

IN THE SUPREME COURT
FOR THE STATE OF MISSOURI

No. SC93745

THOMAS ESS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

On Appeal from the Circuit Court of Monroe County
State of Missouri
The Honorable Rachel L. Bringer, Circuit Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

Respectfully Submitted,

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ARGUMENT

I. Claims Raised In The Motion For New Trial Should Be Reviewed Under Normal Standards of Review As Opposed To Plain Error

The State argues that there was no clerical error in any order by the trial court and therefore no nunc pro tunc order should be entered. However, a nunc pro tunc order is specifically directed at “clerical error” and, “is a common law power derived from a court's jurisdiction over its records.” *Pirtle v. Cook*, 956 S.W.2d 235 (Mo. 1997). The “clerical error” that occurred in this case involved the clerk telling defense counsel’s secretary that the motion could not be filed without a notary stamp¹ when defense counsel had the motion otherwise ready to tender for filing. “No question can exist as to the power of the [c]ourt to make nunc pro tunc entries, for the furtherance of justice” *Id.* at 240. Moreover the State’s assertion that no correction was made is inaccurate. The new trial motion itself shows the motion originally file-stamped on January 10, and that this file stamp was crossed out and it was re-file stamped for January 9. The notation “per order of the court” clearly indicates that this was done to correct an error, per the court’s order.

Moreover, central to the reasoning behind subjecting certain issues to plain error review as opposed to normal standards of review is the concept that in some cases, a trial

¹ There was no dispute as to what actually happened that resulted in the motion being filed one day late.

counsel's failure to object may be a matter of trial strategy. *State v. Cochran*, 365 S.W.3d 628, 635, n.5 (W.D. 2012). However, in this case, it is clear that the failure to file the New Trial Motion on time was not any matter of trial strategy. Contemporaneous objections, as is true of new trial motions, give the trial court the first opportunity to correct errors and render informed legal decisions. It is without question that the new trial motion in this case did just that. The Court and the Prosecuting Attorney were both given sufficient notice of the objections that would be stated and the issues that would be raised in the hearing on the motion for new trial, and any error that occurred as a result of the filing one day late was harmless. Moreover, the harm to Mr. Ess's rights that would occur as a result of not having this Court fully and thoroughly review the very serious claims presented in the new trial motion is considerable. The judge's order that the new trial motion be considered filed on January 9 should stand as a matter of equity and fairness, and normal standards of review should apply in this case to issues raised in the new trial motion.

II. The Failure Of Juror Crigler To Disclose His Bias Requires Reversal As To All Counts

Frequently, juror challenges derive not from matters specific to the pending case, but focus on a juror's past experiences. *See e.g. State v. Endres*, 698 S.W.2d 591, 596 (Mo. App. E.D. 1985) (juror failed to remember the shooting death of her half-brother that occurred six weeks before trial); *Massey v. Carter*, 238 S.W. 3d 198 (Mo. App. W.D.

2007)(juror failed to disclose that he was being sued in a collections lawsuit); *Schultz v. Heartland Health System, Inc.* 16 S.W.3d 625 (Mo. App. W.D. 2000)(juror failed to disclose prior litigation experience in bankruptcy proceedings); *Strickland by and through Carpenter v. Tegler*, 765 S.W.2d 726 (Mo. App. W.D. 1989)(juror failed to disclose family members congenital arm defects); and *Groves v. Ketcherside*, 939 S.W.2d 393 (Mo. App. W.D. 1996)(in medical malpractice case, juror failed to disclose unfavorable ruling in wrongful death litigation against doctor for the death of his wife). In such cases, the prejudice comes not from any suggestion that the bias touches directly on the issues in the case being tried, but rather on the possible affect of the juror's previous experiences **may** bring to the courtroom. In this case, there is no such leap of logic or inference necessary. Juror Crigler's expression of indifference toward any possible defense and his clear statement that he had prejudged the case is nose-face plain. Even the Respondent concedes as much: "Respondent would agree that a statement that the case was 'open and shut' ...would seem to connote that the case was 'open and shut' in favor of the State." (Respondent's Brief, hereinafter "R.B." at 19).

Crigler, like any other person who participates as a potential juror in any case has a sworn duty to answer all voir dire questions full, fairly, and truthfully. *State v. Moorehead*, 875 S.W.2d 915 (Mo. App. E.D. 1994); *State v. McKee*, 856 S.W.2d 658 (Mo. App. S.D. 1993); and *State v. Hatcher*, 835 S.W.2d 340 (Mo. App. W.D. 1992). Crigler did not do so and his intentional disregard of his oath and duty was solid proof of

his bias against the defendant. There is no doubt he would have been removed as a potential juror had he made his comments in open court. Because he chose not to be truthful and to not reveal his preconceived and uninformed belief concerning the eventual outcome of the case, Ess was deprived of an impartial jury that could fairly render an unbiased assessment of the evidence against him. *In re Berg*, 342 S.W.3d 374, 387 (“The right to unbiased and unprejudiced jurors is foundational to the judicial process.”)

The State primarily relies on *State v. Mayes*, 63 SW 3d 615 (Mo banc. 2001) in an effort to avoid the clear impact on a defendant’s right to a fair trial and a fair jury by excising from its text a single phrase which has limited, if any, application to the case before the Court. This Court noted in *Mayes* that “[a] prospective juror must have an ‘open mind free from bias and prejudice.’ *State v. Wheat*, 775 SW 2d 155, 158 (Mo banc. 1989) *cert denied*, 493 U.S. 1030 (1990). Prospective jurors have a duty to answer all questions fairly, fully, and truthfully during voir dire. *State v. Jackson*, 412 SW 2d 428, 432 (Mo banc. 1967); *State v. McKee*, 856 SW 2d 685, 690 (Mo App. S.D. 1993). The failure to respond to an applicable question can deprive counsel of information needed to exercise a peremptory challenge or challenge for cause. *State v. Martin*, 755 SW 2d 337, 339 (Mo. App. E.D. 1988); *State v. Endres*, 698 SW 2d 591, 595 (Mo. App. E.D. 1985).” *Id.* at 624-625. It is within the perimeters of these obvious concepts of fundamental fairness that the Court must determine if juror Crigler indeed did not possess an “open mind free from bias and prejudice.”

The underlying facts surrounding the juror nondisclosure in *Mayes* are distinguishable from the facts in this case. First, the lawyer in *Mayes* had, at the time of the voir dire, a questionnaire executed by the juror indicating that she had a family member that had been a victim of a crime, a question arguably distinct from that propounded during the course of voir dire². Despite having a questionnaire answer that could arguably be different from her failure to respond to a similar inquiry during the actual questioning, defense counsel failed to follow-up with the juror. Defense counsel failed to cross check the juror's questionnaire with her oral responses until after trial, under circumstances in which the timely discovery of the response was "entirely within the control of counsel." *Id.* at 625.

Second, *Mayes*' counsel failed to "present 'evidence through testimony or affidavits of **any** juror, or **other witness**. . . at the hearing on his motion for new trial.'" *Id.* at 625-626 (quoting from *Portis [v. Greenhaw*, 38 SW 3d 436, 445 (Mo. App. W.D. 2001).]) The opposite is true here. This Court in *Mayes* or any other case never decreed that the referenced affidavit or testimony **must** include testimony from the offending juror. In denying the *Mayes* relief, this Court specifically called attention to the fact that the defendant "failed to offer either an affidavit or testimony of [the offending juror], **or other evidence** that she in fact did have a relative who had been the victim of a crime, **or**

² Defense counsel asked whether members of the panel had "loved ones or close relatives" that were victims of a crime. *Id.* at 624.

any evidence as to why she did not respond to the Judge’s inquiry.” *Id.* at 626 (emphasis added). In this case, the Appellant did offer both affidavits and testimony in support of his claim that Crigler, before hearing any evidence, had decided that this was a “open and shut” case. The difference is significant and controlling.

Third, the inquiry of Crigler, whether he was biased or prejudiced or had formed any opinion concerning the Ess’ guilt, was designed to get at the very essence of voir dire, i.e. whether a prospective juror has a “open mind, free from bias and prejudice.”

Whereas the inquiry of the juror in *Mayer*, while significant, did not necessarily touch upon the ability of the juror to be free from bias or prejudice. As this Court noted in *Mayer*, testimony or an affidavit from the juror might have been significant in that it would have helped determine if her answer on the questionnaire may not have been in conflict with her answer to the question presented during voir dire, i.e. is a close family member or loved one necessarily encompassed within the question on the questionnaire concerning whether she had “any relative who was the victim of a crime.” In other words, the Court noted that both answers could have been true depending on the juror’s definition of “loved one or close relative,” *Id.* at 626, or she could “have simply checked the wrong box on her questionnaire and not have a relative who was the victim of a crime.” *Id.*

The holding in *State v. Potter*, 711 SW 2d 539 (Mo. App. E.D. 1986) in which the State seeks to bootstrap into an in-every-case doctrine that any motion based on juror

concealment, intentional or otherwise, must be supported with an affidavit or testimony from the offending juror, did not control this Court's decision in *Mayes*. Furthermore, in *Potter* the only witness called at the hearing for the motion for new trial denied the juror's untested claims and thus the only evidence before the trial court directly contradicted the allegations in the motion for new trial. That certainly wasn't true here, where all the evidence supported the claim that Crigler, prior to taking his seat in the jury box, had indicated his bias, his prejudice, and that he had made up his mind. As the State conceded in oral argument before the Court of Appeals and in its brief in that Court that the bias was "in favor of the State." The State in its brief before this Court totally ignores that the actual holding in *Mayes* that, while there must be some evidentiary support in the record, there is no requirement that it include an affidavit or testimony from the offending juror.

The State's argument that the decision in *State v. Lane*, 415 SW 3d 740 (2013) supports its argument that an affidavit or testimony must be produced from the offending juror is likewise a distortion of the facts and holding of that case. In *Lane*, the Defendant did not allege intentional jury concealment or nondisclosure in his motion for new trial, and produced no evidence or testimony to support such a claim. In fact, the Court could not even determine the identity of the juror from the record on appeal. "Defendant offered no evidence to the trial court supporting his claim." *Id.* at 755. Counsel in *Lane* "failed to demonstrate that the conduct alleged to support Defendant's claim of

nondisclosure or jury misconduct actually occurred” *Id.* at 755-756.

The State argues that this Court has placed the burden on Defendant by requiring testimony from the offending juror. As herein stated, that is not a requirement that has ever been imposed by this Court. Furthermore, there was no objection by the State asking Ess be required to produce statements from counsel or any other source explaining why Crigler was not providing testimony at the hearing. The State, if it wished to, could have presented testimony itself but chose to present nothing³. This Court’s holding in *Mayer* does not require that such an explanation be part of the record. It is also obvious that jurors, who have violated their oath would be reluctant to come forward and make such an admission to the Court. While the State may not have the initial burden of establishing grounds by affidavit in a motion for new trial⁴, once a defendant makes that allegation, the State has free rein to refute it.

This Court’s per curiam holding in *Johnson v. McCullough*, 306 SW 3d 551 (2010) is particularly instructive. *Johnson* recognizes that “bias and prejudice is presumed if a juror intentionally withholds material information.” What could be more material than the question of whether a juror in a criminal case had already made a decision concerning the defendant’s guilt? In *Johnson*, the issue was the juror’s failure to

³Even the cross-examination , such as it was, failed to challenge the testimony.

⁴Counsel is unaware of any situation in which the State has filed a motion for new trial.

disclose prior litigation experience. In this case, the nondisclosure implicated the very guarantees that are the foundation of our system of justice - a defendant's inviolable right to have his fate decided by jurors with open minds who are ready and capable of rendering a fair decision only **after** the jury has heard the evidence. In addition, this Court's holding in *Johnson*, nine years after the holding in *Mayes*, supports Ess' claim that he need not offer "any **direct** evidence explaining why [the offending juror] failed to answer the pertinent question as to a material matter. . ." *Id.* at 557. In *Johnson*, the Court noted that the defendant had cited "no case law supporting their argument that either an affidavit or testimony is necessary to support a finding of an intentional nondisclosure."

Crigler was biased against Ess. He lied about his bias throughout the voir dire. There is no way to determine how that bias could have affected the other jurors but it most certainly affected him. The State could have presented evidence from Crigler that: (1) he did not make the statement; (2) that he was not being sincere when he said it; (3) that he did a 180 ° turn around and changed his mind during voir dire; (4) or that if he was biased, it was a bias in favor of the Appellant. No such evidence was presented because there was none. This court should not engage in a guessing game of such magnitude when a citizen's entire adult life is at stake. The evidence was far from overwhelming and jury deliberations took more than six hours; the jury did not return with its verdict until after 11:00 p.m.

The Respondent has argued that because the statement was made early in the voir

dire process Crigler may have changed his mind at the time the questions were asked. Crigler's comments were made during the lunch break. Prior to the break, both the judge and the prosecutor had made it abundantly clear that Appellant was to be presumed innocent and that the state had the burden of proving him guilty. Tr:41; 73. If there was "any reason" that Crigler could not have followed the court's instruction it was incumbent on him to reveal that reason. He did not. Likewise, the prosecutor emphasized the importance of fairness and impartiality and the juror's ability to evaluate the case on the basis of the evidence and the legal standards the court had related in its instructions. When the prosecutor asked Crigler, to his face, if there was **any** reason he could not "be a good juror for this particular case," Crigler lied and said no. Tr: 95.

Just as significant as these early false claims, the offending remark occurred over the lunch break after the court had specifically admonished the jurors: "You must not discuss any subject connected with the trial among yourselves, or form or express any opinion about it, and, until you are discharged as jurors, you must not talk with others about the case, or permit them to discuss it with you or in your hearing." Tr: 203. MAI 300.04. There was no sea change in Crigler's attitude or bias. He was willing to openly violate the court's instructions within minutes of having received them.

HEARSAY CONSIDERATIONS

The State's argument that the claim should be denied because the evidence was hearsay should not present an obstacle to a fair and just decision in this case. First, the

statement was evidence of Crigler's state of mind which, unlike *State v. Rios*, 234 SW 3d 412, 422 (Mo App. W.D. 2007) was especially relevant to the inquiry in question: had Crigler stated this was a "cut and dry" or "open and shut case" and whether this indicated a bias that should have precluded him from serving as a juror in this case? Second, the Prosecutor never objected to the admission of the statements based on hearsay. Third, Crigler's statements were not offered for the truth of their content but rather to show that they were made. Defendant did not offer this evidence to support Crigler's belief that this was an "open and shut" case, but rather, that Crigler thought it was. Accordingly, the statements are not hearsay, are completely relevant to the inquiry concerning the offending juror, and were admissible whether objected to or not. Appellant's conviction should be reversed and he should receive a fair trial before a fair jury.

III. A Complete Reversal Is Required As To Count II

The Government incorrectly asserts as to this Point that Ess was trying to argue that the evidence was insufficient as to W.L.'s age because of the testimony presented by the grandmother. This misconception of Ess' argument entirely misses the point. The evidence was insufficient simply because the State presented no evidence suggesting that W.L. was under 14 at the time of the crime, and this was an essential element of the offense. A judgment of acquittal should have been entered as to this Count at the close of the State's evidence because the State did not present evidence as to this essential element of the offense. Ess referred to the testimony of the grandmother simply to establish that

the evidence as to age that *was* presented by the State actually suggested that W.L. was older than 14 at the time.

The only evidence that the State could argue was presented as to age was W.L.'s testimony that he could specifically recall one act of Ess having performed oral sex on him. R.B at 28 (citing Tr:tr 294, 300). Because he later testified that all sexual activities continued as he got to 14 or 15, the State argues, a jury could infer that he was less than 14 years old when the oral sex occurred. This testimony does not suggest that fact, and certainly is not sufficient from which to find this essential element of the offense beyond a reasonable doubt.

This argument is analogous to a situation where a person was convicted of murder, but there was no evidence was presented suggesting that the victim had actually died. This fact alone that no evidence was presented that the person had actually died would be sufficient to require that a judgment of acquittal at the close of the State's evidence. But this case is even more analogous to a situation where no evidence was presented that the victim had died, while there was evidence presented that the victim was actually still alive. The argument that the witness who testified in this manner "could have been mistaken" is ludicrous in light of the State's burden and the fact that no evidence was presented to the contrary. This count should have never been presented to the jury.

With regard to *State v. Miller*, 372 S.W.3d 455 (Mo.banc. 2012), the State argues that because there was no disparity between the time period charged and instructed and

the time period proven at trial, the same double jeopardy issues do not exist. But the State again misses the point. The *disparity* was not what was relevant. The double jeopardy issue arose in this case because the failure of the State to present *any* evidence as to the specific time period or W.L.'s specific age, means that Ess could be convicted of a second crime based on the exact same evidence that was presented at this trial, if the State simply decided to charge that the crime occurred during a different time period. Double jeopardy concerns therefore prevent this conviction from standing and a complete reversal is required as to this count

IV. Complete Reversal Is Required As To Count V Because The Incorrect Instruction Completely Relieved The State Of Its Burden Of Proving An Essential Element Of The Offense

The State cites *State v. Tillman*, 289 S.W.3d 282, 292 (Mo.App.W.d. 2009) for the proposition that an appellate court should reverse for plain error where the error “excused the state from its burden of proof on a contested element of the crime.” That is exactly what happened in this case. The instructional error completely relieved the burden on the State of proving that B.L. was under twelve years old at the time of the offense.

The State attempts to distinguish *State v. Miller*, 372 S.W.3d 455 (Mo.banc. 2012) based on the fact that the jury in *Miller* had found the defendant guilty of conduct that was “not criminal” during the charged period. R.B. at 40 (citing *Miller*, 372 S.W.3d at 455). This overly literal interpretation of the Court’s words in *Miller* is neither accurate

nor a basis for distinguishing *Miller* from this case. The act at issue in *Miller* was a touching of genitals that occurred “through the clothing.” At the time this occurred, this “touching” could have been considered a third degree assault under §565.070 RSMo (Supp. 1998), which proscribed, “knowingly caus[ing] physical contact with another person knowing the other person will regard the contact as offensive or provocative.” Surely, a touching of the genitals “through the clothing” could be considered “criminal conduct” under that statute. In saying that the instruction allowed the jury to find Ess “guilty of a crime . . . for conduct that was not criminal . . .” (372 S.W. 3d at 471), the Court clearly did not mean that it was not criminal under any statute at all. What it meant was that it did not fit the definition of the crime with which the defendant had been charged and for which the defendant had been found guilty. That is the exact case in Ess’ case, and *Miller* is indistinguishable in this regard. The State’s attempt to distinguish *State v. Langston*, 229 S.W.3d 289 (Mo. App. S.D. 2007) and *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-63 (2000) are similarly unavailing as they do not change the fact that the jury was improperly instructed as to a fundamental element of the offense and thereby relieved of its burden of proving that element beyond a reasonable doubt.

The State asserts that Rule 23.01 and §545.240 RSMo only apply to the filing of an initial information and “do not mandate the filing of an amended information to charge attempt.” R.B. at 43. However, the State does not cite to a single rule or case explaining why Rule 23.01, which requires that, “[t]he . . . information shall be in writing, signed by

the prosecuting attorney, and filed in the court having jurisdiction of the offense,” (Resp.Brief at 42 (citing Mo.Sup.Ct.Rule 23.01)) should be disregarded in this case. Of the cases cited by the State, only *State v. Allen* (756 S.W.2d 167, 170 (Mo.App.W.D. 1987)) deals with an issue of the State failing to file an Amended Information. *Allen* is readily distinguishable on its facts. In *Allen*, the court’s ruling was that the information would be amended by inter-lineation of one or two words, and case suggested that the failure to do this was a clerical error on the part of a clerk. 756 S.W.2d at 167, 170. In this case, the trial court merely ruled that a motion for judgment of acquittal would be overruled as to the lesser included “attempt” offense and the prosecutor assured the court that it would file amended charging documents. Tr.Tr:556. The prosecutor never did. In allowing instructions to be submitted to the jury as to this offense despite the fact that the information was never filed, the trial court relieved the State of one of its most fundamental and basic burdens: that of charging the defendant with the crime for which he was being tried.

The State relies on a number of cases for the proposition that an attempt may be charged by amended information. R.B. at 45 (citing to *State v. Robertson*, 764 S.W.2d 483, 484-85 (Mo. App. W.D. 1989); *State v. Taylor*, 724 S.W.2d 531, 536 (Mo. App. W.D. 1986); *State v. Messa*, 914 S.W.2d 53, 54 (Mo. App. W.D. 1996)). In none of these cases was it asserted, as it is here, that allowing the amended information deprived the defendant of a defense and therefore appellant’s rights were substantially prejudiced.

Rule 23.08 requires both that “no new offense is charged” *and* that substantial prejudice does not result from amending information. In this case, substantial prejudice resulted, because the amendment entirely stripped Ess of an asserted defense, i.e. that Ess had not touched B.L. underneath his clothing. *Messa* even supports the proposition that a court must consider substantial prejudice even where the charge has been amended to charge attempt or a lesser-included offense. 914 S.W.2d at 55 (finding that the defense being asserted was still available under an amended offense of attempt and therefore the amendment was permissible). The amendment was prejudicial and the therefore impermissible.

The State asserts that the instructions distinguished a touch “through the clothing” from one requiring skin to skin contact. They did not do so, but simply stated the words “through the clothing” without defining them, and then later stated the words “touch the defendant’s genitals” without defining them. The distinction between these two touchings was by no means clear and required further explanation. Reversal is required as to this count.

V. The Evidence Was Insufficient To Convict For Attempted Child Molestation

The State argues that Appellant’s point relied on confused the charge as to Count V. While the wording in the point relied on in Appellant’s opening brief filed in the Eastern District court could be (but by no means must be) interpreted as attempting to assert that Count V required a finding that Mr. Ess attempted to touch B.L. underneath his

clothing, the argument clearly conformed to the facts and charges as the record actually stated them. Moreover, in Appellant's substitute opening brief filed in this Court, Appellant made a slight change to this wording and highlighted that change in a footnote stating as follows: " In Appellant's opening brief on appeal, this portion of this point read, ' . . . that Defendant acted with the purpose to touch B.L. underneath his clothing . . . ' "

Respondent pointed out that this language is unclear and could be read to mean a touching underneath B.L.'s clothing, as opposed to 'underneath Defendant's clothing' as the argument portion of the point-relied-on suggested. The language in the point-relied-on has been changed to more clearly reflect the intended meaning of this language."

Respondent does not object to this change, but merely asserts the same argument asserted in the Court of Appeals that the Court of Appeals did not accept. *State v. Ess*, No. ED98038, slip op. at 23-24. The Court of Appeals was correct in its ruling that without some showing that Appellant made an attempt to have B.L. place his hands underneath Ess' clothing, the evidence was insufficient to sustain a conviction. Complete reversal is required as to this count.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Judgment of the Circuit Court be reversed.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 6th day of May, 2014, one true and correct copy of the foregoing brief, was served via the court's electronic filing system on:

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/s/ Richard H. Sindel
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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c) this brief:

1) contained the information required by Rule 55.03; 2) complies with the limitations in Rule 84.06(b); and 3) contains 4,705 words determined using the word count in WordPerfect 12. A copy of this brief was submitted, in WordPerfect 13 format, via electronic copy. All digital copies of this brief were scanned for viruses and found to be virus free as required pursuant to Rule 84.06(h).

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