

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**STATE OF MISSOURI, Respondent,
v.
RICHARD LEON KERKSIEK, Appellant.**

DOCKET NUMBER WD84784

DATE: March 7, 2023

Appeal From:

The Circuit Court of Johnson County, Missouri
The Honorable R. Michael Wagner, Judge

Appellate Judges:

Division Two: Edward R. Ardini, Jr., Presiding Judge, and Lisa White Hardwick and Karen King Mitchell, Judges

Attorneys:

Andrew Bailey, Attorney General, and Daniel N. McPherson, Assistant Attorney General, Jefferson City, MO, Attorneys for Respondent.

Jonathan Sternberg, Kansas City, MO, Attorney for Appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.

RICHARD LEON KERKSIEK, Appellant.

WD84784

Johnson County

Before Division Two Judges: Edward R. Ardini, Jr., Presiding Judge, and Lisa White Hardwick and Karen King Mitchell, Judges

Richard Kersiek appeals, following a jury trial, his convictions in Johnson County of first-degree statutory sodomy and incest, for which he was sentenced by the court as a persistent offender to consecutive terms of twenty years and seven years, respectively, in the Department of Corrections. Kersiek raises three claims on appeal. First, he argues that the trial court abused its discretion in excluding his father as a defense witness in response to a discovery violation. In his second and third points, he argues that the court plainly erred in submitting Instructions 6 and 7 (the verdict directors) because neither included an allegation that the charged acts occurred in Johnson County. His second point claims that the omission resulted in a fatal variance between the information and the instruction insofar as the information alleged the conduct occurred in Johnson County while the verdict directors alleged only that it occurred in the State of Missouri. And his third point argues that the omission allowed the jury to convict him of uncharged crimes insofar as there was evidence that he committed the same acts in Morgan County as well, and the omission in the instructions left the jury without guidance as to which acts it was to consider. Finding no error, we affirm.

AFFIRMED.

Division Two holds:

1. The trial court did not abuse its discretion in excluding defense witness Rogers as a sanction for a discovery violation. The late endorsement unfairly surprised the State, the witness's testimony would have been both cumulative and collateral, and there was no reasonable justification for the failure to disclose the witness. Further, it does not matter that the witness was listed on the original information because endorsing a witness on the information does not apprise the State of a *defendant's* intent to call that same person as a witness at trial. That is the purpose of Rule 25.05.

2. The trial court did not plainly err in providing Instructions numbers 6 and 7 to the jury without requiring the jury to find that the charged conduct occurred in Johnson County. The applicable MAI do not require allegations of the county of commission. The fact that the information alleged the conduct occurred in Johnson County while the verdict directors alleged only that it occurred in the State of Missouri did not amount to a variance. And there was no risk of jury confusion from alleged uncharged conduct insofar as the jury was aware that similar conduct allegedly occurred in Morgan County and that Kerksiek was facing charges in Morgan County as well.

Opinion by: Karen King Mitchell, Judge

March 7, 2023

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