IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 84855
	)	
RONNIE GAINES,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
31st JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE HENRY W. WESTBROOKE, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement on Page 4 of Appellant's Substitute brief is incorporated herein by reference.

STATEMENT OF FACTS

The Statement of Facts on Pages 5 through 10 of Appellant's Substitute brief is incorporated herein by reference.

POINT RELIED ON

The trial court erred in overruling defense counsel's objections and abused its discretion in admitting evidence that on November 17, 1997, Gaines hit Tarwater with his fist and broke her nose, because that evidence was neither logically nor legally relevant and its admission violated Gaines' rights to due process of law and to be tried only for the crime with which he was charged, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, and 18(a) of the Missouri Constitution, in that Gaines denied that he hit Tarwater on November 17, 1997, and the result was a trial within a trial with the State attempting to prove that he had assaulted Tarwater on that earlier occasion and forcing Gaines to defend against a charge that had never been filed.

State v. Conley, 873 S.W.2d 233 (Mo. banc 1994);

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993);

State v. *Burns*, 978 S.W.2d 759 (Mo. banc 1998);

State v. Barriner, 34 S.W.3d 139 (Mo. banc 2000);

U.S. Const. Amends. V and XIV;

Mo. Const. Article I, Sections 10, 17 and 18(a);

Rule 30.20.

ARGUMENT

The trial court erred in overruling defense counsel's objections and abused its discretion in admitting evidence that on November 17, 1997, Gaines hit Tarwater with his fist and broke her nose, because that evidence was neither logically nor legally relevant and its admission violated Gaines' rights to due process of law and to be tried only for the crime with which he was charged, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, and 18(a) of the Missouri Constitution, in that Gaines denied that he hit Tarwater on November 17, 1997, and the result was a trial within a trial with the State attempting to prove that he had assaulted Tarwater on that earlier occasion and forcing Gaines to defend against a charge that had never been filed.

For the first time in this case, Respondent argues that Appellant failed to properly preserve the issue for appellate review. Resp. br. at 10. However, a review of the record demonstrates that Appellant did object at trial and included this claim of error in his motion for new trial (Tr. 287, L.F. 35).

Respondent argues that defense counsel should have objected during an exchange between the prosecuting attorney and the alleged victim (Tarwater) when it became apparent that Tarwater had begun testifying about the November incident. Resp. br. at 10. Tarwater was responding to the prosecutor's question, "I want to draw your attention more specifically now to December the 12th of

1997. Did you do something to act on those feelings about being depressed and upset with him for not being there and things?" The victim then began to relate an incident in which she and Appellant began to argue. The prosecutor asked Tarwater if she had done something with her daughter prior to the argument starting (Tr. 274). She replied, "[i]n November?" and the prosecuting attorney clarified that he was talking about December (Tr. 275). There was nothing to object to at that point. The prosecuting attorney was not attempting to elicit the evidence of other crimes, Tarwater had misunderstood the question.

But when the prosecuting attorney asked, "[o]kay, so we've been talking about the time that the defendant hit you on December the 12th of 1997. **Was that the only time he'd hit you?"**, the defense attorney immediately objected and asked to approach the bench (Tr. 287). Appellant objected that the prosecutor was attempting to introduce evidence of the November assault (Tr. 288). After the bench conference, the trial court overruled Appellant's objection and ruled that evidence of the November assault was admissible (Tr. 290). Appellant then included this claim of error in his motion for new trial (L.F. 35), thereby properly preserving it for review by this Court.

Respondent is correct in asserting that Appellant's counsel failed to object to the photographs of the victim's face showing the injuries she sustained in November. Resp. br. at 11. Nor did he object to the testimony of investigating officer Hosinger (Tr. 328). When Dr. Burke, the physician who treated Tarwater began to relate her medical history, Appellant objected, first on the basis of

hearsay, but then adding, "[y]our honor, what actually happened is not relevant to his treatment of her." That objection was overruled (Tr. 394).

Respondent did not argue lack of preservation in its original brief to the Southern District Court of Appeals, nor did that Court address this issue in its decision reversing Appellant's conviction. This indicates that everyone involved in the case knew what Appellant's claim of error was and that the trial court had ruled not only that Tarwater could testify to the November incident, but that evidence of that incident was admissible. In *State v. Taylor*, 929 S.W.2d 925 (Mo. App., S.D. 1996), the Court rejected the State's argument that the Appellant had not properly preserved the issue of whether he should be allowed to present evidence of his intoxication on the night of the offense, ruling that the court had sustained the State's motion in limine immediately before the witness' testimony and "[n]othing occurred after the ruling to indicate a basis for the court to change the ruling." *Id*. at 927. The same is true here. The trial court ruled that evidence concerning the alleged November assault was admissible. Appellant's failure to object to each witness was technically error, but there is nothing in the record to indicate that the trial court would have changed its ruling had those objections been made. This is evidenced by the trial court overruling Appellant's objection during the testimony of Dr. Burke, that the cause of Tarwater's injuries was irrelevant to her treatment (Tr. 394).

However, if this Court does find that Appellant has not properly preserved the issue as it pertains to the exhibits, or Officer Hosinger, then he respectfully

requests that the admission of that evidence be reviewed for plain error pursuant to Rule 30.20.

Respondent argues the evidence that, one month before the charged assault, Appellant struck Tarwater with his fist and broke her nose was "highly relevant to prove that hitting her in the face with his fist again was 'practically certain' to result in broken bones to the face." Resp. br. at 13. There are two problems with this argument. First, it requires the factfinder to believe that the November incident actually occurred, and second, evidence that a man hit a woman in the face with his fist hard enough to knock her to the floor (Tr. 278) would, in and of itself, "prove that defendant acted knowingly." There was no need for evidence of a prior assault.

Next the Respondent argues that evidence of the November incident was logically relevant to prove intent, motive, and animus against the victim, "because it involved the same victim as the charged assault." Resp. br. at 13. In support of this, Respondent relies on *State v. Bolden*, 494 S.W.2d 61 (Mo. 1973). Respondent asserts that *Bolden* created a "rule" that evidence of a prior assault is admissible if it involves the same victim as the charged assault. Resp. br. at 13-14. That is not the law in Missouri and it is not what *Bolden* held.

In *Bolden*, the defendant was charged with attempting to kill his paramour by shooting her. *Id*. at 63. A month earlier, the defendant had broken the victim's jaws and told her that if she had him arrested, he would kill her. *Id*. She called the police and an arrest warrant was issued. *Id*. Given those facts, and after

enunciating the general rule against admission of evidence of other crimes and the limited exceptions to that rule, the *Bolden* Court ruled that evidence of the earlier assault was both logically and legally relevant to prove defendant's motive and intent. *Id*. at 65. *Bolden* did not announce a new exception to the rule against admission of other crimes evidence.

Respondent is correct that there have been cases which allowed the admission of evidence of prior assaults against the victim of the charged assault. Resp. br. at 14. But in none of those cases was this evidence admitted without the weighing of logical and legal relevance and, hopefully, only after being subjected to the rigid scrutiny that this Court demands in *State v. Holbert* 416 S.W.2d 129, 132 (Mo. 1967); *State v. Conley*, 873 S.W.2d 233 (Mo. banc 1994); and *State v*. *Burns*, 978 S.W.2d 759, 761 (Mo. banc 1998).

Respondent argues that *State v. Conley, supra* is not relevant to this case because *Conley* "dealt with the introduction of uncharged acts against *other victims*, not of acts against the same victim." Resp. br. at 15 (italics in the original). Nothing in *Conley* limits its holding in that way. In *Conley*, this Court held that "in order for intent or the absence of mistake or accident to serve as the basis for admission of evidence of similar uncharged crimes, it is necessary that those be legitimate issues in the case." 873 S.W.2d at 237. That is the issue presented here. Appellant's intent to cause physical harm to Tarwater was established by the State's direct evidence of his having punched her in the face with his fist hard enough to knock her to the floor. Appellant did not claim that he

accidentally or mistakenly hit Tarwater. He did not argue self-defense, mental disease or defect, or that it was not his intention to cause serious physical injury. Appellant's defense was he was not in the house on December 12, 1997. As this Court found in *Conley*:

> [w]hen there is direct evidence that the defendant committed the illicit act, the proof of the act ordinarily gives rise to an inference of the necessary *mens rea*. No other evidence required to establish that element of the case unless the state has some reason to believe that the defendant will make intent or mistake or accident an issue in the case.

Id.

Respondent goes on to argue that *Conley* provides no relief in this case because "intent is always at issue in a case where the State must prove a mental state, as the State is required, as a matter of due process, to prove beyond a reasonable doubt each and every element of the charged offense." Resp. br. at 15. This argument was rejected by this Court in *Conley*. "If the state's argument is correct, in any case having a *mens rea* element, prior similar crimes may be admitted to establish that issue. But that is not the law." *Id*. at 237.

Respondent is asking this Court to do away with the requirement that trial judges strictly scrutinize whether the evidence of uncharged crimes is both logically and legally relevant in cases involving the same victim. There is no legal precedent for such an exception. As this Court has recognized in numerous cases, evidence of uncharged crimes is highly prejudicial and should only be admitted

when there is strict necessity for it. *See e.g*., *State v. Spray,* 174 Mo. 569, 74 S.W. 846 (Mo. 1903); *State v. Reese*, 364 Mo. 1221, 274 S.W.2d 304 (Mo. banc 1954); *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993), *State v. Conley*, 873 S.W.2d 233 (Mo. banc 1994) and *State v*. *Burns*, 978 S.W.2d 759 (Mo. banc 1998). Automatic admission of evidence of other crimes based on the identity of the victim is contrary to longstanding Missouri law. *Burns*, 978 S.W.2d at 761.

Respondent makes short shrift of the weighing of probative value against prejudicial effect, simply asserting without analysis that the probative value of the November incident outweighed the prejudicial impact of that evidence. Resp. br. at 16. As was argued in Appellant's Substitute Brief, the prejudicial impact of this evidence outweighed any probative value it might have had (and Appellant is not conceding that it had any probative value) based on the sheer volume of evidence of the November incident placed before the jury. There were two trials here, one for the charged December assault and the other for the uncharged November incident.

Interestingly, Respondent relies on *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000) in support of his argument that Appellant suffered no harm from the introduction of the evidence of the uncharged November incident. Resp. br. at 16. Respondent is correct when it states that *Barriner* stands for the proposition that "[t]o be entitled to reversal in a case of improper admission of evidence of uncharged bad acts, that admission must have resulted in outcome-determinative prejudice." Resp. br. at 16.

In *Barriner*, this Court noted that outcome-determinative prejudice "expresses a judicial conclusion that the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all of the evidence properly admitted, there is a reasonable probability that the jury would have reached a different conclusion but for the erroneously admitted evidence." 34 S.W.3d at 150, *quoting State v. Roberts*, 948 S.W.2d 577 (Mo. banc 1997), *cert. denied* 522 U.S. 1056 (1998). This Court then went on to set out factors to be considered when deciding whether the erroneous admission of uncharged crimes was outcome-determinative. One such factor is the similarity of the charged offense to the improperly admitted evidence. As this Court noted, "[t]he jury is more likely to attach significant probative value to the improperly admitted evidence if it related directly to the charged offenses." 34 S.W.3d at 150. Here, the two acts were identical, the State alleged that in both the charged and uncharged offenses, Appellant struck Tarwater in the face with his fist.

Next this Court looked at the "amount of evidence that was erroneously admitted and the extent to which the evidence was referred during the trial." *Id*. at 151. As can be seen from the chart in Appellant's Substitute brief at page 13, the State presented as much, if not more, evidence of the uncharged incident as it did the charged offense. The same conclusion this Court reached in *Barriner* can be reached here, "[t]he sheer volume of erroneously admitted evidence weighs in favor of a finding that the erroneous admission of evidence in this case is reversible, outcome-determinative prejudice." *Id.*

This Court then considered whether the erroneously admitted evidence was highlighted throughout the trial. *Id*. The prosecuting attorney argued this evidence extensively in his closing (Tr. 466, 467, 468, 471, 472, 482, 483, 484, 487). This factor too weighs in favor of a finding of outcome-determinative prejudice.

As in *Barriner*, the prosecutor's elicitation of the evidence that was erroneously admitted was not inadvertent. He argued vigorously to the trial court in response to Appellant's objection that the evidence was relevant, both logically and legally.

Finally, this Court in *Barriner* rejected the State's argument that because evidence of guilt was overwhelming, any error in the admission of evidence of other crimes was harmless. *Id*. at 151. This Court held that another way of explaining outcome-determinative prejudice is to see 'whether the evidence had an effect on the jury's deliberations to the point that it contributed to the result reached." *Id*. In this case, the State's evidence of guilt depended entirely on the credibility of Terri Rae Tarwater. But her credibility was undermined by her own testimony that she had told police officers and doctors various stories about how she had received her injuries.

> But "overwhelming evidence of guilt" means at a minimum that there Is sufficient evidence to support a conviction without consideration of the inadmissible evidence. . .there must be no reasonable doubt that appellant committed the crime, and the prejudice that occurred by the use of the

inadmissible [evidence] must be insubstantial.

State v. Dexter, 954 S.W.2d 332, 342 (Mo. banc 1997). The State's evidence in this case was far from overwhelming. It cannot be concluded with any degree of confidence that the extensive presentation of evidence of the November incident had no effect on the jury's deliberations or that the prejudice caused by its admission was insubstantial.

Looking at the record in this case, it is clear that the trial court did not engage in the kind of strict scrutiny required before evidence of uncharged crimes should be admitted. The result was an abuse of discretion and the denial of a fair trial for Ronnie Gaines. The Southern District Court's opinion correctly reflects that kind of rigid scrutiny as well as the recognition that this sort of highly prejudicial evidence should be admitted only when strictly necessary. It was not strictly necessary in this case and for that reason, Appellant's conviction should be reversed and his cause remanded for a new trial.

CONCLUSION

For the reasons stated in Appellant's Substitute Brief and in this Substitute Reply Brief, Appellant Ronnie Gaines respectfully requests that this Court find that the trial court committed reversible error when it allowed the State to put Appellant on trial for a crime he was never charged with committing. The trial court's action amounted to an abuse of discretion, and therefore Mr. Gaines asks that this Court reverse his conviction, and remand for a new, fair trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Nancy A. McKerrow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,092 words, which does not exceed the 7,750 words allowed for a reply briefs.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in January, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ___ day of January, 2003, to Richard A. Starnes, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

_____
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