IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC97910
	)	
	)	
JEFFERY WATERS,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF LAWRENCE COUNTY, MISSOURI
TWENTY-FIFTH JUDICIAL CIRCUIT, DIVISION II
THE HONORABLE JOHN D. BEGER, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Jeffery Waters, was charged in Pulaski County, Missouri, with four separate offenses: the unclassified felony of statutory rape in the first degree (Count 1); the unclassified felony of statutory sodomy in the first degree (Count 2); the class D felony of incest (Count 3); and the unclassified felony of attempted statutory sodomy in the first degree (Count 4). L.F. 32:1-2.[1] The jury convicted Mr. Waters of Counts 2 and 4. Tr. 1230.[2] The jury was unable to reach a verdict on Counts 1 and 3. Tr. 1237. The trial court declared a mistrial as to those counts. Tr. 1237. Subsequently, Mr. Waters was sentenced on Counts 2 and 4 to a total of eighteen years in prison. S.Tr. 34.

A notice of appeal was filed in the Missouri Court of Appeals, Southern District, as to Count 2 and 4, the two counts where a sentenced was entered. L.F. 42:1-3; S.Tr. 34. After briefing and argument on the merits, the Missouri Court of Appeals, Southern District, dismissed the case because of a lack of a final judgment. Op. 1-2. Specifically, the court found that because Counts 1 and 3 remain outstanding all the issues had not been adjudicated, and, therefore, an appeal did not lie. Op. 3 (citing *State v. Storer*, 324 S.W.3d 765, 766-67 (Mo. App. S.D. 2010)). The Southern District found support for its conclusion in this Court's opinion in *State v. Smiley* where it found that because there had not been a final adjudication as to the armed criminal action and the associated assault charges, "the trial court's judgment was not a final judgment[.]" Op. 4-5 (citing 478 S.W.3d 411, 415 (Mo. banc 2016)).

After seeking rehearing and transfer below, Respondent sought transfer to this Court on the question of whether there was a final appealable judgment as to the two counts where a sentence was entered. This Court subsequently granted transfer. This Court should find, as the Southern District did, that there is not a final appealable

[1] The legal file will be cited by referencing the document number and then the page number (L.F. D:P).

[2] Relevant for this brief, the record on appeal consists of the legal file, the pretrial transcript of April 24, 2017 (Pre. Tr.), the trial transcript (Tr.), the post-trial transcript of May 17, 2017 (Post. Tr.), and the sentencing transcript (S.Tr.).

judgment because the trial court's judgment did not dispose of all the issues, specifically, the trial court failed to adjudicate Counts I and III.

"The right to appeal is purely statutory." *Barlow v. State*, 114 S.W.3d 328, 331 (Mo. App. W.D. 2003). Section 547.070, RSMo 2000, provides that a defendant may appeal "[i]n all cases of final judgment rendered upon any indictment or information[.]" Likewise, Rule 30.01(a) permits an appeal "[a]fter the rendition of final judgment in a criminal case[.]" "A trial court's judgment is final ... if the judgment disposes of all disputed issues in the case and leaves nothing for future adjudication." *State v. Burns*, 994 S.W.2d 941, 942 (Mo. banc 1999) (citation omitted). The source of this rule comes from this Court's preference to avoid piecemeal litigation unless there is a specific rule or statute that permits it. *See Weir v. Brune*, 364 Mo. 415, 418, 262 S.W.2d 597, 599 (Mo. 1953); *Boley v. Knowles*, 905 S.W.2d 86, 88 (Mo. banc 1995). Generally, in a criminal case, a final judgment occurs when a sentence is entered. *Burns*, 994 S.W.2d at 942.

This general rule, however, does not control in all cases. In *State v. Thomas*, the defendant was charged with two counts of assault. 801 S.W.2d 504, 505 (Mo. App. S.D. 1991). Following a jury trial, the trial court declared a mistrial on Count I and entered a sentence on Count II. *Id*. The defendant appealed and the Missouri Court of Appeals, Southern District, dismissed the appeal as premature because Count I remained pending against the defendant and, therefore, this issue needed to be resolved before a final appealable judgment existed. *Id*. Under the Southern District's precedent, when there is a multi-count indictment or information and the finder of fact is not able to reach a verdict on a pending charge, an appeal does not lie until all counts have been adjudicated *and* a sentence has been entered.

The Missouri Court of Appeals, Eastern District, disagrees with this approach.[3] The Eastern District "has consistently applied the long-standing rule that a judgment

[3] It does not appear the Missouri Court of Appeals, Western District, has spoken on this specific issue. Respondent cited *State v. Kimberly*, 103 S.W.3d 850, 854 (Mo. App W.D. 2003) in its transfer application to this Court. *Kimberly* is inapposite to this case, however, as there was an adjudication on all counts in the multi-count information. *Id*. at

becomes final in a criminal case when sentence is entered or imposed" irrespective of whether all the counts in the indictment or information have been adjudicated following a trial. *State v. Bracken*, 333 S.W.3d 48, 52 (Mo. App. E.D. 2010).

What *Bracken* fails to acknowledge, however, is that there can only be a single final judgment in a case as the plain language of Rules 29.07(c) and 30.01(a) contemplates. Rule 29.07(c) states:

> A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

Rule 29.07(c) contemplates that there is a single final judgment that resolves all criminal charges and issues by either setting forth "the plea, the verdict or findings, and the adjudication and sentence" or by a "discharge" that would be indicated in the final judgment. Similarly, Rule 30.01(a) states: "After the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by law." This rule also contemplates a single "final judgment in a criminal case." The plain language of this Court's rules indicate there can only be a single final judgment following trial; therefore, *Bracken* must be wrongly decided. *See* Rules 29.07(c) and 30.01(a).

Furthermore, the Eastern District's approach unnecessarily puts the two concepts of when a final judgment lies at tension. The Southern District has given meaning to both of these rules for when a final judgment lies. On the other hand, the Eastern District has given no meaning to the fact that all the issues need to be disposed of for an appeal to lie. By holding that a final judgment lies only when a sentence is entered *and* all counts are disposed of in a multi-count indictment of information following a trial, it gives meaning to both rules and does not require the court to ignore one rule over the other.

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855. Kimberly received a fine and a suspended imposition of sentence ("SIS") and the Western District found that Kimberly could appeal the conviction where she received a fine. *Id*. Although this Court does not have to overrule *Kimberly* to find this Court does not have authority to hear this case, it may consider it because the rule in *Kimberly* encourages piecemeal litigation as Kimberly could subsequently appeal her SIS conviction if a sentence was entered.

Additionally, requiring the State to resolve all counts in a multi-count indictment or information best protects a defendant's rights. A defendant has a right to have all issues disposed of in his case in a timely manner. U.S. Const. amend. VI. Allowing the State to hold these charges over a defendant pending his appeal deprives him of this right under the Sixth Amendment. Additionally, whether the defendant is successful or not on appeal on the counts where a sentence was entered is not an appropriate factor for a prosecutor to consider in determining to pursue pending charges against a defendant. The State should be required to make a decision to adjudicate either by trial, plea, or dismissal of the pending charges, prior to appeal, and this decision should be made irrespective of the defendant's success on appeal.

Because of the plain language of this Court's Rules and the need to protect a defendant's rights, this Court should find that there is not a final appealable judgment. Therefore, this Court does not have authority to hear this case. Section 547.070. In the alternative, should this Court hold there is a final appealable judgment, this Court, after granting transfer, does have jurisdiction over this case. Mo. Const. art. V, secs. 3 and 10; Rule 83.04.

STATEMENT OF FACTS

The State argued in closing this case all comes down to credibility; whether the jury believes S.E. or Kira Waters, S.E.'s stepmother. Tr. 1153. If they believe S.E. they should find Mr. Waters guilty. Tr. 1153. If they believe Mrs. Waters they should find him not guilty. Tr. 1153. The jury only believed that S.E. was partly telling the truth. L.F. 37:1-8.

Count I of the information alleged Mr. Waters committed the crime of statutory rape in the first degree, Section 566.032 RSMo Cum. Supp. 2006, in that on or about November 10, 2015, Mr. Waters knowingly had sexual intercourse with S.E., a child less than fourteen years old. L.F. 32:1. Count II alleged that Mr. Waters committed the crime of statutory sodomy in the first degree, Section 566.062 RSMo Cum. Supp. 2006, in that on or about November 10, 2015, Mr. Waters, for the purpose of arousing or gratifying his sexual desire, had deviate sexual intercourse with S.E., who was less than fourteen years old, by inserting his finger into her vagina. L.F. 32:1. Count III alleged Mr. Waters committed the crime of insist, Section 566.062 RSMo Cum. Supp. 2006, in that on or about November 10, 2015, Mr. Waters engaged in sexual intercourse with S.E., whom the defendant knew to be his descendant by blood. L.F. 32:2. The final count, Count IV, alleged that Mr. Waters committed the crime of attempted statutory sodomy in the first degree, Section 566.062 RSMo Cum. Supp. 2006, in that on or about November 11, 2015, Mr. Waters, for the purpose of arousing or gratifying his sexual desire, removed the clothing of S.E., put his fingers between her legs and touched her between her vaginal and anal areas, and such conduct was a substantial step toward the commission of the crime of statutory sodomy in the first degree of S.E., a child less than fourteen years old. L.F. 32:2.

Jury Selection

Prior to trial, the court gave a questionnaire to the prospective jurors to fill out. Pre. Tr. 3-5. Consistent with the instructions of the court, at the beginning of the questionnaire, the jury was told to answer the questions truthfully, to the best of their

ability, and that their answers would be kept confidential in that only the attorneys and the court would know their answers. Pre .Tr. 3; L.F. 57:1. Some questions asked for basic information from the potential jurors, such as their name, age, and address. L.F. 57:1. Other questions were more specific to the case and asked the potential jurors whether they knew anyone who worked for a child advocacy center, or whether they knew anyone close that had training in interviewing children in a criminal case. L.F. 57:3-4. Relevant here, question 33 read:

> 33. IN THIS CRIMINAL CASE THE DEFENDANT IS CHARGED WITH STATUTORY RAPE, STATUTORY SODOMY, INCEST AND ATTEMPT STATUTORY SODOMY, ON A SCALE OF 1 TO 10 (1—STRONGLY DISAGREE, 10—STRONGLY AGREE) PLEASE INDICATE BY CIRCLING THE NUMBER THAT BEST REPRESENTS YOUR THOUGHTS REGARDING THE FOLLOWING STATEMENTS:
>
> IF I HEAR SOMEONE IS ACCUSED OF CHILD MOLESTATION I FEEL THAT THEY DID IT.
> 1 2 3 4 5 6 7 8 9 10
>
> CHILDREN DO NOT LIE ABOUT BEING MOLESTED.
> 1 2 3 4 5 6 7 8 9 10
>
> PERSONS ACCUSED OF MOLESTATION ARE LYING WHEN THEY SAY THEY DID NOT DO IT.
> 1 2 3 4 5 6 7 8 9 10
>
> I CANNOT BE FAIR (WHETHER TO THE DEFENDANT OR THE STATE) IN THIS KIND OF CASE.
> 1 2 3 4 5 6 7 8 9 10

L.F. 57:4.

Following the instructions from the court and the State speaking to the potential jurors, the defense spoke to potential jurors and they acknowledged filling out a juror questionnaire. Tr. 236. They acknowledged that they signed their names to those questionnaires and, as the questionnaires indicated, that the answers the jurors gave were truthful to the best of their ability. Tr. 236. Defense counsel started by reminding the jury of the first prompt on question 33 and asked the jurors who circled 10 to raise their hands.

Tr. 236-37. No juror responded. Tr. 237. One juror indicated that he or she did not remember what they had answered. Tr. 237.

Defense counsel started with Juror 1 who circled 10 on the first prompt. Tr. 237. Juror 1 did not remember circling 10 but then acknowledged that did occur.[4] Tr. 237. Juror 1 then acknowledged that he circled 10 for the second prompt that he does not believe children lie about being molested. Tr. 237. Juror 1 acknowledged circling 8 on whether he could not be fair in the case. Tr. 237. Juror 1 indicated he did have performed opinions about this case. Tr. 237. As a result, at the end of voir dire, the court agreed that Juror 1 should be struck for cause based on his verbal answers in open court confirming his written answers to the questionnaire. Tr. 283-84.

Defense counsel then asked Juror 4 about their answers to question number 33. Tr. 238. Juror 4 acknowledged that they answered 5, 7, 7, and 7 to the four prompts as asked in order. Tr. 238-39. As a result of the answers, Juror 4 acknowledged that they have preconceived notions about the case.[5] Tr. 239. Before defense counsel could ask another question, the State objected and a conversation was held outside the presence of the jury. Tr. 239.

The State argued that the answers given by the jurors in their questionnaires are to be kept confidential and defense counsel should not refer to them in open court. Tr. 239. Defense counsel explained that the court could bring each juror to the bench whom counsel had concern about and then he could ask each juror about their questionnaire.[6] Tr. 240. Defense counsel also recommended that the court strike some of the jurors based

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[4] It is not clear why Juror 1 changed his answer so quickly, but the record appears to indicate that defense counsel may have approached Juror 1 and shown him his questionnaire because the following question started with defense counsel saying "And I guess while I'm here also…" Tr. 237.

[5] Juror 4 was struck for cause based on her in court answers and that she had preconceived ideas about the case. Tr. 284.

[6] Defense counsel would later tell the court that he had concern about most of the jurors. Tr. 273.

on their questionnaires to expedite the process. Tr. 240. The State argued that it would be improper to strike a juror based solely on their questionnaire because the answers the jurors gave are a subjective number without enough context, and the jurors could have been confused by the question. Tr. 241-43. The trial court agreed that the questionnaires are confidential and that the jurors' answers could not be disclosed to the public in open court. Tr. 243. Additionally, the court denied the defense's request to voir dire each individual juror about their questionnaire. Tr. 243-44; 272-73.

After overruling the defense's request to voir dire each individual juror, the court asked jurors whether they had any preconceived notions about the case, whether they could be fair and impartial, and whether they could not follow the instruction that said "filing of a charge is no indication and no evidence that an offense occurred or the Defendant is guilty of that offense" and no juror responded. Tr. 274-75. Both parties then asked the court to ask question 33 from the questionnaire. Tr. 274-75. The court asked: "Is there anybody here who, if they hear someone is accused of child molestation, feels that they did it just because of the accusation?" Tr. 277. No juror responded. Tr. 277. The court read the next prompt: "Is there anyone here who feels children would never lie about being molested?" Tr. 277. Two jurors, 32 and 51, responded affirmatively and explained their thoughts.[7] Tr. 277. Next, the court asked the third prompt: "Is there anybody here who feels if somebody is accused of molesting a child, they are lying when they say they did not do it?" Tr. 278. No jurors responded. Tr. 278. Next, the court asked: "If you knew nothing more about the case, other than they were accused and said they didn't do it, is there anybody here who would automatically feel they were lying?" Tr. 278. No juror responded. Tr. 278. Finally, the court asked: "Is there anybody here who feels, given -- again, I'm gonna ask you, is there anybody here who feels because of the nature of the charges, that they cannot be fair to both sides if they sit as a juror in this

[7] As to this prompt in their questionnaires, Juror 32 answered 9/10 (L.F. 60:9) and Juror 51 answered 10/10 (L.F. 62:4). Other jurors who indicated similar bias, such as Juror 9 (10/10) and Juror 28 (10/10), who were the subject of peremptory strikes, did not disclose their thoughts on this prompt.

case?" Tr. 279. "In other words, who would go into it with a preconceived notion?" Tr. 279. Jurors 45 and 51 indicated that they could not be fair to both sides. Tr. 279.

After the close of voir dire, Defense counsel sought to strike jurors based on their questionnaires. Tr. 282-83. Defense counsel explained that the questionnaires show some jurors had preconceived ideas about certain issues. Tr. 288. Among other jurors, the defense sought to strike jurors 5, 10, 11, 15, 16, 18, 22, 30, and 35, all of whom served on the jury, for their answers in the questionnaires.[8] [9] Tr. 288, 290-93, 296, 299-300. The court again agreed with the State that the questionnaires alone could not serve as the basis for a strike for cause. Tr. 286-88. Additionally, the court also noted that it asked the four prompts from question 33 and no one responded except Jurors 32, 45, and 51. Tr. 287-88. In the end, a jury was selected and the case moved to the presentation of evidence. Tr. 311-12.

Background Information

S.E.'s biological parents are Jeffery Waters and Melissa.[10] Tr. 634-35. S.E. lived with her mother for a period of time before she came to live with Mr. Waters after Melissa started having trouble with Child Protection Serves. Tr. 1034. When S.E. came to live with Mr. Waters, he was living with his other daughter, Miranda, and his new wife Kira Waters and her three children, Desmond, Mauri, and Isaac. Tr. 1034. Donald Schnedler, Kira Waters' ex-husband and father to her other three children, was a constant presence in the Waters' lives, including S.E.'s. Tr. 767-68, 1037.

Mr. Schnedler's testimony was introduced via deposition as he was found to be unavailable as he was deployed overseas. Tr. 1031-32. Mr. Schnedler said that S.E. said

[8] Question 33 was not the only question in the questionnaire that the defense argued should serve as the basis for a strike for cause.

[9] Defense counsel could not use peremptory strikes on these jurors because they had already been used on jurors 6, 9, 19, 23, 28 and 41. Tr. 308-309; L.F. 53:2-4.

[10] Undersigned counsel has omitted Melissa's last name as she shares the same last name as S.E.

she hated living with the Waters and hated Mrs. Waters. Tr. 1032-33. S.E. did not like that her father was with Mrs. Waters and she wanted to live with her mother. Tr. 1033. S.E. also said she always wanted to live with her biological mother and that only stopped when she moved in with her foster mother. Tr. 727, 769.

Mrs. Waters testified that when S.E. started to live with them around when she was six they had a lot of issues. Tr. 1034. She explained that S.E. did not really act her age; S.E. was acting out and wetting herself at night and during the day. Tr. 1035. Mrs. Waters said S.E. had trouble explaining things and when she did she was not truthful. Tr. 1035.

The Waters decided to send S.E. to catholic school because of her issues. Tr. 1036. The Waters also enrolled their other kids in catholic school to keep the kids together. Tr. 1036. However, two months in, they had to pull the children out of catholic school because S.E. told her class that she saw her mother, who was pregnant, get shot in the face and killed. Tr. 1036-37. S.E. said she lied about her mother being murdered when she was seven to get attention. Tr. 730-31, 801. She received sympathy from her classmates and teachers when she told them this. Tr. 731. The school's principal asked the Waters to remove S.E. from the school and they took the rest of the kids out to keep them together. Tr. 1037.

Mrs. Waters testified that she did not have a good relationship with S.E. because S.E. kept getting into trouble and Mrs. Waters had to discipline her by grounding her, spanking her, or making her write sentences. Tr. 1043, 1045-47. Mrs. Waters would discipline all her children this way. Tr. 1043. Mrs. Waters said no matter what they did, S.E. continued acting up and they felt like she was losing control, so they sought a counselor at Royal Oaks. Tr. 1048-49. Mr. and Mrs. Waters participated in the counseling. Tr. 1048-49. They also took S.E. to counseling at A Place of Grace to try and seek help. Tr. 1049.

S.E. testified that it is hard not to lie and she lied so many times she cannot remember. Tr. 669, 750. She said her biological mother taught her how to lie because her mother lied to her a lot and it got passed down to her. Tr. 722.

S.E. recounted one time she drew over her parents' friends' couch. Tr. 669. She lied and told her parents she did not do it. Tr. 670-71. Another time she cut a hole in the ceiling of another family's house and blamed it on her siblings. Tr. 671. Yet another time, when she was in second grade, S.E. lied and stole her classmates' toys and things. Tr. 672. She also lied to others about Mrs. Waters beating her. Tr. 676. S.E. lied online when she told people she was older than she was. Tr. 677. She said she did this to get attention. Tr. 677. After these incidents of lying, she would receive a punishment, like getting her own room taken away, getting grounded, or getting privileges taken away, like electronics. Tr. 678. S.E. said her dad also spanked her and whipped her with a belt. Tr. 750.

S.E. described a time she got in trouble because she had an application called Kik on her tablet.[11] Tr. 741-42. She used her Kik account to get attention. Tr. 743. She acknowledged that Kik is an application for adults. Tr. 743. She said she did not remember how old she told people she was and did not remember how many people she befriended. Tr. 744-45. She acknowledged that she sent inappropriate pictures to other people because she wanted attention. Tr. 745.

She also got into trouble for talking to a boy on Facebook who was older than her and who could drive named Alexander Elmore. Tr. 772. She said they talked about made up sex stories. Tr. 775. She said she did this because she wanted attention and he made her feel good. Tr. 778.

S.E. described the three times she ran away from home. The first time was when she was nine. Tr. 672-73. She ran away to get away from her family. Tr. 673. The second time she does not remember how old she was but she ran away again to get away from her family. Tr. 674. The third time she ran away was when she was with Donald Schnedler and her siblings. Tr. 674. They were at Walmart and she ran out a side door. Tr. 675. When she was discovered by police, they showed her a picture of Mrs. Waters and S.E. lied and said she did not know who that was. Tr. 675.

[11] It is not clear in the record but Kik appears to be an online instant messenger application. See https://www.kik.com/about/

S.E. said that she was into witchcraft. Tr. 759. One time she cut the hair off her cat to do a voodoo spell on Mrs. Waters. Tr. 760. S.E. said that at one point, when she was in second grade, she planned to kill Mr. and Mrs. Waters. Tr. 761, 810.

Another incident of lying occurred when S.E.'s family bought chocolate bars for her band's fundraiser when she was in sixth grade. Tr. 666-67. Instead of bringing the chocolate bars home, she gave them to her friends because she wanted friends. Tr. 667. She kept telling Mrs. Waters that she would bring the chocolate home. Tr. 667-68. Eventually, Mrs. Waters came to her school and she told Mrs. Waters that the principal and vice principal ate them. Tr. 669. S.E. said she lied to Mrs. Waters because she was scared to get in trouble. Tr. 669. She got in trouble when Mrs. Waters learned she was lying. Tr. 669.

Gary Powers, a family friend, was asked about S.E.'s reputation for truthfulness in the community during the time he knew S.E. Tr. 896. He answered: "You'd be lucky to be told the truth." Tr. 897. Mr. Powers admitted he did not know what her reputation was now, two years after the incident. Tr. 901.

Tina Fortner was a guidance counselor at Laquey Middle School, where S.E. went to school. Tr. 846-87. S.E. came to see Ms. Fortner while she was student at Laquey. Tr. 847. Ms. Fortner said S.E. had a reputation for lying. Tr. 848.

The Incidents

S.E. testified at trial that when she was 12 years old, her dad, Mr. Waters, asked whether she wanted to be her "cuddle buddy" and she responded yes. Tr. 640. Mrs. Waters was staying the night at the hospital. Tr. 639. S.E. said her dad had never asked her that before. Tr. 641. She said before they started to watch Supernatural on TV, her dad gave her some pink liquid to help her sleep. Tr. 659. She fell asleep and her dad went and played a computer game called Diablo. Tr. 648-49.

S.E. testified that she woke up at 4:00 a.m. Tr. 645. She said when she woke up her underwear and pants were down to her ankles. Tr. 650. When she went to bed she was wearing pants, underwear, and a nightgown. Tr. 650. The nightgown was black with

polka dots. Tr. 650. She said Mrs. Waters gave it to her when Mrs. Waters was pregnant. Tr. 650. S.E. testified that her dad placed his fingers inside of her privates. Tr. 653. She did not know how long this lasted but she tried to act like she was asleep. Tr. 654. At some point, she said Mr. Waters stopped and then he placed his penis inside of her vagina. Tr. 655. He was not wearing a condom. Tr. 772. She said he flipped her from her back on to her stomach and he ejaculated on her back. Tr. 656-57. She said her dad then asked her if she wanted a cigarette while she was leaving the room. Tr. 658. S.E. said her dad was acting like she was Mrs. Waters because he called her "honey." Tr. 658. She unlocked the bedroom door and left crying. Tr. 658, 660.

After leaving the bedroom, she said she wiped the semen off her back with the nightgown she was wearing. Tr. 660. She said she put the nightgown in her dresser. Tr. 660. She tried to find a phone to call 911 but she could not find one. Tr. 804. Instead, she said she then went to the couch, covered herself with pillows, and fell asleep. Tr. 663. The next thing she said she remembered was waking up when her father placed a blanket on her. Tr. 663. Mr. Waters said "I swear Kira was here." Tr. 663.

Miranda, S.E.'s sister, talked about her memory of that night. Tr. 1012. She said that the family, minus Mrs. Waters as she was at the hospital, watched a movie in Mr. Waters' bedroom. Tr. 1012. This was not unusual. Tr. 1014. S.E. was wearing a white shirt with green letters that said, "kiss me, I'm Irish." Tr. 1013. Miranda was shown the nightgown that S.E. said she was wearing that night and Miranda said S.E. was not wearing that, she has never seen S.E. wear that, and that the nightgown belonged to Mrs. Waters. Tr. 1013. Miranda admitted that her father has given her and S.E. allergy medicine. Tr. 1020.

The day after the incident, S.E. testified that she told her sister Miranda what she said happened to her when they took a walk together. Tr. 664-65. When she told Miranda what happened, she said Miranda did not want to believe her. Tr. 665.

S.E. testified that she went back into Mr. Waters' room the night after the first incident. Tr. 679. She said she was afraid that he would notice she was gone and that she would get in trouble. Tr. 679. Mrs. Waters was still at the hospital. Tr. 679. S.E. said she

fell asleep again and was awakened when Mr. Waters placed his finger between her private and butt. Tr. 697. She testified that when she woke up she tried to pull her pants back up but he grabbed her. Tr. 698. She broke free, ran to her room, and laid down on the bed. Tr. 699. She said Mr. Waters came to her room and said sorry and asked her to come back to his room. Tr. 699. She said no and he left. Tr. 699. She said she fell back asleep after that. Tr. 699-700.

The next morning she went to school. Tr. 700. She told her friends Melanie Kamker and Haven Curtis during breakfast at school that she was raped by her father. Tr. 700, 755. She said she only talked to them until breakfast was over and that was it. Tr. 807. However, Haven testified that after breakfast they went to the bathroom and talked about another two hours. Tr. 870. S.E. denied going to the bathroom with Haven to talk about the incident. Tr. 754. After S.E. disclosed to her, Haven said she told her that she was also molested. Tr. 870-71. However, S.E. claimed that Haven told her first. Tr. 809. S.E. said Haven told her that when she told people about being molested, she was removed from the foster home she was in. Tr. 832.

S.E. said later that day, after she returned home from school, she talked with Haven on the phone. Tr. 701. They talked about what had happened to S.E. and Haven asked permission to call the hotline. Tr. 701, 766. At first, S.E. said no because she said she was scared that she was going to lose her dad. Tr. 702. Eventually, however, S.E. agreed and the hotline was called. Tr. 702.

Haven Curtis testified that S.E. called her and told her that her dad was molesting and raping her for almost two years. Tr. 869. Haven gave the phone to her mother Jasmine Curtis and Jasmine talked to S.E. Tr. 999. Jasmine said that S.E. told her that her dad had been molesting her and raping her for two years. Tr. 999. Victoria Graves, Haven's older sister, was present when S.E. confirmed that she told Haven that she was molested and raped for two years. Tr. 874. Victoria talked with S.E. and S.E. also told her that she was molested for two years. Tr. 874. S.E. denied telling Haven and Jasmine that her father had been raping her for two years. Tr. 756.

S.E. handed the phone to Mrs. Waters because S.E. wanted Haven to tell her what was going on. Tr. 702. S.E. said Mrs. Waters yelled at her but S.E. said the allegation is true. Tr. 702. Victoria said that when she hung up, her mother called the hotline, and she called the sheriff's department. Tr. 876, 999.

In cross-examination, S.E. responded "I don't remember" over 100 times. Tr. 708-96. S.E. explained that she answered "I don't remember" because she has tried to block out the memory of her old family. Tr. 796. S.E. acknowledged that she had a better memory when the State questioned her than when the defense questioned her. Tr. 825. She said that she can remember specific dates and times when the prosecutor asks her, but cannot remember them when the defense asks her. Tr. 825-26.

The Investigation

On November 13, 2015, Officer Lynn Bays received a call from the Department of Family Services regarding a hotline call about an allegation that Mr. Waters had touched S.E. sexually. Tr. 468. Officer Bays and a DFS worker, Ms. Watson, went out to the Waters's residence. Tr. 469. Officer Bays asked Kira Waters, who answered the door, whether they could speak with S.E. in private. Tr. 470. S.E. told Officer Bays that her father had penetrated her with his finger and he had sex with her. Tr. 471.

After talking with S.E., Officer Bays called Detective Nicole Cunningham regarding the allegation that S.E. had made. Tr. 381-82. Detective Cunningham told Deputy Bays to gather the clothing S.E. was wearing during the incident and the bed sheets from the bed. Tr. 381. Officer Bays testified that he asked S.E. and Mrs. Waters to retrieve the clothing she was wearing that night and to retrieve the bedding while he waited in the dining room. Tr. 473, 475. S.E went one way and returned with clothes and Mrs. Waters went another way and returned with the bedding. Tr. 474-75. The clothes included a white-with-black-polka-dotted nightgown, blue female panties, and blue pajama bottoms with a Care Bear on it. Tr. 476. Officer Bays secured these items and they were transported to the sheriff's office for storage. Tr. 476-77.

On cross-examination Officer Bays testified that he had received training in investigating a crime scene and was taught how to take pictures of a crime scene using a camera. Tr. 488-49. He acknowledged that he had a camera in his vehicle and he was the only deputy on the scene. Tr. 489. Officer Bays testified that he did not take any pictures of the crime scene. Tr. 490. Specifically, he did not take any pictures of where the clothes S.E. gave him came from but that he could have. Tr. 490. The reason Officer Bays did not take photographs is because his superior officers did not tell him to take pictures. Tr. 497

S.E. testified that she remembered when officers came to the house after the hotline was called and she told an officer what happened to her. Tr. 703. She said she was asked to get Mr. Water's bedsheets and to retrieve the clothes she was wearing the night of the incident. Tr. 704. She went to retrieve her clothes, a blouse, pants and underwear, from her drawer in her room. Tr. 705. She said she could not remember whether she retrieved the bed sheets. Tr. 705.

Miranda said she remembers when the police came to the house to interview S.E. Tr. 1015-16. She said S.E. was excited when they showed up and she had a smirk on her face. Tr. 1016. The police also talked with Miranda. Tr. 1016. After talking to the police, she happened to walk in front of the doorway to her parents' bedroom and saw S.E. and Officer Bays in the bedroom. Tr. 1017. She saw S.E. take clothes, including the nightgown and some red sweat pants, from her parents dirty clothes basket and give them to Officer Bays. Tr. 1017-18. In rebuttal, Officer Bays denied that he was in the room where S.E. retrieved the clothing. Tr. 1124.

Mrs. Waters was present when officers came to the house later that evening and removed things from the home. Tr. 1054. She identified the nightgown as her nightgown and not S.E.'s. Tr. 1054-55. She did not give it to S.E. and had never seen her wear it. Tr. 1055. Mrs. Waters said she saw S.E. retrieve the nightgown she was wearing previously from the dirty clothes and give it to the officer. Tr. 1058-59. She said officers never asked her to do anything and it was S.E. who retrieved the bedding and clothes. Tr. 1083. Mrs. Waters did not object when officers seized the nightgown. Tr. 1125.

Garrett Schmitz, a DNA criminalist, tested all three items seized by Officer Bays. Tr. 528. Mr. Schmitz and Jackson Scanlon, a criminalist with the Highway Patrol, tested the nightgown and a stain on the dress was consistent with semen. Tr. 532, 546, 549. Mr. Schmitz testified that he could not determine how long the semen was on the dress or who had been wearing it. Tr. 537. The DNA profile developed from Mr. Waters was consistent with the DNA profile taken from the dress. Tr. 552. Mr. Scalon also tested four swabs taken from different parts of S.E.'s body as part of the rape kit. Tr. 554. No semen was detected in the samples taken from the rape kit. Tr. 555-56.

Detective Cunningham arranged for an interview of S.E. that evening and for a SAFE exam to be performed. Tr. 382-83. The SAFE examiner, Debra Ballard, met Detective Cunningham at Kids Harbor around 9:30-10:00 that night. Tr. 383. Detective Cunningham performed the interview of S.E. at Kids Harbor. Tr. 383. She explained the interview procedure and how it was used in this case. Tr. 378-80, 390-91. Detective Cunningham acknowledged that the purpose of the interview is to establish what happened and the purpose is not to determine whether the statements are truthful. Tr. 409, 452-53. The interview was recorded and a redacted copy was played for the jury. Tr. 402; Ex. 1A.

Debra Ballad performed the SAFE exam on S.E. Tr. 925. She found no physical evidence that S.E. was molested or raped. Tr. 936-37, 956, 974. However, she did not rule out sexual abuse because in 95% of cases there is no physical evidence of the sexual abuse on the victim. Tr. 956. She said she did not see any evidence that S.E. had any STDs and S.E. confirmed she did not have any STDs. Tr. 771, 956. Ms. Ballard said STDs do not always transfer when two people have intercourse. Tr. 984.

Detective Anthony Narug interviewed Mr. Waters on December 1, 2015. Tr. 609. This interview was recorded, but according to Officer Narug, the hard drive crashed and the audio was lost. Tr. 619. Mr. Waters voluntarily came to speak with Detective Narug. Tr. 610. Mr. Waters told Detective Narug that he found out about the allegation from his wife and denied that it happened. Tr. 612. According to Detective Narug, Mr. Waters said that he invited his kids into the bedroom to watch a movie the night of the alleged first

incident. Tr. 612. S.E. was the only one who came. Tr. 612. They both fell asleep while watching a movie but she woke up and left the room crying and Mr. Waters did not know why. Tr. 612. Detective Narug testified that Mr. Waters admitted that he gave S.E. pink medicine to help her sleep. Tr. 612. He also admitted to having a few beers while he was working on some home-improvement projects early in the day. Tr. 614. Mr. Waters explained to Detective Narug that S.E. was over-sexualized and would write explicit stories. Tr. 613. He explained that she was making this up with her sexually explicit imagination. Tr. 613.

Mr. Waters testified at trial. He said he understood he did not have to testify and he waived his right to remain silent. Tr. 1096-97. He said he absolutely did not rape or attempt to commit sodomy against his daughter. Tr. 1097. He did not rub his hand on her private parts or butt. Tr. 1096. Mr. Waters said he does have three STDs: genital warts, herpes and hepatitis B. Tr. 1098. Mr. Waters said he has had genital warts since he was a teenager and that he has had herpes for at least nine years; he was not sure how long he has had Hepatitis B. Tr. 1099.

Mr. Waters acknowledged that he has three convictions: (1) carrying a concealed weapon, a B misdemeanor, for possessing a butterfly knife he was given as a gift; (2) assault in the fourth degree, a class A misdemeanor; and (3) one felony for burglary when he stole a pack of cigarettes from a gas station. Tr. 1101. He has never been convicted of any type of sexual assault. Tr. 1101.

Rebuttal

Mrs. Waters testified that when she returned from the hospital everyone, including S.E., wanted to show her the house because they cleaned it up for her. Tr. 1055-56. They ate dinner and they watched some TV in their room. Tr. 1056. At some point, Mrs. Waters kicked all the kids out the room because she wanted to spend time with Mr. Waters alone. Tr. 1056. She took a shower and put on her nightgown. Tr. 1057. She closed the bedroom door and waited for her husband. Tr. 1057. They had unprotected sexual intercourse. Tr. 1058. Mrs. Waters admitted that she had two STDs, HPV and

herpes. Tr. 1060. Mr. Waters ejaculated on her back, and then Mr. Waters cleaned it up with the nightgown. Tr. 1058. This was the same nightgown later seized by police. Tr. 1059.

In cross-examination, Mrs. Waters acknowledged that sometime after Mr. Waters was arrested, she went and visited him in jail. Tr. 1088-89. The jail visiting area is an open room and there was another officer there supervising them. Tr. 1089.

In rebuttal, the State called Officer Gary Brankel. Officer Brankel worked at the jail where Mr. Waters was incarcerated prior to trial. Tr. 1113-14. On September 10, 2016, Officer Brankel was present when Mrs. Waters came to visit Mr. Waters. Tr. 1114-15. They both knew he was there. Tr. 1120. Officer Brankel was in the room and overheard the Waters talking about a nightgown that Mrs. Waters wore and them having sexual contact the night after the alleged incident. Tr. 1116-17. Officer Brankel said they discussed that they had sex in the "doggy" position and "that the nightgown was pulled up on her back and he ejaculated onto the nightgown." Tr. 1117. Officer Brankel did not take any notes about this conversation and did not make a police report. Tr. 1119.

In cross-examination, defense counsel asked Officer Brankel, "who is Michael Plummer" which elicited an objection by the State. Tr. 1117. The State argued that this question was irrelevant. Tr. 1118. Defense counsel explained that the purpose of this line of questioning was to show that Officer Brankel is not credible because he participated in a scheme to file false affidavits to receive a permit for breath alcohol analyzer. Tr. 1118. Officer Brankel received immunity to testify against Michael Plummer, who was the Marshall and his boss at the time. Tr. 1118. The court sustained the State's objection. Tr. 1119.

Closing and Verdict

In closing, the State argued that this case comes down to whether you believe that Mr. Waters had sex with S.E. or with Mrs. Waters. Tr. 1153. The State argued that the jury should believe S.E. because she testified in court and she told other people who also testified about what S.E. told them. Tr. 1153-54. The State acknowledged that a key issue

in this case is the credibility of a child, and the jurors all said, or did not object when they were asked whether, they could judge the credibility of children. Tr. 1154-55, 1187-88, 1191. The State argued that children do lie and they heard about a number of times S.E. admitted to lying, but S.E. was young and she lied oftentimes about insignificant things. Tr. 1155-56. The State also argued that if you look at the stain on the nightgown, it is consistent with S.E.'s story. Tr. 1160. The State argued the jury should disbelieve Mrs. Waters's testimony because she said on the stand that on Thursday they had sex and Mr. Waters picked the nightgown off the floor to clean the ejaculate off her back. Tr. 1162. However, Officer Brankel testified that he overheard Mrs. Waters talking about this with her husband in jail and she said she was wearing the nightgown while having sex. Tr. 1162. Both those statements cannot be true. Tr. 1162. The State argued Mrs. Waters' statements are incredible and unbelievable and neither statement is true and both are made up by Mrs. Waters. Tr. 1162-63. The State asked the jury to believe S.E. and return verdicts of guilty. Tr. 1191

The defense argued that the State failed to meet their burden to prove Mr. Waters guilty beyond a reasonable doubt. Tr. 1165. The defense argued that S.E. is not credible. Tr. 1170. The defense pointed out the number of time S.E. indicated that she did not remember something. Tr. 1168-69. She told Jasmine, Haven, and Victoria, that she had been raped for two year and other times she said it only happened once. Tr. 1170-71. The defense explained that there is no physical evidence of a sexual assault besides the nightgown. Tr. 1165, 1167. The defense pointed out that Mr. Waters has STDs and S.E. doesn't even after allegedly have unprotected sex with Mr. Waters. Tr. 1167, 1172. The defense argued that S.E.'s demeanor during the interview was not consistent with a rape victim. Tr. 1166. S.E. also said she was scared after allegedly being raped, but then went into Mr. Waters' bedroom the next night. Tr. 1179. The defense argued that this case was burdened with poor police work, like when Officer Butler did not take pictures of where the nightgown was seized from. Tr. 1173-75.

The jury started deliberation at 6:23 P.M. Tr. 1193. Hours into deliberation, the court inquired into how the jury was progressing. Tr. 1201. The jury was split 2/2/8[12] and continued deliberation. Tr. 1201-202. Later, the jury told the court they were 9/2 and 1. Tr. 1208. Juror Adkins told the court that further deliberation may help. Tr. 1208. It was 11:47 in the evening and the court recessed until Monday. Tr. 1209. The jury did not return to deliberation until 9:13 a.m. on Wednesday because of heavy rain and closed roadways. Tr. 1222. At 10:10 a.m. the jury reached a verdict on Counts II and IV but could not come to a verdict as to Counts I and III. Tr. 1229-30. The court accepted the verdicts of guilty for Counts II and IV and declared a mistrial for the others. Tr. 1230, 1237.

Defense counsel informed the court that he needed to make his offers of proof before he could file his motion for new trial. Tr. 1234. The court set that hearing for May 17. Tr. 1236. The court granted counsel's request for an extension for the motion for new trial, which made it due May 30, 2017. Tr. 1235.

Offer of Proof

On May 17, 2017, Officer Gary Brankel testified in an offer of proof made by the defense. Post. Tr. 25. Officer Brankel testified that he used to have a Type III permit for the operation of a breath alcohol analyzer. Post. Tr. 25. The permit is good for three years. Post. Tr. 26. To get a permit, officers have to take a class and pass a multiple choice test. Post. Tr. 26. Then the officers have to fill out an application and submit it to get the permit renewed. Post. Tr. 26.

Officer Brankel received immunity to testify against Michael Plummer, his boss. Tr. 31; Ex. HH. Officer Brankel testified that he knew he had to take 40 hours of classes and pass a test to receive the permit. Tr. 29. It was Officer Plummer's responsibility to schedule the classes. Tr. 32. Officer Plummer told Officer Brankel to fill out and sign the application but leave blank the dates he took the necessary classes. Post. Tr. 29, 32, 35-

[12] It is clear that the numbers represent guilty, not guilty and undecided, but it is not clear which number applies to which answer. Tr. 1206.

36. Officer Brankel indicated that he was present for the classes on a sign-in sheet Officer Plummer gave him, but there were never any classes. Post. Tr. 32. Instead, Officer Brankel took the exam, but before he did, he was given the answers to the exam by Officer Plummer. Post. Tr. 36. Officer Brankel signed his application for a Type III permit after not attending the required classes and cheating on the test. Post. Tr. 28; Ex. II.

Motion for New Trial and Sentencing

The court took up defendant's motion for new trial, which was filed on June 2, 2017. L.F. 39:1-34; S.Tr. 4. The State argued that the court should not consider the motion for new trial because pursuant to Rule 29.11, the motion for new trial was due May 30, 2017, within the ten day extension. S.Tr. 2. Defense counsel admitted he made a mistake and believed he had gotten a 15 day extension. S.Tr. 5. The court found that because the motion for new trial was late, it was going to deny the motion. S.Tr. 6.

After the State and defense presented evidence at sentencing, the court sentenced Mr. Waters to ten years on Count II and eight years on Count IV. L.F. 51:1; S.Tr. 34. The court ran the sentences consecutive for a total of eighteen years. L.F. 51:1; S.Tr. 34.

This appeal follows.

POINTS RELIED ON

I.

The trial court plainly erred in prohibiting the defense from asking prospective jurors about the answers they gave in the juror questionnaires as to whether the charge of molestation alone means the defendant did it, whether children lie about being molested, whether someone is lying when they deny they molested a child, and whether they could be fair in this kind of case, because this ruling deprived Mr. Waters of his rights to due process of law, to a fair and impartial jury, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that some jurors' answers in open court to these questions were inconsistent with their questionnaires which revealed these biases, prejudices and partialities against accused and for the accuser.

State v. Clark, 981 S.W.2d 143 (Mo. banc 1998);

State v. Finch, 746 S.W.2d 607 (Mo. App. W.D. 1988);

State v. Mayes 63 S.W.3d 615 (Mo. banc 2001);

Knese v. State, 85 S.W.3d 628 (Mo. banc 2002);

U.S. Const., Amends. V, VI, & XIV;

Mo. Const., Art. I, §§ 10 and 18(a); and

Rule 30.20.

II.

The trial court plainly erred when it refused to allow evidence that Officer Brankel lied and cheated in an attempt to receive a permit to use a breath alcohol analyzer, because the exclusion of this evidence violated Mr. Waters' rights to due process, to a fair trial, and to present a defense, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that this evidence was relevant to challenge the credibility of Officer Brankel, whose credibility was always at issue and central to the State's case, in that, if believed, Officer Brankel's testimony showed that Mrs. Waters, S.E.'s stepmother, knowingly lied to protect her husband against accusations that he raped S.E. Because the issue of Officer Brankel's credibility was key in the case, the courts error results in a manifest injustice.

Mitchell v. Kardesch, 313 S.W.3d 667 (Mo. banc 2010);
State v. Donovan, 539 S.W.3d 57 (Mo. App. E.D. 2017);
State v. Barriner, 111 S.W.3d 396 (Mo. banc 2003)
Crane v. Kentucky, 476 U.S. 683, 688 (1986)
U.S. Const., Amends. V, VI, & XIV;
Mo. Const., Art. I, §§ 10 and 18(a); and
Rule 30.20.

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ARGUMENT

I.

The trial court plainly erred in prohibiting the defense from asking prospective jurors about the answers they gave in the juror questionnaires as to whether the charge of molestation alone means the defendant did it, whether children lie about being molested, whether someone is lying when they deny they molested a child, and whether they could be fair in this kind of case, because this ruling deprived Mr. Waters of his rights to due process of law, to a fair and impartial jury, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that some jurors' answers in open court to these questions were inconsistent with their questionnaires which revealed these biases, prejudices and partialities against accused and for the accuser.

A. Facts, Preservation, and Standard of Review

Prior to trial, the court gave a questionnaire to the prospective jurors to fill out. Pre. Tr. 3-5. Consistent with the instructions of the court, at the beginning of the questionnaire, the jury was told to answer the questions truthfully, to the best of their ability, and that their answers would be kept confidential in that only the attorneys and the court would know their answers. Pre .Tr. 3; L.F. 57:1. Some questions asked for basic information from the potential jurors, such as their name, age, and address. L.F. 57:1. Other questions were more specific to the case and asked the potential jurors whether they knew anyone who worked for a child advocacy center, or whether they knew anyone close that had training in interviewing children in a criminal case. L.F. 57:3-4. Relevant here, question 33 read:

> 33. IN THIS CRIMINAL CASE THE DEFENDANT IS CHARGED WITH STATUTORY RAPE, STATUTORY SODOMY, INCEST AND ATTEMPT STATUTORY SODOMY, ON A SCALE OF 1 TO 10 (1—STRONGLY DISAGREE, 10—STRONGLY AGREE) PLEASE

INDICATE BY CIRCLING THE NUMBER THAT BEST REPRESENTS YOUR THOUGHTS REGARDING THE FOLLOWING STATEMENTS:

IF I HEAR SOMEONE IS ACCUSED OF CHILD MOLESTATION I FEEL THAT THEY DID IT.
1 2 3 4 5 6 7 8 9 10

CHILDREN DO NOT LIE ABOUT BEING MOLESTED.
1 2 3 4 5 6 7 8 9 10

PERSONS ACCUSED OF MOLESTATION ARE LYING WHEN THEY SAY THEY DID NOT DO IT.
1 2 3 4 5 6 7 8 9 10

I CANNOT BE FAIR (WHETHER TO THE DEFENDANT OR THE STATE) IN THIS KIND OF CASE.
1 2 3 4 5 6 7 8 9 10

L.F. 57:4.

Following the instructions from the court and the State speaking to the potential jurors, the defense spoke to potential jurors and they acknowledged filling out a juror questionnaire. Tr. 236. They acknowledged that they signed their names to those questionnaires and, as the questionnaires indicated, that the answers the jurors gave were truthful to the best of their ability. Tr. 236. Defense counsel started by reminding the jury of the first prompt on question 33 and asked the jurors who circled 10 to raise their hands. Tr. 236-37. No juror responded. Tr. 237. One juror indicated that he or she did not remember what they had answered. Tr. 237.

Defense counsel started with Juror 1 who circled 10 on the first prompt. Tr. 237. Juror 1 did not remember circling 10 but then acknowledged that did occur.[13] Tr. 237. Juror 1 then acknowledged that he circled 10 for the second prompt that he does not

[13] It is not clear why Juror 1 changed his answer so quickly, but the record appears to indicate that defense counsel may have approached Juror 1 and shown him his questionnaire because the following question started with defense counsel saying "And I guess while I'm here also…" Tr. 237.

believe children lie about being molested. Tr. 237. Juror 1 acknowledged circling 8 on whether he could not be fair in the case. Tr. 237. Juror 1 indicated he did have performed opinions about this case. Tr. 237. As a result, at the end of voir dire, the court agreed that Juror 1 should be struck for cause based on his verbal answers in open court confirming his written answers to the questionnaire. Tr. 283-84.

Defense counsel then asked Juror 4 about their answers to question number 33. Tr. 238. Juror 4 acknowledged that they answered 5, 7, 7, and 7 to the four prompts as asked in order. Tr. 238-39. As a result of the answers, Juror 4 acknowledged that they have preconceived notions about the case.[14] Tr. 239. Before defense counsel could ask another question, the State objected and a conversation was held outside the presence of the jury. Tr. 239.

The State argued that the answers given by the jurors in their questionnaires are to be kept confidential and defense counsel should not refer to them in open court. Tr. 239. Defense counsel explained that the court could bring each juror to the bench whom counsel had concern about and then he could ask each juror about their questionnaire.[15] Tr. 240. Defense counsel also recommended that the court strike some of the jurors based on their questionnaires to expedite the process. Tr. 240. The State argued that it would be improper to strike a juror based solely on their questionnaire because the answers the jurors gave are a subjective number without enough context, and the jurors could have been confused by the question. Tr. 241-43. The trial court agreed that the questionnaires are confidential and that the jurors' answers could not be disclosed to the public in open court. Tr. 243. Additionally, the court denied the defense's request to voir dire each individual juror about their questionnaire. Tr. 243-44; 272-73.

After overruling the defense's request to voir dire each individual juror, the court asked jurors whether they had any preconceived notions about the case, whether they

[14] Juror 4 was struck for cause based on her in court answers and that she had preconceived ideas about the case. Tr. 284.

[15] Defense counsel would later tell the court that he had concern about most of the jurors. Tr. 273.

could be fair and impartial, and whether they could not follow the instruction that said "filing of a charge is no indication and no evidence that an offense occurred or the Defendant is guilty of that offense" and no juror responded. Tr. 274-75. Both parties then asked the court to ask question 33 from the questionnaire. Tr. 274-75. The court asked: "Is there anybody here who, if they hear someone is accused of child molestation, feels that they did it just because of the accusation?" Tr. 277. No juror responded. Tr. 277. The court read the next prompt: "Is there anyone here who feels children would never lie about being molested?" Tr. 277. Two jurors, 32 and 51, responded affirmatively and explained their thoughts.[16] Tr. 277. Next, the court asked the third prompt: "Is there anybody here who feels if somebody is accused of molesting a child, they are lying when they say they did not do it?" Tr. 278. No jurors responded. Tr. 278. Next, the court asked: "If you knew nothing more about the case, other than they were accused and said they didn't do it, is there anybody here who would automatically feel they were lying?" Tr. 278. No juror responded. Tr. 278. Finally, the court asked: "Is there anybody here who feels, given -- again, I'm gonna ask you, is there anybody here who feels because of the nature of the charges, that they cannot be fair to both sides if they sit as a juror in this case?" Tr. 279. "In other words, who would go into it with a preconceived notion?" Tr. 279. Jurors 45 and 51 indicated that they could not be fair to both sides. Tr. 279.

After the close of voir dire, Defense counsel sought to strike jurors based on their questionnaires. Tr. 282-83. Defense counsel explained that the questionnaires show some jurors had preconceived ideas about certain issues. Tr. 288. Among other jurors, the defense sought to strike jurors 5, 10, 11, 15, 16, 18, 22, 30, and 35, all of whom served on the jury, for their answers in the questionnaires.[17] [18] Tr. 288, 290-93, 296, 299-300. The

[16] As to this prompt in their questionnaires, Juror 32 answered 9/10 (L.F. 60:9) and Juror 51 answered 10/10 (L.F. 62:4). Other jurors who indicated similar bias, such as Juror 9 (10/10) and Juror 28 (10/10), who were the subject of peremptory strikes, did not disclose their thoughts on this prompt.

[17] Question 33 was not the only question in the questionnaire that the defense argued should serve as the basis for a strike for cause.

court again agreed with the State that the questionnaires alone could not serve as the basis for a strike for cause. Tr. 286-88. Additionally, the court also noted that it asked the four prompts from question 33 and no one responded except Jurors 32, 45, and 51. Tr. 287-88.

The error here is that the court sustained the State's objection to the defense's request to ask the potential juror's about their answers in their questionnaires. Tr. 243-44; 272-73. Counsel included this claim in the motion for new trial filed on June 2, 2017. L.F. 39:1-16, 24. However, the motion for new trial was due May 30, 2017, thus making the motion for new trial untimely. Rule 29.11. An untimely motion for new trial does not preserve anything for review. *See State v. Langston*, 229 S.W.3d 289, 294–95 (Mo. App. S.D. 2007). Therefore, Mr. Waters requests plain error review under Rule 30.20.

Claims of plain error under Rule 30.20 are reviewed "under a two-prong standard." *State v. Cable*, 207 S.W.3d 653, 659 (Mo. App. S.D. 2006). First, this Court determines whether there is error that is evident, obvious, and clear. *Id.* If so, then this Court looks to the second prong of the analysis, which considers whether a manifest injustice or miscarriage of justice has occurred as a result of the error. *Id.* at 659-60.

Generally, the appellate court reviews a trial court's decision to prohibit certain questions during voir dire for an abuse of discretion. *State v. Hunter*, 179 S.W.3d 317, 321 (Mo. App. E.D. 2005) (citing *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1998)). The trial judge is in the best position to determine whether questions raised in voir dire assure the presence of a fair and impartial jury without amounting to prejudicial presentation of evidence. *State v. Leisure*, 749 S.W.2d 366, 373 (Mo. banc 1988). An appellate court will find reversible error only when an abuse of discretion is found and the defendant can demonstrate prejudice. *State v. Oates*, 12 S.W.3d 307, 311 (Mo. banc 2000).

[18] Defense counsel could not use peremptory strikes on these jurors because they had already been used on jurors 6, 9, 19, 23, 28 and 41. Tr. 308-309; L.F. 53:2-4.

B. Analysis

In this case, the trial court plainly erred in prohibiting the defense from asking prospective jurors using their questionnaires about questions indicating that they could not be fair and impartial in this case. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 18(a) of the Missouri Constitution guarantee a criminal defendant's right to trial by an impartial jury. *State v. Baumruk*, 85 S.W.3d 644, 650 (Mo. banc 2002). A necessary component of the guarantee of an impartial jury is an adequate voir dire that identifies unqualified jurors. *Morgan v. Illinois*, 504 U.S. 719, 729-730 (1992). "Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Id.* For this reason, liberal latitude is granted in the examination of prospective jurors on voir dire. *State v. Clement*, 2 S.W.3d 156, 159 (Mo. App. W.D. 1999).

"Litigants have the right, through the process of voir dire, to discover bias or prejudice on the part of prospective jurors and they should be allowed a wide latitude in the search for open minded jurors." *State v. Finch*, 746 S.W.2d 607, 613 (Mo. App. W.D. 1988). On voir dire, litigants may inquire into critical facts - facts with substantial potential for disqualifying bias. *Clark*, 981 S.W.2d at 147.

In *Clark*, the trial court prohibited the defense in voir dire from questioning prospective jurors about whether their fairness and impartiality would be affected by the fact that one of the murder victims was three years old. 981 S.W.2d at 146. On appeal, the Supreme Court of Missouri held that the trial court had abused its discretion and reversed the defendant's conviction because the fact of the child victim's age had the potential of implicating bias and disqualifying prospective jurors. *Id.* at 147-48.

Similarly, in *Finch*, this Court held that the trial court had abused its discretion in prohibiting the defense from discovering in voir dire prospective jurors' bias, prejudice, or partiality. 746 S.W.2d at 613. In *Finch*, the trial court prohibited defense counsel from asking prospective jurors whether they would automatically believe the testimony of an alleged rape victim merely because she said a rape was attempted. *Id.* This Court held the

trial court should have permitted the question because defense counsel was "entitled to learn if any of the prospective jurors had a predisposition to accept as true the testimony of alleged rape victims generally, for whatever reason such preferential belief may have been harbored." *Id.*

Here, defense counsel sought to voir dire potential jurors about a critical fact bearing on the jurors' bias, prejudice, or partiality using their answers in their questionnaires. For example, using their questionnaires, the defense wanted to ask jurors about whether they would give the presumption of innocence to Mr. Waters or did they believe he was guilty simply by an accusation. Like *Clark* and *Finch*, the defense also wanted to determine whether the jury could believe this witness, who was an alleged child victim, could be lying about this type of accusation. Furthermore, the defense sought to ask jurors whether they could listen to the accused or did they automatically not believe him. And finally, the defense sought to explore whether the jurors could be fair in this type of case. *Clark* and *Finch* support that counsel should be permitted to ask these types of questions.

The State may argue that any prejudice from prohibiting counsel to use these questionnaires was cured when the court read question 33 to the jury and no one responded except Juror 32, 45, and 51. However, this did not cure the problem, instead, it created an inconsistency between the juror's in court answers and there out of court answers. It is not clear why jurors answered one way in their questionnaires and another way in open court. A likely explanation is that jurors felt more comfortable answering truthfully while they sat quietly answering these questionnaires instead of in open court given the pressure of a courtroom and the topic area. In the end, the purpose of voir dire is probe jurors about these issues and determine what biases the jurors had and whether they could set those aside and be fair and impartial. Judge Rahmeyer, of the Southern District, observed as much recently in a concurring opinion:

> For many people, answering questions propounded by a judge as a person of authority in a black robe is intimidating and discourages complete and honest answers. There is a huge power differential. I doubt you would get a thoughtful answer to the question, "Is there anyone here who cannot follow

> the law and presume that the defendant is innocent?" The potential juror cannot get into a discussion with the trial court over what that question means.

State v. Remster, 567 S.W.3d 306, 313 (Mo. App. S.D. 2019). This Court knows, for example, Juror 1 must have felt uncomfortable answering the court's questions because he did not indicate that he believed children do not lie about being molested although he had previously acknowledged holding this opinion in open court and in his questionnaires. Tr. 237; L.F. 57:4. Juror 1 was not the only juror who indicated strong biases in their questionnaire but for some reason would not indicate those same biases in open court. *See, e.g.*, L.F. 57:44, 59:40.

That same power differential occurs when an attorney ask the same questions in open court. This was shown when defense counsel asked Juror 1 about his answer to the questionnaire and it seemed liked he was surprised by his answers until he was confronted with his questionnaire. The questionnaires make it clear potential jurors held certain biases and the defense was entitled to use those questionnaires to explore those biases.

Admittedly, the defense may not have been able to prove that the jurors who indicated bias, prejudice, or partiality in their questionnaires should be struck for cause. The jurors may have been confused by the question and clarified their answers to the satisfaction of the court. The jurors may have been able to say that they would put aside those beliefs and follow the court's instruction. The State may have been able to rehabilitate jurors who indicated they could not be fair and impartial. There are many possibilities, but what is not fair is to deprive the defense the basic opportunity to use juror questionnaires to determine whether a potential juror can be fair and impartial.

There is not a lot of Missouri case law on the use of questionnaires in jury selection. Oftentimes the issues of questionnaire arise after trial when defense counsel discovers that a seated juror did not disclose something that was in their questionnaire. Missouri courts have found that when counsel does not bring to the court's attention a possible conflict between a questionnaire and a juror's response in court, they waive any

review of such a claim on direct appeal. *See State v. Mayes* 63 S.W.3d 615 (Mo. banc 2001). For example, in *State v. Mayes*, the court found that counsel waived any complaint about juror's nondisclosure when counsel had evidence of nondisclosure in the form of a juror questionnaire and yet he failed to bring it to the court's attention. *Id*. at 625. The court explained "the purpose of the questionnaire is to assist in examining the potential jurors during voir dire." *Id*. This Court found it would be unfair to give the defense a new trial where the discovery of the questionnaire response in a timely manner was entirely within the control of counsel. *Id*.

The use of juror questionnaires also arises in claims regarding ineffective assistance of counsel when counsel fails to ask a juror about an answer in their questionnaire. *See Knese v. State*, 85 S.W.3d 628, 633 (Mo. banc 2002). For example, this Court held that counsel was ineffective at minimum for failing to read juror questionnaires and to voir dire the potential jury to determine whether potential jurors could serve. *Id*. In *Knese*, counsel failed to read the questionnaires and discovered that jurors who eventually served were possibly predisposed to give the death penalty. *Id*. The court found that "[t]his complete failure in jury selection is a structural error." *Id*. If counsel must read a questionnaire and voir dire a potential juror about something, and if they do not, then they either waive the claim and/or they are ineffective. *See Mayes* 63 S.W.3d at 625; *Knese*, 85 S.W.3d at 633. This means it must have been error to forbid counsel from using the questionnaires to inquire into jurors' potential biases which were evident from their questionnaires. This error is evident, obvious, and clear.

Furthermore, the court's ruling resulted in a manifest injustice in that the defense was forbidden from using the questionnaires that indicated potentially disqualifying bias, prejudice, and partiality of potential jurors. For example, Juror 5, who sat on the jury, indicated with an answer of 9 that he strongly agrees that when he hears someone is accused of child molestation, the accused did it. L.F. 57:24. Juror 5 also indicated with an 8 that he does not believe children lie about being molested; that an accused child molester lies when they say they did not do it; and that he strongly agrees he cannot be fair in this kind of case. L.F. 57:24. Juror 5, like Jurors 9 and 28, did not disclose in open

court their bias, prejudice and partiality when the court asked them whether they could be fair to the defendant or the State in the kind of case which they indicated in their questionnaires. L.F. 57:24, 27:44, 59:39. The court essentially asked the same question and these jurors did not indicated they could not be fair. *See* Tr. 274-75, 279. By not allowing counsel to use the questionnaires to test juror biases, it permitted jurors who may have disqualifying biases to serve on this jury on a case that was not very strong but invokes strong emotions.

"The defendant's right to an impartial jury would be meaningless without the opportunity to prove bias." *Clark*, 981 S.W.2d at 147. The defense was deprived of the ability to protect Mr. Waters' right to a fair and impartial jury by using the questionnaire to prove bias. Thus, a manifest injustice has resulted and this Court should reverse Mr. Waters' conviction and remand for a new trial and fair trial.

II.

The trial court plainly erred when it refused to allow evidence that Officer Brankel lied and cheated in an attempt to receive a permit to use a breath alcohol analyzer, because the exclusion of this evidence violated Mr. Waters' rights to due process, to a fair trial, and to present a defense, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that this evidence was relevant to challenge the credibility of Officer Brankel, whose credibility was always at issue and central to the State's case, in that, if believed, Officer Brankel's testimony showed that Mrs. Waters, S.E.'s stepmother, knowingly lied to protect her husband against accusations that he raped S.E. Because the issue of Officer Brankel's credibility was key in the case, the courts error results in a manifest injustice.

A. Facts, Preservation, and Standard of Review

Mrs. Waters testified that when she returned from the hospital everyone, including S.E., wanted to show her the house because they cleaned it up for her. Tr. 1055-56. They ate dinner and they watched some TV in their room. Tr. 1056. At some point, Mrs. Waters kicked all the kids out the room because she wanted to spend time with Mr. Waters alone. Tr. 1056. She took a shower and put on her nightgown. Tr. 1057. She closed the bedroom door and waited for her husband. Tr. 1057. They had unprotected sexual intercourse. Tr. 1058. Mrs. Waters admitted that she had two STDs, HPV and herpes. Tr. 1060. Mr. Waters ejaculated on her back, and then Mr. Waters cleaned it up with the nightgown. Tr. 1058. This was the same nightgown later seized by police. Tr. 1059.

In cross-examination, Mrs. Waters acknowledged that sometime after Mr. Waters was arrested, she went and visited him in jail. Tr. 1088-89. The jail visiting area is an open room and there was another officer there supervising them. Tr. 1089.

In rebuttal, the State called Officer Gary Brankel. Officer Brankel worked at the jail where Mr. Waters was incarcerated prior to trial. Tr. 1113-14. On September 10,

2016, Officer Brankel was present when Mrs. Waters came to visit Mr. Waters. Tr. 1114-15. They both knew he was there. Tr. 1120. Officer Brankel was in the room and overheard the Waters talking about a nightgown that Mrs. Waters wore and them having sexual contact the night after the alleged incident. Tr. 1116-17. Officer Brankel said they discussed that they had sex in the "doggy" position and "that the nightgown was pulled up on her back and he ejaculated onto the nightgown." Tr. 1117. Officer Brankel did not take any notes about this conversation and did not make a police report. Tr. 1119.

In cross-examination, defense counsel asked Officer Brankel, "who is Michael Plummer" which elicited an objection by the State. Tr. 1117. The State argued that this question was irrelevant. Tr. 1118. Defense counsel explained that the purpose of this line of questioning was to show that Officer Brankel is not credible because he participated in a scheme to file false affidavits to receive a permit for breath alcohol analyzer. Tr. 1118. Officer Brankel received immunity to testify against Michael Plummer, who was the Marshall and his boss at the time. Tr. 1118. The court sustained the State's objection. Tr. 1119.

Officer Gary Brankel testified in an offer of proof made by the defense. Post. Tr. 25. Officer Brankel testified that he used to have a Type III permit for the operation of a breath alcohol analyzer. Post. Tr. 25. The permit is good for three years. Post. Tr. 26. To get a permit, officers have to take a class and pass a multiple choice test. Post. Tr. 26. Then the officers have to fill out an application and submit it to get the permit renewed. Post. Tr. 26.

Officer Brankel received immunity to testify against Michael Plummer, his boss. Tr. 31; Ex. HH. Officer Brankel testified that he knew he had to take 40 hours of classes and pass a test to receive the permit. Tr. 29. It was Officer Plummer's responsibility to schedule the classes. Tr. 32. Officer Plummer told Officer Brankel to fill out and sign the application but leave blank the dates he took the necessary classes. Post. Tr. 29, 32, 35-36. Officer Brankel indicated that he was present for the classes on a sign-in sheet Officer Plummer gave him, but there were never any classes. Post. Tr. 32. Instead, Officer Brankel took the exam, but before he did, he was given the answers to the exam by

Officer Plummer. Post. Tr. 36. Officer Brankel signed his application for a Type III permit after not attending the required classes and cheating on the test. Post. Tr. 28; Ex. II.

Counsel included this claim in the motion for new trial filed on June 2, 2017. L.F. 39:20-24. However, the motion for new trial was due May 30, 2017; thus, making the motion for new trial untimely. Rule 29.11. An untimely motion for new trial does not preserve anything for review. *See State v. Langston*, 229 S.W.3d 289, 294–95 (Mo. App. S.D. 2007). Therefore, Mr. Waters requests plain error review under Rule 30.20.

Claims of plain error under Rule 30.20 are reviewed "under a two-prong standard." *State v. Cable*, 207 S.W.3d 653, 659 (Mo. App. S.D. 2006). First, this Court determines whether there is error that is evident, obvious, and clear. *Id.* If so, then this Court looks to the second prong of the analysis, which considers whether a manifest injustice or miscarriage of justice has occurred as a result of the error. *Id.* at 659-60.

B. Analysis

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) (citation omitted). The denial of the opportunity to present relevant and competent evidence negating an essential element of the state's case may constitute denial of due process. *State v. Ray*, 945 S.W.2d 462, 469 (Mo. App. W.D. 1997). When considering questions of relevancy, trial courts must be mindful that a defendant's right to offer testimony of witnesses is the right to present a defense and is a fundamental element of due process. *State v. Brown*, 549 S.W.2d 336, 340 (Mo. banc 1977).

Furthermore, a defendant has a constitutional right to a fair and impartial trial. *State v. Hill*, 817 S.W.2d 584, 587 (Mo. App. E.D. 1991). If the defendant is deprived of the evidence, it may violate the defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution. *Id.*

As a general proposition, the credibility of witnesses is always a relevant issue in a lawsuit. *Mitchell v. Kardesch*, 313 S.W.3d 667, 675 (Mo. banc 2010). "Anything that has

the legitimate tendency of throwing light on the accuracy, truthfulness, and sincerity of a witness is proper for determining the credibility of the witness." *State v. Donovan*, 539 S.W.3d 57, 71 (Mo. App. E.D. 2017) (quoting *State v. Strughold*, 973 S.W.2d 876, 891 (Mo. App. E.D. 1998)). The jury is entitled to know information that may affect the credibility of the witness and the weight to be given to his testimony. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 869 (Mo. banc 1993). The Supreme Court of Missouri stated:

> When a person, regardless of whether a party, is being questioned on the witness stand, then long-standing Missouri law holds that the person may be asked about specific instances of his or her own conduct that speak to his or her own character for truth or veracity, even where the issue inquired about is not material to the substantive issues in the case.

Kardesch, 313 S.W.3d at 677.

During cross examination, a witness may be impeached at any time by asking the witness about any matter involving evidence of the witness's character for truthfulness and veracity. *Id*. at 677. Therefore, the only question left for the court to decide on is whether this evidence is legally relevant, or in other words, is the probative value of the evidence outweighed by danger of unfair prejudice. *Id*. at 679.

The exclusion of admissible evidence creates a presumption of prejudice, rebuttable by facts and circumstances of the particular case. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003). "[T]he erroneous exclusion of evidence in a criminal case creates a presumption of prejudice which can only be overcome by a showing that such erroneous exclusion was harmless beyond a reasonable doubt." *State v. Bowlin*, 850 S.W.2d 116, 118 (Mo. App. S.D. 1993).

In *Mitchell v. Kardesh*, the Supreme Court of Missouri reversed the trial court's judgment because it excluded evidence that a doctor in a wrong death suit had lied in his interrogatory answer and in his deposition that his medical license was never suspended. 313 S.W.3d at 683. The doctor's license was suspended due to a felony conviction unrelated to his ability to practice medicine. *Id*. at 674, 679. The trial court found that because the doctor's suspension was unrelated to the practice of medicine, the issue was

collateral. *Id*. at 679. The court rejected this and held that credibility is always is central, not collateral, and it is error to exclude relevant evidence that goes to the credibility of a witness. *Id*.

Similarly here, it was error for the trial court to forbid defense inquiry into a State's witness's prior admissions to lying and cheating to obtain a permit to operate breath alcohol analyzers. This evidence directly goes to this witness's credibility, as Officer Brankel, in his capacity as an officer, lied and cheated in an attempt to obtain a permit. In *Kardesch*, the court found that the doctor's license suspension had nothing to do with him as a medical professional but still found the impeachment evidence admissible. Here, Officer Brankel's accuracy, truthfulness and sincerity were always at issue, and his willingness to lie and cheat in his capacity as a police officer is far more relevant and probative as to credibility than the evidence in *Kardesch*.

This evidence is akin to using a prior conviction to impeach a witness testimony which has always been permitted. *State v. Baker*, 636 S.W.2d 902, 907 (Mo. banc 1982) (citing Section 491.050). Essentially, Officer Brankel avoided a possible conviction in exchange for his testimony against a co-defendant. The defense was entitled to impeach Officer Brankel with his conduct in his capacity as an officer just like the State was entitled to impeach Mr. Waters with his conviction. If anything, this evidence goes more directly to Officer Brankel's credibility than Mr. Waters's conviction for possessing a butterfly knife he was given as a gift. The exclusion of relevant evidence impeaching Officer Brankel's credibility following *Kardesch* is evident, obvious, and clear error.

Furthermore, this error resulted in a manifest injustice. Like in *Kardesch*, the witness's testimony was key in the case. Mrs. Waters testified to an alternative explanation for why semen was found on a nightgown. If Mrs. Waters was telling the truth, as the State argued in closing, Mr. Waters is not guilty. Tr. 1153. However, the State argued that Officer Brankel's testimony about what he overheard shows Mrs. Waters is not credible and shows she is making her story up. This evidence did not just simply call into question the defense's alternative explanation for the semen found on the nightgown, but if the jury believed Officer Brankel, it showed a stepmother who was

willing to lie to protect her husband at the expense of her stepdaughter. If the jury did not believe Officer Brankel, then there is a plausible explanation for why there is semen on the nightgown, further eroding an already weak State's case. Therefore, Officer Brankel's credibility was key in this case and the defense should have been able to attack his credibility. Just like the State's need to introduce Mr. Waters' prior convictions for unrelated crimes to attack his credibility, Mr. Waters' right to a fair trial and to present a defense required the court to allow him to present evidence that Officer Brankel is willing to lie and cheat as an officer. Because the court excluded this evidence, Mr. Waters was denied his right to a fair trial.

CONCLUSION

For the reasons stated herein, Mr. Waters respectfully requests that this Court find that this appeal is premature and remand this case back to the trial court for a determination as to the outstanding counts. In the alternative, if this Court finds it does have authority to hear this case, Mr. Waters respectfully requests this Court to reverse his convictions and remand for a new and fair trial.

Respectfully submitted,

/s/ Christian E. Lehmberg

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Certificate of Compliance

I, Christian E. Lehmberg, 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 in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance, and appendix, the brief contains 14,933 words, which does not exceed the 31,000 words allowed for an appellant's substitute brief.

/s/ Christian E. Lehmberg

Christian E. Lehmberg