IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 86803
	)	
CLIFTON C. REED,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BUTLER COUNTY, MISSOURI
36TH JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE MARK L. RICHARDSON, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Clifton Reed, appeals his conviction, after a jury trial in Butler County, Missouri, of six counts of criminal nonsupport, Section 568.040 RSMo 2000.[1] The Honorable Mark L. Richardson sentenced Appellant, as a prior and persistent offender, to six concurrent terms of five years imprisonment. After the Missouri Court of Appeals, Southern District, issued its opinion in SD 25895, this Court granted Appellant's Application for Transfer pursuant to Rule 83.03. This Court has jurisdiction of this appeal under Article V, Section 10, Mo. Const. (as amended 1976).

[1] All statutory references are to RSMo 2000 unless otherwise noted.

STATEMENT OF FACTS

The State filed an Information charging Appellant with two counts of criminal nonsupport, Section 568.040, on July 22, 2002 (L.F. 11). Count I alleged that Appellant failed to provide support for each of six months within the period January 1, 2000 through December 31, 2000 (L.F. 11). Count I alleged that Appellant failed to provide support for Travis Reed, born June 20, 1985 (L.F. 11). Count II contained the same allegations, however the child in question was Clifton Reed, born December 10, 1983 (L.F. 12).

The Information was amended twice (L.F. 13, 16). In the Amended Information, the State added four counts, identical to Counts I and II except the time periods were January 1, 2001 through December 31, 2001 (Counts III and IV) (L.F. 14), and January 1, 2002 through December 31, 2002 (Counts V and VI) (L.F. 14-15). The Second Amended Information added the allegation that Appellant was a prior and persistent offender (L.F. 16-20).

After voir dire, Appellant objected to the State's use of all seven of its peremptory strikes against men on the basis of gender, citing *Batson v. Kentucky*[2] and *J.E.B. v. Alabama*[3] (Tr. 65). The prosecutor told the trial court that he did not know that he had struck all males, he just struck them. He added that he had

[2] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[3] 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

struck some based on their occupations and the way they either spoke or did not speak, and their body language (Tr. 65). The court, addressing defense counsel, asked "[f]inal word, Mr. Collier?" (Tr. 65-66). Defense counsel responded that he was still objecting to the State's strikes on the basis of gender. (Tr. 66). The trial court overruled the objection (Tr. 66). The State then presented the following evidence.

Juanita Smith had known Appellant for twenty years, and had two sons with him, Clifton Clyde Reed, born 12/10/83, and Travis Terrell Reed, born 6/20/85 (Tr. 76). The couple married on February 14, 1989 (Tr. 76), and divorced on February 14, 1995 (Tr. 78). Appellant was not present at the divorce hearing but Smith remembered seeing him that evening at one of the boy's basketball games (Tr. 78). She could not recall whether or not she told Appellant they were now divorced (Tr. 78). Smith never told Appellant that he had been ordered to pay a particular amount of child support, but on occasion she would tell him that the children needed things for playing sports (Tr. 79).

She received no support from Appellant during 2000, 2001, or 2002 (Tr. 80-81). During those years she did ask him for support (Tr. 82), but again, she never told him that he had been ordered to pay an amount certain each month, only that she needed help (Tr. 83).

Smith knew that Appellant was not working but she did not know whether or not he was disabled (Tr. 83). Her older son Clyde graduated from high school in May, 2003 (Tr. 83), and Travis was still in high school (Tr. 84).

Smith believed that Appellant was in Arkansas when she filed for divorce and she did not serve him with any papers (Tr. 84). Smith received some papers from the prosecutor's office in 2001, but she did not mention this to Appellant (Tr. 85). Smith did not know where Appellant was during that time (Tr. 86). Appellant would give her $5 or $10 once in a while (Tr. 87).

The parties stipulated that on February 14, 1995, Butler County Divison III ordered Appellant to pay $213 per month child support for Clifton Reed, Jr. and Travis Reed (Tr. 89). It is not clear from the stipulation whether this was the total amount of child support ordered, or if this was per child.

Diana Medlin was the supervisor in the Butler County Prosecuting Attorney's Office: Child Support Division (Division) (Tr. 90). She was also custodian of records (Tr. 90).

In 2001, her office began an administrative modification in reference to Clifton Clyde Reed and Juanita Smith (Tr. 91). According to Medlin, federal law required the county to review each case every three years to determine if a modification of the judicial order through the administrative process was warranted (Tr. 91).

The first step in that process was to mail each party a letter with a financial information statement to be completed and returned (Tr. 92) Smith returned hers, there was no response from Appellant (Tr. 92). The next step was to send, by certified mail, each party a "Form 14," which was the presumed child support obligation (Tr. 92). The green return card was received for Smith, but not for

Appellant (Tr. 93). Finally, the Division sent a motion to the Sheriff's office for service of the Motion to Modify Judicial Order (Tr. 93). The Division received a return of service for Appellant (Tr. 94). The motion was served on Appellant while he was in the Butler County Jail, serving a one year sentence (Tr. 94). Service was made by Butler County Jail employee Jeneva Tyler, and was served on July 6, 2001 (Tr. 98).

After the State rested, Appellant submitted a Motion for Judgment of Acquittal at the End of the State's Case (L.F. 29). That motion was overruled (Tr. 100). Appellant then testified on his own behalf (Tr. 114).

At the time of trial, Appellant was in the Butler County Jail (Tr. 114). He did not know about the court ordered child support until he received some papers in this case (Tr. 115). He did not remember being served with any papers while he was in the jail in 2001 (Tr. 115). He admitted he most likely was, but he did not remember (Tr. 115). He was incarcerated in the Butler County jail from 2000 until 2001 (Tr. 115). When he was released in October or November, 2001, he applied for disability, and that action was pending at the time of trial (Tr. 116).

Appellant testified that he was released from prison "right after the divorce," and did not know anything about it (Tr. 119). Appellant did not know he had been ordered to pay monthly child support (Tr. 124). On cross examination, Appellant stated that when he returned from Arkansas, he went to live in Cape Girardeau for a while (Tr. 134). He knew he was divorced, but he did not know that he had been ordered to pay child support until 2001 (Tr. 134).

Appellant's motion for Judgment of Acquittal at the End of All of the Evidence (L.F. 31) was overruled (Tr. 148). The jury was instructed on six counts of criminal nonsupport (L.F. 38-43). No instruction on "good cause" was offered or given (L.F. 33-47).

The jury returned guilty verdicts on all six counts (Tr. 167-168; L.F. 49-54). The Honorable Mark Richardson sentenced Appellant, as a prior and persistent offender (Tr. 6, L.F. 26), to six concurrent five year terms of imprisonment (Tr. 176, L.F. 60). Appellant was granted leave to appeal *in forma pauperis* (L.F. 67), Notice of Appeal was timely filed (L.F. 68), and this appeal follows.

POINTS RELIED ON

I.

The trial court erred in overruling Appellant's motion for judgment of acquittal after the close of all of the evidence for Counts I, II, III, and IV of criminal nonsupport because the State did not prove those offenses beyond a reasonable doubt, in violation of Appellant's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 10 of the Missouri Constitution, in that the State did not present any evidence from which a rational trier of fact could have reached a "subjective state of near certitude" that Appellant knew or was aware that he had been ordered by a court to pay monthly child support and therefore the State failed to prove that Appellant acted knowingly, an essential element of criminal nonsupport as charged in the Information.

State v. Morovitz, 867 S.W.2d 506 (Mo. banc 1993);

State ex rel. Dally v. Copeland, 986 S.W.2d 943 (Mo.App., S.D. 1999);

State v. French, 79 S.W.3d 896 (Mo. banc 2002);

State v. Cariaga, 147 S.W.3d 122 (Mo.App., S.D. 2004);

U.S. Const., Amendment XIV;

Mo. Const. Article I, Section 10;

Sections 445.010, 568.040; and

Rule 29.11(d).

II.

The trial court clearly erred in overruling Appellant's challenges to the State's use of all of its peremptory challenges to remove male venirepersons, because such ruling denied Appellant and the venirepersons their rights to equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that the prosecutor alleged that he struck all males because he was unaware that he was using all of his peremptory strikes against men and because he had placed either a minus sign or a question mark next to their names after reading their questionnaires. These explanations, however, were mere pretext for removing all males since there were similarly situated female venirepersons who were not struck and none of the men struck by the State gave any answers during voir dire and therefore the State never attempted to question them about whatever it was that caused the prosecutor to place a minus or question mark next to their names.

State v. Antwine, 743 S.W.2d 51 (Mo. banc), *cert. denied*, 486 U.S. 1017 (1988);

State v. Davis, 894 S.W.2d 703 (Mo.App., W.D. 1995);

State v. Marlowe, 89 S.W.3d 464 (Mo. banc 2002);

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994);

U.S. Const. Amendment XIV;

Mo. Const., Article I, Section 2; and

Rule 29.11(d).

I.

The trial court erred in overruling Appellant's motion for judgment of acquittal at the close of all of the evidence for Counts I, II, III, and IV of criminal nonsupport because the State did not prove those offenses beyond a reasonable doubt, in violation of Appellant's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 10 of the Missouri Constitution, in that the State did not present any evidence from which a rational trier of fact could have reached a "subjective state of near certitude" that Appellant knew or was aware that that he had been ordered by a court to pay monthly child support and therefore the State failed to prove that Appellant acted knowingly, an essential element of criminal nonsupport as charged in the Information.

The trial court erred in overruling Appellant's motion for judgment of acquittal at the close of all of the evidence because there was insufficient evidence to support a finding that Appellant knew or was aware that he had a court ordered legal obligation to support his two children in the years 2000 and 2001 as required for conviction on Counts I, II, III, and IV of the Information.

Preservation:

Appellant filed a motion for judgment of acquittal at the end of all of the evidence, specifically arguing for dismissal of Counts I through IV (L.F. 31, 100-105, 148). The motion was denied (Tr. 148). Appellant included this claim of

error in his motion for new trial (L.F. 56) and therefore it is properly preserved for review by this Court. Rule 29.11(d).

Standard of Review:

In reviewing a challenge to sufficiency of the evidence this Court considers whether, in light of the evidence, the jury could reasonably have found Appellant guilty beyond a reasonable doubt of the charged offenses. *State v. Dawson*, 985 S.W.2d 941, 951 (Mo.App., W.D. 1999). In applying this standard, this Court must look to the elements of the crime and consider each in turn, taking the evidence in the light most favorable to the verdict and granting the State all reasonable inferences from the evidence. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc), *cert. denied* 510 U.S. 997 (1993). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *Id*. But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc) *cert. denied*, 534 U.S. 1030 (2001).

Facts:

In Counts I through IV, Appellant was charged with the class D felony of criminal nonsupport in that during the period between January 1, 2000 and December 31, 2000 (Counts I and II), and January 1, 2001 and December 31, 2001 (Counts III and IV), he "knowingly failed to provide, without good cause, adequate support for" Travis T. Reed (Counts I and III) and Clifton C. Reed

(Count II and IV) "the defendant's minor child(ren) for whom defendant was legally obligated to provide such support." (L.F. 16-18). The State enhanced the charge from a class A misdemeanor to a class D felony by including the allegation that "[t]he defendant knowingly failed to provide support[4] in each of six individual months within the twelve month period of" January 1, 2000 through December 31, 2000 (Counts I and II), and January 1, 2001 through December 31, 2001 (Counts III and IV) (L.F. 16-18).

In support of these charges, the State presented the testimony of Appellant's ex-wife, Juanita Smith (Tr. 75). Smith testified that she divorced Appellant on February 14, 1995 in Butler County (Tr. 77). Appellant was not present for the divorce proceedings (Tr. 78). Smith saw Appellant that evening but she could not recall whether she told him they were divorced (Tr. 78). She never told him that the court had ordered him to pay a particular amount of child support, but through the years she would tell him she needed financial help when the children needed things for playing sports (Tr. 79). Smith testified that she believed Appellant was in Arkansas when she filed for divorce (Tr. 84).

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[4] The Information omits the word "child" which is included in Section 568.040.4: "Criminal nonsupport is a class A misdemeanor, unless the person obligated to pay **child** support commits the crime of nonsupport in each of six individual months within any twelve-month period." (emphasis added).

The parties stipulated that on February 14, 1995, Butler County Circuit Court Division III ordered Appellant to pay $213 per month in child support for Clifton Reed, Jr., born 12/10/83 and Travis Reed born 6/20/85. (Tr. 89).

Diana Medlin was the supervisor for the Butler County Prosecuting Attorney's Child Support Division (Division) (Tr. 90). Records from that office showed that in 2001, the Division began an administrative modification of the February 14, 1995 support order (Tr. 91). A notice was mailed to both parties (Tr. 92). Smith responded, Appellant did not (Tr. 92). Next, the Division sent a "Form 14" to each party by certified mail (Tr. 92). Smith's return receipt was received. Appellant's was not (Tr. 93). Finally, the Division sent the Motion for Modification to the Butler County Sheriff's Office for service (Tr. 93). A jail employee, Jeneva Tyler, served the motion on Appellant, who was in the Butler County Jail, on July 7, 2001 (Tr. 98). The State then rested (Tr. 98).

Argument:

Due process requires that the State prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). This standard impresses upon the fact finder the need to reach "a subjective state of near certitude" of the guilt of the accused. *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979). The critical inquiry is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 318, 99 S.Ct. at 2788-2789.

No person may be deprived of liberty except upon evidence that is sufficient to support a conclusion that every element of the crime has been established beyond a reasonable doubt. *Id.*

Section 568.040 states in relevant part:

> 1. . . . a parent commits the crime of nonsupport if such parent knowingly fails to provide, without good cause, adequate support which such parent is legally obligated to provide for his child or stepchild who is not otherwise emancipated by operation of law.
>
> * * *
>
> 4. Criminal nonsupport is a class A misdemeanor, unless the person obligated to pay child support commits the crime of nonsupport in each of six individual months within any twelve-month period. . .

The State charged Appellant with the class D felony of criminal nonsupport, alleging that he "knowingly failed to provide support in each of six individual months within the twelve month period of January 1, 2000 (2001) through December 31, 2000 (2001)" (L.F. 16-18).

Section 568.040.2 is an example of the legislature choosing to make the violation of a civil court order a criminal offense. *State ex rel. State v. Campbell*, 936 S.W.2d 585 (Mo.App., E.D. 1996). See *State v. Schleiermacher*, 924 S.W.2d 269 (Mo. banc 1996) (reviewing Section 455.010(1) which prohibits violation of a court order of protection proscribing abuse or harassment of a victim). Therefore, it was incumbent upon the State to prove that Appellant knew there was an order

of support in order to prove that he "knowingly failed to pay child support." Section 568.040.4.

In *State v. Morovitz*, 867 S.W.2d 506, 508 (Mo. banc 1993), this Court set out the essential elements of Section 568.040:

1. Defendant had a legal obligation;

2. Defendant failed to provide adequate support;

3. Defendant did so knowingly; and

4. Defendant did so without good cause.

"Knowledge is proven when the defendant is shown to be aware of his support obligation." *Id*. at 509. In *Morovitz*, this Court found the evidence of knowledge sufficient since the evidence showed the defendant's awareness of the court order of support "since it was part of his dissolution decree and since he fought the obligation for years." *Id*. In *State v. French*, 79 S.W.3d 896, 900 (Mo. banc 2002), this Court found that the defendant had acted knowingly since the record showed that:

> 1) French had sex with Wilson; 2) Wilson became pregnant and told French that he was the father; 3) after the child was born, French offered Wilson money if she would not file for child support; 4) French was served with a summons indicating that Wilson had initiated paternity and support proceedings through the Buchanan County Child Support Enforcement Department; and 5) French never responded to the summons. Although French never accepted the copy of the judgment sent to him, the foregoing

evidence was sufficient to establish that he was aware of his support obligation.

In *State ex rel. Dally v. Copeland*, 986 S.W.2d 943 (Mo.App., S.D. 1999), the Southern District held that:

> once a court of law determines in a proceeding for dissolution of marriage that a husband is legally obligated to support a child of the marriage, the husband is susceptible to prosecution for nonsupport if, without good cause, he knowingly fails to provide adequate support for such child.

Id. at 946.

In this case, the State failed to introduce any evidence from which the jury could find, beyond a reasonable doubt, that Appellant was aware that there was a February 14, 1995 court order directing him to pay $213 per month in child support. Smith testified that she never told him of that order and the State did not introduce evidence showing that Appellant had been notified of the divorce proceedings or that he received a copy of the judgment. Smith testified that she believed Appellant was in Arkansas when she initiated divorce proceedings, and to her knowledge, he was never served with any papers (Tr. 84). It appears that Appellant may have been in prison in Arkansas when the divorce proceedings were taking place (Tr. 84, 119). The State failed to prove the essential element that Appellant was aware that a court had ordered him to pay child support.

A conviction for criminal nonsupport cannot be sustained merely on proof of a biological relationship between parent and child. *See, State v. Reed,* No.

SD25895 slip op. at 3 (Mo.App., S.D., April 16, 2005). A conviction for a violation of Section 568.040 requires more than an admission by a defendant that he fathered the child(ren). *Id*.

As the *Morovitz, French* and *Copeland* cases indicate, the existence of a legal obligation is a separate element from the mental state that a defendant acted knowingly in failing to provide adequate support to his child(ren).

The Southern District recognized this distinction in *State v. Cariaga*, 147 S.W.3d 122 (Mo.App., S.D. 2004). In that case the Court held that "a parent acts with the particular mental state of 'knowingly' when a parent is aware of the support obligation." *Id*. at 126, quoting *State v. French*, 79 S.W.3d 896, 900 (Mo. banc 2002). The Court went on to find that the evidence was sufficient to show that Cariaga had knowledge of his legal obligation since he admitted it in his Petition to Enter a Plea of Guilty, and because the withholdings from his wages were "substantially less than his court-ordered monthly child support payment." *Id*.

The appellate courts seem to take inconsistent positions on cases concerning violations of Section 568.040. *State v. Sellers*, 77 S.W.3d 2 (Mo.App., W.D. 2002) is an example. In *Sellers*, Mother was ordered to pay $79.60 per month in child support for each of her three children. She failed to do so and was prosecuted for the class D felony of criminal nonsupport, the State alleging that her arrearage was in excess of $5,000. *Id*. at 4.

The Court first stated that the object of section 568.040 is to compel a recalcitrant parent to fulfill her obligation of care and support. *Id*. (citation omitted). The Court went on to state that "a parent has a legal obligation to provide for her children and a failure to do so without good cause is an offense against the state under section 568.040. *Id*., citing *Morovitz*, 867 S.W.2d at 508. But the Court does not explain how this "legal obligation" arises. Is it inherent in mothering a child or must there be some judicially recognized obligation placed on her to provide support for her child(ren)?

This is where *Sellers*, and many of the other cases interpreting Section 568.040 is ambiguous. *Sellers* states "[p]rosecution under section 568.040 is not a means to enforce a dissolution decree." *Id*. at 5, *citing Morovitz*, 867 S.W.2d at 508. And while a child support order provides evidence of what is adequate support, failure to pay a monthly court-ordered amount is not conclusive of whether a parent has violated section 568.040. *Id*. (citations omitted). One inference from this is that a parent has an inherent "legal obligation" to provide adequate support for her child(ren) based on the biological relationship of mother to child, and therefore if she admits or the State proves that she gave birth to the victim(s), the State has met its burden of proving she acted knowingly.

In fact, this view of the origin of the "legal obligation" imposed upon parents is specifically stated in *State v. Watkins*, 130 S.W.3d 598, 600 (Mo.App., W.D. 2004) where the Court held, "a support order is not even a requisite to criminal liability. A parent can be prosecuted for criminal nonsupport despite the

absence of such an order."[5] In *Morovitz, supra*, this Court held that "[p]roof of the relationship of parent to child is sufficient to establish a prima facie basis for a legal obligation of support." 867 S.W.2d at 508.

A court order finding that the legal obligation to provide adequate support for a child does not implicate Article I, Section 11 of the Missouri Constitution. That Section states: "That no person shall be imprisoned for debt, except for nonpayment of fines and penalties imposed by law."

That was the issue addressed by this Court in *State v. Davis*, 469 S.W.2d 2, 3 (Mo. 1971). The defendant contended that his duty to support his children had been reduced to a judgment for money and therefore his prosecution "merely sought to enforce that judgment by jailing him for nonpayment thereof." *Id*. at 3. This Court disagreed, and in responding to that constitutional challenge, the confusion over the origin of a "legal obligation" to provide adequate support for one's child seems to have begun.

The *Davis* Court held that Section 559.353 (the predecessor to Section 568.040)

> "was predicated on the theory that both parents have a legal obligation to look after and provide for their offspring and that the failure to perform that obligation, without good cause, is a punishable offense against the state. . . .

[5] How this legal obligation arises when a stepchild is involved has not been addressed in any cases Appellant has found.

> A prosecution under the statute is for violation of the obligation imposed by the statute on the man or wife with respect to his or her minor child. It is not a proceeding to enforce the terms of a divorce decree providing support for minor children. . .A divorce decree with a provision for child support is not a prerequisite to a prosecution under Section 559.353, and by the same token the existence of such a support decree does not bar a prosecution under that section.

Id. (footnotes omitted).

Appellant submits that there is a difference between a court order that a parent provide child support in a certain amount constituting a debt, and that order creating the legal obligation to provide adequate support. This is in keeping with the cases holding that the amount of child support ordered provides some proof of what constitutes "adequate support." *See, Morovitz*, 867 S.W.2d at 509; *State v. Nichols*, 725 S.W.2d 927, 929 (Mo.App., E.D. 1987); *State v. Davis*, 675 S.W.2d 410, 416 (Mo.App., W.D. 1984)..

It is also in keeping with the cases which hold that a parent can provide "adequate support" by means other than paying the court ordered child support payments. If a parent provides food, clothing, lodging, medical treatment, insurance, etc., and does so in an "adequate" amount, he cannot be convicted under Section 568.040. *Watkins*, 130 S.W.3d at 600-01; *Sellers*, 77 S.W.3d at 4.

There is no reason why this Court cannot unambiguously hold that a court order for child support creates the "legal obligation" contemplated by Section

568.040 and that the mental state necessary for conviction is knowledge of that legal obligation without finding that such an order creates a "debt" as contemplated in Article I, Section 11 of the Missouri Constitution.

In addition, if a showing of paternity alone were sufficient to establish the necessary mental state for failure to provide adequate support, how could the State enhance a charge of criminal nonsupport from a class A misdemeanor to a class D felony? Section 568.040.4 provides that:

> Criminal nonsupport is a class A misdemeanor, unless the person obligated to pay child support commits the crime of nonsupport in each of six individual months within any twelve-month period, or the total arrearage is in excess of five thousand dollars, in either of which case it is a class D felony.

The existence of an order requiring a defendant to pay child support cannot be "merely evidence of what constitutes 'adequate support.'" *See, State v. Reed*,No. SD25895 (Mo.App., S.D., April 16, 2005) and the cases cited therein. Appellant submits that such an order is necessary to create the "legal obligation" to provide adequate support. If a legal obligation created by a court does not exist, there is no monthly amount to be paid, nor is there any way to calculate when an "arrearage" is over $5,000. The court-created obligation to provide support is essential to proving that a recalcitrant parent "knowingly" failed to meet his obligations.

In *Sellers supra*, the defendant was charged with the class D felony of criminal nonsupport. In its opinion, the *Sellers* Court cites the statutory language that the class A misdemeanor of criminal nonsupport may be enhanced to a class D felony if "*the person obligated to pay child support*" fails to do so under particular circumstances. *Id*., citing Section 568.040 (emphasis added). From the plain language of the statute, it appears that a "legal" obligation requires court ordered child support payments. If this is so, then the mental state required for a conviction for criminal nonsupport has to include, as an essential element, that the defendant knew that a court-created legal obligation existed.

This interpretation is in keeping with those cases in which the appellate courts have granted the State's request for writs of prohibition forbidding men charged with criminal nonsupport from obtaining blood tests to prove they were not the biological fathers on the child(ren) they had been ordered to support. In *State ex.rel Dally v. Copeland*, *supra*, the Court held that "the 1992 dissolution decree that Christopher was born of the marriage between Defendant and Rebecca is tantamount to a finding that Christopher is Defendant's child. . . irrespective of whether Defendant is in fact Christopher's biological father." *Id*. 986 S.W.2d at 945. In explaining its rationale, the Court stated:

> The opinion in *Campbell*[6] recognized that the General Assembly, in enacting Section 568.040 RSMo 1994, intended to subject a party to criminal liability for nonsupport if such party, without good cause,

[6] *State ex. rel Campbell*, 936 S.W.2d 585 (Mo.App., E.D. 1996).

> knowingly fails to provide adequate support for a child whom such party *has been found legally obligated to support in a dissolution action*. 936 S.W.2d at 588. Nothing in *Campbell* indicates the General Assembly intended that Section 568.040 apply only to individuals who fail to support their biological children.

Id. at 946 (emphasis added).

The *Copeland* and *Campbell* opinions cannot be reconciled with a holding that the mental state necessary to support a conviction for criminal nonsupport can be met by simply showing that the defendant fathered or mothered the child(ren). If that were the correct interpretation of the statute, how could the courts preclude a defendant from contesting that essential element with a paternity test? The right to present a defense is a fundamental element of due process. U.S. Const. Amend. XIV, *State v. Crow*, 63 S.W.3d 270, 275 (Mo.App., W.D. 2001).

Appellant found no Missouri cases in which a defendant was convicted of criminal nonsupport where there was no court order for the payment of child support. Despite the language used in many cases implying that the knowledge of one's legal obligation to support a child flows directly from the act of "siring" a child, only the Southern District has actually applied that standard in a case - Appellant's.[7]

[7] There was a court order for child support in Appellant's case. The issue is whether the State proved beyond a reasonable doubt that he was aware of it.

The State's evidence does establish that Appellant was served with a copy of the Division's Motion to Modify on July 6, 2001, while he was in the Butler County Jail (Tr. 98). Therefore, Appellant's claim is limited to Counts I through IV since there is no evidence of such knowledge for the time period January 1, 2000 through July 6, 2001. The trial court erred in not granting Appellant's motion for judgment of acquittal on those counts.

This Court should hold that the while every parent has an ethical and/or moral obligation to provide for his child(ren), a conviction under Section 568.040 requires the State to prove, beyond a reasonable doubt, the essential element that a defendant failed to provide adequate support *knowing* that a legal obligation had been created by a court ordering him to pay child support.

Since the State failed to prove this element in Appellant's case in Counts I, II, III, and IV, this Court should vacate Appellant's convictions of criminal nonsupport and discharge him from custody on those counts.

II.

The trial court clearly erred in overruling Appellant's challenges to the State's use of all of its peremptory challenges to remove male venirepersons, because such ruling denied Appellant and the venirepersons their rights to equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that the prosecutor alleged that he struck all males because he was unaware that he was using all of his peremptory strikes against men and because he had placed either a minus sign or a question mark next to their names after reading their questionnaires. These explanations, however, were mere pretext for removing all males since there were similarly situated female venirepersons who were not struck and none of the men struck by the State gave any answers during voir dire and therefore the State never attempted to question them about whatever it was that caused the prosecutor to place a minus or question mark next to their names.

The trial court erred in finding that the prosecutor's explanations for using all seven of his peremptory challenges against men was no purposeful gender discrimination in violation of Appellant's and the venire persons' right to equal protection as guaranteed by the by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution.

Preservation:

Appellant raised this issue in his Original Brief, and the Court remanded the case on July 16, 2004 with directions to the trial court to hold a hearing on Appellant's objection to the State's use of its peremptory strikes against male venire members. *State v. Reed, State v. Reed,* 2004, WL 1587053 (Mo.App., S.D. July 16, 2004). The Court's order directed the trial court to apply the procedure outlined in *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992).

Standard of Review:

This Court's review of the trial court's ruling on a *Batson* challenge is limited to determining whether it is clearly erroneous. *State v. Pullen*, 843 S.W.2d 360, 362, 363 (Mo.banc), *cert. denied*, 510 U.S. 871 (1993). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *State v. Antwine*, 743 S.W.2d 51, 66 (Mo.banc), *cert. denied*, 486 U.S. 1017 (1988).

Facts:

After voir dire, Appellant objected to the State's use of all of its peremptory strikes against men (Tr. 65). Appellant's objection was based on gender bias, and in support, he cited *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (Tr. 65). The prosecutor offered the following explanation for his strikes:

> To tell the truth, Judge, I didn't know. I didn't even know I struck all males. I really don't know. I just struck them. Some based on age, and some based on some of their occupations and the way they either spoke in the courtroom or that they didn't speak and their body language. To be honest with the Court I never knew I struck all seven and they were all males.

(Tr. 65). The court, addressing defense counsel, asked "[f]inal word, Mr. Collier?" (Tr. 65-66). Defense counsel responded that he was still objecting to the State's strikes on the basis of gender bias (Tr. 66). The trial court overruled the objection (Tr. 66).

A hearing was held in compliance with the Southern District Court's remand on September 29, 2004, and the trial court entered "Findings Pursuant to Remand" which held, in relevant part that:

> The State has provided reasonably specific and clear explanations that its peremptory strikes were gender neutral. Therefore, the Court finds that Defendant's prima facie case is rebutted.
>
> The Court further finds Defendant has failed to convince the Court that State's explanations were merely pretextual or that the true motivation for the strikes was gender based.

(Second Supplemental Legal File p. 36.)[8]

[8] Hereinafter S.Supp.L.F.

At the hearing, the following evidence was adduced.

"Terry" Frazier is a man, and the final composition of Appellant's jury was ten women and two men (H.Tr. 6).[9]

The prosecuting attorney repeated what he had said during trial, that until Appellant objected, he was not aware that he had used all of his peremptory challenges on men (H.Tr. 7). Before giving reasons for each venireman struck, the prosecuting attorney explained his method of jury selection. When he received the jury questionnaires, he looked at the occupation of the venire person and put either a "+", a "-", or a "?" next to each name depending on the type of case (H.Tr. 7). This was a criminal non-support case (H.Tr. 7). Then, during voir dire, he would put a "+" or "-" next to a name depending on how the person was dressed, facial features, and whether or not they paid attention throughout the process (H.Tr. 7-8). With that system in mind, the prosecutor addressed each venire person struck.

David Burk was self-employed and the prosecutor believed that people who are self-employed have a tendency to hide their income (H.Tr. 8). In addition, Burk was middle aged (H.Tr. 8). In response to the trial court's inquiry of what age had to do with it, the prosecutor stated that there had been three self-employed men on the panel and he only struck two. He did not strike Lloyd Fennell because he was born in 1934 and therefore was of the WWII generation (H.Tr. 9). The

[9] There was some question about Mr. Frazier's gender prior to the evidentiary hearing.

prosecutor believed that members of that generation had strong beliefs about supporting the family not found in someone who grew up during the 1950's or 1960's (H.Tr. 9).

Jerry Huneycutt was a single 24 year old (H.Tr. 10). The prosecutor struck Huneycutt because he was looking for more "traditional type" jury members and because Huneycutt did not answer the questions the prosecutor asked during voir dire (H.Tr. 10).

Carl Jenkins was also a middle-aged, self employed man (H.Tr. 10).

Bill Penrod had been a maintenance man for Poplar Bluff Housing and so the prosecutor believed that because his main witness was a Black woman who had lived most of her life in public housing, Mr. Penrod might have a dislike for individuals who had been on welfare (H.Tr. 11).

Albert Morrow had a "-" sign next to his name based on his appearance and two "?" on the list (H.Tr. 12).

Sammy Way was a plumber, he was young, and the prosecutor wanted more "traditional" type jurors (H.Tr. 12).

Jimmy Wilson was 25 years old and had "-" and "?" on both lists (H.Tr. 12).

The prosecutor had a "?" beside the names of two women, Clelah Bradley and Melissa Wells (H.Tr. 17). However, he questioned Bradley about her employment and was satisfied with her answer, and even though Melissa Wells was self-employed, the prosecutor liked her appearance and demeanor and

therefore did not strike her (Tr. 18). Those were the only two "of the female persuasion" that had any marks by their names on either of the prosecutor's lists (H.Tr. 18).

The trial court then asked defense counsel if she accepted those explanations and she said "no." (H.Tr. 19). The court was satisfied there was no discriminatory intent on the prosecutor's part and no evidence of a discriminatory technique and accepted the reasons given as reasonable, specific, and legitimate (H.Tr. 19).

Defense counsel then noted that at trial, the prosecutor had mentioned age, occupation, whether or not a juror spoke or did not speak and body language (H.Tr. 20). No mention was made of his system of symbols although that was his primary method of jury selection (H.Tr. 20).

Defense counsel pointed out that the prosecutor had not used a peremptory on anyone who spoke during voir dire (H.Tr. 21). In addition, Melissa Wells was similarly situated to Albert Morrow in age and neither answered any questions (H.Tr. 21-22). The prosecutor stated that Jerry Huneycutt failed to answer questions asked, but the record shows he was asked no questions (H.Tr. 22). There were female venirepersons who did not speak, Tona Arnold, Patricia Baker, Melissa Wells, Tina Crow (who was struck by the defense) (H.Tr. 22-23). Patricia Baker and David Burk were similar in age and neither spoke during voir dire (H.Tr. 23). Albert Morrow and Tina Crow were of similar age and neither spoke during voir dire (H.Tr. 23). Defense counsel asserted that Albert Morrow, Tonya

Arnold and Patricia Baker all had similar "office-type" jobs (H.Tr. 23). The trial court corrected her however, stating that an order clerk at Riggs Wholesale Supply Co., is not an office job, it is more like a counter job (H.Tr. 24).

In response to defense counsel's comments, the prosecutor stated that he had not mentioned his symbol system because the trial court had not required any more specific reasons for his strikes at the first trial (H.Tr. 25). The prosecutor liked Tina Crow because she knew Kevin Barbour and that would be a good thing for the State (H.Tr. 28). Defense counsel stated that Tina Crow never spoke during voir dire (H.Tr.29).[10]

At the end of the hearing, the trial court took the matter under advisement, and ultimately overruled Appellant's gender-based challenge to the State's use of its peremptories (S. Supp. L.F. 36).

Argument:

The Equal Protection Clause prohibits the use of peremptory strikes to exclude jurors on the basis of their race, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), or gender, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *State v. Marlowe*, 89 S.W.3d 464, 468 (Mo. banc 2002). Missouri has adopted a three-part procedure to aid the trial court in deciding whether a strike was actually based upon race or

[10] Defense counsel was wrong about this. Ms. Crow did say she knew Kevin Barbour (Tr. 28).

gender. *State v. Brown*, 998 S.W.2d 531, 541 (Mo. banc), *cert. denied*, 528 U.S. 979 (1999); *State v. Koenig*, 115 S.W.3d 408, 412 (Mo.App., S.D. 2003).[11] This Court gives great deference to the trial court's findings of fact, and will not overturn the trial court's determination on appeal unless it is clearly erroneous. *Id*. at 411.

The first step in the three-part procedure requires that the Appellant timely object and identify the cognizable gender group to which the struck venireperson(s) belongs. *Id*., citing *Brown*, 998 S.W.2d at 541; *State v. Williams*, 24 S.W.3d 101, 120 (Mo.App., W.D. 2000). Appellant did this. When both parties tendered their peremptory strikes to the court, Appellant objected that the State had used all seven of its strikes against males, specifically citing *Batson*, and *J.E.B.* (Tr. 65).

Once the Appellant has objected, the second step requires the trial court to order the State to come forward with reasonably specific, clear, and gender-neutral explanations for the strike(s). *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc), *cert. denied*, 506 U.S. 1014 (1992). In the third step, "[a]ssuming the prosecutor is able to articulate an acceptable reason for the strike, the defendant will then need to show that the state's proffered reasons for the strikes were merely

[11] The procedures adopted for a *Batson* challenge are equally applicable to a challenge based on gender bias. *Koenig*, 115 S.W.3d at 411 n.3 (citations omitted).

pretextual and that the strikes were []motivated [by gender bias]." *Id*.

Peremptory strikes are an important method of freely rejecting venirepersons "for real or imagined partiality." *Swain v. Alabama*, 380 U.S. 202, 219-220, 85 S.Ct. 824, 835-836, 13 L.Ed.2d 759 (1965). But, although parties may employ "hunches and horse-sense" in exercising peremptory strikes, the striking party must be prepared to justify their challenges, "and objective factors are the most persuasive." *State v. Kempker*, 824 S.W.2d 909, 911 (Mo. banc 1992).

It is at the third step of the process that the persuasiveness of the State's justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. *Marlowe*, 89 S.W.3d at 469. The opponent must show that the proffered reasons are merely pretextual. At issue is the plausibility of the explanation for striking the venireperson. *Id*. "At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id*.

In determining pretext, the first consideration is whether there were any similarly situated female venirepersons who were not struck. *Parker*, 836 S.W.2d at 940. Although this factor is not dispositive, it is so relevant to a determination of pretext that it may be considered "crucial." *Marlowe*, 89 S.W.3d at 469. Other factors to consider in determining pretext include the "degree of logical relevance between the proffered explanation and the case to be tried." *Id*., citing

Parker, 836 S.W.2d at 940. The trial court must also examine the prosecutor's credibility, based on "the prosecutor's demeanor or statements during voir dire," and the "court's past experiences with the prosecutor." *Marlowe*, 89 S.W.3d at 469, citing *Parker*, 836 S.W.2d at 940. The final factor is "the demeanor of the excluded venirepersons." *Id.* The most important of these factors is the "plausibility of the prosecutor's explanation in light of the totality of the facts and circumstances surrounding the case. *Id*. at 939.

At the third step of this case, the prosecutor initially reasserted the response he had given during trial that until Appellant pointed it out, he was unaware that he had used all seven of his peremptory strikes against men. That is implausible. The names of the persons struck were all male, David, Jerry, Carl, Bill, Albert Sammy and Jimmy (S.Supp. L.F 1). The prosecuting attorney had just completed voir dire and was selecting those he wanted to peremptorily strike. How could he do so intelligently if he was unaware of their gender?

Next, this was a non-support case in which Appellant, a man, was charged with failing to support his children (L.F. 16-20). The State's only witnesses were two women, Appellant's ex-wife (Tr. 75), and Diana Medlin, Supervisor of the Butler County Prosecuting Attorney's Child Support Division (Tr. 90). In this type of case, the prosecutor may have believed that an all female jury would be highly beneficial to the State. This provides a strong incentive to discriminate on the basis of gender. By using all seven of his peremptories against men, the prosecutor nearly accomplished the goal of an all female jury.

In addition, there were four similarly situated women the State did not strike. The prosecutor had placed question marks next to two women's names after his initial review of their questionnaires, Clelah Bradley and Melissa Wells (H.Tr. 17). In explaining why he had not struck either of these women, the prosecutor told the trial court that he had questioned Bradley about her employment and was satisfied with her answers (H.Tr. 17). The trial transcript does not bear this out. The prosecuting attorney did not question Bradley about her employment (Tr. 24-44), nor did she discuss her employment during the defense voir dire (Tr. 44-51).

He stated that he initially put a question mark by Wells' name because she might have been self-employed, but when he saw her, he was impressed by her appearance and demeanor (H.Tr. 18). He was no more specific than that and therefore it is impossible to determine whether any of the men peremptorily struck were similarly situated.

The prosecutor indicated that he struck David Burk and Carl Jenkins because they were born in 1956 (S. Supp. L.F. 13, 20) and were both self-employed (H.Tr. 8, 10). He explained his belief that people who are self-employed tend to hide their income, and this was a child support case (H.Tr. 8). He did not strike the third self-employed male, Lloyd Fennell, because Fennell was born in 1934 and the prosecutor believed that people who grew up in the WWII generation had strong beliefs about supporting family, feelings not shared by those raised in the '50's and '60's (H.Tr. 9). However, the prosecutor never

asked Fennell, Burk or Jenkins their opinions on this topic (Tr. 24-44). Failure to inquire about a topic that concerns the prosecutor and is used as a basis for peremptorily striking members of the suspect class was one of the reasons given by the Court in *State v. Hopkins*, 140 S.W.3d 143, 150, (Mo.App., E.D. 2004) for finding a *Batson* violation. "Thus, if 'adding things up' was important to the prosecutor, he would have asked questions necessary to determine if any of the other venirepersons' employment involved such activity. Because the prosecutor did not ask those questions, his behavior is inconsistent with his stated reasoning for striking Bell." *Id.* at 150-51.

The prosecutor gave no explanation why he did not believe that Wells, as a self-employed woman born in 1967 (S. Supp. L.F. 28), would not be someone who would hide her income or have a weak view of family support despite her appearance and demeanor (H.Tr. 18). In addition, there was another self-employed woman who was not struck by the State. Angelia Croy noted on her questionnaire that she owned Croy's Perfect Press (S. Supp. L.F. 24), and during voir dire, she pointed this out to the prosecutor (Tr. 31). The prosecutor offered no explanation why he did not strike Croy since she was born in 1965 (S. Supp. L.F. 24) and was self-employed.

"[I]n determining pretext, the judge should consider the totality of the facts and circumstances surrounding the case." *Marlowe*, 89 S.W.3d at 470. In *Marlowe*, the Supreme Court reversed the trial court's finding that the prosecutor's use of a peremptory strike was race-neutral. *Id*. at 470. The prosecutor had struck

the only African-American on the panel because the venireperson was "a government employee who's going to soon be a part of a class action, and . . . might not be a good juror for the State," *Id*. at 468. The trial court found the reason race-neutral and therefore the case entered the third *Batson* stage. Defendant in *Marlowe* pointed to two white venirepersons who were going to be in "class actions." The prosecutor distinguished one, saying that the venireperson gave good strong answers to his questions and he wanted him on his jury. He offered no explanation for the different treatment of the other white venireperson. *Id*. at 469.

In reversing, this Court found the prosecutor's reason to be only "marginally relevant" to an assault and weapons case. *Id*. That, combined with the prosecutor's failure to offer any explanation for the differential treatment of a similarly-situated white venireperson led the Court to find that the trial court had clearly erred in upholding that strike. *Id*. at 470.

In this case, the prosecutor attempted to distinguish Bradley by stating that he had questioned her about her employment when he had not. He distinguished Wells by referring to his vague and irrebuttable opinion about her appearance and demeanor, offering no explanation for not striking the other self-employed female on the panel. The trial court erred in finding the prosecutor's stated reasons nonpretextual.

The prosecutor stated that he struck Jerry Huneycutt because he was young and single, and the prosecutor was looking for more "traditional types" for the jury

(H. Tr. 10). He also struck Huneycutt because he did not answer the prosecutor's questions during voir dire (H.Tr. 22). But the record shows that the prosecutor did not ask Huneycutt any questions (Tr. 24-44). Huneycutt was 24 years old (Second Supp. L.F. 15). The Prosecutor struck Albert Morrow because he had a "-" on the list because of his appearance and 2 "?". (H.Tr. 12). The prosecutor offered no explanation of what it was about Morrow's appearance that made him place a "-" sign by his name, nor did he explain the basis of the two "?" marks. Sammy Way was struck because he was a young plumber and again, the prosecutor wanted more "traditional" types on the jury (H.Tr. 12). Finally, Jimmy Wilson was 25 years old and had "-" and "?" next to his name on both lists (H.Tr.12). Again, no explanation was given for those marks or what specifically it was about the juror that the prosecuting attorney did not like.

The prosecutor's explanations here are similar to those found wanting by the Court in *State v. Davis*, 894 S.W.2d 703, 706 (Mo.App., W.D. 1995). In that case, the prosecuting attorney continued to rely on the fact that the two African-Americans he peremptorily struck were ex-military. *Id*. at 710. The Court noted that while this reason was facially neutral, the prosecutor never offered an explanation for not wanting retired military personnel on the jury. *Id*. The *Davis* Court noted that this was the same situation that had concerned this Court in *Antwine, supra*. "The prosecutor has provided no information illustrating the legitimacy of the 'retired military' justification for his peremptory strikes and

provided no explanation as to how this characteristic related to the case at bar." *Id*.

In this case, the prosecutor offered an even less objective rationale for his strikes. He simply informed the trial court about his symbol system without explaining how he decided which symbol to use and why he did not use it on every venire member.

If Appellant limits the prosecutor's response to the only objective reasons given for striking Huneycutt, Wilson and Way, their ages, then there is a similarly-situated female who was not struck by the State. Jennifer Reece was born in 1980, making her the same age as Jerry Huneycutt (S. Supp. L.F. 15, 14). She was two years younger than Sammy Way (S. Supp. L.F. 27), and one year younger than Jimmy Wilson (S. Supp. L.F. 31). Reece was unemployed and had recently married (S. Supp. L.F. 14). After general voir dire, Reece approached the bench to tell the trial court and the parties that she did not understand the "big words" used by the attorneys during voir dire (Tr. 51-54). Her questionnaire indicated that she had married between the time she filled it out and the time of trial (S. Supp. L.F. 14), but she had a two year old child (Tr. 53). If the prosecutor was really looking for more "traditional" type people, measured at least by age, he would have struck Reece.

The prosecutor's stated reasons for using all seven of his peremptory strikes against men were no clearer or more objective than they had been before this case was remanded. "*Batson* is not satisfied by 'neutral explanations' that are no more

than facially legitimate, reasonably specific, and clear. *Davis*, 894 S.W.2d at 706, *citing Antwine*, 743 S.W.2d at 65.

As the Court noted in *State v. Reed*, 2004, 2004, WL 1587053 (Mo.App., S.D. July 16, 2004), the prosecutor was required to give reasonably specific reasons for each strike. *Id. slip op.* at 8, *citing State v. Barnett*, 980 S.W.2d 297, 302 (Mo. banc 1999). There is nothing specific about saying that a venireperson had a "-" or a "?" next to his name with no explanation of what facts led to those marks. To say someone was struck because the prosecutor wanted more "traditional" people gives Appellant nothing to rebut without some notion of what "traditional" means. "The trial court's [a]cceptance [of] the State's justifications for its peremptory strikes without any rationale by way of explanation or otherwise supported by the record showing the facts and circumstances surrounding the case would amount to a 'rubber stamp' of approval, rendering the *Batson* holding and principles a charade." *Id. slip op* at 9, quoting *Davis*, 894 S.W.2d at 710 (changes in the original).

As for the prosecutor's demeanor, the only thing that occurred was during the hearing on remand. When the trial court asked the prosecutor if he had any marks by women's names and he looked through his lists and mentioned Clelah Bradley and Melissa Wells (H.Tr. 17). He then stated that "those are the only two that I can see of the female persuasion." (H.Tr. 18). The use of such a flippant phrase reveals an attitude on the prosecutor's part of taking women as a group less seriously than men. The trial court was trying to determine if the prosecutor had

discriminated on the basis of gender. That statement should have been considered when the trial court examined the totality of the record.

Additionally, in at least two instances, the prosecutor gave reasons which were rebutted by the record. Contrary to the prosecutor's assertions, he never questioned Bradley about her employment and he never asked Huneycutt any question which Huneycutt failed or refused to answer.

And finally, the prosecutor's use of all seven available peremptory strikes against men is a factor which should be considered by this Court in determining whether the prosecutor's stated reasons for his strikes are a pretext for discrimination. In *State v. Heckenlively*, 83 S.W.3d. 560 (Mo.App., W.D. 2002), the Court noted the fact that the defendant had attempted to use five of his six peremptory challenges to exclude African-Americans. This fact, along with the trial court's rejection of the defendant's explanation that he struck a venireperson because throughout voir dire the vernireperson had given him hostile looks led the Court of Appeals to affirm, finding that the trial court had not clearly erred in denying the strike. *Id*.

The trial court's finding that Appellant had not met his burden of proving that the prosecutor's use of seven of seven peremptory strikes against men was not gender biased is clearly erroneous. Both Appellant and the venire members who were peremptorily struck were denied their right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 2 of the Missouri Constitution. This Court should find that based on a

review of the entire record of voir dire, and the hearing on remand, the trial court's findings were clearly erroneous and reverse Appellant's convictions and remand his case for a new, fair trial.

CONCLUSION

For the reasons stated in Point and Argument I, this Court should vacate Appellant's convictions on Counts I, II, III and IV and discharge him from his sentences on those counts. For the reasons stated in Point and Argument II, this Court should reverse Appellant's convictions and remand his case for a new, fair trial.

Respectfully submitted,

_____
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Certificate of Compliance and Service

I, Nancy A. McKerrow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 10, 462 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in June, 2005. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ___ day of June, 2005 to Assistant Attorney General Dora Fichter, at P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Nancy A. McKerrow

APPENDIX

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