prior inconsistent or consistent statements and permits bolstering of the witness. It mandates that such testimony and statements are to be considered as true (no matter whether the jury believed them) and that such statements are substantial evidence, which means that

a defendant's conviction could stand on the 491.075 evidence alone. This dilutes or weakens the State's burden of proof by permitting the trier of fact to consider evidence that in many cases would be excluded.

The Supreme Court of the United States held that the reasonable doubt standard is part of due process of law. In re: Winship, 397 U.S. 358, 364 (1970). The Court said "due process commands that no man shall lose his liberty unless the government has borne the burden of convincing the fact finder of his guilt. To this end, the reasonable doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." Id., at 364. Thus proof beyond a reasonable doubt is such proof that it proves the guilt of a defendant to near certitude. Jackson v. Virginia, 443 U.S. 307, 315 (1979). By mandating that otherwise inadmissible evidence be admitted as true and as substantial evidence, 491.075 weakens the burden of proof and makes it easier for the State to convict a criminal defendant charged under 565, 566, 568 and 573. Certainly, the more times a party can get its evidence before the jury, the more it becomes believable and this is the case with bolstering or consistent statements. By being able to bolster a witness who has not been impeached, the State's burden of proof has been lessened, which violates due process.

Equal Protection.

In Wright, 751 S.W.2d 48, 52, the Court found that 491.075 did not violate equal protection. It found the statute neither burdens a suspect class nor impinges a fundamental right. Appellant would argue that those charged under Chapters 565, 566, 568 and 573 R.S.Mo. where a child 14 years and younger is testifying is denied equal protection of law because 491.075 provides that the rules of evidence do not apply. The State is able to gain an unfair advantage because it is entitled to admit otherwise inadmissible hearsay and base a conviction on it. Further, it is allowed to impeach its own witness without a proper foundation and it is able to bolster its witness without said witness being impeached. A criminal defendant charged under other chapters of the statutes would have the benefit of protection of the Rules of Evidence if such a witness was testifying. It is still the law of this state that inadmissible hearsay and improper bolstering are not permitted and are grounds for reversal. State v. Cole, 867 S.W.2d 685, 689 (Mo. App. E.D. 1993).

Ordinarily, impeaching evidence and rehabilitating evidence are not admissible as substantive evidence. State v. Gregory, 96 S.W.2d 47, 52 (Mo. 1936). 491.075 mandates that it be substantive evidence is the evidence that an appellate court evaluates to decide if there was substantial evidence to support a conviction. By mandating that otherwise inadmissible hearsay be considered as

adequate for a conviction under Chapters 565, 566, 568 and 573 R.S.Mo., deprives these defendants of both due process and equal protection of the law.

It is informative to compare 491.075 to the Federal Rules of Evidence. Rule 801(d) of the Federal Rules of Evidence deals with the same evidence as does 491.075. It provides:

> "Statements which are not hearsay. A statement is not hearsay if –
>
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statements, and the statement is (a) inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (b) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person made after perceiving the persons.

801(d)(1)(B) was interpreted by the Supreme Court in Tome v. United States, 513 U.S. 150, 156 (1995). The Court ruled there was a timing requirement and admits only those statements made before the charged recent fabrication or improper influence or motive. The Tome case involved an issue where the government had been allowed to introduce six (6) out of court statements of a child abuse victim. The Supreme Court held that the statements were not admissible and reversed the

conviction. The Tome case is relevant to the issues presented here, even though Missouri has not adopted the Federal Rules of Evidence. Rule 801(d)(1)(B) continues the common law rule on the admission of prior consistent statements with the exception that if the statements qualify the come in as substantive evidence. This according to Justice Kennedy was a compromise between the scholars and the common law jurisdictions. Missouri also follows the common law rule on prior consistent statements, this being that prior consistent statements are admissible for the purpose of rehabilitating a witness whose credibility has been attacked by an express or implied claim of recent fabrication of trial testimony. State v. Ramsey, 864 S.W.2d 320, 329 (Mo. banc. 1993) citing as authority Federal Rules of Evidence 801(d)(1)(B). Apparently, Missouri follows the common law rule on prior inconsistent statements except in cases under Chapters 565, 566, 568 and 573 R.S.Mo. where the witness is 14 years of age or younger and is testifying for the State. Federal Rules of Evidence 801(d)(1)(B), unlike 491.075, applies to all litigants both civil and criminal. This is just another example of how 491.075 violates due process and equal protection. Appellant did not have the same protection of the Rules of Evidence as others not charged under Chapters 565, 566, 568 and 573. As stated by Justice Kennedy in Tome, 573 U.S. at 159, "that Rule 801(d)(1)(B) permits prior consistent statements to be used for substantive purposes after the statements are admitted to rebut the existence of improper

influence or motive makes it all the more important to observe the preconditions for admitting the evidence in the first place." Because 491.075 admits both prior inconsistent and prior consistent statements without regard for the rules of evidence and admits them as substantial evidence, Appellant was deprived of due process of law and equal protection of law and his conviction should be reversed.

CONCLUSION

For the foregoing reasons, Appellant's conviction should be reversed and remanded for a new trial, or if the facts permit, that the conviction be reversed and Appellant be discharged.

Respectfully submitted,

MICHAEL BAKER
Missouri Bar No. 19893
ATTORNEY FOR APPELLANT

Michael Baker
Attorney at Law
3432 Culpepper Court, Suite A
Springfield MO 65804
(417) 883-8200
(417) 883-3165 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of Appellant's brief was served on the Missouri Attorney General's Office, Supreme Court Building, PO Box 899, Jefferson City, MO, 65102, by hand delivery of the same, this___day of November, 2010.

MICHAEL BAKER
Missouri Bar No. 19893
ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I, Michael Baker, hereby certify the following:

That in filing Appellant's brief, Appellant's argument is not presented or maintained for any improper purpose and that the legal contentions contained therein are warranted by existing law and that there is evidentiary support in the record and that any denials of factual contentions are warranted on the evidence.

That this brief complies with the limitations contained in Rule 84.06(b); and that the number of words in the brief are 2,674 and the number of lines of monospaced type are 337. This was determined by using word and line count of the word processing system used in preparing the brief.

I further certify that the floppy disk submitted herein was scanned for viruses and that it is virus-free.

_____

MICHAEL BAKER
Missouri Bar No. 19893
ATTORNEY FOR APPELLANT