No. SC93435

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

NICHOLAS R. HILLMANN,

Appellant.

Appeal from the Warren County Circuit Court
Twelfth Judicial Circuit
The Honorable James David Beck, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

This is an appeal from a Warren County Circuit Court judgment convicting Nicholas R. Hillmann ("Defendant") of one count of distribution of a controlled substance to a minor (§ 195.212, RSMo Cum. Supp. 2010), and one count of attempted second-degree statutory sodomy (§ 564.011, RSMo Cum. Supp. 2010, § 566.064, RSMo Cum. Supp. 2010). (L.F. 2). Defendant was tried by a jury on May 31-June 1, 2012, with the Honorable James David Beck presiding. (L.F. 5-6).

Defendant does not contest the sufficiency of the evidence to support his convictions. Viewed in the light most favorable to the verdict, the evidence presented at trial showed:

Defendant was Victim's first cousin. (Tr. 43). On January 29, 2011, while Victim was 15 years old and Defendant was 28 years old, Victim spent the day with Defendant and her brother, ("Brother"). (Tr. 43, 44, 46). Defendant and Brother were going to eat lunch at Show-me's, so Victim asked to accompany them. (Tr. 47-48). After they ate lunch, they returned to Defendant's house, and Defendant asked Victim to babysit his three kids that night so he could go out drinking with Brother and Defendant's friend "Joe." (Tr. 48-49). Victim agreed to babysit. (Tr. 48). Before Defendant, Brother, and Joe left at around 9 p.m., Defendant offered Victim marijuana, and Victim

smoked it. (Tr. 50-51, 165). Defendant, Brother, and Joe left Victim with Defendant's three children. (Tr. 51). The children fell asleep in the living room on the floor around midnight, and Victim fell asleep on the couch shortly thereafter. (Tr. 52, 69).

Defendant and Brother returned during the night, and Defendant woke Victim up by rubbing her legs and asking her, "Do you want to be cousins with benefits?" (Tr. 52, 55). Victim said "no," and attempted to go back to sleep. (Tr. 56). When she could not go back to sleep, Victim got up to look for Brother. (Tr. 56). Victim found Brother sitting at the kitchen table; she tried to wake him up to talk to him, but he did not want to talk. (Tr. 57). Brother went into the living room and passed out on the couch. (Tr. 57).

Victim remained in the kitchen, and Defendant joined her. (Tr. 58). Defendant got a beer from the fridge and offered one to Victim, but she refused. (Tr. 58). Defendant then got some marijuana from the cabinet above the microwave and smoked it. (Tr. 59). Defendant and Victim talked for three to four hours; Defendant started a conversation about Victim's previous suicide attempt. (Tr. 59-60). Defendant told Victim that he understood because he had some of the same issues with suicidal thoughts, and Defendant assured Victim that her family loved her. (Tr. 60).

While talking, Victim stood by the refrigerator. (Tr. 51). Defendant lifted Victim onto the kitchen counter and stood directly in front of her. (Tr. 61). Victim began crying because she was uncomfortable with Defendant. (Tr. 62). Defendant began touching Victim's breasts over her clothing. (Tr. 62). Defendant then kissed Victim. (Tr. 63). Defendant then touched her buttocks over her pajama pants. (Tr. 63). Defendant moved his hands under her pants and touched Victim's bare buttocks. (Tr. 64). Victim tried to push Defendant away, but he did not stop touching her. (Tr. 64). Defendant then began to move his hands toward her vagina, and Victim shoved him away. (Tr. 64-65). Defendant pulled down his pants and underwear, exposed his naked penis, and told Victim to "touch it." (Tr. 66-67).

Victim refused and went into the bathroom. (Tr. 66, 67). Defendant followed her to the bathroom and waited outside the door. (Tr. 65-66). When Victim exited the bathroom, she told Defendant he needed to go to bed. (Tr. 66). Defendant was intoxicated and had a hard time walking or standing. (Tr. 67). Victim entered Defendant's bedroom with Defendant, and Defendant lay down in bed. (Tr. 67). Victim attempted to walk away from Defendant, but Defendant grabbed her and pulled her onto the bed with him. (Tr. 67). Defendant immediately rolled on top of Victim. (Tr. 68). Defendant told Victim that she could not tell anyone what happened because "[she] kissed

[him] back." (Tr. 68). Victim pushed Defendant off her and returned to the living room to sleep in a chair. (Tr. 68).

The next morning, Victim and Brother left Defendant's house without talking to Defendant. (Tr. 69-70). Victim did not tell anyone what had happened because she was worried that Defendant would get into trouble. (Tr. 70-71). Eventually, Victim disclosed in a school writing assignment that something had happened. (Tr. 72-74). After Victim's teacher read the assignment, she gave the assignment to the guidance counselor who spoke with Victim. (Tr. 73). Victim told the counselor what had happened, and the counselor called the police. (Tr. 74).

Lieutenant Scott Schoenfeld contacted Victim and arranged for her to call Defendant while Lieutenant Schoenfeld listened to the conversation. (Tr. 128-31). When Victim called Defendant and began talking about the incident, Victim told Defendant that he asked her if she "wanted to be cousins with benefits." (Tr. 131). Defendant responded by saying, "Well, do you want to?" (Tr. 132). Defendant then said, "I said that? That's awesome." (Tr. 132). Victim began crying, and Defendant said that he remembered kissing and hugging Victim and holding her. (Tr. 132).

Later that evening, Lieutenant Schoenfeld contacted Defendant at his residence. (Tr. 134-35). Based on information Lieutenant Schoenfeld gathered

before contacting Defendant, he was worried Defendant might harm himself, so he brought three other officers with him. (Tr. 135). Defendant refused to let the officers in the house, so he stepped onto the porch to talk with the officers. (Tr. 135). Defendant requested to go inside his house to get his phone so he could get a family member to watch his children; Lieutenant Schoenfeld would only allow Defendant to do so if the officer could accompany Defendant in the house because he was worried Defendant would harm himself or destroy evidence. (Tr. 135, 137, 147). Defendant allowed Lieutenant Schoenfeld to enter the house three or four steps, and Lieutenant Schoenfeld watched Defendant retrieve his phone. (Tr. 137). Then Defendant ushered Lieutenant Schoenfeld back onto the front porch and continued talking with him there. (Tr. 138).

Lieutenant Schoenfeld read Defendant the *Miranda*[1] warnings, and Defendant indicated that he understood his rights and wished to speak with the officers. (Tr. 138). Defendant admitted that he kissed his fifteen-year-old cousin, but stated that they "didn't have any sex." (Tr. 158). Defendant admitted that there was marijuana in his home, that he had given Victim marijuana, and that Victim smoked the marijuana. (Tr. 160, 165). Lieutenant

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Schoenfeld asked Defendant about exposing his penis to Victim, and Defendant responded that Victim "said that had happened, and yeah, it had happened." (Tr. 166). Defendant made several apology-type statements and stated that he had not acted responsibly. (Tr. 167).

Defendant consented to a search of his home. (Tr. 159). Upon searching Defendant's home, officers located marijuana, rolling papers, and a marijuana pipe. (Tr. 161-62). Defendant told the officers that he normally kept his marijuana in a cabinet above the microwave. (Tr. 165). Lieutenant Schoenfeld placed Defendant under arrest. (Tr. 170).

At trial, Defendant presented the testimony of Victim's mother, ("Mother"), and recalled Victim to the stand. (Tr. 234, 251). Mother testified that she only gave Victim permission to babysit if Brother remained at the house with Victim. (Tr. 238). Mother qualified her consent because she did not think Victim was mentally stable enough to babysit three small children by herself. (Tr. 241). Mother also testified that after the incident, Defendant called both Mother and Victim's father—separately—to see if Victim could babysit again. (Tr. 243, 244). Mother refused Defendant's request. (Tr. 244). Defense counsel questioned Victim about inconsistencies in her testimony at trial compared to her deposition testimony and compared to the testimony of the two officers. (Tr. 250-55, 256-57).

The jury found Defendant guilty as charged and recommended a sentence of five years' imprisonment for distribution of a controlled substance to a minor and four years' imprisonment for attempted second-degree statutory sodomy. (L.F. 6-7, 76-77, 80-81; Tr. 302). The court imposed the jury's recommended sentences and ordered that Defendant serve them consecutively for a total of nine years' imprisonment. (L.F. 131-32). The court ordered that Defendant participate in the Sex Offender Assessment Unit ("SOAU") program pursuant to section 559.115. (Tr. 131-32). At the end of the 120-day SOAU program period, the court denied Defendant's release on probation and ordered the nine-year sentence to be executed. (L.F. 2, 8).

ARGUMENT

I. (incomplete transcript)

Defendant was not denied meaningful appellate review due to the omissions in the transcript in that Defendant failed to exercise due diligence in attempting to obtain the missing portions of the transcript, and Defendant was not prejudiced by the omissions in that the record provided an adequate basis for appellate review of Defendant's points on appeal.

A. Standard of review.

"An appealing party is entitled to a full and complete transcript for the appellate court's review." *State v. Middleton*, 995 S.W.2d 443, 466 (Mo. banc 1999). "[A] record that is incomplete or inaccurate does not automatically warrant a reversal of the appellant's conviction." *Id.* (citing *Jackson v. State*, 514 S.W.2d 532, 533 (Mo. 1974)). An appellant "is entitled to relief [due to an incomplete record] only if he exercised due diligence to correct the deficiency in the record *and* he was prejudiced by the incompleteness of the record." *Id.* (citing *State v. Borden,* 605 S.W.2d 88, 92 (Mo. banc 1980)).

B. The record pertaining to this claim.

In response to the State's May 4, 2011, discovery request, defense counsel Charles Billings filed a motion to endorse 34 witnesses on February

22, 2012. (L.F. 23-25). As trial was set for February 29, 2012, and the motion did not include the contact information of the proposed witnesses, the trial court ordered attorney Billings to file a list of witnesses with their contact information within 30 days. (L.F. 26). The court also continued the trial to May 31, 2012. (L.F. 26). On April 4, 2012, counsel Billings moved to withdraw from the case, and on April 13, 2013, defense counsel Jeffrey Witt entered his appearance on behalf of Defendant. (L.F. 4).

On May 29, 2012, counsel Witt filed a motion to endorse 17 witnesses. (L.F. 5). On the first day of trial, the trial court heard argument regarding Defendant's motion to endorse witnesses. (Tr. 7). The court clarified that of the 17 witnesses Defendant attempted to endorse, the State did not object to seven. (Tr. 7). The prosecutor objected to the endorsement of ten of the witnesses because she did not know who the witnesses were and had no time to contact them in the two days before trial. (Tr. 8).

The court clarified the reasoning for excluding Defendant's witnesses. (Tr. 11). The court stated that Defendant did not submit a list within the 30-day period as the court ordered. (Tr. 12). On May 29, 2012, Defendant (through counsel Witt) emailed a list of the names and addresses of the 17 witnesses that he intended to call at trial on May 31, 2012. (Tr. 12). The court noted that this motion to endorse was filed 95 days after the February 23,

2012 order and just two days before trial. (Tr. 12). The court then denied Defendant's motion to endorse Donna Berry, Julie Kluga, Brad Young, Sarah Young, Mike Rich, Bonnie Rich, Joseph Rothermich, Joseph Ingratia, Emily Fallon, and Anthony Hemmingway, Jr. (Tr. 13).

Defendant then argued that "the Court did not have all the information at the time the order was made." (Tr. 14). Defendant argued that the State had not "turned over the DFS child interview; the interview on audio with [Brother] . . . ; the interview of the defendant that I asked to be suppressed in this week's filing; [or] one other audio tape." (Tr. 14). Defendant claimed that he had been prejudiced because he was not going to be allowed to "call witnesses when we don't have everything, and there wasn't going to be time to even review the discovery once he did receive it to file an endorsement of witnesses." (Tr. 14-15).

The court stated that at the time it ordered the disclosure of witnesses, Defendant's counsel did not raise any discovery issues; rather, defense counsel indicated that the 30-day continuance would be sufficient time to provide the contact information for the listed witnesses. (Tr. 15-16). The court noted that although Defendant's counsel Billings later withdrew from the case and counsel Witt entered his appearance, counsel Billings failed to file the list of witness names and addresses within the 30-day period, and counsel

Witt did not follow up on this outstanding order when he entered his appearance in the case. (Tr. 16). The court stated that counsel Witt could have brought the outstanding court order to the court's attention and asked for more time to gather witness information, "[b]ut instead [defense counsel] waited until two days before the trial date to file an endorsement of witnesses, which I think is an unfair surprise and unfairly prejudicial to the State." (Tr. 16).

After Defendant rested his case, he made another record about the witnesses that were excluded. (Tr. 262). The following exchange occurred:

> Mr. Witt: I have other witnesses that were not allowed by the court to testify who have been here, willing and able to testify, and I would like to have their testimony on the record.
>
> The court: Can I see counsel up here please?
>
> (At this time counsel approached the bench, and the following proceedings were had: (indiscernible)
>
> Mr. Witt: I would like to offer up an offer of proof (indiscernible).
>
> The court: You mean the basis for your not being allowed is because of the late endorsement. I'm not sure what they have to say. I mean, if you want to put an offer of proof I'm not going to

prevent you but I think (indiscernible) the Court's decision was it wasn't because they had (indiscernible) testimony or that they didn't have anything to say or anything (indiscernible) because of a late endorsement. And if it's not done it comes back on me.

Mr. Witt: (indiscernible)

[The prosecutor]: I think it comes back on you and if the Court says it's irrelevant and I'm not letting it in and you don't make an offer of proof, then it comes back on you.

Mr. Witt: Correct, if we're saying (indiscernible) testimony witnesses to testify to (indiscernible) for that reason. Absolutely (indiscernible). Preserving it for the record.

The court: (indiscernible) relevant not be without reason, absolutely make an offer of proof and show that I'm not in that respect but my ruling was that because it was a late endorsement, two days before trial and done well after the previous order was in place. That's why they were excluded, not because they may not have anything relevant to say. So, if you want to take the time to put them on and let them testify, I mean, I can't prevent you from doing that, but I'm telling you that it doesn't affect the Court's ruling.

Mr. Witt: I guess I understand that but, preserving every right possible.

[The prosecutor]: Your issue on appeal would be that the Court erred in not allowing you to put on these witnesses because of the endorsement, not because there was a ruling or inadmissible testimony.

The court: Was I wrong in saying that you couldn't have a late endorsement, then that's the case then when you guys come back, your offer of proof isn't going to choose [sic] the Court of Appeals of any knowledge of that issue because the issues that they gave irrelevant testimony or they (indiscernible) but again, going --

(Proceedings returned to open court.)

(Tr. 262-64).

C. Defendant did not exercise due diligence to correct the deficiency in the record.

Defendant failed to exercise due diligence in an attempt to complete the indiscernible portions of the transcript. "Rule 30.04(h) allows an appellant to request a stipulation of the parties or an order by the appellate court to supplement the file in order to cure omissions." *Middleton*, 995 S.W.2d at

466. Here, the record is devoid of any attempt by Defendant to enter into a stipulation of the parties or a request for an order from the appellate court to supplement the record to cure the omissions. (*See* L.F.). Thus, "[n]othing suggests an attempt [by Defendant] to obtain by stipulation or motion the substance of the missing testimony." *Id.*

Defendant argues that "the ordinary remedy imputed on the challenging party to attempt to perfect the record is not possible in this occasion as too much of the record is non-existent. It is doubtful the parties and the trial court . . . could recall the specifics of the discussions such that a complete or even a paraphrased . . . record could be created for review." (App. Br. 7). But this statement demonstrates that Defendant did not exercise due diligence by at least attempting to obtain by stipulation the missing portions of the transcript. Due diligence "is not discharged by merely transmitting whatever the court reporter prepares. If material omissions occurred it was incumbent upon the defendant-appellant to attempt to correct the record by stipulation or by motion to the appropriate appellate court." *Borden*, 605 S.W.2d at 91-92. As Defendant did nothing other than request and present the transcript the court reporter prepared, he did not exercise due diligence, and his point should be denied.

D. Defendant suffered no prejudice from the omissions in the record.

Defendant refers in passing to "at least thirty-two instances where the proceedings were in audible [sic]." (App. Br. 3). Of these "thirty-two instances" (App. br. 3), only the instances involving discussion of the exclusion of Defendant's witnesses were relevant to Defendant's arguments on appeal.[2] Other than the omissions in the record pertaining to the exclusion of Defendant's witnesses, Defendant does not argue that the omissions were relevant to any of his arguments on appeal. (App. Br. 3-5). As these omissions were immaterial to Defendant's appeal, they did not prejudice Defendant's appeal. *See Middleton*, 995 S.W.2d at 466 (finding no prejudice where many of the defendant's cited omissions were "trivial and clearly immaterial to his appeal").

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[2] For example, Defendant cites omissions from page 230, lines 5, 8, and 9, which involved argument related to Defendant's motion for judgment of acquittal at the close of the State's evidence. (Tr. 230). As Defendant did not raise an issue of the sufficiency of the evidence on appeal, the omissions related to the denial of his motion for judgment of acquittal did not prejudice Defendant's appeal.

Defendant was also not prejudiced by the omissions related to the discussion of the exclusion of Defendant's witnesses. From volume one of the transcript, it is clear that the basis for the trial court's ruling excluding Defendant's witnesses was Defendant's late endorsement of these witnesses. (Tr. 11-13). The record of the pre-trial hearing demonstrates that the trial court excluded Defendant's witnesses as a sanction after Defendant failed to disclose the names and contact information for his witnesses within the 30-day period ordered by the court. (Tr. 11-13). Instead, Defendant disclosed the names and addresses of these witnesses two days before trial. (Tr. 12-13). The State objected to ten of Defendant's seventeen witnesses because the prosecutor did not know who those ten witnesses were, and the prosecutor would not have time to locate them and talk to them before trial began. (Tr. 8). The trial court excluded these witnesses on the basis that the late endorsement constituted "an unfair surprise and [was] unfairly prejudicial to the State." (Tr. 16).

After Defendant rested his case, he again brought up the issue of his excluded witnesses. (Tr. 262). Defendant first asserted that he wished to put the excluded witnesses' testimony on the record through an offer of proof. (Tr. 263). Although there are several instances of "indiscernible" statements in this exchange, the record demonstrates that the court told Defendant an offer

of proof would not change its ruling, but it would not prevent Defendant from making an offer of proof. (Tr. 263-64). The court again clarified that the reason for excluding the witnesses was not due to potential irrelevancy of their testimony, but rather due to Defendant's late endorsement of the witnesses. (Tr. 262).

Defendant claims he was prejudiced by the "missing rulings and discussion of an offer of proof[.]" (App. Br. 7). Although there were several "indiscernible" portions of the discussion regarding Defendant's desire to make an offer of proof, the main points of the discussion are readily discernible. Moreover, the record demonstrates that Defendant did not make an offer of proof. (Tr. 264). The trial court repeatedly told defense counsel that the court would not prevent counsel from making an offer of proof. (Tr. 263-64). Defendant, however, did not make an offer of proof. (*See* Tr. 263-64). As Defendant did not make an offer of proof, and the record shows that the trial court did not prevent Defendant from making such an offer of proof (and Defendant does not claim otherwise), any omissions in this portion of the transcript did not prejudice Defendant.

Defendant argues that the conclusion of the discussion about the offer of proof "is obviously not complete" because the court's statement was only a partial statement. (App. Br. 6). But the partial statement was not followed by

a notation of "indiscernible" as was each of the 31[3] other inaudible portions from the second volume of the transcript. (Tr. 264, 190, 213, 218, 230, 232, 239, 240, 248, 252, 253, 260, 263, 264, 302). Furthermore, the record contained several instances where speakers would not say complete sentences, and in those instances, the court reporter transcribed "--" to show the sentence ended incompletely. (*See, e.g.*, tr. 239 line 19). Here, the court's sentence ended in "--", meaning the court supplied an incomplete sentence. If there were further inaudible discussion, the court reporter would have noted "indiscernible" at the end of the audible portion.

Defendant cites *Loitman v. Wheelock*, 980 S.W.2d 140 (Mo. App. E.D. 1998), to support his argument that the omissions related to the discussion of an offer of proof prejudiced him. (App. Br. 4, 6). But in *Loitman*, the appellant argued that he had made an offer of proof, and the entire offer of proof was omitted from the transcript. *Id.* at 142. Here, conversely, the record demonstrates that Defendant made no offer of proof. (Tr. 263-64). Furthermore, the record here contained sufficient information from which

[3] Although Defendant claims there were 32 inaudible portions of the transcript, line 6 of page 263 did not contain an omission in the transcript. (Tr. 263).

this Court can determine Defendant's claims on appeal. As such, *Loitman* is distinguishable from the present case, and Defendant's reliance on it is misplaced.

None of the omissions in the record prevented full review of Defendant's points on appeal. Defendant therefore suffered no prejudice from the incomplete transcript, and his point should be denied.

II. (exclusion of defense witnesses due to discovery violation)

The trial court did not abuse its discretion in excluding, as a discovery sanction, Defendant's witnesses because Defendant committed a clear discovery violation resulting in unfair surprise to the State without a valid explanation for the late disclosure. Defendant has also failed to show that the sanction for this discovery violation resulted in fundamental unfairness because nothing in the record shows the content of the proposed testimony of these witnesses in that Defendant failed to make an offer of proof.

A. Standard of review.

"The exclusion of evidence as a sanction for violation of discovery rules is an area left to trial court discretion." *State v. Miller*, 372 S.W.3d 455, 472 (Mo. banc 2012) (citing *State v. Walkup,* 220 S.W.3d 748, 757 (Mo. banc 2007)). "'The sanction is used sparingly against a defendant in a criminal case because of the trial court's duty to ensure a fair trial by allowing the defendant to put on a defense.'" *Id.* (quoting *Walkup*, 220 S.W.3d at 757). "In determining whether the trial court abused its discretion, an appellate court must first consider what prejudice the State would have suffered as a result of the discovery violation and second, whether the remedy resulted in

fundamental unfairness to the defendant." *State v. Martin*, 103 S.W.3d 255, 260 (Mo. App. E.D. 2003).

"Fundamental unfairness results if the exclusion of a witness's testimony substantively alters the outcome of the trial." *Id.* at 261 (internal citations omitted). "To determine whether the exclusion resulted in prejudice to the defendant, the facts and circumstances of the particular case must be examined including the nature of the charge, the evidence presented, and the role the excluded evidence would have played in the defense's theory." *Id.* (internal citations omitted). "Exclusion of a witness may be proper when no reasonable justification is given for the failure to disclose the witness." *Id.* "As a matter of law, no abuse of discretion exists when the court refuses to allow the late endorsement of a defense witness whose testimony would have been cumulative, collateral, or if the late endorsement would have unfairly surprised the State." *Miller*, 372 S.W.3d at 472 (internal citations and quotation marks omitted).

B. The relevant evidence at trial.

In response to the State's May 4, 2011, discovery request, defense counsel Charles Billings filed a motion to endorse 34 witnesses on February 22, 2012. (L.F. 23-25). As trial was set for February 29, 2012, and the motion failed to include the contact information of the proposed witnesses, the trial

court entered an order giving attorney Billings 30 days to file a list of witnesses with their contact information. (L.F. 26). The court also continued the trial to May 31, 2012. (L.F. 26). On April 4, 2012, counsel Billings moved to withdraw from Defendant's case, and on April 13, 2013, defense counsel Jeffrey Witt entered his appearance on behalf of Defendant. (L.F. 4).

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The court clarified the reasoning for excluding Defendant's witnesses was due to Defendant's late endorsement of witnesses in violation of the court's order. (Tr. 11). The court stated that Defendant did not submit such a list within the 30-day period. (Tr. 12). On May 29, 2012, Defendant (through counsel Witt) emailed a list of the names and addresses of 17 witnesses that he intended to call at trial on May 31, 2012. (Tr. 12). The court noted that this motion to endorse was filed 95 days after the February 23, 2012 order and just two days before trial. (Tr. 12). The court then denied Defendant's

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The court stated that at the time it ordered the disclosure of witnesses, Defendant's counsel did not raise any discovery issues; rather, defense counsel indicated that the 30-day continuance would be sufficient time to provide the contact information for the listed witnesses. (Tr. 15-16). The court noted that although Defendant's counsel later withdrew from the case and counsel Witt entered his appearance, counsel Billings failed to file the list of witness names and addresses within the 30-day period, and counsel Witt did not follow up on this outstanding order when he entered his appearance in

the case. (Tr. 16). The court stated that counsel Witt could have brought the outstanding court order to the court's attention and asked for more time to gather witness information, "[b]ut instead [defense counsel] waited until two days before the trial date to file an endorsement of witnesses, which I think is an unfair surprise and unfairly prejudicial to the State." (Tr. 16).

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didn't have anything to say or anything (indiscernible) because of a late endorsement. And if it's not done it comes back on me.

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>
> (Proceedings returned to open court.)

(Tr. 262-64).

Defendant included this claim in his motion for new trial and supplemental motion for new trial. (L.F. 82-83, 102-03).

C. The trial court did not abuse its discretion in excluding Defendant's witnesses.

The trial court did not abuse its discretion in excluding Defendant's witnesses because Defendant's disclosure of these witnesses two days before the start of trial unfairly surprised the State, and Defendant offered no reasonable justification for the late disclosure. At trial, Defendant attempted

to justify his late endorsement of witnesses based on an alleged discovery violation by the State. (Tr. 14-15). But the court clarified that Defendant's late endorsement of witnesses was not excused when he failed to bring this alleged discovery violation to the court's attention and instead filed the late endorsement two days before the start of trial. (Tr. 15-16). Furthermore, six of the ten excluded witnesses were named in counsel Billings's initial endorsement of 34 witnesses, so Defendant's suggestion that he did not know of these witnesses prior to two days before trial is refuted by the record. (L.F. 23-25; Tr. 13). Additionally, two of the remaining four witnesses were named in Victim's account and in the police reports, of which Defendant had possession since May 4, 2011. (L.F. 15; Tr. 10). As Defendant provided no reasonable justification for his late endorsement, the trial court did not abuse its discretion in excluding these witnesses. *See Martin*, 103 S.W.3d at 261 ("Exclusion of a witness may be proper when no reasonable justification is given for the failure to disclose the witness.").

Determining whether there is any merit to Defendant's claim is complicated by the fact that Defendant made no offer of proof describing the

content of his witnesses' proposed impeachment testimony.[4] "'When a prospective witness is precluded from testifying, the proper procedure is for the person protesting such exclusion to preserve the anticipated evidence by an offer of proof in the form of questions and answers, or a summation by counsel of the proposed testimony, which should also demonstrate why such testimony was admissible.'" *State v. Woods*, 357 S.W.3d 249, 253 (Mo. App. W.D. 2012) (quoting *State v. Lopez,* 836 S.W.2d 28, 33 (Mo. App. E.D. 1992)). "The offer of proof allows for the record to be preserved for appeal and 'to allow the trial court to consider further the claim of admissibility.'" *Id.* (quoting *State v. Yole,* 136 S.W.3d 175, 178 (Mo. App. W.D. 2004)). "An offer of proof 'enables the trial court to rule upon the propriety and admissibility of the evidence, and preserves a record for appellate review.'" *Id.* (quoting *Karashin v. Haggard Hauling & Rigging, Inc.,* 653 S.W.2d 203, 205 (Mo. banc 1983)).

[4] Defendant's argument implies that he made an offer of proof at trial regarding the excluded witnesses and that the incomplete record omitted that offer of proof. (App. Br. 9). But, as discussed in Point I, *supra*, Defendant made no offer of proof. (Tr. 262-64).

"An offer of proof must show three things: '(1) what the evidence will be; (2) the purpose and object of the evidence; and (3) each fact essential to establishing the admissibility of the evidence.'" *State v. Peters*, 186 S.W.3d 774, 781 (Mo. App. W.D. 2006) (quoting *State v. Hirt*, 16 S.W.3d 628, 633 (Mo. App. W.D. 2000)). "An appellate court normally does not review evidence excluded by the trial court 'unless a specific and definite offer of proof' was made at trial." *Id.* (quoting *Hirt*, 16 S.W.3d at 633). The exception to the rule requiring an offer of proof is "very narrow" and involves a three-part test. *Id.* (quoting *Destin v. Sears Roebuck & Co.*, 803 S.W.2d 113, 116 (Mo. App. W.D. 1990)). "First, there must be a complete understanding based on the record of what the excluded testimony would have been. Second, the objection must be to a category of evidence rather than to specific testimony. Third, the record must reveal that the evidence would have helped its proponent." *Id.*

Defendant cannot establish fundamental unfairness from the exclusion of his witnesses' testimony because he failed to make an offer of proof describing the content of that testimony and nothing in the record identifies the content of the proposed evidence. Moreover, Defendant's suggestion that he made an offer of proof that was omitted from the transcript is incorrect. The record shows that Defendant did not make an offer of proof, and nothing

in the record suggests that the trial court would have prevented Defendant from making such an offer.

Defendant has also failed to establish that his case falls within the "very narrow" class of cases in which an offer of proof is not needed. Missouri courts have held that a trial court does not abuse its discretion in excluding a defense witness's testimony as a discovery sanction when that witness was not disclosed during discovery, especially when the defense makes no offer of proof regarding the content of the witness's testimony. *See State v. Duncan*, 385 S.W.3d 505, 508 (Mo. App. S.D. 2012); *Woods*, 357 S.W.3d at 253-54; *State v. Ellis*, 567 S.W.2d 454, 456 (Mo. App. St.L.D. 1978); *State v. Eddy*, 564 S.W.2d 938, 940 (Mo. App. St.L.D. 1978).

Defendant claims—without evidentiary support due to his lack of an offer of proof at trial—that the excluded witnesses would have attacked Victim's veracity. (App. Br. 11). Even if this Court were to assume that these witnesses would have testified as Defendant claims, no fundamental unfairness resulted from their exclusion because Defendant was able to attack Victim's veracity in other ways. A trial court's exclusion of a defense witness's testimony is not fundamentally unfair when the testimony was offered for mere impeachment purposes and the witness whose testimony was to be impeached was thoroughly cross-examined at trial. *See State v. Stout*,

675 S.W.2d 931, 936 (Mo. App. E.D. 1984). The record shows that Victim was thoroughly impeached at trial with the alleged discrepancies—most of them minor—regarding the timeline of the day of the disclosure, when she disclosed the incident to her boyfriend, whether the officer who drove her home from school told her brothers about the incident, and the details of her call to Defendant. (Tr. 77-87, 94-96, 251). Defendant also had Mother testify that Victim lied to Mother, thus calling into question Victim's credibility. (Tr. 238). Defendant has not established that exclusion of the witnesses' testimony, which would have been cumulative in nature to the other impeachment evidence already in the record, substantively altered the outcome of Defendant's trial.

The trial court did not abuse its discretion in excluding the alleged impeachment testimony of the defense witnesses. Defendant has failed to show that the trial court's sanction for his discovery violation resulted in fundamental unfairness. Defendant's point should be denied.

III. (suppression of marijuana evidence)

Defendant waived his claim that the trial court erroneously admitted the marijuana evidence when defense counsel affirmatively stated that he had no objection to the admission of this evidence at trial. Furthermore, the trial court did not plainly err in failing to *sua sponte* exclude this evidence as Defendant consented to the search of his home that resulted in the discovery of this evidence. Finally, Defendant suffered no manifest injustice or miscarriage of justice from the admission of this evidence in light of his admission that he provided Victim marijuana.

A. Waiver.

When reviewing a ruling on a motion to suppress evidence, courts "review the facts and reasonable inferences therefrom in the light most favorable to the trial court's ruling, and disregard all contrary evidence and inferences." *State v. Chambers*, 234 S.W.3d 501, 512 (Mo. E.D. App. 2007). When a claim is preserved, absent an abuse of discretion, the appellate courts will not disturb the trial court's decision to admit or exclude evidence. *Id.*

Here, Defendant's claim was not preserved. To the contrary, it was affirmatively waived. Defendant did not file a pre-trial motion to suppress this evidence, did not object to the admission of this evidence at trial,

affirmatively stated he had no objection to the admission of this evidence, and did not raise this issue in his motion for new trial. (Tr. 162; L.F. 82-98). To preserve an issue for appeal, the defendant must make an objection to the admission of the evidence. *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009). "Plain error review would apply when no objection is made due to 'inadvertence or negligence.'" *Id.* (quoting *State v. Mead,* 105 S.W.3d 552, 556 (Mo. App. W.D. 2003)). A defendant waives plain error review when "counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence." *Id.* (citing *Mead*, 105 S.W.3d at 556) (internal quotation marks omitted). "Plain error review does not apply when 'a party affirmatively states that it has no objection to evidence an opposing party is attempting to introduce' or for a trial strategy reason." *Id.* (quoting *Mead*, 105 S.W.3d at 556).

Here, Defendant, as in *Johnson*, waived plain error review by affirmatively stating that he had no objection to the admission of the marijuana evidence. *Id.* As such, this Court should decline to review this point for plain error.

B. The relevant evidence at trial.

Prior to trial, Defendant filed a motion to suppress Defendant's statements to Lieutenant Schoenfeld and a motion to exclude evidence "not

timely turned over to the Defendant." (L.F. 32-34, 40-42). Neither motion involved the suppression of marijuana evidence. (*See* L.F. 32-34, 40-42). Due to the late filing of the motion to suppress Defendant's statements, the trial court took the motion with the case. (Tr. 18).

Lieutenant Schoenfeld testified that after having Victim call Defendant and listening to his responses, Lieutenant Schoenfeld went to Defendant's residence to speak to him. (Tr. 134-35). Lieutenant Schoenfeld testified that he had concerns about Defendant's safety and worried Defendant would harm himself. (Tr. 135). After Defendant answered the door, Defendant refused to allow Lieutenant Schoenfeld to enter his house and instead stepped onto the porch in clothing that was not warm enough for that time of year. (Tr. 136). Lieutenant Schoenfeld testified that he prevented Defendant from going into his house to retrieve his phone unless he allowed Lieutenant Schoenfeld to accompany him inside; Lieutenant Schoenfeld was worried that Defendant would harm himself or get a weapon if allowed to go inside unaccompanied. (Tr. 137). Defendant agreed to allow Lieutenant Schoenfeld to accompany him inside to get his phone; Lieutenant Schoenfeld entered the house three or four steps and watched Defendant from that location; when Defendant retrieved his phone, Lieutenant Schoenfeld exited the house with Defendant.

(Tr. 137-38). At that time, Lieutenant Schoenfeld did not search anything. (Tr. 159).

After returning to the porch, Lieutenant Schoenfeld read Defendant the *Miranda* warnings, and Defendant agreed to answer questions. (Tr. 138). Defendant then admitted to providing Victim marijuana, to kissing Victim, and to touching Victim's buttocks. (Tr. 158, 165, 167). Defendant also admitted that Victim told him that he had exposed his penis to her and asked her to touch it. (Tr. 166). Defendant said "yeah, it had happened." (Tr. 166).

Lieutenant Schoenfeld testified that Defendant admitted he had marijuana in the house and told Lieutenant Schoenfeld where he kept the marijuana. (Tr. 160). Lieutenant Schoenfeld testified that Defendant then consented to a search of his home. (Tr. 159, 143, 209). Upon searching Defendant's home, Lieutenant Schoenfeld discovered some marijuana. (Tr. 161).

The prosecutor sought to admit the marijuana as State's Exhibit 5. (Tr. 161-62). In response to the State's offer of Exhibit 5, Defendant affirmatively stated, "No objections." (Tr. 162). The trial court admitted Exhibit 5 into evidence. (Tr. 162).

C. The trial court did not plainly err in admitting the marijuana evidence because Defendant consented to the search of his home.

Even if Defendant's affirmative statement that he had no objections to the admission of the marijuana is disregarded, no plain error occurred in the admission of the marijuana because Defendant consented to the search of his home. A reviewing court has the discretionary authority to review for plain error affecting a defendant's substantial rights "when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20; *State v. Carney*, 195 S.W.3d 567, 570 (Mo. App. S.D. 2006). Plain error review is utilized sparingly, and a defendant seeking such review bears the burden of showing that plain error has occurred. *See State v. Garth*, 352 S.W.3d 652 644 (Mo. App. E.D. 2011).

"Review for plain error involves a two-step process." *State v. Baumruk*, 280 S.W.3d 600, 607-08 (Mo. banc 2009). "The first step requires a determination of whether the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted." *Id.* (quoting *State v. Brown*, 902 S.W.2d 278, 284 (Mo. banc 1995) (internal citation and quotation marks omitted)). "All prejudicial error, however, is not plain error, and '[p]lain errors are those which are evident,

obvious, and clear.'" *Id.* (quoting *State v. Scurlock*, 998 S.W.2d 578, 586 (Mo. App. W.D. 1999) (internal citation omitted)). "If plain error is found, the court then must proceed to the second step and determine 'whether the claimed error resulted in manifest injustice or a miscarriage of justice.'" *Id.* (quoting *Scurlock*, 998 S.W.2d at 586).

"In general, an entry and search without a warrant are deemed unreasonable under the Fourth Amendment to the Constitution of the United States unless the action falls within certain carefully delineated exceptions." *State v. Epperson*, 571 S.W.2d 260, 263 (Mo. 1978) (internal citations omitted). "Where consent is lawfully obtained, law enforcement officers may conduct a search commensurate in scope with the permission given. This is so even though the search was not otherwise supported by probable cause or reasonable suspicion of criminal activity." *State v. Hyland*, 840 S.W.2d 219, 221 (Mo. banc 1992) (internal citations omitted). "[W]e have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Id.* (internal citations and quotation marks omitted).

Whether consent to search was voluntary depends on the totality of the circumstances. *State v. Blair*, 638 S.W.2d 739, 750 (Mo. banc 1982). Voluntariness is determined by consideration of

> many factors including but not limited to the number of officers present, the degree to which they emphasized their authority, whether weapons were displayed, whether the person was already in police custody, whether there was any fraud or misleading on the part of the officers, and the evidence as to what was said and done by the person consenting.

Id. (quoting *State v. Rush*, 497 S.W.2d 213, 215 (Mo. App. St.L.D. 1973)).

Here, the record demonstrates that Defendant voluntarily consented to a search of his home. Lieutenant Schoenfeld clarified that while Defendant first indicated he did not want the police to enter his home, he allowed Lieutenant Schoenfeld to accompany him three or four steps inside the house so that Defendant could retrieve his phone. (Tr. 137-38). At that time, Lieutenant Schoenfeld did not search the house. (Tr. 159). Instead, Lieutenant Schoenfeld and Defendant both exited the house and continued talking. (Tr. 137-38). After talking for a while, and after Defendant admitted to giving Victim marijuana and that he had marijuana in his house,

Defendant consented to a search of his home. (Tr. 158, 165, 167, 143, 159, 209).

Because Defendant did not file a motion to suppress evidence based on this search or object to the admission of the fruits of the search, the record pertaining to Defendant's consent is sparse. Without citing to the record, Defendant claims that, "[u]sing [Defendant's] children as a tool, Schoenfeld continued to encroach into a search of the rest of the home [without Defendant's] authorization or consent[,] eventually seizing the marijuana." (App. Br. 16). This allegation has no basis in the record. Instead, the record shows that on three separate occasions, Lieutenant Schoenfeld testified that after talking with Defendant, Defendant consented to a search of his home. (Tr. 143, 159, 209). The record simply does not support Defendant's contention that he was "coerced into an illegal search." (App. Br. 17). The record merely shows that, after talking to Lieutenant Schoenfeld for a while, Defendant let the officers into the house and gave consent to search. (Tr. 143, 159, 209). As the record demonstrates that Defendant freely consented to the search of his home, the trial court did not plainly err in admitting into evidence the marijuana seized as a result of that search. Defendant's point should be denied.

D. Defendant suffered no manifest injustice from the admission of this evidence in light of his admission that he gave Victim marijuana.

Finally, Defendant suffered no manifest injustice from the admission of this evidence in that this evidence was in no way outcome-determinative. *See State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006) ("'[U]nder Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative [.]'") (quoting *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002)). "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice."*Id.* at 652 (citing *State v. Mayes,* 63 S.W.3d 615, 624 (Mo. banc 2001)).

Here, Defendant failed to meet his burden to prove he suffered manifest injustice as a result of the admission of this evidence. Defendant's argument is devoid of any assertion of manifest injustice or explanation of how this evidence affected the outcome of his trial. (*See* App. Br. 13-17). Based on this deficiency, Defendant failed to meet his burden to prove manifest injustice resulted.

Additionally, the admission of the marijuana was not outcome-determinative in light of Defendant's admission that he provided marijuana

to Victim. (Tr. 165). Because Defendant admitted to giving Victim marijuana, the admission of marijuana seized from Defendant's house did not alter the outcome of his trial. Defendant suffered no manifest injustice or miscarriage of justice, and his point should be denied.

IV. (constitutionality of § 559.115)

Section 559.115, RSMo Cum. Supp. 2010, does not violate the equal protection clauses of the Fourteenth Amendment of the United States Constitution or Article I, Section 2 of the Missouri Constitution in that § 559.115 does not create a distinction between sex offenders and non-sex offenders. Furthermore, § 559.115 does not impinge on a fundamental right and bears a rational relationship to the legitimate State interest in ensuring those released on probation will adhere to the requirements of probation.

A. Standard of review.

In determining whether a statute is constitutional, this Court conducts review *de novo*. *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012) (citing *City of Arnold v. Tourkakis,* 249 S.W.3d 202, 204 (Mo. banc 2008)). "Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision." *Id.* (citing *State v. Pribble,* 285 S.W.3d 310, 313 (Mo. banc 2009)). Defendant, "as the party challenging the statute's validity, bears the burden of proving the statute clearly and undoubtedly violates the constitution." *State v. Young*, 362 S.W.3d 386, 390 (Mo. banc 2012) (citing *State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009)).

B. The record pertaining to this claim.

On August 6, 2012, the trial court sentenced Defendant in accordance with the jury's recommendation to five years' imprisonment for Count I and four years' imprisonment for Count II. (L.F. 7, 131-32). The court further sentenced Defendant pursuant to section 559.115 to the Sex Offender Assessment Unit ("SOAU"). (L.F. 7, 131-32). The record is unclear whether Defendant was sent to this program, but Defendant asserts that he participated in the 120-day program. (App. Br. 17). On August 16, Defendant filed his notice of appeal. (L.F. 8). On November 8, 2012, the trial court determined Defendant's release on probation would be an abuse of discretion and ordered the execution of Defendant's sentences. (L.F. 8). The trial court further ordered that the sentences run consecutively. (L.F. 8).

C. Section 559.115, RSMo Cum. Supp. 2010, is constitutional.

Section 559.115 is constitutional and does not violate the equal protection clause. "The United States Constitution provides, 'No state shall ... deny to any person within its jurisdiction the equal protection of the laws.'" *Young*, 298 S.W.3d at 396 (quoting U.S. CONST. amend XIV). "Article I, section 2 of the Missouri Constitution provides in pertinent part, '[A]ll persons are created equal and are entitled to equal rights and opportunity under the law.'" *Id.* (citing MO. CONST. art. I, § 2). "Missouri's equal

protection clause provides the same protections as the United States Constitution." *Id.* (citing *In re Care and Treatment of Coffman,* 225 S.W.3d 439, 445 (Mo. banc 2007)).

Determining whether a statute violates the equal protection clause involves a two-step process. *Id.* at 397 (citing *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003)). "First, the Court determines whether a classification of certain persons under the law 'operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.'" *Id.* (quoting *Etling*, 92 S.W.3d at 774). "If so, the classification is subject to strict judicial scrutiny to determine whether it is necessary to accomplish a compelling state interest. Otherwise, review is limited to a determination of whether the classification is rationally related to a legitimate state interest." *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004) (citing *In re: Marriage of Kohring*, 999 S.W.2d 228, 231-32 (Mo. banc 1999)). "As for fundamental rights, those requiring strict scrutiny are the rights to interstate travel, to vote, free speech, and other rights explicitly or implicitly guaranteed by the Constitution." *Id.* (citing *In re Marriage of Woodson,* 92 S.W.3d 780, 784 (Mo. banc 2003)).

The second step of the analysis requires the application of the appropriate level of scrutiny to the challenged statute. *Young*, 362 S.W.3d at 397 (citing *Weinschenk v. State,* 203 S.W.3d 201, 211 (Mo. banc 2006)). "As to the rational basis for the statutes, there only need be a conceivably rational basis to uphold the regulatory scheme." *United C.O.D.*, 150 S.W.3d at 313. "This Court presumes statutes have a rational basis, and the party challenging the statute must overcome this presumption by a 'clear showing of arbitrariness and irrationality.'" *Young*, 362 S.W.3d at 397 (quoting *Foster v. St. Louis County,* 239 S.W.3d 599, 602 (Mo. banc 2007)).

1. Defendant draws a false distinction in naming the groups of people treated differently by section 559.115.

Defendant argues that section 559.115 violates the equal protection clause in that it distinguishes between sex offenders who appeal their convictions—and thus are not eligible for the SOAU—and non-sex offenders who appeal their convictions—and are still eligible to participate in 120-day shock incarceration programs.[5] (App. Br. 19). But section 559.115 creates no

[5] Defendant also asserts that "participation in the SOAU is mandated by state law due to the nature of his conviction . . . ." (App. Br. 19). Defendant does not cite to which State law he believes makes his participation in this

such distinction. Section 559.115(1) states that "Neither probation nor parole shall be granted by the circuit court between the time the transcript on appeal from the offender's conviction has been filed in appellate court and the disposition of the appeal by such court." § 559.115, RSMo Cum. Supp. 2010.

Practically speaking, this provision of the statute means that anyone sentenced to a 120-day program will not be granted probation or parole at the end of the 120-day period if he or she appeals his or her conviction. This is the case because the trial court only retains jurisdiction to grant probation for 120 days after entering the judgment in a case, and the disposition of an appeal will usually take longer than 120 days. The result is that, because the trial court is forbidden from granting probation to someone who has a pending appeal, anyone who participates in a 120-day program and appeals their conviction will not be eligible for probation. This is the case for all offenders—not just sex-offenders, as Defendant suggests. (App. Br. 19, 21-22).

Defendant relies on an online publication from the Missouri Sentencing Advisory Commission to argue that section 559.115 draws a distinction between sex offenders and non-sex offenders in terms of the consequences of

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program mandatory, and section 559.115 has no such requirement. § 559.115, RSMo Cum. Supp. 2010.

an appeal on the possibility of probation. (App. Br. 21). While the document Defendant cites does seem to draw this distinction, the statute does not. [6] As the statute does not utilize the classification Defendant claims, Defendant has failed to identify any classification in the statute that violates the equal protection clause. Defendant has therefore failed to meet his burden to prove the statute is unconstitutional, and his point should be denied.

[6] Review of the website reveals what appears to be a Department of Corrections internal policy. Respondent does not concede the accuracy of this online publication, but it appears that this publication draws a distinction between sex offenders and non-sex offenders due to the Department's apparent policy that successful completion of sex-offender treatment programs requires an offender to take responsibility for his or her actions and admit his or her guilt. *See Spencer v. State*, 334 S.W.3d 559, 568 (Mo. App. W.D. 2010) (noting that successful completion of sex-offender treatment program requires the offender to admit his guilt). This distinction does not exist in the statute. To the extent that Defendant is challenging whether a Department of Corrections internal policy accords with the law, the appropriate avenue for relief would be an extraordinary writ.

2. Rational basis applies because any distinction between those who appeal and those who do not does not impinge upon a fundamental right.

To the extent that Defendant's point can be read as arguing that the statute improperly distinguishes between those who appeal and those who do not appeal, this classification does not impinge upon a fundamental right. Defendant argues that the Missouri Constitution protects "the right to an appeal[,]" citing article V, section 5. (App. Br. 20). But this provision does not establish a right to appeal; rather, it merely directs that any Supreme Court rule related to practice and procedure in Missouri courts "shall not change . . . the law relating to . . . the right of appeal." Mo. CONST. art. V, § 5.

Missouri courts have repeatedly recognized that the right to appeal is a statutory, not constitutional, right. *See State v. Burns*, 994 S.W.2d 941 (Mo. banc 1999) (citing *State v. Troupe,* 891 S.W.2d 808, 813 n. 5 (Mo. banc 1995) ("The right to appeal is purely statutory.")); *State v. Shuey*, 193 S.W.3d 811, 813-14 (Mo. App. W.D. 2006) ("[The] application [of the escape rule] does not violate a defendant's constitutional rights because a right to appeal a conviction does not exist."); *Randol v. State*, 144 S.W.3d 874, 876 (Mo. App. W.D. 2004) ("Application of the [escape] rule does not violate a defendant's constitutional rights because neither a right to appeal a conviction nor to a

state post conviction proceeding exists."). Neither does the U.S. Constitution provide a right to appeal. *See Goeke v. Branch*, 514 U.S. 115, 119 (1995) (internal quotation omitted) ("There can be no argument that the fugitive dismissal rule ... violates the Constitution because a convicted criminal has no constitutional right to an appeal.").

Additionally, the statute's distinction between those who appeal and those who do not appeal in determining who is qualified for probation does not impinge on statutory right to appeal. Rather, the statute limits an offender's ability to secure probation. The statute's effect on Defendant's chance at probation also does not impinge a fundamental right as probation is a privilege and not a right. "[A] convicted person has no right to probation in the first instance. Probation cannot be demanded as of right; it is a privilege which may be granted or withheld in the discretion of the sentencing court." *Smith v. State*, 517 S.W.2d 148, 150 (Mo. 1974).

Because neither the statutory right to appeal nor the privilege of probation constitute a fundamental right, Defendant has failed to identify any fundamental right upon which section 559.115 impinges. As such, review of the statute is limited to whether the legislature had a rational basis for its distinction. *See Young*, 362 S.W.3d at 397 ("Since section 115.350 does not operate to the disadvantage of a suspect class nor impinge upon a

fundamental right, it will withstand constitutional challenge if the classification bears some rational relationship to a legitimate state purpose.").

3. The State had a rational basis for distinguishing between those who appeal and those who do not in the determination of whether a person should be granted probation.

The legislature had a rational basis for drawing a distinction between those who appeal and those who do not appeal in regard to who is eligible for probation. A person's submission to a lawful judgment supplies a good basis to determine that the person would be willing to comply with probation restrictions, and thus would be more likely to succeed on probation. Additionally, a person who submits to a lawful judgment could reasonably be expected to work harder to successfully complete the terms of probation than someone who does not submit to the judgment. Based on a person's likelihood of success on probation increasing in the absence of an appeal, the State had the legitimate purpose of incentivizing convicted persons not to appeal in exchange for a chance at probation.

Additionally, the State had the legitimate purpose of reducing the number of appeals from convictions, and thereby reducing the strain on the justice system, by offering a benefit to convicted felons. This purpose was

rationally related to the classification of those who appeal versus those who do not appeal in that it directly affects the usage of the justice system.

Finally, the State had the legitimate purpose of ensuring that those who participate in the 120-day programs had a likelihood of success. Because the State has limited resources, space in the 120-day programs is necessarily limited. Because those who appeal their convictions have a chance of having their convictions overturned entirely, there is no assurance that these people will remain in the justice system. Because space in these programs is limited, the State had the legitimate purpose to ensure that those who participate in the 120-day programs—and thus become eligible for probation—are limited to those whose continuation in the program is assured—those who have not appealed their convictions.

As the State had a legitimate purpose in distinguishing between those who appeal and those who do not appeal in terms of probation eligibility, and those purposes were rationally related to the classification, section 559.115 does not violate the equal protection clause. Defendant's point should be denied.

CONCLUSION

The trial court did not commit reversible error in this case. Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 10,446 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 19th day of July, 2013, to:

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