

No. 88894

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

BRIAN FASSERO,

Appellant.

Appeal from St. Charles County Circuit Court
The Honorable Nancy Schneider, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for first degree child molestation, §566.067, RSMo, obtained in the Circuit Court of St. Charles County, for which appellant was sentenced to fifteen years. The Missouri Court of Appeals, Eastern District, affirmed appellant's conviction and sentence. *State v. Fassero*, No. ED86106 (Mo.App.E.D., September 4, 2007). It denied appellant's motion for rehearing on October 15, 2007.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On November 20, 2007, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction pursuant to Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant was charged by indictment with first degree child molestation¹ (LF 1, 53-55). On June 18, 2004, appellant's first trial ended in a mistrial due to a hung jury (LF 9, 34). Appellant's case was retried on January 18, 2005 before a jury in the Circuit Court of St. Charles County, the Honorable Nancy L. Schneider presiding (LF 9; Tr. 1).

Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

On February 2, 2003, Sandra Lay and her husband, along with their daughter, Mindy Dorenkamp, Mindy's husband Paul, and their two children, Tyler and Katie, along with the Lay's other grandchildren, 10-year-old A.A. and 8-year-old Austin, and the Lay's 11-year-old niece, S.N., went to Tumble Drum, a play area with slides, ball pits, and rope swings for children in St. Peter, Missouri (Tr. 285, 358, 384-385, 435, 465, 484). Paul watched his two children, 4-year-old Tyler and 2-year-old Katelyn, as well as A.A., and Austin, while they played in the ball pit (Tr. 288).

As Paul watched the children, appellant walked up next to him (Tr. 290). Appellant's daughter was also playing in the ball pit (Tr. 290). Appellant asked Paul which children were his and Paul indicated Tyler and Katelyn (Tr. 291). Paul made no reference to A.A. or S.N. (Tr. 291).

¹ The state nolle prossed an alternative charge of first degree statutory sodomy (LF 39).

Appellant's daughter started crying, so appellant went into the ball pit to comfort her (Tr. 292). His daughter calmed down, but appellant did not leave the ball pit (Tr. 292). Instead, appellant started playing with the rest of the children (Tr. 292). At first they were just joking around and throwing balls at each other (Tr. 292). Appellant started grabbing S.N. and A.A. by their belt loops and pulling them down into the ball pit and tickling them (Tr. 292, 467, 468, 489). Appellant grabbed S.N. and A.A. by their legs and dragged them through the balls, causing them to sink underneath the balls (Tr. 293, 467, 488). Appellant did not, however, tickle his own daughter or drag her through the balls (Tr. 353, 479). Dorenkamp did not see appellant play with his own daughter (Tr. 354).

S.N. felt her pants start to come down when she would get dragged by the legs (Tr. 467). At one point, appellant put his thumb down the side of S.N.'s pants (Tr. 468). Mr. Dorenkamp saw A.A. standing up, with the top of her underwear sticking out of her pants (Tr. 295). A.A. stuck her underwear back in her pants and pulled her pants back up (Tr. 295). A.A. was wearing elastic stretch capris pants (Tr. 484).

Mindy Dorenkamp walked up and asked Paul what appellant was doing in the ball pit (Tr. 293). S.N. and A.A. were sitting in the balls off to the left (Tr. 293). Everyone appeared to be taking a break (Tr. 293). Mindy thought it looked like appellant was reaching out underneath the balls toward A.A. (Tr. 360). Mindy asked Paul if it looked like appellant was reaching out towards S.N. and A.A. (Tr. 293). Paul said he couldn't tell because all one could see was the top of appellant's shoulder, but it did appear as though he were reaching out (Tr. 293). Mindy again asked what appellant was doing in there, but Paul thought it was

innocent enough (Tr. 293-294). Mindy told Paul to keep an eye out because something didn't look right (Tr. 360).

Mindy walked away, and then appellant asked A.A. if she wanted a piggyback ride (Tr. 294). A.A. got on appellant's back and then appellant fell back on top of her (Tr. 294, 490). Appellant appeared to be holding her down and teasing her (Tr. 294). A.A.'s legs were around him and he was laying back between her legs (Tr. 294). Appellant put his hand underneath and inside A.A.'s underwear and felt A.A.'s "private part", sticking one of his fingers inside her vagina (Tr. 490, 492, 493, 510-511). A.A. did not say anything because she was scared (Tr. 493). Appellant later again asked A.A. if she wanted a piggyback ride; she said no, but ultimately acquiesced (Tr. 494). The same thing happened, except that this time appellant did not insert his finger because A.A. pulled his hand away (Tr. 494, 505, 524). Appellant remained on top of A.A. for about 4 or 5 minutes (Tr. 294). Paul heard A.A. say something like, "Hey, stop, you are hurting me." (Tr. 294). Paul said, "Hey, what are you doing?" and told appellant to get up (Tr. 294). Appellant did not respond (Tr. 294). Again, Paul yelled at appellant to get up and then they all got up and came out of the ball pit (Tr. 294, 494).

Paul started talking with A.A.'s grandmother, Sandra Lay, saying that he didn't like the way appellant was touching and tickling the kids and that it "just seemed weird." (Tr. 296, 387). Paul pointed out appellant to Mrs. Lay (Tr. 389). Paul explained to Mrs. Lay about the piggyback incident (Tr. 296). At this point, all of the children were filing back into the ball pit; A.A. was the last in line (Tr. 296). Appellant jumped up behind A.A. (Tr. 296). Mrs. Lay went over to talk to appellant and saw that appellant's hand was on A.A.'s buttocks

and wrist as he escorted her toward the ball pit (Tr. 296, 335, 389-390, 392, 495). Mrs. Lay grabbed appellant and said, “What are you doing with your hands on my granddaughter?” (Tr. 296, 335-336, 392). Mrs. Lay told appellant, “If you don’t let her go, I’m going to fuck you up.” (Tr. 392). Appellant said, “I don’t know what you’re talking about.” (Tr. 392). “Yes, you do,” Mrs. Lay replied (Tr. 392). “My son-in-law stood here and watched you. Don’t touch her again.” (Tr. 392). Mrs. Lay let go of appellant (Tr. 392). Appellant went to his table, gathered his things, and headed for the front door (Tr. 298, 495). Mrs. Lay told the children to go back by the table until she was able to find out what was going on (Tr. 392, 495).

Mrs. Lay asked the girls what had happened (Tr. 393). They both started crying, and A.A. said that appellant had his hand down her pants; S.N. said that appellant had tried to put his hand down her pants, but her pants were too tight (Tr. 393). Mrs. Lay then went to look for appellant and stopped him at the front door of Tumble Drum, saying, “You’re not going anywhere.” (Tr. 394). Appellant said he had to leave because he had to have his daughter back to Columbia by 6:00 (Tr. 395). Mrs. Lay asked the woman manning the front desk to call the police, but she ignored her (Tr. 395). Mrs. Lay loudly demanded that someone call the police (Tr. 395).

Nicholas Gaglio, the store manager, was in the office when he heard profanity (Tr. 437). He immediately went out and saw Mrs. Lay arguing with appellant (Tr. 437). Gaglio told Mrs. Lay that profanity was not allowed, and told her that if she was not quiet, they would call the police on her (Tr. 395, 440). Mrs. Lay said, “I wish you would.” (Tr. 395). The manager said, “We don’t even know what’s going on.” (Tr. 395). Mrs. Lay said, “This

gentleman molested my granddaughter in the ball pit.” (Tr. 395, 440). The manager said, “We didn’t see it happen. It’s over with, and there is nothing we can do.” (Tr. 395). Mrs. Lay said, “If you let him walk out that door, I’m going after him. I’m going to jump on him and I’m going to beat his ass” (Tr. 395).

In the meantime, all of the kids had come back to the table (Tr. 297). Paul said to A.A., “That guy was kind of weird, wasn’t he?” (Tr. 297). A couple of the children were nodding their heads, and A.A. gave Paul a strange look (Tr. 297). Paul said, “[A.A.], he didn’t do anything weird, did he?” (Tr. 297). A.A. put her head down and started crying (Tr. 297). Paul asked A.A. what he did, and she said that appellant had his hands in her pants (Tr. 297). Paul asked her if she was sure, and she said that she was (Tr. 298).

Paul started looking for appellant and found him up in front arguing with Mrs. Lay (Tr. 298). A staff member of Tumble Drum was calling the police (Tr. 298, 441). Paul told the manager, “No, you don’t understand. You need to talk to A.A..” (Tr. 298). Paul brought A.A. up front and said, “Can you tell him what you just told me?” (Tr. 298). A.A., who was crying, told the manager that appellant had touched her inappropriately in the ball pit and the manager said that appellant wasn’t going anywhere (Tr. 298, 440, 449, 461). The manager apologized to Mrs. Lay (Tr. 397). They waited for the police to arrive (Tr. 298).

Officer Lori Lake of the St. Peters Police Department responded to a disturbance call at Tumble Drum (Tr. 542). When she arrived, there was a large group of people in the front of the store (Tr. 543). Appellant was headed towards the door (Tr. 397). A male officer intercepted him and Officer Lake approached Mrs. Lay and asked if she was the victim (Tr.

397). Mrs. Lay pointed toward A.A. and said that she had been touched inappropriately (Tr. 543).

Officer Lake took A.A. into the main office to speak with her (Tr. 442, 527, 543-544). A.A. looked scared and nervous (Tr. 546-547). Lake asked A.A. what had happened (Tr. 547). A.A. indicated that appellant had reached down the front of her pants into her underwear and touched her private parts (Tr. 547). Lake asked why that happened, and A.A. said they had been playing in the ball pit and that appellant had been tickling her and S.N. (Tr. 547). A.A. said that at one point, appellant picked her up, threw her back in the balls, and landed on top of her, and that's when the molestation occurred (Tr. 547-548).

Once Lake had determined that a crime had occurred, she ended the interview and had everyone go down to the police station to be interviewed (Tr. 398, 548). Appellant was placed in custody and transported by another officer to the police station (Tr. 550).

Back at the police station, Officer Lake questioned A.A. again (Tr. 551). A.A. told her that they were playing in the ball pit and appellant was tickling her and S.N. (Tr. 551). A.A. said that at one point, appellant picked her up and threw her into the ball pit (Tr. 551). A.A. said that appellant landed on top her and he reached behind him into her underwear and touched her private parts (Tr. 551-552). Officer Lake asked A.A. if she could be more specific, and A.A. said that appellant had put his finger inside of her (Tr. 552). Officer Lake asked if A.A. could tell her how far, and A.A. pointed to her first knuckle (Tr. 552). A.A. said that she managed to get away, but that appellant grabbed her by the arm and pulled her back through the balls (Tr. 552). A.A. said that appellant offered to give her a piggyback ride, but instead, he fell backwards on top of her again and tried to put his hand in her pants

again, but she was able to get him off of her (Tr. 553). A.A. said she got out of the ball pit, but appellant grabbed her by the arm and put her hand on her buttocks and tried to push her back toward the ball pit again (Tr. 553). Officer Lake also talked with S.N., who said that appellant put his hands between the waistband of her jeans and her skin, but did not touch her private parts (Tr. 554).

Detective Russell Vossenkemper interviewed appellant (Tr. 625, 632). Appellant understood his rights under *Miranda* and agreed to make a statement (Tr. 633-634). Appellant said that he and his daughter were at Tumble Drum and she asked him to come into the ball pit because she had been hit with a ball (Tr. 635). Appellant said that there were other children in the ball pit, and he began playing with all of them (Tr. 635). Appellant said he dragged a couple of girls through the balls because they asked him to and that he tickled them because they tickled him first (Tr. 635, 637). Appellant said that at one point, A.A. was on his back, riding piggyback, and that he fell into the balls backwards, and they both ended up on their backs under the balls and they “got stuck” for a few minutes (Tr. 636-637).

Appellant said that he had to leave because he had to get back to Columbia, so he and his daughter got out of the ball pit, got their shoes, and then got a soda (Tr. 638). Appellant said that he saw A.A. and that she was “in some sort of distress” over by the ball pit (Tr. 638). Appellant went to her and asked her if she was okay, and she indicated that her hand hurt (Tr. 638). He patted her on the shoulder, and then, according to appellant, he was confronted by Mrs. Lay (Tr. 638).

Appellant was fairly calm as he told this story, but had a “kind of arrogance” about him and seemed to be smirking, but as the interview continued, he became “whiny.” (Tr.

639). Detective Vossenkemper confronted him with the specific accusation, that he had stuck his finger in A.A.'s vagina, but appellant kept saying that he didn't remember doing any of the things of which he was accused (Tr. 646). When Detective Vossenkemper suggested that S.N. had made the same accusation, appellant raised his voice and asked, "Do you mean both of them are saying I did this?" (Tr. 648). Appellant denied the accusation that he had stuck his finger in A.A.'s vagina (Tr. 649). Appellant said that his hands never went underneath her clothing (Tr. 649).

Since the incident at the Tumble Drum, A.A. had trouble sleeping at night, and did not want to be in her room by herself (Tr. 404, 500-501). She always had to have a nightlight on (Tr. 404). She became very moody, crying and whining (Tr. 405). She had been very happy-go-lucky and had been comfortable being by herself (Tr. 405).

Appellant testified in his own defense (Tr. 686). At the close of evidence, instructions, and argument by counsel, the jury found appellant guilty of first degree child molestation (LF 9, 21, 23). After the punishment phase of the trial, the jury assessed punishment at 15 years (LF 21, 22). The trial court sentenced appellant accordingly (LF 10; Sent.Tr. 25).

The Missouri Court of Appeals, Eastern District, affirmed appellant's conviction and sentence. *State v. Fassero*, No. ED86106 (Mo.App.E.D., September 4, 2007). It denied appellant's motion for rehearing on October 15, 2007. On November 20, 2007, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court.

ARGUMENT

I.

The trial court did not abuse its discretion in ordering a mistrial in appellant's first trial and overruling his motion to dismiss his retrial because the jury in the first trial was unable to reach a verdict.

A. Relevant facts.

At appellant's first trial the following ensued:

THE COURT: Back on the record in State of Missouri vs. Brian Fassero. Let the record show it is now 2:35 p.m. The jury has been deliberating a little over four hours. Mr. Raymond, are you the Foreperson of the jury?

JUROR RAYMOND: Yes, your Honor.

THE COURT: I was handed a note from the jury a few minutes ago that says basically the jury deliberated vigorously and is not at this time able to reach a unanimous verdict; is that correct?

JUROR RAYMOND: That's correct, your Honor.

THE COURT: All right. And I don't want you to make any statements about how many votes there were for guilty or how many votes there were for not guilty, and we are not going to ask each of you what your vote is at this time, but according to the note that you sent me, the jury is split ten to two; is that correct?

JUROR RAYMOND: That's correct.

THE COURT: All right. And it's been a few minutes since you gave me this. We had to get everybody back in the courtroom. Has there been any change in that split since you wrote this note to me about fifteen minutes ago?

JUROR RAYMOND: No, there hasn't.

THE COURT: And the jury has at this time deliberated for about four . . . and a half hours. My suggestion to you at this time is whether . . . or not you believe any further deliberation would result in the jury being able to reach a unanimous verdict in this case?

JUROR RAYMOND: We discussed it and, no, no one is willing to change their decision.

THE COURT: And so it's your opinion that you would not be able by continued deliberation in good faith to reach a unanimous verdict?

JUROR RAYMOND: That's correct.

THE COURT: Everyone who agrees with the statement that your Foreperson just made, please raise your hand at this time. For the record, the Court notes that each and every juror has raised his or her hand. Thank you, and agreed with Mr. Raymond that further deliberation by the jury would not result in a unanimous verdict.

(1Tr. 777-778). At this point, the trial court discharged the jury and declared a mistrial (1Tr. 778-779).

Prior to retrial, appellant made an oral motion that the case should be dismissed due to double jeopardy (Tr. 16). Defense counsel noted that at the end of the previous trial, the trial

court received a note from the jury and was advised by the jury foreman that the jury was hung (Tr. 16). The note indicated which way the jury was hung (Tr. 16). The jury note was sealed (Tr. 17). Defense counsel had requested disclosure of the contents of the note at a subsequent bond hearing, but the court denied it (Tr. 17). Defense counsel also noted that the court declared a mistrial on its own, not at the request of either the defense or the state (Tr. 17). Defense counsel argued that he was unable to make an intelligent response or objection with respect to the state of the jury deliberations “unless he inadvertently forced a verdict which would be against his client.” (Tr. 18). Defense counsel argued that the jury had not been subjected to the normal requirements of a deadlocked jury (Tr. 18). Thus appellant was moving to dismiss the case for double jeopardy (Tr. 19). Appellant also moved to disclose the contents of the jury’s note (Tr. 19). Defense counsel said that had he known the split was 10 to 2 for acquittal, he would have moved for a hammer instruction (Tr. 21).

The court observed that it was not appropriate for the court to even know what the state of the deliberation was and that it was not to inquire (Tr. 21). The court said it was not aware of any case stating that the failure to advise counsel of the numerical state of the decision² and the failure to *sua sponte* give the hammer instruction was outside the court’s discretion, nor that it would constitute double jeopardy (Tr. 22). The trial court denied the motion (Tr. 22).

² Appellant does not claim that the trial court erred in not revealing the numerical split to counsel.

The jury's note had read as follows: The jury deliberated vigorously and came to a final vote of ten not guilty, and two jurors voting guilty (Tr. 262). The note was signed by the foreperson (Tr. 262).

B. Standard of review.

Appellate courts review a trial court's refusal to grant a mistrial for an abuse of discretion. *State v. McGowan*, 184 S.W.3d 607, 610 (Mo.App.E.D. 2006). This is because the trial court has viewed the complained-of incident and is in a better position to determine the prejudicial effect the alleged error may have had on the jury. *Id.* An abuse of discretion is found when the trial court's ruling is clearly against the logic of the circumstances then before it and when the ruling is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. *Id.*

C. Analysis.

The trial court did not abuse its discretion in declaring a mistrial or in overruling appellant's motion to dismiss his second trial because the jury in the first trial was unable to reach a verdict.

It was within the trial court's discretion to declare a mistrial when the jury foreperson informed the court that they could not reach unanimous verdict. While appellant asserts that there was not a "manifest necessity" to declare a mistrial, "the prototypical example of 'manifest necessity' sufficient to remove the double jeopardy bar in a case of a court-declared mistrial is the jury's declaration that it is unable to reach a verdict." *State v. Fitzpatrick*, 676 S.W.2d 831, 835 (Mo.banc 1984) citing *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S.Ct. 2083, 2087 (1982). As the United States Supreme Court stated in *Arizona v.*

Washington, 434 U.S. 497, 509, 98 S.Ct. 824, 832 (1978), “[W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.”

In determining whether manifest necessity existed for a mistrial in a case of juror deadlock, factors to consider include: a jury's own statement that it cannot agree, the length of deliberations, the length of the trial, the complexity of the issues presented to the jury, the jury's communication to the judge, and the impact that further, forced deliberations might have on the verdict. *Escobar v. O’Leary*, 943 F.2d 711, 717 (7th Cir. 1991). “The jury's own statement that it is unable to reach a verdict is the most critical factor.” *United States v. Salvador*, 740 F.2d 752, 755 (9th Cir. 1984), *United States v. Lansdown*, 460 F.2d 164, 170 (4th Cir. 1972); *United States v. Byrski*, 854 F.2d 955, 961 (7th Cir. 1988). Where the jury reports that it is unable to reach a verdict, the trial court should “question the jury in such circumstances, either individually or through its foreman, on the possibility that its current deadlock could be overcome by further deliberations.” *United States v. See*, 505 F.2d 845, 847 (9th Cir. 1975). A trial judge's determination of manifest necessity in cases of jury deadlock is entitled to great deference because the “determination is based on such factors as the judge's observation of the jurors during *voir dire*, his familiarity with the evidence, the background of the case on trial, and the tone of the argument delivered and its effect on the jurors.” *Camden v. Circuit Court of Second Judicial Circuit*, 892 F.2d 610, 614 n.5 (7th Cir. 1989).

In the present case, all twelve jurors indicated to the trial court that they would not be able to reach a unanimous decision, even with further deliberation (1Tr. 777-778). The trial court questioned both the foreperson and all the jurors in open court with all parties present. It was not an abuse of discretion for the trial court to declare a mistrial at that point.

Appellant takes issue because the jury had only been deliberating four-and-one-half hours before reaching this point. But in *State v. Turner-bey*, 812 S.W.2d 799, 803 (Mo.App.W.D. 1991), *overruled on other grounds*, *State v. Carson*, 941 S.W.2d 518 (Mo.banc 1997), the trial court was found not to have erred when it declared a mistrial when the jury therein declared it was deadlocked after four-and-a-half hours of deliberation, the same length of deliberation in the present case. The Court of Appeals, Western District, noted that it is within the trial court's sound discretion to determine the length of time a jury will be allowed to deliberate, as well as whether to read MAI-Cr3d 312.10, the "hammer" instruction. The Court further noted that continued deliberations could have resulted in a waste of judicial resources or a coercion of an incorrect verdict. *Id.*

Appellant takes issue in the present case because no "hammer" instruction was read. But there is no requirement that a "hammer" instruction ever be read. The Notes on Use to 312.10 state that the instruction "may be given when the Court deems it appropriate." Particularly here, where the court – through no fault of its own – knew the numerical split of the jury – the court may have wished to avoid the appearance of coercing a verdict by

“hammering” the jury.³ The fact that the split was 10-2 in favor of appellant is of no consequence because the trial court should not be in the business of appearing to suggest to the jury a verdict either for or against the defendant. And while appellant cites cases where the “hammer” instruction had been found to have been appropriately given (App.Br. 50-52), none of those cases mandate that a hammer instruction be given before a mistrial may be declared. Nor is appellant claiming that the trial court erred in not giving the hammer instruction.

Appellant contends his case is like *United States v. Hotz*, 620 F.2d 5 (1st Cir. 1980). Therein, the jury sent a note stating that they were at an impasse of 11-1 and that the foreman did not believe the holdout could be swayed. *Id.* at 6. The defendant stated that he wanted the jury to continue its deliberations into the evening, and so the trial court directed the deputy marshal to advise the jurors that they should continue deliberating, but the court

³ One of the criteria looked at to determine whether a verdict was coerced is whether the trial court knew the numerical split of the jury prior to reading the hammer instruction. *State v. Copple*, 51 S.W.3d 11, 14 (Mo.App.W.D. 2001). While the mere fact that the jury volunteered the numerical split to the trial court will not result in a finding that a verdict was ultimately coerced, *Copple, supra*, it is certainly still a factor that the trial court can consider in making a determination whether or not to “hammer” the jury. *See, e.g., State v. Holt*, 592 S.W.2d 759, 771-772 (Mo.banc 1980) (finding no abuse of discretion in declaring a mistrial after only an hour and a half of deliberation where jury volunteered to trial court the numerical split).

would send out for sandwiches. *Id.* Only when the court was advised that it would be impossible to make arrangements to get the jurors fed until 7:30 or 8:00 p.m. that night, did the trial court bring the jurors in and ask the foreman whether he felt a unanimous verdict could be reached in the next 30 minutes. *Id.* The foreman said no, and the court declared a mistrial and discharged the jury. *Id.*

Hotz is not like the present case. There, the trial court had actually directed the jury to continue deliberation and only cut things short when it learned about the logistical difficulties of getting the jury fed. Given the circumstances in *Hotz*, where the trial court had initially told the jury to continue deliberation and then, of its own accord, called the jury back in, it is reasonably inferable that the trial court was basing its discretionary decision on whether to declare a mistrial not on the fact that the jury was deadlocked, but on the fact that the jury could not be fed for another two hours. This constituted an abuse of discretion.

No such circumstances exist in the present case. The trial court spoke to the foreman and inquired of the entire jury whether they felt that they would be able to reach a verdict if deliberation continued, and the jury unanimously declared that they did not feel they could reach a unanimous verdict, even with further deliberation. When presented with such facts, it is certainly within the trial court's discretion to declare a mistrial. *See State v. Turner-bey, supra.*

Appellant also suggests that the trial court declared a mistrial because the court knew appellant might be acquitted (App.Br. 50). Appellant bases this on the fact that the trial court knew the split of the jury was 10 to 2 in favor of acquittal (App.Br. 50). But this court should decline appellant's invitation to conclude that the trial court abandoned its

impartiality. Moreover, the 10-2 split did not mean that the jury was going to acquit appellant; in fact, the jury stated they could not reach a unanimous verdict. Nor does it mean that if the “hammer” instruction were read, the two hold-out jurors would have necessarily voted to acquit (App.Br. 50). Appellant cannot maintain that the mere fact that the trial court knew the numerical split meant that the trial court acted in bad faith. And, indeed, absent some evidence to support appellant’s allegations, the contrary should be presumed.

In short, the trial court had the best opportunity to observe the jury and based on the jurors’ representations that they could not reach a unanimous verdict, it was well within the trial court’s discretion to declare a mistrial at that point. There was no abuse of discretion in either declaring a mistrial or in overruling appellant’s motion to dismiss. Appellant’s claim is without merit and should be denied.

II.

The trial court did not abuse its discretion in overruling appellant's motion for mistrial after the prosecutor elicited testimony from appellant's ex-wife that she believed that appellant was molesting their daughter because appellant opened the door to the testimony in question; appellant, when requesting a mistrial, did not request a less drastic remedy; and when ultimately appellant did request a curative instruction to disregard the evidence, that instruction was given.

A. Relevant facts.

As rebuttal evidence, the state called appellant's ex-wife, Jennifer Comte-Fassero, to testify as to appellant's general reputation for truthfulness and veracity in the community (Tr. 782). Ms. Comte-Fassero testified that appellant had a bad reputation and frequently made up stories and lies (Tr. 782).

On cross-examination, defense counsel asked Ms. Comte-Fassero, "On February 2d, 2003, did you trust your husband with this little girl?", referring to their daughter, Natalia (Tr. 782, 784). The state objected on the grounds of relevance, but the objection was overruled (Tr. 784). Ms. Comte-Fassero then testified that she did not trust appellant with her daughter (Tr. 784).

On redirect, the state asked Ms. Comte-Fassero why she did not trust appellant with their daughter (Tr. 784). Ms. Comte-Fassero stated that before she and appellant divorced, Natalia had started making strange comments about appellant (Tr. 785). Appellant objected, and the trial court said that Ms. Comte-Fassero was not to repeat the statements as that would be hearsay (Tr. 785). The following exchange then occurred:

Q. (By Mr. Buehler) Why is it that you didn't trust Mr. Fassero with your daughter?

MR. O'HERIN: Your Honor, I would object to any statements that she makes, based on hearsay.

THE COURT: Answer the question, ma'am, without giving us hearsay statements by someone out of court.

A. So it's just my personal opinion, okay?

THE COURT: What you say and what you observed, not what someone else said to you.

A. Okay. Natalia was very upset about going to her dad's for a while. And she was very scared and would cry, and so I can say that stuff, I think.

* * *

THE COURT: Wait for another question. Just wait for a question. I can't really answer your question. The attorney has to ask you the question.

Q. (By Mr. Buehler) What were your feelings at the time that caused you not to trust the defendant to be with your daughter?

Mr. O'HERIN: Objection, Your Honor, irrelevant. She stated her opinion.

THE COURT: Sustained as to what her feelings were.

Q. (By Mr. Buehler) What was your opinion as to why didn't you trust Mr. Fassero with your daughter at that point?

MR. O'HERIN: Objection, your Honor, based on in part on hearsay.

MR. BUEHLER: Judge, he asked her opinion. He opened door to it, Judge.

THE COURT: I am going to allow her to give her opinion without hearsay.

A. I believe that he was molesting her.

(Tr. 786). Appellant immediately moved for a mistrial (Tr. 786). The trial court denied the request (Tr. 786). Defense counsel then engaged in recross examination (Tr. 787). The evidence was then declared closed and the jury was dismissed for the day (Tr. 788).

At this point, defense counsel again requested a mistrial (Tr. 789-790). The prosecutor explained that appellant opened the door by asking Ms. Comte-Fassero whether she trusted appellant with their daughter (Tr. 791). The prosecutor explained that the police reports reflected that Ms. Comte-Fassero had made such allegations about appellant in the past and that defense counsel would have been aware of this (Tr. 791). Defense counsel claimed that he had tried to warn the court that Ms. Comte-Fassero had made such allegations, but the court flatly rebuked this assertion, noting that the court had no idea and had not been apprised that Ms. Comte-Fassero had any concern that appellant may have molested their own daughter (Tr. 793).

The trial court stated that it believed appellant asked Ms. Comte-Fassero about whether she trusted appellant as a matter of trial strategy, knowing that this would allow the state to ask her why she didn't trust him (Tr. 794). The trial court further noted, however, that it did not like the fact that the statement was made before the jury. The trial court stated that the only relief appellant had asked for was a mistrial, and the court was not going to

grant that (Tr. 794). The trial court subsequently stated that it believed that defense counsel “might have deliberately tried to provoke a mistrial by asking her that question, knowing that that was an answer that she was likely to give.” (Tr. 796). Defense counsel denied knowing what answer Ms. Comte-Fassero would give (Tr. 796). The trial court again stated, “I denied the only the request that you have made, which is for the mistrial.” (Tr. 797).

The next morning, defense counsel stated that it had occurred to him that the trial court had been trying to suggest that there was a possible alternative remedy other than a mistrial (Tr. 799). Defense counsel suggested that the court might “make a statement to the jury with respect to the significance of that particular testimony” or “consider the possibility of some type of limiting instruction or cautionary instruction.” (Tr. 799). The prosecutor objected, and stated that he did not anticipate arguing that appellant was molesting his own daughter (Tr. 800).

Ultimately, defense counsel asked the trial court to advise the jury to disregard Ms. Comte-Fassero’s answer (Tr. 804). Defense counsel asked the court to read the question and answer to the jury, and then tell them to disregard it (Tr. 804). The prosecutor expressed concern that the jury might feel that the state had acted in bad faith (Tr. 804-805). The trial court said that it was not finding that anyone was acting in bad faith, but that it was going to instruct the jury to disregard and was also directing both counsel not to argue anything relating to Ms. Comte-Fassero’s lack of trust or reason therefore in closing argument (Tr. 805).

At the close of the instructions conference, defense counsel made a record and stated: “At this time I would request on the record that the Court consider an instruction to the jury

before they go out, before the instructions and argument that would indicate, that would include the fact the question by Mr. Buehler, as well as the answer, which was quote, I believe he was molesting her, would be instructed to disregard that.” (Tr. 807-808). The trial court stated that that was the first thing it would do after it greeted the jurors (Tr. 808). The trial court stated that it would advise the jury that only the following question asked and the answer given by Jennifer Comte-Fassero be disregarded: “QUESTION: What was your opinion as why didn’t you trust Mr. Fassero with your daughter at that point? ANSWER: I believe that he was molesting her.” (Tr. 809). Defense counsel stated that he was appreciative of that relief and believed that the wording of the relief was correct (Tr. 810).

When the jury came in, the court greeted them and then said:

Ladies and gentlemen, at this time the Court will advise the jury that only the following question asked and answer given by Jennifer Comte-Fassero be disregarded. QUESTION: What was your opinion as why didn’t you trust Mr. Fassero with your daughter at that point? ANSWER: I believe that he was molesting her.

(Tr. 810). The trial court then declared the evidence closed and read the jury the instructions (Tr. 810-811). Closing arguments followed and the case was submitted to the jury (Tr. 811-851).

B. Standard of review.

Appellate courts review a trial court’s refusal to grant a mistrial for an abuse of discretion. *State v. McGowan*, 184 S.W.3d 607, 610 (Mo.App.E.D. 2006). This is because the trial court has viewed the complained-of incident and is in a better position to determine

the prejudicial effect the alleged error may have had on the jury. *Id.* An abuse of discretion is found when the trial court's ruling is clearly against the logic of the circumstances then before it and when the ruling is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. *Id.*

C. Analysis.

The trial court did not abuse its discretion in denying appellant's motion for mistrial. Appellant opened the door to the testimony in question, and appellant cannot take advantage of invited error. Appellant did not, initially, seek any less drastic relief. Ultimately, appellant did seek a curative instruction which was given.

To begin, appellant opened the door to the prosecutor's question and Ms. Comte-Fassero's testimony. When appellant asked Ms. Comte-Fassero whether she trusted appellant with their daughter, he opened the door to the state asking Ms. Comte-Fassero *why* she did not trust him. For example, in *State v. Crenshaw*, 59 S.W.3d 45 (Mo.App.E.D. 2001), the Court of Appeals, Eastern District, found no error in allowing the victim's grandmother to testify about prior bad acts of the defendant because the defendant had opened the door to the question by asking the grandmother whether she disliked the defendant. Crenshaw was charged with murder. The victim's grandmother testified, and defense counsel, on cross-examination, inquired as to her dislike of the defendant, asking her, "And it's also fair to say that you were not very fond of [Defendant]." *Id.* at 50. Grandmother responded that she was not. *Id.* On redirect, the state was allowed to ask, over Crenshaw's objection, as to why the victim's grandmother disliked Crenshaw, and she testified as to prior bad acts of Crenshaw. *Id.* On appeal, Crenshaw contended that it was

error to allow her to testify as to prior bad acts, but the court rejected the claim. *Id.* The court of appeals, while noting that evidence of uncharged crimes is generally inadmissible to show a defendant's propensity to commit crimes, noted that a defendant cannot take advantage of self-invited error, and that Crenshaw had opened the door regarding whether the victim's grandmother disliked him, and the state was free to cross the threshold and inquire further. *Id.*

Similarly, in *State v. Bentz*, 766 S.W.2d 453 (Mo.App.E.D. 1989), the defendant was found to open the door to evidence of prior bad acts. Bentz was charged with first degree assault, unlawful use of a weapon, and armed criminal action for stabbing the victim. *Id.* at 453, 454. The defense, in cross-examining the victim, asked if it were true that he had never gotten along with the defendant and had had previous fights with the defendant in elementary school. *Id.* at 457. This Court found that defense counsel's questioning opened the door to the state asking, on redirect, about these previous fights, and the fact that the defendant had pulled a knife on the victim while walking to class in the 5th grade. *Id.* "When defense counsel cross examines a witness about a dispute with a defendant, it is proper for the prosecutor to inquire about details of the affair." *Id.* See also *State v. Uka*, 25 S.W.3d 624 (Mo.App.E.D. 2000) (defense questions of victim as to whether she despised defendant opened door for state to question about reasons for dislike and problems victim had with defendant).

In the present case, as in *Crenshaw* and *Bentz*, the defense opened the door to the state's questioning when the defense asked Ms. Comte-Fassero whether she trusted appellant with their child. Since the defense chose to question Ms. Comte-Fassero about her

relationship with appellant regarding their daughter, it was proper for the prosecutor to inquire about the details.

As the Court of Appeals noted in *Crenshaw*, a defendant may not take advantage of self-invited error nor complain about matters he himself brings into the case. *Crenshaw*, *supra* at 50. Appellant brought the matter into the case and cannot be heard to complain about it now. Indeed, the trial court itself noted that, given the fact that defense counsel knew via the police reports that Ms. Comte-Fassero had made sexual abuse allegations against appellant, it seemed that defense counsel “might have deliberately tried to provoke a mistrial by asking her that question, knowing that that was an answer that she was likely to give.” (Tr. 796).

Appellant questions whether the invited error doctrine applies here, asserting that because Ms. Comte-Fassero’s answer to defense counsel’s question allegedly did not go to appellant’s benefit, there was no adverse inference for the state to refute, and thus no call for the invited error doctrine. (App.Br. 57). What appellant actually references is the doctrine of curative admissibility. “Under the doctrine of curative admissibility, ‘where the defendant has injected an issue into the case, the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects.’ ” *State v. Weaver*, 912 S.W.2d 499, 510 (Mo.banc 1995) (quoting *State v. Lingar*, 726 S.W.2d 728, 734-735 (Mo.banc 1987)). The state was not proceeding under the doctrine of curative admissibility but rather the “invited error” doctrine, which is conceptually distinct from both the rule of completeness and the doctrine of curative admissibility. 22 Missouri Practice §106.1. Under the invited error doctrine, a party who opens up a subject is estopped

from objecting when the opposing party seeks to further explore the subject. 22 Missouri Practice §106.1. “The invited error doctrine is that a party who has introduced evidence pertaining to a particular issue may not object when the opposite party introduces related evidence intended to rebut or explain.” *State v. McFall*, 737 S.W.2d 748, 756 (Mo.App.S.D. 1987), citing 5 Am.Jur.2d *Appeal and Error*, §§713-717 (1962). This is true even though the evidence introduced to rebut or explain would have been inadmissible in the first instance. *Id.* See also *State v. Jordan*, 646 S.W.2d 747, 750 (Mo.banc 1983) (“a defendant is not in a position to complain of the state inquiring about matters brought into the case by his own questions.”).

In any event, the defense question and Ms. Comte-Fassero’s answer did benefit appellant because it suggested a bias against appellant on the part of Ms. Comte-Fassero. Defense counsel, on cross-examination, established that Ms. Comte-Fassero and appellant had had a contentious history since their divorce and that she was currently litigating against him in St. Louis County Circuit Court (Tr. 783). Ms. Comte-Fassero’s answer that she did not trust appellant, in addition to their history, suggested a bias against appellant on the part of Ms. Comte-Fassero. The state was entitled to introduce evidence to explain why Ms. Comte-Fassero did not trust appellant, to show that it was not merely based on the fact that appellant was her ex-husband and that they had had a contentious history since the divorce (Tr. 777, 783).

Additionally, the trial court should not be faulted for failing to declare a mistrial when, at the time, appellant refused to ask for any less drastic remedy. A mistrial is a drastic remedy to be used only in the most extraordinary of circumstances where there is grievous

error which cannot otherwise be remedied. *State v. Scott*, 996 S.W.2d 745 (Mo.App., E.D. 1999). “By failing to request any curative action short of a mistrial, defendant bears the heavy burden of showing that any less drastic remedy could not have removed the prejudice.” *State v. Clark*, 759 S.W.2d 282, 283 (Mo.App.E.D. 1988). The fact that no other relief or corrective action was requested by appellant “‘dulls any inclination’ to hold that the trial court abused its discretion in not declaring a mistrial.” *State v. Webber*, 982 S.W.2d 317, 323 (Mo.App.S.D. 1998), quoting *State v. Smith*, 934 S.W.2d 318, 321 (Mo.App.W.D. 1996). Where a defendant does not ask for a limiting instruction, the appellate courts will consider the failure to grant a mistrial an abuse of discretion only if the court finds that the statement was so prejudicial that its effect could not have been removed by direction to the jury. *State v. Smith, supra*. Missouri courts have repeatedly held that the fact that a defendant sought no relief other than a mistrial cannot aid him. *Smith, supra*; *State v. Gilmore*, 681 S.W.2d 934, 942 (Mo.banc 1984); *State v. Thurlo*, 830 S.W.2d 891, 893-894 (Mo.App.S.D. 1992); *State v. McCaw*, 753 S.W.2d 57, 59 (Mo.App.E.D. 1988).

In the present case, appellant, initially, sought no less drastic remedy than a mistrial, despite the trial court’s obvious telegraphing that it would be willing to consider a less drastic remedy: “If you are going to ask for a mistrial, that’s a very serious and drastic remedy . . . That’s the only relief that you asked me for, and I am not going to give you a mistrial” (Tr. 794) and “I denied the only request that you have made, which is for the mistrial.” (Tr. 797).

Furthermore, the trial court, which was in the best position to judge what was going on, had misgivings that the defense “might have deliberately tried to provoke a mistrial by

asking her that question, knowing that that was an answer that she was likely to give.” (Tr. 796). Moreover, the defense never objected to the state’s questions on the grounds that it was likely to elicit evidence of an uncharged bad act. It was within the trial court’s discretion not to “reward” the defense for what it perceived to be a possibly deliberate attempt to mistry the case.

Finally, appellant did receive relief in that he ultimately did request a curative instruction the next day and was given one. The trial court expressly told the jury, right before instructing them on the entire case, that they were not to consider Ms. Comte-Fassero’s testimony that she believed appellant was abusing their child. A jury is presumed to follow a trial court’s instruction to disregard any improper comments. *State v. Albanese*, 9 S.W.3d 39, 55 (Mo.App.W.D. 1999). *State v. Brasher*, 867 S.W.2d 565, 569 (Mo.App.W.D. 1993) (absent showing to the contrary, jury presumed to follow court’s curative instruction to ignore reference to perpetrator of abuse). And while appellant now suggests that the curative instruction “only emphasized the improper evidence,” (App.Br. 59), it is appellant who ultimately asked for the curative instruction. It was not given *sua sponte* by the trial court or against appellant’s wishes, but at his request.

Appellant suggests that “the only realistic deterrent to improper conduct by the State is through the trial and appellate courts,” citing *State v. Banks*, 215 S.W.3d 118, 120 (Mo.banc 2007) in support (App.Br. 58-59). In the present case, however, there was no improper conduct because appellant invited the conduct and the state was entitled to put on the evidence. But even if there were improper conduct, appellate courts do not reverse cases simply as a “deterrent” or “warning” to prosecutors; they reverse *only* where the conduct in

question resulted in prejudice to the defendant. *State v. Banks, supra*, at 121. The question is not whether the prosecutor should be punished for asking improper questions (or whether appellant's case should be a reminder to other prosecutors to avoid this type of questioning); rather the question is whether appellant was afforded a fair trial. See *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (“the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor”); *State v. Forrest*, 183 S.W.3d 218, 227 (Mo. banc 2006) (“In situations involving prosecutorial misconduct, the test is the fairness of the trial, not the culpability of the prosecutor.”).

In the present case, the prosecution did not improperly and without cause inject evidence of a prior bad act. Appellant invited the question by raising the issue; indeed, defense counsel had every reason to know that Ms. Comte-Fassero had made such allegations as they were in the police report, and yet chose to ask her if she trusted her ex-husband with their daughter. The state was entitled to explain why the witness would have such negative feelings about her ex-husband, and the trial court was in the best position to determine what was going on in the case. And the trial court not only determined that a curative instruction was sufficient; the trial court also believed that appellant might have been purposely trying to mistry the case. Under such circumstances, it simply cannot be said that the trial court abused its discretion in refusing to grant a mistrial.

In sum, appellant opened the door to the evidence in question and cannot take advantage or be heard to complain about matters he injected into the case. In any event, the trial court instructed the jury to disregard the evidence in question, and the jury is presumed

to follow the trial court's instructions. And the trial court cannot be deemed to abuse its discretion in declining to declare a mistrial, particularly where the trial court believed that the defendant may have deliberately tried to inject error and provoke a mistrial in the case. Appellant's claim is thus without merit and should be denied.

III.

The trial court did not abuse its discretion in allowing the state to introduce in penalty phase evidence of a 2003 Illinois indictment for two counts of aggravated criminal sexual abuse against an unnamed child under thirteen because the evidence was properly admissible under §557.036, RSMo, in that it reflected on appellant's character and history and thus was relevant to appellant's sentencing.

A. Relevant facts.

The jury found appellant guilty of first degree child molestation (Tr. 853). The case then proceeded to penalty phase (Tr. 855). At sidebar, the state announced its intent to present an authenticated copy of an indictment from the Circuit Court of Madison County, Illinois, showing that appellant had been charged with two felony counts of aggravated criminal sexual abuse (Tr. 856). The Illinois case was still pending (Tr. 857). Defense counsel said he did not believe it was relevant (Tr. 858). The trial court overruled appellant's objection, but allowed it to be continuing (Tr. 861).

During the penalty phase, the state presented the testimony of A.A., who testified that since the incident, she could not sleep in a room by herself and had to have nightlights because she had nightmares that appellant was getting out of jail and was going to hunt her down and kill her (Tr. 867-868). A.A.'s mother also testified about the effect the molestation had on A.A. and the family (Tr. 869-873). The state then put into evidence an authenticated copy of an amended indictment from Madison County, Illinois which charged appellant with two counts of aggravated criminal sexual abuse (Tr. 875). Appellant presented no evidence and made no argument with regard to punishment (Tr. 876, 878).

The jury assessed punishment at fifteen years, as the state had requested (Tr. 879-880). The trial court sentenced appellant accordingly.

B. Standard of review.

The trial court retains broad discretion over the admissibility of evidence. *State v. Clark*, 197 S.W.3d 598, 599 (Mo.banc 2006). Error will be found only if this discretion was clearly abused. *Id.* A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.* If reasonable persons can disagree about the propriety of the trial court's decision, the trial court did not abuse its discretion. *State v. Johnson*, 207 S.W.3d 24, 40 (Mo.banc 2006).

Claims of whether a defendant's rights were violated under the Confrontation Clause are reviewed *de novo*. *State v. Justus*, 205 S.W.3d 872, 878 (Mo.banc 2006).

C. Analysis.

Appellant raises essentially two questions in this point. The first is whether the Confrontation Clauses in the United States and Missouri Constitutions apply in the second stage of a bifurcated non-capital jury trial (App.Br. 62). They do not.

The vast weight of caselaw authority around the country holds that the Confrontation Clause does not apply to the punishment phase. *See, e.g. United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005) (holding that there is no Sixth Amendment right to confrontation at sentencing proceedings and *Crawford v. Washington*, 541 U.S. 36 (2004) does not change that analysis); *United States v. Martinez*, 413 F.3d 239, 242-243 (2nd Cir. 2005) (defendant's confrontation rights not violated by consideration of hearsay at sentencing); *United States v.*

Robinson, 482 F.3d 244 (3rd Cir. 2007) (confrontation clause does not apply to sentencing proceeding and *Crawford* does not change analysis); *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007) (holding that confrontation clause does not operate to bar hearsay statements at sentencing); *United States v. Stone*, 432 F.3d 651, 654 (6th Cir. 2005) (*Crawford* does not change long-settled rule that confrontation clause does not apply in sentencing); *United States v. Miller*, 450 F.3d 270, 273 (7th Cir. 2006) (holding that neither *Crawford* nor the combination of *Crawford* and *Booker* extend the confrontation clause protections to sentencing proceedings); *United States v. Wallace*, 408 F.3d 1046, 1048 (8th Cir. 2005) (confrontation clause does not apply to sentencing proceedings); *United States v. Littlesun*, 444 F.3d 1196, 1199 (9th Cir. 2006) (*Crawford* does not change law that confrontation clause does not apply to sentencing proceedings); *United States v. Bustamante*, 454 F.3d 1200 (10th Cir. 2006) (holding that *Crawford* does not change precedent that Confrontation Clause is not implicated in sentencing); *United States v. Cantellano*, 430 F.3d 1142, 1146 (11th Cir. 2005) (finding that *Crawford* does not extend to sentencing proceedings); *State v. McGill*, 140 P.3d 930 (Ariz. 2006) (confrontation rights do not apply to sentencing, which is not a criminal prosecution); *People v. Lassek*, 122 P.3d 1029 (Colo.App. 2005) (no constitutional right to confrontation in sentencing proceedings); *Cameron v. State*, 943 So.2d 938 (Fla.App. 4 Dist. 2006) (Sixth Amendment right to confrontation does not apply at sentencing proceeding); *Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1248 (Mass. 2006) (confrontation rights end on determination of guilt and do not apply to sentencing proceedings); *State v. Rodriguez*, 738 N.W.2d 422, 431 (Minn.App. 2007) (confrontation clause, as interpreted by *Crawford*, does not apply to sentencing proceedings); *Thomas v.*

State, 148 P.3d 727, 732 (Nev. 2006) (*Crawford* and confrontation clause do not apply to capital penalty hearing); *People v. Leon*, 2008 WL 420022 (N.Y., February 19, 2008) (*Crawford* does not apply to at sentencing proceedings); *State v. Sings*, 641 S.E.2d 370 (N.C.App. 2007) (use of hearsay at sentencing does not violate confrontation clause); *McDonald v. Belleque*, 138 P.3d 895 (Or.App. 2006) (*Crawford* confrontation rule does not apply to sentencing proceedings).

Thus, while appellant urges this court to hold that the confrontation clause applies in the sentencing phase of a noncapital jury trial (App.Br. 71), such a ruling would fly in the face of long established authority to the contrary recognized nationwide.

Appellant duly acknowledges the overwhelming weight of authority against his position (App.Br. 67), but suggests that those cases are all wrong because they rely on *Williams v. New York*, 337 U.S. 241 (1949), and that case was a due process case, not a confrontation clause case (App.Br. 67). Although the *Williams* court referred to the case as a due process case, the case did address the question of whether the defendant's confrontation rights were violated. *Id.* at 251-252. The question was addressed as a matter of due process because the confrontation clause had not yet been applied to the states.⁴ The Court reiterated its holding one year later in *Williams v. Oklahoma*, 358 U.S. 576, 584 (1950), again finding no violation of the defendant's rights to confrontation, while not explicitly referring to the Confrontation Clause. In any event, for nearly 60 years, the United States Courts of Appeals have relied on this case in ruling that the confrontation clause is not applicable in a

⁴ This was not done until *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

sentencing proceeding, and these determinations have never been set aside by the United States Supreme Court. It is doubtful that the Supreme Court has merely turned a blind eye toward the issue for nearly 60 years.

And while appellant notes language in *Bullington v. Missouri*, 451 U.S. 430 (1981), which he believes indicates that the Supreme Court believes that the right to confront witnesses is a protection available at a sentencing hearing (App.Br. 68), this language is not applicable to the case at bar. *Bullington* was a death penalty case, and in the penalty phase of a death penalty case, the jury is required to make specific findings of fact beyond a reasonable doubt in order to justify the death sentence. The case which *Bullington* cited, *Specht v. Patterson*, 386 U.S. 605 (1967), stated that due process required certain rights, including the right to confront witnesses, because the case involved invocation of a Sex Offenders Act, which constituted a new charge leading to a new crime and a new punishment. In other words, these cases required the jury to make new findings of fact. Similarly, all of the other cases appellant cites as calling into question the validity of *Williams* are all capital cases – none are non-capital cases (See App.Br. 69-71).

In a non-capital case such as that presented here, the jury is not required to make any finding of fact whatsoever. Nor is the state required to prove anything beyond a reasonable doubt. See § 565.030.4, RSMo 2001. See also *State v. Clark*, 197 S.W.3d 598, 602 (Mo.banc 2006). Thus, the penalty phase in a non-capital case is similar to a sentencing hearing or probation revocation hearing, wherein the factfinder considers the history and character of the defendant as well as the nature of the crime and its effect on the victim and the victim's family in crafting an individualized punishment.

Appellant also tries to distinguish *Williams* because it involved judge sentencing as opposed to jury sentencing. But this is of no consequence because the jury in the second part of a bifurcated trial is performing the same role as the judge – considering evidence concerning the impact of the crime upon the victim, the victim’s family, and others, the nature and circumstances of the offense, and the history and character of the defendant, in determining an appropriate, individualized sentence. §557.036.3, RSMo Cum. Supp. 2007. The second stage of a bifurcated trial is no more or less adversarial than a traditional sentencing hearing before a judge. The mere fact that a jury rather than a judge is called on to arrive at a sentence does not change the nature of the proceeding, any more so than a defendant’s constitutional rights are different at a bench trial as opposed to a jury trial.

Appellant also asserts that *Williams* may still be applicable as to non-testimonial hearsay, but can no longer be applied to testimonial hearsay. None of the United States Courts of Appeals have so held, and in fact many of them have expressly declined to apply *Crawford* because *Crawford* itself is silent as to its application to sentencing hearings. *See, e.g. United States v. Luciano*, 414 F.3d 174, 179 (holding that there is no Sixth Amendment right to confrontation at sentencing proceedings and *Crawford* does not change that analysis); *United States v. Martinez*, 413 F.3d 239, 242-243 (2nd Cir. 2005) (defendant’s confrontation rights not violated by consideration of hearsay at sentencing); *United States v. Robinson*, 482 F.3d 244 (3rd Cir. 2007) (confrontation clause does not apply to sentencing proceeding and *Crawford* does not change analysis); *United States v. Stone*, 432 F.3d 651, 654 (6th Cir. 2005) (*Crawford* does not change long-settled rule that confrontation clause does not apply in sentencing); *United States v. Miller*, 450 F.3d 270, 273 (7th Cir. 2006)

(holding that neither *Crawford* nor the combination of *Crawford* and *Booker* extend the confrontation clause protections to sentencing proceedings); *United States v. Littlesun*, 444 F.3d 1196, 1199 (9th Cir. 2006) (*Crawford* does not change law that confrontation clause does not apply to sentencing proceedings); *United States v. Davis*, 2007 WL 172201 (10th Cir. 2007) (holding that *Crawford* does not change precedent that Confrontation Clause is not implicated in sentencing).

Appellant next argues that the plain language of the confrontation clause in both the United States Constitution and the Missouri Constitution supports application of the right to confrontation to a sentencing proceeding (App.Br. 71). The Sixth Amendment to the United States Constitution states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Article I, Section 18(a) of the Missouri Constitution states “[t]hat in criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.” Appellant argues that a “criminal prosecution” by definition includes the sentencing proceedings, citing to BLACK’S LAW DICTIONARY, and the definition of “criminal prosecution,” which is taken from a Connecticut case, *State v. Parker*, 485 A.2d 139, 142 (Conn. 1984), which states that a criminal prosecution “embraces not only the accusation, whether by indictment or information, and the determination of guilt or innocence, but also, in case of a conviction, the imposition of sentence.” Conversely, respondent notes that Black’s Law Dictionary defines “prosecution” as “a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime.” This definition leaves out any reference to sentencing.

Black's therefore would appear ambivalent, at best, as to how to define the parameters of a "criminal prosecution," and of course, does not purport in any event to define that term for the purposes of the confrontation clause or due process. The United States Supreme Court, however, has stated the following:

[O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics. These considerations make it clear that the State's Attorney's statement of the details of the crime and of petitioner's criminal record—all admitted by petitioner to be true—did not deprive petitioner of fundamental fairness or of any right of confrontation or cross-examination.

Williams v. Oklahoma, 358 U.S. 576, 584 (1950). And, as previously noted, all of the United States Courts of Appeal have determined that the confrontation clause is inapplicable to sentencing proceedings. And some state courts have gone so far as to expressly state that sentencing hearings are not part of the trial for confrontation clause purposes. *See, e.g., State v. McGill*, 140 P.3d 930 (Ariz. 2006) (confrontation rights do not apply to sentencing, which is not a criminal prosecution); *Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1248 (Mass. 2006) (confrontation rights end on determination of guilt and do not apply to sentencing proceedings).

Additionally, appellant argues that the Court of Appeals, Western District, ruled in *State v. Berry*, 168 SW3d 527 (Mo.App.W.D. 2005) that hearsay evidence was inadmissible in a sentencing proceeding (App.Br. 66). The *Berry* court did *not* find a violation of the Sixth Amendment right to confrontation, and in fact noted that it had found no authority for reversing the case on Sixth Amendment grounds. *Id.* at 538-539. All *Berry* did was rule that the evidence was improperly admitted because it was hearsay. Whether or not something is hearsay does not necessarily implicate the Confrontation Clause, as *Crawford* itself recognizes, given that it finds no confrontation violation by non-testimonial hearsay. *Berry* cannot be read to hold, even implicitly, that the Confrontation Clause, is applicable to sentencing proceedings.

And in the present case, the evidence in question, unlike the evidence in *Berry*, was not hearsay. The indictment was admissible evidence under §490.130, which provides that the records of judicial proceedings of any court of any state, attested by the clerk thereof, with the seal of the court annexed, if there be a seal, and certified by the judge to be attested in due form, are entitled to full faith and credit. Moreover, it was the fact of the indictment itself that was relevant, not whether the allegations in the indictment were true. This is not hearsay. *State v. Sutherland*, 93 S.W.2d 373 (Mo.banc 1997).

Appellant's second claim is that the indictment does not reflect upon his history and character (App.Br. 76). Clearly, the fact that a grand jury finds probable cause to charge a person with a crime does reflect on that person's history and does reflect on that person's character.

Section 557.036.3, RSMo Cum.Supp. 2004 provides, in pertinent part, as follows, with regard to the evidence to be presented at the punishment stage of a bifurcated trial:

Evidence supporting or mitigating punishment may be presented. Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant. Rebuttal and surrebuttal evidence may be presented.

As a general rule, the trial court has discretion during the punishment phase of trial to admit whatever evidence it deems to be helpful to the jury in assessing punishment. *State v. Clark, supra* at 600. Even evidence of a defendant's prior unadjudicated criminal conduct may be heard by the jury in the punishment phase of a trial. *Id., citing State v. Winfield*, 5 S.W.3d 505, 515 (Mo.banc 1999) and *State v. Ferguson*, 20 S.W.3d 485, 500 (Mo.banc 2000).

In *Clark*, the state introduced evidence of Clark's involvement in prior shootings, despite the fact that he had been acquitted of those shootings. *Clark, supra*, at 600. This Court noted that a lower standard of proof is used in the punishment phase of a trial. *Id.* at 601, *citing State v. Jaco*, 156 S.W.3d 775, 780 (Mo.banc 2005). Because Clark was not subjected to enhanced sentences, any facts that would have tended to be used to assess his punishment were not required to be found beyond a reasonable doubt by a jury. *Clark, supra*, at 602. Thus, the state was not precluded from putting on evidence of Clark's prior incidents, notwithstanding that he had been acquitted under a reasonable doubt standard of those acts. *Id.*

Appellant concedes that Missouri law allows the jury to hear evidence of unadjudicated bad acts in the penalty phase of a non-capital trial (App.Br. 76-77), which is of course what happened in the present case. But appellant takes issue with the fact that the jury was presented with an indictment that had not at that time resulted in a conviction without presenting any witnesses to establish the allegations presented in the indictment (App.Br. 76, 78).

Appellant's argument treats an indictment as an essentially meaningless document that provides no evidentiary basis for whether the acts charged in the indictment occurred. Appellant characterizes the indictment as "merely the act of an Illinois grand jury that allowed the State to attempt to prove the allegations contained in the indictment in court at a later date should the state decide to pursue the matter." (App.Br. 79). But while it certainly is an act allowing the state to take a case to trial, it is more than that; it is a legal determination made by a jury⁵ based on evidence that there is probable cause to believe that appellant committed the crimes set out in the indictment. And the fact that anywhere from 9 to 16 jurors have found sufficient evidence to find probable cause to charge appellant with two counts of aggravated criminal sexual abuse certainly *is* relevant to appellant's history and character.

This is precisely why other jurisdictions have found such evidence relevant as to sentencing. For example, in *State v. Robinson*, 971 S.W.2d 30, 48 (Tenn.Crim.App. 1997),

⁵ It would appear that the regular panel of a grand jury consists of 16 people under Illinois law. 705 ILCS 305/9 and 305/9.1

the defendant asserted that the trial court should not have considered his indictment for other crimes as evidence of prior criminal conduct. *Id.* The Tennessee Court noted that while an *arrest* record is insufficient to establish criminal conduct, such was not the case with an indictment. *Id.* “[A]n indictment indicates that evidence against the accused has been presented to a grand jury and his peers have concluded that sufficient evidence existed to charge the accused with a crime.” *Id.* Other jurisdictions have also found untried indictments relevant. *See, e.g., State v. Dwight*, 875 A.2d 986 (N.J.Super.App. 2005) (finding no abuse of discretion in imposing extended term where defendant had, among other factors, four pending indictments); *United States v. Streich*, 987 F.2d 104, 108 (2nd Cir. 1993) (rejecting claim that district court should not have considered facts contained in a dismissed count of an indictment); *People v. York*, 557 N.Y.S. 137 (N.Y.A.D. 2 Dept. 1990) (finding court properly considered pending indictments); *Neal v. Secretary of Navy and Commandant of Marine Corps*, 639 F.2d 1029 (3rd Cir. 1981) (finding that pending indictments for other criminal activity are of sufficient reliability to be considered by sentencing judge in sentencing).

Appellant asserts that the indictment did not “prove” anything (App.Br. 80). While true that an indictment is not “conclusive proof” that appellant committed sexual assaults on other children, the jury was not required to so find in order to sentence him as they did, any more than the jury was “required” to find that A.A. was in fact adversely affected by appellant’s sexual molestation of her before they could sentence him to 15 years. The jury could consider the indictment for what it was: evidence that 9 to 16 of his peers in Illinois felt there was probable cause to believe he did commit sexual assaults on other children. The

jury could consider the indictment for what it was: that appellant's character and history was such that other people, after viewing evidence, believed he may have committed such crimes against other children. Simply put, the fact that someone has been indicted for a crime undoubtedly reflects on the person's history and character, even if it does not conclusively prove any ultimate truth regarding that person. And the evidence admissible under §557.036 includes evidence of the history and character of the defendant.

Moreover, if appellant's concern is that the indictment doesn't conclusively prove anything, he certainly had the opportunity to point this out to the jury by arguing, for example, that even though indicted he still had a presumption of innocence as to those charges. Appellant had every opportunity to explain to a jury to what extent, if any, they should consider the indictment, just as appellant would regarding *any* evidence brought against him. But appellant opted not to make any argument to the jury in the sentencing portion of the trial (Tr. 878). Appellant's failure to provide the jury with any perspective with which to consider the evidence does not render the evidence irrelevant as to appellant's character or history. Appellant could have taken steps to make sure he was not unduly prejudiced by the indictment; he simply failed to do so.

Appellant cites several cases to argue that the indictment should not have been admitted but these cases are largely distinguishable. *State v. Arther*, 350 S.E.2d 187 (S.C. 1986), dealt with admission of an arrest warrant and supporting affidavit for a charge that was ultimately dismissed, not with an indictment found by a grand jury that was still pending at the time of appellant's sentencing. *People v. Kirk*, 378 N.E.2d 795, 797 (Ill.App.3 Dist. 1978), dealt with references by psychiatrists in evaluation reports to incidents for which Kirk

was not tried or wherein the cases were discharged, not a properly authenticated indictment found by a grand jury. *State v. Storey*, 986 S.W.2d 462, 466 (Mo.banc 1999), referred to use of a constitutionally void conviction, not pending charges. The reasoning in *Waters v. State*, 483 P.2d 199 (Alaska 1971), is in direct conflict with this Court's own ruling in *Clark*. The *Waters* court states that an indictment is not evidence of a guilty conduct "absent a conviction." But as this Court noted in *Clark*, even charges of which a defendant has been acquitted can be relevant evidence of the defendant's history and character.

In sum, the Illinois indictment was relevant evidence reflecting upon appellant's history and character and was properly considered by the jury during appellant's sentencing. And appellant's confrontation rights were not implicated in the sentencing proceeding. Appellant's claim is thus without merit and should be denied.

IV.

The trial court did not plainly err in overruling appellant's motion to dismiss because appellant was not entitled to discharge by virtue of the fact that he was not brought to trial by the end of the next term of court following his mistrial. Appellant's claim is waived as it was not raised at the earliest possible opportunity and, in any event, the claim is without merit in that this did not constitute a double jeopardy violation or a violation of appellant's right to a speedy trial.

Appellant contends that the trial court did not have jurisdiction to retry him because Missouri Constitution, Article I, §19 states that if a jury fails to return a verdict, the trial court may discharge and recommit the prisoner for trial "at the same or next term of court." Appellant asserts that because he was not retried at the same or next term of court, his case should have been dismissed.

A. Relevant facts.

On June 18, 2004, appellant's first trial ended in a mistrial because of a hung jury (Tr. 776-80; LF 35-36). On August 24, 2004, appellant's cause was reset for jury trial on January 18, 2005 (LF 9). Appellant was retried on January 18-21, 2005 (Tr. 1). Appellant objected to the retrial on grounds of double jeopardy, but his objection was overruled. The record does not reflect that appellant ever objected to the timing of his retrial.

B. Standard of review.

Appellant concedes that he did not raise to the trial court the claim he raises now on appeal but asserts that his claim is reviewable for plain error (App.Br. 78). But actually, appellant's claim is waived. Appellant bases his claim on the Missouri constitution, but a constitutional claim is waived if not raised at the earliest opportunity. To preserve a constitutional claim for appellate review, such claim must be made at the first opportunity with citations to specific constitutional sections. *State v. Chambers*, 891 S.W.2d 93, 103-104 (Mo. banc 1994). The matter must also be preserved at each stage of the judicial process, including the motion for new trial. *State v. Blankenship*, 830 S.W.2d 1, 12 (Mo. banc 1992). "A constitutional question is waived if not raised at the earliest opportunity." *State v. Plummer*, 860 S.W.2d 340, 351 (Mo.App. E.D. 1993).

Appellant asserts that a defendant may raise the issue of the trial court's jurisdiction to try the case for the first time on appeal (App.Br. 78). In so asserting, he cites *State v. Whitmore*, 948 S.W.2d 643 (Mo.App.W.D. 1997), for the proposition that a claim of double jeopardy is an assertion of a constitutional grant of immunity. But the claim appellant raises is not a double jeopardy claim, nor is it jurisdictional.

To begin, appellant's claim is not one of double jeopardy. The right against double jeopardy (per the Missouri Constitution) is the right not to be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury. Missouri Constitution, Article I, Section 19. *When* someone is brought to trial has nothing to do with one's "double jeopardy" rights, although it may have something to do with his or her rights to a speedy trial. It makes no logical or legal sense to suggest, for example, that if appellant had been

retried on September 30, his double jeopardy rights would not have been violated, but if he went to trial the next day, October 1, he would have been subjected to double jeopardy.

Appellant, of course, is relying on the fact that the provision at the root of his claim in this point is in the Missouri constitutional section on double jeopardy. But all that particular provision regarding the time of retrial does is clarify that failure of a jury to reach a verdict does not equate to an “acquittal” for double jeopardy purposes, and attempt to assure that any retrial is conducted in a timely manner. Failure to do so does not mean that a defendant has unconstitutionally been put in jeopardy of life or liberty for the same offense after having been acquitted. Appellant points to no authority that failure to be brought to retrial within a specified time is “double jeopardy,” and respondent is not aware of any.

Nor is appellant’s claim “jurisdictional.” Appellant’s claim is essentially a claim that his speedy trial rights were violated. It is well-settled that a defendant’s right to a speedy trial is not jurisdictional.⁶ *State v. Norton*, 7 S.W.3d 459, 460 (Mo.App.E.D. 1999). Appellant cites no authority that failure to bring someone to trial within the second term of court after a hung jury deprives the trial court of jurisdiction and respondent is unaware of any such authority.

The only case appellant cites in support of his claim, *State v. Mauldin*, 669 S.W.2d 58 (Mo.App.E.D. 1984) (App.Br. 79), does not state that the trial court lost jurisdiction to hear

⁶ The exception would be one’s speedy trial rights under the Interstate Agreement on Detainers, which is not at issue here.

the case. *Mauldin* interprets a statute that is no longer in effect (as appellant admits (App.Br. 79)) and says nothing regarding jurisdiction.

Appellant's claim is not jurisdictional. It is not a double jeopardy claim. Appellant's apparent claim -- that he had a constitutional right under Article I, §19, to be brought to trial within the second term of court following his mistrial -- was waived because he did not raise his constitutional claim at the earliest opportunity. Appellant's claim thus should be deemed waived and not entitled to review.

C. Analysis.

Appellant's claim is that the trial court plainly erred in failing to bring him to trial within the second term of court after his mistrial. The trial court did not plainly err in failing to do so and appellant cannot show that he suffered a manifest injustice or miscarriage of justice where the record does not reflect any step by appellant, at the time of mistrial or thereafter, to challenge the timing of the trial setting for his retrial.

Respondent is not aware of any caselaw in Missouri interpreting the language at issue in appellant's claim. Nor does appellant cite any. But caselaw interpreting analogous statutory language demonstrates that appellant did not suffer a manifest injustice or miscarriage of justice and in fact waived his claim.

Section 545.890, RSMo 2000, provides that a defendant who is not brought to trial before the end of the second term of the court shall be entitled to discharge, unless the delay shall happen on the application of the prisoner or shall be occasioned by the want of time to

try the cause at such second term.⁷ Section 545.920, RSMo 2000, states that in all cities or counties in which there shall be more than two regular terms of the court having jurisdiction of criminal cases, the defendant shall not be entitled to discharge until the end of the third term after the indictment was found, or until the end of the fourth term, if he is on bail.

In *State v. Harper*, 473 S.W.2d 419 (Mo.banc 1971), the defendant argued, similarly to appellant in the present case, that he was entitled to discharge because he was not brought to trial by the end of the relevant term of court. This Court flatly rejected Harper's claim because he had failed to take any affirmative action seeking a speedy trial and thus had waived the right. *Id.* at 424. The Court noted that the statutory enactments were enacted for the benefit of an accused, implementing his constitutional right to a speedy trial. *Id.* at 424. The statutes were to "prevent unreasonable delays in prosecutions, forestalling the protracted imprisonment or harassment of one accused of crime." *Id.* The statutory provisions were not intended to "furnish a technical escape from trial and punishment or to forfeit any rights of the public." *Id.* The Missouri Supreme Court found that the legislature "never intended . . . to place . . . an arbitrary duty on the state that a defendant who does not desire a prompt trial can sit idly by without objecting to the delay or requesting a trial and, at the appropriate time, successfully assert a motion for release claiming that his right to a speedy trial had been violated and that he should go 'scot free.'" *Id.* at 424. Thus, the Missouri Supreme

⁷ While this statute is strikingly similar to the constitutional language, it is also strikingly dissimilar in that the statute states that the defendant "shall be entitled to discharge" while the constitutional language contains no such provision.

Court found that a defendant was not entitled to release under the statutes simply because the required number of terms had elapsed. *Id.* The defendant had to show that he had demanded a trial, and that such request was made without success for a reasonable length of time before his right to release has been asserted. *Id.*

A similar interpretation should be given to the language in Article I, §19. That language, like the statutory language at issue in *Harper*, was meant to prevent an unreasonable delay in the prosecution, not to “furnish a technical escape from trial and punishment.” Appellant is not entitled to release simply because the required number of terms had elapsed. Appellant has not shown that he demanded a trial at all, let alone that his request was made and denied a reasonable length of time before he asserted his claim to discharge. Where, as here, there is no indication that appellant objected to the initial retrial setting and made no attempt or argument to have the retrial take place sooner, it cannot be said that the trial court *plainly* erred in failing to bring the case to trial sooner than it did. And appellant has not even begun to show a manifest injustice or miscarriage of justice from the fact that his case did not go to retrial sooner than it did.

Appellant’s claim would also fail if one were to apply the traditional balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), to determine whether a defendant has been denied his constitutional right to a speedy trial. The test requires balancing four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant’s assertion of his right to a speedy trial; and (4) prejudice to the defendant. *State v. Ivester*, 978 S.W.2d 762, 764 (Mo.App.E.D. 1998). Here, appellant’s case was retried a mere seven months (214 days) after the mistrial was declared in his first case.

Indeed, in some counties, this would have been within the next “term of court” and therefore timely. *See, e.g.*, generally, Local Rules 2.2, First Judicial Circuit (Schuyler County); Second Judicial Circuit (Adair County and Lewis County); Fourth Judicial Circuit (Atchison County and Holt County); Seventh Judicial Circuit (Clay County); Eighth Judicial Circuit (Ray County); Ninth Judicial Circuit (Chariton, Linn and Sullivan Counties); Fourteenth Judicial Circuit (Randolph County); Nineteenth Judicial Circuit (Cole County); Thirty-Second Judicial Circuit (Bollinger County); Thirty-third Judicial Circuit (Scott and Mississippi Counties); Thirty-eighth Judicial Circuit (Christian and Taney County); Thirty-ninth Judicial Circuit (Stone County); Forty-second judicial Circuit (Iron, Reynolds, and Wayne County); and Forty-third Judicial Circuit (Caldwell, Clinton, Daviess, DeKalb, and Livingston Counties). There is no indication that the state (or appellant) sought any delay in retrying the case; the trial court merely set the case, and one would presume this was at the first available setting. At a bond reduction hearing on September 13, 2004, defense counsel indicated that “that was the first setting guaranteed” and defense counsel was also concerned about the publicity generated by newspaper articles about the hung jury (9-13-04 Tr. 2). Defense counsel explained that he preferred a later date because of the publicity, and expressly stated that he had no problem with the trial date (9-13-04 Tr. 9). Trial counsel stated that he was not requesting an earlier trial date (9-13-04 Tr. 10). From this it would appear that the defense acquiesced in the trial setting. In any event, appellant never asserted his right to have the case set during the “next term of court.” And appellant has not alleged any prejudice.

In short, the fact that appellant was not retried by the end of the second term of court does not entitle appellant to discharge. He is not entitled to a technical escape from trial and punishment. It does not constitute a double jeopardy violation. And appellant has failed to show that it violated any constitutional right he might have to a speedy trial. Appellant's claim, if even reviewed, is without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence 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 Missouri Supreme Court Rule 84.06 and contains _____ words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of March, 2008, to:

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