IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	SC96770
	)	
MAVERICK SWAN HOLMSLEY,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI,
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE KRISTINE A. KERR, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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REPLY ARGUMENT (POINT I)

The trial court found Juror 12 guilty of misconduct because she attempted to "flee the deliberative process" and made "contact with the Court's bailiff," causing improper communication between the bailiff and the juror. L.F. 241.

Because of Juror 12's misconduct, the jury was potentially exposed to prejudicial outside influences that may have influenced deliberation, creating a presumption of prejudice.[1] Both parties agree the case is governed by *State v. Babb*, 680 S.W.2d 150, 152 (Mo. banc 1984), a case where the jury was potentially exposed to spectators and witnesses when bad weather forced everyone into the courthouse basement. This Court held that when separation or misconduct happens after deliberation has started, there is a rebuttable presumption of prejudice that "in some cases" may be overcome with evidence, and "is subject to review for an abuse of discretion." *Id.* The problem creates a "rebuttable legal presumption that [the communications]

[1] Section 547.020(2) provides a new trial may be granted when "the jury has been separated without leave of the court, after retiring to deliberate upon their verdict, or has been guilty of any misconduct tending to prevent a fair and due consideration of the case."

were prejudicial to the moving party, [and] this presumption may in some cases be overcome by evidence, and . . . where competent evidence is offered it is the duty of the trial court to hear and consider it, and . . . when it does so, and decides the motion thereon, its decision is discretionary, and is reviewable . . . [on appeal] for abuse of discretion only." *Babb*, 680 S.W.2d at 152.[2]

The trial court abused its discretion in finding the State met that burden by simply presenting the guilty juror's testimony that she had been unaffected by the incident. The issue here is simple: the State had a burden to demonstrate with evidence the verdict rendered by *the jury* was unaffected by juror misconduct. In presenting only the offending juror's testimony on this question, the State failed to rebut the presumption that Holmsley was prejudiced.

[2] *Babb* overruled *State v. Dodson*, 92 S.W. 614 (Mo. 1936), on the question of whether misconduct or separation after a jury *requires* a new trial, or whether that decision is subject to the discretion of the trial court, reviewable on appeal for an abuse of discretion.

The State's response first seems to suggest Holmsley is alleging misconduct by the bailiff, which it argues would not constitute misconduct turning the burden of proof to the State. Resp. Br. 17. The State points out that the bailiff was put in a difficult position where she was forced to interact with the offending juror: "[t]he bailiff communicated with the juror only to keep her from exiting the room . . . [this] communication, which was necessary to prevent the separation of the jury, should not be considered error or misconduct, and prejudice should not be presumed." *Id.* But the trial court did not find misconduct by the bailiff. The court found Juror 12 guilty of misconduct by attempting to leave the room, causing the confrontational scene with the bailiff.

The State next argues that even if prejudice is presumed, "the bailiff, in telling Juror 12 not to leave the room, did nothing to influence *the jury* in its deliberations." Resp. Br. 17 (emphasis added). This argument does not help the State because it implicitly acknowledges that misconduct's effect on the jury as a whole is the right inquiry. The State further argues the altercation with the bailiff was a secret of the jury room that cannot be impeached: "The fact [the juror] may have caused a scene in the jury room is a secret of the jury room that should not be explored by the court." Resp.

Br. 18. This argument misses the mark and also directly contradicts the State's other argument that the problem was purely between the bailiff and the offending juror, that could never have affected the eleven jurors who witnessed it. Resp. Br. 17. Either the scene in the doorway of the jury room was a "secret of the jury room," or trivial incident involving only the offending juror and the bailiff; it cannot be both. In any event, the State has the burden to present evidence that Holmsley was not prejudiced, which may take the form of testimony from non-offending jurors in support of the verdict. "The use of juror affidavits to support their verdict and negate a claim of prejudice arising from jury separation or misconduct has long been recognized in Missouri." *State v. Hayes*, 637 S.W.2d 33, 38 (Mo. App. 1982).

The State argues Holmsley should not receive a new trial under the holding in *State v. Kirk*, 636 S.W.2d 952 (Mo. 1982); Resp. Br. 24. In *Kirk*, the defendant argued the bailiff made improper contact with the jury when he informed the jurors they could order dinner, unless they believed they might reach a verdict in less than an hour, because it would take about that amount of time to receive food. *Id.* at 955. The jury responded that they thought they would reach a verdict in less than an hour, so the bailiff did not

order dinner. *Id.* at 956. This Court found that this brief communication was not coercive, and had no discernable on the jury's deliberations or verdict. *Id.* The State argues the bailiff contact in *Kirk* is comparable to the facts of this case. Resp. Br. 24.

The facts of this case are more complicated and problematic. The State argues "nothing substantive was said," similar to *Kirk*, but the record does not reflect that. Resp. Br. 24. Juror 12 twice attempted to flee deliberations, made improper contact with the court's bailiff while leaving the room, and caused a scuffle with the bailiff that led to the bailiff warning the juror she would go to jail. Bulus, the bailiff, explained, "The door opened, and the tall Juror Number 12 said she had to leave, she couldn't do it no more, she was being forced into something she didn't believe in." Tr. 436. Bulus said Juror 12 was "crying, very upset," that the juror "kept walking past me," and that she "kept gently guiding her back [into the jury room] with a little hug." Tr. 436. Bulus said she locked the jury room and reported the incident to the judge. Tr. 437. When she returned to her post, Juror 12 later came "back out again," and Bulus "told her that she needed to remain with her group, that, you know, she needed to comply, and work as a team." Tr. 437-438. Bulus clarified that in her initial encounter with Juror

12, Bulus said, "No, that you can't [leave], you must remain, you have to stay and work as a team." Tr. 440.

Juror 12 admitted that she tried to leave the room during deliberations. Tr. (8/31/2016) 59. She testified that Bulus stood at the door and told her she "would go to jail" if she came out of the room. *Id.* at 61. Juror 12 testified she never left the jury room. *Id.* at 66. Instead, she "went back into the room, I did not want to go to jail." *Id.* at 68. She described Bulus as having both her arms raised on the door frame. *Id.* at 68. The juror said, "I would have had to run over her to get out." *Id.* She testified that she did not know whether any of the other jurors observed the interaction between her and the bailiff, but that she was standing in the door with the bailiff blocking the way. *Id.* at 68, 70. She testified that, if the bailiff had not threatened her with jail, she would have forced her way out of the jury room. *Id.* at 73.

This incident is different and significantly more serious than the few-sentence interaction in *Kirk*. The incident in this case was dramatic, and likely upsetting and coercive. Without testimony from the other jurors, it is impossible to speculate how this incident affected their verdict. Some of the jurors may have felt unsettled, at minimum, or even fearful, or perhaps coerced to return a verdict. The State was free, as it has in many other cases,

to present testimony or affidavits from jurors stating they were not influenced by fear, coercion, or any "disturbing influence . . . brought to bear upon them," and that they were "not interfered or tampered with." *State v. Underwood*, 57 Mo. 40, 52 (1874). The State failed to do so.

The remaining cases cited by the State demonstrate uniformly that when a juror is guilty of misconduct, the State will present testimony or affidavits from non-offending jurors in support of the verdict to rebut the presumption of prejudice. The State points to *Hayes*, 637 S.W.2d at 36, for example, where an hour after the jury began its deliberation the bailiff discovered the court had inadvertently forgot to discharge the alternate juror. Resp. Br. 23. To rebut the presumption of prejudice, the State presented the testimony of the jury foreman, who testified the alternate made one comment that he could not remember. *Id.* at 38. The State, further, presented affidavits of all twelve jurors as well as that of the alternate juror. *Id.* "In effect, each affidavit stated that the alternate juror did not participate in or influence the jury deliberations." *Id.*

Further unhelpful to the State are *Middleton v. Kansas City Public Service Co.*, 152 S.W.2d 154 (Mo. 1941); *Consol Sch. Dis. No. 3 of Grain Valley v. W. Mo. Power Co.*, 46 S.W.2d 194 (Mo. 1931); and *State v.*

Herndon, 224 S.W.3d 97 (Mo. App. 2007). In *Middleton*, a juror gathered outside evidence by measuring the height of the fender of a car that collided with a streetcar. 152 S.W.2d at 156-157. After an allegation of juror misconduct, the trial court considered the offending juror's testimony that the evidence did not affect his verdict, as well as affidavits from nine jurors stating they did not discuss the outside evidence during deliberations. *Id.* at 161. In *Grain Valley*, a juror researched what would happen to an electrical transformed when it exploded. 46 S.W.2d at 180. The court found the information gathered "was consistent with the State's own evidence," the offending juror testified it did not affect his verdict, and the State presented an affidavit from a non-offending juror stating that the offending juror never spoke of the issue during deliberations. *Id.* at 179.

In *Herndon*, certain jurors were allowed to use cell phones to make business and personal calls, such as to inform their families they would be home late. 224 S.W.3d at 102. Significantly, one juror spoke to the alternate juror on the phone, and the alternate expressed a view that the defendant was innocent. *Id.* While this misconduct was as potentially serious as the issue in this case, unlike here, the State in *Herndon* responded

by presenting testimony from all twelve jurors, as well as both alternates, in support of the verdict. *Id.* at 103.

The State was at liberty to present testimony from jurors in support of their verdict to attest that "no disturbing influence was brought to bear upon them, and that they were not interfered or tampered with." *Underwood*, 57 Mo. at 52. The State failed to do so, and fell short of rebutting the presumption that Maverick was prejudiced.

On Point I, this Court must remand for a new trial.

REPLY ARGUMENT (POINT II)

Point II concerns trial court error in overruling Holmsley's objection to the prosecutor's improper statement in closing argument that the jury did not see Exhibits 7 and 7A "because the defense objected" and "didn't want you to see them." Tr. 404.

The State first urges this Court to review the point only for plain error, arguing an untimely objection. Resp. Br. 49. But Holmsley's objection was timely. By way of illustration, about 17 lines of trial transcript separate the remarks, and the objection. Tr. 404-405. The objection was timely enough for the court to rule upon it and timely cure any prejudice. The State's primary authority for the question being unpreserved for appellate review is *State v. Hall*, 319 S.W.3d 519 (Mo. App. 2010), but in *Hall*, counsel did not object, did not request any curative measures, and the trial court never made a ruling on the issue. *Id.* at 523. Here, Holmsley timely objected, requested a curative instruction (Tr. 405) and the court overruled the objection. Tr. 406. The standard of review is for an abuse of discretion. *State v. Price*, 541 S.W.2d 777, 778 (Mo. App. 1976).

Further, the prosecutor's improper statements were not permissible retaliation as the State . The State was the first to bring up the issue of the

letters: in its initial closing argument, the State argued that "Maverick wrote apology letters" as evidence that "Maverick did this." Tr. 375. Holmsley's lawyer argued in his own closing argument, "The fact of the matter is we never saw apology letters. You know, the prosecution promised you these apology letters in opening statement. We never saw any apology letters written by [Holmsley]." Tr. 397. Then the State, in final closing argument, argued, "the defense objected. They didn't want you to see them." Tr. 404.

Neither the alleged "apology letters," nor the fact that Holmsley wrote the letters, was in evidence. *See State v. Nelson*, 957 S.W.2d 327, 329 (Mo. App. 1997) (where "neither the statement or the fact the defendant made the statement" was in evidence, yet the prosecutor argued at closing the statement "wasn't coming in"). The dean of students testified she did not receive the letters from Holmsley. Tr. 218-219. The principal testified "he was aware of apology letters written by" Holmsley, but had no firsthand knowledge and could not authenticate them. Tr. 257. The trial court correctly excluded the letters because the State presented no evidence that Holmsley wrote them. The State indeed promised evidence in opening statement, failed to deliver, argued the evidence in closing argument anyway, and Holmsley pointed this out to the jury.

The jury did not see the evidence because it was inadmissible. As concluded in *Nelson*, the "trial court's permitting the prosecutor to make such as argument, over defendant's objection, constituted reversible error." 957 S.W.2d at 330.

This Court should reverse for a new trial on Point II.

REPLY ARGUMENT (POINT III)

The State improperly argued in closing argument that the alternative mental state involving "sexual gratification" that was not before the jury was "an option" for the jury in the case. Tr. 407-408. Now the State on appeal attempts to minimize this serious issue.

While the prosecutor was chastised at sidebar and the objection sustained, the trial court refused to give a curative instruction instructing the jury to disregard this comment because the court did not want to "beat up" the prosecutor in front of the jury. Tr. 408. Holmsley's right to a fair trial, however, must outweigh the trial court's desire not to correct the prosecutor.

To minimize the issue, the State argues "the prosecutor did not commit misconduct" because she merely "stated the definition of deviate sexual intercourse, including the part about sexual gratification that was not included in the jury instructions." Resp. Br. 34. But "the part about sexual gratification" was never before the jury, because the State had never before alleged the charged acts were motivated by sexual gratification.

The State further argues "[it] was a reasonable inference from the evidence presented at trial that the boys committed the acts of sodomy both for the purpose of terrorizing the victims and for sexual gratification." Resp.

Br. 35. The State argues the prosecutor's statements "served to contradict [Holmsley's] arguments during closing argument that the act was not a sex act and was instead a prank." Resp. Br. 35. But again, the State charged the acts were done for the purpose of terrorizing, not sexual gratification. If there had been evidence of a sexual gratification *mens rea*, surely the State would have requested that the jury be instructed on that issue.

The State further argues that the improper comment was made "only once" and if the argument was a "misstatement of the law" it was "barely mentioned." Resp Br. 36, 37.

The prosecutor's argument was far out of line; the fact it was said once does not address the real issue of how inflammatory it was. The trial court was obligated to give a curative instruction. The State argues a trial court *may* give a curative instruction under these circumstances, but is not required to, citing *State v. Johnson*, 22 S.W.3d 183 (Mo. banc 2000). In *Johnson*, the defense objected to an improper closing argument and moved for a mistrial, which the court denied. *Id.* at 190. But (unlike here) the defense requested, and the court gave, a curative instruction admonishing the jury to disregard. *Id.* Johnson complained on appeal that a mistrial was required. While *Johnson* states "a trial court may" address an improper

statement in closing argument by giving a curative instruction, it was in the context of discussing the trial court's discretion to go further and declare a mistrial.

The law is that where a trial court sustains an objection but fails, after request, to use "its authority to minimize any prejudice by ordering the comments stricken or issuing cautionary instructions," the court fails at its "duty to ensure that every defendant receives a fair trial, which requires the exercise of its discretion to control obvious prosecutorial misconduct." *State v. Roberts*, 838 S.W.2d 126, 131 (Mo. App. 1992). This principle is so important that courts are expected to neutralize "obvious prosecutorial misconduct *sua sponte*" in some cases. *Id.*

The error was prejudicial. Maverick was charged with aiding or encouraging his classmates to engage in the charged behavior. L.F. 15. In addition to his limited role in the incident and lessened culpability, there was a serious question for the jury regarding whether his intent was to "terrorize" his classmates. Maverick verbally apologized to the students involved, and was distraught when he learned of the students' distress. Tr. 291, 321. Further, Maverick, along with other students, was designated to be in charge of younger students, with little to no supervision. Tr. 98, 123, 127. The

system in place at football camp appeared haphazard and disorganized as far as what staff members were charged with watching over the high school students who lived in the dorm. Tr. 123, 124, 186, 229, 294. There appeared to be a culture of "pranking" in the dorms that was tolerated or ignored by the adults in charge. Tr. 124, 126. The evidence that Maverick should be convicted of a serious sex crime, subject to a lifetime designation as a sex offender, was weak indeed. The State's aggressive maneuver in closing argument crossed an important line, and deprived Maverick of a fair trial.

On this Point, this Court should grant a new trial.

CONCLUSION

For the reasons stated in Points I, II and III, Appellant respectfully requests a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) I certify that on March 12, 2018, a true and correct copy of the foregoing brief was served via the efiling system to the Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65101. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 14 point font, and does not exceed 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains **3610** words.

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