IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	Appeal No. SD28150
vs.	)	
	)	**ORAL ARGUMENT**
SAMUEL A FREEMAN,	)	**REQUESTED**
	)	
Appellant.	)	

APPELLANT'S BRIEF

On Appeal to the Missouri Court of Appeals
SOUTHERN DISTRICT

From the Circuit Court, Criminal Division, of Ripley County, Missouri
Honorable David A. Dolan, Special Judge

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JURISDICTIONAL STATEMENT

Beginning on September 5, 2006, the Trial Court impaneled a jury in Butler County to consider the charge brought against the Appellant, murder in the first degree, RSMo § 565.020. LF 8-9; App. 1-2. The State dismissed Count II. SLF 1; App. 3. After the jury returned a verdict of guilty with a sentence of life without the possibility of parole (LF 11; App. 4), the trial court imposed sentence on November 16, 2006. LF 41-45. The Appellant filed his Notice of Appeal on November 20, 2006 and, as the issues raised on appeal do not involve matters within the exclusive jurisdiction of the Missouri Supreme Court, venue and jurisdiction are proper before this Honorable Court. LF 46-48.

STATEMENT OF FACTS

In May of 1992, Laura Wynn was knocked in the head, sodomized and strangled. Tr 94, 99 & 103-110. Despite an extensive investigation, no charges were filed. Tr 224. In 2005, the State performed additional DNA testing and brought charges against the Appellant. Tr 339; LF 8. This appeal questions *inter alia:* the sufficiency of the evidence; the trial court's decisions admitting one Galliano bottle and sending it and a second, smaller one, used a demonstrative object, to the jury; and, the trial court's refusal of the Appellant's proffered alibi evidence.

The Appellant grew up in and around Poplar Bluff, Missouri. Tr 567. He joined the Army in the late 1980's. Tr 569. He was discharged in November of 1991. Tr 209. Not long after that, he joined the local VFW and became a frequent patron. Tr 132 & 179.

Laura Wynn was also a residence of Poplar Bluff, Missouri. *Ibid.* She worked at the local VA Hospital. Tr 19. In early 1992, she moved into an apartment at 623-A Cherry Street. Tr 20. In April of 1992, after she had moved the large items in, she had her friend from work, Jimmie Reed, an African American, as well his wife, Joan Reed, over. Tr 247. Jimmie and Joan helped move smaller items as well as assisting Laura with window treatments. Tr 247.

Wednesday, May 6, 1992 started off as any other day at the VFW. Around

4:45 p.m., Candace Shipman came in to take over the evening shift. Tr 125, 132. She relieved Bridgett Russom, who stayed around the canteen awaiting her fiancé, Junior Pyle. Tr 132-33. Robert McSwain, as was his habit, came in after work. Tr 129. His son, Richard McSwain, and Richard's friend Cary arrived. Tr 153. Eventually, the Appellant and Laura Wynn made their appearances. *Ibid.*

Richard, Robert's son, was at the VFW to try and borrow dad's car. Tr 154. He and his friend and, perhaps, his dad, began shooting pool. Tr 133 & 147. Eventually, the Appellant placed his quarter on the pool table's side rail and waited his turn to play the winner. Tr 157 & 180.

Laura Wynn was seated at the bar between her friends, Bridgett (the day shift barkeep) and Bridgett's fiancé, Junior Pyle. Tr 178. Laura had an ongoing love-hate relationship with Robert McSwain. Tr 249. Sometimes they were a couple, at other times they would breakup and then they would get back together. Tr 249.

The Appellant's turn eventually came up at the pool table. Tr 180-81. It may be necessary to note that the VFW was a private club. Tr 127. Richard was 17 and, one presumes his friend, Cary, was of similar age. In any case, the Appellant began shooting pool against the kids. Tr 133. Eventually, Laura got up from her seat and had a conversation with the Appellant. Tr 145-46; 158; 182-83. Neither the pool shooters nor the people at the bar nor any other witness

overheard the conversation. *Ibid*. From the Appellant's statement in 1992 and 2005, it appears the crux of the conversation was Laura's concern that the Appellant was hustling the boys. Tr 181, 573. All of the witnesses agreed the encounter was brief. *Ibid.*

Richard and his friend eventually got dad's car. Tr 154. The Appellant continued to drink his usual Budweiser and shots of Galliano. Tr 140, 149. He would eventually polish-off the Galliano and take the bottle with him. Tr 141. It was apparently difficult to forget this fact because, as he was trying to open the door to leave, he dropped the bottle and made light of the fact it bounced rather than broke. Tr 188-89, 192. It is not clear when, but it seems to be before he finished off the Galliano, he was standing or sitting next to Laura Wynn, flirting with her. *Ibid.*

The witnesses testified the Appellant did not have a car and he testified he walked home. Tr 188-89; 210-11; & 574. At this time, he had neither a driver's license nor a motor vehicle. *Ibid.* As his only prior conviction was a stop sign violation, this was a voluntary choice. Tr 568. It is a little over a mile from the VFW to the Appellant's home, which Officer Tim Davis walked off in 32 minutes. Tr 205-06; 344.

The VFW closed-up anywhere between 10:00 p.m. and 11:00 p.m. on weeknights. Tr 124. At closing on May 6, 1992, the only people left were

Bridgett, Laura and the barkeep, Candace. Tr 141. Sometime before closing, perhaps at last call, Laura asked for a six pack of Miller Lite to go. Tr 144. Robert McSwain was still there. Tr 144-45. As Robert was a Busch drinker and the Appellant preferred Budweiser, Candace suggested Laura buy three Budweiser's on the assumption it would make Robert jealous of the Appellant. Tr 134, 144-45. Laura declined and purchased six cans of Miller Lite. Tr 145.

Laura, Bridgett and Candace left at 10:38 p.m. Tr 177. Bridgett specifically remembers looking at a digital clock as they were leaving. Tr 177. Bridgett, whose car was parked next to Laura's car, offered to follow her home. Tr 190. Laura declined. Tr 190. While the ladies followed each other out of the parking lot, they parted ways when Laura continued down Cherry and Bridgett turned left on Fifth Street. Tr 191.

On May 7th, somewhere between 1:00 and 2:00 p.m., Laura's mother went to 623-A Cherry Street and, when she found Laura sprawled on her bed, she left and called the police. Tr 35. Laura's apartment was just up and over the hill from the VFW, being only 1,241.8 feet from the club. Tr 172; 308-09. Officer Mobley was the first to respond. Tr 35. After walking through the apartment, he called dispatch and informed them this appeared to be a homicide. Tr 43-44. Donwell Clark arrived to handle the evidence and Bruce Goins, the Deputy Coroner, arrived somewhere around 2:30 p.m., which was after Donwell had

already begun processing evidence. Tr 47. As the investigators entered Laura's apartment, they came into the living room. Tr 51; Exhibit 5 (App. 5). Directly in front of them across the living room was the kitchen area. Exhibit 5 (App. 5). The rooms in this apartment were small. Tr 196 (P.H. Tr pg. 20). From State's Exhibit 22, the floor space in the kitchen is no wider than a four burner stove and a narrow one-drawer cabinet with the entire width of the kitchen being the additional depth of a countertop and kitchen sink. Exhibit 22. What the crime scene investigators found on the verge of the living room and kitchen was a the brown paper bag with the loose Miller Lite cans, presumably from the bar, and a box of tampons inside the bag. Tr 144-45; 196 (P.H. Tr. pg. 36-37).

After entering the apartment and having the paper bag with the beer and tampons to the front, around to the right, through a doorway, was the apartment's bedroom. Exhibit 5 (App. 5). Laura was found in the bedroom on the bed. Tr 40. However, her head was at the foot of the bed. Tr 40. She was face-up on the bed. Exhibits 27-31. Beside or slightly underneath her right shoulder, the shoulder closest to the door from the living room, the investigator's found a square of facial or toilet tissue. *Id*. She was naked except for her right foot that still had a knee-high stocking. Tr 86. A similar stocking was found tied around her neck. Tr 42, 86.

Laura's body was transported to Farmington where Dr. Steven Parks

performed an autopsy. Tr 82. By the time of trial, Dr. Parks had passed on. Tr 82. The State called Michael Zaricor, a doctor of osteology, and a pathologist. Tr 78. His basic findings were that Laura had been hit in the head behind the right ear ,her hyoid bone was broken and, about the time of death, she suffered bruising and two abrasions in and around the vaginal area. Tr 94, 99 & 103-110. The cause of death was asphyxia resulting from the nylon around her neck being sufficiently tight to restrict the flow of blood to her brain. *Ibid*. The pathologist found it interesting the ligature was just tight enough to cut-off the arterial blood but not so tight it kept the veins from draining the blood out of her head. Tr 87, 90-91.

The State examined Dr. Zaricor further regarding the blow to the head. *Ibid.* He specifically identified the blow as being somewhere behind the right ear. Tr 92. He stated it could have been caused by an instrument or a fist. Tr 94. He was specific in stating that whatever caused the injury did not result in any tearing of the skin, as this injury was not noticed or discernable on an external examination of the head and was only revealed later in the autopsy. Tr 91-92; 94-95. Upon further inquiry, the doctor informed the State that the most he could say about the instrument, if one was used, was that it was smooth because it did not tear the skin. Tr 94. The State made further inquiry establishing that some instruments, such as hammers and two by fours, leave very specific injuries or

distinct wounds. Tr 95. In this case, the most the doctor would ever commit to was that the injury could have been caused by an instrument or a hand. Tr 94-95.

The State made an extended inquiry into the findings made after the examination of the vaginal area and buttocks. Tr 103-110. As the doctor described from State's Exhibit 4, there was bruising to the left underside of the buttocks and somewhat higher on her right side. Tr 103. There was a one-inch abrasion or scrape just inside the vaginal opening. Tr 103, 108. As Dr. Zaricor testified, the report indicates this was on the left side while the witness suggested it was on the right side. Tr 103. The report also indicated there was an abrasion of unknown size, high-up in the vagina near the cervix. Tr 109. There was no photograph of this later injury, as it would have required using a colposcope. Tr 111.

Beyond stating that these injuries were not caused by a penis, the State could never get the doctor to commit to an opinion greater than "probably so". Tr 109 & 111. Upon the State's first inquiry as to what might have caused the injuries, the doctor's reaction was "Oh, I'm not familiar with dildos..". Tr 111. The witness then goes on to refer to "something like that", although it is never identified in the record. Tr 111. The witness then testified that from the location of the injury near the paracervical area, it is probably six or eight inches long. Tr 112. When the State tried to connect the external bruising and internal injury, the

doctor again stated he was not familiar with dildos but the object had to be small enough to fit and at least six to eight inches long. Tr 112. After an objection, discussion among counsel and the court, the doctor testified the injuries could happen if the object were moved side to side or during insertion or if the instrument had a flange. Tr 113-15.

Beyond what has been mentioned, as of 1992, the only other remarkable item found in the apartment was noticeable by its absence. *Ibid.* There were almost no fingerprints anywhere in the apartment. Tr 196 (P.H. Tr 28-29). The record is anything but clear, however, it seems there were somewhere between two and four fingerprints found in the apartment despite Donwell Clark spending more than ten days examining the scene. Tr 196 (P.H. Tr 30); 391-401. The preceding evidence was all that existed up until about 2004 or 2005.

There would be several intervening evidence custodians for the Poplar Bluff Police Department and, in 2005, Tim Davis would resubmit evidence from the investigation for additional DNA testing. Tr 339 and 426. Aside from tests that produced no results (the beer cans and fingernail scrapings from Laura's left hand), Tr 437, and tests producing DNA profiles consistent only with Laura's (her right fingernail scrapings), Tr 439, six items produced quantifiable DNA results. Tr 439. In the end the State elicited an extended discussion of two of the exhibits, State's Exhibit 55, which bears lab number 3 and State's Exhibit 56,

which bears lab number 5. State's Exhibit 55, lab number 3, was the nylon around Laura's neck. Tr 428, 432-33. Exhibit 56, lab number 5, was the tissue by her shoulder. Tr 445.

When examining the tissue, Jason Wycoff, first used an alternative light source. Tr 446. From this, he was able to identify ten separate areas of the tissue that might bear DNA evidence. *Id.* Of the ten sites identified by Jason Wycoff, there was usable DNA information on six of those. *Id.* One of the six sites had a "major" contributor and at that location on the tissue, Jason Wycoff found a DNA profile consistent with the Appellant's profile. Tr 449 & 461. Another of the six sites had a DNA profile that was neither Laura's nor the Appellant's DNA profile. Tr 461. There were six different DNA profiles identified on the tissue. Tr 455. As the DNA criminalist would later testify on direct exam, there were at least three DNA profiles on both the tissue and nylons. Tr 468. On cross-examination, he testified there very well could be three, four or five. Tr 475. It is characteristic of a minimum of two. *Id*. This is foreign DNA not matching the Appellant or the victim. Tr 468.

The nylon from Laura's neck was State's Exhibit 55 or lab number 3. Jason Wycoff was not able to identify any area of the nylon where there was a "major" component. Tr 465. The most the witness would testify to was that a profile consistent with the Appellant's DNA profile appeared to be part of the DNA

mixture on the nylon. Tr 469.

The other excluded evidence that will form a separate point relied on involves a handwritten note by the Appellant's Mother. The Appellant's Mother suffered a stroke sometime in 1991. Tr 511; 547-548. Thereafter, her communication was essentially limited to writings. Tr 511 & 548. On July 6 2004, she passed away. Tr 511 & 544. In going through her papers, Appellant's sister, Pearl Ann Cornett, found a note, identified as Defendant's Exhibit P. Tr 510. Pearl turned Exhibit P over to the Detective Davis in August of 2005, which was the same day they executed a search warrant on the Appellant's home. Tr 513.

POINTS RELIED ON

POINT I

The trial court erred in denying the Appellant's motions for judgment of acquittal because the guarantee of due process prohibits entering or sustaining a conviction in the absence of sufficient evidence and the State alleged the Appellant caused the victim's death in that, after the pathologist testified the blow to the head could be caused by a fist, the only evidence connecting the Appellant to the crime was his DNA found on a tissue and a stocking and while everyone has grown up with knowledge of fingerprint evidence and the inferences that may be drawn from locating a fingerprint, the same inferences do not follow from DNA because DNA, unlike fingerprints, is robust, miniscule and easily transferred, as shown by the four or five other DNA "fingerprints" found on the same tissue and stocking.

State v. Grim, 854 S.W.2d 403 (Mo. 1993)

Jackson v. Virginia, 443 U.S. 307 (1979)

State v. McMullin, 136 S.W.3d 566 (Mo.App. S.D. 2004)

State v. Waller¸163 S.W.3d 593 (Mo.App. W.D. 2005)

POINT II

The trial court erred in admitting over objection Galliano bottles because the admission of weapons not used in the commission of a crime is

not legally or logically relevant in that the pathologist testified the contusion on the victim's head could have been caused by a hand or any smooth object (the bottom portion of the bottles is ridged) and he testified the vaginal penetration was by something other than a penis but the bruising could have been from penetration or from the angle of penetration or perhaps from a "flanged" object whereas the Galliano bottle, unlike a flaring wine bottle, is actually conical.

State v. Anderson, 76 S.W.3d 275 (Mo. *en banc* 2002)

State v. Merritt, 460 S.W.2d 591 (Mo. Div. 2 1970)

State v. Waynne, 182 S.W.2d 294 (Mo. Div. 2 1944)

State v. Baker, 434 S.W.2d 583 (Mo. Div. 2 1968)

POINT III

The trial court erred in refusing the Appellant's Exhibit P because, while the trial court is vested with broad discretion in admitting evidence and hearsay is certainly objectionable, Missouri has no residual exception to the hearsay rule, yet it has placed no limitation period of bringing murder charges and the defendant is guaranteed the right to due process and, while the accused enjoys the right to confront witnesses, the State does not enjoy such a guarantee in that throughout the trial there are repeated references to the exceptional evidence collection techniques of Donwell Clark, who did not testify at trial as he was deceased but, when the Appellant sought the

admission of a note written by his Mother after she had a stroke but not found until after she had passed on, which was found not by the Appellant but by his sister and located amongst Shirley Freeman's other papers, Exhibit P had sufficient indicia of trustworthiness to justify its admission.

State v. Bell, 950 S.W.2d 482 (Mo. 1997)

2 McCormick on Evidence § 324 (John W. Strong ed, 4th 1992)

POINT I

The trial court erred in denying the Appellant's motions for judgment of acquittal because the guarantee of due process prohibits entering or sustaining a conviction in the absence of sufficient evidence and the State alleged the Appellant caused the victim's death in that, after the pathologist testified the blow to the head could be caused by a fist, the only evidence connecting the Appellant to the crime was his DNA found on a tissue and a stocking and while everyone has grown up with knowledge of fingerprint evidence and the inferences that may be drawn from locating a fingerprint, the same inferences do not follow from DNA because DNA, unlike fingerprints, is robust, miniscule and easily transferred, as shown by the four or five other DNA "fingerprints" found on the same tissue and stocking.

The Appellant's conviction rests not on evidence but on the improper transfer of presumptions everyone has grown up with regarding fingerprints being extended to DNA "fingerprint evidence". While both types of evidence provide a unique identifier, such uniqueness is the beginning, middle and end of the similarity between fingerprints and DNA "fingerprints". Fingerprints come only from the fingers, which are attached to the hands, which necessarily leads to the inference the entire person was present where the fingerprint is found. Other than personal items, such as briefcases or umbrellas, the type of property that

can be identified as belonging to one person even without fingerprint evidence, property is not usually transported from place to place. Even to the extent items are readily transported, fingerprints are large and fairly fragile, meaning that absent a specific intent to capture, preserve and transplant a fingerprint, its presence is often obliterated when an object is moved. None of that is even relevant when the fingerprint is located on a large, relatively immobile object. In short, it is only because fingerprints are large and relatively fragile that they usually support the inference of the defendant's presence. *See Grim, infra*. Keep in mind, Laura's apartment was wiped clean and only a couple fingerprints survived. On the other hand, DNA is miniscule, robust and easily transferred. Unlike a fingerprint that is easily obliterated, the DNA evidence in this case consisted of 125 ten trillionths of a gram of evidence. This miniscule quantity of evidence sat undiscovered, on a tissue, in an evidence room for more than 12 years. DNA fingerprints are tiny and robust. They are easily transferred. If there were any doubt as to the ease with which DNA can be transferred and the fact that one cannot draw an inference of presence, both the stocking and the tissue that had DNA from the Appellant and the victim also had at least three and possibly four other DNA profiles. The conviction rests on speculation and conjecture arising from a lifetime of experience with fingerprints and the inferences that can be drawn from fingerprints and the jury's confusion of those

inferences with what can be known from an entirely different category of evidence, DNA fingerprints. It is also possible the jury simply abandoned reason and was inflamed by passion by the improper admission of the Galliano bottles.

The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 10 of the Missouri Constitution, guarantees that no conviction will be sustained in the absence of sufficient evidence. *Jackson v. Virginia*, 443 U.S. 307 (1979). At the risk of violating the admonition to avoid extended cites from earlier opinions, the standard of review was so well stated in 2004, it would be an injustice to paraphrase the following:

> In a jury-tried case, our review of a trial court's ruling on a motion for judgment of acquittal is whether or not the state has made a submissible case. *State v. Sensabaugh,* 9 S.W.3d 677, 679 (Mo.App. E.D.1999). In determining whether the evidence is sufficient to support the conviction, we accept as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and we disregard all evidence and inferences to the contrary. *State v. Grim,* 854 S.W.2d 403, 405 (Mo. banc 1993). "An 'inference' is a conclusion drawn by reason from facts established by proof; 'a deduction or conclusion from facts or propositions known to be true.' " *State v. Foster,* 930 S.W.2d 62, 64

(Mo.App. E.D.1996) (quoting *Draper v. Louisville & N.R. Co.,* 348 Mo. 886, 156 S.W.2d 626, 630 (1941)). In considering whether the evidence is sufficient to support the jury's verdict, we must look to the elements of the crime and consider each in turn. *State v. Thomas,* 75 S.W.3d 788, 790 (Mo.App. E.D.2002). In our review, we may not "supply missing evidence or give the state the benefit of unreasonable, speculative or forced inferences." *State v. Langdon,* 110 S.W.3d 807, 812 (Mo. banc 2003). We look to whether there was sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Dulany,* 781 S.W.2d 52, 55 (Mo. banc 1989). The reasonable doubt standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." *State v. Pendergrass,* 726 S.W.2d 831, 835 (Mo.App. S.D.1987).

State v. Naasz, 142 S.W.3d 869, 875 (Mo.App. S.D.,2004). In this case, the facts must be sufficient to show the Appellant caused the death of Laura Wynn.

Facts

The victim and the Appellant were both regulars at the Poplar Bluff VFW. Tr 132. They had never had a relationship. Tr 579. The victim had an on-again off-again, love-hate relationship with another regular of the VFW, Robert McSwain. Tr 132, 249. On May 6, 1992 Robert's son came into the VFW in the

hopes of borrowing dad's car and stayed to shoot some pool before asking. Tr 153-54. Laura approached the Appellant sometime while the boy's were playing. Tr 145-46. The encounter did not last long enough and, to the extent it was argument, was not loud enough to be overheard by anyone. Tr 145-46; 158; 182-83. Later in the evening, the Appellant would be described by the State's witnesses as flirting with Laura. Tr 134, 144-45; 188-89. He left the bar before the victim and was afoot but carrying an empty Galliano bottle. Tr 188-89. The victim, the on-duty barkeep and the off-duty barkeep closed up and left the VFW together at 10:38 p.m. Tr 177. Sometime later in the night, one presumes when she first arrived home, Laura Wynn was struck in the head behind the right ear. The blow could have been from any smooth object, as the blow did not tear the skin, and it was consistent with Laura being hit with someone's fist. Tr 92-95. Thereafter, she was stripped, taken to her bed, at some point the stocking from her left foot was tied around her neck, which would eventually asphyxiate her by cutting the arterial blood flow to her brain. Tr 94. She suffered additional injuries, including bruising on her buttocks and abrasions inside the vagina. Tr 103-110. The pathologist testified these were inconsistent with a penis. *Ibid.* However, they could have been caused by the initial attempt at insertion or from the angle of insertion or even from the shape of the object used. Tr 109-115. Presumably after those events, the criminal wiped the entire apartment clean of

fingerprints, with the exception of one located on the headboard and perhaps a second one on a showerhead or beer can. Other than the stocking tied around her neck, the only other physical evidence of consequence was a tissue found beside and partially beneath the victim's right shoulder. Although there was extensive investigation, there were no charges filed in 1992. Tr 224. It was not until additional DNA testing was done on the tissue and stocking that charges were filed against the Appellant in 2005.

Prior Decisions

Gary Waller was accused of littering because a trash bag containing mail addressed to him was found just off the side of a public right-of-way. *State v. Waller*¸163 S.W.3d 593 (Mo.App. W.D. 2005). After being convicted in a case tried to the court, the Western District reversed the conviction because the only connection between the defendant and the trash was mail addressed to Gary Waller, along with mail addressed to April Waller and Crystal Waller. *Ibid.* The Western District was willing to entertain the notion that one of the Waller's had dumped the trash, as opposed to the real estate agent who had taken over the Waller's old home. The Court was willing to entertain the notion that it was probably Gary Waller who dumped the litter. However, the court reversed the conviction because it required too much speculation to jump from the probable

commission of a crime to evidence sufficient to show guilt beyond a reasonable doubt. *Ibid.*

In the case at bar, just as with the trash in *Waller*, there were multiple return addresses for the DNA profiles on the stocking and tissue found at the scene of the crime. If anyone should question citing a littering case in a brief relating to a capital offense, the Appellant would point out what is at issue is not the desire for retribution nor the strengthen of such a desire based on the harm to the victim. What is at issue is a Constitutional right guaranteed to every accused, regardless of whether he or she is charged with littering or murder. Unlike *Waller*, that involved the mail, which would not ordinarily be thought of as being transferable except to put the mail in the trash, the case at bar involves DNA that is transferred from one person to another all of the time. This is evidenced by the five separate DNA profiles on both pieces of evidence at issue.

Moving from misdemeanors to felonies, Dean McMullin was accused of violating an order of protection on two separate occasions and upon conviction sentenced to two consecutive four years terms of imprisonment. *State v. McMullin*, 136 S.W.3d 566 (Mo.App. S.D. 2004). The difficulty the Prosecutor ran into was proving the defendant knowingly violated the order of protection. The return on the full order of protection was never completed by the Sheriff, despite the fact that McMullin was in the jail at the time it was issued. A panel of this

Court affirmed his conviction for the communication sent to the victim in April because the letter self-evidently established his knowledge of the order and claimed he was exempt because he had not been served. *Ibid.* As the crime does not require proof of service, the defendant's admission of knowledge in the April letter satisfied the State's burden of proof. What the panel refused to do was infer the defendant's knowledge of the order in March based on either the fact that he knew about the order of protection by April or followed the State's suggestion that, if one infers the clerk usually sends out the orders, one can further infer the defendant received the order and had actual knowledge prior to the March letter. *Ibid.* The panel specifically observed that the initial inference, the clerk's ordinary behavior of mailing notice of the full order, was an inference without any evidence and, as the first inference lacked any evidence, the court would not stack upon it the second inference, the presumption of receipt. *Ibid.* While specifically disparaging the notion on inference stacking in footnote no. 5, the court noted the problem is invariably that the first inference lacks any factual basis.

In the case at bar, the State first wishes to infer from the size, shape and print on the tissue paper, it was toilet paper, which seems a safe inference and one that can be reached beyond any reasonable doubt. The State further wishes to infer the toilet paper came from the victim's home, as it is the same type of

paper and pattern as the toilet paper at the scene, which likewise seems to be a safe inference and one that can be drawn beyond a reasonable doubt. These two inferences, for they are inferences as there is no direct evidence the toilet paper on the bed was in fact from the batch removed from the rolls of paper found in the home, are something the incautious would call inference stacking. They are obviously not inference stacking, they are both sound conclusions that flow almost inexcerably from the basic facts.

What the State next wants to infer is that, since its toilet paper, the victim would not have taken it outside the home. As with the inference the clerk mails copies of full orders of protection, this inference has no factual basis.

The State next infers that since the toilet paper was not removed from the home, the only way for the Appellant's DNA to be deposited on the toilet paper is for him to have been present in the victim's home. Then, from the location and position of the toilet paper and the body, the State wants to make the final inference that the Appellant was present at or near the time Laura Wynn was brutally murdered.

It is speculation not inference when the State suggests the toilet paper was never removed from the home. In fact, the inference the State wants to draw is completely refuted by the fact there are at least five people's DNA on the tissue. Tr 455. The question is whether the Appellant went to the tissue or the tissue

was brought into the presence of the Appellant. There is no factual basis to make an inference as to which happened other than the presence of the other people's DNA. The only proper inference from this evidence is that Laura, like nearly every other woman on the face of the earth who carries a purse, had tissue in her purse. It might be said this is not a safe inference. The only inference that can drawn from the presence of the Appellant's DNA, Laura Wynn's DNA and at least four or maybe five other people's DNA on the toilet tissue, is that the victim carried the toilet tissue out of her house and into the public.

The Court's attention is invited to the further fact that the DNA sat in an evidence locker from 1992 until 2005. Aside from the fact that the Appellant was in the Army until November 1991 and it is not clear how long this particular style or print of toilet paper had been in production, there is no reason to suspect the transfer of DNA did not happen anytime between 1979 and 1992. Factiousness aside, there is no reason to infer the DNA transfer happened on May 7th or May 6th or May 5th or anytime in May 1992.

As with the State's effort to stack the inference of receipt on top of an inference of mailing without any factual predicate of actual mailing, the case at bar rests on the inferences drawn from inferences that have no factual basis. The State's claim the Appellant must have encountered the tissue and left his DNA on the tissue while at Laura's apartment rests on the claim Laura never took the

toilet tissue out of the apartment. The later inference or assumption is speculation. There is no factual predicate to suggest Laura did not carry toilet tissue in her purse. As there are five separate DNA profiles, the facts will not support the inference that is necessary to a chain of inferences required by the State's theory or any other theory putting the Appellant in the victim's apartment. Thus, as was necessary in *McMullin*, the conviction must be reversed.

This would perhaps be the opportunity to turn to a murder case where the defendant's fingerprint inked in blood is found at the scene. The reader is cautioned, in the case at bar there are five DNA fingerprints found at the scene. Ms. Bradford, an elderly woman, was murdered in her own home by being stabbed in the chest four times, including one wound that severed her aorta artery. *State v. Grim*, 854 S.W.2d 403 (Mo. 1993). From the nature of the injury, copious amounts of blood were spilled at the scene. *Id.* at 408. During the course of the investigation, the officers found a bloody fingerprint inside Ms. Bradford's wallet. *Id.* at 410. The jury convicted the accused of second degree murder. At the time of his trial and subsequent appeal, Missouri followed the old fashioned "circumstantial evidence rule", which, as the Appellant understands it, required that convictions resting solely on circumstantial evidence had to be presented on a theory so air-tight that the circumstantial evidence was inconsistent with any reasonable theory of innocence. It is necessary to mention that rule because Grim

theorized on appeal that, as there was no evidence he did not come in after the murder but before the blood dried, he was innocent of involvement in the murder. As to the case at bar, the decision in *Grim* is far more important than the abandonment of the circumstantial evidence rule. As the Court observed, a fingerprint usually proves little more than identity and presence. Fingerprint evidence supports the inference of presence because prints are left on physical contact between people and things. *Id.* at 411-412. Occasionally, the circumstances surrounding the print, either its location or the nature of the print, provide additional evidence of how, when or why the person touched the object. *Ibid.* The opinion goes on to cite an instance where a bloody palm print was left inside a trunk, which trunk also contained a bullet riddled corpse, leading to the inference the body or the wounds were inflicted prior to the hand leaving the print inked in blood. While the court sustained the conviction in *Grim*, this Court is invited to the obvious distinctions between fingerprints, fingerprints etched in blood and DNA fingerprints.

For this case to bear any relationship to the circumstances in *Grim*, there would have to be five separate fingerprints inside Ms. Bradford's wallet. The Court's attention is likewise invited to the fact that in *Grim*, the State could not match the blood of the fingerprint to the victim's blood. As it turned out, making such a test would have required destroying the fingerprint. As the Appellant

noted, fingerprints are fragile, even when they are inked in blood. The DNA evidence in this case survived storage for more than twelve years.

In addition, in both *Grim* and the case it referred to with the bloody palm print in the trunk, the prints were readily apparent to the naked eye. In the case at bar, the transfer of DNA occurred involving evidence containing no more than 125 ten trillionths of a gram.

The Appellant will not repeat the discussion of the tissue in regards to the nylon stocking tied around Laura's neck. Just like the tissue, it had at least three unidentified DNA profiles. Tr 468. Unlike the tissue, there is no question it had been taken outside Laura's apartment. The five profiles on the stocking simply bear out the Appellant's point.

During the course of examining the scene, Donwell Clark could not find the pants Laura was wearing. Likewise, someone had taken all of her shoes. If a person is wearing pants and shoes, how does he or she get other people's DNA profiles on his or her socks? There were DNA profiles on the tissue found beside Laura, as well as the stocking from her left foot because these things had been taken into public and DNA is readily transferable.

The other evidence connecting the Appellant to the crime is that Laura was hit in the head and the Appellant left the VFW with a bottle. There is no

question Laura was hit in the head. However, it requires the same stacking of inferences upon an inference that has no factual basis for this to be relevant.

The head injury was not visible on an external examination of Laura's body. The pathologist only found the head injury during the autopsy. The same pathologist who testified there was a head injury indicated it was consistent with Laura being hit with a fist. Tr 94.

The State's theory is that any weapon, so long as the person wielding it chokes his or her swing, would also be consistent. It could be true, Laura's assailant had a weapon but choked his swing but on the other hand, the same evidence establishing the head injury shows the assailant could have used his fists. There is no factual basis to draw either inference. To the contrary of connecting the Appellant to the crime, his possession of the bottle makes it less likely of his involvement. One would be required to believe that even though he had a weapon and, as the State argued in its closing was in an alcohol fueled rage, he did not swing the weapon with any more force than he could have produced using his fist. Tr 611-12. As argued in the next point, the State was not trying its case by introducing negative evidence, the State was introducing the bottles to inflame the jury's passions with suggestions Laura was sodomized with the bottle.

The Unexplained

There is no evidence the Appellant knew where Laura Wynn lived. She had a telephone, as depicted in one of the exhibits, and it can be inferred it was connected with active service. However, there is no evidence she had a "listed" telephone number. Further, she had recently moved and there was no evidence that, after her move but before May 6th, a new telephone directory was published and distributed. The victim left the VFW in the presence of two other people. Tr 177 & 190. The Appellant was afoot and, the State presented no testimony of a witness seeing someone following the people leaving the VFW. Tr 188-89; 210-11; & 544. Even supposing there is an inference he followed Laura from the VFW, she lived up and *over* a hill, which means the Appellant could not know where she had turned off of Cherry Street. Tr 172, 308-09. One presumes Laura's on-again, off-again boyfriend, Robert McSwain, knew where she lived. Tr 249. There is no question Jimmie Reed had been to her new apartment. Tr 247.

In the course of Donwell Clark's extended examination of Laura's apartment, he found two African American pubic hairs. Jimmie Reed had been to Laura's apartment a couple of times. Jimmie Reed probably had absolutely nothing to do with Laura's murder. The Appellant's point is that it is difficult to be in a place without inadvertently leaving at least minute traces of one's presence, like pubic hairs in the bathroom. Whoever murdered Laura Wynn stripped her body, sodomized her and went through the entire apartment wiping

off nearly every fingerprint. Nevertheless, there is nothing to suggest the Appellant's presence other than his DNA on a small square of tissue paper. If Jimmie Reed cannot come by for a couple innocuous visits without leaving trace evidence of his presence, one is left to ponder how the Appellant supposedly committed this murder and managed to keep the evidence of his presence limited to two articles Laura took from her apartment into the public, where at least four other people had the chance to leave their DNA, and then brought the articles back to her apartment.

State's Internally Inconsistent Theories

The State's arguments are internally inconsistent. This is not a case where the State has advanced multiple theories with each distinct theory being internally consistent, although there is conflict between or among the various theories. From the closing arguments, it is clear the State's theories are internally at war with themselves.

The State initially beings its closing argument by explaining the Appellant was in an alcohol fueled rage over Laura's rejection of his advances. Tr 610-12. State's Exhibit 53 is 18 inches long, the length of your elbow to your fingerprints. It has a neck about the same diameter as a baseball bat and a business end about the same diameter of the barrel of a baseball bat. When, as it was displayed in Exhibit 53, it is full of liquid, it has a heft of a baseball bat. No one in an alcohol

fueled rage hit Laura in the back of the head with a baseball bat, leaving a wound the pathologist could not distinguish from one caused by a fist. If the Appellant was in an alcohol fueled rage wheeling a Galliano bottle, he would have bashed Laura's head in. Laura's head was not bashed in. If he was in an alcohol fueled rage, why did he set the bottle down to hit her in the back of the head with his fist?

The State's fall back position is the small bottle. Why introduce the 18" club like bottle? Exhibit 53 serves the purpose of inflaming passion. The impression created is the Appellant hit her with his fist and sodomized her with the 18" long bottle.

In its initial closing argument, the State suggests this is a sick attack. It argues from the standard definition of rape, which is to say it is not about sex but power and control. Tr 610-12. The defense presented in its closing argument the theory that the Appellant had nothing to do with the crime. The defense pointed out it made little sense that the Appellant was a perverted sexual psychopath because after 1992 he married, adopted two children and conceived a third. In the close of the close, the State then argued the killing was the work of a calm, cool calculated killer.

One wonders what happened to the alcohol fueled rage. Indeed, what is inexplicable is how you get from flirting and a rebuffed advance to the decision

to kill someone without an alcohol fueled rage. It is further inexplicable because the Appellant drank six to eight beers, as well as shots of Galliano. He cannot possibly be the calm, cool, calculating killer who made up the sex crime and perversions to cover his tracks.

Either the Appellant was drunk or he was sober. Either he was intoxicated or he was calm, cool and collected during the killing. In point of fact, the evidence is he was intoxicated when he left the VFW. The State's theory of this case requires the Appellant be both intoxicated and stone cold sober. It further requires that he not have a weapon and he have a weapon.

Conclusion

Everyone accused of a crime within the territorial jurisdiction of the United States of America is guaranteed due process. *Jackson v. Virginia*, 443 U.S. 307 (1979). Encompassed within the notion of due process is the simple proposition there must be sufficient evidence in the record from which a reasonable juror could conclude beyond a reasonable doubt the accused committed the crime. Appellate courts do not, on review, sit as super jurors and the Appellant is not inviting such review. The Appellant can point to the specific mistake of reasoning or inference the prosecution sought, which error the jury made. Despite having a reasonably fair trial,[1] what the Appellant could not

[1] As is discussed *infra*, despite repeatedly presenting throughout trial that the

overcome was the lay jury's lifetime experience, prejudices, familiarity and presumptions regarding fingerprints. This is true despite the fact it is undisputed DNA is highly transferable; the DNA in question was a fluid; the fluid was not blood or semen; and, the amount transferred was miniscule. Nevertheless, the jury extended the inferences that is familiar with based on the unique identifying factors of a fingerprint and extended those inferences to DNA fingerprints solely because DNA, like fingerprints, are unique to each individual. The problem being and the prejudice the Appellant could not overcome is that whereas fingerprints are large, DNA is small and whereas fingerprints are fragile and easily wiped down, DNA is tiny and robust and whereas a fingerprint comes from the hand which is attached to the body and, whereas everyone spends their entire life interacting with the world by acts of volition by extending their hands, touching and manipulating and leaving fingerprints, DNA is readily transferable by means so small or miniscule as to have the act of transfer be completely unknown to the person causing the transfer or the one holding the object receiving the transfer. The Appellant was not convicted on the sufficient

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object labeled Exhibit 52 was merely demonstrative or a model, when the jury asked for both bottles, the State promptly volunteered and the Court sent to the jury the demonstrative exhibit or model that was never offered nor introduced nor treated as if it were in evidence. Tr 657-58.

evidence. There is not sufficient evidence to sustain the Appellant's conviction. The Appellant's conviction rests on everyone's lifetime of experience with one type of evidence, fingerprints, which familiarity has absolutely no extension to the newly developed evidence, DNA "fingerprints".

The State convinced the jury to convict the Appellant by inflaming their passions with the suggestion Laura was raped with the Galliano bottle. It then appealed to their long held beliefs, prejudices and experience with fingerprints to extend the inferences a fingerprint will support to DNA evidence, which is wholly unlike a fingerprint and will not support the same inferences. The Appellant was convicted because he could not overcome the jury's lifetime experience with fingerprints and his efforts to explain facts of DNA transfer became compared with the ink an octopus squirts out to confuse its attackers and escape. Appellate courts do not sit as super jurors. The Appellant is not asking this Court to sit as super jurors and revisit and reweigh the evidence. The Appellant is pursuing his due process rights because the lay jury and even the supremely educated, well intentioned prosecution has confused the inferences that one may draw from fingerprints with the inferences that can be drawn from a DNA fingerprint that does not involve semen or blood.[2]

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[2] Even DNA evidence drawn from blood shares the same potential crime novel crime aspects of a fingerprint on a highly mobile object, like wine glass. In this

case, it is not necessary to explore that aspect because its undisputed the DNA is not from blood or semen and the only things left are fluids from the nose or mouth.

POINT II

The trial court erred in admitting over objection Galliano bottles because the admission of weapons not used in the commission of a crime is not legally or logically relevant in that the pathologist testified the contusion on the victim's head could have been caused by a hand or any smooth object (the bottom portion of the bottles is ridged) and he testified the vaginal penetration was by something other than a penis but the bruising could have been from penetration or from the angle of penetration or perhaps from a "flanged" object whereas the Galliano bottle, unlike a flaring wine bottle, is actually conical.

On May 6, 1992 the Appellant left the Poplar Bluff VFW with one empty Galliano bottle. The State's theory at trial seems to have been, as long as the expert was sufficiently vague in how the crime occurred and witnesses did not remember, then any object may be admitted or used for demonstrative purposes. The witnesses could not remember if it was the 12" bottle, Ex. 53, or the 18" tall bottle, Ex. 52. Tr 137-39; 186. The pathologist, on direct examination, said the head injury could be caused by a fist. As to the vaginal injury, he testified they could be caused by the shape of the object or how it was used. The State's evidence fails the logical relevance test, as vagueness regarding how a crime occurred, fails to put any fact at issue. Even to the extent logical relevance is

established, there is a lack of legal relevance, as there is no connection between a bottle and the crime.

I. Standard of Review

Trial courts are necessarily vested with broad discretion in the admission of evidence. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. *en banc* 2002). To be logically relevant, the evidence must tend to make the existence of a material fact more or less probable. *Ibid.* The introduction of a weapon not connected to the crime, even if the evidence is later withdrawn and the jury is instructed to disregard it, is an abuse of discretion. *See State v. Smith*, 209 S.W.2d 138 (Mo. Div. 2 1948). Even logically relevant evidence must be legally relevant, which is to say its probative value must out weigh its cost or tendency to confuse the issues, mislead the jury, or cause undue delay. *State v. Anderson*, 76 S.W.3d at 276. The Supreme Court has long recognized the unacceptable cost of introducing weapons not connected to the crime, as without further evidence they confuse and mislead the jury by inviting an inference of the truth of all that is predicated on the weapon. *Id.* at 277. In other words, deadly weapons or cruel injuries tend to overwhelm reason and cause the jury to associate the accused with the crime, even in the absence of sufficient evidence. *State v. Anderson*, 76 S.W.3d at 277. Of the many cases cited by Mr. Anderson's counsel, in a four to three split decision,

the Supreme Court distinguished the cases on which the Appellant relies because, in *Anderson* the evidence was an 8 ½ x 11 flyer depicting pictures of firearms and the dispute was whether the weapon used was a BB gun or a firearm.

II. Facts

1. Injuries

The victim was struck in the head. The injury was above the right ear. This injury was not visible on an exterior examination of the head. The State depicted the injury with an autopsy photograph taken after the pathologist peeled the skin off Laura's head. In addition, there was bruising on the buttocks and vaginal area. On the left side, there was a larger bruise lower down and on the underside of the buttocks. On the right side, there was a smaller bruise higher up near the vaginal opening. Just inside, there was a one inch scratch. These injuries were depicted with autopsy photographs of Laura's nether regions. There was another scratch, of unknown size, inside the vaginal vault near the cervix.

2. Pathologist

The State called Dr. Michael Zaricor. He testified the injury to the head could have been caused by a fist or any other smooth object. He adduced the

latter from the lack of tearing on the skin. When the State made inquiry into the vaginal bruising, he testified the injuries could be caused by the perpetrator's efforts at penetration. He testified they could be caused by the angle at which the object was used. He testified the injuries could be caused by a "flanged" object. There is no definition of flanged nor explanation of the asymmetrical bruising.

3. Weapons

The Appellant has asked the State to file with the Court the Galliano bottles, Exhibit 52 and 53, but will describe them here for the benefit of the reader. The top four inches of both the large and small bottle are a little over an inch in diameter, which is similar to the diameter of a standard wooden baseball bat.[3] After the neck, both bottles are conical, although the angle of outward slope is very slight. The smaller bottle is 12 inches long and the base is not much larger

[3] Many aluminum bats and some wooden bats have a narrow handle area. A handle that is slightly more than an inch in diameter allows an adult with a good sized hand to grasp the object with their middle and ring finger touching the meat of the thumb.

than the neck. The large bottle is 18 inches long. The base is about three inches across. The diameter is similar to the barrel of a baseball bat.

The Appellant left the VFW with one bottle. The witnesses could not agree on whether it was the large one or the small one. The small one was produced as a model. The State never offered it and it was never introduced, although both would eventually go the jury. Tr 657-58. The larger one was seized at the Appellant's home during the execution of a search warrant in 2005. It is undisputed Candace gave the bottle to the Appellant because it was empty. State's Exhibit 52, the large bottle, was still full. When the large bottle is filled with a liquid, it has about the same heft as a baseball bat.

III. Case Law

1. Supreme Court's 2002 *Anderson* decision

Anderson is the most recent Supreme Court opinion with an indepth discussion of the parameters of a trial court's discretion regarding exhibits that are or depict weapons. *State v. Anderson*, 76 S.W.3d 275 (Mo. *en banc* 2002). The Prosecution accused Mr. Anderson of armed robbery and sought an additional conviction for the charge of armed criminal action. The Defendant did not deny his involvement in the robbery. His claim throughout the trial was that the object used in the robbery was a BB gun and not a firearm. A witness, whose

familiarity with weapons extended no further than distinguishing revolvers from "automatics", described the weapon used in the robbery as the type where the bullets go in the bottom, an automatic, as opposed to the cylinder in a revolver. Either during the arrest or execution of the search warrant, the police seized a standard size piece of paper, which was an advertisement for berretta handguns. One side showed seven guns and the reverse side advertised eleven berretta firearms. During the trial, there was a fairly brief exchange of about seven questions regarding the flyer. Even though the evidence consisted only of depictions of weapons and, as there were either seven or eleven photographs per side, very small depictions, the Supreme Court split four to three in affirming the conviction. Three of the justices thought small pictures of guns created sufficient prejudice to warrant reversal. The majority opinion cited the long history of cases in Missouri reversing convictions when a weapon is improperly introduced at trial. Rather than overruling those opinions, the *Anderson* court distinguished them because Anderson's trial involved an incidental reference to the weapons and the evidence consisted of the flyer rather than the introduction of the weapons themselves.

In the case at bar, the weapons themselves were introduced. Indeed, even though it was allegedly a model or demonstrative exhibit, the smaller bottle would eventually go the jury. Tr 113-14, 657-58, Index pg. viii. While one might

be tempted to reason the Appellant, who certainly had a Galliano bottle, would be less prejudiced by sending the smaller bottle to the jury, in this case, both are needed. The smaller bottle is needed to persuade any juror whose reason is not overwhelmed by the larger bottle because the head injury is inconsistent with a person, in a murderous rage, swinging an 18 inch club that has the heft of a baseball bat. However, to inflame the jury and overcome their reason, the State needed the larger bottle still full of liquor, to create the image of a brutal sodomization. In the case at bar, if the State could not overwhelm the jury's reason with the larger bottle, it had that problem fixed when it displayed the smaller bottle as a model. Both bottles were sent to the jury.

2. Logical Relevance

Before turning to the cases relied on by *Anderson,* it is necessary to begin with logical relevance. Unlike *Anderson*, where the witnesses testified the perpetrator had a gun and the armed robbery was caught on videotape, in the case at bar, there is no evidence any weapon was used. The pathologist testified the blow to the head could be caused by a fist. The only thing definitive testimony regarding the vaginal injuries was that they did not result from a penis. The lack of specificity does not, as the State apparently theorized, make admissible any evidence that might satisfy the vague description. The vague description fails to put at issue any material fact.

It is a fact Laura was hit in the head behind the ear. It is an expert opinion that the injury cannot be linked to any specific object, instrument, weapon or anything else, other than a hand, presumably a closed fist. If the State cannot adduce evidence, it does not open the doors of the courtroom to any species of rank speculation the State might want a jury to engage in. When there is a lack of factual evidence from which even an expert opinion can be tendered, the result is the failure to place at issue a material fact.

A division of the Missouri Supreme Court reversed a conviction under similar circumstances when the defendant was accused of larceny and robbery and during the arrest, when the police seized him and his wife, the police found weapons in her purse. *State v. Smith*, 209 S.W.2d 138 (Mo. Div. 2 1948). In July of 1945, someone stole seven typewriters from the Preston School. On July 31, 1994 the Highway Patrol stopped Mr. Smith and his wife. After ordering them both out of the car, the trooper searched Ms. Smith's purse because it felt exceptionally heavy. *Id.* at 138-39. Inside the purse, he found two load guns, a 32 automatic and an "owl head". *Ibid.* At trial, the State sought the admission of both weapons apparently on the theory that ordinary citizens do not carry firearms. Even though the trial court eventually sustained the defendant's objection and issued a withdrawal instruction to the jury, the court reversed the conviction for the erroneous admission of the firearms. As error, the court cited

not just the prosecution's ineffectual efforts at providing a foundation, the appellate panel noted even after the court rejected the evidence, the prosecution tried to offer them as exhibits.

In the case at bar, the State's theory was that the Appellant was a collector and no ordinary person would take an empty bottle from a bar. While in *Smith*, the State submitted both burglary and larceny charges to the jury, in the case at bar, the State dismissed the sodomy charge in Count II but still sought the introduction of the bottle. To the extent the error in *Smith* rested on the State again seeking the introduction of the pistols even after the Court had reversed itself and sustained the objection, in this case the court sustained the object to asking the pathologist about sodomy by bottle, Tr 113-115. Nevertheless, in closing arguments, the State argued Laura was hit in the head with the Galliano bottle, Tr 611, and sodomized with it. Tr 612. Then, when the jury asked for the bottles, both, including the model, Exhibit 53, which was never introduced, was sent to the jury. Tr 657-58.

The large bottle is even less connected to the crime. The police seized it at the Appellant's home in 2005. Tr 339-40. Although the Appellant told the police he got it a couple of months earlier, the State argued one could disbelieve his story. Tr 322 and 341. The State had no contrary evidence of when it might have been bought. Disbelieving the Appellant does not put a material fact at issue.

Finding the large bottle at the Appellant's home 13 years after the crime and saying it was a trophy for a collection is not logical relevance, it is speculation. Tr 341. The speculation is also contrary to the facts in evidence, as one of its own witnesses, Candace Shipman, had often taken bottle home. Tr 141.

2. Legal Relevance, connecting weapon to crime

The requirement of a direct connection between the exhibits and the crime has been made clear by prior decisions. In *Baker*, the defendant was charged with sex crimes involving his daughter and the State introduced a rifle, which it was alleged the defendant discharged in the home. *State v. Baker*, 434 S.W.2d 583 (Mo. Div. 2 1968). The State theorized that the use of the firearm scared the prosecutrix, which was offered as evidence of lack of consent. The Supreme Court, while reversing for other reasons, noted the State had failed to establish the prosecutrix was actually afraid or caused to submit by the use or discharge of the firearm. In *Baker*, the court's attention is invited to the fact the defendant had a gun and discharged the gun and the error was in failing to connect the discharge of a firearm with the prosecutrix's lack of consent. In the case at bar, there is no evidence of any particular weapon, much less a specific connection between a bottle or other instrument of the rough size and shape of a Galliano bottle with the crime.

Similarly in *Merritt*, the case involved the discharge of a firearm and a weapon found at the scene of the crime. *State v. Merritt*, 460 S.W.2d 591 (Mo. Div. 2 1970). Unlike *Baker* that involved a sex crime, *Merritt* involved assault with a deadly weapon, to-wit: not only was a gun discharged, someone was shot. In addition, the police found a gun at the scene. The conviction was nonetheless reversed as a result of introducing the weapon found at the scene because there was no connection between the gun and the defendant or the gun and the crime. If knowing a gun was discharged and someone was shot is not sufficient to justify the admission of a firearm found at the scene, then surely, when the State can adduce no evidence of the particulars regarding the injuries, it is reversible error to admit and send to the jury an item with the length of a billy club and the heft of a baseball bat. This is doubly so when, even though the weapon is inconsistent with the head injury, its introduction inflames the jury with suggestions the victim was vaginally sodomized, raped, with an 18 inch long glass bottle full of liquor.

Finally, among the many cases cited by the *Anderson* court, cases one presumes are still good law, as the Supreme Court distinguished them rather than overruling them, was one involving a weapon used as a demonstrative exhibit. *See State v. Waynne*, 182 S.W.2d 294 (Mo. Div. 2 1944). In *Waynne*, the State used a pistol in an effort to show how it would look and bulge in a person's

pocket. The conviction was reversed, as the demonstration was of little value because there was no showing it was the same type of weapon used to create the bulge or that the prosecutor, in whose pants the weapon was placed, was of a similar size, build or wearing the same type of pants as the person who allegedly carried the firearm. Here again was another instance when there is no dispute an individual carried a gun and the prop the State used was a gun, nevertheless the court had to reverse the conviction. In the case at bar, there is not even testimony about a particular object being used. The conviction in *Waynne* had to be reversed when there was testimony a person had a gun but confusion over what type. In this case, the State's own witnesses have described a wildly different object. The testimony did not make the models of both weapons admissible. The disparate testimony rendered the admission of either bottle reversible error.

3. "Unfair" prejudice

What has gone unmentioned but is surely known to the court is that the Honorable Kenneth Shrum sat on the court in *Anderson* and issued a concurring opinion. Judge Shrum's concurrence was occasioned the term "unfair prejudice", as it is used in analyzing the issue in this point. When the jury requested the bottles, the State, despite spending the entire trial arguing Exhibit 53 was only a model and demonstrative object, Tr 113-14; 136-38, proffered and the court accepted both and sent them to the jury. Tr 657-58. The case involves

confusion of the issues. While the Appellant undoubtedly left the VFW with a Galliano bottle, the State's witnesses were unable to agree if it was the smallest or largest of the Galliano bottles. Tr 137 & 186. This is particularly a problem when the victim has suffered two injuries and one injury may or may not have involved any weapon or object other than a closed hand but the second injury involved a vaginal sodomization. To compound the vagueness of the evidence, the State had on hand the small Galliano bottle that is at least potentially consistent with the head injury, assuming the assailant choked his swing, and the large bottle that would cause an injury, is distinguishable from what a fist might cause, but which invites the jury to speculate about whether the victim was sodomized with the 18 inch tall club like bottle.

This case is also consistent with misleading evidence. As the Appellant has pointed out, the large bottle, while inconsistent with the head injury, was surely capable of inflaming the passions of the jury and overriding their reason when the jury gets the impression the victim was sodomized with the large bottle. Tr 612, State's Closing. As for the jurors capable of resisting such passion, in the absence of any evidence that such a grotesque item was used, the State had the fall back little bottle.

IV. Conclusion

As with the firearms cases, the case at bar must be reversed and remanded for a new trial unless the conviction is reversed outright for the lack of substantial evidence. The lack of specificity as to the necessity of a weapon or a particular type of weapon coupled with the State's introduction of two particular Galliano bottles requires reversal, as was done in *Waynne* and *Smith*. To the extent the Court views the evidence as being sufficient to show a weapon of some kind was used, the evidence is wholly inconsistent with the particular weapons introduced at trial, as was true in *Baker* and *Merritt*. Unlike the split decision in *Anderson*, the references in the case at bar were anything but fleeting or passing and rather than mere photographs of the objects, the State introduced the actual objects. Further, even though no one disputed the bottle was empty, and the State emptied the little bottle, for the larger bottle, it taped and sealed closed, which made sure none of the liquid leaked out but had the incidental effect of giving the club a heft comparable to a baseball bat. And as if none of that were sufficient, when the jury requested that both bottles be returned to them for their inspection, the prosecutors, despite having repeatedly assured the court the smaller bottle was simply a model or demonstrative exhibit, volunteered the same and the court sent both back to the jury. Tr 657-58.

POINT III

The trial court erred in refusing the Appellant's Exhibit P because, while the trial court is vested with broad discretion in admitting evidence and hearsay is certainly objectionable, Missouri has no residual exception to the hearsay rule, yet it has placed no limitation period of bringing murder charges and the defendant is guaranteed the right to due process and, while the accused enjoys the right to confront witnesses, the State does not enjoy such a guarantee in that throughout the trial there are repeated references to the exceptional evidence collection techniques of Donwell Clark, who did not testify at trial as he was deceased but, when the Appellant sought the admission of a note written by his Mother after she had a stroke but not found until after she had passed on, which was found not by the Appellant but by his sister and located amongst Shirley Freeman's other papers, Exhibit P had sufficient indicia of trustworthiness to justify its admission.

The prosecution in this case was not commenced until 13 years after the crime. LF 8. Between the time of the preliminary hearing, where Donwell Clark testified and the time of trial, Mr. Clark passed on. As a result of his passing, he was unavailable and his preliminary hearing testimony became admissible. Although the trial court redacted portions of the testimony, as if it were a deposition as opposed to testimony in court before a judge where the parties

were represented by counsel, the Appellant has not pursued that issue. However, when the Prosecution, apparently believing much of its case rested on the adequacy of the evidence collection procedures, i.e. a lack of DNA contamination, repeatedly had witnesses praise the work of its deceased evidence technician, it seems incongruent to the point of being inconsistent with the notion of due process, for the State to then object and the trial court sustain the objection to nearly identical evidence tendered by the Appellant.

The earlier points relied on have addressed the standard of review for a point on appeal questioning a trial court's submission or rejection of evidence. The Appellant further acknowledges the issue has most recently addressed in 1997 and the proposition of a "residual hearsay exception" was rejected by a majority of the Missouri Supreme Court. *State v. Bell*, 950 S.W.2d 482 (Mo. 1997)(Limbaugh, Judge concurring separately and joined by Price and Holstein, JJ urging the adoption of the residual hearsay exception). The Appellant further notes that Article V, Section 5 of the Missouri Constitution may prohibit a court from recognizing a residual exception to hearsay, to the extent it were deemed a rule of evidence rather than a recognition of common law. Nevertheless, if there were a case or a set of facts where the residual hearsay exception might exist, it seems to the Appellant this would be the case.

The only real evidence linking the Appellant with the crime was the presence of his DNA at the scene. As discussed at length in his challenge to the sufficiency of the evidence, it seems a bold leap to assume the presence of his DNA even allows the inference of his presence at the scene of a crime. In any case, a substantial part of the State's case rests on the adequacy of the evidence collection techniques. The problem for the State at trial was that its evidence technician had died. Thus, even though the State had no difficulty establishing the chain of custody or identifying the items of evidence collected at the scene of the crime, it nonetheless felt compelled throughout the presentation of its case-in-chief to praise the great work and accuracy of Donwell Clark, the deceased evidence technician.

The Appellant had a similar problem in that his only alibi witness had died. The Appellant had left the Army in November of 1991 and continued to reside at home with his mother and father. In November of 1991, Shirley Freeman, the Appellant's mother, suffered a stroke and thereafter communicated in large part with writings or notes. Tr 511-12. She passed on in July of 2004, before the reinvestigation of the crime had commenced. Tr 510-11. Sometime after her passing, the Appellant's sister was going through her papers when she came across what was marked as Defendant's Exhibit P. Tr 510-11. In short, it is a writing, which is explained because of events prior to the crime causing this

witness to communicate mainly in writing. No one knew of this writing until after the witness had passed on. Tr 510-11. The writing was found before any reinvestigation of the crime had commenced. There was an extended length of time, 12 years, between the initial crime and location of the note. The extended length of time does raise the question of when it was written but, the Appellant does not believe that question is of importance because it was written either near the time of the events described or much later and in anticipation of her passing. If it is closer to the event it was more timely and presumably accurate. If it is in anticipation of passing, the law has long recognized this as the time one is least likely to lie. Indeed, under the circumstances of the case, it seems highly unlikely it was written any other time other than around the time of the initial police investigation. As no charges were brought and there was no investigation in 2004, there would have been no reason to mention it.

In the absence of other guidance, the Appellant would turn to the concurrence in *Bell*, providing the text of Federal Rule of Evidence 803(24) and outlining the approach to considering such evidence, as set forth in *McCormick on Evidence*. The initial question in considering such evidence is a necessity of relying on the proposed hearsay. In addition, the court must consider what factors tend to suggest the evidence is otherwise trustworthy. The Appellant has no other source of proof nor alibi witness. Of the two people with whom he

lived, the one still alive testified but, he arose somewhere between 3:00 and 4:00 a.m. to prepare for work and went to bed much earlier in the evening. The note does provide an alibi. It requires at least half an hour to walk to the Appellant's home from the vicinity of the VFW or the victim's apartment and, as the note would place the Appellant at home by 12:15, it is unlikely to the point of being fantastic to believe that between 10:38 p.m. when the victim left the VFW and 11:40 p.m., the Appellant strangled and sodomized the victim and then wiped every single fingerprint off in the entire apartment. The Appellant would further point out the note does not go beyond anything knowable by the witness. If the Appellant or his sister had "cooked-up" this note, it surely would have mentioned the fact the Appellant did not have a garbage bag full of panties, bras and shoes. Finally, the Appellant will grant there is certainly questions of how much weight a jury would give to a note written by the Appellant's mother but, to the extent such things are important to a jury, or at least perceived by counsel of the one accused of murder as being important, this Honorable Court need look no further than the State's presentation of its case wherein it felt compelled to repeatedly refer to the outstanding and meticulous job done by Donwell Clark.

Although the State eventually mentioned hearsay, it stated its objection by indicating that admitting the note would preclude the State from cross-examining the witness. The State has no guarantee or particular right to cross-

examine a witness. Further, even if Shirley had been alive to be cross-examined, as one may discern from the State's cross-examination of the Appellant's father, there is no real knock-out cross-examination for one to use against a parent whose testimony is limited to what time a child arrived home.

Under the peculiar facts of this case, the due process clauses of the Fifth and Fourteenth Amendment to the United States Constitution together with the provisions in Article I, § 10 of the Missouri Constitution require the trial court to allow the Appellant to submit to the jury the testimony of Pearl Cornett and present Defendant's Exhibit P. The Exhibit is included in the appendix and, to the extent necessary to the resolution of this point, it is incorporated herein by reference.

CONCLUSION AND REMEDY

The evidence was insufficient to sustain the conviction. When a conviction is obtained on insufficient evidence, an accused's protections against double jeopardy preclude a retrial, just as the due process clause prohibits affirming a conviction in the absence of substantial evidence and the most appropriate remedy is an order of discharge. If the Court rejects the notion that the evidence was insufficient, but sustains any of the Appellant's remaining points of appeal, the only appropriate remedy is to remand the case for a new trial.

_____
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IN THE

MISSOURI COURT OF APPEALS

SOUTHERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	Appeal No. SD28150
vs.	)	
	)	
SAMUEL A FREEMAN,	)	
	)	
Appellant.	)	

CERTIFICATE OF SERVICE

COMES NOW the Appellant, by and through the undersigned counsel, John M. Albright of MOORE, WALSH & ALBRIGHT LLP, and certifies that the Brief complies with the limits in Rule 84.06(b) insofar as it is Appellant's Brief with less than 31,000 words or a Respondent's Brief with less than 27,000 words or as a Reply Brief with less than 7,750 words in that it is Appellant's Brief and contains 13,044 words and that a copy of the Appellant's Brief, together with a copy on disk in Word format scanned for viruses, was served upon the attorneys of record by United States mail, postage prepaid, addressed to: Shaun Mackelprang, Esq., Asst. Attorney General, P.O. Box 899, Jefferson City MO 65102 on this 10th day of May, 2007.

BY:_____
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