IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC94226
	)	
BRENDA A. CHURCHILL,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF MONROE COUNTY
TENTH JUDICIALCIRCUIT
THE HONORABLE RACHEL BRINGER SHEPHERD, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Brenda Churchill, was convicted of the class D felony of perjury, Section 575.040, following a bench trial in the Circuit Court of Monroe County, Missouri. The Honorable Rachel Bringer Shepherd, sentenced Brenda to four years in the Department of Corrections. Pursuant to Rule 83.02, the Court of Appeals, Eastern District, transferred this case to this Court after issuing an opinion. This Court has jurisdiction over this cause pursuant to Article V, Section 10, Mo. Const. (as amended 1976).

STATEMENT OF FACTS

The State charged Brenda Churchill, Appellant, with the class D felony of perjury, alleging that she lied under oath during a juvenile court hearing regarding the existence of her youngest child, Joshua Churchill, a.k.a. Christian Churchill (LF 11).

The facts regarding the protective custody hearing are as follows:

On June 8, 2011, the Juvenile Office filed a petition alleging that a child of Brenda's (Christian Churchill) was in need of "protective care" (LF 36). The petition alleged Brenda was the parent of the child, and it outlined allegations of abuse, neglect or harm to the child (TR 88).

Brenda was served with a subpoena the next day, June 9, 2011 – the day before the hearing (LF 13; TR 28). The subpoena ordered her to produce the child at the next day's hearing (TR 80). When the deputy sheriff served the subpoena, Brenda consented to a limited search of her home (TR 71). She told him that there were no children living in the house (TR 71).

The next day, Brenda appeared at the hearing without a child (Ex. 1, 21, 23; TR 28, 80). She immediately requested counsel, but the court proceeded without allowing Brenda to obtain counsel or appointing counsel for her (TR 83). The juvenile court judge would later testify that he would not have granted a continuance "under any circumstances," because there "was a strong likelihood that if there was a child, the child was in danger" (TR 83). The judge believed this

to be true because he was the former prosecutor that represented the State in terminating Brenda's parental rights to her other children (TR 78).

One of Brenda's daughters, Trista Churchill, was called to testify at the hearing (EX. 1, 5). Trista does not live with Brenda; at that time, she and her mother did not talk and did not get along (EX. 1, 6, 10).[1] When Trista was asked whether Christian Churchill was Brenda's biological child, Trista testified that she "ha[d] no idea who the child actually is," but that she had seen her mom with a child (EX. 1, 6). Trista said that her mom told her the child belonged to her sister from New York, but Trista had no idea who the child belonged to (EX. 1, 7). Trista's son played with this other child (EX. 1, 7-8). She had not seen the child since Christmas time, approximately six months earlier, which was the last time Trista visited Brenda's home (EX. 1, 8, 10-11).

Brenda's father, Marvin McSparren, testified that he believed Brenda had a son named Christian, but he did not know how old the child was (EX. 1, 15). He had seen her with a child (EX. 1, 15). He described the child as being a "good little boy" with blondish hair and about three and a half feet tall (EX. 1, 15-16). McSparren testified that Brenda told him that her husband Mark was the child's father (EX. 1, 17). McSparren said that they originally believed that the child belonged to Heather, one of his granddaughters, but when he asked Heather about

[1] Brenda's parental rights were terminated as to Trista and her other siblings (EX. 1, 12).

it, she told him that she was not able to have children (EX. 1, 18). This is how he discovered that the child must be Brenda's (EX. 1, 18). McSparren further testified that the child lived in Brenda's house and is well taken care of; he has plenty of toys to play with and he is not neglected (EX. 1, 20).

When Brenda was called to testify at the hearing, she immediately requested counsel (EX. 1, 23). The court acknowledged that Brenda had a right to counsel, and that if she could not afford one, one would be appointed for her, but that they were "going to proceed with as much of this hearing as we can today" (EX. 1, 24). Brenda repeated her request for counsel, but the court allowed the Juvenile Officer to continue questioning Brenda in the absence of counsel:

COURT: Miss Churchill, please come forward and be sworn. Please raise your right hand. Do you solemnly swear that the evidence you shall give in this case now appearing will be the truth, the whole truth, and nothing but the truth so help you God?

BRENDA: I just – I want legal counsel.

COURT: Well –

BRENDA: (Inaudible). But yes, sir.

COURT: All right.

BRENDA: Yes, sir.

COURT: All right. Fine. Before you start. Miss Churchill, have a seat. Just let me say this is not the end of this procedure.

> This is merely the beginning of this procedure. You certainly have the right to legal counsel. We're not going to make any final determinations until you have legal counsel. What we're going to do today, if anything, would be a temporary matter. If you cannot afford legal counsel, we will appoint one for you.
>
> …
>
> We are going to proceed with as much of this hearing as we can today. All right?

BRENDA: I – I want legal counsel, sir, please.

COURT: Well, that I understand.

BRENDA: Okay.

COURT: Now –

JUV. OFF: May I proceed?

COURT: [The Juvenile Officer] is still free to ask you questions.

(EX. 1, 23-24).

Thereafter, the Juvenile Officer questioned Brenda under oath (EX. 1, 25-35). She denied having a son named Christian Churchill with a birthdate of February 16, 2006 (EX. 1, 28-29). She denied having a birth child since having her son, Gabriel (EX. 1, 29). Again, she asked for counsel:

JUV. OFF: And you do understand that you're under oath?

BRENDA: I am under oath. And I want to stop these proceedings. Because I was served yesterday and I'm trying to find an attorney and I am taking care of my mother.

(EX. 1, 29). The Juvenile Officer continued asking Brenda questions about the child that she had been seen with and she denied that it was her child (EX. 1, 30). She said that she watches her grandson, Austin (TR 31). When the Juvenile Officer asked her if the child people had seen her with was Austin, she again asked for counsel:

JUV. OFF: -- about a child they're talking about Austin?

BRENDA: I want an attorney. Because I was threatened[2] that they would do whatever they had to get me out of my mother's life. And I would like to pursue this with an attorney, please.

…

JUV. OFF: Miss Churchill, this proceeding is about your child.

BRENDA: I do realize that, and I want an attorney, because I've been threatened. My life has even been threatened.

[2] Brenda believed that her daughters, Heather and Trista, and her father, Mr. McSparren, had threatened her, because she had power of attorney for her mother. Brenda believed that her mother was a victim of abuse by McSparren and that her mother did not want any contact with him (EX. 1, 31).

(EX. 1, 31). Brenda again requested counsel again during questioning by the Guardian Ad Litem (GAL):

GAL: Brenda (sic) testified that she saw a child in your home and his name was Christian; and that you told her that the child was her sister's child. You heard her testify to that?

BRENDA: No comment. I want an attorney because I've been threatened.

COURT: The question is did you hear her testify to that?

BRENDA: I hear – yes, I did hear that.

COURT: Answer the question.

BRENDA: I'm sorry. I'm tired.

(EX. 1, 35). Brenda was never advised of her 5th Amendment privilege against self-incrimination. At the end of her testimony, the court asked Brenda if she was "planning on getting an attorney?" (EX. 1, 35). The following exchange took place:

COURT: Miss Churchill, are you planning on getting an attorney?

BRENDA: Yes, sir. Yes, sir.

COURT: Well, you should get one. You better do it quickly. If you cannot get one, then let me know and I'll appoint an attorney for you.

BRENDA: Yes, sir.

COURT: Now I'm going to renew Mr. Livesay's order to produce the child. I'm ordering you specifically, directly to produce any children that are in your home that are your children. And you're telling me you cannot comply with that because there are no children, is that right?

BRENDA: That's correct.

COURT: All right. Well, I want to make sure you understand, you know, if – if there is in fact a child –

BRENDA: There's no child.

COURT: If there is in fact –

BRENDA: Okay.

COURT: -- a child, you know, you're going to be thrown in jail on a high bond for failure to obey a judge's order. In addition, charges will probably be brought against you by the prosecution – or prosecutor's office for perjury. You understand that?

BRENDA: Yes, sir.

COURT: All right. And you understand that's a very serious thing?

BRENDA: Yes, sir.

COURT: All right. Well, that's where we stand. At this point in time I can't give any order to take custody of a child we don't have.

(EX. 1, 36-37). At the conclusion of the hearing, the court told Brenda that if she did not have an attorney by 8:00 a.m. Monday morning that the court would appoint an attorney for her (EX. 1, 38).

The Perjury Charge

On June 27, 2011, Brenda and her attorney, Earl Seitz, brought her son, Joshua Churchill, to an arranged meeting at the juvenile office in Boone County (TR 152-153). Attorney Seitz advised that Brenda did not wish to talk about the case; however, Brenda did provide the children's division worker with some information about the child's routine, his date and place of birth and his full name (TR 153, 160). Joshua was taken into protective custody of the children's division (TR 159).

Thereafter, the State charged Brenda with the class D felony of Perjury, Section 575.040, alleging that Brenda, while a witness under oath at the juvenile hearing, with the purpose to deceive, knowingly testified falsely to a material fact, namely the existence of her son Joshua Churchill, aka Christian Churchill, when he did in fact exist during a hearing where the juvenile officer sought to take protective custody of said child (LF 11).

Before trial, Brenda moved to suppress the statements she made during the protective custody hearing, because she was denied her right to counsel during the hearing (LF 13-30; TR 12-42). A hearing was held on the motion to suppress (TR 68-131). The juvenile court judge testified at the suppression hearing (TR 76). He testified that he presided over a child protection hearing where Brenda was alleged

to be the parent (TR 88). He had never presided over a protective custody hearing where the child had not been produced and could not be located (TR 77).

The judge stated that he was familiar with Brenda because he had, in the past, represented the state in a number of parental rights termination cases involving Brenda (TR 78). He testified that Brenda appeared at this juvenile hearing without an attorney, but if she had appeared with one, he would have let the attorney participate in the hearing (TR 79). The judge testified that he did not consider Brenda a party to the hearing initially, because she claimed not to be the parent of the child (TR 81-82). He did not find her testimony credible that she was not the parent (TR 84). When he determined that she was not being truthful, then he considered her a party (TR 87). Even though Brenda asked for an attorney, he would not have, under any circumstances, granted a continuance of the hearing for her to obtain one (TR 83).

The trial court denied the motion to suppress (LF 51-55). In doing so, it found that Brenda was entitled to counsel during the juvenile hearing, *Section 211.211.1, RSMo*, but that the violation of this right did not compel Brenda to commit perjury, nor is perjured testimony excused even where the Government exceeds its powers in making the inquiry (LF 51-55).

Brenda waived her right to a jury trial (LF 49-50; TR 43-45), and the case was tried to the Court on July 5, 2012, (Tr. 12-266). Brenda was found guilty (LF 60; TR 173), and she was sentenced to four years imprisonment (LF 61). A timely notice of appeal was filed (LF 63-65), and this appeal follows.

POINTS RELIED ON

I.

The trial court erred in admitting, over objection at trial, Brenda's statements made during the juvenile hearing, about the non-existence of the child, because this ruling violated Brenda's statutory and constitutional right to counsel, her privilege against self-incrimination and her right to due process of law, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 18(a) of the Missouri Constitution Section 211.211 & Rules 115.01(a) and 123.05(d), in that Brenda was entitled to counsel during the juvenile hearing and the trial court's refusal to continue the hearing "under any circumstances," and threatening her with contempt and criminal charges without advising her that it was her privilege not to testify, resulted in Brenda being compelled to testify against herself, thus depriving herself of her liberty, or to commit perjury and her resulting statements must be suppressed.

State v. Caperton, 207 S.W.795 (Mo. 1918);

United States v. Mandujano, 425 U.S. 564 (1976);

State ex rel Northum v. Walsh, 380 S.W.3d 557 (Mo. banc 2012);

U.S. Const., Amends 5, 6, & 14;

Mo. Const., Amends 10 & 18(a);

Section 211.211; and

Rules 29.11, 115.01, and 123.05.

II.

The trial court erred in overruling defense counsel's motions for judgment of acquittal and sentencing Brenda on her conviction of perjury, because there was insufficient evidence from which a rational finder of fact could find Brenda guilty beyond a reasonable doubt, in violation of her right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that the state's evidence failed to prove that Brenda's allegedly false statement about the non-existence of her child could or did "substantially affect" the course or outcome of the proceeding, and, in any event, Brenda "retracted" the statement in the course of the official proceeding in which it was made by delivering the child to the juvenile authorities.

State v. Roberson, 543 S.W.2d 817 (Mo. App., St.L. 1976);

State v. Whalen, 49 S.W.3d 181 (Mo. banc 2001);

Jackson v. Virginia, 443 U.S. 307 (1979);

U.S. Const., Amend XIV;

Mo. Const., Art. I, Section 10;

Sections 211.121, 211.211 & 575.040; and

Rule 29.11.

ARGUMENT

I.

The trial court erred in admitting, over objection at trial, Brenda's statements made during the juvenile hearing, about the non-existence of the child, because this ruling violated Brenda's statutory and constitutional right to counsel, her privilege against self-incrimination and her right to due process of law, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 18(a) of the Missouri Constitution Section 211.211 & Rules 115.01(a) and 123.05(d), in that Brenda was entitled to counsel during the juvenile hearing and the trial court's refusal to continue the hearing "under any circumstances," and threatening her with contempt and criminal charges without advising her that it was her privilege not to testify, resulted in Brenda being compelled to testify against herself, thus depriving herself of her liberty, or to commit perjury and her resulting statements must be suppressed.

A parent's right to raise his or her children is "one of the oldest and most fundamental liberty interests" guaranteed by the Constitution. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The "integrity of the family unit" has protection in the due process clause of the fourteenth amendment. *Stanley v. Illinois*, 405 U.S. 645, 651 (1971) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). The "liberty of parents and guardians" includes the right "to direct the upbringing and education

of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925). And the constitutional right to counsel at civil proceedings that impinge upon parental rights must be decided on a case-by-case basis. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 28 (1981). Indeed, these proceedings bear many of the indicia of a criminal trial. *Santosky v. Kramer*, 455 U.S. 745, 762 (1982).

As an aspect of due process, the right to counsel turns not on whether a proceeding may be characterized as "criminal" or "civil," but on whether the proceeding may result in a deprivation of liberty. *State ex rel. Family Support Division v. Lane*, 313 S.W.3d 182, 186 (Mo. App. W.D. 2010). At the protective custody hearing – where the State sought custody of Brenda's child and the court threatened her with contempt, perjury charges, incarceration and a "high bond" (Ex. 1, 36) – Brenda was faced with at least two potential deprivations of her liberty: her right to parent her child and her physical liberty to remain free.

The Missouri statutes and rules are very clear: *Section 211.211.1 RSMo 2000,* and *Rule 115.01(a)* provide that "a party is entitled to be represented by counsel in all proceedings." *See In re C.F.*, 340 S.W.3d 296, 299 (Mo. App., E.D. 2011). Therefore, when the Juvenile Officer filed the Petition, alleging Brenda to be a parent of the juvenile, Brenda was entitled to be represented by counsel at the juvenile hearing. The trial court acknowledged that Brenda was denied her right to counsel at the juvenile court proceeding, but concluded that her perjured statements following such violation were not constitutionally protected through

the remedy of suppression (LF 53-55). This ruling and the admission of Brenda's statements were erroneous and must be reversed.

Preservation and Standard of review

The reviewing court defers to the trial court's factual findings and credibility determinations, but examines questions of law *de novo*. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998). Factual issues on motions to suppress are mixed questions of law and fact. *State v. Werner*, 9 S.W.3d 590, 595 (Mo. banc 2000).

Counsel filed a motion to suppress Brenda's statements, which was overruled by the trial court after the suppression hearing (LF 13-30, 51-55; TR 62-130). Counsel objected when Brenda's statements at the juvenile hearing were introduced at trial, and a continuing objection was permitted and overruled (TR 144). As this was a bench-tried case, no motion for new trial was required for purposes of preservation. *Rule 29.11(e)(2)*. Therefore, this issue is preserved for appellate review.

Analysis

Here the trial court found that Brenda was denied her right to counsel (LF 33-35). Brenda's right to counsel is guaranteed by Rule, Statute and the Constitution. As mentioned above, *Rule 115.01(a)* and *Section 211.211* provide that a party is entitled to by represented by counsel in all juvenile proceedings. This includes protective custody hearings. *Rule 123.05(d)*. Likewise, the right to counsel exists in these state civil proceedings by virtue of the Due Process Clause

of the Fourteenth Amendment to the Unites States Constitution. *See Lane*, 313 S.W.3d at 186 (*citing Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). For purposes of triggering a defendant's right to counsel under the due process clause, the distinction between a "criminal" and a "civil" proceeding is irrelevant if the outcome of the civil proceeding is imprisonment. *Id.* (*citing Walker v. McLain*, 768 F.2d 1181, 1183 (10th Cir. 1985)) ("The right to counsel, as an aspect of due process, turns not on whether a proceeding may be characterized as 'criminal' or 'civil,' but on whether the proceeding may result in a deprivation of liberty.")

Here, over repeated requests for counsel, made from the outset of the juvenile hearing, Brenda was purposefully denied the right to counsel, with full knowledge of the juvenile court judge that she was entitled to counsel (Ex. 1, 23-37). And even as it deprived her of right to counsel, and threatened her with criminal charges, contempt, incarceration, and a "high bond" the juvenile court also failed to inform her that she had a right not to incriminate herself (Ex. 1, 36).

The Fifth Amendment to the United States Constitution, which is "fully applicable to the States through the Fourteenth Amendment," *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 53 (1964), provides, "No person shall ... be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. *State ex rel Northum v. Walsh*, 380 S.W.3d 557, 562 (Mo. banc 2012). The principles to be followed in applying these two provisions are consistent." *State ex rel. Munn v. McKelvey*, 733 S.W.2d 765, 767 (Mo. banc 1987). Both embody a privilege that "reflects many of our fundamental values

and most noble aspirations," including "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt." *Murphy,* 378 U.S. at 55.

Accordingly, the privilege "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley,* 414 U.S. 70, 77 (1973). The right to invoke the privilege against self-incrimination "extends not only to answers which would in themselves support a conviction of a crime but likewise embraces those answers which would simply furnish a link in the chain of evidence needed to convict the witness." *Munn,* 733 S.W.2d at 768.

The privilege against self-incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. *Kastigar v. United States*, 406 U.S. 441, 444 (1972). The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. *Maness v. Meyers*, 419 U.S. 449, 466 (1975). A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. *Id.*

Here, neither the juvenile court judge, nor the juvenile officer informed Brenda, who was without counsel, that she had a right to remain silent and to not

answer their questions. Instead, they proceeded with their inquisition, threatening her with criminal charges, contempt and incarceration if she did not take the stand and testify. Without knowing that she could remain silent, Brenda was faced with the dilemma of either speaking and making statements that would be used against her in the abuse and neglect proceedings, or making a false statement. Her testimony was "compelled" in the most fundamental way.

Nor was Brenda granted testimonial immunity at the juvenile hearing. Witnesses may be immunized from prosecution for "any act, transaction, matter or thing" when they are "called to testify or provide other information at any proceeding ancillary to or before a circuit or associate circuit court or grand jury." *Section 491.205 RSMo*; *Northum*, 380 S.W.3d at 564. When a witness is granted testimonial immunity that fully supplants her constitutional rights, the witness's "refusals to answer [questions] based on the privilege [are] unjustified." *Kastigar*, 406 U.S. at 449. This principle is grounded on the notion that "[i]mmunity statutes ... are not incompatible with [the] values" underlying the privilege but instead "seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Id.* at 445–46.

At Brenda's criminal trial, the trial court acknowledged that the United States Supreme Court has adopted exclusionary rules in numerous cases when the evidence is obtained in violation of the accused's rights, not only under the Constitution, but also under federal statutes, or federal rules of procedure. *See United States v. Blue*, 384 U.S. 251, 255 (1966). However, the trial court

distinguished the compulsion of Brenda's uncounseled, unwarned statements in this case because "perjury is not protected by any constitutional provision, including the right to counsel and the right against self-incrimination" (LF 53).

In denying Brenda's motion to suppress, the trial court relied on *United States v. Mandujano*, 425 U.S. 564, 576-577 (1976). In *Mandujano*, the defendant was charged with perjury for statements he made during his grand jury testimony. *Id.* at 564. The defendant asserted that his false statements to the grand jury should be suppressed because he was not given *Miranda* warnings. In dicta, the Court noted that "perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings…[and] our cases have consistently…allowed sanctions for false statements or perjury; they have done so even in instances where the perjurer complained that the Government exceeded its constitutional powers in making the inquiry." *Id.* at 576-577.

The Court's ultimate holding, however, was that *Miranda* warnings were not actually required to be given to the defendant before his grand jury testimony, and that the warnings given by the prosecutor "were sufficient to inform him of his rights and his responsibilities and particularly of the consequences of perjury." *Id.* at 580. Before the defendant gave his grand jury testimony, the prosecutor told him that he did not have to answer questions that he felt would incriminate him, but that if he answered, he must do so truthfully, or he could possibly be charged with perjury. *Id.* at 567-568. Further, the defendant was informed that he could

have the assistance of counsel when he testified (the attorney would be made available for consultation, albeit outside the courtroom). *Id.* at 581.

Here, the trial court's reliance on *Mandujano* to deny Brenda's motion to suppress is erroneous. Not only does *Mandujano* not apply to the facts of this case, it does not preclude the relief of suppression. In *Mandujano*, the Supreme Court clearly noted, that there could be cases involving abuse of process which would require the voiding of a subsequent perjury charge. *Id.* 426 U.S. at 582-583 (*citing Brown v. United States*, 245 F.2d 549 (8th Cir. 1957). Indeed, since circumstances involving "abuse of process" were not involved in *Mandujano*, the Court said that we "have no occasion to address the correctness of the results reached by the courts in these inapposite instances."

But "abuse of process" clearly occurred in Brenda's case, as noted by the Eastern District majority and dissenting opinions. The majority opinion noted that Brenda testified "without advice of counsel despite her repeated requests for counsel," that she was "forced by the trial court to testify before she was allowed to consult with an attorney, and that the trial court violated her "absolute right to counsel" (Slip Op. at 9-11). The dissenting opinion further noted that, "after repeatedly requesting counsel, and being assured by the court she had a right to counsel, [Brenda] was forced to testify under oath by the judge who informed her that anything done on that day 'would be a temporary matter.'" (Dissent Op. 1).

The State of Missouri has determined what process is due to civil litigants like Brenda, to secure the liberty interests in parenting children, and given the fact

that this process was violated knowingly and egregiously, her statements made in violation of her due process rights were compelled and involuntary. Even the defendant in *Mandujano* was granted due process protections: Before he gave his grand jury testimony, the prosecutor told him that he did not have to answer questions that he felt would incriminate him, but that if he answered, he must do so truthfully, or he could possibly be charged with perjury. *Id.* 425 U.S. at 567-568. Further, the defendant was informed that he could have the assistance of counsel when he testified (the attorney would be made available for consultation, albeit outside the courtroom). *Id.* at 581.

The two protections and advisements of rights that Mandujano received were exactly the ones that were missing in Brenda's case. Brenda was neither advised that she was entitled to have counsel with her that very day at that very hearing, nor was she advised that she could remain silent. She was denied her repeated requests for counsel, and she was compelled to testify under oath by the threat of contempt, jail time, a high bond, and criminal charges (Ex. 1, 36). As such, Brenda's statements should have been precluded as the basis for a criminal perjury charge and they should have been suppressed as involuntary at her criminal trial, because they violated her right not to be compelled to be a witness against herself and to due process of law.

In *State v. Caperton*, 207 S.W.795 (Mo. 1918), this Court reversed the defendant's perjury conviction because his statements made before the grand jury were made without advisement that "it is his privilege not to testify unless he

wants to do so, and that anything he may say may be used against him." *Id.* at 796. The Court presumed that the perjured statements were thereby made involuntarily and the motion should have been sustained. *Id.*

Here, in denying the motion to suppress, the trial court attempted to distinguish the *Caperton* case by finding that the questions propounded to Brenda were in no way "compelled." The trial court found that she was "merely asked to confirm the identity of her own child." (LF 54). This finding is erroneous. Not only was Brenda denied her absolute right to counsel, which she repeatedly requested, she was not advised of her privilege not to incriminate herself and she was threatened with contempt, jail time, a high bond, and criminal charges (Ex. 1, 36). Her statements were compelled.

Therefore, as Brenda's statements were taken in violation of her statutory and constitutional right to counsel, her privilege against self-incrimination, and her right to due process of law, this Court must reverse her conviction.

II.

The trial court erred in overruling defense counsel's motions for judgment of acquittal and sentencing Brenda on her conviction of perjury, because there was insufficient evidence from which a rational finder of fact could find Brenda guilty beyond a reasonable doubt, in violation of her right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that the state's evidence failed to prove that Brenda's allegedly false statement about the non-existence of her child could or did "substantially affect" the course or outcome of the proceeding, and, in any event, Brenda "retracted" the statement in the course of the official proceeding in which it was made by delivering the child to the juvenile authorities.

Standard of review and Preservation

The standard of review in a bench-tried case is the same as in a jury-tried case. *State v. Johnson*, 81 S.W.3d 212, 215 (Mo. App., S.D. 2002). This Court will affirm a trial court's denial of a motion for judgment of acquittal if, at the close of evidence, there was sufficient evidence from which reasonable persons could have found the defendant guilty of the charged offense. *State v. Small*, 873 S.W.2d 895, 896 (Mo. App., E.D.1994). When reviewing for sufficiency, the evidence and inferences reasonably drawn from the evidence are reviewed in the

light most favorable to the verdict and contrary evidence and inferences are disregarded. *State v. Berry*, 54 S.W.3d 668, 675 (Mo. App., E.D. 2001). This Court may not supply missing evidence, or give the state the benefit of unreasonable, speculative or forced inferences. *State v. Whalen*, 49 S.W.3d 181 (Mo. banc 2001). A challenge to the sufficiency of the evidence is based in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307, 314-315 (1979).

Defense counsel moved for a judgment of acquittal at the close of the State's case and at the close of all the evidence (TR 164, 170). As this was a bench-tried case, no motion for new trial was required for purposes of preservation. *Rule 29.11(e)(2)*. Therefore, this issue is preserved for appellate review.

Analysis

The facts of this perjury case are very simple. The evidence showed that, on June 10, 2011, Brenda made statements during a juvenile court hearing denying the existence of her child, Joshua Churchill (Ex. 1, 29, 30, 36). The juvenile court judge did not believe these statements and he ordered her to produce the child, threatening her with contempt and jail if she did not comply (Ex. 1, p. 37-38).[3]

[3] *Section 211.121* addresses the situation where a parent and or the child do not appear. It states that "a capias may be issued for the parent or guardian, or for the child" and the person may also "be proceeded against for contempt of court."

On June 27, 2011, Brenda and her attorney, Earl Seitz, brought the child to an arranged meeting at the juvenile office in Boone County (TR 152-153). Joshua was taken into protective custody of the children's division (TR 159). Thereafter, the State charged Brenda for perjury based on the statements she made at the juvenile hearing (LF 11).

Even if the statements Brenda made, denying the existence of the child, were false, testifying falsely is not the only element of a perjury charge; the State must also prove that the statement involved a "material fact" that could or did "substantially affect" the course or outcome of the proceeding. *Section 575.040.1 & .2 RSMo 2000*. It is also a defense to a perjury charge if the falsity is retracted in the course of the official proceeding in which it was made. *Section 575.040.4*. Brenda asserts that the evidence failed to prove that the statement involved a "material fact," and further, that she remedied the alleged falsity during the course of the official proceeding.

Materiality

The essence of the crime of perjury is the willful false swearing to a substantial definite material fact, *State v. Vidauri*, 305 S.W.2d 437, 440 (Mo. 1957), and it is incumbent upon the State to not only allege but also to prove beyond a reasonable doubt that the defendant has sworn falsely to a material fact for the reason that false testimony to an immaterial fact is not perjury. *State v. Swisher*, 364 Mo. 157, 260 S.W.2d 6, 11 (Mo. banc 1953). Where there is no dispute as to what the testimony of the party charged with perjury was, then it is

purely a question of law for the trial court to determine whether such testimony as given was material to the issue thus presented. *State v. Dineen*, 102 S.W. 480, 482 (Mo. 1907). However, the materiality of the testimony on which perjury is assigned must be established by evidence and cannot be left to presumption or inference. *Id.* To prove materiality the State must introduce into evidence in a perjury trial enough of the records and testimony in the original trial to inform the trial court wherein and how the assigned testimony became material. *State v. Roberson*, 543 S.W.2d 817, 820 (Mo. App., St.L. 1976). Materiality looks to the relationship between the propositions for which the evidence is offered and the issues in the case. *Roberson*, 543 S.W.2d at 821 (citation omitted). Therefore it is necessary that the State prove the falsity of the statement in the prior proceeding and prove what the issue or point in question in the former proceeding was, so the trial court can ascertain the materiality of the alleged false statement to the issue or point in question. *Id.*

Here, the State introduced the entire transcript of the juvenile hearing into the record (Ex. 1). That transcript establishes that Brenda was repeatedly denied the assistance of counsel to which she was entitled and that she was never advised of her Fifth Amendment privilege not to testify against herself (See Point I). It also shows that, without counsel, Brenda made statements denying the existence of the child (Ex. 1, 29, 30, 36). The juvenile court Judge Wilson testified that he did not find Brenda's testimony credible; he believed that the child existed and that she was the child's parent (TR 84, 87). The record shows that he ordered her

to appear with the child by 8:00 a.m. Monday morning or be thrown in jail on contempt charges with a high bond (Ex. 1, 37-38).

"A fact is material, regardless of its admissibility under rules of evidence, if it could substantially affect, or did substantially affect, the course or outcome of the cause, matter or proceeding." *§ 575.040.2*. While it is true that materiality does not require that the untrue testimony successfully deceive the trier of fact, *See State v. Jarrett*, 304 S.W.3d 151, 157 (Mo. App., S.D. 2009), it does require a showing that it "substantially" could have affected the outcome of the proceeding.

Here, Judge Wilson did exactly what the statute contemplates when a parent or child fails to appear or obey the summons of the court to produce the child. *Section 211.121*. Brenda's alleged false testimony did not and could not "substantially affect" the outcome of the proceeding, because regardless of whether Judge Wilson believed Brenda or not, he acted in accordance with what *Section 211.121* required. When a person summoned does not appear personally, or with the child, a capias warrant may issue and contempt of court proceedings will lie. Thus, whether Judge Wilson believed or disbelieved Brenda's statement about the existence of the child, his actions would have remained the same until the custody of the child was determined. Her statement did not "substantially affect" the course or outcome of the proceedings – indeed, it did not affect anything except the timing of when the transfer of custody occurred.

Retraction of falsity

Regarding this transfer of custody of the child, when Brenda voluntarily brought the child and relinquished him to the juvenile authorities, she thereby "retracted the false statement in the course of the official proceeding in which it was made," which is a complete defense to the charge of perjury. *Section 575.040.4.* Statements made in separate hearings at separate stages of the same proceeding, including but not limited to statements made before a grand jury, at a preliminary hearing, at a deposition or at previous trial, are made in the course of the same proceeding. *Id.*

Likewise, the juvenile proceedings were ongoing and were still proceeding at the time of Brenda's perjury trial. Since "the same proceeding" contemplates many different stages of a criminal trial – preliminary hearing, depositions and even previous trials – the same should hold true in the civil context. Because the evidence clearly showed that Brenda remedied the allegedly false statement by relinquishing custody of the child to juvenile authorities, in the course of the same proceeding, the trial court erred in finding that Brenda had not retracted the alleged perjurious statement, thereby finding her guilty.

Because the overwhelming evidence showed that Brenda's statement did not substantially affect the course or outcome of the juvenile proceeding, and because she retracted the alleged falsity in the course of the same juvenile proceedings, this Court should find that the trial court erred in convicting her of perjury. Brenda respectfully requests that this Court reverse her conviction.

CONCLUSION

Brenda respectfully requests that this Court reverse her conviction and discharge her from her sentence.

Respectfully submitted,

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Certificate of Compliance

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certificate of compliance and service, and appendix, the brief contains **7,020** words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 30th day of June, 2014, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Evan Buchheim, Assistant Attorney General, at Evan.Buchheim@ago.mo.gov.

/s/ Amy M. Bartholow

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