

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)
)
 Respondent,)
)
 v.)
)
 JERMANE CLARK)
)
 Appellant.)

No. SC92003

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 11
THE HONORABLE BRYAN L. HETTENBACH

APPELLANT'S SUBSTITUTE REPLY BRIEF

JESSICA HATHAWAY
Missouri Bar No. 49671
Office of the State Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
314.340.7662
314.340.7685
jessica.hathaway@mspd.mo.gov

ATTORNEY FOR APPELLANT

INDEX

TABLE OF AUTHORITIES	3
REPLY ARGUMENT	5
CONCLUSION	15
CERTIFICATE OF SERVICE AND COMPLIANCE.....	16

TABLE OF AUTHORITIES

CASES

Delaware v. Van Arsdall, 475 U.S. 673 (1986)12

Johnston v. 411744 A.H. Tannery, Inc., 262 S.W.3d 705 (Mo. App. W.D. 2008)..... 8

McMahon v. Geldersma, 317 S.W.3d 700 (Mo. App. W.D. 2010)..... 8

Mitchell v. Kardesch, 313 S.W.3d 667 (Mo. banc 2010) 6

State v. Butler, 984 S.W.2d 860 (Mo. App. W.D. 1998) 9

State v. Foust, 920 S.W. 949 (Mo. App. E.D. 1996)..... 6

State v. Francis, 997 S.W.2d 74 (Mo. App. W.D. 1999).....10

State v. Franklin, 16 S.W.3d 692 (Mo. App. E.D. 2000)10

State v. Gilbert, 121 S.W.3d 342 (Mo. App. S.D. 2003)..... 7

State v. Johnson, 700 S.W.2d 815 (Mo. banc 1985) 8

State v. Joiner, 823 S.W.2d 50 (Mo. App. E.D. 1991) 5, 9

State v. Lockhart, 507 S.W.2d 395 (Mo. 1974) 6

State v. March, 216 S.W.3d 663 (Mo. banc 2007)12

State v. Nicklasson, 967 S.W.2d 596 (Mo. banc 1998) 5

State v. Solven, 371 S.W.2d 328 (Mo. banc 1963) 5

State v. Thomas, 118 S.W.3d 686 (Mo. App. W.D. 2003) 6

State v. Watts, 813 S.W.2d 940 (Mo. App. E.D. 1991)..... 5

State v. Winfrey, 337 S.W.3d 1 (Mo. banc 2011)..... 5

REPLY ARGUMENT

The State argues the trial court had “broad discretion” to prohibit cross-examination of Maurice Payne on whether he expected his testimony in Mr. Clark’s case to benefit his own pending criminal case. Resp. Br. 11.¹ In support, the State cites *State v. Nicklasson*, 967 S.W.2d 596, 619 (Mo. banc 1998), which refers to the trial court’s “broad discretion” to determine whether evidence may be admitted during the penalty phase of a capital case.

But this is not a simple question of the admission or exclusion of evidence, and there is more specific guidance on the standard of review that the State omits. While a trial court has some discretion to limit cross-examination of an adverse witness, that discretion is meant to curtail repetition and harassment. *State v. Watts*, 813 S.W.2d 940, 943 (Mo. App. E.D. 1991). Contrary to the State’s presentation of the standard of review, a trial court has no discretion to foreclose cross-examination on a relevant topic. *State v. Joiner*, 823 S.W.2d 50, 54 (Mo. App. E.D. 1991). “Cross-examination about any issue is permissible if it shows the bias or interest of the witness.” *State v. Winfrey*, 337 S.W.3d 1, 8 (Mo. banc 2011)

¹ This brief will cite Respondent’s Substitute Brief as “Resp. Br.”

(citing *State v. Solven*, 371 S.W.2d 328, 332 (Mo. banc 1963)). “It is well-established that the interest of a witness is never irrelevant.” *Id.* (citing *Mitchell v. Kardesch*, 313 S.W.3d 667, 676 (Mo. banc 2010)).

Further, the record shows the trial court misapplied the law, and in such cases, there is no deference to its ruling. *State v. Foust*, 920 S.W.2d 949, 955 (Mo. App. E.D. 1996). A defendant is entitled to cross-examine a witness about the witness’s perception of leniency from the State when the witness has a pending criminal charge, even if there is no express deal with the State. *State v. Lockhart*, 507 S.W.2d 395, 396 (Mo. 1974); *State v. Thomas*, 118 S.W.3d 686, 691 (Mo. App. W.D. 2003).

The trial court’s reason for prohibiting cross-examination of Payne on this issue was that Payne’s pending criminal case was a “totally different case” and that Payne had “no deal” with the State. Tr. 270. This ruling was in response to the State’s puzzling complaint that Mr. Clark’s lawyer was unfairly portraying Payne as “dishonest” based on Payne’s belief that he could personally benefit from his testimony. Tr. 268. The trial court did not have discretion to prohibit cross-examination that would reveal Payne’s personal interest in testifying in a way that pleased the State. *Foust*, 920 S.W.2d at 955.

Despite the clarity of the law on this issue, the State argues that the trial court's ruling was correct. According to the State, Payne's expectation or hope of leniency was irrelevant, because Payne's pending criminal case was "essentially disposed of" when he testified against Mr. Clark. Resp. Br. 16-20. Citing *State v. Gilbert*, 121 S.W.3d 342, 345 (Mo. App. S.D. 2003), the State argues that since Payne's case was "essentially" closed at the time of this trial, any hope Payne had to curry favor with the prosecutor or court was not "rooted in reality." Resp. Br. 17.

Payne's expectation that his testimony may help him in his pending case was entirely reasonable. Payne's hope was based on the reality that successful completion of the eleven-month drug court program was hardly a foregone conclusion. The record reflects that Payne's pending case was City of St. Louis cause number 0922-CR06356-01. Tr. 266. Payne faced up to sixteen years in prison if he did not successfully complete the drug court program. Tr. 273. Case.net, the Missouri Court System's electronic case management system, reflects that Payne was released on his own recognizance by a drug court commissioner on April 22, 2010, two days after he testified for the State in this

case.² Case.net reflects that eleven days later, on May 3, 2010, a capias warrant issued because Payne failed to appear in drug court. According to Case.net, Payne was expelled from the drug court program on July 1, 2010, and his case returned to Division 11 in the City of St. Louis. Case.net further indicates that Payne appeared in court on August 13, 2010 and was sentenced to a term of eight years of imprisonment by Judge Hettenbach. For the State to argue Payne's case was "essentially disposed of" ignores that Payne reasonably perceived that his cooperation might help him at sentencing in his pending case. Moreover, Payne's failure to complete the drug court program and his subsequent sentencing belies

² Appellate courts have relied on information appearing in Case.net to decide issues on appeal. *See, e.g., McMahon v. Geldersma*, 317 S.W.3d 700, 706 (Mo. App. W.D. 2010) (where appellate court considered separate litigation against the defendant based on information from Case.net); *Johnston v. 411744 A.H. Tannery, Inc.*, 262 S.W.3d 705, 708 (Mo. App. W.D. 2008) (where appellate court reviewed electronic docket entries in Case.net to determine issue on appeal).

the notion advanced by the State that Payne's criminal case had been disposed of. Resp. Br. 17.

In further support of its argument, the State cites *State v. Johnson*, 700 S.W.2d 815 (Mo. banc 1985). Resp. Br. 17. The issue in *Johnson* involved, "the decision of the trial court not to allow defendant to use extrinsic evidence to further demonstrate to the jury [the witness's] prejudice and hostility toward defendant." 700 S.W.2d at 817. The defendant in *Johnson* was not allowed to use extrinsic evidence to prove bias, but was allowed to cross-examine the witness on the same topic. *Id.* Here, in contrast, the issue is not the admissibility of extrinsic evidence that would duplicate matters already covered in cross-examination.

In *Joiner*, 823 S.W.2d at 53, cited by the State, evidence of a witness's pending criminal case was improperly excluded. Resp. Br. 18. *Joiner* supports Mr. Clark's position, stating that cross-examination is essential on a witness's interest or motive to testify favorably for the State when the interest is "distinct and immediate, [when] the witness has an ongoing dual relationship with the prosecutor, or [when] the witness is of some service to the prosecution by giving testimony while his status and relation to the same prosecutor is vulnerable."

Joiner, 823 S.W.2d at 54.

In *State v. Butler*, 984 S.W.2d 860, 865 (Mo. App. W.D. 1998), the trial court did not allow the defendant to cross-examine a witness on allegedly “favorable treatment by the state in a pending case where the State did not object to a personal recognizance bond.” Resp. Br. 19. This case is not helpful to the State, however, because it does not involve a situation where a witness perceives possible benefit for himself. *Id.* The witness in *Butler* testified “that she had no expectation of any favorable treatment.” *Id.*

Likewise, *State v. Francis*, 997 S.W.2d 74 (Mo. App. W.D. 1999) does not aid the State. Resp. Br. 19-20. In *Francis*, the defendant wished to cross-examine a witness about a police search of his residence. *Id.* at 79. The Court found that area of cross-examination was irrelevant because the search did not lead to an arrest or any other criminal proceeding. *Id.* The excluded testimony in this case involved a witness’s pending criminal case. Tr. 273.

Finally, in *State v. Franklin*, 16 S.W.3d 692, 698 (Mo. App. E.D. 2000), the defendant was allowed to ask a State’s witness about a pending criminal charge, and argued on appeal that the witness *may* have had an expectation of leniency that the defendant was not permitted to explore. Resp. Br. 20. The Court found that argument “speculative,” because the defendant failed to make an offer of

proof on the issue. *Id.* at 698. In this case, the trial court was not required to speculate about whether Payne actually had an expectation of leniency—Payne expressly acknowledged that he did. *Id.*

With respect to prejudice, the State argues that despite the trial court’s ruling, Mr. Clark was able to argue “the idea” that both Payne and Shelby were biased and “might be seeking to curry favor with the State” based on the fact both had previously pleaded guilty to crimes, which the jury was instructed could be used to evaluate their general credibility. Resp. Br. 22. Further, the State argues that the excluded area of cross-examination left the jury open to “speculate” that Payne may have had a deal with the State, or hoped his testimony would benefit him personally. Resp. Br. 23.

But the Court should not have to resort to guesswork to determine what the jury could have speculated about during its deliberations. *State v. Davis*, 738 S.W.2d 517, 519 (Mo. App. S.D. 1987) (stating, “[a]n appellate court has no way of knowing—and should not speculate about—what evidence a jury did or did not believe and the extent to which that evidence entered into the jury’s decision-making process.”). Further, even if the jury had heard that no deal had been made in exchange for Payne’s testimony, that fact does not help the State. In the

absence of a deal, Payne had even more of an incentive to perform well in front of the jury and hope for a favorable sentencing recommendation by the State down the road. The fact is, all of this evidence was withheld from the jury, and it is not possible to guess how the evidence, as well as counsel's argument on this issue, would have affected the jury's view of Payne's credibility in this weak case.

The State must demonstrate the error was "harmless beyond a reasonable doubt," as the standard of review requires. *State v. March*, 216 S.W.3d 663, 667 (Mo. banc 2007); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). This standard of review requires the State to prove, beyond a reasonable doubt, that the error did not contribute to the jury's verdict. *March*, 216 S.W.3d at 667. The State has not come close to satisfying this burden.

The State argues that Payne's testimony was "cumulative to the testimony of Glenn Shelby." Resp. Br. 23. The State omits that Payne, and not Shelby, claimed to be an eyewitness to the shooting. Tr. 280-283. Moreover, Shelby's testimony was of little help to the State. After being caught with the murder weapon, Shelby claimed he had previously given the gun to Mr. Clark, and then accepted it back after Mr. Clark told him he had used it to shoot Mr. Thompson, presumably to explain why he had possession of the weapon. Tr. 232, 237, 251.

Even though Mr. Clark had allegedly told Shelby about having shot a man, Shelby never reported this information to the police, and eluded police after they discovered his gun was the murder weapon. Tr. 238, 239, 318. As the alleged eyewitness to the shooting, and someone who had not personally been caught with the murder weapon, Payne was essential to a conviction.

As far as the “overall strength of the State’s case,” the State argues there was “substantial evidence of Appellant’s guilt, including ballistics testing of the bullet in the victim’s clothing which matched the recovered gun.” Resp. Br. 24. This evidence does little to prove Mr. Clark’s guilt because it was Shelby who was arrested with the gun. Tr. 232. Outside of Shelby and Payne’s testimony, there was no evidence whatsoever that Mr. Clark was involved in the shooting or was even present when Mr. Thompson was killed. And there was certainly no evidence connecting him to the murder weapon. Tr. 232, 237, 251.

Further, substantial evidence existed that Mr. Clark was falsely accused by these two men and not guilty of the charged crimes. Unlike the other two men, Mr. Clark voluntarily turned himself in to police a few days after Payne and Shelby told detectives he committed this crime. Tr. 326, 333. He consented to a search of his apartment, as well as the search of a book bag he kept at his

girlfriend's apartment. Tr. 328-329, 334. Also, someone had made approximately fifty calls from the victim's stolen cell phone. Tr. 326-327. None of these calls had any connection to Mr. Clark. Tr. 326-327. Although the State could not corroborate the story that Shelby and Payne told, it still elected to prosecute Mr. Clark. Due to the weak case the State presented and the fact that trial counsel was unable to explore an essential area of cross-examination, this Court should have no confidence in the verdict the jury reached and should remand this case for a new trial.

CONCLUSION

The State has failed to show beyond a reasonable doubt that the verdict was unaffected by exclusion of this testimony about Payne's interest in cooperating with and testifying favorably for the State. This Court must reverse and remand for a new trial.

Respectfully submitted,

/s/ Jessica M. Hathaway

Jessica M. Hathaway, Mo. Bar #49671
Office of the State Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
Phone: (314) 340-7662
Fax: (314) 340-7685
jessica.hathaway@mspd.mo.gov

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this 30th day of December, 2011, a true and correct copy of the foregoing brief was sent via the Court's electronic filing system to Robert J. Bartholomew, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Plantagenet Cherokee Serif 13 point font, and does not exceed the greater of 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains **2,527** words.

/s/ Jessica Hathaway

Jessica M. Hathaway, Mo. Bar #49671
Office of the State Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
Phone: (314) 340-7662
Fax: (314) 340-7685
jessica.hathaway@mspd.mo.gov
ATTORNEY FOR APPELLANT