

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

STATE OF MISSOURI

Respondent

v.

KENNETH WILLIAM REGISTER

Appellant

DOCKET NUMBER **WD73390**

DATE: May 22, 2012

Appeal From:

Circuit Court of Henry County, MO
The Honorable James Kelso Journey, Judge

Appellate Judges:

Division One
Cynthia L. Martin, P.J., Thomas H. Newton, and Karen King Mitchell, JJ.

Attorneys:

Matthew Ward, Columbia, MO

Counsel for Appellant

Attorneys:

Timothy Blackwell, Jefferson City, MO

Counsel for Respondent

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

STATE OF MISSOURI, Respondent, v.
KENNETH WILLIAM REGISTER, Appellant

WD73390

Henry County

Before Division One Judges: Martin, P.J., Newton, and Mitchell, JJ.

Register was charged with two counts of first-degree statutory sodomy and first-degree statutory rape for committing sexual acts against his daughter. At his jury trial, the daughter testified that Register had committed sexual acts against her on two separate times at different locations. One of those incidents occurred at a Register's prospective new home on Memorial Day weekend. According to the daughter, the Sunday morning of that Memorial Day weekend, Register's wife observed her and Register lying in bed together, saw the daughter with no bottoms on, and saw Register running to the porch.

The State subpoenaed the wife to testify against him at trial. She informed the State that she would not testify although the State secured immunity from the court for her. The State requested permission to call the wife to the stand so that she could invoke her Fifth Amendment right against self-incrimination in front of the jury. The trial court granted the request over Register's objection. On the witness stand, the wife invoked her Fifth Amendment privilege after the State questioned her whereabouts on Memorial Day weekend. Outside the presence of the jury, the wife was held in contempt and arrested.

During the jury instructions conference, defense counsel requested that the jury be informed that the wife's invocation could not be used against him. The State challenged the instruction, arguing that any inference drawn therefrom was evidence because the wife's invocation was invalid. The court agreed and denied the request. During closing arguments, the State argued that the wife did not testify because she was protecting Register. Subsequently, a jury acquitted Register of first-degree statutory rape and one count of first-degree statutory sodomy and convicted him of first-degree statutory sodomy based on the events of Memorial Day weekend. Register appeals.

REVERSED AND REMANDED.

Division One Holds:

In a sole point, Register argues that the trial court erred in overruling Register's objection and allowing the wife to invoke the privilege against self-incrimination in front of the jury. A court has discretion in allowing witnesses to be called to the stand to invoke their right against incrimination. A witness's invocation is not evidence and cannot be argued to support favorable or unfavorable inferences concerning the defendant's guilt. The law precludes a court from allowing the prosecutor to call a witness for the purpose of invoking the right against self-incrimination so that it could use the inference that a defendant is guilty as a means to build its case.

The State contends that the trial court did not abuse its discretion because the rule does not apply when the witness's invocation is invalid as it was here. Because the rationale supporting the rule does not depend on a valid or invalid invocation, the rule applies despite the invalid invocation.

Here, the State's case against Register was weak. The State called the wife so that it could argue inferences against Register from the wife's invocation and build its case. Therefore, in these circumstances, the trial court erred in allowing the wife to invoke her Fifth Amendment right in the jury's presence. We reverse and remand for a new trial.

Opinion by Thomas H. Newton, Judge

May 22, 2012

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