No. SC97595

In the Supreme Court of Missouri

IN THE INTEREST OF D.C.M.,

Appellant,

v.

JUVENILE OFFICE,

Respondent.

Appeal from Circuit Court of Pemiscot County, Missouri
Thirty-Fourth Judicial Circuit, Pemiscot County No. 18PE-JU00022
The Honorable W. Keith Currie, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Chris, a juvenile, appeals a delinquency judgment that he made a terrorist threat in the second degree. While in the school cafeteria, Chris threatened to blow up the school, scaring nearby students and instilling a fear that caused attendance to drop district-wide the next day.

Chris makes ineffective assistance of counsel ("IAC") claims, arguing that he was prejudiced (1) by the absence of a witness, and (2) by the admission of certain trial testimony. Appellant's argument fails, however, because he cannot raise a claim of ineffective assistance of counsel on direct appeal. But even if he could, he is not entitled to relief because his counsel was effective, regardless of whether this Court evaluates juvenile hearing IAC claims under the *Strickland* or "meaningful hearing" standard. The missing witness issue fails, in part, because the record is silent on how the missing witness might have helped Chris's case. The claim of prejudice from irrelevant testimony fails because such concerns are minimal in a bench hearing, and further, such statements were relevant, admissible, non-objectionable, and non-prejudicial.

Chris also argues that the Juvenile Court abused its discretion by denying his request for a recess or continuance to have three witnesses subpoenaed to testify. Whether to grant a continuance is in the sound discretion of the trial court, and there can be no abuse of discretion where the

record on appeal is silent as to what the testimony would have been, as is the case here.

Lastly, Appellant attacks the sufficiency of the evidence to sustain his adjudication, specifically claiming insufficient evidence that (1) he knowingly made a threat, or (2) that he recklessly disregarded the risk of causing the evacuation, quarantine, or closure of his school. But Chris made purposeful statements that he wanted to blow up the building, and nearly every 16-year-old knows that, in the shadow of such a threat, there is a substantial risk that such a statement could cause the evacuation of the school.

STATEMENT OF FACTS

D.C.M. ("Chris")[1], a juvenile, appeals from a § 211.031.1(3) juvenile-delinquency judgment that he made a terrorist threat in the second degree, a class E felony under § 574.120 if committed by an adult. An adjudication hearing was held before the Honorable W. Keith Currie in the Thirty-Fourth Judicial Circuit on February 28, 2018. Tr. 1, 5. Chris was committed indefinitely to the legal and physical custody of the Division of Youth Services. He appealed his commitment to the Missouri Court of Appeals, Southern District, which affirmed. *D.C.M. v. Pemiscot County Juvenile Office*, 2018 WL 5919259, at *5 (Mo. App. S.D. Nov. 13, 2018).

Testimony at Juvenile's § 211.031.1(3) Hearing

Chris, age 16, had attended Hayti High School for just five days when he was arrested for threatening to blow up the school. Tr. 52. Chris transferred from a different school, where he was suspended for threatening a teacher and a fellow student. Tr. 52-53, 61. In his few days at Hayti High, he expressed his view that there were too many black students and used the "N word" repeatedly, drawing warnings from high school staff against using racial slurs. Tr. 24, 40, 51-52.

[1] To preserve confidentiality, minors throughout this brief will be referred to by their first name only.

On the day of his arrest, Chris alarmed at least two students by talking about a recent Florida school shooting on the bus. Tr. 10, 21. According to one witness, Chris wondered aloud, "I wonder how it feels to shoot somebody." Tr. 10. Fellow students urged him to talk about something else, but he didn't, instead claiming that his father owned guns similar to the ones used in the Florida shooting. Tr. 10. He continued to loudly talk about the incident in an aggressive manner in the hallways at school that same day. Tr. 21-22.

That day, in the cafeteria at lunch, Chris said, loud enough for students at the next table to hear, "I feel like blowing the school up." Tr. 30. He then said he might blow it up tomorrow because there were "too many black people" there. Tr. 39-40. The comment was overheard by witnesses. Tr. 30, 34, 39.

Tamara was in the cafeteria on the day of the incident, sitting near Chris. Tr. 30. She heard Chris say, "I feel like blowing the school up," or "I feel like blowing this school up." Tr. 30, 34.

Zachary was also in the cafeteria on the day of the incident and was sitting near Chris in the cafeteria. Tr. 39. Zachary hears Chris say he, "…wanted to see how it feel like to blow up the school…" Tr. 39. Zachary also heard Chris say he "…might do it tomorrow…He said he's going to do it tomorrow." Tr. 39. Zachary was scared when Chris made the statement, and Tamara looked scared when she heard it. Tr. 40, 42.

After hearing Chris' comments, Tamara left the cafeteria and alerted the high school principal, Melanie Tipton. Tr. 30. The principal then contacted the local authorities and required Chris to remain in a teacher's classroom. Tr. 55. The Principal decided against locking down the school or evacuating the school because (a) they were able to secure Chris, and (b) the threat that was made was that Chris was going to do it tomorrow. Tr. 57-58. On the stand at the hearing, the Principal said it was a possibility that the school would have been evacuated or locked down if they had not been able to isolate Chris. Tr. 57-58.

Chris was transported to the Pemiscot County Juvenile Office to be interviewed. Chris, his mother, a police officer, and the juvenile officer were present during the interview. Tr. 45-48. The police officer conducted the interview wherein Chris denied making any threatening statements and said that he was only joking with some people in the cafeteria. Tr. 46. Chris' mother became defensive during the interview and expressed her wish that her son have a lawyer present. Tr. 48. The interview was terminated and Chris was taken into custody and placed in juvenile detention.

Attendance at all three schools in the district dropped dramatically the day after the incident as a result of Chris's threat. Tr. 51-52, 56. Parents were reluctant to send their kids to school because they feared for their children's lives, and they were calling in to see if "their children were going to be safe."

Tr. 56. On the day of the incident, attendance at the high school was nearly 92 or 93 percent. Tr. 51, 56. The very next day attendance in the high school plummeted to 77 percent. Tr. 52. Attendance in the middle and elementary school fell 11-12 percent as well. Tr. 51-52.

At the adjudication hearing, Chris denied that Zachary was at the same table as him. Tr. 69. He said he didn't remember seeing Tamara, but that he "would not doubt that she would have been sitting there." Tr. 70. Chris further testified that both Tamara and Zachary were lying, stating that he did not recall making any statement about "blowing anything up." Tr. 71, 75-78. Chris said, "Everyone who says that I said that pretty much is lying because I know I did not say it." Tr. 78. On questioning from his counsel, he denied making racial comments, but he added that "[i]f I didn't like black people, I wouldn't have gone to Hayti School." Tr. 72. He denied ever using the "N" word. Tr. 75. Chris was asked if he was the only one telling the truth, and he responded, "Yes." Tr. 78.

The Defense's Request for a Continuance

One of Chris's fellow students, Jonathan, was also in the cafeteria on the day of the incident. Tr. 79. Jonathan did not testify at Chris' adjudication hearing. After Chris stepped down, his counsel requested a continuance to subpoena Jonathan. Tr. 79. The continuance was denied. Tr. 79. Jonathan's account of the events was in the police report generated after this incident. Tr.

79. The existence of the police report was briefly mentioned on the record, but it was not discussed in detail.[2] Tr. 79. Chris's counsel made no offer of proof as to what Jonathan's testimony might be. According to the police report, "Jonathan stated that he did not recall [Chris] making any threats or statements but that he didn't doubt it. [Jonathan] stated that [Chris] has made racial comments towards other students but that he had not heard [Chris] make any statements." Police Report Pg. 3.

The Findings of the Juvenile Proceedings

Based on the evidence presented at Chris' adjudication hearing, the Court weighed the credibility of the witnesses and found beyond a reasonable doubt that the allegations of the petition were true. Tr. 86. The Court then proceeded to the disposition phase, and Chris was committed to the legal and physical custody of the Division of Youth Services. Tr. 99.

[2] Appellants have included the police report in the supplemental legal file. However, as the Southern District observed in the Court below, there was an appellate tender of the document, and it is neither self-proving, nor was it received as a trial exhibit. *D.C.M. v. Pemiscot County Juvenile Office*, 2018 WL 5919259, at *3 n.10 (Mo. App. S.D. Nov. 13, 2018). Respondent objects to the use of such a document on appeal, but this brief assumes, arguendo, that it may be considered.

ARGUMENT

I. Appellant cannot raise a claim of ineffective assistance of counsel on direct appeal, but even if he could, he is not entitled to relief because his counsel was effective. (Responding to Points Relied On I and III.)

In his first and third points on appeal, Appellant argues that he received ineffective assistance of counsel ("IAC"). This case raises two issues of first impression before this court: (1) the proper avenue for juveniles raising IAC claims following detention proceedings, and (2) whether to apply the *Strickland* or "meaningful hearing" standard in determining whether counsel was effective. Ultimately, however, this case does not hinge on these issues, because (1) such a claim is not cognizable on direct appeal, nor should it be; and (2) even if it were cognizable, Appellant's counsel was not ineffective, regardless of whether the *Strickland* standard or the "meaningful hearing" standard is applied. For these reasons, the Juvenile Court's judgment should be affirmed.

Appellant spills considerable ink arguing that juveniles have the right to effective assistance of counsel, but this is neither in doubt nor contested. Under Missouri law, a juvenile is "entitled to be represented by counsel in all proceedings." Rule 115.01. In juvenile detention proceedings under § 211.031, "the court shall appoint counsel for the juvenile when necessary to assure a full and fair hearing." Rule 115.02. Missouri's Rules are based on constitutional principles. Juvenile proceedings are not strictly criminal in nature, so the

Sixth Amendment does not apply. *State v. Andrews*, 329 S.W.3d 369, 374 (Mo. banc 2010). Instead, a juvenile's right to counsel is a matter of due process. *Id.*; *In re Gault,* 387 U.S. 1, 41 (1967) ("We conclude that [the Constitution] requires that in respect of proceedings to determine delinquency . . . [if a child and his parents cannot afford counsel] that counsel will be appointed to represent the child.").

This Court recently stated that this due process right has an effectiveness element. "The "due process right to counsel . . . would be hollow were there no accompanying requirement counsel be effective." *Grado v. State*, 559 S.W.3d 888, 897 (Mo. banc 2018). In short, "[t]here is no question that this child had a right to effective counsel" in proceedings such as these. *In Interest of R.G.*, 495 S.W.2d 399, 403 (Mo. 1973).

The salient question here is how to best adjudicate such a right. Neither this State's statutes, nor this Court's Rules, nor this Court's cases specify the avenue for juveniles to raise a claim for ineffective assistance of counsel. Given that juveniles have a constitutional right to counsel, Missouri law clearly should provide an avenue for challenging representation that falls below a constitutional standard. *See Marbury v. Madison*, 5 U.S. 137, 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

The preferred outcome would be for the legislature to adopt a statutory procedure for consideration of such claims. Should it not do so, this Court will need to identify the proper procedure for consideration of IAC claims in the future, and there is some merit in Appellant's suggestion that a rule be drafted. *See* Appellant's Substitute Brief at 29. But that precise issue need not be decided here. IAC claims are not cognizable on direct appeal, nor should they be. But even if they are, Appellant's counsel was not ineffective, regardless of whether the *Strickland* standard or the "meaningful hearing" standard is applied.

A. **Claims of ineffective assistance of counsel reviewed under the Sixth Amendment are not cognizable on direct appeal, and direct appeal is not the best avenue for bringing such claims.**

Sixth Amendment IAC claims are generally not cognizable on direct appeal, and nothing permits them in this instance. Counsel can find neither (1) a provision of state statute nor (2) rules adopted or cases decided by this Court that authorize direct appellate review of claims in a juvenile delinquency matter.

This Court may consider establishing such a precedent here, but direct appeal is an ill-suited path for bringing such claims for at least two reasons. First, trial counsel often handles the appeal, and obvious problems are presented by expecting trial counsel to raise and argue his or her own ineffectiveness. *See Grado v. State*, 559 S.W.3d 888, 897 n.8 (Mo. banc 2018)

(noting that appellants are "often represented by the same counsel who represented him or her at trial and, therefore, it is not conducive to raising claims of ineffectiveness either in a post-trial motion or on appeal."). Secondly, the grounds upon which the IAC claim rests are generally not apparent from the record, so courts often require testimony from trial counsel regarding trial strategy. *Id.* at 897 n.9 ("[T]here might be some need for a hearing on the ineffective assistance of counsel claims when factual issues arise outside the record."). This Court has, on occasion, permitted IAC claims on direct appeal in different contexts where claims of ineffective assistance involve counsel's actions at trial. *See, e.g.*, *id.* at 897 (Mo. banc 2018) (permitting direct review of IAC claims in sexually violent predator cases). But this is a stopgap measure, tailored to the individual cases, and does not address the broader issue of how juveniles can litigate their rights.

One important exception, however, is Missouri's parental-rights cases. *In Interest of J.C., Jr.*, 781 S.W.2d 226, 228-29 (Mo. App. W.D. 1989). Because the right to counsel in parental-rights cases is grounded in due process, not in the Sixth Amendment, Missouri courts apply a different substantive standard. *Id.* Those claims—like most due process claims reviewed under *Mathews v. Eldridge*, 424 U.S. 319 (1976)—are raised on direct appeal and based on a review of the record. *See Grado*, 559 S.W.3d at 898 (noting that the "meaningful hearing" standard is "based on the record on appeal").

This Court has recently encountered issues similar to these in two companion sexually violent-predator cases. *See Grado v. State*, 559 S.W.3d 888, 897 (Mo. banc 2018); *Matter of Care and Treatment of Braddy*, 559 S.W.3d 905, 907 (Mo. banc 2018). *Grado* is more analogous to this case, and there this Court considered (1) the proper avenue for raising claims of ineffective assistance of counsel, and (2) whether to apply the "meaningful hearing" or *Strickland* standard in deciding such a claim. *Id.* at 897-99. Ultimately, this Court determined that it need not address these questions. Noting that "all of Mr. Grado's claims of ineffective assistance involve counsel's actions at trial, and are evident on the record," this Court allowed the direct appeal and made determinations "through review of the appellate record." *Id.* at 897-98. On the question of which standard to apply, this Court said that "this is an issue that must be left for another day, for Mr. Grado would not be entitled to relief" under either standard. *Id.* at 898.[3]

Grado also briefly addressed alternatives to direct appeal. The Court said a "post-appeal procedure would allow for appointment of new counsel and consideration of ineffective assistance of counsel at both the trial and appellate level." *Id.* at 897 n.8. The weakness there, the court observed, is that a "post-

[3] Judge Draper, joined by Judge Breckenridge, concurred, stating that they would have held that Grado's claims "should be reviewed under the standard set forth" in *Strickland*. *Id.* at 903.

appeal proceeding would need to be adopted by either statute or rule." *Id.* A habeas procedure would be similar, but the Court noted that "there is no right to counsel in a habeas proceeding." *Id.* The Court found no benefit to appointment of a special master, stating that it would "fail to solve all difficulties." *Id.*

As the Attorney General's Office urged in *Grado*, this Court should hold that claims of ineffective assistance of counsel reviewed under *Strickland*'s standard are not cognizable on direct appeal. For the reasons stated above, direct appeal is a suboptimal path for providing a legal remedy, and no statute, rule, or precedent provides that it is allowable in juvenile adjudications such as this.

B. Regardless of whether the *Strickland* or "meaningful hearing" standard is applied, Appellant's counsel was not ineffective.

If this Court does hold that juveniles may be entitled to raise an IAC claim on direct appeal, this Court may need to decide which standard should be applied in determining the issue. Missouri has two predominant standards for evaluating IAC claims, and both will be discussed below, but regardless of which standard is applied, Appellant's counsel here was not ineffective. Appellant and the Amicus party supporting the juvenile advocate for a youth-specific standard, but that proposition is not supported by any authority in Missouri law.

In adult criminal proceedings, Missouri follows the so-called *Strickland* standard, which was set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this standard, a defendant must show by a preponderance of the evidence: "(1) his or her counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation, and (2) he or she was prejudiced by that failure." *Mallow v. State*, 439 S.W.3d 764, 768-69 (Mo. banc 2014). A defendant must "overcome a strong presumption that counsel's conduct was reasonable and effective to meet the first prong of the *Strickland* test," and that involves pointing to "'specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of professional competent assistance.'" *Zink v. State*, 278 S.W.3d 170, 176 (Mo. banc 2009), quoting *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006). "In order to prove the prejudice prong of *Strickland*, the question is whether 'there is a reasonably probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grado v. State*, 559 S.W.3d 888, 897 (Mo. banc 2018), quoting *Strickland*, 466 U.S. at 694. As Appellants correctly point out, most other jurisdictions apply the *Strickland* standard to gauge the effectiveness of counsel at delinquency hearings. *See* Appellant's Brief at 34 (collecting cases). This is, perhaps, because courts do not recognize the distinctions that arise because of different due process standards for juvenile proceedings.

The other approach would be to adopt the less stringent "meaningful hearing" standard, which probes "whether the attorney was effective in providing his client with a meaningful hearing based on the record." *Grado*, 559 S.W.3d at 898, quoting *In the Interest of J.P.B.*, 509 S.W.3d 84, 97 (Mo. banc 2017). The "meaningful hearing" standard is used in termination of parental rights cases. *Id.*

The "meaningful hearing" standard is more consistent with the U.S. Supreme Court's "fundamental fairness" standard for juvenile proceedings, and thus it is the preferable standard in this context. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) (holding that "the applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness"). "The essence of fundamental fairness is the opportunity to be heard at a meaningful time and in a meaningful manner." *State ex rel. Juvenile Dep't of Multnomah Cty. v. Geist*, 796 P.2d 1193, 1203 (Or. 1990) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Thus, fundamental fairness requires something less than "the more stringent criminal law standard" when reviewing the effectiveness of counsel under the due process clause. *Geist*, 796 P.2d at 1203. Missouri's "meaningful hearing" standard is grounded in this understanding of due process. *In Interest of J.C., Jr.*, 781 S.W.2d at 228 (agreeing with other states that "have relaxed the criminal standard and have held the test of ineffectiveness to be that, 'if it

appears from the record that an attorney was not ineffective in providing a meaningful hearing, due process guaranties have not been met'"), quoting *In re Moseley*, 660 P.2d 315, 318 (Wash. Ct. App. 1983). The Southern District's opinion in the case below applied the meaningful hearing standard. *D.C.M. v. Pemiscot County Juvenile Office*, 2018 WL 5919259, at *4 (Mo. App. S.D. Nov. 13, 2018) ("The test is whether the attorney was effective in providing his client with a meaningful hearing based on the record.") (citations and quotations omitted). But the Southern District also noted that the outcome would be the same under either this standard or the *Strickland* standard. *Id.* at *4 n.12 ("That said, as in *Grado* . . . our result would be the same under either test") (citations omitted).

Both tests have their merits, however. *Strickland* is widely litigated and familiar to both courts and counsel. *See Grado*, 559 S.W.3d at 904 (Draper, J., concurring) (citations and quotations omitted) (noting that *Strickland* is a well-known standard that is "likely to invite a more consistent application"). But the "meaningful hearing" standard is the more appropriate standard for this context, for the reasons noted above.

Ultimately, however, the outcome is the same under either test, and this Court need not decide the issue. Appellant makes two complaints: (1) that his counsel failed to subpoena Jonathan, and (2) that counsel elicited and failed to object to certain irrelevant testimony. But neither of these purported failures

constitute ineffective assistance of counsel under well-established Missouri precedent.

As the Southern District held in the case below, "[a]bsent an adequate record of [Jonathan's] testimony, Appellant has not demonstrated why [his] absence deprived" Appellant of effective counsel. *D.C.M. v. Pemiscot County Juvenile Office*, 2018 WL 5919259, at *4 (Mo. App. S.D. Nov. 13, 2018). To prevail on a claim of ineffective assistance of counsel for failure to call a witness, the movant must demonstrate: "1) [t]rial counsel knew or should have known of the existence of the witness; 2) the witness could be located through reasonable investigation; 3) the witness would testify; and 4) the witness's testimony would have produced a viable defense." *McIntoch v. State*, 413 S.W.3d 320, 328 (Mo. banc 2013), quoting *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. banc 2005).

Even assuming, arguendo, that the first prong is satisfied, Appellant cannot overcome deficiencies with the other three prongs of this test. There is no evidence to support Appellant's position on the second and third prongs: other than the fact that Jonathan spoke to the police officer, nothing indicates whether Jonathan could be located and whether he would testify.

More importantly, it is abundantly clear that the fourth prong—the requirement that the testimony would produce a viable defense—cannot be met here. While Jonathan did state in the police report that he did not recall

Chris making any threats or statements, Appellant overstates the value of Jonathan's testimony: Jonathan also said he did not doubt that the threat was made. Police Report Pg. 3. Jonathan helps Chris's position no more than any other nearby student, and in fact, Jonathan damages Appellant by not doubting the statement's utterance, implying that this is typical of Chris's character. Accordingly, Appellant has not demonstrated that Jonathan's testimony "would have provided him with a viable defense." *Barton v. State*, 432 S.W.3d 741, 751 (Mo. banc 2014).

Further, Appellant cannot overcome the fact that Jonathan would have actually impeached the testimony of Chris, since he said he heard him make "racial comments towards other students," Police Report at 3, a charge which Chris flatly denied at his adjudication. Tr. 72. "If a potential witness's testimony would not unqualifiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance." *State v. Jones*, 885 S.W.2d 57, 58 (Mo. App. W.D. 1994).

In his third point on appeal, Appellant again makes an IAC claim because his attorney (1) "failed to object to, and in some instances elicited, testimony of irrelevant matters," and (2) Chris was "improperly asked to comment on the credibility of other witnesses without objection" by his counsel. Appellant's Brief at 56. Both of these arguments are without merit because

such concerns are minimal in a bench hearing, and such statements were relevant, admissible, non-objectionable, and non-prejudicial.

Appellant makes much of the fact that there was "improper questioning" where Chris was asked to opine on the truth of other witnesses' testimony. Appellant's Brief at 62-63. But as the Southern District explained in the case below, "Although one witness should not comment directly on the veracity of another witness's testimony, Appellant has not shown prejudice from counsel's failure to object, and none of Appellant's cited cases found reversible prejudice in the failure to object to such testimony." *D.C.M. v. Pemiscot County Juvenile Office*, 2018 WL 5919259, at *5 (Mo. App. S.D. Nov. 13, 2018). Appellant claims that Chris was prejudiced because "the Court considered his responses to the improper questions in the . . . determination of guilt" where it observed that Chris said "yes" to a question of whether he was the only one telling the truth that day. Appellant's Brief at 63. But such a statement by Appellant does not explain, in any way, how Chris was prejudiced by being able to bolster the veracity of his own statements. If anything, Chris benefited from being able to make such statements on his own behalf.

"'[I]t is nearly impossible in a court-tried case to predicate reversal on the erroneous admission of evidence.'" *In re I.R.S.*, 361 S.W.3d 444, 449 (Mo. App. S.D. 2012), quoting *In re S.T.W.*, 39 S.W.3d 517, 518 (Mo. App. 2000); *In Interest of T.B.*, 963 S.W.2d 252, 257 (Mo. App. W.D. 1997). "'Deference is

given to the judge's ability to consider that evidence which is relevant and admissible.'" *Id.* (internal punctuation and citations omitted). "'Trial judges are perfectly capable of receiving some evidence for one purpose and not another.'" *In Interest of J.A.R.*, 968 S.W.2d 748, 751 (Mo. App. W.D. 1998), quoting *In re S.P.W.*, 707 S.W.3d 814, 820 (Mo. App. W.D. 1986). "On appeal, this Court presumes the trial judge, as the trier of fact, was not prejudiced by any inadmissible evidence and was not influenced by such evidence in reaching his decision.'" *In re I.R.S.*, 361 S.W.3d at 449, quoting *In re. S.T.W.*, 39 S.W.3d at 518 (internal citations and quotations omitted).

As the Southern District explained in the case below, the Juvenile Court was not influenced or prejudiced by supposedly inadmissible evidence at the adjudication hearing. *D.C.M. v. Pemiscot County Juvenile Office*, 2018 WL 5919259, at *4-5 (Mo. App. S.D. Nov. 13, 2018) ("On this record, Appellant has not convinced us that the court was influenced or prejudiced by inadmissible evidence at the adjudication hearing."). Rather, the Juvenile Court repeatedly demonstrated its ability to sift and sort evidence. As to Appellant's disciplinary history, the Juvenile Court said, "we'll look at that if we reach the dispositional stage." Tr. 63. When appellant's mother disputed this, the Juvenile Court said, "what my focus is on are the allegations of the petition." Tr. 82. The judge continued, "I understand what you're telling me. But I want you to keep

in mind, right now I've got to decide whether the allegations of the petition are true." Tr. 82.

The record shows that Appellant's counsel made pre-trial arguments on Chris's behalf, "made efforts to cross-examine witnesses and elicit testimony favorable" to Chris, and "presented evidence on [his] behalf," including Chris's own testimony. *In Interest of N.L.W.,* 534 S.W.3d 887, 902 (Mo. App. S.D. 2017). While Chris "may have wanted other witnesses at the trial, or felt that his attorney could have better prepared him for the experience of trial, such complaints do not, under the facts of this case, amount to deprivation of a meaningful hearing." *Id.* In short, his counsel was effective.

II. The Juvenile Court did not abuse its discretion in overruling Appellant's request for a recess or continuance to have three witnesses subpoenaed to testify. (Responding to Point Relied On II.)

In his second point on appeal, Appellant asserts that the Juvenile Court abused its discretion by not delaying the proceedings so that three additional witnesses could be called. It is not an abuse of discretion, nor can prejudice be shown, when there is no evidence on the record as to what these students might have said.

A. Standard of Review.

"The decision to grant a continuance is within the sound discretion of the trial court." *State v. Blocker*, 133 S.W.3d 502, 504 (Mo. banc 2004), citing *State v. Edwards*, 116 S.W.3d 511, 535 (Mo. banc 2003). A defendant must

demonstrate that the denial of a continuance was prejudicial. *Blocker*, 133 S.W.3d at 504, citing *State v. Taylor*, 944 S.W.2d 925, 930 (Mo. banc 1997).

B. Analysis.

After Chris stepped down, his counsel requested a continuance to subpoena Jonathan and other students, and the continuance was denied. Tr. 79. Appellant misguidedly calls the refusal to grant the continuance "unreasonable" and seemingly wants it to be the duty of the Juvenile Office to "allege that any prejudice would result . . . if the court granted the continuance." Appellant's Brief at 53. But Appellant misunderstands and misapplies the relevant rules: it was his obligation to show the need for the continuance, and he did not do so. Appellant complains that there was "no compelling reason for the court to deny the continuance," Appellant's Brief at 55, but he fails to understand that nothing on the record indicates a compelling reason to even contemplate a continuance. Appellant's argument is meritless. The Juvenile Court did not abuse its discretion by declining the continuance.

Where counsel seeks additional witnesses, there can be no abuse of discretion where the "record on appeal is silent as to what [the] testimony would have been." *State v. Selvy*, 921 S.W.2d 114, 118 (Mo. App. S.D. 1996). Further, Court Rules 24.10 and 65.04 require, in criminal and civil cases, respectively, that applications for a continuance must demonstrate "facts showing the materiality of the evidence" and "[w]hat particular facts the

affiant believes the witness will prove." The record on appeal is silent as to what the testimony of these witnesses would have been, with the possible exception of Jonathan's tendered-on-appeal police report statements.

Appellant makes much of the fact that the hearing was held only 12 days after the petition had been filed and 8 days after Chris's counsel had entered an appearance. But appellant ignores Rule 127.08, which requires that adjudication hearings be held at the "earliest possible date" when the juvenile is detained. Further, Appellant's counsel at the hearing did not object to the timing of the hearing. Appellant complains now about the speediness of the proceedings, but such complaints must ring hollow where there was no objection and the appellant fails to show any prejudice.

Appellant complains that he was prejudiced because he "needed to introduce" evidence that Jonathan "said that he did not hear Chris make a threat." Appellant's Brief at 55. But once again, Appellant oversells the value of Jonathan's testimony: Jonathan also said he did not doubt that the threat was made. Police Report Pg. 3. He also ignores the fact that the police report was not offered into evidence at the hearing, so any content therein cannot be considered a proffer of potential evidence. See Appellant's Brief at 12 n.3. Further, Jonathan would have actually impeached the testimony of Chris, since he said he heard him make "racial comments towards other students," Police Report at 3, a charge which Chris flatly denied at his adjudication. Tr.

72. Worse, the record is completely silent about what the testimony of these other witnesses might have been: it could have actually damaged Chris.

"The decision to grant a continuance is within the sound discretion of the trial court." *State v. Blocker*, 133 S.W.3d 502, 504 (Mo. banc 2004), citing *State v. Edwards*, 116 S.W.3d 511, 535 (Mo. banc 2003). Nothing here indicates that the trial court abused its discretion by declining to grant the continuance.

III. Appellant's adjudication of Making a Terrorist Threat in the Second Degree, § 574.120, is supported by sufficient evidence. (Responding to Point Relied On IV.)

Lastly, Appellant attacks the sufficiency of the evidence to sustain his adjudication of making a terrorist threat under § 574.120. Specifically, Appellant claims that there is inadequate evidence that he (1) knowingly made a threat, or (2) that he recklessly disregarded the risk of causing the evacuation, quarantine, or closure of his school.

A. Standard of Review.

The standard of review in juvenile proceedings is the same as in other court-tried cases. *C.G.M., II v. Juvenile Officer,* 258 S.W.3d 879, 882 (Mo. App. W.D. 2008), citing *C.L.B. v. Juvenile Officer*, 22 S.W.3d 233, 235-36 (Mo. App. W.D. 2000). "The judgment below will not be disturbed on appeal unless it is against the weight of the evidence, erroneously declares the law, or erroneously applies the law." *C.L.B.*, 22 S.W.3d at 236, citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). "The credibility of witnesses and the weight to

be given their testimony is a matter for the trial court, which is free to believe none, part, or all of their testimony." *C.L.B.*, 22 S.W.3d at 236, quoting *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988). Finally, "in determining the sufficiency of evidence, we view the evidence and reasonable inferences which may be drawn therefrom in the light most favorable to the verdict and we ignore all evidence and inferences to the contrary." *C.L.B.*, 22 S.W.3d at 236, quoting *N.J.B. v. State of Missouri*, 941 S.W.2d 782, 783 (Mo. App. W.D.1997).

B. Relevant Facts.

Two witnesses testified at the hearing that they heard Chris threaten to blow up the school. According to Tamara, Chris said, "I feel like blowing the school up," or "I feel like blowing this school up." Tr. 30, 34. According to Zachary, Chris commented that he, "…wanted to see how it feel like to blow up the school…" Tr. 39. Zachary also testified that Chris said he "…might do it tomorrow…He said he's going to do it tomorrow." Tr. 40. Zachary and Tamara both testified that they were scared when Chris made the statement. Tr. 30, 40, 42. These comments came on the heels of Chris talking about a recent school shooting both on his school bus and in the school hallways. Tr. 10, 21-22. These comments also came on the heels of Chris spouting racial animus. Tr. 24, 51-52.

After hearing Chris' comments, Tamara quickly left the cafeteria and alerted the high school principal, Ms. Melanie Tipton. Tr. 30. Officials didn't

evacuate the school because they were able to secure Chris, and the threat he made was for the next day. Tr. 57-58. The principal then contacted the local authorities and required Chris to remain in a teacher's classroom until he was arrested. Tr. 55. Attendance across the school district plummeted following Chris's threat. Tr. 51-52, 56.

C. Analysis.

A person "commits the offense of making a terrorist threat in the second degree if he or she recklessly disregards the risk of causing the evacuation, quarantine or closure of any portion of a building, inhabitable structure, place of assembly or facility of transportation and knowingly (1) communicates an express or implied threat to cause an incident or condition involving danger to life." § 574.120(1), RSMo. A person acts recklessly or is reckless "when he or she consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." § 562.016.4, RSMo. A person acts knowingly when "he or she is aware of the nature of his or her conduct." § 562.016.3, RSMo. Given these standards, to be guilty of making a terroristic threat in the second degree, the Juvenile Office had to establish that Chris, being aware of the nature of his conduct, communicated a threat to cause an incident involving

danger to life and failed to be aware of a substantial and unjustifiable risk that his statement would cause an evacuation or closure of the school.

The Juvenile Court correctly found that such conduct was proven beyond a reasonable doubt. Chris's conduct—stating that he might blow the school up—caused panic across the school district. As the Southern District noted, "Scared students went straight to school authorities, police were called and responded immediately, and evacuation or lockdown could have been necessary had school staff not isolated and monitored Appellant in the meantime." *D.C.M. v. Pemiscot County Juvenile Office*, 2018 WL 5919259, at *2 (Mo. App. S.D. Nov. 13, 2018). Tamara and Zachary were both scared by the incident, and so were other students. Attendance declined the next day.

Chris clearly communicated a threat that involved danger to human life. *See State v. Tanis*, 247 S.W.3d 610, 614 (Mo. App. W.D. 2008) ("Explosives are inherently dangerous to human life."). Nearly every 16-year-old knows that, in the shadow of such a threat, there is a substantial risk that such a statement could cause the evacuation of the school. "[O]ur society has changed and . . . gone are the days of hanging around airport terminals and joking about bombs." *C.G.M., II v. Juvenile Officer,* 258 S.W.3d 879, 882 (Mo. App. W.D. 2008) (citations and quotations omitted). "Gone are the days that you think it's funny somebody might have a bomb in their shoe." *Id.* Bomb threats

cannot—and should not—be taken lightly, and every indication on the record is that Chris was aware of the wrongful nature of his conduct.

Appellant argues that Missouri should adopt some sort of "reasonable child" standard in juvenile cases, but Appellant admits that there is no such precedent in this state. Appellant's Brief at 71. Indeed, such a standard is not supported by the statutory scheme of § 211.031, and Appellant does not adequately address how this would work in light of Missouri's culpable-mental-state statutes. *See* § 562.016, RSMo.

Appellant also relies heavily on the Western District's opinion in *C.G.M., II v. Juvenile Officer,* 258 S.W.3d 879 (Mo. App. W.D. 2008). But this reliance is misplaced. In that case—where the Western District said the juvenile "came very close to crossing the line"—the juvenile said that he "may receive dynamite from his father for his birthday" and then inquired of a classmate "whether he wanted to help blow up the school." *Id.* at 883-84. The defining characteristics of that case are that the threat was based on a contingency—the receiving of dynamite—and that there was no such "declaratory statement." *Id.* at 883. Here, by contrast, there was no precondition, and Chris made clearly declaratory statements. Tamara heard Chris say, "I feel like blowing the school up," or "I feel like blowing this school up." Tr. 30, 34. Zachary testified hearing Chris say he, "…wanted to see how it feel like to blow

up the school…" Tr. 39. Chris said he "…might do it tomorrow…He said he's going to do it tomorrow." Tr. 39.

Further, Zachary testified that he was scared when Chris made the statement, and he said Tamara looked scared when she heard it. Tr. 40, 42. As the Western District explained, while the terroristic-threat statutes do not "require the listener to believe that the accused will carry out the threat or to be placed in fear that the threat will be carried out," the "reaction of the listener may constitute some evidence of the intent of the person making the statement." *C.G.M.,* 258 S.W.3d at 883.

Appellant relies on the statement of the Western District that, where "the school principal opined that he would not have evacuated the school," that statement "is pertinent to the determination of whether a substantial and unjustifiable risk of evacuation existed." *Id.* at 883. But that situation is not the same here, where the principal at Hayti High testified that it was a possibility that the school would have been evacuated or locked down if they had not been able to isolate Chris. Tr. 57-58.

In short, if the juvenile in C.G.M. came "very close to crossing the line," Chris went well beyond it. Chris clearly instilled fear throughout the school district with his purposeful statements that he wanted to blow up the building. The requirements of § 574.120 were met beyond a reasonable doubt, and the

evidence here is sufficient, especially when the facts are viewed in a light most favorable to the verdict.

CONCLUSION

This Court should affirm the decision of the Juvenile Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on March 25, 2019.

This Brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. This Brief contains 7,768 words, excluding the cover, signature and this Certificate.

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/s/ Christopher R. Wray
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