IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE CARE AND TREATMENT OF D.N., Appellant.	)	No. SC SC98077

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE EASTERN DISTRICT COURT OF APPEALS, FROM THE
CIRCUIT COURT OF CLARK COUNTY, MISSOURI
FIRST JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE RICK R. ROBERTS, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES.....

STATEMENT OF FACTS.....

REPLY ARGUMENT.....

POINT 1 .....

POINT 2 .....

POINT 3 .....

POINT 4 .....

POINT 5 .....

POINT 6 .....

POINT 7 .....

CONCLUSION .....

TABLE OF AUTHORITIES

Cases

Care and Treatment of Wolfe v. State, 291 S.W.3d 829 6

In re Care and Treatment of Grado, 559 S.W.3d 888 (Mo. banc 2018)..... 14

State v. Koenig, 115 S.W.3d 408 (Mo. App. S.D. 2003) 15

Statutes

U.S. Const. Amend. XIV 8, 9

Mo. Const. Art. I, §10..... 8, 9

RSMO 632.495 9

STATEMENT OF FACTS

Appellant stands on the statement of facts in his initial brief.

REPLY ARGUMENT

I.

The trial court abused its discretion when it prohibited D.N. from questioning the venire panel during *voir dire* about the age of victims and whether anyone had strong feelings about the age of the victims that would cause them to be biased, in that the victims' ages were critical facts of the case that had substantial potential for revealing any disqualifying basis because of sympathies for a child and were facts emphasized by the State throughout the trial. The trial court's denial of *voir dire* on the victims' age prevented the defense from uncovering bias, and therefore denied D.N.'s due process rights to a fair trial and an impartial jury guaranteed by the Fourteenth Amendment to the United States Constitution and Art. I, §§10 and 22 of the Missouri Constitution.

Reply Argument

In its brief the state argues that D.N. was able to sufficiently inquire about the ages of the victims in this case, and as such there was no prejudice. The state ignores one key fact- that even in the excerpts it selects, D.N. was never allowed to inquire as to the ages of the victims, even after the answers of the panel indicated this was a major concern and source of bias.

The state offered the following quotes as proof that counsel was able to ask about the ages of the victims:

> , "I expect that you'll hear that the disorders we're going to be talking about include . . . an attraction to children, . . . and I expect you'll hear that [Offender]

> has victimized several people in his history." (Tr. 60). The State's attorney followed by asking, "So does anyone have any kind of personal issues that are weighing on their minds about this subject matter that they say I just cannot follow the law the Judge is going to give me on this case." (Tr. 60-61) (State's br 22)
>
> "How many people have children that are young kids? . . . Quite a few people." (Tr. 169). Is there anybody . . . that is worried that because of having kids or grandkids that are small that that's going to be in the back of your mind when you're looking at the evidence and . . . if you don't feel that the State has met their burden, that because of the fact that you have kids, that you're going to vote to – that he meets criteria because you'd rather be safe than sorry because of those close to you?" (Tr. 170) (State's Brief at 22).

It is notable that in all of these excerpts, no one mentions the existence of child victims-- merely an attraction to children. Attraction to children and actually acting on that traction are very different things. When D.N.'s counsel attempted to ask about the juror's ability to hear evidence about child victims- specifically that there were boys, both around 10, the trial court immediately sustained a objection from the state. (Tr 169). D.N. was never able to inquire about a core source of Juror Bias.

The state claims that this denial is appropriate under *Care and Treatment of Wolfe v. State*, 291 S.W.3d 829 (Mo. App. W.D. 2009. However, this conflates the facts of *Wolfe* with what occurred in this case. In *Wolfe* the respondent attempted to introduce additional, often very explicit details of what occurred. These included things like the degree of damage to the child's vagina. *Id* at 832. D.Nn merely attempted to introduce the existence and age of child victims.

D.N. did not just have an alleged attraction to children, he had a history of accusations of acting on that attraction. This court has repeatedly recognized that where children are the victims of a major crime, it is inherently a source of jury bias. D.N.

should have been able to ask, specifically about this bias. Worse, this is especially true in this case- as discussed appellants brief, there were pervasive issues with the belief that D.N.'s family molested children as a group—issues which trial counsel admitted he did not investigate before trial.

II.

The trial court abused its discretion when it excluded the expert testimony of Dr. Kline concerning his risk assessment and opinion that D.N. is not more likely than not to commit predatory acts of sexual violence if not confined based on the State's argument that this evidence was irrelevant since Dr. Kline did not believe D.N. suffers from a mental abnormality, because this ruling denied D.N. his due process rights to a fair trial, present a defense, and the assistance of a mental health expert independent of the prosecution guaranteed by U.S. Const. Amend. XIV and Mo. Const. Art. I, §10, in that, as a forensic psychologist with experience and training in SVP evaluations and risk assessments and court-ordered to perform an SVP evaluation in this case, Dr. Kline was qualified to render an expert opinion on D.N.'s future dangerousness for the jury to consider; Dr. Kline's ultimate future dangerousness conclusion was based, in part, on his consideration of relevant and admissible actuarial instruments; Dr. Kline's opinion was key to D.N.'s defense to this essential element of the State's case; and his testimony was necessary to rebut the State's evidence and explain why D.N.'s actuarial scores and dynamic risk factors did not lead to a conclusion that he was more likely than not to commit predatory acts of sexual violence if not confined.

Appellant stands on the arguments in his initial brief.

III.

The trial court plainly erred when it submitted instruction 6 which failed to require the jury to state which mental abnormality or abnormalities they found required D.N. to be remanded to the care and treatment of the Department of Mental Health. RSMO 632.495 requires a unanimous verdict on the part of the jury. Without knowing what mental abnormality the jury agreed D.N. suffered from, or if they unanimously agreed on any mental abnormality, it is impossible to know if their verdict was, in fact, unanimous. This was error because this ruling denied D.N. his due process rights to a fair trial, present a defense, and a unanimous verdict guaranteed by U.S. Const. amend. XIV and Mo. Const. art. I, §10 and RSMO 632.495, in that what, if any, mental abnormality D.N. suffered from was a central issue in this case, and but for the possibility of a non-unanimous finding, D. N. was reasonably likely to have not been found to be a SVP.

Appellant stands on the arguments in his initial brief.

IV.

D.N. was provided ineffective assistance of counsel when his attorney failed to provide any basic, meaningful representation at the probable cause hearing in that he: failed to file an answer before the probable cause hearing; failed to lodge any objection to the testimony of Angela Webb, the unlicensed psychologist who authored the end of confinement report for the department of corrections; failed to bring to the attention of the court that there was no report authored by a qualified expert; failed to bring to the attention of the court that Dr. Webb not only was unlicensed, but had failed her examinations. This was error in that failure to file an answer and subsequently object to the qualifications of the end of confinement report writer has been ruled to allow a finding of probable cause solely on the pleadings, and waive future complaints about the qualifications of the end of confinement report writer. In this case, any reasonably competent attorney would have filed an answer, and objected to the testimony of Dr. Webb. A reasonably competent attorney would have provided some basic level of representation at and leading into the probable cause hearing, including filing an answer and raising the issue of Dr. Webb's lack of a license. But for this failure there would have been no finding of probable cause- especially given the sole Missouri licensed psychologist to examine D.N. found he did not suffer from a qualifying mental abnormality, and was not more likely than not to reoffend. This error deprived D.N. of his rights to a fair trial, due process of law, and effective assistance of counsel guaranteed by the

Sixth and Fourteenth Amendments to the United States Constitution and art. I, §§10 and 22 of the Missouri Constitution.

Appellant stands on the arguments in his initial brief.

V.

The Circuit Court clearly erred when it failed to grant the motion for new trial, or hold an evidentiary hearing on the issue of juror misconduct by intentional non-disclosure in that in violation of D.N.'s rights to due process of law and trial by an impartial jury under a fair trial and an impartial jury guaranteed by the Fourteenth Amendment to the United States Constitution and art. I, §§10 and 22 of the Missouri Constitution in that there was a reliable report, found credible in a related circuit court proceeding, of jurors discussing the case outside of the Court room, including their belief that the N. family was composed of child molesters, and not disclosing such in voir dire.

Appellant stands on the arguments in his initial brief.

VI.

The Circuit Court clearly erred in denying counsel's oral supplement to his motion for new trial in that evidence presented was sufficient to show by a preponderance of the evidence that trial counsel was ineffective for failing to investigate the jury pool, and as a result, to timely move for a change of venue. This was error in that but for this failure, D.N. could have had a trial by a an untainted jury pool- as it was, because of the failure, he was tried by a jury pool which believed his entire male family line were child molesters. A reasonably competent attorney would have investigated the jury pool, then moved for a change of venue as a result of this local bias. This error deprived D.N. of his rights to a fair trial, due process of law, and effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and art. I, §§10 and 22 of the Missouri Constitution.

Appellant stands on the arguments in his initial brief.

VII.

There was structural error in this case in that , through no fault of D.N., the trial transcript contains material omissions sufficient to deny him full and meaningful appellate review on some of his claims. Failure to preserve a transcript is structural error when, even if such a deletion (as is the case here) is partial, it denies the appellant full and meaningful review on appeal. Because of this error, D.N. was deprived of his rights under guaranteed by the Fourteenth Amendment to the United States Constitution and art. I, §§10 and 22 of the Missouri Constitution

Reply Argument

The state alleges that D.N. has failed to prove that he was prejudiced by the sixty six instances of indiscernible content in his trial transcript. The artificially specific proof of prejudice demanded by the state is impossible for D.N to prove, not because there was no prejudice, but rather, because neither he, nor his counsel, can tell what occurred during each of these indiscernible incidents. Some of the omissions are minor, with only single word deletions. (Tr 97). Some are extended, spanning entire side bars (See, e.g. Tr 515). -- but the sheer frequency leaves D.N with no possible way to determine what occurred during these sections. The inability to tell what is in these segments is inherently prejudicial to an appellant facing not only the need to review the transcript for preserved legal error, but also issues with ineffective assistance under *In re Care and Treatment of Grado*, 559 S.W.3d 888 (Mo. banc 2018)

Post *Grado*, the transcript in a Sexually violent predator commitment case is

of even greater importance, as the appellant must review the transcript not only for traditional direct appeal claims, but also for claims of ineffective assistance of counsel. The state relies on a criminal appeal: *State v. Koenig*, 115 S.W.3d 408, 416 (Mo. App. S.D. 2003) to argue that there must be a specific identifiable instance of prejudice in order to receive a new trial for faulty sound recorded transcript. But Koenig is a criminal direct appeal. There is a well-developed post-conviction process to independently investigate and fill any gaps in the record caused by a malfunctioning recorder iin the context of criminal proceedings. That process is entirely lacking in the realm of sexually violent predator commitments. Further, The Koenig Court put the Court System on notice about how to avoid this issue in the future, and yet, the circuit court used sound recording in this case:

> Many jury trials, due to the number of participants and the manner in which testimony may be presented, do not lend themselves to a record made by machine that cannot make known the shortcomings of lawyers or witnesses (or even judges) who may not speak in a manner that can be recorded. Fortunately, the shortcomings identified in the majority opinion do not require a new trial in this case. Future cases with such omissions may not be so fortunate. The type of record used at trials should be adequate for the circumstances of the case being tried.

State v. Koenig, 115 S.W.3d 408, 417 (Mo. App. S.D. 2003) (Concurring opinion).

The transcript in this case was not produced by means adequate to the type of case involved- a multiple expert multi-day civil jury trial. Because of this failure, the transcript contains sixty six instances of indiscernible content by the count of appellate counsel. Sixty Six holes of various sizes in the record which can never be reviewed, in a case

where there is the right to have the effectiveness of counsel reviewed- but not for independent proceeding like a post-conviction relief hearing to develop the record.

D. N deserves the ability to have the full review of the transcript in his own case. This case should be remanded.

CONCLUSION

WHEREFORE, based on the arguments as set forth in this brief and appellant's brief, appellant respectfully requests this Court remand for a new trial or such other relief as this Court sees fit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 363, I hereby certify that a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, garrick.aplin@ago.mo.gov, via the Missouri e-filing system, care of Mr. Daniel McPherson, Office of the Attorney General.

/s/ Amy E. Lowe
Amy E. Lowe

Certificate of Compliance

I, Amy Lowe, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in times new roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, the brief contains 2691words

_____/s/ Amy E Lowe_