

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)
)
 Plaintiff-Respondent,)
) No. SC88274
 v.)
)
 ROBERT SALTER,)
)
 Defendant-Appellant.)

On Appeal from the Circuit Court of St. Louis County
Division No. 15
Hon. John A. Ross, Circuit Judge
(Circuit Court No. 05CR-823A)

BRIEF FOR APPELLANT
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JURISDICTIONAL STATEMENT

This is an appeal by defendant Robert Salter from a judgment of conviction and sentence on the Information in Lieu of Indictment, alleging a violation of §§ 287.128.5, RSMo, charging that defendant committed a Class E felony between February 1, 2004 and September 12, 2004, of failure to insure workers' compensation liability of a company, (Housecalls, Inc.) of which he was president (LF 7-8). This charge is ordinarily a Class A misdemeanor, but the Information alleged a felony because the defendant had previously pleaded guilty to the offense of failure to insure workers' compensation liability, as a result of which Section 287.128.5 makes the second offense a felony.

The case was heard by a jury in the court of the Honorable John A. Ross, Circuit Judge, Division No. 15 of St. Louis County, Missouri. On October 25, 2006, the jury returned a verdict finding defendant guilty as charged (LF 49); on October 26, 2006, after a separate sentencing hearing, the jury returned a verdict assessing punishment of imprisonment of two years and a fine to be set by the Court (LF 56).

Defendant filed a Motion to Set Aside the Jury Verdicts and to Enter Judgment of Acquittal or, in the Alternative, to Grant a New Trial (LF 58-88), which was denied on December 4, 2006 (LF 92). At that time, defendant was sentenced to a term of one year imprisonment, to pay a fine of \$5,000 (LF 93) and

a penalty of \$25,000 pursuant to § 287.128.5 (LF 91). Defendant duly filed his Notice of Appeal (LF 96-127) to this Court. Defendant is free on appeal bond pending this appeal.

Because this appeal involves constitutional questions challenging the validity of § 287.128.5, in violation of Article I, Sections 10 and 11, and Article III, Section 32, of the Constitution of the State of Missouri, and the Fourteenth Amendment to the Constitution of the United States. (See Point I of this Brief and Argument Section I.), the Supreme Court of Missouri has exclusive appellate jurisdiction of this case under Article V, Section 3 of the Constitution of the State of Missouri.

STATEMENT OF FACTS

Appellant Robert Salter was originally charged in the Circuit Court of the County of St. Louis, Missouri, in a two count Indictment (LF 5-7) filed on February 23, 2005, which alleged in Count 1 a violation of the worker's compensation law, a Class D felony, in violation of Section 287.128.5, RSMo. Defendant was not named in Count 2, which charged Housecalls, Inc., d/b/a Business Management Corp. with a violation of the worker's compensation law, a Class A misdemeanor. Each count charged that the named defendant between February 1, 2004 and September 12, 2004 at 9358 Dielman Industrial Drive in the County of St. Louis was an employer as defined in Section 287.030, RSMo, but failed to insure "its" worker's compensation liability as required by Section 287.128, RSMo as to Count 1, and as required by Section 287.280, RSMo, in Count 2. Although the counts were virtually identical, Count 1 charged a felony as to defendant Salter because of an allegation that he had pleaded guilty to an offense of failure to insure worker's compensation liability under Section 287.128.5 in an earlier case.

Subsequently, an Information in Lieu of Indictment (LF 17-18) was filed on September 11, 2006, as to defendant Salter only, which was virtually identical with Count 1 of the Indictment. The only difference between the Information and Count 1 of the Indictment was that the date of his plea of guilty to the previous charge was changed from December 4, 2004, to December 4, 2002. Prior to the

filing of the Information in Lieu of Indictment, the prosecuting attorney filed a Memorandum of Nolle Prosequi as to the defendant Housecalls.

On February 9, 2006, defendant filed an amended motion to dismiss the Indictment (LF 8-9) alleging that Section 287.128.5 was unconstitutional and in violation of Article I, Sections 10 and 11, of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution, and Article III, Section 23 of the Missouri Constitution. Certified copies of the Secretary of the State of Missouri concerning the history of the adoption of Section 287.128 were presented to the trial Court, Hon John A. Ross, Circuit Judge, who entered an order on March 7, 2006 overruling the amended motion to dismiss (LF 10-11). This constitutional challenge is the subject of Point I of this Brief.

A jury trial of the Information against defendant commenced on September 12, 2006, and just prior to the completion of the testimony the Court declared a mistrial because the only witness for the State (Randolph Wilkins) injected testimony about another charge for which defendant was being investigated. The case was continued for trial on October 23, 2006 (LF 2).

On October 13 and October 16, 2006, the State endorsed new witnesses, including Ms. Uchechi Brown who testified as a defense witness at the first trial (LF 20-21). On October 23, 2006, defendant filed an application for continuance of the trial based upon the absence of a witness (LF 22-24), and a separate motion

for continuance for further investigation (LF 25-28). These motions were discussed before the jury was called (Tr. 1-6) and were denied by Judge Ross (LF 24, 28). The Motion for Continuance because of absence of a witness is the subject of Point III of this Brief.

There were two phases of the trial – guilt and punishment. The initial witness for the State was Randolph Wilkins who was employed by the Missouri Department of Labor in the fraud and noncompliance investigative unit of the workers' compensation section of the Department of Labor (Tr. 13-14). Another section of the Department of Labor was the Employment Security unit (Tr. 14). The State did not call any other witnesses before resting. Defendant called Ms. Uchechi Brown who had worked with Housecalls, Inc. and had testified as a defense witness at the first trial; she was endorsed as a State witness before the second trial, but the State did not call her and therefore defendant did. She was the only witness for the defense and afterwards David Ziegler an associate with Lee & Associates, a commercial real estate firm (Tr. 193), testified on rebuttal for the State. He was another of the newly endorsed witnesses for the State. Defendant wanted to testify and requested the Court to bar the State from cross-examining him as to the nature of his prior conviction which was alleged in the Information. The Court refused to prohibit such cross-examination, and defendant did not testify in the guilt phase of the trial. This is the subject of Point IV of this Brief.

Mr. Wilkins testified from State's Exh. 1, Division of Employment Security quarterly reports, over objection of defendant (Tr. 19, 20-25). He testified as to what the records showed as to the number of workers for Housecalls for several quarters for the dates alleged in the Indictment and he also testified as to statements made to him by defendant when Mr. Wilkins came to Housecalls' office and engaged him in conversation. Defendant was not advised of his *Miranda* rights, but the objection was overruled (Tr. 40-52).

Defendant was under the impression that the company was exempt from being required to carry workers' compensation insurance unless they had more than five employees; Mr. Wilkins corrected the defendant that the law provided that if they had five employees then they must carry insurance. The records which he identified from the Division of Employment Security (State's Exh. 1) showed that during each quarter alleged in the Information, the company had listed five workers, one of whom was Uchechi Brown. (Tr. 28-30).

On cross-examination Mr. Wilkins stated that the DES Form "listed workers and not employees" (Tr. 56). He was aware when he interviewed defendant at the company office that a person who is an independent contractor is not counted as an employee for insurance purposes, but he did not discuss that subject with defendant (Tr. 70). He said that the Division of Workers' Compensation did not have

any records indicating the number of employees of the company and he made no attempt to interview company employees (Tr. 79).

He discussed various tests for determining who is or is not an independent contractor and said that he used IRS guidelines, the State guidelines for the Department of Employment Security, and some sort of a pamphlet issued by the Workers' Compensation Commission (Tr. 85). He was aware of the right-to-control test and the 8 factors used in applying that test to determine whether a person is an independent contractor, but he did not use that test here (Tr. 90). Officers may be counted for workers' compensation purposes; the only officer he knew of was defendant who told him he was president. There was no discussion of any other officers (Tr. 96).

After his testimony the State rested and defendant called Uchechi Brown as a witness. She identified Deft. Exh. A, a signed Work for Hire Agreement (Tr. 138) and corporate minutes (Deft. Exh. C) authorizing the company to sign the agreement with her (Tr. 131). Although she was secretary of the company, she was not paid for that work (Tr. 136). Her compensation was according to the Work for Hire Agreement, which stated that she was an independent contractor (Tr. 139). At one time, the Work for Hire Agreement was lost and she and defendant executed a replacement copy (Tr. 141-143).

Her compensation as an independent contractor was stated in the Agreement.

She was paid semi-monthly and she requested that taxes be withheld as a convenience so that she did not have to separately accumulate the money to pay her taxes (Tr. 178). The agreement provided that Housecalls would not provide workers' compensation coverage for Ms. Brown or any of her employees. She did not punch a time clock, and spent very little time in the company office. Her work was outside doing marketing with doctors and hospitals in order to obtain business for the company. Defendant did not tell her whom to see. She recruited dentists to use billing services provided by the company. She furnished her own equipment such as typewriters and computers (Tr. 146-150).

On cross-examination she was questioned about a statement on State's Exh. 2 (records of the Secretary of State), showing her address as the same as defendant's home address. She had known him since 1999 and never lived with him (Tr. 148-150). She received a W-2 for the taxes that had been deducted and not a Form 1099. She said that the IRS guidelines were examined by Housecalls' attorney, but he made no mention of whether it should be a W-2 or a 1099 (Tr. 165-167).

On redirect examination Ms. Brown testified that with reference to page 23 of Exhibit 2, where her name and defendant's address were listed, she did not prepare or sign it, and never received a copy (Tr. 172). Exhibit A was retyped for

the year 2004 because it had been lost. She was aware that Housecalls was moving from office space on Dielman to Hollenberg and this was discussed in the minutes, and signed by defendant and herself. Although it was not dated, the first page shows the effective date (Tr. 174), but she did not notice the Hollenberg address (Tr. 175). She received the retyped Exh. A for 2004 and the 2005 contract at the same time (Tr. 175). There was nothing in the corporate minute book (Deft. Exh. C) which showed Salter's address as being hers (Tr. 175).

She was not asked to bring any of the documents to the first trial, except Exh. A. Before the second trial she received a subpoena from Mr. McSweeney, the prosecutor, but was not requested to produce any documents. Later defense counsel asked her to bring the books (Tr. 177-178). Her taxes on payments she received from Housecalls were withheld at her request and at the end of the year she reported the total received less the taxes and her business expenses (Tr. 178).

On re-cross examination, she was asked again and repeated that she never lived at defendant's address and that it was a mistake to list his address on the form for the Secretary of State (Tr. 181). She got her subpoena from Mr. McSweeney on the Friday before the trial (Tr. 182). She told defense counsel that she had found the minute book which reminded her of the facts that occurred. She had no conversation with Mr. McSweeney about the minute book. Her husband had told

her where to locate it and her memory was refreshed (Tr. 183). Mr. McSweeney was supposed to call her as to when she would be needed in court but he never did call, and then defense counsel told her that she should come to court on Tuesday and where to go (Tr. 184). Mr. Salter did not have a copy of the minute book (Tr. 185). On re-direct examination, she said that she would not have talked to anyone on Saturday.

Defense counsel stated that he wanted to put Mr. Salter on the witness stand as a witness, but requested that the State be limited in the use they could make of his prior conviction. There was no objection to the fact that he had a prior conviction and the defense offered to stipulate to it, but wanted the Court to restrict the State from cross-examining as to the nature of the prior offense, contending that a conviction is admissible for impeachment purposes irrespective of what the offense is, and to present specifics of the offense, being the same as the offense in the Information, the prejudicial impact outweighed the probative value of the nature of the prior crime. Defense counsel also wanted the jury to be advised that the indictment against the corporation had been nolle prossed, but the Court denied each of these requests (Tr. 189-190).

On rebuttal, the State called David Ziegler concerning a lease that he kept at his office (State's Exh. 3), which was drawn up by his company, and delivered to defendant who read and signed it; it was kept in his possession in the normal

course of business (Tr. 196). It was a lease between the owner and Day Star Health Services, d/b/a Housecalls Health Care. Housecalls, Inc. was not listed on the lease (Tr. 200-201).

After all the evidence, defendant made a Motion for Judgment of Acquittal at the Close of All the Evidence on the basis that the State failed to prove any obligation of defendant to obtain insurance, and there was no other evidence of any obligation on him. Also raised was that he was accused of misconduct by failing to act but that failing to act is not conduct as required by § 287.125.5, RSMo. Another basis for the motion for judgment of acquittal was that Ms. Brown was an independent contractor and should not be counted and therefore there were not five but only four employees (Tr. 203-206). These issues are the subject of Points II and V of this Brief.

During the instruction conference (Tr. 208-221) at which the Court decided which instructions would be given and which refused, defendant objected to the giving of Instructions No. 5 and 6 and the refusal to give Instructions A, B, C, and D. The issues are detailed in Point V of this Brief.

The case was then argued and submitted to the jury (Tr. 223-242). The jury returned a verdict finding defendant guilty of the charge contained in the Information in Lieu of Indictment, and as submitted in Instruction No. 5 (Tr. 242, LF 49). The trial of the penalty phase of the case then began (Tr. 242).

Randolph Wilkins testified again and was the only witness for the State, and defendant was the only witness for the defense. Various documents were introduced and some issues arose, but defendant is not raising any issues on this appeal relating to the sentencing phase, except that some evidence during that phase is included in the Argument portion of this Brief to the extent relevant to those issues.

The jury returned a verdict (Tr. 321, LF 56), assessing punishment at imprisonment for a term of two years and a fine, the amount to be determined by the Court. On November 20, 2006, defendant filed a Motion to Set Aside Jury Verdict and to Enter Judgment of Acquittal or, in the Alternative, to Grant a New Trial (LF 58-73), with Exhibits A through G (LF 74-86) and an Affidavit (LF 87-88) attached.

On December 4, 2006, defendant appeared for sentencing (Tr. 322). Defendant directed attention (Tr. 326) to paragraph 49 of the motion for new trial which was based upon newly discovered evidence with reference to concealment of documents. This issue is detailed hereafter in the Argument of Point VI of this Brief. Defendant also mentioned specially the question of whether a negative act was sufficient to sustain a conviction on the charge (Tr. 327) (see Point II of this Brief) and the Court's refusal to restrict the cross-examination of defendant, concerning the specific details of his prior conviction, if he had elected to testify at the guilt phase of the trial (Tr. 329-331) (see Point IV of this Brief).

The Court overruled defendant's Motion for New Trial, or, in the Alternative, to Set Aside the Jury Verdict and Enter a Judgment of Acquittal (Tr. 331). Defendant and his wife then made brief statements concerning punishment (Tr. 332-335)

The Court imposed a sentence of one year imprisonment in the custody of the St. Louis County Department of Justice Services, and he was ordered to pay a fine of \$5,000.00, with the State to pay court costs, and the Court imposed a further penalty of \$25,000.00 (Tr. 336-337, LF 93-95).

Defendant's bond was revoked with a new bond set at \$25,000.00 cash only. The cash was deposited, and defendant was released on bond on that date. Thereafter, this appeal was filed in due time.

POINTS RELIED ON

I.

The trial Court erred in overruling Defendant's Amended Motion to Dismiss the Indictment (LF 5-7) and the Information in Lieu of Indictment (LF 17-18), because the charges in this case were filed for alleged violation of § 287.128.5, RSMo, the provisions of which were adopted by the Legislature in violation of the Constitution of the State of Missouri, in that § 287.128 was enacted and applied in violation of Article I, Sections 10 and 11, and Article III, Section 23 of the Constitution of the State of Missouri, and the Fourteenth Amendment to the Constitution of the United States.

Carmack v. Director, Missouri Department of Agriculture,

945 S.W. 2d 956 (1997);

Hammerschmidt v. Boone County, 877 S.W. 2d 98

(Mo. banc 1994);

Ex parte Smith, 135 Mo. 223, 36 S.W. 628 (1896);

State v. Persinger, 76 Mo. 246 (1882);

Constitution of the United States, Fourteenth Amendment;

Constitution of Missouri, Article III, § 23;

Section 287.128, RSMo.

II

The trial Court erred in refusing at various stages of the trial to order the dismissal of the charge against defendant and to order his discharge, because there was an insufficiency of evidence and the State failed to produce any evidence that defendant violated the law in that there was no evidence that defendant had ever acted or engaged in any prohibited conduct and the only evidence in the case was that defendant did not acquire workers' compensation insurance for the employees at Housecalls, Inc. when there was no evidence that he was under any duty to do so as he was not the employer and had no personal obligation to acquire insurance, and there was no basis to impute or infer any illegal conduct by defendant under §§ 562.011 or 562.061, RSMo.

People v. Parvin, 125 IL. 2d 519 (1988);

Section 562.011, RSMo;

Section 562.061, RSMo;

720 ILCS 5/5-5;

720 ILCS 5/4-1;

Model Penal Code, § 2.01;

Model Penal Code, § 2.07(6).

III.

The trial Court erred in denying defendant's Application for Continuance of Trial based upon the absence of a witness, because the Court abused its discretion in denying the request, in that the unavailable witness had crucial evidence in the case, the application conformed with all of the requirements of Supreme Court Rule 24.10 and § 545.720, RSMo, and presented good and sufficient reasons for continuing the trial for a few days, and the State did not attempt to show any prejudice to their case or that anyone would be discommoded by a continuance.

Section 545.720, RSMo;

Supreme Court Rule 24.09;

Supreme Court Rule 24.10.

IV.

The trial Court erred in refusing to order the State to refrain from producing specific details and the nature of his prior conviction in the event defendant testified during the guilt phase of the trial, and in refusing to accept a stipulation by defendant, with an appropriate instruction by the Court, that defendant admitted the fact of his being guilty of a prior offense, because it was an abuse of discretion for the Court to deny defendant's request in that

the purpose of developing the evidence at the guilt phase was for impeachment and to affect the credibility of defendant as a witness, and the prejudicial impact was a consequence of having the jury told of the specifics of his prior conviction, which in this instance was an offense similar to that which the jury was considering at the guilt phase, and such prejudicial impact outweighed any probative value in informing the jury at this stage of the proceedings of the exact nature of the prior conviction.

Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644,
136 L.Ed. 2d 574 (1997).

V.

The trial Court erred in giving an instruction offered by the State, giving an instruction ostensibly offered by defendant, and refusing to give instructions offered by defendant, in the following respects:

A. Instruction No. 1 given by the State was erroneous, because of the use of the word “conduct” , in that there was no evidence of any conduct engaged in by defendant and the charge did not involve conduct but instead was non-conduct premised on a failure to act.

B. Instruction No. 6, although it was offered ostensibly by defendant but was in fact prepared by the Court and made necessary in the Court’s opinion by the refusal to give any of Instructions A through D which were

offered by defendant, was erroneous because it was premised upon defendant knowingly causing the failure of Housecalls, Inc. to have workers' compensation insurance, in that there was no proof of any illegal conduct for which defendant could be criminally responsible and no proof that defendant committed any illegal act.

C Any of Instructions No. A, B, C, and D, offered by defendant but refused by the Court, should have been given because they were all proper instructions, in that they were based upon evidence in the case that Uchechi Brown was not an employee of Housecalls, Inc., but instead was an independent contractor, and there was evidence of, and the jury should have been instructed on, the guidelines for determining whether or not she was an independent contractor, and without an instruction on the definition of independent contractor, defendant was left without a defense.

Seaton v. Cabool Lease, 7 S.W. 3d 501 (Mo. App. S.D. 1999);

DiMaggio v. Johnston Audio D&M Sound, 19 S.W. 3d 185

(Mo. App. W.D. 2000);

Phillips v. Par Elec. Contractors, 92 S.W. 3d 278

(Mo. App. W.D. 2002);

Nunn v. C.C. Mid West, 151 S.W. 3d 388 (Mo. App. W.D. 2004).

VI.

The trial Court erred in not taking remedial action for the State's belated production and concealment of evidence to contradict the State's unfounded accusation of adulterous misconduct by defendant and Ms. Uchechi Brown because the State not only violated the *Brady* rule of disclosure in that the State had previously produced corporate documents of all other companies in which defendant was involved but apparently purposely withheld the corporate records of another company until the trial was completed, as a result of which defendant was prejudiced by not having access to the document which showed that there was no misconduct by defendant and Ms. Brown.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194,
10 L.Ed. 2d 215 (1963).

ARGUMENT

I.

The trial Court erred in overruling Defendant's Amended Motion to Dismiss the Indictment (LF 5-7) and the Information in Lieu of Indictment (LF 17-18), because the charges in this case were filed for alleged violation of § 287.128.5, RSMo, the provisions of which were adopted by the Legislature in violation of the Constitution of the State of Missouri, in that § 287.128 was enacted and applied in violation of Article I, Sections 10 and 11, and Article III, Section 23 of the Constitution of the State of Missouri, and the Fourteenth Amendment to the Constitution of the United States.

Defendant was originally indicted on February 23, 2005, in Count I of an Indictment which charged a violation of § 287.128.5, R.S. Mo. (LF 5-7), in that between February 1, 2004 and September 12, 2004, defendant was an employer as defined in § 287.030, R.S. Mo., but failed to insure its worker's compensation liability as required by § 287.128, R.S. Mo. The Indictment further charged that on or about December 4, 2004 [sic] defendant had pleaded guilty in an earlier case to a similar offense under the same statute. On February 9, 2006, defendant filed an Amended Motion to Dismiss the Indictment on constitutional grounds (LF 8-9) which was overruled on March 7, 2006 (LF 10-11).

Subsequently, the State was informed by Defendant's Motion to Strike (LF 12-13) that defendant actually pleaded guilty under an *Alford* plea on December 4, 2002. The Court denied the motion to strike on September 11, 2006, and granted leave to the State to file an Information in Lieu of Indictment (LF 16, 17-18), which the State did on September 11, correcting the date of defendant's prior plea of guilty. Defendant did not actually file a new motion to dismiss the Information in Lieu of Indictment because it was understood by the Court and the parties that the motion to dismiss the Information would be identical with the amended motion to dismiss filed earlier, and that the Court would not have changed its ruling with reference to the Information in Lieu of Indictment.

Defendant's Amended Motion to Dismiss (LF 8-9) raised various constitutional objections to the statute and Indictment, as follows:

1) A denial of due process of law in violation of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment due process clause of the Constitution of the United States, because of the vagueness of the words "executive officers" of a corporation which was not defined in § 287.020.1, R.S. Mo., and the State was attempting to include a non-executive officer of the corporation named Uchechi Brown.

2) A violation of Article I, Section 11 of the Missouri Constitution because the criminal penalty of § 287.128.5 attempted to punish defendant for failure to

pay a debt, namely a workers' compensation insurance premium, and established twice the annual premium of the insurance company as part of the penalty, and that classifying this conduct of failing to insure as a Class A misdemeanor which could provide for one year in jail.

3) A denial of due process of law in that the creation of a criminal penalty and jail time without defendant knowingly and intentionally failing to insure would become a Class D felony subject to 5 years imprisonment without knowingly and intentionally failing to insure, in violation of Article I, Sections 10 and 11 of the Missouri Constitution and the Fourteenth Amendment due process clause of the Constitution of the United States.

4) Senate Bill No. 251 and House Bills No. 1237, 1409, 1166, 1154 and 1491 were vague in creating different penalty provisions for § 287.128.5 as to when a charge was a misdemeanor or felony, in violation of Article I, Section 10 of the Missouri Constitution.

5) Section 287.128.5, RSMo, as contained in enacting bills Senate Bill No. 251 and House Bills No. 1237, 1409, 1166, 1154, and 1491, is unconstitutional, in violation of Article III, Section 23 of the Missouri Constitution.

Standard of Review

The standard of appellate review with reference to the constitutionality of an act of the legislature was recently stated in *Missouri Association of Club*

Executives, Inc. v. State of Missouri, 208 S.W. 3d 885, 888 (Mo. banc 2006):

“An act of the legislature carries a strong presumption of constitutionality. This Court resolves all doubts in favor of the procedural and substantive validity of legislative acts. Attacks against legislative action founded on constitutionally imposed procedural limitations are not favored. An act of the legislature must clearly and undoubtedly violate a constitutional procedural limitation before this Court will hold it unconstitutional.”

The Court cited *Carmack v. Director, Missouri Department of Agriculture*, 945 S.W. 2d 956, 959 (Mo. 1997), and *Hammerschmidt v. Boone County*, 877 S.W. 2d 98, 102 (Mo. banc 1994).

* * * * *

Defendant will not lengthen this brief by further argument as to reasons 1, 2, 3, and 4 because we feel that the language of § 287.128.5 clearly leads to the conclusion that it is unconstitutional for the above reasons (vagueness and punishment for non-payment of a debt), and there is no need to further argue what appears to be obvious. See *State v. Brown*, 660 S.W. 2d 694, 697-698 (Mo. banc 1983).

With reference to the fifth reason, Article III, Section 23 of the Missouri Constitution states:

“Section 23. Limitation of scope of bills -- contents of titles – exceptions

No bill shall contain more than one subject which shall be clearly expressed in its title,”

If a statute conflicts with a constitutional provision, this Court must hold that the statute is invalid. *State ex rel. Upchurch v. Blunt*, 810 S.W. 2d 515, 516 (Mo. banc 1991). See also *State ex rel. Williams v. Marsh*, 626 S.W. 2d 223, 227 (Mo. banc 1982), where this Court discussed the constitutional issue and relied on the following language, particularly applicable here, from *Ex parte Smith*, 135 Mo. 223, 36 S.W. 628, 630 (1896):

“And if it be true, as must be true, that an unconstitutional law *is no law*, then its constitutionality is open to attack at any stage of the proceedings and even after conviction and judgment; and this upon the ground that *no crime* is shown and therefore the trial court had no jurisdiction; because its criminal jurisdiction extends only to such matters as the *law* declares to be *criminal*; and if there is no law making such declaration, or, what is tantamount thereto, if that law is unconstitutional, then

the court which tries a party for such an *assumed* offense, tran-
scends its jurisdiction, and he is consequently entitled to his discharge
. . .” [Italics by Court in Smith; underline by defendant.]

In determining this issue it is necessary to examine the legislative history of § 287.128, R.S. Mo., and determine whether the enacting laws contained more than one subject and whether the required subject was clearly expressed in the title of the bill. A violation of either test will invalidate the law. See *Carmack v. Director, supra*, at 960, and *Hammerschmidt v. Boone County, supra*, at Notes 2 and 3.

In his order denying the motion to dismiss, the trial Court acknowledged (LF 10) having examined certified copies of the enacting legislation, one of which had some typographical errors. A corrected certified copy was subsequently obtained and these Exhibits, being designated as Defendant’s Exhibits L and M, will be filed with this Court in accordance with Rule 81.16(c).

In 1993, S.B. 251 (see Exhibit L) became the first law to attempt to criminalize a failure to have workers’ compensation insurance, and it violated Article III, Section 23 because the bill contained more than one subject matter. House Bill Nos. 1237, 1409, 1166, 1154 and 1491 (hereinafter “H.B. 1237”) (see Exhibit M) purported to change the penalty in 1998, but it could not overcome the constitutional defect of S.B. 251.

Prior to 1993, § 287.128.2 (see Exhibit L, page10) stated that failure to provide workers' compensation insurance was punishable by a fine of up to \$10,000; § 287.128.3 authorized license revocation or suspension and § 287.128.4 provided for reimbursement of benefits received:

“[287.128. 1. It is unlawful for . . . (2) Any employer, governed by the provisions of this chapter, or insurer to fraudulently fail to provide adequate workers' compensation coverage for every employee that is under the direct employ of such employer; . . .

2. Any person who violates any provision of subsection 1 of this section is punishable by a fine of up to ten thousand dollars.

3. The division of workers' compensation may revoke or suspend the license of, or any other privilege granted pursuant to this chapter to, any person who violates the provisions of subsection 1 of this section.

4. Any person who violates any provision of subsection 1 of this section shall reimburse any person for the benefits received pursuant to this chapter, including direct financial benefits and benefits received as services.]”

As such, this “offense”, with a fine and other sanctions, was, at the most, an infraction. Section 556.021, R.S. Mo., defines an infraction:

“1. An offense defined by this code or by any other statute of this state constitutes an “infraction” if it is so designated or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction.

2. An infraction does not constitute a crime and conviction of an infraction shall not give rise to any disability or legal disadvantage based on conviction of a crime.” [Emphasis supplied.]

For the first time in 1993, S.B. 251 made the conduct of an employer in failing to provide workers’ compensation insurance a crime (see Exhibit L, page 9), by adopting subsection 5:

“5. Any employer failing to insure his liability pursuant to this chapter shall be guilty of a Class A misdemeanor and, in addition, shall be liable to the state of Missouri for a penalty in an amount equal to twice the annual premium the employer would have paid had such employer been insured or twenty-five thousand dollars,

whichever amount is greater.”

State v. Persinger, 76 Mo. 346 (1882), is on point. It held that defining conduct previously legal as now illegal is one subject matter. Clearly in S.B. 251, there were more than one subject matter since, in the same bill, insurers were to provide safety engineering in § 287.123 (see Exhibit L, page 8), false billing practices of health care providers were defined in § 287.129 (see Exhibit L, page 10), and occupational diseases were defined in §§ 287.063 and 287.067 (see Exhibit L, page 6). These changes did not involve declarations of crimes.

The title of S.B. 251 stated (Exhibit L, page 2):

“AN ACT to repeal sections . . . 287.128 . . .
RSMo. Supp. 1992, relating to workers’ compensation,
and to enact in lieu thereof sixty-five sections relating to
the same subject, with penalty provisions and an effective
date for certain sections.”

It cannot be argued that the “penalty provisions” referred to in the title to S.B. 251 was the same as the “penalty provisions” in § 287.125 prior to S.B. 251, because prior to S.B. 251, the conduct was not a crime, and S.B. 251, for the first time, made the conduct a crime. Such a change required a bill with a title to reflect the change to a crime, as declared by Article III, Section 23 (“one subject which shall be clearly expressed in its title”).

Nor can it be argued that the subject words “workers’ compensation” in the title covers the creation of a new crime. See the discussion of “amorphous titles” in footnote 3 of *Hammerschmidt v. Boone County*, *supra*, at 102, and the lengthy discussion in *Carmack v. Director*, *supra*, at 959-960 in Section II(A), with the conclusion “that the words ‘economic development’ [substitute here: workers’ compensation] are too broad and amorphous to describe the subject of a pending bill with the precision necessary to provide notice of its contents.”

As shown above, S.B. 251’s enactment was unconstitutional because of its violation of Article III, Section 23. Therefore in 1998, the title to H.B. 1237 et al. should have indicated that the conduct described for the first time therein would be a crime. Its title, prefaced by its purpose “Revises Workers’ Compensation Laws”, (see Exhibit M, page 3) stated the same amorphous title as Exhibit L (see Exhibit M, page 4):

“AN ACT to repeal Sections . . . 287.128 . . . RSMo 1994, and sections . . . 287.650, RSMo Supp. 1997, relating to workers’ compensation, and to enact in lieu thereof twenty-nine new sections relating to the same subject, with penalty provisions.”

See also *Missouri Health Care Association v. Attorney General of the State of Missouri*, 953 S.W. 2d 617, 622-623, Section III (Mo. banc 1997), rejecting a title

referring to “the department of social services”.

The title of H.B. 1237 fails to give notice that more than one subject matter was covered, including the new felony provision for violating § 287.128, RSMo (see Exhibit M, pages 10-11), and the creation, funding and administration of the Kids Chance Scholarship Program in Sections 1-3 of § 287.650, RSMo (see Exhibit M, pages 38-40.) For the first time § 287.128.5, RSMo, prescribed that a second violation of § 287.129 would also be a Class D felony (see Exhibit M, page 11.) This new crime in itself was not a subject matter because § 287.129 in S.B. 251 was not a crime and had no penalty provision. (See Exhibit L, page 10.)

A review of the title of H.B. 1237 et al. and its subject matter, making a violation of § 287.128.5 both a misdemeanor and a felony, and making a violation of § 287.129, both a misdemeanor (for the first time) and a felony, and creating a Kid’s Chance Scholarship Program, reveals that there was clearly a violation of Article III, Section 23. In *Hammerschmidt v. Boone County*, *supra*, at 101-102, this Court explained the purposes of Article III, Section 23:

“ . . . to facilitate orderly legislative procedure . . .; to prevent ‘logrolling’ – the practice of combining a number of unrelated amendments in a bill, none of which alone could command a majority, but which taken together, combine the votes of a sufficient number of legislators having a vital interest in one

portion of the amended bill to muster a majority for its entirety . . .; to defeat surprise within the legislative process . . .; to assure that the people are fairly apprised . . . of the subjects of legislation that are being considered in order that they have [an] opportunity of being heard thereon . . .; [and] (f)inally . . . to prevent the legislature from forcing the governor into a take-it-or-leave-it choice when a bill addresses one subject in an odious manner and another subject in a way the governor finds meritorious.”

For all of these reason, defendant respectfully submits that this Court should reverse his conviction because of the constitutional violations in the process of adopting § 287.128.5, RSMo.

II

The trial Court erred in refusing at various stages of the trial to order the dismissal of the charge against defendant and to order his discharge, because there was an insufficiency of evidence and the State failed to produce any evidence that defendant violated the law in that there was no evidence that defendant had ever acted or engaged in any prohibited conduct and the only evidence in the case was that defendant did not acquire workers' compensation insurance for the employees at Housecalls, Inc. when there was no evidence that he was under any duty to do so as he was not the employer and had no personal obligation to acquire insurance, and there was no basis to impute or infer any illegal conduct by defendant under §§ 562.011 or 562.061, RSMo.

Throughout all of the stages of the trial, including at the close of the State's opening statement (Tr. 11-12), at the conclusion of the evidence presented by the State (Tr. 111-113), at the conclusion of all of the evidence (Tr. 203-206) and during the instruction conference (Tr. 213-216), defendant always took the position that there was no evidence that he personally had engaged in any illegal conduct and therefore he could not be held responsible for a violation of § 287.128.5, RSMo.

Standard of Review

This issue is basically one of the sufficiency of the evidence. The standard of appellate review is that the Court accepts as true all evidence favorable to the State, including all favorable inferences drawn from the evidence, disregarding evidence and inferences to the contrary; review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Grim*, 854 S.W. 2d 403, 405 (Mo banc 1993), *cert. den.*, 510 US 997, 114 S.Ct. 562, 126 L.Ed. 2d 462, and *State v. Crawford*, 68 S.W. 3d 406, 407-408 (Mo. banc 2002).

* * * * *

The Information in Lieu of Indictment (LF 17-18) charged that “the defendant was an employer as defined in Section 287.030, RSMo, but failed to insure its worker’s compensation liability as required by Section 287.128, RSMo, . . .” Defendant believes that he was not an employer in this case, but the employer was Housecalls, Inc. Note that the Information refers to “its” (not “his”) workers’ compensation liability. Further defendant contends that the failure to insure, as alleged in the Information, does not constitute the “conduct” required of defendant by any statute.

The State’s position was that defendant committed a “voluntary act” within the purview of § 562.011, RSMo. That statute, however, is based upon “conduct”,

and we will show hereafter that there was no such conduct by defendant within the definitions of § 562.011. The State further contended that § 562.061, RSMo, was applicable but that statute also requires proof of “conduct”.

Section 562.011

Section 562.011, which is based on Model Penal Code § 2.01, says that “a person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act.” We submit that a failure to engage in conduct does not constitute evidence of prohibited conduct.

With reference to a “voluntary act”, we recognize that subsection 2(2) of the statute states that a voluntary act is “an omission to perform an act of which the actor is physically capable.” Compare Model Penal Code § 2.01(3). But subsection 2(2) of § 562.011 is qualified by subsection 4 of § 562.011, which reads:

“A person is not guilty of an offense based solely upon an omission to perform an act unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law.”

Compare Model Penal Code § 2.01(3).

Section 287.128.5 does not expressly provide that the omission of an officer of a corporation to perform the act of acquiring insurance is prohibited conduct by the officer. Furthermore there is no evidence to satisfy the second portion of sub-

section 4, because there was no evidence of any other provision of Missouri law imposing “a duty to perform the omitted act”. Note the Committee comments to the 1973 Proposed Code with reference to subsection 4. The duty is that of the corporation which was made apparent by the allegations of the Information in Lieu of Indictment, which says that the defendant “failed to insure its worker’s compensation liability as required by” the statute. The word “its” was obviously referring to the corporation and not to defendant Salter.

Section 562.061

This statute relates to the liability of an individual for conduct of a corporation or unincorporated association and provides that a “person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation or unincorporated association to the same extent as if such conduct were performed in his own name or behalf”. This particular statute only uses the word “conduct”. It does not provide for any exception to the word “conduct” by equating it with an omission to perform some act. Therefore, § 562.061 could not be applicable to impose liability on the individual defendant.

Section 562.061 is based on Model Penal Code § 2.07(6), Both relate to “conduct” and they do not contain language relating to a failure to perform an act.

There is apparently no reported case in Missouri holding that an individual is criminally liable for failure to perform an act which the corporation is required to perform. As indicated above, § 562.011.2 states that a person's liability can be based on conduct that includes a voluntary act or "an omission to perform an act of which the actor is physically capable", but an interpretation of this language must include reference to subsection 4 to § 562.011. We reiterate that that language was not satisfied by any proof in this case.

Illinois has a statute which is similar to § 562.061, RSMo. See § 720 ILCS 5/5-5, relating to accountability for conduct of a corporation; it provides:

"Accountability for conduct of corporation. (a) A person is legally accountable for conduct which is an element of an offense and which, in the name or in behalf of a corporation, he performs or causes to be performed, to the same extent as if the conduct were performed in his own name or behalf."

The subject of liability of an officer of a corporation was considered by the Supreme Court of Illinois in *People v. Parvin*, 125 Il. 2d 519, 533 N.E. 2d 813 (1988). There the defendant was a corporate officer of a corporation which failed to pay a 5% retailer's occupation tax. The Court stated (533 N.E. 2d at 814): "The sole issue on appeal is whether defendant could be held criminally liable

under the Act for failure to file corporate retailers' occupation tax returns.”

In its opinion, the Court noted that the defendant operated the business and was the corporate officer solely responsible for filing the tax returns. The Court held that Mr. Parvin was not a “person engaged in the business of selling tangible personal property at retail.” . . . 533 N.E. 2d at 814. The Court continued:

“[N]othing in the provision defining “person” indicates that it is to be given multiple interpretations in connection with a single enterprise. It is well established that a corporation is separate and distinct as a legal entity from its shareholders and officers . . . It is undisputed that corporate officers are not directly liable under the Act for payment of the tax.”

.The Court went on to note at page 815 that there is a difference between the filing of a fraudulent return by an officer or agent, which was specifically made an offense by the statute, and the failure of the officer or agent to file a return, to which the Court added that “we can certainly conceive of rational reasons why the legislature intended to cast a wider net for those who file fraudulent returns than for those who fail to file them.”

Although Illinois has a statute similar to § 562.011, RSMo the Court in *Parvin* did not discuss it.

We recommend a reading of the entire *Parvin* decision which shows a rejection of all of the contentions made by the State in the instant case and (some not made by the prosecutor here). There was nothing in the Illinois law to authorize a conviction of Mr. Parvin, and there is nothing in this case on which to convict defendant here.

For all of the foregoing reasons, we respectfully suggest that the conviction of defendant should be reversed, with directions that the Circuit Court should order his discharge.

III.

The trial Court erred in denying defendant's Application for Continuance of Trial based upon the absence of a witness, because the Court abused its discretion in denying the request, in that the unavailable witness had crucial evidence in the case, the application conformed with all of the requirements of Supreme Court Rule 24.10 and § 545.720, RSMo, and presented good and sufficient reasons for continuing the trial for a few days, and the State did not attempt to show any prejudice to their case or that anyone would be discommoded by a continuance.

Standard of Review

The grant or denial of a motion for continuance is a matter of discretion for the Court. A very strong showing is required to prove abuse of that discretion, and the party requesting the continuance bears the burden of showing prejudice. *State v. Thompson*, 985 S.W. 2d 779, 785 (Mo. banc 1999). See also the recent decision in *State v. Slagle*, 206 S.W. 3d 404, 405 (Mo. App. E.D. 2006).

* * * * *

Defendant filed his application for continuance of the trial (LF 22-24) on Monday, October 23, 2006, the day on which the case was set for trial. In September 2006 the case had been partially tried but a mistrial was declared near the end of the trial because of improper testimony by the government's only witness

Randolph Wilkins; on September 13 a new trial was set for October 23 (LF 2).

Mr. Wilkins and Bill Byington of Missouri Employers Mutual Insurance were the only witnesses endorsed by the State for the first trial, but Mr. Byington was not called.

Uchechi Brown testified for the defense at the first trial. She was cross-examined by the prosecutor, Edward F. McSweeney, about her address, which at one time had been listed on a report filed by Housecalls, Inc. with the Secretary of State's Office as the same address of defendant's residence (see page 23 of State's Exh. 2). The implication which Mr. McSweeney attempted to create was that she was having an illicit romantic affair with defendant. See paragraphs 2 and 3 of Defendant's Motion for a Continuance for Further Investigation (LF 25-28). In addition, she testified at length concerning her association with Housecalls, Inc. and identified the Work for Hire Agreement (Deft. Exh. A) which she had executed and which, among other things, stated that she was to do work for Housecalls as an independent contractor. She was vigorously cross-examined concerning that agreement, and she testified as to her business relationship with Housecalls as being an independent contractor. Mr. Wilkins was questioned at the first trial concerning an independent contractor status and his knowledge as to tests to determine when a relationship is that of an independent contractor. See Argument V of this Brief.

On Friday, October 13, 2006, Mr. McSweeney filed and mailed to defense counsel an *ex parte* request for leave to endorse Ms. Brown, Mr. Byington, and Mr. Wilkins, as witnesses for the State (LF 20). On Monday, October 16, Mr. McSweeney filed a new *ex parte* request for leave to endorse Ms. Brown, Mr. Byington, Mr. Wilkins, and Mr. David Ziegler of Lee & Associates (LF 21). In each instance, the certificate of service stated that Mr. McSweeney mailed a copy on “this day of October, 2006” without stating the date; defense counsel received the endorsement of October 13 on the afternoon of Tuesday, October 17, and the endorsement of October 16 on October 18. See paragraphs 4-10 of Defendant’s Motion for a Continuance for Further Investigation (LF 25-28).

There was no indication as to why Ms. Brown was suddenly endorsed as a State witness, and defense counsel pondered the reason, including the possibility that the State had somehow prevailed upon her to change her testimony. Defense counsel decided that it would be important to secure other evidence as to the circumstances of her Work for Hire Agreement, the manner in which she performed her job, the basis of her compensation, and anything concerning the unfounded accusation of a meretricious relationship with defendant.

Defense counsel was put in contact with Mr. Joel Kamil, CPA, who had performed accounting services for Housecalls, was familiar with independent contractor relationships, and had knowledge as to compensation received by Ms.

Brown from Housecalls. Defense counsel spoke with Mr. Kamil and determined that he had information which was essential for use in defendant's case. However, Mr. Kamil informed defense counsel that he would be unavailable for the trial because he had commitments for business meetings out-of-town from Monday through Wednesday, October 23-25. Therefore, defense counsel prepared the application for continuance of trial (LF 22-24), and he filed it and served a copy on Mr. McSweeney early Monday morning, October 23, 2006. At the same time, defendant prepared and filed the Motion for a Continuance for Further Investigation (LF 25-28) after an informal meeting on October 19 with defense counsel, Mr. McSweeney, and the Court.

The two requests for continuance were discussed by the Court and both attorneys immediately after they were filed on October 23, 2007, before the jury was assembled (Tr. 1-8). After preliminary discussions of the background, defense counsel addressed the absence of Mr. Kamil and the need for his testimony and his unavailability until Thursday, October 26 (Tr. 3-4). As it turned out, he was not available because the guilt phase of the trial ended and the jury returned a verdict on October 25 (Tr. 242, LF 4-9). The Court said that the endorsement of Mr. Kamil was untimely and had not been mentioned at the October 19 conference in chambers. Defense counsel explained that he had not felt the need for Mr. Kamil until after the October 19 conference and a review of the new documents just

received from Mr. McSweeney and a concern over the very recent endorsement of Ms. Brown as a witness for the State. Therefore, Mr. Kamil did not become a needed witness until October 20, after which the application for continuance because of his absence was prepared (Tr.4-5).

This Application for Continuance of Trial was in proper form and fully complied with all of the requirements of Supreme Court Rules 24.09 and 24.10 and § 545.720, RSMo. The facts are set forth in writing. The materiality of the evidence sought to be obtained from Mr. Kamil, as required by subsection (a) of Rule 24.10, appears in paragraphs 2, 3, 4, 6, 7, and 8, of the application, and due diligence of defendant, as required by subsections (a) and (b) appears in paragraphs 7 and 8, and was amplified orally to the Court (Tr. 3-5) The name and address of Mr. Kamil, as required by subsection (b) of Rule 24.10, appears in paragraph 3 of the application. The particular facts which would be proven by Mr. Kamil and the unavailability of any other witness, as required by subsection (c) of Rule 24.10, appears in paragraphs 4, 6, 7, and 8 of the application. The fact that defendant was not responsible for Mr. Kamil's absence starting October 23 and that the application was not made for vexation or delay but in good faith, as required by subsection (d) of Rule 24.10, appears in paragraph 9 of the application. The application was in affidavit form as required by the last paragraph of Rule 24.10 and § 545.720, RSMo.

The application required that the Court grant the continuance. The facts alleged were undisputed, and showed prejudice to the defendant by a denial of the continuance. If the State had any basis for opposing the application, the prosecutor did not present any. The denial of the continuance was an abuse of discretion.

The need for the witness was emphasized by evidence at the trial. Portions of State's Exhibit 1 which was frequently referred to in the evidence were prepared by Mr. Kamil's firm (Tr. 57, 63-67).

Defendant respectfully submits that the application for the continuance because of the absence of a witness was in proper form and supplied all the requirements of Rules 24.09 and 24.10 and § 545.720, RSMo. Although the trial Court said that he "called for a jury" (Tr. 5), the jury had not appeared; in fact, after the discussion, the Court said "At this time, we are going to bring the jury panel down" (Tr. 6). Even if the jury had been sitting in the courtroom, that should not have been a reason to deny a continuance. As said in *State v. Whitfield*, 837 S.W. 2d 503, 506 (Mo. banc 1992): "[T]rial court must tailor the appropriate remedy to be fundamentally fair to each party . . . [T]he maximum harm from a continuance would have been the need to select a new jury. Even this harm might be avoided if the defense needed only a short delay." In this instance, the only delay that would have been needed was three days until Thursday, October 26, when Mr. Kamil would be available.

The continuance should have been granted, and its denial was an abuse of discretion and requires a reversal.

IV.

The trial Court erred in refusing to order the State to refrain from producing specific details and the nature of his prior conviction in the event defendant testified during the guilt phase of the trial, and in refusing to accept a stipulation by defendant, with an appropriate instruction by the Court, that defendant admitted the fact of his being guilty of a prior offense, because it was an abuse of discretion for the Court to deny defendant's request in that the purpose of developing the evidence at the guilt phase was for impeachment and to affect the credibility of defendant as a witness, and the prejudicial impact was a consequence of having the jury told of the specifics of his prior conviction, which in this instance was an offense similar to that which the jury was considering at the guilt phase, and such prejudicial impact outweighed any probative value in informing the jury at this stage of the proceedings of the exact nature of the prior conviction.

During the guilt phase of the trial, defendant was considering testifying so that he could explain his position to the jury as to the offense charged. Defendant was aware of the fact that he had a prior conviction, which was alleged in the Information in Lieu of Indictment so as to enhance the seriousness of the charge being tried, and defendant believed that it would be disastrous if the jury became

aware of the prior conviction at the guilt phase. Defendant felt that, because the purpose of offering evidence of prior convictions when a defendant testifies is to impeach his credibility, defendant could stipulate to let the jury know that he had a prior conviction without poisoning the jury by informing them of the specifics of the prior charge. On the other hand, he believed that if there was evidence of the specifics of the crime, the impeachment effect paled in comparison with the effect of the jury being told of the nature of the prior charge, especially where the prior was factually similar to the charge being tried.

When the State rested, the Court refused to restrict the State's use of the prior conviction and, accordingly, defendant elected not to testify in order to avoid the poison that would result. Defendant explained his position just after the State rested (Tr. 111-113), and the Court had defendant acknowledge, out of the hearing of the jury, that he did not want to testify under these circumstances (Tr. 202-203).

Standard of Review

The Supreme Court of the United States decided this issue in *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed. 2d 574 (1997). In footnote 1 of that opinion (519 U.S. at 174), the Court stated:

“The standard of review applicable to the evidentiary rulings of the district court is abuse of discretion. *United States v. Abel*, 469 U.S. 45,

54-55, 105 S. Ct. 465, 470-71, 83 L.Ed. 2d 450

(1984).”

* * * * *

The *Old Chief* case is on all fours with the instant case, except that the use of the prior conviction in *Old Chief* was for the purpose of proving the prior conviction as an element of the crime under consideration, inasmuch as the charge there was a felon in possession of a firearm. Here the only purpose of the conviction was to affect credibility and not to prove an element of the crime charged except to enhance the offense from misdemeanor to a felony and to increase the punishment which would be relevant at the penalty phase. Thus, in *Old Chief* the evidence that the defendant there was a felon would have come in during the guilt phase by showing a conviction whether or not *Old Chief* testified. Here, the evidence of the prior conviction would not be admissible unless the defendant testified in the guilt phase. Missouri procedure makes certain that it would not be admissible until the punishment stage (unless the defendant testified and then for impeachment purposes only) by providing a bifurcated trial to keep the prior conviction out before there is a finding of guilt. The importance to the prosecutor of showing the nature of the prior offense is demonstrated by the fact that in the closing argument during the punishment phase, the prosecutor devoted a considerable amount of his time to the prior conviction (Tr. 316-320).

We could lengthen this Brief considerably by quoting numerous statements of Mr. Justice Souter in his opinion in *Old Chief*, but we will refrain from the temptation to do so and commend the case for reading by this Court, and by the trial Court and prosecutors. Suffice it to say that the Court concluded:

“ . . .the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available.” (519 U.S. at 191.)

It was error for the trial Court here to deny defendant his right to testify, and his conviction should be reversed.

V.

The trial Court erred in giving an instruction offered by the State, giving an instruction ostensibly offered by defendant, and refusing to give instructions offered by defendant, in the following respects:

A. Instruction No. 1 given by the State was erroneous, because of the use of the word “conduct” , in that there was no evidence of any conduct engaged in by defendant and the charge did not involve conduct but instead was non-conduct premised on a failure to act.

B. Instruction No. 6, although it was offered ostensibly by defendant but was in fact prepared by the Court and made necessary in the Court’s opinion by the refusal to give any of Instructions A through D which were offered by defendant, was erroneous because it was premised upon defendant knowingly causing the failure of Housecalls, Inc. to have workers’ compensation insurance, in that there was no proof of any illegal conduct for which defendant could be criminally responsible and no proof that defendant committed any illegal act.

C Any of Instructions No. A, B, C, and D, offered by defendant but refused by the Court, should have been given because they were all proper instructions, in that they were based upon evidence in the case that Uchechi

Brown was not an employee of Housecalls, Inc., but instead was an independent contractor, and there was evidence of, and the jury should have been instructed on, the guidelines for determining whether or not she was an independent contractor, and without an instruction on the definition of independent contractor, defendant was left without a defense.

Various errors of instruction are raised herein, and were presented to the Court in the instruction conference (Tr. 212-222). The Court made some changes in Instruction No. 5 offered by the State, but it still was not a proper statement of the law. The Court refused to give Instructions No. A through D offered by defendant, which should have been given, and instead prepared and gave Instruction No. 6 as an attempted solace to defendant. It did not even touch upon the theory of the defense, and the argument was made clear at the instruction conference. Pursuant to the last sentence of Supreme Court Rule 84.04(h), we have not included these instructions in this Argument, because they are set forth in full in the Appendix to this Brief, pages A- to A- , and they are also included in the Legal File (LF 29-36, 41-43). (We apologize that in the binding and numbering of pages in the Legal File, page 35 was actually the second page of Instruction No. B and should have followed page 31 of the Legal File.)

Standard of Review

The standard of appellate review of the issues related to the giving or refusal

to give instructions is to review the evidence in the light most favorable to the defendant and the theory propounded by the defendant to determine whether the evidence was sufficient to support and authorize the instruction. If the evidence tends to establish the defendant's theory, or supports differing conclusions, the defendant is entitled to an instruction on it. *State v. Cole*, 377 S.W. 2d 306, 307 (Mo. 1964), *State v. Westfall*, 75 S.W. 3d 278, 280 (Mo. banc 2002), *State v. Avery*, 120 S.W. 3d 196, 200 (Mo. banc 2003).

A.

Instruction No. 5 offered by the State was erroneous because of its use of the word “conduct”. Conduct is obviously an act which is performed by someone, and yet the Information in Lieu of Indictment uses the phraseology that defendant “failed to insure *its* workers’ compensation liability”. This subject was fully discussed with the Court, and the Court’s attention was directed to the language of §§ 562.011 and 562.061, RS Mo, the Model Penal Code, the Illinois statute, and the Illinois case of *State v. Parvin*, 533 N.E. 2d 813 (1988). This issue is fully developed in Section II of this Argument, and we will not repeat what has been said there. Suffice it to say that an instruction should not be based upon a theory that has no merit and for which there was no evidence that defendant failed to do anything that he was under a duty to perform. The instruction may have been appropriate if the corporation were the defendant on trial, but it had been dismissed

by the State as a defendant.

B. and C.

Instructions No. A through D all addressed the issue which was discussed throughout the trial and brought before the jury as to whether Uchechi Brown was an employee or an independent contract. She worked for Housecalls, Inc. as an independent contractor, and her status was memorialized in Defendant's Exhibit A, her Work for Hire Agreement. This was explored at length with the State's chief witness Randolph Wilkins, and he was certainly aware of the distinction that the law recognizes between an independent contractor and an employee (Tr. 60, 70, 84-85).

He acknowledged that if she were an independent contractor, she would not be counted in determining whether there were five employees necessary to require workers' compensation insurance, and therefore Housecalls would not have had five or more employees at any time within the period alleged in the Indictment and Information. An independent contractor is also recognized by the law, and, although there is no statutory definition of an independent contractor, it is clear from the law as to how one is determined to be an independent contractor.

A right-to-control test is applied, and the following eight factors are used to determine whether one is an independent contractor: 1) the extent of control, 2) the actual exercise of control, 3) the duration of the employment, 4) the right to

discharge, 5) the method of payment, 6) the degree to which the employer furnished equipment, 7) the extent to which the work was the regular business of the employer, and 8) any employment contract. Mr. Wilkins was familiar with the test and the eight factors, but he did not use them in this case to determine the difference between independent contractor and employee (Tr. 89-90). For use of the test and factors in worker's compensation matters, see *Seaton v. Cabool Lease*, 7 S.W. 3d 501, 505 (Mo. App. S.D. 1999), *DiMaggio v. Johnston Audio D&M Sound*, 19 S.W. 3d 185, 188 (Mo. App. W.D. 2000), *Phillips v. Par Elec. Contractors*, 92 S.W. 3d 278, 282 (Mo. App. W.D. 2002), and *Nunn v. C.C. Mid West*, 151 S.W. 3d 388, 400 (Mo. App. W.D. 2004). These citations were called to the attention of the Court because they were attached to each of Instructions A, B, C, and D as authority. There being no statutory definition or definition in the MAI-CR, it is appropriate to utilize a definition established by case law.

Reviewing the evidence in the light most favorable to defendant and the theory propounded by the defendant that Ms. Brown was an independent contractor, it is clear that, under the applicable standard of review, the evidence was sufficient to support and authorize an independent contractor instruction. Defendant was entitled to the instruction. Actually, the trial Court recognized that whether or not Ms. Brown was an independent contractor or an employee was a question of fact to be decided by the jury (Tr. 206):

“It is a jury question whether or not Ms. Brown was an independent contractor, or an employee, or should be counted as an employee. That is a question for the jury.”

Having thus recognized the necessity of an instruction on the only factual issue in the case, the Court in effect directed a verdict against defendant!

And the prosecutor took advantage of the absence of any instruction on independent contractor, when he said in closing argument (Tr. 239):

“He has made a big issue about independent contractor status. I want you to take a look at all of the pages of instructions. You will never find it in there. That may be one of the things you put in a note to the Judge. What’s an independent contractor. That’s one of the things the Judge won’t answer.

* * * * *

The evidence has to apply to the law as Stated in the instructions. There is nothing in There about independent contractor status.”

There was more than enough evidence, particularly when “examined in the light most favorable to the defendant and the theory propounded by the defendant” to

require an instruction on “independent contractor”. The trial Court erred in failing to give the instruction.

For all of the foregoing reasons, we believe that the Court committed reversible error in giving Instructions No. 5 and 6 and by refusing to give any of Instructions No. A through D. Accordingly, for this reason, defendant’s conviction should be reversed.

VI.

The trial Court erred in not taking remedial action for the State's belated production and concealment of evidence to contradict the State's unfounded accusation of adulterous misconduct by defendant and Ms. Uchechi Brown because the State not only violated the *Brady* rule of disclosure in that the State had previously produced corporate documents of all other companies in which defendant was involved but apparently purposely withheld the corporate records of another company until the trial was completed, as a result of which defendant was prejudiced by not having access to the document which showed that there was no misconduct by defendant and Ms. Brown.

During the trial and the earlier trial which ended in a mistrial, the State, through Assistant Prosecutor Edward McSweeney, produced a document (State's Exhibit 2) concerning Housecalls, Inc. which, among other things, listed the residence address of Uchechi Brown as the same address of defendant Salter (Tr. 151-155). On the witness stand Ms. Brown denied that she had any improper relationship with Mr. Salter (Tr. 155). Defendant objected to such evidence because it was not true and it created a highly emotional and extraneous issue which could only have an adverse impact upon a jury. The accusation was made at several times during the trial, including closing argument by Mr. McSweeney (Tr. 181-182, 224,

225, 228, 239).

Exhibit 1, as well as a number of other corporate documents pertaining to businesses in which Mr. Salter was interested, had been produced by Mr. McSweeney pursuant to discovery required under Supreme Court Rule 25.03. See Defendant's Motion in Limine, Section B, filed before the first trial in this case (LF 13-14).

In the meantime, there had been another prosecution of Mr. Salter by the State of Missouri, *State v. Salter*, No. 06CR-2047, which was pending in the St. Louis County Circuit Court before Judge Ross at the time of the trial herein. It involved another corporation in which Mr. Salter was interested, Day Star Health Services, Inc. The State was represented by Assistant Attorney General Douglas Pribble. Defendant was represented by Attorney Bernard Edwards, Jr. who was also co-counsel in the trial of the instant case.

Mr. Edwards had attempted to obtain discovery from Mr. Pribble, pursuant to Rule 25.03; Rule 25.02 provides that the request for disclosure should be answered in ten days after service of the request. Because of the delinquency of Mr. Pribble in disclosure, an order was entered on August 11, 2006 by Judge Ross for the parties to provide discovery as required by Court Rules, to-wit: on or before August 21, 2006. Mr. Edwards continued to demand the discovery and on October

6 filed another written request for disclosure. Nothing was received from Mr. Pribble through the end of the second trial in the instant case, during which the document which gave the erroneous address of Ms. Brown was included in the State's Exhibit 2 at page 23. A copy is attached to defendant's motion for a new trial as Exhibit D (LF 80)

On October 30, Mr. Edwards filed a motion to continue the other case and a motion to enforce discovery, which he delivered to Mr. Pribble on that date, and at that time Mr. Pribble finally gave Mr. Edwards discovery documents. Among the papers received by Mr. Edwards on October 30, 2006 was an Annual Registration Report filed in behalf of Day Star Health Services, Inc. which stated the address of Ms. Brown as 6912 Candlewick Way, Florissant, MO 63033. See Exhibit G to defendant's motion for new trial (LF 86).

All of the foregoing facts concerning the discovery delinquencies by the State of Missouri in the other case are set forth in paragraph 49 of Defendant's Motion to Set Aside Jury Verdict and to Enter Judgment of Acquittal, or, in the Alternative, to Grant a New Trial (LF 58-86). An affidavit as to the truth of the statements of fact contained in paragraph 49 was executed by Mr. Edwards and is attached to the motion (LF 87-88). Paragraph 49 was part of the motion for new trial and was included by reference in the motion to set aside jury verdict and to enter judgment of acquittal; see paragraph (LF-59).

Unfortunately, the failure to make disclosure of the Day Star records with the correct address for Ms. Brown and the concealment of that crucial document, until less than a week after the conclusion of the trial, caused defendant to be unaware of the existence of the document prior to the verdict. The post-trial motion, including paragraph 49, and the affidavit of Mr. Edwards thereto, were properly and timely filed pursuant to Rule 29.11(f). No opposing affidavits were ever filed by the State of Missouri.

Not only was there a violation in this case of the discovery Rule 25.03 by the State of Missouri, but the circumstances of development of this issue as presented in paragraph 49 of the post-trial motion, without contradiction by the State of Missouri, suggest a violation of the duty of disclosure by the State, in accordance with *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1983), and the chronology of events as set forth in paragraph 49 lead to the conclusion that there was prosecutorial misconduct by the representatives of the State of Missouri to delay disclosure until the passage of time prevented use of the document during the trial.

Standard of Review

The standard of appellate review for the failure to produce newly discovered evidence is that the evidence be sufficiently credible that it would probably have produced a different result. *State v. Thompson*, 610 S.W. 2d 629, 633 (Mo. Div. 1,

1981). We submit, however, that because of the *Brady* violation, a different standard applies so “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution” (*Thompson*, at page 632, quoting *Brady*, 373 US at 87, 83 S.Ct. at 1196). Furthermore we believe that in this particular case involving a deliberate concealment amounting to prosecutorial misconduct, “a reasonable doubt [is created] that did not otherwise exist, [and] constitutional error has been committed.” (*Thompson*, at page 633, quoting from *United States v. Agurs*, 427 U.S. 97, 112-113, 96 S.Ct. 2392, 2401-2402, 49 L.Ed. 2d 342 (1976).

* * * * *

There is no doubt that there was prejudice to the defendant by the constant inclusion of this spurious and slanderous issue, affecting the testimony of defendant’s only witness. Her exoneration from the unwarranted accusation was carefully orchestrated by the State until after her testimony and conclusion of the trial.

For these reasons, defendant believes that sanctions are appropriate against the State of Missouri, which should include a dismissal of the charges against defendant in this case. Defendant respectfully suggests that his conviction should be reversed and that this case be remanded to the trial Court for entry of an order of

dismissal and discharge of defendant, and such other orders as this Court may deem appropriate.

CONCLUSION

For all of the foregoing reasons, defendant respectfully suggests that this Court should reverse the judgment of conviction in the Circuit Court and remand this cause for further action consistent with the opinion to be filed.

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CERTIFICATE OF SERVICE

IRL B. BARIS, the undersigned attorney for Appellant Robert Salter in this appeal, hereby certifies that on the 17th day of October, 2007, he will deliver two copies of the foregoing Brief to the office of Attorney General, State of Missouri, Supreme Court Building, Attn: Shaun J. Mackelprang.

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