

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

STATE OF MISSOURI,

Respondent,

v.

BRYAN M. JOHNSON,

Appellant.

DOCKET NUMBER WD77379

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: December 15, 2015

APPEAL FROM

The Circuit Court of Clay County, Missouri
The Honorable Larry D. Harman, Judge

JUDGES

Division Three: Ellis, P.J., and Mitchell and Witt, JJ.

CONCURRING.

ATTORNEYS

Chris Koster, Attorney General
Karen L. Kramer, Assistant Attorney General
Jefferson City, MO

Attorneys for Respondent,

Jeannette L. Wolpink, Assistant Appellate Defender
Kansas City, MO

Attorney for Appellant.



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

STATE OF MISSOURI,)
)
Respondent,)
v.) **OPINION FILED:**
) **December 15, 2015**
BRYAN M. JOHNSON,)
)
Appellant.)

WD77379

Clay County

Before Division Three Judges: Joseph M. Ellis, Presiding Judge, and Karen King Mitchell and Gary D. Witt, Judges

Bryan Johnson appeals his convictions, following a jury trial, for one count of first-degree statutory rape, § 566.032, and one count of first-degree statutory sodomy, § 566.062, for which he was sentenced to consecutive terms of 12 years' imprisonment. In four points, Johnson argues that the trial court erred in both the admission of evidence and the denial of his motion for new trial based upon alleged juror misconduct.

AFFIRMED.

Division Three holds:

1. An expert witness's diagnosis of "child sexual abuse" was not an improper comment on Victim's veracity as a witness where the expert never identified the defendant as the perpetrator of the abuse.
2. The defendant failed to demonstrate prejudice from the expert's testimony insofar as: (1) the court granted his request to strike the testimony; thus, it was no longer before the jury for its consideration; and (2) to the extent the expert's testimony could be considered a comment on Victim's credibility, such an error was invited by the defendant.
3. Out-of-court statements do not constitute hearsay if they are admitted solely to explain subsequent conduct. Such statements, however, must be limited to only that information

that is necessary to explain the subsequent conduct. Exceeding this scope may result in error.

4. Any error in the admission of hearsay evidence must be prejudicial to warrant reversal.
5. Prejudice will not be found from the admission of hearsay testimony where the declarant was also a witness at trial, testified on the same matter, and was subject to cross-examination.
6. Here, the testimony Johnson complains of was cumulative to testimony from Victim, who testified at trial and was available for cross-examination. Thus, he suffered no prejudice.
7. A witness is qualified to testify as to the accused's reputation for truthfulness and veracity if it is shown that the witness is sufficiently familiar with the accused, the community in which he has lived, or the circles in which he has moved, so as to speak with authority of his character.
8. A personal view of the witness as to the character of the accused is immaterial and not admissible.
9. Here, Johnson improperly elicited personal opinions from his character witnesses by asking questions such as, "have you had an opportunity to form an opinion as to [Johnson's] reputation for truthfulness and honesty within the community?"
10. The State may cross-examine a character witness with reference to defendant's prior arrests and accusations of specific misconduct for the purpose of testing the trustworthiness, knowledge and good faith of the witness.
11. The form of the questions about other acts of misconduct is important. Couching the question in terms of personal knowledge has been criticized and prohibited.
12. The preferred method of asking the question is, "have you heard . . ." The inquiry must be directed to rumors or reports concerning the defendant's character, and not be of the "don't you know" type.
13. Here, the State's cross-examination questions were couched in terms of hypotheticals and personal knowledge by using phrases such as, "would it change your opinion if you knew," or "if you were aware," followed by an alleged act of misconduct by Johnson.
14. Johnson was not prejudiced by the State's improper questioning, however, because there was evidentiary support in the record for each of the alleged acts of misconduct forming the bases of the State's inquiries.
15. A party alleging juror misconduct during voir dire must present evidence to substantiate its allegations.

16. Here, Johnson presented evidence suggesting that the juror intentionally failed to disclose familiarity with Victim. The juror testified, however, that she did not know Victim, and the trial court found the juror's testimony credible.
17. Appellate courts defer to the trial court on factual issues because it is in a better position to judge not only the credibility of witnesses and the persons directly but also their sincerity and character and other trial intangibles which may not be completely revealed by the record.

Opinion by: Karen King Mitchell, Judge

December 15, 2015

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