No. SC94226

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

BRENDA CHURCHILL,

Appellant.

Appeal from Monroe County Circuit Court
Tenth Judicial Circuit
The Honorable Rachel Bringer Shepherd, Judge

RESPONDENT'S SUBSTITUE BRIEF

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STATEMENT OF FACTS

Appellant (Defendant) appeals from a conviction in Monroe County Circuit Court for perjury.

Defendant was charged with the class D felony of perjury relating to a June 2011 incident in which Defendant testified falsely during a temporary-protective-custody hearing before the juvenile division of the Monroe County Circuit Court. (L.F. 4). Defendant waived her right to a jury trial and was tried on September 19, 2012, before Judge Rachel Bringer Shepherd. (L.F. 7–8; Tr. 43–45). The parties stipulated that the court could take judicial notice of evidence submitted during the motion-to-suppress hearing and the transcript of the protective-custody hearing (State's Ex. 1).[1] (Tr. 141–44). The court found Defendant guilty as charged and later sentenced her to four years' imprisonment. (Tr. 173, 266).

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[1] Defendant received a continuing objection to admission of any statements she made during the juvenile-court hearing, including those contained in a transcript of that hearing that was otherwise stipulated to by the parties. (Tr. 141–44). Defendant's challenge to the trial court's order overruling her motion to suppress is addressed in Point I.

Defendant challenges the sufficiency of the evidence to support the conviction. Viewed in the light most favorable to the verdict, the evidence presented at trial showed:

In June 2011, the juvenile officer for the Tenth Judicial Circuit in Monroe County became concerned about the welfare of a child purportedly named Christian Churchill, who was living with Defendant and thought to be her son.[2] (Tr. 15–17). Christian was thought to be Defendant's eighth child with her husband Mark Churchill; Defendant's previous children had been removed from the home and her parental rights to them terminated by the juvenile court because of physical and sexual abuse. (Tr. 17, 75–76; State's Ex. 1, pp. 12, 22–23).

After several unsuccessful attempts to locate the child, the Juvenile Officer for the Tenth Circuit prepared a petition asking for an emergency protective-custody hearing in the juvenile division of the circuit court. (Tr. 15–18, 23). The purpose of the hearing, which was held under the authority

[2] It was later determined that Christian's legal name was Joshua. (Tr. 17). A witness called by Defendant during her sentencing hearing testified that Defendant called her son by a different name to protect him from others in Defendant's family. (Tr. 243).

provided in § 211.032, RSMo, was to determine if there was a child in need of protection from the court and the child's whereabouts. (Tr. 81, 84). In those cases, the parent or guardian of the child is summoned to the hearing; if the person summoned is not a parent or guardian of the child, they are not a party to the case. (Tr. 81). A summons was issued for Defendant to appear at a June 10, 2011 hearing before the juvenile court and to bring with her the child in question. (Tr. 18, 80; State's Ex. 1, p. 30).

A Monroe County deputy made multiple attempts on June 8, 2011, to serve the summons on Defendant; he successfully served her on June 9. (Tr. 69, 145–46). Defendant told him that no children lived in her house and that the only child present there was her grandson, Austin. (Tr. 71, 147–48). She claimed that she sometimes called her grandson Christian. (Tr. 71). Defendant gave the deputy consent to search, but she told him that he could not search one particular room. (Tr. 72). The deputy noticed, in addition to the no trespassing sign and cable across the end of Defendant's driveway, an alarm in the house connected to a motion sensor; the alarm was triggered when someone entered Defendant's driveway. (Tr. 74).

Defendant appeared at the June 10, 2011 protective-custody hearing, but she did not bring a child with her. (Tr. 18, 77–78; State's Ex. 1, p. 4).

Defendant's eldest daughter, Trista, testified at the hearing that she knew of a child named Christian Churchill and that she had seen a five-year-old child with Defendant. (State's Ex. 1, pp. 5–6). Defendant told Trista that the child belonged to Trista's sister, who lived in New York. (State's Ex. 1, pp. 6–7). Defendant's father testified that Defendant had a child named Christian, that he had seen the child with Defendant at her residence, and that the child lived with Defendant. (State's Ex. 1, pp. 15–17, 20). He said that Defendant's daughter who lived in New York had told him that the child did not belong to her. (State's Ex. 1, pp. 18–19).

Counsel for the Juvenile Officer called Defendant to the stand, where she was sworn in as a witness; he asked Defendant if she had a son named Christian Churchill. (State's Ex. 1, pp. 25, 28). Defendant denied either the existence of any child named Christian Churchill or that she had a child who was about five or six years old:

Q. …You have a son named Christian Churchill, is that true?

A. No, sir.

Q. And your son's—this child's date of birth is 2/16 of '06, isn't that true?

A. No. sir.

Q. You're saying that's not true?

A. I'm saying that is not true.

Q. All right. Do you know a…Christian Churchill?

A. There is no Christian Churchill.

Q. All right. You were here when your father testified, is that right?

A. Yes.

Q. And you were here when your daughter testified.

A. Correct. There is no Christian Churchill.

Q. All right. Is there a—do you have a child that's approximately five or six years old?

A. No, sir, I do not.

(State's Ex. 1, pp. 28–29). Defendant, after acknowledging that she was under oath, also denied having birthed any children since her parental rights to her child Gabriel had been terminated. (State's Ex. 1, p. 29).

Defendant acknowledged that the summons for the hearing had directed her to bring the child in question, but she said that she could not "produce a child that I don't have." (State's Ex. 1, p. 30). Defendant said the child that her father and daughter had seen her with was not her child, but was her grandson, Austin. (State's Ex. 1, p. 30–31). Defendant then demanded an attorney and claimed that her life had been threatened by her daughters and father. (State's Ex. 1, p. 31). When asked if she had heard Trista testify that

Defendant had told Trista that the child in her home whose name was Christian belonged to Trista's sister, Defendant replied, "No comment." (State's Ex. 1, p. 35). Defendant then followed up by saying that Trista was lying. (State's Ex. 1, p. 35).

The court then renewed the order to produce any children in Defendant's home that are her children, but Defendant said she could not do that because she had no children:

> The Court: Now I'm going to renew [Counsel for the Juvenile Officer]'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?
>
> [Defendant]: That's correct.
>
> The Court: All right. Well, I want to make sure you understand, you know, if—if there is in fact a child—
>
> [Defendant]: There's no child.

(State's Ex. 1, p. 36). The court then warned her that if there was a child she could be jailed for failing to obey a judge's order and that charges "will probably be brought against" her by the prosecutor; Defendant said she

understood, and she agreed it was a "very serious thing." (State's Ex. 1, pp. 36–37).

The juvenile court then specifically ordered Defendant to produce the child by 8 a.m. Monday[3] morning; Defendant acknowledged the order, but responded, "There is no child." (State's Ex. 1, p. 38). The court directed the sheriff to accompany Defendant to her residence and search for any children; Defendant gave her consent for the search. (State's Ex. 1, pp. 37–38).

About two weeks after the protective-custody hearing, a search warrant for Defendant's residence was issued and executed. (Tr. 148). Although police did not find the child, they discovered medical documents for a "Joshua Churchill" and observed numerous children's items around the house, including toys and a swing set. (Tr. 148–50).

On June 27, 2013, Defendant, accompanied by her attorney, brought her five-year-old son Joshua Churchill to Boone County to be turned over to juvenile officials from Monroe County. (Tr. 151–53, 159). Although Defendant's attorney said that Defendant did not want to talk about the case, Defendant described Joshua's routine to one of the officials. (Tr. 153, 159–60).

[3] This Court may take judicial notice of the fact that June 10, 2011, fell on a Friday; the date on the following Monday was June 13, 2011.

Defendant also told this official that the child's legal name was Joshua and that he was born in Illinois. (Tr. 160). Defendant admitted to her that Joshua was her son. (Tr. 160, 162).

Defendant did not testify at trial or call any witnesses on her behalf. (Tr. 166–70). During closing argument at the sentencing hearing, Defendant's counsel told the court that Defendant had admitted that she lied on the stand, had taken responsibility for her actions, and conceded there was no defense for her actions:

> So we have an opportunity to convict a person with a perjury because that's crystal clear, and lying to the court is wrong. There's no defense to that. We acknowledge that, and she has taken responsibility. She has right in the SAR. It's documented by probation and parole. She said, I lied on the stand. She admitted it. She acknowledges that she doesn't have a good faith basis to do it.

(Tr. 262).

ARGUMENT

I (motion to suppress).

The trial court did not clearly err in overruling Defendant's motion to suppress the false statements she made while testifying during the temporary-protective-custody hearing held before the juvenile court because Defendant's Sixth and Fifth Amendment rights to counsel were not violated in that these constitutional protections apply only in criminal proceedings, not civil cases, and Defendant cannot rely on these provisions, or any statutory right to be represented by counsel at juvenile proceedings, to suppress perjurious testimony she voluntarily and repeatedly gave during the juvenile hearing.

Moreover, Defendant's statements cannot be suppressed as being obtained in violation of her constitutional rights because the false statements she made during the juvenile-court hearing constituted the crime (perjury) for which she was later prosecuted. Defendant was not compelled to divulge incriminating information about any criminal activity she may have committed before the juvenile-court hearing.

Finally, Defendant's Fifth Amendment right against self-incrimination was not violated because she failed to assert that right during the juvenile hearing and the giving of false testimony is never condoned under the Fifth Amendment notwithstanding whether the person testifying feels compelled to answer or is not expressly advised of the Fifth Amendment right against self-incrimination.

A. The record pertaining to this claim.

Defendant was served with a summons to appear at a protective-custody hearing held June 10, 2011, involving Christian Churchill; Defendant was identified by the court as the juvenile's purported "natural mother." (State's Ex. 1, p.4). Defendant was present at this hearing. (State's Ex. 1, p. 4).

Following direct examination of Defendant's father by counsel for the juvenile officer, the juvenile court asked Defendant if she had any questions for her father. (State's Ex. 1, p.21). Defendant said, "No, sir, because I am seeking legal counsel." (State's Ex. 1, p.21).

Counsel for the juvenile officer later called Defendant as a witness during the hearing. (State's Ex. 1, p. 23). As she was being sworn in as a witness, Defendant told the juvenile court that "I just—I want legal counsel." (State's Ex. 1, p. 23). The court explained to Defendant that the hearing was "merely the beginning of the procedure," that Defendant had the right to legal

counsel, that no "final determinations" would be made "until [she had] legal counsel," and that anything done on that day "would be a temporary matter." (State's Ex. 1, p. 24). Defendant again told the court, "I want legal counsel, sir, please." (State's Ex. 1, p. 24). The court said that it understood, but that counsel for the juvenile officer was still free to ask her questions. (State's Ex. 1, p. 24).

After Defendant denied having any children and claimed that the child she had been seen taking care of was her grandson, counsel for the juvenile officer asked her to confirm that the child referred to by the other witnesses was, in fact, Defendant's grandson. (State's Ex. 1, p. 31). Defendant replied that she "want[ed] an attorney" because she had been threatened over a matter involving the care of her mother. (State's Ex. 1, p. 31). When counsel told her that the hearing was about Defendant's child, Defendant again said she wanted an attorney because she had been threatened. (State's Ex. 1, p. 31). During questioning by the guardian ad litem, Defendant said that she had "been trying to get ahold of legal counsel." (State's Ex. 1, pp. 33–34). When she was asked whether she heard her daughter testify that a child named Christian was seen in her home and that Defendant had told her daughter that the child belonged to the daughter's sister, Defendant replied, "I want an attorney because I've been threatened." (State's Ex. 1, p. 35).

After she was questioned by the attorneys, the juvenile-court judge asked Defendant if she was "planning on getting an attorney," and Defendant replied, "yes, sir." (State's Ex. 1, p. 35). The court then told Defendant that she "should get one" and to "do it quickly." (State's Ex. 1, p. 36). The court further advised Defendant that if she could not get an attorney, the court would "appoint an attorney" for her. (State's Ex. 1, p. 36).

The juvenile-court judge then specifically confirmed with Defendant that her position was that she could not comply with the court's order to produce any children in her home because there were not any. (State's Ex. 1, p. 36). Defendant said that the court was correct and that "[t]here's no child." (State's Ex. 1, p. 36). The court warned Defendant that if there was a child, she could be "thrown in jail on a high bond for failure to obey a judge's order" and that "charges will probably be brought against [her] by the…prosecutor's office for perjury." (State's Ex. 1, p. 36). Defendant said that she understood, and she acknowledged to the court that she was going to retain an attorney. (State's Ex. 1, p. 37).

After counsel for the juvenile officer suggested that Defendant be given a time frame by which to produce the child, the court ordered that any child be produced by 8 a.m. the following Monday. (State's Ex. 1, p. 38). The court also told Defendant that if she did not have an attorney by 8 a.m. Monday

morning, she must notify the court so it could appoint an attorney for her. (State's Ex. 1, p. 38). After Defendant stated that she had contacted "Melissa Faurot's office in Columbia," and had been told that Ms. Faurot would not be back until Tuesday, the court extended the deadline for Defendant to retain an attorney until the following Tuesday at noon.[4] (State's Ex. 1, p. 38). But the court expressly reiterated that its "specific order is to produce the child by 8:00 a.m. Monday morning." (State's Ex. 1, p. 38). Defendant acknowledged the court's order and said, "[t]here is no child." (State's Ex. 1, p. 38).

In her criminal proceeding, Defendant filed a motion to suppress the statements she made during the juvenile protective-custody hearing on the ground that her constitutional right to counsel was violated. (L.F. 13–30). During the motion-to-suppress hearing, defense counsel expressly stated that Defendant's claim was that she was denied both her constitutional and statutory right to counsel. (Tr. 111–12). The circuit court overruled the motion, and Defendant was allowed to make a continuing objection to the admission of any statements she made during the juvenile-court hearing. (L.F. 7; Tr. 134, 136).

[4] The record does not further identify Ms. Faurot.

B. Standard of review.

An appellate court reviews a trial court's decision on a motion to suppress statements to determine whether there is "substantial evidence" to support the ruling. *State v. Gaw*, 285 S.W.3d 318, 319 (Mo. banc 2009). "[T]he facts and reasonable inferences from such facts are considered favorably to the trial court's ruling and contrary evidence and inferences are disregarded." *Id.* (quoting *State v. Galazin*, 58 S.W.3d 500, 507 (Mo. banc 2001) (alteration in original)). In "reviewing the trial court's overruling of a motion to suppress, this Court considers the evidence presented at both the suppression hearing and at trial to determine whether sufficient evidence exists in the record to support the trial court's ruling." *Id.* (quoting *State v. Pike*, 162 S.W.3d 464, 472 (Mo. banc 2005)). "Deference is given to the trial court's superior opportunity to determine the credibility of witnesses." *Id.* at 320 (quoting *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998)). "This Court gives deference to the trial court's factual findings but reviews questions of law de novo." *Id.*

C. The trial court did not clearly err by overruling the motion to suppress and admitting Defendant's statements into evidence.

The trial court did not clearly err in overruling the motion to suppress Defendant's statements because neither Defendant's constitutional right to

counsel under the Fifth and Sixth Amendments, nor her statutory right to be represented by counsel in juvenile proceedings, were violated during the juvenile-court hearing. Moreover, Defendant suffered no violation of her Fifth Amendment right against self-incrimination.

1. The right to counsel.

Defendant suffered no violation of either her Sixth or Fifth Amendment right to counsel. Those amendments, which pertain only to criminal prosecutions and proceedings, did not apply because the juvenile hearing at which Defendant appeared, testified, and perjured herself was not a criminal prosecution or proceeding; it was a civil action.

The juvenile proceeding held in this case was authorized under § 211.031, which gives a juvenile court "exclusive original jurisdiction" involving any child "alleged to be in need of care and treatment because…[t]he parents…neglect or refuse to provide proper support…or other care necessary for [the child's] well-being." Section 211.031.1(1)(a), RSMo Cum. Supp. 2013. The law also provides that upon request from any party, the juvenile "court shall hold a protective custody hearing…within three days of the request." Section 211.032.1, RSMo Cum. Supp. 2013. The parents of the child "shall be provided with notice of, and an opportunity to be heard in, any hearing to be held with respect to the child." Section 211.171.3, RSMo Cum. Supp. 2013.

The child's parents "shall have the right to be present at all times during any hearing." Rule 124.03(a).

The Sixth Amendment states in pertinent part that "[i]n all *criminal prosecutions*, the accused shall enjoy the right…to have the assistance of counsel for his defence." U.S. CONST. amend. VI (emphasis added). Missouri's Constitution provides "[t]hat in *criminal prosecutions* the accused shall have the right to appear and defend, in person and by counsel…." MO. CONST. art. I, § 18(a) (emphasis added). The express wording of these amendments provides that the right to counsel found in them applies only to criminal proceedings; the "Sixth Amendment does not apply to civil actions." *See Bittick v. State*, 105 S.W.3d 498, 502 (Mo. App. W.D. 2003); *see also Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011) ("[t]he Sixth Amendment does not govern civil cases").

The right to counsel found in the Sixth Amendment attaches only after adversary criminal judicial proceedings have been initiated against a person. *See State v. Umphfrey*, 242 S.W.3d 437, 441 (Mo. App. E.D. 2007). "'The right to counsel attaches in the critical stages in the *criminal justice process* when the state commits to prosecuting its case.'" *Id.* at 442 (quoting *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (emphasis added)). "The Sixth Amendment right, however, is offense specific. It cannot be invoked once for all future

prosecutions, for it does not attach until a prosecution is commenced…." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). "Thus, there are two steps to the attachment of the Sixth Amendment right to counsel: the initiation of adversary judicial proceedings, and invocation of the right by the accused." *Umphrey*, 242 S.W.3d at 442 (holding that the initiation of extradition proceedings in a foreign jurisdiction did not "constitute the initiation of adversary judicial proceedings").

Similarly, the Fifth Amendment expressly provides in pertinent part that "[n]o person…shall be compelled *in any criminal case* to be a witness against himself…." U.S. CONST. amend. V (emphasis added). Missouri's Constitution provides "[t]hat no person shall be compelled to testify against himself in a criminal cause…." MO. CONST. art. I, § 19. To invoke the Fifth Amendment right to counsel during any custodial interrogation "'requires, at a minimum, some statement that can reasonably be construed to be expression of a desire for assistance of an attorney in dealing with custodial interrogation by the police.'" *Umphrey*, 242 S.W.3d at 443 (quoting *McNeil v. Wisconsin*, 501 U.S. at 176–77). "Also, the person must invoke his right to counsel in the context of a 'custodial interrogation,' either ongoing or impending. *Id.* "He cannot invoke the right anticipatorily outside of this context." *Id.*

The juvenile hearing at which Defendant perjured herself was a civil proceeding. *See In re D.M.*, 370 S.W.3d 917, 921 (Mo. App. E.D. 2012) ("Juvenile proceedings are in the nature of civil proceedings…."); *McKamely v. Hession*, 704 S.W.2d 701, 704 (Mo. App. E.D. 1986) ("Proceedings under the juvenile code are civil, not criminal, in nature…."). Consequently, "the due process rights accorded criminal defendants do not apply." *In re A.G.R.*, 359 S.W.3d 103, 108 (Mo. App. W.D. 2011); *see also In re W.J.S.M.*, 231 S.W.3d 278, 283 (Mo. App. E.D. 2007) ("While due process requires competence to stand trial in a criminal matter, no such requirement exists in a civil case….").

Since Defendant had no Sixth or Fifth Amendment right to have counsel present during this civil proceeding held under the juvenile law, neither her Sixth nor Fifth Amendment right to counsel was violated by her being asked questions at the temporary-protective-custody hearing. Since she was a party to the civil proceeding under the juvenile code, the juvenile officer and the juvenile court were entitled under Missouri law to ask her questions under oath. *See* Section 491.030, RSMo 2000 ("Any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted or defended, to testify as a witness in his behalf, in the same

manner and subject to the same rules as other witnesses…."). Defendant's constitutional rights were not violated when she was asked to testify at a civil proceeding to which she had been summoned as the purported parent of a child who was potentially in need of care and treatment from the juvenile court.

Courts in other states have rejected similar Sixth Amendment challenges involving child-protection proceedings in juvenile court. *See State v. Adams*, 483 S.E. 2d 156, 157 (N.C. 1997) (holding that a mother's Sixth Amendment right to counsel did not attach upon the filing of a petition alleging abuse and neglect of a child, which commenced only a civil proceeding); *In re AMB*, 640 N.W.2d 262, 303–04 (Mich. App. 2001) (holding that the "Sixth Amendment right to counsel and the analogous state [constitutional] right to counsel…do not apply directly to child protective proceedings because these proceedings are civil, not criminal, in nature" and that "the right to counsel in a protective proceeding is statutory, not constitutional"); *see also In re Pittman*, 561 S.E.2d 560, 564 (N.C. App. 2002) (holding that the rule in *Miranda* did not apply in a juvenile-abuse-and-neglect proceeding).

Defendant also suggests that her constitutional right to counsel was violated because state law provided her with the right to be represented by counsel at all juvenile proceedings. Missouri law provides that a "party" to a

juvenile proceeding "is entitled to be represented by counsel in all proceedings." Section 211.211, RSMo 2000; Rule 115.01(a). A parent is a *party* under the law. Rule 110.04(a)(20). During a protective-custody hearing, the juvenile court must "inform the juvenile's parents…of the right to counsel, including the right to appointed counsel." Rule 123.05(d). During this hearing, one of the determinations the court must make is "whether the parents…are entitled to appointed counsel." Rule 123.05(g)(3).

Defendant appeared at the protective-custody hearing without counsel, and the juvenile court informed Defendant of her right to have counsel appointed for her if she could not afford one. (Tr. 78; State's Ex. 1, p. 24). The court also asked her if she planned on obtaining an attorney, and Defendant replied that she was in the process of getting one; she even asked for additional time to hire an attorney when the court set a deadline for her to obtain one. (State's Ex. 1, pp. 35–38).

Missouri law simply provides that parties to a juvenile proceeding have the right to be represented by counsel. But nothing prevents those proceedings from occurring if a party appears without counsel. In fact, the rules contemplate that advice on the right to counsel can occur during a protective-custody hearing and that the determination of whether a party is entitled to appointed counsel can be made after such a hearing. State law

required this hearing to commence within three days, and the juvenile court in this case was not going to delay the hearing since it was concerned about the child's welfare. (Tr. 82–83). The juvenile rules discourage continuances of protective-custody hearings by requiring "compelling extenuating circumstances justifying the continuance." Rule 123.05(c).

Whether state law provided Defendant with the right to be represented by counsel at the hearing did not prevent her from being summoned as a party and called to testify about the existence and whereabouts of her child. The law did not require the court to delay the proceedings simply because Defendant failed to bring an attorney with her to the hearing. Defendant could not unilaterally delay the juvenile proceedings simply by showing up on the day of the hearing and demanding counsel. Defendant's statutory right to be represented by counsel was not violated by the juvenile court's inquiry at a temporary-custody hearing into whether Defendant was the parent of a child who potentially fell under the jurisdiction of the juvenile court.

Having the statutory right to be represented by counsel also did not insulate Defendant from a possible perjury charge if she testified falsely during the hearing. Even if the state law pertaining to the representation of counsel was violated, which it was not, this does not automatically equate to a violation of Defendant's constitutional right to counsel. *See Virginia v.*

Moore, 553 U.S. 164, 174–75 (2008) (holding that merely because police violated a state law regulating arrests did not mean this also constituted a constitutional violation under the Fourth Amendment requiring application of the exclusionary rule). If Defendant believed her statutory right to be represented by counsel was being violated, she had legal remedies available to her; resorting to perjury was not one of them. Nothing in either Missouri's Constitution or its statutory code compels the suppression of perjurious testimony given in a civil proceeding even if the perjurer's statutory right to be represented by counsel was arguably violated during a temporary-custody hearing.

Moreover, Defendant's presence at the hearing was not to investigate or prosecute her for any prior criminal conduct. The sole purpose of the hearing was to determine if she was the parent of a child who was in need of protection by the State. No criminal offense occurred until Defendant decided to falsely testify in an effort to thwart the juvenile court from obtaining custody over her son. In other words, Defendant was not coerced to testify without counsel and forced to incriminate herself regarding a prior crime she may have committed. The crime for which she was charged derived from her choosing to perjure herself at the protective-custody hearing. Defendant cannot rely on a statutory right to be represented by counsel at juvenile

proceedings to excuse perjury she chose to commit and to suppress evidence of that perjury during a later criminal prosecution.

In *United States v. Mandujano*, 425 U.S. 564 (1976), the defendant sought to suppress incriminating statements he made to a grand jury investigating drug trafficking on the ground that he was not given the *Miranda* warnings by the prosecutor after he was later charged with perjury for making false statements during that testimony. 425 U.S. at 568–69. In rejecting this claim, the Court distinguished grand-jury testimony from custodial police interrogation. *Id.* at 579–80. The Court noted that absent an assertion of privilege, the defendant was under a duty as a grand-jury witness to answer questions. *Id.* at 581. The Court held that a witness sworn to tell the truth before a grand jury or any "other duly constituted tribunal" could not seek suppression of false statements made during that testimony. *Id.* at 582–83. The Court also noted that it had "consistently…without exception allowed sanctions for false statements or perjury" and that it had done so "even in instances where the perjurer complained that the Government exceeded its constitutional powers in making the inquiry." *Id.* at 577.

Courts in other jurisdictions have refused to suppress evidence of a crime based on alleged constitutional violations when the defendant's statements

were not inculpatory with respect to a previous crime, but actually constituted the crime itself:

> Committing a crime is far different from making an inculpatory statement, and the treatment we afford the two events differs accordingly. An inculpatory statement usually relates to a previously committed illegal act; there is nothing unlawful about the statement itself. A crime, on the other hand, whether committed by word or deed is by definition an act that violates the law.

United States v. Mitchell, 812 F.2d 1250, 1253 (9th Cir. 1987).

In a case involving an alleged *Miranda* violation, the Ninth Circuit held that no *Miranda* violation occurred when a defendant who was in custody, but who had not been given any *Miranda* warnings, made statements to the police that constituted a crime itself. *See United States v. Gordon*, 974 F.2d 1110 (9th Cir. 1992). In *Gordon*, the defendant was arrested by Secret Service agents after he trespassed on the property of former President Ronald Reagan. *Id.* at 1113. While the agents were walking the defendant off the property, the defendant told them that "Ronald Reagan is the anti-Christ" and that "he must be killed and I must kill him." *Id.* As they continued to walk, the defendant repeated these statements. *Id.* Only then did the agents

advise him of the *Miranda* warnings; the defendant nevertheless continued to make similar statements after he had been read his rights. *Id.*

The defendant was charged with violating a federal law making it a crime to knowingly and willfully threaten to kill, kidnap, or inflict bodily harm upon a former President who is protected by the Secret Service. *Id.* at 1113 n.1. The court held that the statements the defendant made before he was given the *Miranda* warnings were admissible because the statements themselves constituted the crime:

> Applying the exclusionary rule to these statements is inappropriate due to the nature of the crimes at issue. Section 879(a)(1) punishes threats against a former President. The statements [the defendant] seeks to suppress were not merely evidence of a crime but also the crime itself. In this situation, whether [the defendant] received a *Miranda* warning is irrelevant. The purpose of the *Miranda* warning is to protect defendants by safeguarding their privilege against self-incrimination. However, failure to give a *Miranda* warning does not bar prosecution of an offense committed while in custody.

Id. at 1116 [citations omitted]; *see also United States v. Mitchell*, 812 F.2d at 1253–54 (the defendant's statements threatening to kill the President would not be suppressed even if made while the defendant was being illegally

detained by police in violation of the Fourth Amendment because the statements themselves constituted the crime); *United States v. Owuor*, 397 Fed. Appx. 572, 575 (11th Cir. 2010) (holding that the defendant's false statements given to ICE agents after his arrest but without *Miranda* warnings were admissible in a prosecution for making false statements and for falsely representing himself to be a U.S. citizen because the defendant's "statements to the ICE agents…were new crimes rather than statements that related to past crimes); *United States v. Melancon*, 662 F.3d 708, 712 (5th Cir. 2011) (holding in a prosecution for presenting a false affidavit to federal agents that the defendant "was not free to lie to the questioners and be absolved from the consequences of those lies because of the absence of [*Miranda*] warnings and that the "exclusionary rule does not act as a bar to the prosecution of a crime where the statements themselves are the crime").

There was no authority to suppress Defendant's perjurious statements even if they were obtained in violation of her constitutional rights or her statutory right to be represented by counsel at juvenile proceedings. Defendant's statements themselves constituted the crime for which she was prosecuted; she was not forced to make inculpatory statements relating to past acts. Public policy militates against creating an avenue by which a

defendant can have his or her false statements given in a civil case suppressed in a later criminal prosecution for perjury.

2. The Fifth Amendment right against self-incrimination.

Defendant also contends on appeal that her Fifth Amendment right not to incriminate herself was violated when she testified at the hearing without first being informed by the juvenile court that she had the right not to incriminate herself. There are several problems with this claim.

First, Defendant did not seek to suppress the statements made during the juvenile-court hearing on the ground that her Fifth Amendment right not to incriminate herself was violated. The sole claim in her motion to dismiss was that her constitutional right to counsel was violated; she did not assert that she was forced to incriminate herself in violation of the Fifth Amendment. (L.F. 13–30; Tr. 111–12). S*ee State v. Tidwell*, 888 S.W.2d 736, 740 (Mo. App. S.D. 1994) ("An accused is not permitted on appeal to broaden the objection he presented to the trial court; he may not rely on a theory different than the one offered at trial.").

Second, although the Fifth Amendment right not to incriminate one's self may be asserted in any proceeding, civil or criminal, *see Kastigar v. United States*, 406 U.S. 441, 444–45 (1972), the failure to timely assert that right results in a waiver of the right to invoke the privilege to suppress the

statements in a later criminal proceeding, s*ee Minnesota v. Murphy*, 465 U.S. 420, 440 (1984). *See also United States v. Mandujano*, 425 U.S. 564, 575 (1976). Defendant never asserted her Fifth Amendment right not to incriminate herself during the protective-custody hearing. (Tr. 32). In fact, it is not clear whether that privilege could have been asserted since the hearing pertained only to whether Defendant had a child and the child's whereabouts; it was not an inquiry into Defendant's prior conduct relating either to that child or anything else that may have constituted a criminal offense. Even the demand in the summons that Defendant produce any child she had could not be resisted on Fifth Amendment grounds. *See Baltimore City Dep't of Social Services v. Bouknight*, 493 U.S. 549, 555 (1990) (holding that "a person may not claim the [Fifth] Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded").

Third, the Fifth Amendment "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). Defendant's response to the questions posed at the juvenile proceeding did not implicate her in the commission of a prior

criminal offense. Defendant's truthful answer to a question asking whether she had a son was not potentially incriminatory. What she was later prosecuted for were her perjurious answers to those questions. In other words, the untruthful answers given under oath constituted the crime; her answers were not used against her to prove prior criminal conduct. If Defendant believed her answers might have incriminated her in a future criminal proceeding, it was incumbent on her to assert her Fifth Amendment rights. By not doing so, she waived those rights.

In *Brogan v. United States*, 522 U.S. 398 (1998), the defendant "falsely answered 'no' when federal agents asked him whether he had received any cash or gifts from a company whose employees were represented by the union in which he was an officer." In challenging his conviction for making a false statement, the defendant invoked the Fifth Amendment protection against compelled self-incrimination. *Id.* at 404. The Court roundly rejected this argument and held that "neither the text nor the spirit of the Fifth Amendment confers a privilege to lie." *Id.* "[P]roper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely." *Id.* (quoting *United States v. Apfelbaum*, 445 U.S. 115, 117 (1980)).

The *Brogan* Court also rejected the argument that silence in the face of questioning "is an 'illusory' option because a suspect may fear that his silence will be used against him later, or may not even know that silence is an available option." *Id.* at 405. "As to the former: It is well established that the fact that a person's silence can be used against him—either as substantive evidence of guilt or to impeach him if he takes the stand—does not exert a form of pressure that exonerates an otherwise unlawful lie." *Id.* "And as for the possibility that the person under investigation may be unaware of his right to remain silent: In the modern age of frequently dramatized 'Miranda' warnings, that is implausible. Indeed, we found it implausible (or irrelevant) 30 years ago, unless the suspect was 'in custody or otherwise deprived of his freedom of action in any significant way….'" *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 445 (1966)).

Fourth, the "Fifth Amendment's prohibition against self-incrimination relates to crimes alleged to have been committed *prior to the time* when the testimony is sought." *United States v. Kirk*, 528 F.2d 1057, 1061 (5th Cir. 1976). "[A]s a general rule it can be said that no fifth amendment problem is presented when a statement is admitted into evidence which is not confessional in nature, but in and of itself constitutes the crime charged." *Id.* at 1062. *See also Glickstein v. United States*, 222 U.S. 139, 142 (1911) (noting

that "the immunity afforded by the constitutional guaranty [against self-incrimination] relates to the past, and does not endow the person who testifies with a license to commit perjury"); *United States v. Vreeland*, 684 F3d 653, 660–61 (6th Cir. 2012) (holding in a prosecution for making a false statement to a federal probation officer that the Fifth Amendment right against self-incrimination did not apply when the false statements themselves constituted the crime).

In *United States v. Wong*, 431 U.S. 174 (1977), the defendant had been called before a grand jury investigating illegal gambling and obstruction of state and local law enforcement after the government had received reports that the defendant had paid bribes to police officers. *Id.* at 175. Before she testified, the defendant was advised of her Fifth Amendment privilege; she then falsely denied having paid money to police officers. *Id.* at 175–76. The Defendant claimed on appeal from her perjury conviction that her limited command of English prevented her from understanding the explanation of her Fifth Amendment rights and that her perjurious statements should be suppressed. *Id.* at 176. The Supreme Court rejected this argument and reiterated its holding in *Mandujano* that the "Fifth Amendment does not condone perjury." *Id.* at 178. It also rejected the argument that the failure to provide a warning of the privilege called for a different result. *Id.* The Court

noted that "even the predicament of being forced to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury." *Id. See also United States v. Knox*, 396 U.S. 77 (1969) (holding that a taxpayer's false statement in a tax return, which he was required to file, was not compelled in violation of the Fifth Amendment because in providing a false answer, the taxpayer took "a course that the Fifth Amendment gave him no privilege to take").

Defendant's reliance on *United States v. Blue*, 384 U.S. 251 (1966), is misplaced since that case involved the defendant being compelled to, in effect, testify against himself during a Tax Court proceeding involving the same matters for which he was later criminally charged. In its opinion, the Court noted in dicta that it had "recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure," but it did not apply any such rule in *Blue*; it simply reversed the district's court order dismissing the indictment and remanded the case. *Id.* at 254–55.

Defendant's reliance on the 95-year-old case of *State v. Caperton*, 207 S.W. 795 (Mo. 1918), is similarly unavailing. There, the defendant, who was called before the grand jury investigating whether he was living in "open and notorious adultery," testified falsely that he was married to the woman he

was living with. *Id.* at 795. The court stated in dicta that a defendant could not be called before a grand jury inquiring about his commission of a crime and be compelled to either admit guilt or commit perjury. *Id.* It noted that if an objection had been made to admission of the defendant's testimony it should have been sustained. *Id.* The court reversed the defendant's conviction, however, based on the erroneous giving of an instruction that conflicted with the substantive law relating to perjury prosecutions. *Id.* Any precedential value *Caperton* may have had was rendered meaningless by the modern treatment of grand-jury testimony outlined in *Mandujano* and *Wong* and the Court's later declaration of a witness's constitutional right to assert the privilege not to incriminate himself in any proceeding.

The circuit court did not clearly err in refusing to suppress the statements Defendant made before the juvenile court during the protective-custody hearing.

II (sufficiency).

The record contains sufficient evidence to support Defendant's conviction for perjury because the record contains sufficient evidence to prove that her false statement, in which she denied having a child, involved a "material" fact in that the sole purpose of the hearing was to determine if Defendant had a child and whether that child was in need of state protection.

Moreover, Defendant's surrender of her child two weeks after the temporary-protective-custody hearing did not constitute a "retraction" of her false statement because this defense to a perjury charge was not asserted by Defendant at trial and the mere surrender of the child did not constitute a "statement" made by Defendant in which she retracted the false statement previously made.

A. Standard of review.

When considering sufficiency-of-evidence claims, this Court's review is limited to determining whether the evidence is sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt. *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008); *State v. O'Brien*, 857 S.W.2d 212, 215-16 (Mo. banc 1993). Appellate courts do not review the evidence de

novo; rather they consider the record in the light most favorable to the verdict:

> To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ "a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." Thus, evidence that supports a finding of guilt is taken as true and all logical inferences that support a finding of guilt and that may reasonably be drawn from the evidence are indulged. Conversely, the evidence and any inferences to be drawn therefrom that do not support a finding of guilt are ignored.

O'Brien, 857 S.W.2d at 215–16 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "An appellate court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. banc 1998) (quoting *Jackson v. Virginia*, 443 U.S. at 326); *see also Freeman*, 269 S.W.3d at 425 (holding that an appellate court should "not weigh the evidence anew since 'the fact-finder may believe all, some, or none of the testimony of a witness when considered

with the facts, circumstances and other testimony in the case'") (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002)).

Appellate courts do not act as a "super juror with veto powers"; instead they give great deference to the trier of fact. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993); *State v. Chaney*, 967 S.W.2d at 52. Appellate courts may neither determine the credibility of witnesses, nor weigh the evidence. *State v. Villa-Perez*, 835 S.W.2d 897, 900 (Mo. banc 1992). It is within the trier of fact's province to believe all, some, or none of the witnesses' testimony in arriving at the verdict. *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). Circumstantial evidence is given the same weight as direct evidence in considering the sufficiency of the evidence. *Grim*, 854 S.W.2d at 405–06.

B. The record contains sufficient evidence to support Defendant's conviction for perjury.

The record contains sufficient evidence to show that Defendant's false statement involved a "material" fact under the perjury statute. Moreover, Defendant did not assert a "retraction" defense at trial, and, in any event, the record shows that Defendant did not retract her false statement before its falsity was discovered.

1. Defendant's false statement involved a material fact.

Defendant was charged with perjury in violation of § 575.040, which provides:

> A person commits the crime of perjury if, with the purpose to deceive, he knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths.

Section 575.040.1, RSMo 2000. "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." Section 575.040.2, RSMo 2000. "[F]alse testimony as to one point is material and can be the subject of perjury even though that testimony may not have been necessary to the result and although that result could have been obtained even without the false testimony." *State v. Barkwell*, 600 S.W.2d 497, 500 (Mo. App. W.D. 1979).

As outlined in the Statement of Facts, Defendant testified falsely before the juvenile court during the protective-custody hearing. She denied the existence of a child named Christian or that she had birthed a son who was living with her at her residence. (State's Ex. 1, pp. 28–38). Other testimony

showed that she was living with a child whom she called Christian, that this child matched the description of the child others had seen her with, and that this child was her son. (State's Ex. 1, pp. 5–7, 15–19). A little over two weeks after she made these false statements, Defendant turned the child over to juvenile authorities and admitted to officials that the child was her son. (Tr. 148–50). During Defendant's sentencing hearing, Defendant's counsel expressly conceded that Defendant had testified falsely and had committed perjury during the protective-custody hearing. (Tr. 262).

Defendant argues that the State failed to prove that her false statement to the juvenile court about the existence of the child was a *material fact* under the perjury law. But the record suggests the opposite. The State adduced evidence showing that the purpose of the protective-custody hearing was to determine if there was a child in need of protection by the State, whether Defendant was the parent of this child, and the child's whereabouts. (Tr. 81, 84). During the motion-to-suppress hearing, Defendant's counsel conceded that there was "a basis for [the] protective custody hearing." (Tr. 18).

The evidence also showed that the State's attempts to locate the child had been unsuccessful, which necessitated the scheduling of a protective-custody hearing at which Defendant was summoned to appear and produce the child. (Tr. 23, 74–75). Since the purpose of the proceeding was to determine if

Defendant had a child, to obtain custody of the child, and to provide him with care and protection, Defendant's false statements certainly delayed, and could have potentially prevented, the child from receiving the care he potentially needed. (Tr. 81–84). In fact, after Defendant turned the child over to officials with the juvenile office, another protective-custody hearing had to be conducted. (Tr. 31). When imposing its sentence on Defendant, the trial court noted that Defendant's lie had prevented her child from receiving the help he needed:

> There's also been testimony today that the child had needs that could have been met with the full resources of the state, and so that was another issue in terms of the lie being told preventing the child from receiving help that he could have had.

(Tr. 265).

The record thus contained sufficient evidence that Defendant's false statements involved a "material" fact under the perjury statute.

2. Defendant did not assert a "retraction" defense at trial and her act of surrendering the child was not a retraction of her false statements.

Defendant next contends that by bringing the child to juvenile officials in a different county some two weeks after the protective-custody hearing, she

effectively retracted the false statement and that this provided her with a defense to the perjury charge. Missouri law allows a defendant to defend a perjury charge by proving that he or she retracted the false statement:

> It is a defense to a prosecution under subsection 1 of this section that the actor retracted the false statement in the course of the official proceeding in which it was made provided he did so before the falsity of the statement was exposed. 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.

Section 575.040.4, RSMo 2000. "The defendant shall have the burden of injecting the issue of retraction under subsection 4 of this section." Section 575.040.5, RSMo 2000.

There are several problems with this claim. First, nothing in the record suggests that Defendant ever injected the issue of retraction during trial.

Second, nothing in the record shows that Defendant ever retracted her false statement in the course of the juvenile proceeding in which it was made. The statute contemplates that a defendant must make a "statement" at a separate hearing, apparently under oath, expressly retracting the false

statement. The phrase "official proceeding" is defined as "any cause, matter, or proceeding where the laws of this state require that evidence considered therein be under oath or affirmation." Section 575.010(6), RSMo 2000. The word "retraction" has been defined as the "act of recanting; a statement in recantation." BLACK'S LAW DICTIONARY 1318 (7th ed. 1999). Defendant's act of surrendering custody of the child to juvenile authorities in a different county than the one in which the juvenile proceeding was pending plainly does not qualify as a *retraction* of her false statement. *See State v. Hawkins*, 620 N.W.2d 256 (Iowa 2000) (holding that the perjury defendant's act of dismissing his postconviction action did not constitute a "retraction" of false statements made during the postconviction case).

Third, the falsity of Defendant's statements were apparent when she arrived with her child at the meeting with juvenile officials in Boone County. She points to nothing in the record showing that she retracted her perjurious statements before their falsity was discovered.

The record contains sufficient evidence to support Defendant's perjury conviction.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 9,512 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2007 software; and that a copy of this brief was sent through the electronic filing system on August 18, 2014, to:

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