IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 87902
	)	
ROBERT MARCH,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BUTLER COUNTY, MISSOURI
36th JUDICIAL CIRCUIT
THE HONORABLE MARK L. RICHARDSON, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

A Butler County jury found Mr. Robert March, Appellant, guilty of second degree trafficking, Section 195.233 RSMo.[1] The Honorable Mark L. Richardson sentenced Mr. March, as a prior offender, to fifteen years imprisonment. After the Southern District Court of Appeals affirmed Mr. March's conviction, this Court granted Mr. March's transfer application pursuant to Rule 83.04, and it has jurisdiction over this cause pursuant to Article V, Section 10, Mo. Const. (as amended 1976).

[1] References are to RSMo 2000.

STATEMENT OF FACTS

In the early morning of September 6, 2002, Poplar Bluff police officers entered the home of Keva Davis to execute a search warrant (TR 155-157, 198, 240). Ms. Davis and Mr. March were asleep in the master bedroom (TR 157, 198-199). Officers Jason Morgan and Gary Pride entered the bedroom with their guns drawn, woke Mr. March and Ms. Davis and ordered them to put their hands above the covers (TR 157, 181, 198). The covers moved as Mr. March and Ms. Davis tried to get out of bed (TR 157).[2]

The officers ordered Mr. March out of bed, gave him a pair of pants, and handcuffed him (TR 157-158, 199). Ms. Davis told the officers that she also was unclothed and they gave her a robe to put on (TR 157-158, 199). The officers searched the robe and it did not have anything in it (TR 158). Officer Pride said that he noticed something fall to the ground while Ms. Davis was putting on the robe and getting out of bed (TR 158, 199, 206). Officer Morgan looked on the ground, but he did not see anything (TR 158).

As the officers escorted a barefoot Ms. Davis from the bedroom to the living room, they noticed that she was walking with an unusual gait (TR 158, 200, 207). She was holding one leg stiff, and her toes were scrunched as if she was holding onto

[2] This "movement" is not reflected in the police report (TR 185-187). Ms. Davis testified that Mr. March did not try to hand her anything (TR 253).

something (TR 200). They discovered that Ms. Davis had her toes clinched around a plastic baggie that contained several rocks (TR 158-160, 200-201).[3]

Officers Morgan and Pride testified that they overheard Mr. March trying to get Ms. Davis to take the rap, so to speak, because he could not take the "weight" (TR 173, 204, 208).[4]

A laboratory report prepared by Dr. Robert Briner, and admitted into evidence over objection, revealed that the contents of the bag found between Ms. Davis' toes tested positive as 2.7 grams of crack cocaine (TR 158, 287-289, 292; Ex. 8). The State failed to call Dr. Briner as a witness; at the time of trial, Dr. Briner lived in North Carolina, but the State did not show that he was unavailable to testify (TR 211-212, 214, 283-284, 296). When the laboratory received the subpoena for Dr. Briner, Pam Johnson contacted Dr. Briner, who, in turn, inquired whether he needed to make the trip to Missouri to testify (TR 284).

Defense counsel objected that the lab report should not be admitted for two reasons: 1) the state failed to lay a proper foundation, and 2) the report constituted testimonial hearsay and was inadmissible under *Crawford v. Washington*, 541 U.S. 36

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[3] The rocks between Ms. Davis' toes were the only alleged drugs found in the residence (TR 178).

[4] This alleged statement by Mr. March is not contained in any police report (TR 174-176, 188-189, 208).

(2004), because the defense had no prior opportunity to confront Dr. Briner as to how he tested the evidence (TR 212-213). The trial court overruled the objection (TR 215).

Ms. Johnson, the custodian of records at the laboratory, testified that Exhibit 8 was the report generated by Dr. Briner in this case (TR 287). Reports are generated when a law enforcement agency submits evidence for testing (TR 288). Ms. Johnson did not personally receive the evidence from law enforcement, nor did she ever handle it for analysis in this case (TR 293). She did not participate in the testing; Dr. Briner did all of the testing of the evidence in this case (TR 293-294). Ms. Johnson did not personally formulate any of the conclusions that are found in Dr. Briner's report, nor did she observe Dr. Briner's testing of the material or the results of the testing (TR 294). She assumed that he did the tests correctly, but she had no personal knowledge of that (TR 295).

Officer Morgan thought that the rocks were probably worth $40 each (TR 161). A $20 rock is one-tenth of a gram; and since there was 2.7 grams, or twenty-seven $20 rocks, the value of the rocks would be $540 (TR 162). Officer Morgan did not believe that this is a normal amount for personal use, based on his knowledge and experience (TR 162).

No pipes or needles were found in the residence (TR 162). Mr. March had $1,415.00 in his pants pocket (TR 166).[5] None of this money came from a controlled buy

[5] The defense presented evidence that in September 2002, Mr. March had been given partial payment of $900 in cash for purchasing and installing a stereo system in Jake Jacobs automobile (TR 305, 308).

nor was it marked in any other way to connect it with illegal drugs (TR 181). Officers found electronic digital scales, finger scales, sandwich baggies, a cutting board and a razor knife in kitchen (TR 166, 172). None of these items tested positive for drugs (TR 180).

Ms. Davis and Mr. March broke up following their arrests (TR 255). Two and a half years later, just two or three weeks before Mr. March's trial, Mr. Davis was given a plea offer: in exchange for her guilty plea to possessing the crack cocaine that was found between her toes, as well as her testimony against Mr. March, the prosecutor would recommend that Ms. Davis be placed on probation and serve no prison time (TR 231-233, 246-248, 253). Ms. Davis took the offer. At trial, she testified that, after they were released from a 20-hour hold, Mr. March told her that he knew the police knew the drugs were his, and he wondered who had "ratted him out" (TR 228).

Defense counsel inquired of Ms. Davis regarding her motivations to plead guilty and to testify against Mr. March, and why she did not say anything about Mr. March's alleged admissions until just before trial. Ms. Davis said that she did not say anything about Mr. March because she was concerned about her personal safety (TR 251). She talked to her lawyer about what had happened (TR 252). Ms. Davis testified at a pre-trial deposition and at trial that she was happy with the plea agreement because she can put the whole ordeal behind her (TR 248). She won't have to go to prison; and she won't have to worry about anybody else taking care of her children (TR 248).

On redirect, the prosecutor asked what she meant by "getting the whole ordeal" behind her (TR 260). Defense counsel objected and asked to approach the bench (TR

260). Defense counsel explained his belief that the prosecutor was trying to elicit the fact that there were "domestic issues" between Mr. March and Ms. Davis (TR 260). Defense counsel further argued that this was evidence of uncharged bad conduct and should not be admitted (TR 260).

The prosecutor responded that defense counsel opened the door by asking about the "ordeal" that she is trying to get behind her (TR 260-261). The prosecutor offered to limit the question to what happened after the arrest and whether she felt afraid (TR 261). Since defense counsel had asked Ms. Davis why she had not said anything for 2 ½ years, the prosecutor wanted her to explain why (TR 261). The prosecutor believed that defense counsel was implying that she did not come forward about Mr. March's statements because she was guilty, but the prosecutor wanted to explain that she did not come forward because she was scared (TR 261). The prosecutor represented that Ms. Davis would say that she "dummied up" because she was threatened by Mr. March or by other people acting for him (TR 262).

The Court thought that, even if defense counsel opened the door, testimony about threats to Ms. Davis by Mr. March seemed "a little iffy." (TR 262). The prosecutor said he would try to limit it to the 2 ½ year period after the arrest (TR 262). The trial court allowed the questioning, even though it thought the prosecutor was "jeopardizing [his] case on appeal" (TR 262). The trial court asked the prosecutor, "you sure you want to go there?" (TR 262). The prosecutor agreed to limit it to the time period before trial:

Prosecutor: Here is what I will do, I will ask her from the time of September 6th until the time you pled guilty in this court

were you afraid of Mr. March and did he ever say anything directly to you to make you feel that fear?

Defense: You won't get into prior incidents between Mr. March and her?

Prosecutor: Huh-uh.

(TR 263). The trial court overruled defense counsel's objection to the line of questioning, and the prosecutor continued:

Prosecutor: From the time you were arrested that night until the time you pled guilty a couple of weeks ago, they asked you why you stayed quiet for all that time and I asked you a minute ago did your lawyer tell you not to say anything and you said yes. Was there anything else?

Ms. Davis: Yes.

Prosecutor: And just during that time was there anything else?

Ms. Davis: Yes.

Prosecutor: What was it?

Ms. Davis: I was getting threats.

Prosecutor: Okay. Did you get any threats directly from Mr. March?

Ms. Davis: No.

Prosecutor: When they talk about this ordeal that you wanted to get behind you, is it just strictly involving the fact that you have been charged in the criminal case?

Ms. Davis: No.

(TR 264-265). Then the prosecutor moved on to another line of questioning. He asked Ms. Davis:

Prosecutor: And for the love of it you can't figure out why you didn't say anything and why you covered up those drugs that night?

Ms. Davis: I know why I didn't say anything.

Prosecutor: Why?

Ms. Davis: Robert is a woman beater –

Defense: Object, Judge.

Ms. Davis: Well, he is.

Court: Sustained. The objection is sustained. The answer will be stricken and the jury will be instructed to disregard it.

(TR 265-266). Defense counsel requested a mistrial because of Ms. Davis' reference to Mr. March as "a woman beater" (TR 267). Counsel argued that the reference was extremely prejudicial and that a limiting instruction was insufficient to cure what was said (TR 267-268). The request for a mistrial was denied, but the trial court was not sure if the case had been jeopardized (TR 271). "[W]e are going to allow it to go forward. Let the Court of Appeals make a decision on it." (TR 271).

The jury returned a verdict of guilt for second degree trafficking and for the lesser-included offense of possession (TR 341-345). Because of the inconsistency, the trial court returned the jury to its deliberations (TR 345). The second time, the jury returned a verdict of guilt for second degree trafficking only (TR 346-348).

The trial court sentenced Mr. March, as a prior offender, to fifteen years imprisonment (TR 357; LF 55-57). Mr. March took his initial appeal in the Southern District Court of Appeals. There, Mr. March asserted, in part, that the trial court denied his right to cross-examine Dr. Briner regarding his methods of testing and his conclusions drawn in the laboratory report. He argued that his inability to cross-examine the analyst, who had conducted the testing and authored the report, rendered the report inadmissible under the Confrontation Clause, regardless of whether its admission was proper under the statutory business records exception to the hearsay rule.

The Southern District Court of Appeals acknowledged that numerous states have held that laboratory reports constitute testimonial hearsay under *Crawford v. Washington, supra*; however, it felt bound by this Court's opinion in *State v. Taylor*, 486 S.W.2d 239 (Mo. 1972), which held that Confrontation Clause concerns are satisfied if a laboratory report meets the requirements of the statutory business records exception to the hearsay rule. The Court of Appeals stated, "[i]t is for our Supreme Court to determine whether *Taylor* (holding that a lab report admitted as a business record did not offend the Confrontation Clause) and its progeny are consistent with the reasoning of *Crawford*." *State v. Robert March*, SD 27102 (June 30, 2006), Slip Op. at 9.

Therefore, Mr. March sought transfer to this Court to determine whether *State v. Taylor, supra,* remains good law for the admission of business records, in light of *Crawford v. Washington, supra*. This Court granted Mr. March's application for transfer, and this appeal follows.

POINTS RELIED ON

I.

The trial court erred in overruling defense counsel's objections and admitting into evidence Dr. Briner's lab report (Ex. 8) and the testimony of Pam Johnson regarding the contents of Dr. Briner's lab report because the admission of this evidence violated Mr. March's right to confrontation guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that Dr. Briner's lab report and Pam Johnson's testimony regarding the lab report constituted testimonial hearsay regarding the content and quality of the key evidence (drugs) seized at the crime scene, but Dr. Briner was not shown to be unavailable to testify at trial and defense counsel had no prior opportunity to cross-examine Dr. Briner.

Crawford v. Washington, 541 U.S. 36 (2004);

State v. Caulfield, 2006 Minn. Lexis 677 (Minn. Oct. 5, 2006);

Johnson v. State, 929 So.2d 4 (Fla. App. 2005);

People v. Lonsby, 707 N.W.2d 610 (Mich. App. 2005);

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Section 18(a); and

Sections 195.202, 195.223 & 490.680.

II.

The trial court abused its discretion in overruling Mr. March's request for a mistrial after State's witness Keva Davis told the jury that "Robert is a woman beater" because this ruling violated Mr. March's rights to due process and a fair trial before a fair and impartial jury guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Keva's statement constituted evidence of an uncharged crime or prior bad act and this evidence was either irrelevant to any issue at trial and/or was more prejudicial than probative.

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993);

State v. Pennington, 24 S.W.3d 185 (Mo. App., W.D. 2000);

State v. Barriner, 34 S.W.3d 139 (Mo. banc 2000);

State v. Watson 968 S.W.2d 249 (Mo. App., S.D. 1998);

U.S. Const., Amends 5, 6, & 14; and

Mo. Const., Art. I, Section 10 & 18(a).

ARGUMENT

I.

The trial court erred in overruling defense counsel's objections and admitting into evidence Dr. Briner's lab report (Ex. 8) and the testimony of Pam Johnson regarding the contents of Dr. Briner's lab report because the admission of this evidence violated Mr. March's right to confrontation guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that Dr. Briner's lab report and Pam Johnson's testimony regarding the lab report constituted testimonial hearsay regarding the content and quality of the key evidence (drugs) seized at the crime scene, but Dr. Briner was not shown to be unavailable to testify at trial and defense counsel had no prior opportunity to cross-examine Dr. Briner.

Dr. Robert Briner, the analyst who tested, weighed and measured the alleged drug evidence in this case, did not testify at trial. He was not shown to be unavailable to testify; rather, at the time of trial, he lived in North Carolina and did not wish to make the trip. The State introduced Dr. Briner's laboratory report, Exhibit 8, through the testimony of Pam Johnson, another analyst at the laboratory. However, Ms. Johnson played no role in the testing of the evidence in this case, and Mr. March had no opportunity to cross-examine Dr. Briner before trial regarding his methods, procedures and results. Admitting Dr. Briner's lab report denied Mr. March his right to confront a key witness against him.

Factual setting and Preservation

During a break in the trial, the prosecutor alerted defense counsel and the trial court that he would be moving to admit Dr. Briner's laboratory report under the business records statute, Section 490.680, and that he would lay the foundation for admissibility under that statute through the testimony of Pam Johnson (TR 211-212). Defense counsel objected on two grounds: 1) that Pam Johnson, as the custodian of records, could not lay a proper foundation; and 2) that introduction of such evidence, without the in-court testimony of Dr. Briner himself, violated Mr. March's right to confrontation guaranteed by the 6th Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution (TR 212-213).

In support of the second ground for objection, defense counsel cited "the recent case of *Crawford vs. Washington*," stating that "under that decision…the lab tech that actually performed the drug analysis is determined to be an adversarial witness that I have a right to confront and we have a right to question him as to how he went through the testing" (TR 213). Defense counsel also noted that, under the *Crawford* decision, the State had failed to show that Dr. Briner was unavailable,[6] and counsel had not had a prior opportunity to cross-examine him (TR 214-215). The trial court overruled counsel's

[6] The State did not call Dr. Briner to testify because he currently lives in North Carolina (TR 211-212, 214, 283-284, 296). When the laboratory received the subpoena for Dr. Briner, Pam Johnson contacted Dr. Briner and he inquired whether he needed to make the trip to Missouri to testify (TR 284).

objection, ruling that the report would be admitted assuming proper foundation was laid (TR 214-215). It granted defense counsel a continuing objection (TR 214-215).

The laboratory report revealed that the contents of the baggie, which the officers seized from under Ms. Davis' toes, tested positive as 2.7 grams of crack cocaine (TR 158, 287-289, 292; Ex. 8). Pam Johnson, the custodian of records at the laboratory, testified that Exhibit 8 was the report generated by Dr. Briner in this case (TR 287). The report was generated when law enforcement submitted the evidence for testing, after Mr. March had been arrested and charged (TR 288).

Ms. Johnson testified that she did not personally receive the drugs from law enforcement, nor did she ever handle them for analysis in this case (TR 293). Dr. Briner did all of the testing of the evidence (TR 293-294). Ms. Johnson did not formulate any conclusions that are found in Dr. Briner's report, nor did she observe Dr. Briner's testing or the results of his testing (TR 294). She assumed that he did the tests correctly, but she had no personal knowledge of that (TR 295).

Defense counsel renewed the objection to the admission of the lab report in Mr. March's motion for new trial, arguing that it violated Mr. March's right to confrontation as explicated in *Crawford v. Washington* (LF 50-51).

Standard of Review

Generally, the trial court's admission of evidence is not disturbed, absent an abuse of discretion. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002). But the dispositive issue raised herein is whether the Confrontation Clause requires that Mr. March be allowed to confront the author of a laboratory report before it is introduced into

evidence at his criminal trial – i.e., whether the lab report constitutes testimonial hearsay under *Crawford's* new constitutional framework. This is a legal question, not a factual one; therefore, this Court's review of this question is *de novo. See Lilly v. Virginia*, 527 U.S. 116, 136, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (Even though a Confrontation Clause analysis is one involving questions of both fact and law, review must be conducted independently of the lower courts' analyses to guarantee that the protections in the Confrontation Clause are satisfied. Appellate courts must review *de novo* the issue of whether admitted testimony violates a defendant's Confrontation Clause rights); *see also State v. Parks*, 116 P.3d 631, 636 (Ariz. App. 2005) ("Although we review a trial court's ruling on the admissibility of evidence under exceptions to the hearsay rule for abuse of discretion, we review a trial court's determination of a Confrontation Clause violation *de novo*.")

The Right to Confrontation – Crawford v. Washington

In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." U.S. Const., Amendment VI. In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court revised the test for the admission of out-of-court statements of a witness who is not present at trial. The Court rejected the twenty-four-year-old test of *Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S. Ct. 2531, 2538-39, 65 L.Ed.2d 597, 607-08 (1980), which had allowed the admission of testimonial out-of-court statements that were either within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness.

Crawford, 541 U.S. at 59-62. Instead, the *Crawford* Court mandated that all testimonial statements be excluded unless the declarant is unavailable to testify at trial and the defendant has had a prior opportunity to cross-examine the declarant. 541 U.S. at 68.[7] Those conditions were not satisfied here.

The State did not show that Dr. Briner was unavailable to testify at trial regarding his analysis of the evidence submitted to him by law enforcement. Rather, the evidence showed that Dr. Briner preferred not to travel to Missouri. But defense counsel had no prior opportunity to confront Dr. Briner. This case turns, then, on whether Dr. Briner's out-of-court declarations in his lab report, regarding the content and quantity of the alleged drugs were "testimonial" under *Crawford*.

Missouri's pre-Crawford *caselaw*

Current Missouri law, as embodied in *State v. Taylor*, 486 S.W.2d 239 (Mo. 1972), follows the old *Ohio v. Roberts*-type model regarding the admission of out-of-court statements in the form of business records. In *Taylor*, this Court determined that "[o]bjections to such [business] records as hearsay and as depriving a party of the right of cross-examination are...not effective if the records have been properly qualified under [the statute]." *Taylor*, 486 U.S. at 242-243. Under *Taylor*, if the trial court determines

[7] "The Clause…reflects a judgment, not only about the desirability of reliable evidence… but about how reliability can best be determined." *Crawford*, 541 U.S. at 50, 61.

that the business record is reliable, i.e., "the 'sources of information,' are sufficient 'in the opinion of the court,' then the record, generally, is admissible." *Id.* at 242.

At bottom, *Taylor* stands for the proposition that the Confrontation Clause is satisfied if a trial court, alone, determines that the hearsay is reliable. This is the "adequate indicia of reliability" test that was rejected in *Crawford*. Since current Missouri law allows the reliability of all business records to be determined solely by the trial judge, applying the statutory hearsay exception, and not in the crucible of cross-examination, this Court granted transfer to examine how *Crawford* may have changed the test for admitting the subset of business records that also qualify as testimonial hearsay.

Certain Business Records are Testimonial and Subject to the Confrontation Clause

The Supreme Court in *Crawford* declined to offer a comprehensive definition of "testimonial," but it did outline three general categories of testimonial statements:

- *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.
- extrajudicial statements * * * contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.
- statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

541 U.S. at 51-52 (internal citations and quotation marks omitted). Dr. Briner's lab report bears characteristics of each of the three generic descriptions offered by the Supreme Court in *Crawford*. Dr. Briner's report attested to his findings and his report functioned as the equivalent of his testimony on the identification and weight of the substance seized from Mr. March. The report was prepared at the request of law enforcement for the prosecution of Mr. March, and was offered at trial specifically to prove an element of the crime for which he was charged. The report conforms to the types of statements about which the *Crawford* Court expressed concern—affidavits and similar documents admitted in lieu of present testimony at trial. *See* 541 U.S. at 43, 51.

This year, the Supreme Court further explained that statements bear a testimonial aspect when "the purpose of the exercise [is] to nail down the truth about past criminal events." *Davis v. Washington*, 547 U.S. __, 126 S.Ct. 2266, 2278, 165 L.Ed.2d 224 (2006). In *Davis*, the Court made clear that, while its opinion dealt specifically with interrogations, "because the statements in the cases presently before us are the products of interrogations...[t]his is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answered to detailed interrogation." *Id.* Here, Dr. Briner's laboratory report answered law enforcement's open-ended questions about the identity of the substance found at the scene. The purpose of Dr. Briner's lab report was to nail down the truth about alleged past criminal events. Therefore, it was testimonial.

The prosecution witness who can explain precise drug measurements is often crucial to the State's case, especially where slight variations can add years to a prison sentence. See Bradley Morin, *Science, Crawford, and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports*, 85 Boston Univ. Law Rev. 1243, 1244 (2005). For example, in this case, possession of two grams or less of cocaine is a C felony, while possession of more than two grams, but less than six grams, is a B felony. Sections 195.202 & 195.223. It was alleged that Mr. March possessed 2.7 grams. Therefore, his exposure to significantly more prison time depended on the precise measurement of .7 grams.

Often, the lab technician who authored the report will testify at trial. But in some cases, like Mr. March's, the practice has been to admit crucial drug-testing evidence through a lab report or through testimony of another who did not perform the actual testing. While these procedures may satisfy Missouri's rules of evidence,[8] they are no longer consistent with a criminal defendant's constitutional right to be confronted with the witnesses against him. Morin, *Science, Crawford and Testimonial Hearsay*, 85 Boston Univ. Law Rev. at 1244. In other words, use of the business records exception to

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[8] Section 490.680 states: "A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

admit the testimonial hearsay of a lab report may be necessary, but it is no longer sufficient in criminal cases. *Crawford* effected a sweeping change in the law regarding criminal procedure and evidence. *Id.* Once a lab report, such as the one here, is authenticated and qualified as a hearsay exception under the rules of evidence, then Confrontation Clause analysis takes over and the court must decide if the report is also testimonial. *Id.* at 1256.

Numerous states that have examined this question, have determined that laboratory and other reports, which are generated with an eye towards prosecution, and which directly establish an element of the crime, are testimonial in nature and must be subjected to cross-examination under the principles of *Crawford*. *See State v. Caulfield*, 2006 Minn. Lexis 677 (Minn. Oct. 5, 2006) (lab report, offered at trial to prove that a substance seized from the defendant was cocaine, was testimonial); *Commonwealth v. Carter*, 861 A.2d 957, 969 (Pa. Super. 2004)[9] (lab report identifying substance as cocaine constituted testimonial hearsay); *Johnson v. State*, 929 So.2d 4 (Fla. App. 2005)[10] (law enforcement lab report establishing illegal nature of substances defendant possessed was

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[9] The Pennsylvania Supreme Court has agreed to review this decision. *See Commonwealth v. Carter*, 877 A.2d 459 (Pa. 2005).

[10] The Florida Supreme Court recently agreed to review this case. *See Johnson v. State*, 924 So.2d 810 (Fla. 2006).

testimonial hearsay); *People v. Lonsby*, 707 N.W.2d 610 (Mich. App. 2005)[11] (notes and lab report prepared by non-testifying crime lab serologist who tested stain on defendant's swim trunks constituted testimonial hearsay, and admission of notes through other serologist's testimony violated confrontation clause); *State v. Crager*, 844 N.E.2d 390, 397 (Ohio App. 2005) (DNA report was testimonial)[12]; *Smith v. State*, 898 So.2d 907 (Ala. Crim. App. 2004) (Admission of autopsy evidence and report, without testimony of medical examiner who performed autopsy, violated confrontation right in murder prosecution; manner of victim's death was an element of the crime that had to be established by the prosecution); *City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005) (nurse's chain-of-custody affidavit concerning method of conducting and preserving blood alcohol test is testimonial); *People v. Rogers*, 780 N.Y.S.2d 393 (N.Y. App. 2004) (report of blood test is testimonial); *People v. Pacer*, 796 N.Y.S.2d 787 (N.Y. App. 2004) (affidavit of DMV records manager concerning defendant's driving record

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[11] The Michigan Supreme Court recently denied the State's motion to review the decision of the Michigan Court of Appeals. *See People v. Lonsby*, 720 N.W.2d 742 (Mich. 2006).

[12] The Ohio Supreme Court recently agreed to review this case, certifying the following question: "Are records of scientific tests, conducted by a government agency at the request of the State for the specific purpose of being used as evidence in the criminal prosecution of a specific individual, 'testimonial' under *Crawford v. Washington?*" *See State v. Crager*, 846 N.E.2d 532 (Ohio 2006).

testimonial); *Belvin v. State*, 922 So.2d 1046 (Fla. App. 2006) and *Shiver v. State*, 900 So.2d 615 (Fla. App. 2005) (certification that breathalyzer is working properly constitutes testimonial evidence).

While some states, after *Crawford*, have held that lab reports are not testimonial. these cases wrongly focus on the reliability of such reports. *See Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (holding that drug certificates "merely state the results of a well-recognized scientific test determining the composition and quantity of the substance" and are within the state public records hearsay exception); *State v. Dedman*, 102 P.3d 628, 634-36 (N.M. 2004) (holding a report not testimonial and within public records exception because it was prepared by agency that is not law enforcement); *State v. Cao*, 626 S.E.2d 301, 305 (N.C. Ct. App. 2006) (holding that lab reports are nontestimonial business records only when the testing on which they are based is mechanical), *rev. denied* (N.C. Jan. 17, 2006); *Oregon v. Thackaberry*, 95 P.3d 1142, 1145 (Or. Ct. App. 2004) (finding that lab report may be similar to a business record). In *Crawford*, the Court observed, "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" 541 U.S. at 61. This Court should follow the better line of cases which have held that lab reports are testimonial.

Did Crawford *Address Business Records?*

The *Crawford* opinion does not directly address the admissibility of business records. There is dicta in *Crawford* which suggests that, as a general proposition,

business records are by their nature non-testimonial. *Crawford*, 541 U.S. at 56. And Mr. March agrees that the vast majority of business records might be deemed non-testimonial, precisely because they are not prepared in anticipation of a criminal prosecution. However, there is a certain class of business records that run afoul of *Crawford*.

The problem that comes into play, where a lab report is admitted as a business record, is that, technically, the lab report is a record kept in the regular course of business, but, by its nature, it is also intended to bear witness against an accused. *See Johnson*, 929 So.2d at 5-7. In other words, this type of record would not exist but for the criminal investigation and prosecution of the accused. Therefore, the critical determinative factor in assessing whether a business record is testimonial should be whether it was prepared in anticipation of litigation. *See State v. Caulfield*, 2006 Minn. Lexis 677 (Minn. Oct. 5, 2006) (noting that numerous courts have "determined that the testimonial question turns on whether government questioners or declarants take or give a statement 'with an eye toward trial'").

While a minority of courts have invoked *Crawford* for the proposition that business records are so paradigmatic and venerable an exception to the hearsay rule as to remain unaffected by *Confrontation Clause* concerns (*see e.g. People v Grogan*, 28 A.D.3d 579 (N.Y. App. 2006); *State v Dedman*, 102 P.3d at 628), most courts read *Crawford* to require scrutiny of the contours of state law business record jurisprudence to determine whether such a record, otherwise admissible as a business record under state law, nevertheless remains testimonial in nature, entitling an accused to confront its preparer.

In *Johnson, supra*, the Florida Court noted that, despite Crawford's suggestion that business records are non-testimonial, a lab report generated by the Florida Department of Law Enforcement, prepared pursuant to police investigation and admitted to establish an element of a crime, is testimonial hearsay, even if it is admitted as a business record. *929* S.W.2d at 5-7; *see also, City of Las Vegas v. Walsh*, 124 P.3d at 208 (Although statutory affidavits may document standard procedures, they are made for use at a later trial or legal proceeding. Thus, their admission, in lieu of live testimony, violates the Confrontation Clause.)

Indeed, certain laboratory reports seem to fit with the "various formulations" of testimonial evidence described in Crawford. Morin, *Science, Crawford and Testimonial Hearsay*, 85 Boston Univ. Law Rev. at 1258 (citing Neil P. Cohen & Donald F. Paine, Crawford v. Washington: *Confrontation Revolution*, 40 Tenn. Bar J. 22, 24 (2004) (suggesting that a chemist's analysis in a drug prosecution might qualify as both a business record and a testimonial statement)). In many cases, like Mr. March's, the tests are conducted at the request of police or prosecutors, which leads to a reasonably objective expectation that the results of the laboratory tests will be used at trial. Morin, *Science, Crawford and Testimonial Hearsay*, 85 Boston Univ. Law Rev. at 1258 (noting that *Crawford*, 541 U.S. at 51, referred to "pretrial statements that declarants would reasonably expect to be used prosecutorially"). Indeed, the *Crawford* Court recognized that the

> [i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact

> borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay circumstances.

Crawford, 541 U.S. at 56-57 n. 7 (emphasis added). That Court has previously acknowledged that, while hearsay rules and the Confrontation Clause are generally designed to protect similar values, the overlap is not complete. *California v. Green*, 399 U.S. 149, 155-156, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970). Such congruence does not exist; the Court has found violations of Confrontation values even though the statements at issue were admitted under an arguably recognized hearsay exception. *Id*.,(citing *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)).

Another key question in determining whether a report is also testimonial, besides being a business record, should be whether its purpose is clearly to establish an element of the crime at trial. As stated by the Florida court:

> While the business records exception may have been the vehicle for admitting the report, the vehicle does not determine the nature of the out-of-court statement. The nature of the statement is one that is intended to lodge a criminal accusation against a defendant – in other words, it is testimonial. The out-of-court statement does not lose its testimonial nature merely because it is contained in a business record.

Johnson, 929 So.2d at 5-8.

In *People v. Lonsby, supra*, the Michigan Court reversed and remanded for a new trial because the notes and lab report, prepared by a non-testifying crime lab serologist, constituted testimonial hearsay, and the admission of the notes through another serologist's testimony violated defendant's right of confrontation. *Id*., 707 N.W.2d at 618-620. The court noted that "without regard to whether the evidence could clear the hurdles posed by our state's hearsay exceptions, [the analyst's] testimony was inadmissible for failure to meet the standards required by the Confrontation Clause as interpreted in *Crawford*. *Id.*, 618.

Here, Dr. Briner's report was clearly prepared for litigation. The substance to be tested was seized from Mr. March by law enforcement during his arrest for suspected drug dealing. It was sent to the crime lab after the police had preliminarily determined that it was cocaine and Mr. March had been arrested. Dr. Briner's laboratory analysis and report was prepared at the request of law enforcement during the investigation of a criminal case. And the lab report was introduced by the state at trial for the purpose of proving beyond a reasonable doubt that the substance was cocaine. As such, its admission is subject to the strictures of *Crawford*. Compliance with Missouri's business records statute will no longer suffice for admission of this type of report into evidence in a criminal trial. Cases like *State v. Taylor, supra,* which hold that admissibility of a laboratory report under the business records statute also satisfies confrontation concerns, have been implicitly overruled by the United States Supreme Court's opinion in *Crawford*.

The Subjective Intent of the Analyst is Irrelevant

While the State may argue that a lab analyst plays a nonadversarial role and is, therefore, removed from the prosecutorial process, this Court should reject an approach that focuses on the subjective intent of the declarant. "An approach that makes the declarant's perspective dispositive does not give adequate consideration to *Crawford*'s fear of government abuses." *See State v. Caulfield*, 2006 Minn. LEXIS 677, slip op. at 10 (quoting *State v. Bobadilla*, 709 N.W.2d 243, 250-251 (Minn. 2006)). The majority in *Crawford* stated, "The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." 541 U.S. at 66; *See also* Paul C. Giannelli, *Admissibility of Lab Reports: The Right of Confrontation Post*-Crawford, 19 Crim. Just., Fall 2004, at 26, 30-31 (discussing scandals at labs to underscore the need for cross-examination of lab report declarants).

Indeed, as discovered in the recent past, Missouri crime lab technicians are not beyond reproach.[13] Their work must be scrutinized through confrontation and cross-examination – the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. at 158.

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[13] In 2005, a former lab technician at the Missouri State Highway Patrol crime lab pleaded guilty to stealing confiscated drugs, forcing prosecutors to dismiss or decline nearly 400 cases. *See* http://www.msnbc.msn.com/id/8838826/

The Erroneous Admission of Evidence was not Harmless

The erroneous admission of Dr. Briner's report cannot be found to be harmless because there is a reasonable probability that in the absence of this evidence the verdict of the jury would have been different. Without the laboratory report's assertions that the small white rock-like objects found by the officers were cocaine, the State failed to prove an essential element of the crime, namely that Mr. March possessed cocaine. *See State v. Kriedler*, 122 S.W.3d 646, 649-652 (Mo. App., S.D. 2003). Here the State had the burden of proving every element of a crime beyond reasonable doubt. *State v. Rowe*, 838 S.W.2d 103, 111 (Mo. App., E.D. 1992). And "'a criminal defendant may only be convicted on the evidence properly in the record.' " *State v. Moore*, 99 S.W.3d 579, 584 (Mo. App., S.D. 2003) (quoting *State v. Stephens*, 88 S.W.3d 876, 881 (Mo. App., W.D. 2002)).

Because Dr. Briner was not shown to be unavailable and because defense counsel had no prior opportunity to cross-examine him, his laboratory report should not have been admitted at trial, regardless of whether it was admissible under the business records statute. This Court must reverse and remand for a new trial, where the State may either: 1) call Dr. Briner as a witness, allowing him to be cross-examined regarding his testing of the evidence; or 2) have the evidence retested by another analyst, such as Ms. Johnson, who will then be available to testify at trial regarding her findings.

II.

The trial court abused its discretion in overruling Mr. March's request for a mistrial after State's witness Keva Davis told the jury that "Robert is a woman beater" because this ruling violated Mr. March's rights to due process and a fair trial before a fair and impartial jury guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Ms. Davis's statement constituted evidence of an uncharged crime or prior bad act and this evidence was either irrelevant to any issue at trial and/or was more prejudicial than probative.

Despite a lengthy sidebar discussion concerning the necessity to prevent domestic violence issues from being introduced into Mr. March's trial on drug charges, the State nonetheless elicited from Keva Davis that "[Mr. March] is a woman beater." (TR 266). Although the trial court sustained Mr. March's objection, struck Ms. Davis' testimony and instructed the jury to disregard, it denied Mr. March's request for a mistrial. But "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962). Because a mistrial was the only way to cure the prejudice from this statement, this Court must reverse and remand for a new trial.

Factual setting and Preservation

Ms. Davis and Mr. March split up just after they were arrested (TR 255). Two and a half years later, just two or three weeks before Mr. March's trial, Ms. Davis was given a

plea offer: in exchange for her plea of guilty to possessing the crack cocaine that was found between her toes, as well as her testimony against Mr. March, the prosecutor would recommend that Ms. Davis be placed on probation and serve no prison time (TR 231-233, 246-248, 253). Ms. Davis took the offer, and at trial, she testified that, after they were released from a 20-hour hold and they were back at the house, Mr. March said to her that he knew the police knew the drugs were his, and he wondered who had "ratted him out" (TR 228).

Defense counsel inquired of Ms. Davis regarding her motivations to plead and testify against Mr. March, and why she did not say anything about Mr. March's alleged admissions until just before trial. Ms. Davis said that she did not say anything about Mr. March because she was concerned about her personal safety (TR 251). She talked to her lawyer about what had happened (TR 252). Ms. Davis testified at a pre-trial deposition and at trial that she was happy with the plea agreement because she can put the whole ordeal behind her (TR 248). She won't have to go to prison; and she won't have to worry about anybody else taking care of her children (TR 248).

On redirect, the prosecutor asked what she meant by "getting the whole ordeal" behind her (TR 260). Defense counsel objected and asked to approach the bench (TR 260). Defense counsel explained his belief that the prosecutor was trying to get into the fact that there were "domestic issues" between Mr. March and Ms. Davis (TR 260). Defense counsel further argued that this was evidence of uncharged bad acts and should not be admitted (TR 260).

The prosecutor responded that defense counsel opened the door by asking about the "ordeal" that she is trying to get behind her (TR 260-261). The prosecutor offered to limit the question to what happened after the arrest and whether she felt afraid (TR 261). Since defense counsel had asked Ms. Davis why she had not said anything for 2 ½ years, the prosecutor wanted her to explain why (TR 261). The prosecutor believed that defense counsel was implying that she did not come forward about Mr. March's statements because she was guilty, but the prosecutor wanted to explain that she did not come forward because she was scared (TR 261). The prosecutor represented that Ms. Davis would say that she "dummied up" because she was threatened by Mr. March or by other people acting for him (TR 262).

The Court thought that, even if defense counsel opened the door, testimony about threats to Ms. Davis by Mr. March seemed "a little iffy." (TR 262). The prosecutor said he would try to limit it to the 2 ½ year period after the arrest (TR 262). Hesitantly, the trial court allowed the questioning, even though it thought the prosecutor was "jeopardizing [his] case on appeal" (TR 262). The trial court asked the prosecutor, "you sure you want to go there?" (TR 262). The prosecutor agreed to limit it to the time period before trial:

Prosecutor: Here is what I will do, I will ask her from the time of September 6th until the time you pled guilty in this court were you afraid of Mr. March and did he ever say anything directly to you to make you feel that fear?

Defense: You won't get into prior incidents between Mr. March and

her?

Prosecutor: Huh-uh.

(TR 263). The trial court overruled defense counsel's objection to the line of questioning, and the prosecutor continued:

Prosecutor: From the time you were arrested that night until the time you Pled guilty a couple of weeks ago, they asked you why you stayed quiet for all that time and I asked you a minute ago did your lawyer tell you not to say anything and you said yes. Was there anything else?

Ms. Davis: Yes.

Prosecutor: And just during that time was there anything else?

Ms. Davis: Yes.

Prosecutor: What was it?

Ms. Davis: I was getting threats.

Prosecutor: Okay. Did you get any threats directly from Mr. March?

Ms. Davis: No.

Prosecutor: When they talk about this ordeal that you wanted to get Behind you, is it just strictly involving the fact that you have been charged in the criminal case?

Ms. Davis: No.

(TR 264-265). Then the prosecutor moved on to another line of questioning. He asked Ms. Davis:

Prosecutor: And for the love of it you can't figure out why you didn't say anything and why you covered up those drugs that night?

Ms. Davis: I know why I didn't say anything.

Prosecutor: Why?

Ms. Davis: Robert is a woman beater –

Defense: Object, Judge.

Ms. Davis: Well, he is.

Court: Sustained. The objection is sustained. The answer will be stricken and the jury will be instructed to disregard it.

(TR 265-266). Defense counsel requested a mistrial because of Ms. Davis' reference to Mr. March as "a woman beater" (TR 267). Counsel argued that the reference was extremely prejudicial and that a limiting instruction was insufficient to cure what was said (TR 267-268). The request for a mistrial was denied, but the trial court was not sure if the case had been jeopardized (TR 271). "[W]e are going to allow it to go forward. Let the Court of Appeals make a decision on it." (TR 271). The issue was renewed in the motion for new trial (LF 51-52).

Standard of Review

The trial court has broad discretion to balance the value and effect of evidence, in determining whether to admit or exclude it from trial. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). This standard of review compels the reversal of a trial court's ruling on the admission of evidence only if the court has clearly abused its discretion. *State v. Chaney*, 967 S.W.2d 47, 55 (Mo. banc 1998).

Analysis

A most fundamental principle of our system of justice is that an accused may not be found guilty or punished for a crime other than the one on trial. *State v. Conley*, 873 S.W.2d 233, 236 (Mo. banc 1994). As a result, our courts are rightly suspicious of admitting evidence that a defendant committed uncharged crimes or prior bad acts. *Id.* As a general rule, evidence of other crimes or bad acts is not admissible to show a defendant has a propensity to commit crimes such as the crime charged. *State v. Bernard*, 849 S.W.2d at 13. Such evidence is admissible, however, if it is both logically and legally relevant. *State v. Barton*, 998 S.W.2d 19, 28 (Mo. banc 1999). Ms. Davis' description of Mr. March as "a woman beater" was clearly evidence of uncharged crimes or bad acts, however, it was neither logically nor legally relevant.

To be logically relevant, the evidence of prior misconduct must have a legitimate tendency to establish directly the defendant's guilt of the charged crime. *Id.* If the evidence tends to establish motive, intent, absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so related to each other that the proof of one tends to establish the other, or identity, it is admissible. *Bernard*, 849 S.W.2d at 13. Evidence of prior misconduct that does not constitute one of the five exceptions enumerated above may be admissible if the evidence is logically and legally relevant. *Id*.

Mr. March concedes that, had Mr. March threatened or beat up Ms. Davis in order to keep her silent or to prevent her from coming forward about who the drugs belonged to that were found in their apartment, her comment may have been logically relevant.

However, when the prosecutor specifically asked Ms. Davis whether she had been threatened by Mr. March to keep silent about the current case, her answer was "no." (TR 264-265). Therefore, any fear that the prosecutor thought that Ms. Davis was laboring under, was unrelated to the circumstances of this case.

In *State v. Pennington*, 24 S.W.3d 185, 190-191 (Mo. App., W.D. 2000), the defendant was charged with stealing soda pop from a gas station. At trial, the State introduced evidence that Mr. Pennington had stolen soda pop from the gas station on two previous occasions. *Id.* On appeal, the State asserted that the uncharged crimes were admissible to show why a manager tried to block Pennington's car from leaving the scene, in apparent violation of company policy not to attempt to apprehend shoplifters, and why the manager did not call the police until thirteen hours later. *Id.* The State claimed that the manager feared possible job termination, being sued, or even his own arrest as a result of the attempted apprehension. *Id.* The State also claimed that because the police took no action regarding the first two thefts that the manager's intention and delay in reporting the crime was thereby explained. *Id.* The state claimed that it was legitimately entitled to explain these facts through evidence of Mr. Pennington's uncharged crimes. *Id.*

The Western District rejected this argument. *Id.* Such evidence is admissible only when it has a legitimate tendency to prove the defendant guilty of the *crime charged*. *Id.* Thus, evidence of other crimes has been admitted to present a complete and coherent picture where it is part of the *res gestae* of the charge being tried, and where it was "a continuation of a sequence of events" that occurred only hours later after a crime. *Id.*

But in *Pennington*, the defendant's prior uncharged criminal activity was not a part of the circumstances or sequence of events surrounding the offense charged. *Id.* Although Pennington's past acts of misconduct may have helped to provide a "complete and coherent picture" of *the manager's actions*, the evidence was not admissible under this exception for two reasons: first, Pennington's prior uncharged crimes were not part of the circumstances of the offense charged or part of the sequence of events surrounding the offense charged; and second, no authority has ever held that evidence of other crimes is admissible to explain the motive of a *witness* in the course of the offense charged. *Id.* In determining whether such evidence is admissible, the analysis focuses on the identity, motive, et cetera of *the defendant*, not of a witness or any other individual.

The same reasoning applies in Mr. March's case. Evidence of Mr. March's alleged prior crimes or bad acts was not relevant to explain why Ms. Davis did not make statements about the charged crime until just before trial. While they would be relevant if Mr. March had threatened her in some way after the alleged crime had occurred, this was shown not to be the case. Ms. Davis was specifically asked whether Mr. March had threatened her about this case and she said "no." That should have been the end of it. The prosecutor was not entitled to go back and elicit from Ms. Davis that her motivation in covering up the drugs with her toes was because Mr. March was "a woman beater." Evidence of Ms. Davis' motives during the course of the offense charged cannot be explained through evidence of Mr. March's uncharged crimes. *Pennington, supra*.

To be legally relevant, the probative value of the evidence must outweigh the prejudicial effect. *Barton*, 998 S.W.2d at 28. Such evidence of uncharged crimes is only

admissible "if it is highly relevant to a legitimate issue in the case." *State v. Conley*, 873 S.W.2d at 237; *State v. Douglas*, 917 S.W.2d 628, 630 (Mo. App., W.D. 1996). Legal relevance needs "to be resolved in light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." *State v. Clover*, 924 S.W.2d 853, 856 (Mo. banc 1996).

As already discussed, Mr. March's uncharged crimes were irrelevant to any legitimate issue in the case. But even assuming, *arguendo*, that the evidence of Mr. March being "a woman beater" was logically relevant, it was far outweighed by its prejudicial effect. *See State v. Watson* 968 S.W.2d 249, 254 (Mo. App., S.D. 1998) (mistrial required after admission of evidence that Appellant had assaulted his wheelchair-bound mother in order to take her social security money); *State v. Nelson*, 178 S.W.3d 638, 644 (Mo. App., E.D. 2005) (uncharged sodomy of another alleged victim was highly prejudicial and outweighed anything presented in support of the crime of child molestation for which the defendant was on trial); *State v. Barriner*, 34 S.W.3d 139, 150-151 (Mo. banc 2000) (volume and graphic nature of propensity evidence as well as similarity of charged offense to improperly admitted evidence weighed in favor of reversal).

Evidence of other crimes was inadmissible in Mr. March's trial. While the trial court took remedial action, it did not go far enough. While a mistrial is a drastic remedy, it is sometimes required. Here, the prosecutor went beyond the questioning that the parties had agreed to and the trial court had sanctioned. The prosecutor said that he would limit his questioning to whether Mr. March had posed any threats to her in the 2 ½

years leading up to trial (TR 261-263). Her answer was "no." (TR 265). And so the prosecutor decided to go back and ask a question that would possibly elicit an inadmissible response – he asked Ms. Davis why she had curled her toes around the drugs that night (TR 265). There was no evidence presented that Mr. March told her to do it, but Ms. Davis certainly had a motive to put the blame on Mr. March by testifying that she felt threatened because Mr. March was "a woman beater." However, the motive of a witness is irrelevant. *Pennington*, 24 S.W.3d at 190-191.

Ms. Davis' words were not vague or indefinite; rather, they specifically told the jury that Mr. March was "a woman beater." (TR 266). In closing argument, the prosecutor reminded the jury to "think about…the situational life of Miss Davis" (TR 339). This case really came down to who possessed the drugs: Mr. March or Ms. Davis. Since Ms. Davis was the only one who had her toes curled around the drugs – the only drugs found in the house – any inadmissible evidence that tilted the jury in favor of Ms. Davis' credibility and against Mr. March was highly inflammatory and extremely prejudicial to Mr. March's right to a fair trial. Even if there had been such an instruction, error in admitting incompetent evidence which is highly prejudicial to a defendant's rights is generally not cured by an instruction withdrawing it from the jury's consideration. *State v. Benson*, 142 S.W.2d 52 (Mo. banc 1940). "How do you unring a bell?" *State v. Shepard*, 654 S.W.2d 97, 101 (Mo. App., W.D. 1983). This Court must reverse and remand for a new trial.

CONCLUSION

Because the trial court allowed the admission of testimonial hearsay in the form of a laboratory report, the preparer of which did not appear at trial, was not unavailable and had not been subjected to prior cross-examination, in violation of Mr. March's right to confrontation (Point I), and because the trial court failed to declare a mistrial when the State elicited evidence that Mr. March was "a woman beater," which amounted to an uncharged crime unrelated to the crime for which he was on trial (Point II), Mr. March respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Amy M. Bartholow, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2003, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **10,433** words, which does not exceed the 31,000 words allowed for appellant's opening brief.
- ✓ The floppy disc filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which is updated every Sunday (i.e., last updated in September, 2006). According to that program, the disc is virus-free.
- ✓ True and correct copies of the attached brief and floppy disc were hand-delivered this 16th day of October, 2006, to Lisa Kennedy, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

_____
Amy M. Bartholow

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 87902
	)	
ROBERT MARCH,	)	
	)	
Appellant.	)	

APPELLANT'S APPENDIX
