

**MISSOURI COURT OF APPEALS, WESTERN DISTRICT
DIVISION THREE**

**Mark D. Pfeiffer, Presiding Judge
Lisa White Hardwick, Judge
Thomas N. Chapman, Judge**

**November 6, 2024
Lincoln University
Jefferson City, Missouri**

WD85974

State of Missouri, Respondent,

v.

Issac Jermale Fisher, Appellant.

Appellant Issac Fisher appeals from the judgment of the Circuit Court of Jackson County. Following a jury trial, the court found Fisher guilty of second-degree murder, two counts of first-degree murder, six counts of armed criminal action, three counts of first-degree burglary, three counts of unlawful use of a weapon, and two counts of endangering the welfare of a child. The court sentenced Fisher to three consecutive life sentences. Fisher was charged with crimes that occurred at four different locations on the morning of October 7, 2018. According to testimony from Fischer’s mother, Fisher, whose nickname was “Big,” lived in her basement but moved out in the summer of 2018. His mother believed he was staying with his girlfriend but he still had a key to his mother’s house. On the morning of October 7, 2018, Fisher’s mother was asleep when she heard the front door alarm, and Fisher then entered her room and took cigarettes. Shortly thereafter, Fisher’s mother heard someone enter the bathroom and, later, heard Fisher say, “Why you take my money?” and a female voice respond, “Big, stop. I ain’t got your money.” Fisher’s mother then heard gunshots, and she ran to the bathroom where she found Fisher’s girlfriend shot. Fisher’s mother told police that Fisher was holding a gun. He then left the house, taking her car. Fisher then went to the home of his brother where he may have gained entry by kicking in the door. He had a conversation with his brother, took his sister-in-law’s keys, and then took her car. Fisher next went to the house of his step-brother. His step-brother lived with his girlfriend (“Girlfriend”) and their two daughters. When Fisher arrived, he began shooting from outside the house. Girlfriend grabbed one daughter and ran to get the second daughter from the playroom. Girlfriend saw Fisher’s step-brother trying to get off the ground with a man walking behind him. Girlfriend and her daughters hid in the closet. Girlfriend was shot five or six times on her side and one of her daughters was shot in the foot. Fisher’s step-brother was shot 23 times including three shots to the back of his head. The final shooting occurred at Fisher’s cousin’s house. While his cousin’s fiancé was at the store, Fisher allegedly went

to the house and shot his cousin. When the fiancé returned to the house, Fisher's cousin stumbled from the house and, according to his fiancé's testimony, said that "Big" had shot him. Following the shootings, Fisher went to his aunt's house and told his aunt he would turn himself in to the police. The two were on their way to the police station when they were pulled over and Fisher was arrested. A jury found Fisher guilty of all counts except for one count of stealing. He was sentenced to three life sentences to run consecutively. This appeal followed.

Appellant's points on appeal:

1. The trial court erred in putting signs blocking the windows and restricting the public from Fisher's trial except during breaks, in violation of Fisher's rights to an open and public trial as guaranteed by the U.S. Constitution, Sixth and Fourteenth Amendments, and Missouri Constitution, Article I, §18(a), because a trial court cannot close a courtroom without first considering the factors from *Waller v. Georgia*, 467 U.S. 39, 46 (1984), including all reasonable alternatives, in that the trial court imposed a blanket restriction on spectators entering or leaving the courtroom except during breaks without addressing the *Waller* factors or considering any alternatives, resulting in a structural error requiring a new trial.
2. The trial court abused its discretion in failing to sever Counts I and II, in violation of Fisher's rights to a fair trial, due process, and against self-incrimination, guaranteed by the U.S. Constitution, Fifth, Sixth, and Fourteenth Amendments, and Missouri Constitution, Article I, §§10, 18(a), and 19, because a particularized showing of substantial prejudice and that a bias or discrimination to the defendant would result requires severance, in that Fisher demonstrated substantial prejudice and a bias or discrimination by showing he was prevented from testifying and asserting self-defense as to Counts I and II, and the jury wouldn't have heard evidence about Counts I and II at the trial for the rest of the counts, or evidence involving endangering children at the trial for Counts I and II.
3. The trial court abused its discretion in allowing unendorsed witness M.B. to testify, in violation of Fisher's right to a fair trial, guaranteed by the U.S. Constitution, Fourteenth Amendment, and Missouri Constitution, Article I, §10, and Rules 23.01 and 25.03, because Fisher didn't waive the objection, the State acted in bad faith, Fisher was surprised, disadvantaged, and didn't contemplate M.B.'s testimony, in that the defense objected to the State calling M.B., the State had multiple chances but failed to endorse M.B., the defense had no reason to anticipate the State would call an expert witness they never endorsed, the defense was denied the opportunity to prepare for cross-

examination by deposing M.B. or consulting their own expert due to the State's failure, and Fisher was prejudiced by M.B.'s testimony.

4. The trial court abused its discretion in admitting a photograph of Fisher identified as Exhibit 365 and admitted as Exhibit 302, in violation of Fisher's rights to due process and a fair trial, guaranteed by the U.S. Constitution, Fourteenth Amendment, and Missouri Constitution, Article I, §§10, 17, and 18(a), because a photograph must be legally relevant to be admissible, in that the photograph showing Fisher looking dazed and menacing wasn't legally relevant due to its prejudicial effect outweighing the minimal probative value it had to prove anything contested in Fisher's case, and considering the State had other options, and Fisher was prejudiced by the jury seeing the photo during the opening statement, during trial, and during deliberations.
5. The trial court abused its discretion in admitting photographs, Exhibits 5 and 6, depicting a red bag with apparent drugs in it, in violation of Fisher's rights to due process and to be tried only for the crimes he was charged with, guaranteed by the U.S. Constitution, Fourteenth Amendment, and Missouri Constitution, Article I, §§10, 17, and 18(a), because evidence of uncharged crimes is inadmissible unless it has legitimate tendency to prove something in the case and the prejudicial effect doesn't outweigh its probative value, in that the photos of apparent drugs didn't prove anything in Fisher's case as there was no evidence connecting them to the offenses, were prejudicial as they suggested Fisher used drugs, and Fisher was prejudiced by its admission.
6. The trial court plainly erred, in violation of Fisher's rights to due process and freedom from double jeopardy, under the U.S. Constitution, Fifth, Sixth, and Fourteenth Amendments, and Missouri Constitution, Article I, §§10, 18(a), and 19, because a defendant cannot be convicted of a crime he wasn't charged with, in that Fisher was convicted of endangering first child but charged with endangering second child.
7. The trial court erred in overruling Fisher's motions for judgment of acquittal and entering sentence and judgment for first-degree endangering in Count IX in violation of Fisher's rights to due process and a fair trial under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments and the Missouri Constitution, Article I, §§10, 18(a), and 19, because the State must prove that the defendant knowingly endangered a child to sustain a conviction for first-degree endangering, in that no reasonable juror could conclude the State proved Mr. Fisher knew a child was present when he discharged a firearm at step-brother's residence.

WD87131

Kenya M. Walzer, Appellant,

v.

Missouri State Board of Nursing, Respondent.

Appellant Kenya Walzer seeks judicial review of the administrative decision of the Missouri Board of Nursing (“Board”) which revoked Walzer’s nursing license. The record below established that Board initially denied her application for a registered professional nurse license due to a chemical dependency. Walzer appealed the decision to the Administrative Hearing Commission, and, on August 13, 2020, the Administrative Hearing Commission granted Walzer’s application for licensure, contingent on the passage of a licensure examination, and a period of supervised probation. As a term of her probation, Walzer would be required to check-in everyday with a Board approved third-party administrator who would determine if Walzer would need to participate in a random drug and alcohol screening on that particular day. Walzer passed her licensure examination and, in 2021, began her probation period. In November 2022, a probation violation complaint was filed with the Board alleging that Walzer had violated probation by failing to check in with the administrator on two days, having a suspected diluted sample on four testing days, and having one sample test positive for a metabolite of alcohol. On March 9, 2023, the Board issued an order revoking Walzer’s nursing license because she violated the terms on her probation for the reasons stated in the complaint. Walzer filed a petition for judicial review in the Circuit Court of Cole County. The circuit court entered a judgment affirming the Board’s order. This appeal followed. Because it is an administrative decision, this Court reviews the Board’s order.

Appellant’s points on appeal:

1. The Missouri Board of Nursing erred in revoking Kenya Walzer’s license as a Registered Nurse, because the decision is based on the terms of probation issue by the Board after the Administrative Hearing Commission had ordered her licensed, reviewable pursuant to § 536.140.2(2) RSMo, in that the Board had no authority to set any terms of probation.
2. The Missouri Board of Nursing erred in revoking Kenya Walzer’s license as a Registered Nurse, because prohibiting the use of alcohol in any form by a licensee with no history of abuse of alcohol violates the Americans with Disabilities Act of 1990 (42 U.S. C. §§ 12131-12134), as amended by the ADA Amendments Act of 2008 (Public Law 110–325, 122 Stat. 3553 (2008)), reviewable pursuant to § 536.140.2(4) RSMo, in that such an alcohol restriction is, for any other reason, unauthorized by law.

WD86569

State of Missouri, Respondent,

v.

Elijah R. Lopez, Appellant.

Appellant Elijah Lopez appeals the judgment of the Circuit Court of Pettis County. Following a bench trial, the court found Lopez guilty of delivery of a controlled substance, unlawful use of a weapon, and driving while intoxicated by drugs. The court sentenced Lopez to a total of seven years' incarceration, but suspended the execution of his sentence, and placed Lopez on supervised probation for five years. As alleged at trial, on December 19, 2022, a Sedalia Police Officer stopped a car for careless driving and no license plate. When the officer spoke with the driver, the officer observed the driver to have glassy, bloodshot eyes and slow speech. The officer also detected a strong odor of marijuana coming from the car. No one else was in the car. A second officer responded to the scene and conducted a DWI investigation. The second officer asked the driver to exit the vehicle and perform several tests. The second officer testified that the driver had dilated pupils, which he believed to be an indicator of cannabis impairment. The second officer also observed no clues of impairment on the horizontal gaze nystagmus test, but he observed a lack of convergence which, he also believed to be an indicator of cannabis impairment. The driver also showed signs of impairment on a modified Romberg test, a finger-to-nose test, the walk-and-turn test, and the one-leg stand test. The second officer also testified that he observed the driver to have rebound dilation and an elevated pulse rate, indicative of cannabis impairment. The second officer arrested the driver for driving while intoxicated. When the second officer searched the vehicle incident to the driver's arrest, he found a nine-millimeter pistol under the driver's seat. A backpack in the backseat also contained Lopez's identification, his marijuana card, and what appeared to be a fake out-of-state ID card. The backpack also contained 16 psilocybin candy bars, 33 THC cartridges, and approximately 14 grams of marijuana. The second officer testified that psilocybin is a controlled substance that is illegal to possess in Missouri. He also testified that it is illegal to possess a firearm with a felony amount of a controlled substance. The case was tried without a jury. The court sentenced Lopez to concurrent sentences of seven years for delivery of a controlled substance, four years for unlawful use of a weapon, and 180 days in jail for driving while intoxicated. The court suspended the execution of Lopez's sentence, and he was placed on five years of supervised probation. This appeal followed.

Appellant's points on appeal:

1. The trial court erred in entering a conviction and sentence for delivery of a controlled substance, because such entry violates Mr. Lopez's rights to due process and a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, sections 10 and 18(a) of the Missouri

Constitution, in that no evidence was admitted to prove any element of the crime alleged, specifically that Mr. Lopez, with the intent to deliver, knowingly possessed a controlled substance, knowing of its presence and nature and is therefore legally insufficient to support a conviction of delivery of a controlled substance.

2. The trial court erred in entering a conviction and sentence for unlawful use of a weapon, because such entry violates Mr. Lopez's rights to due process and a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, sections 10 and 18(a) of the Missouri Constitution, in that no evidence was admitted to prove any element of the crime alleged, specifically that Mr. Lopez, knowingly possessed a firearm while also possessing a controlled substance, knowing of its presence and nature and is therefore legally insufficient to support a conviction of unlawful use of a weapon.
3. The trial court erred in entering a conviction and sentence for driving while intoxicated by drugs, because such entry violates Mr. Lopez's rights to due process and a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, sections 10 and 18(a) of the Missouri Constitution, in that no evidence was admitted to prove any element of the crime alleged, specifically that Mr. Lopez operated a motor vehicle while under the influence of drugs and is therefore legally insufficient to support a conviction of driving while intoxicated by drugs.
4. The trial court plainly erred in failing to obtain Mr. Lopez's personal waiver of his right to a trial by jury because such a failure violates Mr. Lopez's rights to a jury trial and due process, as guaranteed by the Fifth, Sixth, Seventh, and Fourteenth Amendments to the United States Constitution and Article I, sections 10, 18(a), and 22(a) of the Missouri Constitution, and Rule 27.01, in that, the record fails to establish with unmistakable clarity that Mr. Lopez knowingly, voluntarily, and intelligently waived his right to a jury trial and all the protections guaranteed therein.
5. The trial court plainly erred in admitting the probable cause statement, because admitting improper testimonial evidence violates Mr. Lopez's rights to due process, a fair trial, and to confront the witnesses against him, as 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, the probable cause statement admitted at trial constituted testimonial evidence of an available witness who did not testify at Mr. Lopez's trial.

WD87196

Amelia Briane Van Vickle, Respondent,

v.

Director of Revenue, Appellant.

Appellant Director of Revenue appeals the judgment of the Circuit Court of Johnson County setting aside the Director of Revenue's administrative suspension of Respondent Amelia Van Vickle's driving privileges. As alleged at trial, Van Vickle drove a pickup truck across the center of Missouri Route D at "an excessive rate of speed." The truck then traveled off the left side of the roadway, returned to the roadway, skidded, and traveled off the left side of the roadway again. The truck struck two embankments and returned to the roadway, then crossed the roadway and traveled off the right side, where it struck another embankment before stopping. A Missouri Highway Patrol trooper responded to the crash. The trooper was contacted at the scene by a Johnson County Deputy who indicated he believed the driver, Van Vickle, was intoxicated. Van Vickle was in an ambulance. The trooper believed that VanVickle was unable to safely perform field sobriety tests that required physical activity. At the trooper's request, Van Vickle provided a preliminary breath test which showed a blood alcohol content of .167%. The trooper informed Van Vickle, while she was in the ambulance at the scene, that she was under arrest for driving while intoxicated. There were a number of people in the ambulance, and the trooper did not restrain Van Vickle. The trooper read the Implied Consent Advisory to Van Vickle and requested she consent to a blood test. Van Vickle responded: "Yes, sir." After she agreed to submit to the test, she was read her *Miranda* rights. Van Vickle was then transported to Western Medical Center in Warrensburg via ambulance to receive treatment for the injuries she sustained in the crash. Van Vickle was not restrained at the hospital. The trooper witnessed the blood draw and seized the blood sample. The sample showed a blood alcohol content of .167%. Van Vickle challenged the administrative suspension of her license. The circuit court found that Van Vickle was not placed under arrest by the trooper's statement because there was no physical restraint or submission to authority at that time. The court sent aside the administrative suspension. This appeal followed.

Appellant's points on appeal:

1. The trial court erred in its application of the law when it held that Van Vickle was not placed under arrest, because there was substantial credible evidence that Van Vickle was under arrest by "actual restraint," in that the arrest took place in the ambulance where Van Vickle was lying injured and incapacitated such that no further restraint was necessary to effectuate an arrest.
2. The trial court plainly erred in its application of the law when it held that Van Vickle was not under arrest, because there was substantial credible evidence that

Van Vickle was under arrest by submission to the trooper's authority, in that Van Vickle assented to the directions of the trooper without attempting to leave, and a reasonable person in Van Vickle's position would have believed that she was not free to leave. Thus, a miscarriage of justice resulted.