

MISSOURI COURT OF APPEALS--WESTERN DISTRICT
DIVISION IV
GARY D. WITT, CHIEF JUDGE, PRESIDING
MARK D. PFEIFFER, JUDGE,
LOUIS ANGLES, SPECIAL JUDGE
OCTOBER 12, 2022
UNIVERSITY OF CENTRAL MISSOURI
WARRENSBURG, MISSOURI

WD84499

State of Missouri, Respondent,

v.

Ronnie W. Plunket, Appellant.

Appellant Ronnie Plunket appeals the judgment of the Lafayette County Circuit Court sentencing him to seven years' imprisonment for driving while intoxicated. The evidence at trial showed that Lafayette County Sheriff's Deputy Samuel Crosson was on duty when he saw a 2006 Ford pickup truck pulling a generator. The generator did not have any rear lights. Crosson ran the vehicle registration, and it returned to a 1997 Ford pickup truck. Crosson observed Plunket to be the driver of the truck. Plunket pulled over, exited the vehicle, and was approaching a set of community mailboxes. Crosson pulled behind Plunket and activated his emergency lights. Crosson testified that, when he got within three to five feet of Plunket, Crosson smelled a moderate odor of alcohol coming from Plunket. Crosson also testified that he observed Plunket's eyes to be glassy, watery, and bloodshot. Plunket denied consuming alcohol, but Crosson asked him to submit to a number of field sobriety tests. Crosson testified the he observed six clues of impairment from Plunket's horizontal gaze nystagmus test. On the one-leg stand test, Crosson observed two clues of impairment. Finally, on the walk and turn test, Crosson observed two clues of impairment. Following the tests, Plunket refused Crosson's request to perform a portable breath test. Crosson then arrested Plunket for driving while intoxicated. Ultimately, Plunket's breath sample showed a blood alcohol content of 0.090. A jury found Plunket guilty of driving while intoxicated, and the court sentenced Plunket to seven years' imprisonment as an "aggravated offender." This appeal followed.

Appellant's points on appeal:

1. The trial court *erred in* refusing to give Appellant's proffered definition of "under the influence of alcohol," *because* without such definition, MAI 431.02 misstates the law and misdirects, misleads, and confuses the jury, *in that* even when there is an applicable MAI, the MAI should be modified by the trial court if the MAI misstates the law or would otherwise misdirect, mislead, or confuse the jury and without this definition (1) the MAI misstates the law in that it permits a conviction for "driving while intoxicated" without a definition of what it means to be intoxicated as required by the Missouri Supreme Court in *Raines* and its progeny; and (2) the MAI will misdirect, mislead, and confuse a jury (particularly in light of society's decreased reliance on alcohol) regarding what is

required under the statutes. Appellant was prejudiced because the jury convicted him of driving while intoxicated without a definition of being “intoxicated.”

2. The trial court *plainly erred in* failing to prevent Officer Hutton from directly testifying regarding his thoughts on the credibility of the earlier witness, Officer Crosson, *because* witnesses are not permitted to testify as to the credibility of earlier witnesses, *in that* the State’s case ultimately hinged on whether the jury believed Crosson’s deposition testimony (in which he testified that he did not perform the sobriety tests correctly and/or did not understand the sobriety tests) or his testimony at the hearing (in which he recanted his deposition testimony) such that imbuing his testimony with a “scientific cachet” via the testimony of Highway Patrol Officer Hutton (qualified as an expert on sobriety tests) invaded the province of the jury and prejudiced Appellant. This prejudice is open, plain, and obvious as it is well-settled law which resulted in a manifest injustice to Appellant by removing this lynchpin issue from the province of the jury.
3. The trial court *erred in* denying Appellant’s Motion for Judgment of Acquittal and/or Motion for New Trial, *because* the State failed to make a submissible case that Appellant was driving while intoxicated, *in that* as a matter of law (1) Crosson’s testimony that he did not correctly perform or understand the field sobriety tests renders those tests unreliable and invalid; (2) Crosson’s testimony regarding his failure to confirm that all foreign objects were removed from Appellant’s mouth prior to the DMT Intox test renders those results unreliable and invalid; (3) Crosson’s testimony that the record does not reflect that he observed Appellant for 15 minutes *after* removing *some* of the foreign objects from Appellant’s mouth *before* administering the DMT Intox test, renders those results unreliable and invalid; (4) the remainder of Crosson’s testimony relates to indications that Appellant was *sober* per Crosson’s own admissions; and (5) no other testimony or evidence was offered that Appellant was intoxicated sufficient to find him guilty beyond a reasonable doubt of driving while intoxicated.
4. The trial court *plainly erred in* refusing to permit Plaintiff’s Expert (Travis Jones) to opine as to whether there were sufficient “clues” to find that Appellant was driving while intoxicated, *because* Jones’ testimony was reliable under the Missouri Expert Statute and the State improperly used a Motion in Limine as a means to “choke off” an entire defense, *in that* as a matter of law, (1) the State did not attack Jones’ credentials or experience; (2) the State did not attack Jones’ methods; (3) the State did not attack the documents upon which Jones relied; and (4) the State did not even lodge any attack on Jones’ testimony under the “*Daubert*” standards. As an expert, Jones was entitled to opine to this ultimate issue, just as Officer Crosson was permitted to do. This error was open, clear, and obvious as it is well-settled that experts may opine as to such ultimate issues. This error resulted in a manifest injustice, particularly in light of Officer Hutton’s improper testimony as to Crosson’s credibility, as Appellant’s expert was prohibited from offering the same testimony as the State’s expert.

WD84643
Krystal M. Scroggs, Appellant,
v.
State of Missouri, Respondent.

Appellant Krystal Scroggs appeals from the judgment of the Johnson County Circuit Court denying her Rule 29.15 motion for post-conviction relief. Following a jury trial, Scroggs was convicted of first-degree endangering the welfare of a child, felony murder, and abandonment of a corpse. The evidence at trial showed that Scroggs was addicted to methamphetamine during the pregnancy of her fourth child. Scroggs gave birth to her fourth child at home. The child would not breastfeed or take a bottle but made whimpering sounds. Scroggs fell asleep, and, when she awoke, the baby had died. Scroggs asked her husband to bury the baby, in the yard. Her husband placed the body in a bucket with some baby items, filled the bucket with concrete, and put the bucket in the garage. Scroggs' husband told his mother about the baby and she contacted police. An autopsy indicted the baby's cause of death was "methamphetamine intoxication due to maternal methamphetamine use." Following the guilty verdict, the circuit court sentenced Scroggs to concurrent terms of life for second degree murder, seven years' imprisonment for endangering the welfare of a child, and four years' imprisonment for abandonment of a corpse. Scroggs' conviction was affirmed on direct appeal. Scroggs filed a motion to vacate, set aside or correct the judgment and sentence pursuant to Rule 29.15. Her amended motion claimed that her appellate counsel was ineffective in several ways including for failing to challenge the sufficiency of the evidence as to each of the three counts. Scroggs' motion also alleged her trial counsel was ineffective for failing to object to the abandonment of a corpse verdict director and submit additional evidence. The motion court held an evidentiary hearing at which trial counsel, appellate counsel, and Scroggs testified. Following the hearing, the motion court denied Scroggs' motion. This appeal followed.

Appellant's points on appeal:

1. The motion court clearly erred in denying claim 8/9(a) of Krystal Scroggs' 29.15 amended motion, in violation of her rights to due process and effective assistance of appellate counsel, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, sections 10 and 18(a) of the Missouri Constitution, when it found appellate counsel was not ineffective when he failed to raise a sufficiency challenge to first-degree child endangerment on direct appeal under the theory the State failed to produce sufficient evidence to prove Ms. Scroggs "created" a substantial risk, because no reasonable strategy can support the failure to raise a meritorious sufficiency claim, in that, there was insufficient evidence to support a conviction for child endangerment.
2. The motion court clearly erred in denying claim 8/9(b) of Krystal Scroggs' 29.15 amended motion, in violation of her rights to due process and effective assistance of appellate counsel, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, sections 10 and 18(a) of the Missouri Constitution,

when it found appellate counsel was not ineffective when he failed to raise a sufficiency challenge to felony murder on direct appeal, because no reasonable strategy can support the failure to raise a meritorious sufficiency claim, in that, insofar as there was insufficient evidence to support a conviction for child endangerment, there also was insufficient evidence to support felony murder predicated on child endangerment.

3. The motion court clearly erred in denying claim 8/9(c) of Krystal Scroggs' 29.15 amended motion, in violation of her rights to due process and effective assistance of appellate counsel, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, sections 10 and 18(a) of the Missouri Constitution, when it found appellate counsel was not ineffective when he failed to raise a sufficiency challenge to abandonment of a corpse, because no reasonable strategy can support the failure to raise a meritorious sufficiency claim, in that there was insufficient evidence to support a finding that the Scroggses "disposed" of MJS's body because they never relinquished possession of it.
4. The motion court clearly erred in denying claim 8/9(e) of Ms. Scroggs' 29.15 amended motion, in violation of her rights to due process of law, a fair trial, and effective assistance of counsel, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, sections 10 and 18(a) of the Missouri Constitution, when it found trial counsel was not ineffective when he failed to object and offer an additional element to the abandonment of a corpse verdict director, because the failure to object to a Missouri Approved Instruction can constitute deficient performance, strategic decisions must be reasonable, and prejudice must be assessed with regards to the particular element at issue, in that although the abandonment of a corpse instruction tracked MAI-CR3d, it was missing an element as established by substantive law, that judges rarely deviate from MAI-CR does not excuse the failure to object and offer the additional element, and there was essentially no evidence offered at trial that established the proposed element in the instruction.

WD84946

Bethany D. Harris, Respondent,

v.

Douglas L. Harris, Appellant.

Appellant Douglas Harris ("Husband") appeals from the judgment of the Moniteau County Circuit Court dissolving his marriage to Bethany Harris ("Wife"). The couple were married in 1999 and have eight children, two of whom were emancipated at the time of judgment. The parties reached an agreement in which Wife would have sole legal and physical custody of the children and Husband would have visitation. Wife was not employed, but home schooled the couple's younger children. At trial, the parties disputed Husband's income as well as the value of the marital home. Both parties filed Form 14 calculations of child support amounts. The circuit court rejected both forms and prepared its own. The circuit court found

that, although at the time of trial Husband worked for Putnam Chevrolet, during the course of the marriage, Husband worked as many as three or four jobs, including self-employment in construction, lawn care service, fencing, and as an automotive mechanic. The court found that Husband made substantially more in income during that time. The court believed Husband changed employment because he was no longer willing to work multiple jobs to support Wife and his children. However, the Court also found that Husband was capable of earning substantially more than he did at the time of trial and was “likely to do so once the case is concluded.” Thus, the court imputed an income of \$8,000 per month to Husband even though, at the time of trial, his actual income was \$3,900 per month. Husband also disputed the court’s valuation of the marital residence, which it awarded to Wife. The court valued the residence at \$179,000 based upon the testimony of Wife’s expert witness. Husband’s appraiser valued the home at \$240,000, although Husband’s appraiser did not testify at trial. This appeal followed.

Appellant’s points on appeal:

1. The trial court erred in ordering child support of \$2,252.00 in that it was an erroneous application of law pursuant to instructions on Form 14 and Rule 88 in that the court should not have imputed income to Husband because Husband did not voluntarily quit employment or reduce his work without justification.
2. The trial court erred in ordering child support of \$2,252.00 in that said award was against the weight of the evidence because there was no evidence to support the amount of monthly income imputed to Husband for purposes of child support calculation by Form No. 14 prepared by the court, and the amount ordered exceeds his ability to pay.
3. The trial court erred in finding that mother had no income for purposes of calculating child support in that the court erroneously applied the law by not including income to Wife that she will receive upon claiming all six of the children for federal tax purposes through earned income credit, as required when calculating child support via Rule 88 and Form No. 14.
4. The trial court erred in ordering Husband to pay to Wife maintenance in the amount of \$1,700, in that it was an abuse of discretion to order said amount because the court did not include Wife’s income from EIC, and pursuant to section 452.335[, RSMo,] Husband does not have the ability to pay said amount and be able to cover his own reasonable and necessary living expenses, and the trial court improperly included in Wife’s reasonable and necessary expenses the expenses of the children.
5. The trial court erred in its decision regarding the value of the marital home and in awarding said to Wife, in that it was an abuse of discretion given that Husband had the ability and willingness to refinance the marital residence at value significantly higher than the value Wife and the court placed on the marital residence and Wife is in need of marital funds which would have been available to her if the court had awarded the residence to Husband.

WD84919

Integra Healthcare, Inc., d/b/a Integrity Home Care, et al., Respondents,

v.

Missouri State Board of Mediation, et al., Appellants.

Appellants Missouri State Board of Mediation, the Missouri Department of Labor and Industrial Relations, the Missouri Department of Health and Senior Services, the Missouri Division of Employment Security, the Missouri Quality Home Care Council (“Council”), Margret Donnelly, James G. Avery, Jane Massman, and Bruce Lynch, appeal the judgment of the Cole County Circuit Court awarding \$200,374.94 in attorneys’ fees to Respondent Ingra Health Care, Inc. (“Integra”) and \$32,906.80 to Respondents Alice Davis and Lezlie Connie Banks. On July 7, 2009, Integra sent an open-records request, pursuant to Missouri’s Sunshine Law, Missouri Revised Statute Chapter 610, to the Council and its chair Bruce Lynch. There was no response, and Integra sent a letter addressed to the custodian of records of the Council, a then vacant position, noting that the Council had missed the statutory deadline to respond to the request. Lynch then responded that there were no records responsive to the request, although ultimately it was found that there were some responsive documents. The Respondents filed a Petition seeking damages against the Appellants. In December 2009, the trial court entered an order granting summary judgment to Appellants on six counts of the pending Amended Petition and granting Respondents summary judgment on two counts. The order stated that it would hold a hearing regarding the Sunshine Law violation. Nearly a year later, the circuit court found that the Council had violated the Sunshine Law. More than a year after that, in 2012, the court concluded that the violations were “knowing” and remarked Respondents should “be made whole the portion of attorneys’ fees expended based upon the sunshine law” The matter of attorneys’ fees was continued for several years until May 14, 2021, when a hearing was held on the issue. Ultimately, the circuit court awarded fees to the Respondents. This appeal followed.

Appellants’ points on appeal:

1. The trial court erred in awarding Integra’s attorneys’ fees that expressly did not relate to a Sunshine Law claim, because the Sunshine Law does not provide for the award of attorneys’ fees for non-Sunshine Law claims, in that section 610.027.3, RSMo., which is to be strictly construed, limits recovery to reasonable attorneys’ fees for successfully establishing a Sunshine Law violation.
2. The trial court erred in awarding attorneys’ fees attributable to both Sunshine Law and non-Sunshine Law claims, because Plaintiffs’ counsel did not provide sufficient detail for certain time entries, in that the party requesting fees under the Sunshine Law, which is to be strictly construed, has the burden to adequately detail fees attributable to a Sunshine Law claim.
3. The trial court erred in awarding attorneys’ fees for litigating attorneys’ fees, because the Sunshine Law does not provide for the award of fees on fees, in that section 610.027.3,

RSMo., which is to be strictly construed, limits recovery to reasonable attorneys' fees for successfully establishing a Sunshine Law violation.

4. The trial court erred in awarding attorneys' fees for time entries in which no evidence was received concerning whether they established a Sunshine Law violation, because the Sunshine law, which is to be strictly construed, does not provide for the award of attorneys' fees for non-Sunshine Law claims, in that any risk of exclusion of attorneys' fees for Sunshine Law violations rests with the party seeking the fees.
5. The trial court erred in assessing attorneys' fees against Defendants other than the Council, because the trial court concluded that only the Council had engaged in a knowing violation of the Sunshine Law, in that recovery under section 610.027.3, RSMo., which is to be strictly construed, is solely limited to fees for successfully establishing a knowing violation of the Sunshine Law.