

MISSOURI COURT OF APPEALS-WESTERN DISTRICT
DIVISION 2
MARK D. PFEIFFER, PRESIDING JUDGE
ALOK AHUJA, JUDGE
ANTHONY REX GABBERT, JUDGE
OCTOBER 6, 2021
MISSOURI WESTERN STATE UNIVERSITY
ST. JOSEPH, MISSOURI

WD84321

Michael Eivens, Appellant,

v.

Missouri Department of Corrections, Respondent.

Michael Eivens appeals from the circuit court's entry of summary judgment in favor of the Missouri Department of Corrections ("MDOC") on Eivens' claim of discrimination in violation of the Missouri Human Rights Act. The facts as alleged claim that Eivens' employment with the MDOC began in 2001 and that he worked at various facilities until 2014 when he left to work at the Leavenworth Detention Center. The MDOC rehired Eivens in 2017, and he worked at the Western Missouri Correctional Center until he resigned in April 2019. After he was rehired in 2017, Eivens applied for as many as eight promotions with the MDOC and was interviewed for these positions. There were three promotion opportunities in June 2018 and one in August 2018 at the Western Missouri Correctional Center. Eivens alleged that, for three of the promotions, younger candidates with lower merit scores were chosen. For a fourth promotion, no new interviews were conducted. Instead, the interview committee chose from the prior interviewee pool. Only Eivens and one other candidate were considered. Eivens alleged that the interview committee notes regarding the other younger candidate were changed to be more positive and that candidate was then chosen. Also, in June 2018, a separate interview committee interviewed five applicants to fill five vacancies at the Crossroads Correctional Center. The interview committee recommended only two interviewees be promoted, leaving the other three positions vacant. Eivens filed his first charge of discrimination in October 2018. Eivens alleged that, after bringing the charge, MDOC retaliated by "nitpicking," deterring him from applying for other promotions, and accusing him of drinking on the job. Eivens resigned in April 2019. Eivens filed suit against the MDOC. His Second Amended Petition for Damages alleged three causes of action: age discrimination, retaliation, and hostile work environment. The circuit court granted MDOC's motion for summary judgment on all three claims. Eivens now appeals.

Appellant's points on appeal:

1. The Circuit Court erred in applying the motivating factor standard because the contributing factor standard applies in that Mo. Rev. Stat. § 213.070 applies to the state and state agencies, § 213.070 does not use the "because of" language and, therefore, does not incorporate the motivating factor standard.

2. The Circuit Court erred in granting defendant summary judgment as to Eivens' claim for age discrimination in violation of the MHRA, because genuine issues of material fact exist regarding whether his age was a contributing or motivating factor in the discriminatory actions taken against him, in that the record contains two plausible, but contradictory accounts of essential facts regarding discriminatory intent and pretext.
3. The trial court erred in granting defendant summary judgment as to Eivens' hostile work environment claim, because the trial court A) improperly disregarded tangible employment actions that are legally sufficient to support a hostile work environment claim; B) evaluated each paragraph of Eivens' petition individually and failed to consider the totality of the circumstances; C) disregarded uncontroverted evidence of a hostile work environment; and D) improperly ignored events a jury could have considered as background evidence when determining if defendant's work environment was abusive.
4. The trial court erred in granting defendant's motion for summary judgment as to Eivens' retaliation claim, because genuine issues of material fact exist, in that the trial court failed to consider Eivens' evidence of retaliation and improperly gave defendant the benefit of inferences from the evidence.

WD83740

Elijah L. Jones, Appellant,

v.

State of Missouri, Respondent.

Elijah Jones appeals from the circuit court's judgment denying his rule 29.15 motion for post-conviction relief after an evidentiary hearing. Following a jury trial, Jones was convicted of one count of murder in the second degree and one count of armed criminal action. The evidence established that, in the early morning of July 8, 2006, six-year-old M.H. was sleeping in a room with her two cousins and her uncle, Carl Randolph. After being awakened by a stomping sound, M.H. saw two men carrying rifles enter the bedroom and pull Randolph out of bed. M.H. saw one of the men's face as this occurred. The men then chased Randolph from the bedroom, shot Randolph twice, and then hit Randolph after he had fallen to the floor. The two men fled the home. Randolph died from two gunshot wounds and suffered a blunt force injury behind his right ear. At trial, M.H. identified Jones as the man who shot Randolph. In addition to M.H.'s identification, a shoeprint expert testified the white tennis shoes Jones was wearing at the time of his arrest were the same size, of the same style, and exhibited similar wear patterns as the shoes that had left shoeprints recovered from the floor and back door of the home where the shooting occurred. The trial court sentenced Jones to life imprisonment for murder in the second degree and 55 years' imprisonment for armed criminal action, sentences to run consecutively. This Court affirmed Jones's conviction on direct appeal. On June 10, 2010, Jones filed a *pro se*

motion to vacate, set aside or correct the judgment and sentences pursuant to Rule 29.15. Retained counsel filed an amended motion on July 28, 2011. The amended motion raised five claims for relief and incorporated the eight claims Jones raised in his *pro se* motion. Due to various procedural issues, the motion court ultimately held three evidentiary hearings on the motion between 2012 and 2017. On May 3, 2019, the motion court issued findings of fact, conclusions of law, and a judgment denying Jones's amended 29.15 motion. The judgment also denied Jones's *pro se* motion for abandonment by legal counsel and various other *pro se* motions filed over the nine years the post-conviction matter had been pending. Jones now appeals.

Appellant's points on appeal:

1. The motion court clearly erred in denying appellant's motion for post-conviction relief pursuant to Rule 29.15, because the record established that appellant received ineffective assistance of counsel due to counsel's failure to properly communicate with him regarding a ten-year plea offer that appellant ultimately declined, because he was not fully informed of the strength of the state's case and that he could enter a plea under *North Carolina v. Alford* without admitting guilt. Had counsel performed effectively, appellant would have accepted this plea offer and would have already completed his sentence.
2. The motion court clearly erred in denying appellant's motion for post-conviction relief pursuant to Rule 29.15, because the record established that appellant received ineffective assistance of counsel due to trial counsel's failure to request a mistrial due to the trial court's erroneous instruction that was read to the jury at the commencement of trial that appellant was facing multiple charges involving endangering the welfare of a child, armed criminal action, and first degree burglary that had previously been dismissed, which prejudiced appellant by allowing the jury to consider uncharged bad acts for which appellant was not on trial in determining guilt and punishment.
3. The motion court clearly erred in denying appellant's motion for post-conviction relief pursuant to Rule 29.15, because the record established appellant received ineffective assistance of counsel due to trial counsel's failure to investigate and call appellant's mother, Lettie Lomax, and his grandmother, Helen Rushing, to testify as character witnesses at the sentencing phase of appellant's jury trial. Had trial counsel called these witnesses, there is a reasonable probability that appellant would have received a lesser sentence.
4. The motion court clearly erred in denying appellant's motion for post-conviction relief pursuant to Rule 29.15, because the record establishes that appellant received ineffective assistance of counsel due to trial counsel's failure to investigate and present the video-taped interview of M.H., at both the hearing on appellant's motion to suppress the out of court and in court identifications of appellant by M.H., due to suggestive procedures employed by the police and at the trial to impeach the credibility of M.H.'s identification of appellant as one of the assailants. Had counsel performed effectively, there is a reasonable

- probability that the trial court would have suppressed the out of court and in court identifications of appellant by M.H. and that the outcome at trial would have been different.
5. The motion court clearly erred in denying appellant's motion for post-conviction relief pursuant to Rule 29.15, because the record establishes that appellant received ineffective assistance of counsel due to trial counsel's failure to investigate and present the testimony of Talisha Good and Maple Good to establish an alibi defense to the charges. Had counsel performed effectively, there is a reasonable probability that the outcome at trial would have been different.

The State contends that the Amended Rule 29.15 motion was untimely filed. As such, the State argues that the Court should not address the merits of points one, two, and three. Instead, the State contends the Court should limit its review to those claims of error raised regarding the claims raised by Jones's *pro se* motion.

WD83010
State of Missouri, Respondent,
v.
Antoine Ellis, Appellant.

Antoine Ellis appeals his convictions following a jury trial of two counts of felony statutory rape in the first degree and one count of felony enticement of a child. The specific facts of the alleged rapes are not relevant to the issues on appeal. According to C.S.'s testimony, Ellis, a family friend, raped her on two different occasions when she was under 14, between June 14, 2015, and January 31, 2016. In March 2016, Ellis's girlfriend contacted C.S.'s mother and told her to get C.S.'s texting device. C.S.'s mother got C.S.'s tablet and found sexually explicit messages between C.S. and Ellis. C.S.'s mother then filed a police report. C.S. initially denied any physical contact had occurred with Ellis. C.S. first disclosed the rapes in September 2018 because, according to C.S., she felt safe to do so at that point. As relevant to this appeal, in addition to C.S.'s testimony, the State presented testimony from a probation and parole officer who testified that Ellis was on lifetime supervision because he had been previously convicted of having sex with a minor. The officer testified that Ellis was wearing a GPS monitor during the period of the alleged rapes, which showed that Ellis was present many times at C.S.'s home, including times consistent with the alleged rapes. The jury found Ellis guilty of two counts of felony statutory rape in the first degree and one count of felony enticement of a child. The trial court found that Ellis was a prior offender and a persistent sexual offender. The court sentenced Ellis to life imprisonment without the possibility of parole for each of the two counts of statutory rape and fifteen years' imprisonment for enticement of a child, the life imprisonment terms to be served consecutively and the fifteen-year sentence to be served concurrently. Ellis now appeals.

Appellant's points on appeal:

1. The trial court erred and abused its discretion in admitting, over Appellant's objection, evidence, including the testimony of Probation and Parole Officer

Maguire and State's Exhibit 29, regarding Appellant's specific location at certain dates and times, according to BI Total Access, and any reference to this evidence, because Section 559.125.2 creates a statutory privilege that prohibits the disclosure of "information or data obtained by a probation or parole officer" and such information or data "shall not be receivable in any court," in violation of Section 559.125, in that Maguire accessed and obtained this confidential information and data from BI Total Access through her job as a probation and parole officer supervising Appellant. There is a reasonable probability that the trial court's error affected the outcome of the trial, because the State used the evidence to corroborate the complaining witness's testimony that Appellant was at her house on a date in January 2016, after Mother left for work and before she left for school, when Count II occurred. Appellant was also prejudiced as to Counts I and III, because the defense was that the complaining witness was lying and this evidence corroborated her testimony.

2. The trial court erred and abused its discretion in admitting, over Appellant's objection, evidence, including the testimony of Probation and Parole Officer Maguire and State's Exhibit 29, regarding Appellant's specific location at certain dates and times, according to BI Total Access, and any reference to this evidence, because Section 559.125.2 creates a statutory privilege that prohibits the disclosure of "information or data obtained by a probation or parole officer" and such information or data "shall not be receivable in any court," in violation of Section 559.125, in that Maguire accessed and obtained this confidential information and data from BI Total Access through her job as a probation and parole officer supervising Appellant. There is a reasonable probability that the trial court's error affected the outcome of the trial, because the State used the evidence to corroborate the complaining witness's testimony that Appellant was at her house on a date in January 2016, after Mother left for work and before she left for school, when Count II occurred. Appellant was also prejudiced as to Counts I and III, because the defense was that the complaining witness was lying and this evidence corroborated her testimony.
3. The trial court abused its discretion in admitting, over Appellant's foundation objection, the T-Mobile call records and records custodian's form letter (State's Exhibits 18, 61) for the complaining witness's phone number, and Mother's testimony as to the content of the T-Mobile call records, in violation of Appellant's right to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that no affidavit from a records custodian was admitted and the State did not call a witness to testify regarding the reliability and accuracy of the process by which the records were generated. There is a reasonable probability that the trial court's erroneous admission of this evidence affected the outcome of the trial, because the State used the T-Mobile records to prove that there were an unusually high number of texts and calls to and from phone numbers associated with Mr. Ellis, in order to prove a

relationship between the two and corroborate the complaining witness's and Mother's testimony.

4. The trial court abused its discretion and plainly erred in admitting, over Appellant's best-evidence objection, the screenshots of the texts on the tablet taken by Sergeant Cranston and the photographs of the texts on the tablet taken by Mother (State's Exhibits 2, 17) , in violation of Appellant's right to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the completeness and author of the texts was in dispute, the tablet was the best evidence of the complete text conversation on the tablet, State's Exhibits 2 and 17 were missing texts, and the tablet was no longer operable due to negligence of the State in its storage of the tablet. There is a reasonable probability that the trial court's erroneous admission of this evidence affected the outcome of the trial and a manifest injustice occurred by the admission of this evidence, because the State used State's Exhibits 2 and 17 to corroborate the complaining witness's testimony and as independent proof of guilt of all offenses charged.

WD84193

In Re the Matter of: M.L.H., Appellant,

v.

Juvenile Officer, Respondent.

M.L.H. appeals from the judgment of the circuit court of Buchanan County finding that, if committed by an adult, M.L.H. committed the class D felony of tampering with electronic monitoring equipment and misdemeanor domestic assault in the fourth degree. She was also found guilty of being habitually absent from her home without permission or justification. The facts as alleged claim that, on September 3, 2020, M.L.H. was under the jurisdiction of the juvenile division. M.L.H. was on probation but resided with her great-aunt. On September 3, 2020, M.L.H. wanted to spend time with a friend but was prohibited from doing so because of her probation with electronic monitoring. M.L.H. left anyway and did not return. M.L.H.'s great-aunt called police and reported that M.L.H. had run away. When M.L.H. was found six days later, she was not wearing her electronic monitoring bracelet. M.L.H. was taken to the juvenile detention center in Buchanan County, Missouri. On September 29, 2020, M.L.H. was still residing at the detention facility. Brenae' Tate worked at the facility as an aide, and, on that evening, Tate was responsible for distributing hygiene bags to the residents. M.L.H. and Tate had a confrontation during the distribution of the hygiene bags but disagree as to the initial cause. Tate testified that, when she entered the "dayroom" to distribute the hygiene bags and assist the girls into moving into cells for the night, M.L.H. was agitated and kicking the door. M.L.H. attempted to take a hygiene bag from the cart without permission, was told by Tate not to, and responded by knocking over the cart. M.L.H. contends that she was agitated because she had told Tate she was menstruating and needed sanitary products. Nearly two hours later, Tate returned with the hygiene bags but no sanitary products. At this point M.L.H. became angry, and she knocked over the cart. Both parties agree

that, at that point, M.L.H. refused to go into her detention cell for the night. M.L.H. then stood in front of the exit door and intercom. The facts as alleged claim that, Tate then tried to push M.L.H. aside to gain access to the door and intercom, and M.L.H. responded by grabbing Tate's hair and punching her. The two had a physical fight, which left Tate with bruises and a headache. On October 2, 2020, the Juvenile Office filed a First Amended Motion to Modify Previous Order of Disposition, alleging that M.L.H. was guilty of, if committed by an adult, class D felony of tampering with electronic monitoring equipment and misdemeanor domestic assault in the fourth degree, and, additionally, being habitually absent from her home without permission or justification. The Court held a hearing on the motion to modify on November 18, 2020, finding all three allegations against M.L.H. true. The Court held a disposition hearing on November 19, 2020, and ordered M.L.H. committed to the Buchanan County Academy to complete the program. M.L.H. now appeals.

Appellant's points on appeal:

1. The trial court erred in finding Appellant delinquent for the misdemeanor offense of Assault in the Fourth Degree, because the trial court erroneously applied the law to the facts in determining Appellant's *mens rea*, in violation of Appellant's rights to due process and a fair trial—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, when determining whether Appellant acted recklessly, the trial court was required to apply the standard of care that a child of the same age, capacity, and experience would apply in the circumstances, the trial court did not do so, and the trial court's error was prejudicial.
2. The trial court erred in finding Appellant delinquent for the misdemeanor offense of Assault in the Fourth Degree, because the trial court's finding was against the weight of the evidence, in violation of Appellant's rights to due process and a fair trial—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 M.L.H. was not the initial aggressor, the reasonableness of M.L.H.'s belief that force was necessary should be evaluated based on her individualized traits because she was and is a child, and M.L.H. reasonably believed the force she used was necessary to protect her from what she reasonably believed to be the use or imminent use of unlawful force by the complaining witness.
3. The trial court erred in finding Appellant delinquent for the offense of tampering with electronic monitoring equipment, because there was no substantial evidence introduced supporting the trial court's judgment, violating Appellant's rights to due process and a fair trial—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 a critical element of the offense is that a court or the board of probation and parole require a person to wear electronic monitoring equipment and there was no evidence

introduced that a court or the board of probation and parole required Appellant to wear any such equipment.