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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

There is an obvious tension between the two competing interests surrounding the issue of when a judgment becomes final in a criminal case when there is a multicount indictment or information where some of the counts remain pending following a trial. First, "[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). Second, a final judgment in a criminal case occurs when a sentence is entered. *Id*. The position Appellant has taken has harmonized these two concepts and has argued that for a judgment to become final everything in the case must have been adjudicated and a sentence has been entered unless a rule or statute permits otherwise.

Here, in attempt to resolve this obvious conflict, Respondent encourages this Court to adopt a concept that when there are outstanding counts in this type of situation, those counts that remain pending are *de facto* severed into a new case, thus making the counts where a sentence has been issued final. Resp't Br. 26-28. What is troubling about the State's argument is that despite being well within their right to make such a severance request to the trial court, they have chosen here not to make such a request for over a year and a half. Instead, for no other conceivable reason, Respondent has decided to needlessly wait until the merits of this appeal are resolved although they could have decided long ago whether they want to try these pending counts.

Respondent should make a decision whether to retry these counts irrespective of the merits or resolution of Mr. Waters' appeal. In the opening brief, Appellant argued that one way to achieve this end is to find that this is not a final judgment and send it back to the trial court for Respondent to decide whether to retry the remaining counts or to dismiss these counts. Unfortunately, that would result in more time Mr. Waters would have to wait to get a resolution on the merits of his appeal. In the alternative, this Court could hold this case in abeyance and send the case back to the trial court for the limited purpose of disposing of Counts I and III as the Missouri Court of Appeals, Southern District, did in *State v. Thomas*, 801 S.W.2d 504, 505 (Mo. App. S.D. 1991), and *State v. Wakefield*, 689 S.W.2d 809, 812 (Mo. App. S.D. 1985).

STATEMENT OF FACTS

Mr. Waters incorporates herein by reference the Statement of Facts from his opening brief as though it is set out in full. This Court should note that the Statement of Facts from Respondent's brief is written "in the light most favorable to the verdict[;]" therefore, it is not a "fair" recitation of the facts. *See* Rule 84.04(c), Rule 84.04(f); Resp't's Br. 8-9. Appellant is not claiming Respondent's brief should be struck, but Appellant does ask this Court to consider all the facts when evaluating the impact of a trial court's error and not simply rely on the facts presented in the light most favorable to the verdict. *See State v. Miller*, 372 S.W.3d 455, 472 (Mo. banc 2012).

ARGUMENT

I.

Mr. Waters' right to a fair and impartial jury was violated when the trial court forbid counsel from asking prospective juror about the answers they gave in their questionnaires.

Mr. Waters is entitled to a new trial where he can probe prospective jurors on critical facts about juror biases on sensitive matters in a child sex case. Respondent disagrees for two reasons: 1) "It is not clear from the record that the trial court prohibited defense counsel from following up with those veniremembers whose in-court answers were allegedly inconsistent with their questionnaires or if counsel simply didn't do so[;]" and 2) if the record is clear, then the court did not plainly err. Resp't's Br. 43-50. Appellant will respond to each of these claims.

The trial court was clear

The parties dispute what the trial court's order was in regards to whether defense counsel could use the juror questionnaires that indicated a number of potential jurors had certain biases either in open court or at the bench. *See* Resp't Br. 43-46. The record is clear that defense counsel sought to ask jurors about their answers given in their questionnaire that indicated certain biases and the State objected. Tr. 239. The State successfully argued to the trial court that the questionnaires are to be kept confidential, and, therefore, jurors' answers in the questionnaires are confidential. Tr. 240. The defense proposed that if the court was concerned about confidentiality of the questionnaire, it could bring each juror up and counsel could follow up with them outside the presence of other jurors. Tr. 240. The court said: "I'm not gonna bring them up individually. You can ask them as a group whether anybody else who has not already indicated – if they're not able to be fair in this case, and you can inquire of them individually." Tr. 273. Defense counsel reiterated: "I understand the Court's overruling this, as I understand it and it's my request to bring them up individually." Tr. 273-74. The

trial court confirmed that the ruling was that Appellant could not individually ask potential jurors about their questionnaires. Tr. 273-74. Contrary to Respondent's contention, the trial court was clear that Appellant could *not* use the juror questionnaires in open court or with each juror individually at the bench.

Not only is it clear from the record that counsel was forbidden to use the juror questionnaires, it is also clear from Appellant's extensive, detailed motion for new trial that it was Appellant's belief that he could not use the juror questionnaires. *See* L.F. 39:1-16. The motion specifically identifies numerous times the trial court erred "by not allowing Defense Counsel to voir dire [his/her] responses to Supplemental Juror Questionnaire No. 33" or something substantially similar. L.F. 39:4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16. Furthermore, defense counsel argued similarly at sentencing that the court erred when it foreclosed the use of the questionnaires during voir dire. S.Tr. 30-31. Neither the court nor the State corrected defense counsel and explained that he *was* able to use the questionnaires. It is clear from the record, defense counsel's motion for new trial, and defense counsel's arguments at sentencing that the court did forbid the use of the juror questionnaire during voir dire.

After the trial court made its ruling, the court asked question 33 to the potential jurors and all but three indicated they could be fair and impartial. Both parties agree that juror questionnaires indicated certain possible biases and that jurors' answers to the court asking question 33 were arguably inconsistent with their questionnaires. *See* Resp't Br. 47-49. Respondent seems to argue that Appellant needed to ask the court again whether the court would now take each juror up individually after asking question 33. Resp't Br. 43. It is not clear why Respondent believes Appellant needed to do this because the trial court had already completely foreclosed the questionnaires use. If counsel had asked, it is clear the trial court would have denied that request because when this issue was raised again at sentencing, the court never indicated that counsel was permitted to use the questionnaires. *See* S.Tr. 30-31. This would have been a useless act. *See State v. Long*, 140 S.W.3d 27, 32 n. 7 (Mo. banc 2004) ("The law does not compel the undertaking of a useless act for the lone aim of complying with a technical requirement.") This Court

should find that the trial court did prohibit Appellant from using the questionnaires that indicated certain biases the jurors possessed.

The trial court plainly erred

Respondent argues that any biases indicated in the questionnaire were cured by the trial court's reading of question 33 from the questionnaire to the potential jurors. Resp't Br. 46-50. Except for Jurors 32, 45, and 51, all other jurors indicated they could be fair and impartial after the court's questioning. Tr. 274-79. Therefore, Respondent argues that any other questions were "unnecessary" as the jurors indicated that either they no longer held those biases or they could set those biases aside. Resp't Br. 49. The problem with Respondent's position is that the need to use the questionnaires more urgent, not less, when the jurors' answers to the judge were inconsistent with their answers in the questionnaire.

For example, Juror 5 indicated she strongly agrees that children never lie about being molested in her questionnaire (L.F. 57:24), but she did not respond when the judge asked "Is there anyone here who feels children would never lie about being molested?" Tr. 278. Although this may be a direct contradiction, Respondent seems to insist the trial court was reasonable in assuming either the juror changed her mind when the court asked this question or decided she can set those beliefs aside after hearing the court's instructions. *See* Resp't Br. 46-50. Such an assumption is not reasonable and Appellant should have been able to establish whether the potential jurors could actually be fair and impartial, as they indicated in voir dire, or if they could not, as evidenced by their questionnaires.

The other issue with Respondent's position is the record contradicts the notion that the judge was acting reasonably when he made this assumption. The record shows Defense counsel started voir dire 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 it after being shown his questionnaire. Tr. 237. Juror 1 then acknowledged that he circled 10 for the second prompt, meaning he believes children do not lie about being molested. Tr. 237. Juror 1 also acknowledged circling 8 on whether he could be fair in the case. Tr. 237. Juror 1 acknowledged that he had preformed opinions about this case. Tr. 237. As a result, at the end of voir dire, the court agreed Juror 1 should be struck for cause. Tr. 283. A very similar procedure occurred with Juror 7, who was also struck for cause. Tr. 238-39, 284. Given that the trial court witnessed these exchanges, it was not reasonable for the trial court to believe jurors simply changed their minds as Respondent contends, because Jurors 1 and 7 did not. They actually did hold these disqualifying biases and only revealed them when confronted with their questionnaires. Furthermore, Jurors 1 and 7 did not respond when the court read question 33 to them, although they had just acknowledged that they did hold these biases. It was not reasonable for the judge to believe the potential jurors who indicated possible disqualifying biases simply changed their minds on the sparseness of this record without more. Instead, it is more reasonable to believe, for whatever reason, potential jurors indicated one answer in their questionnaire and would only acknowledge that belief when confronted with their questionnaires. Appellant should have been able to ask potential jurors about their questionnaires as he did with Jurors 1 and 7.

Respondent argues that even if the court did forbid the use of the questionnaires, the questionnaires compared with the juror in court answers at best show a mere equivocation. Resp't Br. 47. However, the cases Respondent largely cites in its argument here are cases were Appellant claimed on appeal that the court erred in not striking a particular juror. *See* Resp't Br. 47. Instead, here, Mr. Waters is claiming that he could not question juror about their equivocations or more particularly to evidence of biases indicated in the questionnaires. As Respondent noted, this Court has said "[i]f prejudices are discovered," which occurred in the questionnaires here, "an inquiry should take place to reveal whether a juror can set aside prejudices and impartially fulfill his or her obligations as a juror." *State v. Edwards*, 116 S.W.3d 511, 529 (Mo. banc 2003). The

Court forbid the use of the questionnaires to establish during jury selection the juror still held those biases. If they did, they may have been rehabilitated and indicated they could set those biases aside but Mr. Waters was never given that opportunity.

The parties agree that the "the necessary and relevant question … was whether the venire members could fairly and impartially consider the evidence and adjudge Defendant's guilt without bias, despite any preconceived notions that they tended to have." Resp't Br. 49. Here, Appellant had evidence of preconceived notions that indicated bias against the defendant and for the alleged victim contained in the questionnaire that potential jurors, for whatever reason, were not revealing in open court. The court was clear that Mr. Waters could not reveal the answers in the questionnaires as they were to be kept confidential. The court also was clear it was not going to bring up each individual juror so counsel could ask them about their questionnaires. Appellant agrees with Respondent "that the trial court was concerned with inefficiency when it prohibited defense counsel from bringing up 'most' of the panel and questioning them one by one." Resp't Br. 44. However, "[w]hile the efficient administration of jury resources is to be encouraged, it can not be accomplished at the price of an arbitrarily limited voir dire examination." *Pollard v. Whitener*, 965 S.W.2d 281, 288 (Mo. App. W.D. 1998). The trial court erred in not allowing Mr. Waters to ask juror about their questionnaires that indicated disqualifying bias. Because Mr. Waters was deprived of his right to adequate voir dire, he is entitled to a new trial.

II.

The trial court plainly erred when it refused to allow evidence that Officer Brankel lied and cheated in his attempt to receive a permit to use a breath alcohol analyzer, in that this evidence was probative of Officer Brankel's credibility, the prejudicial value of the evidence is not substantially outweighed by its probative value, and the exclusion of this evidence resulted in a manifest injustice because Officer Brankel was a critical witness in the State's case.

Respondent argues the trial court did not plainly err in failing to admit the impeachment evidence of Officer Brankel because: 1) the evidence is not probative of Officer Brankel's character for truthfulness; 2) the prejudicial value of this evidence outweighs its probative value; and 3) the exclusion of this evidence did not result in a manifest injustice. Resp't Br. 56-61. Appellant will respond to each of these claims.

Officer Brankel is an admitted liar and cheater

The parties dispute whether Officer Brankel admitted to being a liar and a cheat. The offer of proof established that Officer Brankel needed to fill out an application to receive his permit to use a certain breath alcohol analyzer, which requires 40 hours of classes and a passed test. Post. Tr. 26, 29. Officer Plummer, Officer Brankel's boss, 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 Plummer told Officer Brankel that he would fill in those dates. Post. Tr. 32. Officer Brankel also signed a sign-in sheet for classes he did not intended. Post. Tr. 32. Officer Plummer also gave the answers to the test to Officer Brankel and then Officer Brankel took the test and presumably passed. Post. Tr. 36. Respondent claims that Officer Brankel did not lie or cheat in an attempt to receive his permit. Resp't Br. 56-58.

Respondent claims Officer Brankel was aloof or helpless and did not *knowingly* make false statements. *See* Resp't Br. 56-58. Instead, Officer Brankel signed the application believing that Officer Plummer was going to schedule classes for some later

date and that it was not Officer Brankel's fault that Officer Plummer put out a false statement that certain classes were attended that were never actually held. *See* Resp't Br. 56-58. One would have to strain reason that an experienced officer such as Officer Brankel did not know exactly what was going on in that situation.

The State also argues the fact that Officer Brankel copied answers from a cheat sheet given to him by Officer Plummer does not show he is a liar and a cheater. Resp't Br. 56-57. Respondent explains, "[w]hile Officer Brankel admitted that he 'copied' the answers that Officer Plummer had given him, there is no evidence indicating that those answers were not the same as Officer Brankel would have otherwise given or that Officer Brankel had sought assistance on the exam because he felt he was incapable of answering the questions on his own." Resp't Br. 57. Imagine a student telling a principal that the principal cannot prove he cheated because, although he has a cheat sheet and copied the answers from the cheat sheet, the principal cannot prove the student would not have come up with those answers on their own and there is no proof the student needed help on the test. Although one could believe this, and, therefore, the student or Officer Brankel did not cheat on the test, the far more reasonable inference is that if the student or Officer Brankel did not need the answers, they would not have had them with them to pass the test. Not only does this evidence show "general immorality," it shows that Officer Brankel is willing to lie and cheat in his job.

The fact that Officer Brankel would lie and cheat in his job is probative to whether Officer Brankel would lie about what he overheard between Mr. and Mrs. Waters. Officer Brankel was not some helpless and ignorant person who had no other choice but to follow orders. Officer Brankel knew what he was doing. Although he was not the ringleader of this particular criminal conspiracy, it appears there is more than enough evidence that he was an active accomplice who aided Officer Plummer. Ultimately, the jury could potentially believe that Officer Brankel was not a liar and a cheat, but it is far more reasonable to believe that Officer Brankel knowingly participated in a scheme to lie and cheat to receive a permit for his job. Appellant should have been able to attack the

credibility of one of the State's key witnesses when he admitted he lied and cheated just as the State is entitled to do that with a witness' prior conviction or false statement.

What's the unfair prejudice?

Respondent argues if the jury heard that Officer Brankel lied and cheated in an attempt to receive a permit, then the jury may have inferred Officer Brankel's "guilt by association." Resp't Br. 58-60. Respondent cites cases where the court excluded evidence of a codefendant's guilty plea because the jury may infer based on that evidence that the defendant is guilty. Resp't Br. 59. In that situation, a court should care because "the prosecutor's disclosure of the guilty pleas before the venire injected the venom of prejudice into defendant's right to a fair and impartial trial[.]" *State v. Jordan*, 627 S.W.2d 290, 293 (Mo. banc 1982) (citation omitted). Here, the State does not represent Officer Brankel, Officer Brankel is not on trial, and no adverse consequence would occur if the jury believed Officer Brankel was guilty of something. It is not clear what prejudice to the State would occur except their case is weaker which is exactly why the prejudicial value of this evidence, which is not clear, is not *substantially* outweighed by its immense probative value to challenge the credibility of Officer Brankel, the State's key witness to attack Appellant theory of defense.

A manifest injustice has occurred

Respondent argues a manifest injustice did not occur because of "the exclusion of evidence that was not directly relevant to the offenses for which he was ultimately convicted." Resp't Br. 60-61. However, Respondent's position here is inconsistent with that it took at trial. In closing argument, Respondent argued that this case came down to whether the jury believed Mrs. Waters or S.E. Tr. 1153. Therefore, Mrs. Waters' testimony was relevant to all counts. In other words, Mrs. Waters' testimony was not *only* about the alleged sexual intercourse as Respondent claims; instead, the testimony was

offered to attack the credibility of S.E. about the source of the semen, and thus her credibility more generally.[1]

A manifest injustice resulted when the court excluded the evidence that Officer Brankel lied and cheated in his official capacity as an officer. If the jury had heard this evidence and found Officer Brankel's testimony untrue, the jury would have been more likely to believe Mrs. Waters' testimony, which effectively acted as an alibi as to how the semen got on to the nightgown. This was an extremely close case. The State only had the testimony of S.E., the testimony of the people S.E. told, and the semen on the nightgown. After more than four hours of deliberation the jury was split 8/2/2, and after about another hour of deliberation, the jury was split 9/2/1. The fact that Officer Brankel is an admitted liar and cheater would have swayed a juror to believe and credit Mrs. Waters' testimony, which the State acknowledged would mean that the jury should vote not guilty. Therefore, a manifest injustice has resulted due to the trial court's decision to exclude relevant evidence for Appellant's defense. As a result, Mr. Waters should get a new trial where the jury can hear all the evidence.

[1] The jury may have acquitted Mr. Waters for the alleged intercourse because Mr. Waters had three STDs while S.E. did not. *See* Tr. 771, 956, 1098.

CONCLUSION

For the reasons stated herein and in the opening brief, Mr. Waters respectfully requests that this Court find that this appeal is premature hold the case in abeyance and remand for the limited purpose of disposing of Counts I and III. In the alternative, this Court should remand the case back for a final judgment. 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,

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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, and this certificate of compliance, the brief contains 3,833 words, which does not exceed the 7,750 words allowed for an appellant's substitute reply brief.

/s/ Christian E. Lehmberg

Christian E. Lehmberg