IN THE
MISSOURI SUPREME COURT

No. SC95816

TORRIS CASTON,

Appellant,

v.

STATE OF MISSOURI,

Appellee.

On Appeal from the Circuit Court of the City of St. Louis
State of Missouri
The Honorable John Francis Garvey, Jr., Circuit Judge

SUBSTITUTE OPENING BRIEF FOR APPELLANT

Respectfully Submitted,

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OFFERED FOR THE TRUTH OF WHAT THE POLICE SAID BUT JUST THE OPPOSITE, THAT WHAT THE POLICE TOLD HIM AND HIS WIFE WAS NOT TRUE AND THE STATEMENTS AND THREATS WERE PART OF AN ATTEMPT TO COERCE OR TRICK MR. CASTON INTO MAKING INCRIMINATING STATEMENTS. BY SUSTAINING THE STATE'S MOTION AND OBJECTIONS, THE TRIAL COURT UNFAIRLY PREJUDICED MR. CASTON BY VIOLATING HIS RIGHT TO PRESENT A DEFENSE AND IMPROPERLY LIMITING HIS TESTIMONY. AS A RESULT HIS TRIAL WAS UNFAIR AND THE RIGHTS GUARANTEED TO HIM UNDER ARTICLE I SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED.

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JURISDICTIONAL STATEMENT

Appellant Torris Caston (hereinafter "Mr. Caston") was found guilty of two counts of statutory sodomy in the second degree under § 566.064 RSMo, and one count of statutory rape in the second degree under §566.034 RSMo on April 3, 2014 in the Circuit Court of the City of Saint Louis, Missouri after trial by jury, the Honorable John F. Garvey Jr. presiding. The jury found Mr. Caston guilty of all three charges (LF 321-6). On April 28, 2014, Appellant filed a motion for a new trial, which was overruled by the court. On July 7, 2014, Mr. Caston was sentenced to seven years on Count I, to run consecutive with a sentence of three years for Count II, and concurrently with a three year sentence for Count III, for a total of ten years. A Notice of Appeal with the Missouri Court of Appeals, Eastern District, was timely filed in the Circuit Court on July 12, 2014. On May 17, 2016, in a per curiam order, the Eastern District affirmed the trial court's ruling. On July 15, 2016, Appellant timely filed application for transfer to the Supreme Court of Missouri. This Court entered an order granting transfer pursuant to Supreme Court Rule 83.04 on September 20, 2016.

STATEMENT OF FACTS

Mr. Caston was indicted on January 11, 2011 charging him with two counts of statutory sodomy in the second degree and one count of statutory rape in the second degree (LF 20-21).[1] Count I alleged that the statutory rape occurred between February 4, 2005 and October 17, 2005, and Counts II and III alleged that the statutory sodomy acts occurred between May 1, 2004 and October 17, 2005. All counts involved A.T., a student at the Castons' dance studio. In order to be found guilty of statutory sodomy in the first degree under § 566.064 RSMo 2014[2], the state must prove that an offender was 21 years or older and had deviate sexual intercourse with a person under the age of 17. In order to be found guilty of statutory rape in the second degree under § 566.034 RSMo, the state must prove that an offender that was 21 years or older had sexual intercourse with a person under the age of 17.

Mr. Caston was born in Indiana and began taking dance lessons at a young age (Tr.268)[3]. He eventually took up dance as a profession and began to teach dance in St. Louis; first at Enright School and later at McKinley Elementary School (hereinafter "McKinley") from 1987 until when he was arrested and charged with these crimes. At McKinley, Mr. Caston was forced to teach gym if he did not have enough students enrolled in his dance classes. (Tr, 557). Because he preferred to teach dance, he was

[1] Citations to the Legal File are referred to as LF.

[2] All references to statutes will be 2014 unless indicated otherwise.

[3] Citations to the trial transcript are referred to as Tr.

incentivized to recruit students for dance, particularly from the sixth and seventh grades. Mr. Caston and his wife, Shannon, also opened Caston Ballet Academy (hereinafter "the academy") in Webster Groves, Missouri in 2001. (Tr.552). At the academy, Caston and Shannon taught ballet and modern dance to students of all ages and backgrounds. They would teach at the academy up to six days a week, in addition to their teaching and other jobs. (Tr. 565).

One of the students that Mr. Caston recruited to dance at McKinley was A.T. (Tr. 558). He sought her out because her height was perfect for a particular dance that was going to be staged at McKinley. Id. A.T. started taking dance lessons at McKinley in 2002 and began classes at the academy in the summer of 2003. (Tr. 572; 609). She began by taking one class a week at the academy and increased her hours as she improved. (Tr. 573). A.T. took classes from both Shannon and Mr. Caston and was offered a work study program to pay for her tuition. For her work study, A.T. performed a variety of tasks, such as operating a computer database, housekeeping at the studio, and helping to make costumes for performances. (Tr. 573-574). To facilitate her attendance at the dance studio and at classes, the Castons' would drive her home after dance class. (Tr. 672).

A.T. performed many of her work study tasks with Shannon and as a result developed a particularly strong relationship with her (Tr. 670). There were several instances where A.T. and Shannon worked together on projects at the Caston home. Shannon and A.T. established a friendship and A.T. would describe Shannon as being like a mother/sister and mentor to her. (Tr. 671, 716). A.T. confided in Shannon, often when Shannon was driving A.T. home, and they would talk for extended periods of time

because A.T. was depressed or upset. (Tr. 676). Shannon wanted to help A.T. overcome her emotional issues surrounding an eating disorder, battles with her mother, and bouts of depression. (Tr. 677). To ensure that A.T. felt welcome at the academy, Shannon asked an adult student at the academy, Stephanie Taylor, to befriend A.T., help her get acclimated at the studio, and generally make A.T. feel welcome. (Tr. 744).

Stephanie Taylor and A.T. both shared the unusual characteristic of being tall dancers, which at 5'11 could sometimes be uncomfortable because they stood out from the other much smaller and more petite students. Id. When Shannon and A.T. began working on costumes together on a regular basis, A.T. began spending more time at the Caston home, including spending the night when Mr. Caston was out of town. (Tr. 685). Shannon planned sleepovers and lock-ins with several female dancers, including A.T., at which Mr. Caston was never present. (Tr.656). Although A.T. was not as close to Mr. Caston as she was to Shannon, A.T. also looked up to Mr. Caston and confided in him about personal problems and other matters (Tr. 209).

Eventually A.T.'s relationship with the Castons soured. Shannon in particular became a target and magnet for A.T.'s obstinate behavior. (Tr. 687). In 2005, A.T. became depressed and frustrated with her dancing and as a result was rude and even more defiant toward Shannon. Id. Much of the problem was that A.T. wanted dance roles that the Castons did not believe she could properly perform (Tr, 691). In particular, she wanted the lead role in a performance named "Raymonda" (Tr. 692). Mr. Caston videotaped A.T. and another dancer trying out for the role (Tr. 693-4). A.T. did not dance well during the try-out and Mr. Caston felt he needed to tell her that she was unable to

dance the part and could not be cast in the lead role. A.T. was particularly mad and upset when she was told. Shannon tried to her devote extra time to helping prepare A.T. for other desired roles but Shannon's efforts could not change the fact that A.T. did not have the skill level to perform solo roles (Tr. 695-6). Her relationship with Shannon became more strained, which in turn strained her relationship with Mr. Caston, A.T. quit the studio in August of 2005 (Tr, 534). After A.T. left, her younger sister continued to attend classes at the academy and A.T. continued to recommend the academy to other dancers she met when she was a student at Webster University (Tr. 410).

On June 13, 2010, A.T. attended a production of "Where the Wild Things Are" at the academy (Tr. 738). She had not been a student at the academy or otherwise associated with the Castons for nearly five years. The next day A.T. went to the police and made the present allegations against Mr. Caston. (Tr. 352).

At trial, A.T. testified that in 2003, when she was 15, Mr. Caston made advances towards her during car rides from the academy to A.T.'s home. A.T. testified that during these drives Mr. Caston would touch her knee and eventually kissed her on the cheek and forehead (Tr. 306-7). A.T. testified that she did not think anything of this behavior. After the beginning of the school year Mr. Caston began kissing her on the mouth and saying that he loved her. (Tr. 307-8). A.T. testified that in Mr. Caston continued to kiss her and say that he loved her during the spring and early summer of 2004 (Tr, 310) but nothing of a sexual nature occurred until the summer of 2004, when A.T. was 15. She spent the weekend at the Castons' home in the City of St. Louis because her parents had to leave town (Tr. 313). During that weekend, A.T. testified that she engaged in oral sex

with Mr. Caston in the guest bedroom while Shannon was downstairs.(Tr. 316-320). A.T. testified that this was the only time they ever engaged in oral sex (Tr. 321).

A.T. testified that in 2005, when she was 16, she had sexual intercourse with Mr. Caston at the academy (Tr.330). A.T. also testified that she had sexual intercourse with Mr. Caston on one other occasion in Webster Groves but was unable to recall whether she was 16 or 17 during the second encounter (Tr. 334). A.T. also testified that she had sexual intercourse with Mr. Caston at their home in the City of St. Louis (Tr, 337). A.T. testified that she had intercourse with him in several different rooms but could not provide any dates or times periods. Id. A.T. alleged that when she was 17 she spent the night at the Caston home several times while Shannon was out of town (Tr. 344-5). A.T. ended her alleged relationship with Mr. Caston during her first semester of college in 2006 (Tr. 348).

At trial, Mr. Caston testified in his own defense and denied all of A.T's allegations. Mr. Caston testified that he knew A.T. through McKinley and the academy. He stated that he provided her transportation home because she was enrolled in work study but that he never made sexual advances or touched her in his car (Tr. 553). Mr. Caston also testified that he had never had oral sex or sexual intercourse with A.T (Tr. 556, 587, 593, 607). Mr. Caston, Shannon, and their family members testified that A.T. could not have spent several nights at the Caston home while Shannon was supposedly out-of-town because Shannon did not travel out of town without Mr. Caston on the dates testified to by A.T. (Tr. 531, 534, 535, 536, 556, 661). Shannon did not leave town without Mr. Caston between September of 2005 and April of 2006, the time period when

A.T. alleged she spent the night with Mr. Caston (Tr, 529). Multiple witnesses testified that they had observed Mr. Caston and A.T. together and did not find their relationship to be unusual or otherwise different from those he had with other students (Tr. 746).

During trial several procedural issues arose that will be articulated in the arguments. At trial, the court interjected itself into the trial and made *sua sponte* objections and rulings on multiple occasions. The court also repeatedly directed many derogatory remarks at defense counsel and at the defense in general. (A summary of the comments and sua sponte objections are located in the Appendix pp. 16-19). Certain testimony and evidence was erroneously admitted while other testimony was erroneously excluded. Exculpatory evidence was withheld by the prosecution until after the trial. In addition, the jury instructions did not properly instruct the jury that the law required that they agree on a specific act of sexual activity. These and several other issues arose at trial which will be discussed in detail in the argument portion of the brief. Additional facts will be developed in the arguments.

The jury found Mr. Caston guilty of all three charges (LF 321-6). On April 28, 2014 he filed a motion for a new trial, which was overruled by the court. On July 7, 2014, the court sentenced Mr. Caston to a sentence of seven years on Count I, to run consecutive with a sentence of three years for Count II, and concurrently with a three year sentence for Count III, for a total of ten years. A Notice of Appeal with the Missouri Court of Appeals, Eastern District, was timely filed in the Circuit Court on July 12, 2014. On May 17, 2016, in a per curiam order, the Eastern District affirmed the trial court's ruling. On July 15, 2016, Appellant timely filed application for transfer to the Supreme

Court of Missouri. This Court entered an order granting transfer pursuant to Supreme Court Rule 83.04 on September 20, 2016.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NUMBERS FIVE AND TWELVE TO THE JURY AND IN ACCEPTING THE VERDICT OF GUILTY AND SENTENCING CASTON AS TO COUNT I BECAUSE THE INSTRUCTIONS PROFFERED BY THE STATE AND GIVEN BY THE COURT DID NOT REQUIRE THE JURY TO AGREE ON A SPECIFIC ACT OF MISCONDUCT BEYOND A REASONABLE DOUBT IN THAT THAT INSTRUCTIONS FAILURE TO ELECT A SPECIFIC ACT OF MISCONDUCT DEPRIVED MR. CASTON OF HIS RIGHT TO A UNANIMOUS VERDICT AND HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED BY ARTICLE I, SECTION 10, 18(A), AND 22(A) OF THE MISSOURI CONSTITUTION AND THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

State v. Celis-Garcia, 344 S.W.3d 150 (Mo. 2011)

Hoeber v. State, 488 S.W.3d 648 (Mo. 2016)

Edgerton v. Morrison, 280 S.W.3d 62, 66 (Mo. banc 2009)

II. THE TRIAL COURT ERRED IN FINDING THERE WAS NO PROSECUTORIAL MISCONDUCT IN FAILING TO DISCLOSE PHOTOGRAPHS OF MR. CASTON WEARING DANCE PANTS DURING REHEARSALS BECAUSE THIS EVIDENCE HAD SIGNIFICANT VALUE THAT COULD BE USED TO IMPEACH THE STATE'S REBUTTAL

EVIDENCE. NONE OF THE PHOTOGRAPHS USED BY THE STATE IN THE REBUTTAL PORTION OF THE TRIAL, INCLUDING THE PHOTOGRAPHS THAT DID NOT SUPPORT THE STATE'S THEORY WERE DISCLOSED BY THE STATE BEFORE THE TRIAL AND THE EXCULPATORY PHOTOGRAPHS WERE NOT DISCLOSED UNTIL AFTER THE JURY VERDICT. THE EVIDENCE THAT WAS SUPRESSED BY THE STATE WOULD HAVE BEEN CONSISTENT WITH HIS DEFENSE AND WAS MATERIAL. THE FAILURE TO DISCLOSE THESE PHOTOGRAPHS AND THEIR EXISTENCE UNDERMINES CONFIDENCE IN THE OUTCOME OF THE TRIAL IN THAT THE STATE'S CONDUCT IN FAILING TO PRODUCE THIS EVIDENCE WAS IN VIOLATION OF *BRADY V. MARYLAND*, 373 U.S. 83 (1963) AND IN VIOLATION OF MR. CASTON'S RIGHTS TO A FAIR TRIAL, TO CONFRONT WITNESSES AGAINST HIM, TO EFFECTIVE ASSISTANCE OF FULLY-INFORMED COUNSEL AND DUE PROCESS OF THE LAW AS GUARANTEED BY ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION AND THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Brady v. Maryland, 373 U.S. 83 (1963)

Buchli v. State, 242 S.W.3d 449 (Mo. App. W.D. 2007)

Giglio v. United States, 405 U.S. 150 (1972)

III. THE TRIAL COURT ERRED IN OVERRULING MR. CASTON'S MOTION FOR ACQUITTAL AT THE CLOSE OF EVIDENCE AS TO COUNT I, BECAUSE THERE WAS NO EVIDENCE OR REASONABLE INFERENCE TO SUPPORT THE ESSENTIAL ELEMENT OF A.T. BEING UNDER THE AGE OF 17 AT THE TIME OF THE CHARGED ACT OF SEXUAL INTERCOURSE IN THE CITY OF ST. LOUIS OR THAT THE ACTS OCCURRED WITHIN THE TIME-FRAME ALLEGED IN THE INDICTMENT AND IN THE JURY INSTRUCTIONS. THEREFORE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR STATUTORY RAPE IN VIOLATION OF MR. CASTON'S RIGHT TO DUE PROCESS, A FAIR TRIAL, A UNANIMOUS VERDICT, AND FREEDOM FROM DOUBLE JEOPARDY AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 10, 18(a), 19, AND 22(A) OF THE MISSOURI CONSTITUTION.

State v. Miller, 372 S.W.3d 455 (Mo. 2012)

State v. Ybarra, 386 S.W.2d 384, 386 (Mo. 1965)

Jackson v. Virginia, 443 U.S. 307, 316 (1979)

IV. THE TRIAL COURT CLEARLY ERRED IN INJECTING ITSELF INTO THE PROCEEDINGS BY: A.) REPEATEDLY CRITICIZING COUNSEL'S

WITNESS EXAMINATION AND THE PRESENTATION OF DEFENDANT'S CASE-IN-CHIEF; AND, B.) INJECTING ITSELF INTO THE CASE BY MAKING RULINGS, OBJECTIONS AND COMMENTS SUA SPONTE ALL IN THE PRESENCE OF THE JURY. THESE ACTIONS VIOLATED THE COURT'S DUTY TO MAINTAIN THE APPEARANCE OF ABSOLUTE NEUTRALITY IN ORDER TO AVOID CREATING A PERVASIVE CLIMATE OF PARTIALITY THAT PUT THE DEFENSE IN UNFAIR LIGHT AND RESULTED IN AN UNFAIR BIAS AGAINST MR. CASTON. THESE REPEATED COMMENTS DEPRIVED MR. CASTON OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL, DUE PROCESS OF LAW, THE RIGHT TO PRESENT A DEFENSE AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED UNDER ARTICLE 1 SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

State v. Houston, 139 S.W. 3d 223 (Mo. App. W.D. 2004)

U.S. v. Singer, 710 F.2d (8th Cir. 1983)

People v. Wiggins, 2015 IL App (1st) 133033, 40 N.E.3d 1197

V. THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S MOTION IN LIMINE AND SUBSEQUENT OBJECTIONS PROHIBITING DEFENSE COUNSEL FROM REFERENCING A.T.'S MENTAL HEALTH

DIAGNOSES OR TREATMENT BECAUSE SUCH TESTIMONY COULD HAVE BEEN USED TO IMPEACH THE STATE'S WITNESSES, IN THAT BY SUSTAINING THE STATE'S MOTION, THE TRIAL COURT UNDULY PREJUDICED MR. CASTON SUBJECTING HIM TO AN UNFAIR AND IMPARTIAL TRIAL AND VIOLATING THE RIGHTS GUARANTEED HIM UNDER ARTICLE I SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

State v. Newton, 925 S.W.2d 468 (Mo. App. E.D. 1996)

State v. Nixon, 418 U.S. 683 (1974)

State v. Davis, 186 S.W.3d 367 (Mo. App. W.D. 2005)

VI. THE TRIAL COURT ERRED IN PROHIBITING DEFENSE COUNSEL FROM COMMENTING OR ELICITING TESTIMONY CONCERING THE INTERVIEW OF MR. CASTON AND HIS WIFE BY THE WEBSTER GROVES POLICE DEPARTMENT BECAUSE THE STATEMENTS MADE AND PRESERVED IN THE VIDEOTAPES OF THE INTERVIEW WERE NOT OFFERED FOR THE TRUTH OF WHAT THE POLICE SAID BUT JUST THE OPPOSITE, THAT WHAT THE POLICE TOLD HIM AND HIS WIFE WAS NOT TRUE AND THE STATEMENTS AND THREATS WERE PART OF AN ATTEMPT TO COERCE OR TRICK MR. CASTON INTO MAKING INCRIMINATING STATEMENTS. BY

SUSTAINING THE STATE'S MOTION AND OBJECTIONS, THE TRIAL COURT UNFAIRLY PREJUDICED MR. CASTON BY VIOLATING HIS RIGHT TO PRESENT A DEFENSE AND IMPROPERLY LIMITING HIS TESTIMONY. AS A RESULT HIS TRIAL WAS UNFAIR AND THE RIGHTS GUARANTEED TO HIM UNDER ARTICLE I SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED..

State v. Leisure, 796 S.W.2d 875 (Mo.banc 1990)

State v. Barriner, 210 S.W.3d 285 (Mo. App WD 2006)

State v. Foust, 920 S.W.2d 949 (Mo. App. ED 1996)

ARGUMENT

I. THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NUMBERS FIVE AND TWELVE TO THE JURY AND IN ACCEPTING THE VERDICT OF GUILTY AND SENTENCING CASTON AS TO COUNT I BECAUSE THE INSTRUCTIONS PROFFERED BY THE STATE AND GIVEN BY THE COURT DID NOT REQUIRE THE JURY TO AGREE ON A SPECIFIC ACT OF MISCONDUCT BEYOND A REASONABLE DOUBT IN THAT THAT INSTRUCTIONS FAILURE TO ELECT A SPECIFIC ACT OF MISCONDUCT DEPRIVED MR. CASTON OF HIS RIGHT TO A UNANIMOUS VERDICT AND HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED BY ARTICLE I, SECTION 10, 18(A), AND 22(A) OF THE MISSOURI CONSTITUTION AND THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Standard of Review

The issue of instructional error was properly preserved for appellate review because a specific objection was made at trial (Tr. 788-789), and was renewed in the Motion for New Trial (L.F. 355-56). "Reversal for instructional error is appropriate when the instruction misdirected, misled, or confused the jury and resulted in prejudice." *Edgerton v. Morrison*, 280 S.W.3d 62, 66 (Mo. banc 2009). "To determine prejudice, the

Court considers the facts and instructions together." *State v. Ward*, 745 S.W.2d 666, 670 (Mo. 1988).

Argument

The Missouri Constitution guarantees criminal defendants the right to a unanimous jury verdict. *See State v. Celis-Garcia*, 344 S.W.3d 150, 155 (Mo. 2011) ("One of the 'substantial incidents' protected by article I, section 22(a) is the right to a unanimous jury verdict.") For a jury verdict to be unanimous, and thus enforceable, "the jurors [must] be in substantial agreement as to the defendant's acts, as a preliminary step to determining guilt." *Id.* (citing 23A C.J.S. Criminal Law § 1881 (2006); *State v. Jackson*, 242 Mo. 410, 146 S.W. 1166, 1169 (1912) ("The defendant is entitled to a concurrence of the minds of the 12 jurors upon one definite charge of crime."). "A **multiple acts case** arises when there is evidence of multiple, separate incidents of a crime, each of which could serve as the basis for a criminal charge, but the defendant is charged with those acts in a single count."[4] *Id*. (emphasis added). In a multiple acts case, specific procedural safeguards are required to ensure that all 12 jurors unanimously convict the defendant of the same act. *Id*. at 156.

In *Celis-Garcia*, this Court implemented these procedural safeguards in a multiple acts case by holding that either (1) the State elect a particular criminal act it will rely on to support the charge or (2) the verdict director **specifically describes the separate**

[4] In this case, the defendant was charged with statutory sodomy in Count I. (L.F. 20, 333).

criminal acts presented to the jury **and** the jury is instructed that it must agree unanimously that at least one of those acts occurred. *Id*. at 157 (emphasis added). In order to comply with a defendant's right to a unanimous jury verdict, "the verdict director not only must **describe the separate criminal acts with specificity**, but the court also must instruct the jury to agree unanimously on at least one of the specific criminal acts described in the verdict director." *Id*. at 158 (emphasis added).

Ms. Celis-Garcia was accused of multiple acts of sodomy. *Id*. at 156. Testimony described at least seven separate acts of hand to genital contact that occurred at different times and in different rooms throughout Ms. Celis-Garcia's house. *Id*. At the closing of trial, the court submitted broad verdict directors that "allowed the jury to find Ms. Celis–Garcia guilty of first-degree statutory sodomy if they believed 'that between [specified dates] ... the defendant or [her boyfriend] placed her or his hand on [the victim's] genitals....'" *Id*. Ms. Celis–Garcia contended that her right to a unanimous jury verdict was violated because the submitted verdict directors "required only a **general finding** of hand-to-genital contact between the specified dates and did not require agreement by the jury on a **specific incident** of hand-to-genital contact to find her guilty." *Id*. at 155 (emphasis added).

This Court agreed with Ms. Celis-Garcia's contention, holding that the verdict directors' failure to specifically identify the separate criminal acts "permitted the jury to convict Ms. Celis–Garcia of two counts of sodomy without identifying the acts the jurors were to agree she committed." *Id*. at 158. This Court was concerned that the jury could have convicted Ms. Celis-Garcia of an act that occurred "in her bedroom, **or** on the

enclosed porch, **or** in the shed, **or** in the bathroom." *Id*. (emphasis in original). This Court found the instructional error to be manifest injustice because "the verdict directors misdirected the jury in a way that affected the verdict." *Id*. at 159. As a result, this Court reversed the conviction. *Id*.

The parallels of *Celis-Garcia* to Appellant's case are obvious. There is no doubt that the factual scenario in Appellant's case constitutes a "multiple acts" case.[5] For instance, Jury Instruction No. 12 provided: "You have heard evidence of **multiple acts** of sexual intercourse. . . ." (L.F. 340). Because this is a multiple acts case, *Celis-Garcia* requires the State to either (1) elect the specific act on which it will rely to support the charge or (2) submit a verdict director that specifically describes each separate criminal act presented to the jury. As it did in *Celis-Garcia*, the State chose to present evidence of multiple criminal acts, and thus the verdict directors presented to the jury were required to specifically describe each criminal act presented to the jury. The jury then had to select a single act it believed the State had proved beyond a reasonable doubt.

Jury Instruction No. 5 failed to specifically describe any of the criminal acts presented to the jury.[6] Instead, the verdict director allowed the jury to find Mr. Caston

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[5] "A multiple acts case arises when there is evidence of multiple, distinct criminal acts, each of which could serve as the basis for a criminal charge, but the defendant is charged with those acts in a single count." *Celis-Garcia*, 344 S.W.3d at 155–56.

[6] Jury Instruction No. 5 provided: As to Count I, if you find and believe from the evidence beyond a reasonable doubt: First, that on or about February 5, 2005 to October

guilty of second-degree statutory sodomy if they believed "that on or about February 5, 2005 to October 17, 2005, in the City of St. Louis, State of Missouri, the defendant had sexual intercourse with A.T. . . . .'" As in *Celis-Garcia*, the jury verdict-directors failed to identify any of the acts that the jurors had to agree that Mr. Caston committed. Instead, the jury instructions allowed the jury to consider every allegation of an act of "sexual intercourse" within an eight-month period. The jury instructions failed to provide any identifying details that would link the defendant to a specific criminal act alleged by the State. Rather, the jury instructions used the overly broad phrase "acts of sexual intercourse" in an attempt to encapsulate every distinct act alleged throughout the trial into one count.

This Court recently provided clarity on the requirements of verdict directors in a multiple acts case. *Hoeber v. State*, 488 S.W.3d 648 (Mo. 2016). Mr. Hoeber filed a Rule 29.15 motion for postconviction relief contending, among other things, that his trial counsel was ineffective for failing to object to verdict directors that violated his right to a

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17, 2005, in the City of St. Louis, State of Missouri, the defendant had sexual intercourse with A.T., and; Second, that at that time A.T. was less than seventeen years of age, and; Third, that at that time defendant was twenty-one years of age or older, then you will find the defendant guilty under Count I of statutory rape in the second degree. However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense (L.F. at 333).

unanimous jury verdict.[7] *Id*. at 650. The motion court overruled his motion. *Id*. Mr. Hoeber appealed, and the court of appeals denied him relief in a per curiam opinion (2015 WL 1925414, (8/28/15) (WD76988, (4/28/15)). This Court granted transfer pursuant to Mo. Const. art. V, sec. 10. *Id*. at 653.

At trial, evidence was presented that accused Mr. Hoeber of committing statutory sodomy on several occasions in the kitchen, bedroom, living room, and bathroom. *Id*. at 654. The State's closing argument stated: "[Mr. Hoeber] touched [S.M.] on **at least** two occasions in 2007 between July 1st and the end of August. . . ." *Id*. at 656 (emphasis in original). The jury instructions allowed the jury to find Mr. Hoeber guilty of statutory sodomy if they believed "that between [specified dates] in the County of Buchanan, State of Missouri, [Mr. Hoeber] knowingly touched the genitals of S.M. with his hands . . . ." *Id*. at 655. This Court stated that the verdict directors violated Mr. Hoeber's right to a unanimous trial because the verdict directors failed to "**identify any specific incident or room** in which the conduct occurred." *Id*. at 655. (emphasis added).

Ultimately, this Court in *Hoeber* held that: (1) the verdict directors failed to ensure a unanimous jury verdict because they were insufficiently specific; (2) Mr. Hoeber was prejudiced by trial counsel's failure to object to the insufficiently specific verdict directors; and (3) trial counsel's failure to object to the insufficiently specific verdict

[7] Mr. Hoeber's trial and his direct appeal occurred before *State v. Celis-Garcia* was decided.

directors fell outside the wide range of professional, competent assistance. *Id*. at 660. In other words, his Sixth Amendment rights were violated.

Just as in *Hoeber* and *Celis-Garcia*, the State's case here was not limited to or focused on any particular incident of sexual intercourse. Rather, A.T. alleged that she and Mr. Caston had consensual sexual intercourse on several different occasions at multiple locations (Tr. 330-40). In the State's opening statement, the prosecutor stated to the jury that Mr. Caston and A.T. had sex in the Webster Groves studio, at Mr. Caston's home, in his bedroom, in the guest bedroom, and on the couch in the family room (Tr. 264). In the State's closing argument, the prosecutor stated to the jury that "[A.T.] also says in her statements that they had sex several times. She says specifically that occurred about a dozen more times, about two of them at the studio, on the – of the storage bench, the rest of the occurrences were at his house in the living room, the office, the guest bedroom, and his bedroom." Tr. 822.

Here, as in *Celis-Garcia* and *Hoeber*, the defenses formulated and presented as to Count I were largely dependent on the details surrounding specific incidents of alleged sexual intercourse including location and time period. A.T.'s statement during her police interview, her testimony at her depositions, and her trial testimony varied greatly with regard to the specific details surrounding each alleged incident. Because of these inconsistencies, the State relied on and promoted several acts that were said to have occurred in multiple locations in order to create a generalized accusation of sexual intercourse, rather than relying on any details that would differentiate one act of sexual intercourse from another. Because of the general nature of the verdict and the erroneous

jury instructions, it is impossible to determine, with any degree of certainty, whether the jury actually came to a consensus beyond a reasonable doubt that one specific act occurred in one specific place at one specific time.

The State contends that Mr. Caston's right to a unanimous verdict was protected by Jury Instruction No. 12.[8] However, this argument is contrary to *Celis-Garcia*. "This Court agrees that a defendant's right to a unanimous verdict would be protected in a multiple acts case by . . . the verdict director specifically describing the separate criminal acts presented to the jury **and** the jury being instructed that it must agree unanimously that at least one of those acts occurred." 344 S.W.3d at 157 (emphasis added). The use of a conjunction renders jury instruction number twelve insufficient. The verdict director must specifically describe the separate criminal acts and the jury must unanimously agree on the one act which would require a verdict of guilty as to Count 1. Furthermore, Jury Instruction No. 12 acknowledges that the jury heard evidence of "**multiple acts**" of sexual intercourse however, like Jury Instruction No. 5, it fails to specifically describe any of those acts.

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[8] Jury Instruction No. 12 provided: "You have heard evidence of multiple acts of sexual intercourse between the defendant and A.T. between February 4, 2005 and October 17, 2005. If you find beyond a reasonable doubt that the defendant knowingly had sexual intercourse with A.T., all twelve of you must agree as to the existence of the same act or acts of sexual intercourse. The burden rests upon the State to prove beyond a reasonable doubt each and every element of each offense charged." (LF at 340).

The failure of the verdict director to properly instruct the jury misdirected, misled, or confused the jury by failing to identify any specific incident or room in which the alleged act occurred. The verdict directors allowed each individual juror to determine which incident he or she would consider in finding Mr. Caston guilty on Count I. Under Jury Instruction No 5, one juror could have believed Mr. Caston was guilty of engaging in sexual intercourse with A.T. during an incident at the studio and another at his home, in his bedroom, maybe in the guest bedroom, in the office, or on the couch in the family room. The fact that Instruction 12 refers to "acts" in the plural further complicates the issue and causes even more jury confusion. Appellant was charged with a single act of sexual intercourse even though A.T. claimed it happened more than once. The instruction reference to "acts" strongly suggests that the jury could consider multiple "acts" that occurred on different days and in different rooms to reach their flawed verdict

Accordingly, the verdict directors failed to ensure Mr. Caston's right to a unanimous jury verdict, thereby resulting in prejudice and requiring a new trial.

II. THE TRIAL COURT ERRED IN FINDING THERE WAS NO PROSECUTORIAL MISCONDUCT IN FAILING TO DISCLOSE PHOTOGRAPHS OF MR. CASTON WEARING DANCE PANTS DURING REHEARSALS BECAUSE THIS EVIDENCE HAD SIGNIFICANT VALUE THAT COULD BE USED TO IMPEACH THE STATE'S REBUTTAL EVIDENCE. NONE OF THE PHOTOGRAPHS USED BY THE STATE IN THE REBUTTAL PORTION OF THE TRIAL, INCLUDING THE PHOTOGRAPHS THAT DID NOT SUPPORT THE STATE'S THEORY WERE DISCLOSED BY THE STATE BEFORE THE TRIAL AND THE EXCULPATORY PHOTOGRAPHS WERE NOT DISCLOSED UNTIL AFTER THE JURY VERDICT. THE EVIDENCE THAT WAS SUPRESSED BY THE STATE WOULD HAVE BEEN CONSISTENT WITH HIS DEFENSE AND WAS MATERIAL. THE FAILURE TO DISCLOSE THESE PHOTOGRAPHS AND THEIR EXISTENCE UNDERMINES CONFIDENCE IN THE OUTCOME OF THE TRIAL IN THAT THE STATE'S CONDUCT IN FAILING TO PRODUCE THIS EVIDENCE WAS IN VIOLATION OF *BRADY V. MARYLAND*, 373 U.S. 83 (1963) AND IN VIOLATION OF MR. CASTON'S RIGHTS TO A FAIR TRIAL, TO CONFRONT WITNESSES AGAINST HIM, TO EFFECTIVE ASSISTANCE OF FULLY-INFORMED COUNSEL AND DUE PROCESS OF THE LAW AS GUARANTEED BY ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION AND THE FOURTH, FIFTH,

SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Standard of Review

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Argument

To prevail on his *Brady* claims, Mr. Caston must satisfy three components: 1) The evidence at issue must be favorable to him, either because it is exculpatory or because it is impeaching of an adverse witness; 2) that evidence must have been suppressed by the state, whether willfully or inadvertently; and 3) he must have been prejudiced. *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330 (Mo. 2013) (citing *Strickler v. Greene*, 527 U.S. 263, 281-2 (1999); *Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc 2010)).

In determining prejudice, "A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id*. (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly

shown when the government's evidentiary suppression undermines confidence in the outcome of trial.

Ferguson v. Dormire, 413 S.W.3d 40 71-2 (Mo. App. W.D. 2013) (finding that materiality is established where the undisclosed evidence can reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. "The question is not whether [a defendant] would more likely than not have received a different verdict with the evidence, but whether *in its absence* he received a fair trial…resulting in a verdict worthy of confidence."') (emphasis added) (citations omitted).

The question is whether the evidence withheld would have provided the defendant with plausible and persuasive evidence to support his theory of innocence. *Buchli v. State*, 242 S.W.3d 449, 454 (Mo. App. WD 2007) (citing *State v. Parker*, 198 S.W.3d 178, 180 (Mo. App. WD 2006).

In *Buchli v. State*, the court found a *Brady* violation when the State failed to disclose a video tape that could have provided the defendant with plausible and persuasive evidence to support one of his defense theories at trial. 242 S.W.3d at 456. In *Buchli*, the state did not disclose a portion of a video tape. This tape was used by the State to expand the time when Buchli would have had the opportunity to commit the crime and leave the scene. However, had the entire tape been made available to Buchli, it would have cast doubt on the State's alternate timeline theory and it would have aided in the defense's theory that the video tape was accurate and not three to four minutes slow as argued by the State. *Id*. at 455. The court found that, "At a minimum…such evidence

would have been favorable to the defendant, and would have provided valuable evidence to the defense, casting doubt on the prosecution's evidence." In addition, the court found that the full video tape "would have provided Bulchi with plausible and persuasive evidence to support his theory that he did not have enough time to commit the crime." *Id*. Therefore, the court upheld the circuit court's judgement granting the defendant a new trial. *Id.* at 451.

Here, as in *Buchli*, the prosecuting attorney violated her obligations to disclose possibly impeaching and exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), by failing to disclose to defense counsel all of the photographs turned over by state witness Amanda Cobet prior to or after her direct examination (Tr. 838-9). *See e.g. United States v. Jones*, 34 F.3d 596, 599 (8th Cir. 1994) (*Brady* requires the prosecution to disclose to the defendant…evidence in the prosecution's possession…"). The only photographs introduced into evidence by the State were the photographs in which Mr. Caston was wearing jeans. However, Ms. Cobet had turned over to the State, thus it had in its possession, at least one photograph of Mr. Caston wearing sweatpants or dance pants. *Id*. This was essential because a key component of Mr. Caston's case was that the type of rehearsals taking place at the time A.T. testified that Mr. Caston was wearing jeans, he usually wore sweatpants or dance pants that enabled him the flexibility and safety precautions necessary to demonstrate the dances and various moves for his students (LF 357).

The photographs introduced into evidence via the testimony of Ms. Cobet depicting Mr. Caston demonstrate that he is supervising certain dances position (dance

walk through) while wearing jeans, but do not demonstrate him actually dancing during an actual rehearsal. In the undisclosed photograph in which Mr. Caston is wearing sweatpants or dance pants, he has his legs bent and is standing behind a female dancer and is clearly demonstrating how the dance should be performed. The difference between the types of rehearsals was an important distinction to make when answering the state's claim in rebuttal that Mr. Caston often wore jeans to rehearsals. *Id.* Moreover, the entire case centered on the credibility of witnesses, and the photographs were put into evidence primarily to show that Mr. Caston and his witnesses were lying when they stated that Mr. Caston usually wore dance pants or sweatpants when he was rehearsing with the dancers.

The prosecuting attorney was fully aware of what the testimony of defense witnesses would be prior to trial in that all of the witnesses had testified in St. Louis County, Case No. 10SL-CR10662 (on March 20, 2014)[9],a mistrial of that case was declared due to another set of *Brady* issues. She was aware prior to trial what evidence she would likely be bringing up in rebuttal, and therefore had a duty to disclose all of this evidence prior to presenting any rebuttal evidence or at the least provide all the photographs after Cobet testified.

The untimely, post-verdict disclosure insured the infliction of the most damage while affording the defense no opportunity to rebuff, explain or mitigate the inflicted damage. There was no chance to ask for any relief available from the court such as a

[9] The prosecution attended most of the defense presentation and secured transcripts of, the testimony of Torris and Shannon Caston.

mistrial, continuance, or exclusion of the evidence because the verdict had been received and the jury discharged. *See e.g. State v. Smith*, 491 S.W.3d 286, 297 (Mo. App. ED 2016). The State's calculated actions, or rather inactions, made injustice more likely and the prosecutor reaped the benefit of her purposeful misconduct, while depriving the defendant of a "decent opportunity to prepare his case in advance of trial and avoid surprise." *Id.* The undisclosed photograph was significant evidence in support of the defense testimony and would have established that Mr. Caston and his witnesses were telling the truth and were not bold-faced liars as the state claimed (Tr. 799). This photograph was not disclosed until after the jury's verdict (Tr. 842-3).

Given that the photograph, which the state did not disclose until after trial, could have been used to aid Mr. Caston in his defense, and would have cast doubt on the State's case and the rebuttal testimony of Amanda Cobet, Mr. Caston was prejudiced by this material evidence being withheld. This was in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and in violation of Mr. Caston's rights to a fair trial to confront witnesses against him, to effective assistance of fully informed counsel and due process of the law, as guaranteed by Article I, Sections 10 and 18(a) of the Missouri Constitution and the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Therefore his convictions must be reversed.

III. THE TRIAL COURT ERRED IN OVERRULING MR. CASTON'S MOTION FOR ACQUITTAL AT THE CLOSE OF EVIDENCE AS TO COUNT I, BECAUSE THERE WAS NO EVIDENCE OR REASONABLE INFERENCE TO SUPPORT THE ESSENTIAL ELEMENT OF A.T. BEING UNDER THE AGE OF 17 AT THE TIME OF THE CHARGED ACT OF SEXUAL INTERCOURSE IN THE CITY OF ST. LOUIS OR THAT THE ACTS OCCURRED WITHIN THE TIME-FRAME ALLEGED IN THE INDICTMENT AND IN THE JURY INSTRUCTIONS. THEREFORE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR STATUTORY RAPE IN VIOLATION OF MR. CASTON'S RIGHT TO DUE PROCESS, A FAIR TRIAL, A UNANIMOUS VERDICT, AND FREEDOM FROM DOUBLE JEOPARDY AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 10, 18(a), 19, AND 22(A) OF THE MISSOURI CONSTITUTION.

Standard of Review

In reviewing a challenge to sufficiency of the evidence, this Court must determine whether there is sufficient evidence from which a reasonable juror could have found the defendant guilty beyond a reasonable doubt. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. 2001). In order to determine whether the evidence is sufficient to support the jury's verdict, this Court must look to the elements of the crime and consider each in turn to

determine whether a reasonable juror could find each of the elements beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 405 (Mo.banc 1993) (citing *State v. Dulany*, 781 S.W.2d 52, 55 (Mo.banc 1989)). "Generally, this Court's review of the sufficiency of the evidence is limited to whether the State has introduced sufficient evidence for any reasonable juror to have been convinced of the defendant's guilt beyond a reasonable doubt." *State v. Nash*, 339 S.W.3d 500, 508–09 (Mo. 2011) (citing *State v. Bateman*, 318 S.W.3d 681, 686–87 (Mo. banc 2010).

Argument

A. The trial court erred in overruling Mr. Caston's motion for acquittal at the close of evidence as to Count I because there was no evidence or reasonable inference that supported the jury's finding that an incident of statutory rape in the second degree occurred in the City of St. Louis between February 5, 2005 and October 17, 2005.

"The state has the burden of proving every element of a crime beyond a reasonable doubt." *State v. Seeler*, 316 S.W.3d 920, 925 (Mo. 2010) (citing *State v. Clemons*, 643 S.W.2d 803, 805 (Mo. banc 1983). The Due Process Clause of the Fourteenth Amendment prohibits a criminal conviction except upon evidence that is sufficient to convince the trier of fact of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). To find Appellant guilty of Count I, the State was required to prove beyond a reasonable doubt (i) that on or about February 5, 2005 to October 17, 2005, in the City of St. Louis, State of Missouri, Appellant had sexual intercourse with A.T.; (ii) that at that time A.T. was less than seventeen years of age; and (iii) that at that time

Appellant was twenty-one years of age or older (L.F. 20, 333). Because the State failed to introduce sufficient evidence that could convince any reasonable juror beyond a reasonable doubt of every element in Count I, Appellant's conviction must be reversed.

At trial, the State elicited testimony from A.T. about two incidents of sexual intercourse at Appellant's dance studio (Tr. 330, 333). However, the dance studio is not located in the City of St. Louis, and A.T. conceded that she could not remember whether the sexual acts occurred before or after she turned 17 (Tr. 334). A.T. also described two separate acts of sexual conduct at Appellant's home in the City of St. Louis: deviate sexual intercourse (i.e., oral sex) (Tr. 315-16) and sexual intercourse after A.T. had turned seventeen (Tr. 341-45). Furthermore, A.T. alleged that there were multiple incidents of sexual intercourse at Appellant's home, but provided no testimony regarding the dates, times, or any other information suggesting that A.T. was younger than 17 when the alleged acts of sexual intercourse occurred at Appellant's home in the City of St. Louis. (Tr. 336-42).

A.T.'s testimony did not include a specific incident of statutory rape in the City of St. Louis because she was unable to provide any testimony as to her age at the time of any of the alleged acts of sexual intercourse in the City of St. Louis. Age is an essential element in a statutory rape charge. *See State v. Ybarra*, 386 S.W.2d 384, 386 (Mo. 1965) Moreover, A.T. did not provide the dates (or even a reasonable approximation of the dates) of any of the acts of intercourse that allegedly occurred in the City of St. Louis. Because the testimony of A.T. was the only direct evidence introduced by the State, the State failed to introduce sufficient evidence that A.T. was under the age of 17 at the time

of the charged act of statutory rape in the City of St. Louis. Therefore, no reasonable juror could find each of the elements beyond a reasonable doubt, and reversal is required as to Count I in accordance with Appellant's right to due process and his right to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I , sections 10, 18(a) and 19 of the Missouri Constitution.

B. Double jeopardy concerns also require a finding that the evidence was insufficient because the State's introduction of evidence outside the scope of the indictment violates the protections guaranteed by the Double Jeopardy Clauses in the Fifth Amendment to the United States Constitution and Article I, section 22 of the Missouri Constitution.

"[E]ven though the exact date of a charged offense in not an element of the crime, the indictment or information must allege the time of the alleged offense with reasonable particularity; that is, it must be specific enough to ensure notice to the defendant, assurance against double jeopardy, and reliability of a unanimous verdict." *State v. Miller*, 372 S.W.3d 455, 464-465 (Mo. 2012) (citing AM JUR.2D Indictments and Information § 128.) "When time is not an element of the offense, but the State includes a time period in the information and mirroring instructions, the time period included in the information and mirroring instructions implicate a defendant's double jeopardy rights and preclude the state from using evidence of the uncharged offense to prove the separate charged offense at trial." *Id.* at 468. "When the State chooses to file an information and submit parallel jury instructions charging the defendant with specific conduct during a specific time, the State should not be permitted to secure a conviction with respect to the

specific conduct occurring at a different period of time…." *Id*. at 465. This would not provide the defendant with adequate notice of the evidence that the State intends to present at trial. *Id.* (Further citations omitted).

In *Miller*, evidence was presented that acts of sexual abuse occurred between December 3, 1998 and December 3, 1999, but the charging documents and jury instructions erroneously allowed the jury to find the Defendant guilty of acts that allegedly occurred between December 3, 2004 and December 3, 2005. *Id*. at 463. Consequently, this Court found that even though the evidence suggested the Defendant was guilty of the acts themselves, the State's failure to prove the specified time period meant that there was insufficient evidence to support a conviction. *Id.* The Court commented that "the State is required to prove the elements of the offense it charged, not the one it might have charged" and found that double jeopardy concerns prohibit any other result. In *Miller*, the alleged conduct occurred in a time period outside of the time period that was actually charged in jury instructions. The *Miller* Court found that the State's failure provide the correct time period afforded the State the opportunity to prosecute the defendant for the same offense utilizing the same evidence by alleging that the incident occurred during a different time period, which raised double jeopardy concerns. *Id.* at 467-468.

Here, as in *Miller*, the State charged in the indictment and submitted in its jury instructions that the statutory rape was alleged to have occurred in the City of St. Louis during a specific period of time while A.T. was a minor (L.F. 30, 333) While A.T. was able to testify about the various rooms in the Caston home where she allegedly had

intercourse with Mr. Caston, she never provided any dates when those acts occurred (Tr. 336-38, 344). Because A.T. failed to provide any specific dates or time periods, the State failed to provide the evidence necessary to confirm that A.T. was under 17 at the time she claimed she had intercourse with Mr. Caston in the City of St. Louis. Instead, A.T. testified that when she was 17, and no longer a minor, she engaged in sexual intercourse in the City. (Tr. 344-45). Absent any other testimony or evidence as to the dates of the alleged acts or A.T.'s age at the time of those acts, the State failed to prove beyond a reasonable doubt that A.T. was a victim of statutory rape when the incidents occurred in the City.

Also, as in *Miller*, double jeopardy concerns exist and are exacerbated in this case as A.T. testified at trial about incidents that also occurred in St. Louis County, which was an entirely separate case that had ended in a mistrial. Since the State in the indictment charged that the conduct occurred during a certain time period, but the evidence presented provided no specific information of when sexual intercourse occurred, nothing would preclude the State from charging the defendant with the same offense alleging that it occurred during a different time period based on the same general evidence that was presented at this trial. As in *Miller*, double jeopardy principles prohibit such an outcome, and reversal of Count I is required. The trial court's error in allowing this conviction to withstand scrutiny and sentencing Mr. Caston for a crime the State failed to prove was in violation of Appellant's right to due process, his right to a fair trial as guaranteed by the Fifth Sixth and Fourteenth Amendments to the United States Constitution and Article I , sections 10, 18(a) and 19 of the Missouri Constitution.

IV. THE TRIAL COURT CLEARLY ERRED IN INJECTING ITSELF INTO THE PROCEEDINGS BY: A.) REPEATEDLY CRITICIZING COUNSEL'S WITNESS EXAMINATION AND THE PRESENTATION OF DEFENDANT'S CASE-IN-CHIEF; AND, B.) INJECTING ITSELF INTO THE CASE BY MAKING RULINGS, OBJECTIONS AND COMMENTS SUA SPONTE ALL IN THE PRESENCE OF THE JURY. THESE ACTIONS VIOLATED THE COURT'S DUTY TO MAINTAIN THE APPEARANCE OF ABSOLUTE NEUTRALITY IN ORDER TO AVOID CREATING A PERVASIVE CLIMATE OF PARTIALITY THAT PUT THE DEFENSE IN UNFAIR LIGHT AND RESULTED IN AN UNFAIR BIAS AGAINST MR. CASTON. THESE REPEATED COMMENTS DEPRIVED MR. CASTON OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL, DUE PROCESS OF LAW, THE RIGHT TO PRESENT A DEFENSE AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED UNDER ARTICLE 1 SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Standard of Review

The trial court must maintain neutrality and refrain from engaging in suggestive conduct, hostile remarks, or *sua sponte* interjections that might impair the appearance of impartiality. *State v. Houston*, 139 S.W.3d 223, 227–28 (Mo. Ct. App. 2004) "The judge

presiding at the trial of an action should at all times maintain an impartial attitude in his conduct and demeanor and a status of neutrality between the contending parties, and should exercise a high degree of patience and forbearance with counsel and witnesses." *Duncan v. Pinkston*, 340 S.W.2d 753, 757 (Mo. 1960). "Improper conduct on the part of the judge is incompatible with a fair and impartial trial." *Id*. The court must refrain from reprimanding or admonishing counsel in a manner that implicitly prejudices defendant's case in the eyes of the jury. *See State v. Wren*, 486 S.W.2d 447, 448–49 (Mo.1972) (holding that the trial court committed prejudicial error by stating, in the presence of the jury, that it would allow defense counsel to continue his cross-examination "ad nauseum").

The trial court must refrain from making statements that "can be construed by a jury to a defendant's prejudice." *State v. Castino*, 264 S.W.2d 372, 373-75 (Mo.1954). The trial court's failure to maintain neutrality towards the defense could be reflected or even conjectured by the jury as an opinion as to the defendant's guilt. *State v. Jackson,* 386 S.W.2d 810, 817 (Mo.App.SD.1992). "The rule is well settled that a fair trial exacts absolute impartiality on the part of the judge as to both his conduct and remarks. A judge must not say anything that can be construed by the jury to the prejudice of a defendant." *Castino*, 264 S.W.2d at 375.

Additional Relevant Record

On several occasions throughout the trial, the court made numerous professional and personal admonishments of defense counsel, all spoken in front of the jury, including but not limited to: (1) "Mr. Sindel, let's just do this right. Back off now." (Tr. 375); (2)

"Could we pick up the pace here? We're going to be here for three weeks." (Tr. 377) (3) "It's being done all wrong." (Tr. 379); (4) "What are you doing now, Mr. Sindel?" (Tr. 388); (5) "If we can just get the answer so we can get on with life, I will allow it." (Tr. 406-07); (6) "This is only the seventh time that I've told [Mr. Sindel] how to do it." (Tr. 484); (7) "You're off the rails, Mr. Sindel." (Tr. 561); (8) Okay, Mr. Sindel . . . we'll be here another week." (Tr. 565); (9) I've told [Mr. Sindel] this about seven times now, again, that number." (Tr. 575); (10) "Let's just get to it, Mr. Sindel." (Tr. 599); (11) "Mr. Sindel, just get to it. Come on." (Tr. 661); (11) "Mr. Sindel. Please, just trust your witness." (Tr. 689); (12) "This is why this case has taken so long, it's just rambling." (Tr. 702); (13) "This repetition is just mind numbing, Mr. Sindel" (Tr. 737); (14) "This case will never end." (Tr. 737); and (15) "Pick up the action." (Tr. 756).

In addition to the trial court's one-sided admonishments, the trial court frequently sustained baseless objections by the State without permitting defense counsel to respond. For example, the State repeatedly objected on the basis that "this is improper." (Tr. 191, 204, 219, 227-28, 267, 426, 445, 520, 730, 806). Missouri case law strongly suggests that this type of objection is inadequate.[10] The trial court also imposed its bias in front of the

[10] *State v. Lang*, 515 S.W.2d 507, 511 (Mo. 1974) ("It is universally held in Missouri that specific objections are required to evidence, argument, or statements of counsel, and the objection must call the attention of the Court to the ground or reason for the objection."); *State v. Bartholomew*, 829 S.W.2d 50, 53 (Mo. Ct. App. W.D. 1992) (an objection must "be sufficiently clear and definite so that the court will understand the reason for the

jury when defense counsel asked whether he was required to ask permission to approach the bench on every occasion. In a blatant, inappropriate incidence of hostility towards defense counsel, the court responded: "You know, for you, yeah, you do have to ask permission." Tr. 363-64.

The trial court continued its partiality in front of the jury by wrongfully suggesting that defense counsel did not believe the testimony of one of his key witnesses. During defense counsel's direct examination, the court interjected by repeatedly instructing defense counsel to "trust the witness." Tr. 676, 689. These comments seriously attenuate the credibility of the witness, and improperly invade on the province of the jury.

The trial court's hostility towards defense counsel continued when counsel provided A.T. with a written statement she made to the police to refresh her recollection. Defense counsel then inadvertently referred the witness to the wrong section of the exhibit. In retaliation, the court abruptly interjected defense counsel's cross examination by dismissing the jury for lunch recess. In response, defense counsel stated, "I have it. I can finish that one question." The trial court exclaimed, "It's being done all wrong" and dismissed the jury in the middle of defense counsel's cross examination. (Tr. 378-79).

In addition to harsh criticism of counsel's methods, the Court's consistently attempted to rush counsel through his opening statement, direct examination, cross-examination, and objections. Throughout the trial, the Court repeatedly expressed

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objection."); State v. White, 870 S.W.2d 869, 873 (Mo. Ct. App. 1993) ("The statement 'that's improper argument' is too general and nonspecific . . .")

frustration towards the defense for simply trying to present Mr. Caston's case. Defense counsel was repeatedly admonished for not going as fast as the court thought was appropriate. The criticism was embodied is such comments as "Could we pick up the pace here? We're going to be here for three weeks" (Tr. 377). The Court also repeatedly attempted to rush defense counsel through cross examination and thus curtail the Appellant's two Sixth Amendment rights: the right to counsel and the right to cross-examine, by ordering counsel to "Get to it", "Just get to the issue", "Move on. Get to another topic", "Let's just get to it", or "Just get to that." (Tr. 268, 424, 522, 552, 599, 661, 706).

Argument

A. The trial court clearly erred in injecting itself in the proceedings by repeatedly criticizing counsel's witness examination and the defense case-in-chief in the presence of the jury, thus violating its duty to maintain the appearance of neutrality.

This Court has long held that "the court must always maintain an **absolute impartiality** in any trial, both in its remarks and in its conduct generally; it should not do or say anything which might prejudice the jury or be construed by the jury as indicating a belief in defendant's guilt or innocence." *State v. Sanders*, 360 S.W.2d 722, 726 (Mo. 1962) (emphasis added). "The need for judges to be discreet in what they say or do in the presence of juries so as to avoid appearances of bias cannot be overemphasized." *State v. Engleman*, 634 S.W.2d 466, 473 (Mo. 1982). A judge shall assure that his personal belief in the guilt or innocence of an accused party is not "reflected or even conjectured by the

jury in his treatment of either counsel." *State v. Montgomery*, 251 S.W.2d 654, 657 (1952). "A trial judge must be ever mindful of how his remarks may be perceived by jurors . . . [and] must avoid unintentional statements which a jury might misinterpret as his opinion." *Engleman*, 634 S.W.2d at 473-74. "[The trial judge's] privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. *Quercia v. United States*, 289 U.S. 466, 470 (1933)

The trial court's hostility towards defense counsel violated its duty to maintain the appearance of neutrality and avoid creating a pervasive climate of partiality and unfairness. By doing so, the Court displayed a clear preference for the State. The prosecutor was not admonished at anywhere near the extent of defense counsel, which essentially provided the State with an ally, a second prosecutor, who would disparage counsel and Appellant and make her task that much easier. The Court's obvious bias against defense counsel was erroneous and certainly had a substantial impact on the thinking of the jury and the outcome of this case.

In *State v. Houston*, the Court considered whether the trial court erred in injecting itself in the proceedings numerous times to express its frustration and aggravation with the appellant and his cross-examination. 139 S.W.3d 223, 224 (Mo Ct. App. 2004). There, the appellant represented himself and consistently badgered the State's witnesses and disobeyed the express instructions of the Court. *Id*. at 225-6. Frustrated by the pro se appellant's behavior, the court evidenced its displeasure towards appellant by making several negative comments in the presence of the jury, including: 1) "Oh for goodness sake, what difference does it make who calls whom, Just get on with it now. You're

going to woof me around a bit"; 2) "That means nothing, Mr. Houston, It's absolutely meaningless what you just said"; 3) "What's your point? You've gone over this ad nauseam, which means to the point of sickness"; and 4) "All right. Just stop this inquiry. It's absolutely meaningless. If you didn't want to understand? Now Mr. Houston, this is the second day of trial, and you have tried the patience of this court." *Id.* at 226. During the appellant's final cross-examination of a state's witness, the court became so frustrated that it declared, in the presence of the jury, "Well, remember I've told you, irrelevant questions and that's the end of your game. . . [a]nd most of what you've asked has been immaterial and irrelevant." *Id.*

In *Houston*, the Court found that while the record indicated that the appellant disobeyed express instructions of the trial court, badgered witnesses, and antagonized the Court, none of which happened in the case at hand, the appellant nonetheless had an absolute right to an impartial trial judge. Additionally, the Court held that these types of comments from the trial court communicated a disbelief in the appellant's defense to the jurors, in violation of the Court's duty of neutrality. *Id.* at 228. The Court opined that there was no question that the trial court stepped beyond the bounds of impartiality in making these comments and that this behavior constituted clear and plain error. *Id.* at 228-9. The Court found the trial court's prejudice so compelling that appellant's conviction was reversed and a new trial was ordered. *See also State v. Wren*, 486 S.W.2d 447, 449 (Mo. 1972) (finding that, "Such reprimands or admonishments as may be called for toward counsel should be handled in a such a manner as not to prejudice defendant's case in the eyes of the jury.")

Like the defendant in *State v. Houston*, Mr. Caston suffered bias from the Court's harassment of defense counsel from opening statement to closing argument. Unlike the defendant in *Houston*, Mr. Caston's counsel did not antagonize the court, ignore ordered or express directions, or badger any of the witnesses. Defense counsel was obviously less deserving of the Court's admonishments, criticisms, and insults for simply trying to present his case than was Mr. Houston. The similarities between the biased and prejudicial behavior of the *Houston* Court are similar; however, the statements made by the trial judge in this case were far more prejudicial.

Clearly, the conduct of the trial court was improper and biased, and as in *Houston*, "Given the significant and consistent nature of the trial court's comments…there is no question that the court stepped beyond the boundaries of impartiality, thereby abandoning its duty of neutrality. Not only did this constitute error, it also constituted obvious and clear error." 139 S.W.3d at 228. In determining prejudice in cases involving trial court misconduct, the issue is whether the Court's improper conduct could have prejudiced the minds of the jurors against the defendant. *Id*. at 229. Here, as in *Houston*, it is obvious that the jury was been influenced by the negative comments against Mr. Caston's counsel, and thus Appellant was prejudiced by these comments. Thus, Appellant was deprived of his rights to due process of law, to present a defense, to a fair trial, to cross-examine witnesses against him, and to the effective assistance of counsel in violation of his right under Article I, sections 10 and 18(a) of the Missouri Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Thus, this case should be reversed and remanded for new trial.

B. The trial court clearly erred by injecting itself into the case by making rulings and comments *sua sponte* in the presence of the jury and thus violated the court's duty to maintain the appearance of neutrality.

The trial court erred in interjecting itself into the case by making objections and rulings *sua sponte* including, but not limited to its ruling striking some of the testimony given by defense witness, Casey Weston, and defendant's efforts to impeach the testimony of various State witnesses. Specifically, the trial court struck portions of Mr. Weston's testimony even though it was not objected to or subject to a Motion in Limine to prohibit its use. Additionally, the trial judge made consistent complaints about the nature and extent of Mr. Caston's counsel's cross-examination and his case-in-chief. There were instances wherein defense counsel sought to introduce evidence through Mr. Caston's witnesses and cross examination of State witnesses and the trial court stated *sua sponte* without objection that the testimony was unnecessary, cumulative and that defense counsel was unnecessarily prolonging the trial.

The trial court improperly commented on strategies of defense counsel and the efficacy of the evidence Mr. Caston sought to introduce. These actions exceeded any conceivable boundaries of fair discipline and resulted in a manifest injustice. Virtually all of these comments were made in the presence of the jury, to maximize their impact and effect. Throughout the trial, the Court's interjections grossly compromised the Court's autonomy by assuming a quasi-prosecutorial role by making *sua sponte* objections and rulings that were intended to benefit the State. In issuing rulings with a clear bias towards the State, the Court not only hobbled defense counsel's efforts to mount a defense on

behalf of Mr. Caston but also infused the proceedings with his palpable prejudice against the defense.

The Court's *sua sponte* rulings were not disciplinary but punitive and prejudicial. Consequently, the trial court's actions merged the judiciary with the State, revealing the Court's preference for the State and bias against the defense. The Court's clear bias could not have been ignored or overlooked by the jurors, thus creating a manifest injustice that deprived Mr. Caston of his right to effective assistance of counsel and a fair unbiased, infection-free trial. When these allegations were brought to the attention of the trial court in the Motion for New Trial, the judge offered no explanation or justification for the comments or his role in the proceedings. The trial court's creation of a hostile and slanted environment requires that Appellant's convictions be reversed that this case should be remanded for new trial.

"It is imperative that a trial judge maintains absolute impartiality during criminal proceedings so as to ensure that the defendant receives a fair trial." *State v. Houston*, 139 S.W. 3d 223, 227 (Mo. App. W.D. 2004) (citing *State v. Bass*, 81 S.W.3d 595, 613 (Mo. App. W.D. 2002)). Therefore, "[a] judge must maintain a neutral attitude and avoid any demonstrated hostility which might impair the appearance of impartiality." *Id.* (citing *State v. Hudson*, 950 S.W.2d 543, 548 (Mo. App. W.D. 1997)). Additionally, a judge must not indicate a belief in the guilt or innocence of the accused, or may he or she let such a belief be reflected or even conjectured by the jury in the treatment of either party. *Id.* (citing *State v. Jackson*, 836 S.W. 2d 1, 7 (Mo. App. E.D. 1992).

"The law prohibits the trial court from commenting on the evidence. It must remain impartial." *State v. Beardon*, 748 S.W.2d 753, 756 (Mo. App. E.D. 1988). A question or comment from a trial judge must not express his or her opinion as to the evidence. *Houston*, 139 S.W. 3d at 227. A trial judge should guard against engaging in remarks or conduct in the presence of the jury which can and might have a prejudicial effect upon the jury. *United States v. Porter*, 441 F.2d 1215, 1215 (8th Cir. 1971). . These types of remarks can only serve to discredit one party in the eyes of the jury. A trial judge's frequent participation in the trial, by questions and comments can give the jury the impression that the judge credited one side and did not believe the other. *Id.* A trial judge's isolated questioning to clarify ambiguities is one thing; however a trial judge cannot assume the mantle of an advocate and take over the cross examination for one party. A judge's slightest indication that he favors the government's case can have an immeasurable effect upon a jury. A trial judge should seldom intervene in the questioning of a witness and then only to clarify isolated testimony. A trial court should never assume the burden of direct or cross-examination. *U.S. v. Singer*, 710 F.2d 431, at 436-7 (8th Cir. 1983). While a single instance involving error may not always be so prejudicial as to warrant reversal in a case, when a case is considered as a whole, and there is, as here, a barrage, a fusillade of negative aspersions, the rights of party attacked may be so prejudiced as to deprive them of a fair trial. *Id*. at 437.

In *United States v. Singer*, the court held that the district court so far injected itself into the trial as to give the jury the impression that it favored the prosecution, thus depriving defendants of fair trial. 710 F.2d at 432. In *Singer*, the court made *sua sponte*

objections into the questioning of counsel and admonished him, stating, "You've just about got that question so that it's unintelligible because it's about four questions in one." *Id*. at 433. The court also instructed counsel on how, when, and on what grounds to object. The court also injected itself into the proceedings by telling counsel how to question witnesses and sometimes would question witnesses himself. *Id*. at 434. While in *Singer*, these repeated interjections were directed towards both sides, the appellate court, while looking at the case as a whole, reversed and remanded the case for a new trial because the actions of the trial court judge, "prevented the defendants from having their guilt or innocence determined in a proceeding free of a fatal appearance of unfairness." *Id.* at 432.

Similarly, in *State v. Houston*, the trial court injected itself into proceedings multiple times. There, the trial court consistently ruled against the appellant on non-existent objections and also declared that the appellant's questions were "immaterial and irrelevant". 139 S.W.3d at 226. In addition, when the State had rested, and after the appellant chose not to put on any additional evidence, the court made it clear that it was upset with this decision, stating the defendant had refused to participate in the trial. *Id*. In *Houston*, the case was reversed and remanded, stating that the "trial court clearly communicated to the jury a disbelief in the appellant's defense, thereby abandoning its duty of neutrality." *Id*. at 228.

Additionally, a mere two months ago, the Illinois appellate court in *State v. Wiggins*, --N.E.3d--, Nos. 1–13–3033, 1–13–3107; No. 2015 IL App (1st) 133033, filed Sept. 1st, 2015, (for the court's convenience the case is included in the appendix at (A-20)

found that the trial judge had abandoned his role as a neutral arbiter and that this act had prejudiced the defendants As a result, the convictions were reversed and the case was remanded for a new trial. *Id.* at *1, ¶ 1. In *Wiggins*, the trial judge interrupted counsel's examination of a witness and initiated its own line of questioning.[11] During re-cross examination, the defense began a line of questioning regarding a document that was part of the Court's questions to a witness. The State objected on impeachment grounds. *Id.* at *2, ¶ 11-12.The Court responded, "Well the Court's question is [sic] it within the scope of what we just did?" The judge then sustained his own objection as beyond the scope of redirect. *Id.*

Additionally, on cross-examination of another witness, defense counsel showed the witness a copy of his written statement given to police. The prosecutor objected to this because the copy the defense used had notes and markings that were not on the original. While the judge allowed the defense attorney to use this copy of the statement, he warned counsel in the presence of the jury, stating, "Well, okay, tell you what, you

[11] The trial judge interrupted the assistant State's Attorney's questioning of a witness to ask: "This version of the events contained in the document that you signed as prepared [by Swift's attorney], did you ever reach out to the police and tell them about the fact's contained in that document?" When the witness admitted that he had not, the judge followed with another question, "Did you ever contact the Cook County State's Attorney's Office and tell them about the facts contained in that affidavit?" The witness admitted he had not. *Id*. *2 at ¶ 9.

watch yourself man." *Id*. at *3 ¶ 17. Finally, again on cross-examination, the judge interrupted questioning, making a *sua sponte* objection, and then sustained his own objection. *Id.* at ¶ 20. In its opinion, the appellate court found that while a trial court judge has some limited discretion to raise objections and question witnesses, this discretion must not "invade the province of the jury by making comments, insinuations or suggestions indicative of belief or disbelief in the credibility of a witness." *Id.* at *7 ¶ 46 (citing *People v. Marino*, 111 N.E.2d 534 (Ill. 1953). Under *Wiggins*, if the judge wants to question a witness, "he must do it in a fair and impartial manner, without showing bias or prejudice against either party." *Id.* The appellate court found that the trial court had abandoned its neutrality when the judge issued and rules on his own *sua sponte* objections, interrupted witness examination in order to initiate his own line of questioning, and interposed objections on behalf of the state.

The appellate court also found that the judge indicated his preference for the State to the jury when he told defense counsel, "watch yourself, man", and referred counsel's redirect examination of witness Barnes as "what we just did." *Id.* at *8 ¶ 50. Because the court found the evidence closely balanced, the judge's errors deprived the defendant of a fair trial, and therefore the conviction was reversed and the case was remanded for a new trial. *Id*. at*9 ¶ 53. In reaching this decision, the *Wiggins* court partially relied on the well-established precedent contained in *People v. Sprinkle*, 189 N.E.2d 295 (Ill.1963):

> "The making of an objection to questions or comments by a judge poses a practical problem for the trial lawyer. It can prove embarrassing to the lawyer, but, more importantly, assuming that most juries view most judges

> with some degree of respect, and accord to them a knowledge of law somewhat superior to that of the attorneys practicing before the judge, the lawyer who objects to a comment or question by the judge may find himself viewed with considerable suspicion and skepticism by the very group whom he is trying to convert to his client's view of the facts, thereby perhaps irreparably damaging his client's interests." *Id*. at 297.

Wiggins and *Sprinkle* both recognize the irreparable damage and prejudice created by a trial judge who continuously interrupts the proceedings with his *sua sponte* comments and criticisms.

So what benefits did the State secure at the cost of the appellant? As stated herein, the jury could relish in the judge's obvious bias and slant towards the State. In addition the State did not need to worry about collateral consequences from repeated objections. As the Supreme Court recognized in *State v. Tokar*, 918 S.W.2d 753,768 (Mo. banc 1996), "In many instances seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes. It is feared that frequent objections irritate the jury and highlight the statements complained of, resulting in more harm than good." The State would be able to hide behind the sword and shield wielded by the trial judge knowing that all the negativity would be laid at the feet of the Appellant and his attorney.

Here, as in *Singer*, *Houston*, and *Wiggins* the trial court repeatedly exceeded its discretion by inappropriately inserting itself *sua sponte* into the trial. In doing so, the Court prejudiced Mr. Caston and deprived him of his right to a fair trial. The Court's inappropriate behavior started at the opening of trial when the Court interrupted defense

counsel's opening statement with, "All right. Do you have any more opening statement? Because I'm going to shut it down now. If you want to disobey me, then I have power also." (Tr. 283). During cross examination of A.T., the court made a sua sponte objection, stating, "…let's just do this right. Back off now. You're presenting here with the report all right? So you know that you should give her an opportunity to read the report to herself." (Tr. 375). Counsel agreed to do so this, and the court stated, "And then you ask her a question after you've asked her whether or not she's read the transcript, correct?" "So back off a little bit. Let her read the report, then you can ask the question." Id. Shortly thereafter, the court again objected, asking counsel, "Do you have a question?" When counsel replied in the positive, the court stated, "Could we pick up the pace here? We're going to be here for three weeks." Tr. 377.

At the end of counsel's cross-examination of A.T., the court interrupted counsel as he was searching for a page in a report (Tr. 379). When counsel stated that he had found the page, the court prematurely ended counsel's cross-examination with the admonishment, "It's okay. It's being done all wrong. We've got to talk about this," The Court proceeded to call a recess and send the jurors on their lunch break. Id. The Court's statements combined with his decision to dismiss the jurors were calculated to and did give the jury the impression that the Court was going to "teach" counsel how to properly cross-examine witnesses during the break or further admonish the defense. Id.

During cross-examination of Mary Koenig, the Court again interrupted counsel's questioning in order to criticize, stating, "This is where were going to get in trouble, all right? 'Have you ever said.' That is so generalized and vague." (Tr. 481) (quotations

added). Despite counsel having agreed to reword the question, the Court continued to disparage counsel's word choice as well his cross-examination technique with "No, no, no. Please. You need to give her the specific time and place she supposedly said that." (Tr. 482). Shortly thereafter, the judge again injected himself into the proceeding in order to criticize counsel's method of cross-examination, admonish counsel for utilizing his own instead of those suggested by the Court, and further instructing counsel on how to "correctly" question a witness: "No. We're not going to do it that way. You need to get to the inconsistency. Look, you need to get her to commit on her direct testimony to the statement, then you need to get her to confirm the previous time that she gave a statement, and then you need to confront her with the inconsistent statement. That's how you do it…When you do it this way, we go twenty minutes off the rails. Please, do it the correct way. This is only the seventh time I've told you how to do it." (Id.)

Additionally, when counsel was cross-examining Ms. Koenig, the court responded without objection, and asked, "Any more questions?" When counsel responded in the positive, the judge again interrupted his cross-examination, stating, "Okay. We're not going to argue about this. The document speaks for itself." (Tr. 498).

On direct examination of Shannon Caston, the court objected to counsel's questions, stating that his question asked for narrative and stated that, "This is why this case has taken so long, it's just rambling. Be specific please." (Tr. 702). Finally, several times throughout the trial, the court sustained objections by the state and did not admit testimony it deemed cumulative, with comments such as, "This is cumulative. This is improper bolstering. It's just too much. We've already heard this. Is there anything new

on this?", "Why are we doing this again?", "But we don't need all of this—what does that have to do with anything is this case?" and "This repetition is just mind numbing…And we need to get on with this case. This case will never end." (Tr. 734, 746, 737). All of these comments were meant to signal to the jury that you do not have do listen or pay attention to this testimony because in the Court's mind it "[has nothing] to do with…this case."

Because in this case the evidence was closely balanced, as the only witnesses to the alleged events were Mr. Caston and A.T. and there was no physical or forensic evidence, these interjections by the trial court unduly prejudiced Mr. Caston to a point that if the court had not inserted itself into the trial in this way, the outcome of the case very well may have been different. Doing so deprived Mr. Caston of his rights to due process of law, to present a defense, to a fair trial, to cross-examine witnesses against him, and to the effective assistance of counsel in violation of his right under Article I, sections 10 and 18(a) of the Missouri Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution Thus reversal is required as to Mr. Caston's convictions.

V. THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S MOTION IN LIMINE AND SUBSEQUENT OBJECTIONS PROHIBITING DEFENSE COUNSEL FROM REFERENCING A.T.'S MENTAL HEALTH DIAGNOSES OR TREATMENT BECAUSE SUCH TESTIMONY COULD HAVE BEEN USED TO IMPEACH THE STATE'S WITNESSES, IN THAT BY SUSTAINING THE STATE'S MOTION, THE TRIAL COURT

UNDULY PREJUDICED MR. CASTON SUBJECTING HIM TO AN UNFAIR AND IMPARTIAL TRIAL AND VIOLATING THE RIGHTS GUARANTEED HIM UNDER ARTICLE I SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Standard of Review

"In matters involving the admission of evidence, we review for prejudice, not mere error and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *State v. Davis*, 186 S.W.3d 367, 373 (Mo. Ct. App. 2005) (quoting *State v. Norville*, 23 S.W.3d 673, 678 (Mo.App. S.D.2000). "The presumption that excluded admissible evidence is prejudicial can be rebutted when the error is harmless." *Id*. (citing *State v. Norman*, 145 S.W.3d 912, 919–20 (Mo.App. S.D.2004)). The State has the burden to overcome the presumption by proving beyond a reasonable doubt that the error is harmless after we find error. *Id*.

Argument

The trial court erred in sustaining the State's Motion in Limine and subsequent objections prohibiting Mr. Caston's counsel from referencing A.T's mental health diagnoses or treatment, including counseling, received prior to, during, or subsequent to the time she claimed the acts in the indictment occurred. Specifically, Mr. Caston was

prohibited from eliciting testimony regarding A.T's eating disorders and treatment for depression.[12]

At trial, the State introduced a recording of a phone call from A.T. to Mr. Caston in which A.T. accused Mr. Caston of alienating her from her family, and stated that she was in counseling, depressed, and unable to finish school because of what Mr. Caston had done (State's Exhibit 5). Caston's counsel sought to demonstrate that A.T. actually blamed Mr. Caston for her failures, not because of any prior misconduct, but because she associated Mr. Caston with her inability to thrive in dance and missed dance opportunities while she was a student at the academy (LF 358). Mr. Caston wanted to put evidence before the jury that A.T. had battled with depression and relationship difficulties well before she alleged anything inappropriate took place between her and Mr. Caston, and that these mental problems were some of the reasons that caused her to make the present allegations. Id. Further, the defense sought to establish that A.T. had a history of blaming others when things went wrong, and that A.T. had experiencing similar issues in her past, and blamed Mr. Caston for those problems issues because she was not awarded certain dance roles and did not excel at dance (LF 359).

Prior to the indictment in this case, A.T. signed a release for the prosecution regarding some of her mental health and counseling records (LF 183). These records

[12] Ironically the State called as one of its witnesses, Gladys Smith, who was allowed to testify that in her opinion there were legitimate reasons that A.T. waited years before telling authorities of her claims.

were obtained, deemed relevant and produced as part of the State's discovery materials pursuant to Supreme Court Rule 25.03 and the State's constitutional obligations. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Smith v. Cain*, 132 S.Ct. 627 (2012). After signing that release, A.T. refused to sign releases for any further records of her treatment by mental health professionals, or to answer any questions during numerous depositions, about statements she may have made to these providers concerning her alleged relationship with Mr. Caston, asserting the "physician-patient privilege" as grounds for refusing to answer these questions (LF 191-2). Her refusal to answer these questions during depositions triggered a lengthy process of motions and replies which eventually resulted in a court order to disclose *in camera* the treatment notes of various counselors and mental health providers. (LF 193-4) However, even though the court ruled after *in camera* review that A.T.'s medical records be disclosed to defense counsel, A.T. still refused to answer questions relating to her mental health history. (LF 184). As a result, defense counsel filed a motion to compel or for sanctions. (LF 182-190). Additionally, the trial court excluded defense counsel from referring to A.T.'s medical records in court.[13]

The United States Supreme Court has addressed the issue of whether a statutorily-based privilege overrides a defendant's right to have relevant and material evidence

[13] These matters were brought up before the Court and in an in-chamber conference but not included into the transcript. On May 10, 2016 in the Court of Appeals, Counsel filed a Motion to Supplement the Record on Appeal and the Trial Testimony of Ayla Thorp.

produced through discovery. In *State v. Nixon*, 418 U.S. 683, 709-10 (1974), the court recognized the importance of privileged speech when protecting confidentiality, but opined that such privileges are not expansively construed because they are in derogation of the search for the truth. The court also found that the allowing the privilege as a means to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process and would impair the basic function of the trial court. *Id*. at 711-2. The court in *Nixon* also explicitly secured for defendants the opportunity for access to medical/psychological records after an appropriate *in camera* review. *Id*. at 713. See also see *State v. Newton*, 925 S.W.2d 468, 471 (Mo. App. E.D. 1996). (finding that "the generalized assertion of privilege must yield to the demonstrated specific need for evidence in a pending criminal trial…if the records do contain relevant material evidence, the trial court shall: (1) give copies of the alleged relevant material records to both prosecution and defense counsel; and (2) convene an evidentiary hearing in which both counsel may attack or defend the relevancy and materiality of the records.")

Additionally, the privilege that exists in this situation is not absolute. Under §210.140 RSMo, the privilege "shall not apply to situations involving known or suspected child abuse or neglect and shall not constitute grounds for failure to give or accept evidence in any judicial proceeding relating to child abuse or neglect." The privilege can also be waived by the patient, explicitly or implicitly. The privilege is implicitly waived where a person entitled to the privilege acts in a fashion inconsistent with its assertion, such as voluntarily disclosing privileged material. See *ex rel. McNutt v. Keet*, 432 S.W.2d 597 (Mo. 1968); *Cline v. William H. Friedman & Associaties, Inc*., 882

S.W.2d 754, 761 (Mo. App. E.D. 1994) (finding that the privilege can be waived by an act showing a clear purpose to divulge the privileged information). The privilege can also be waived when the person claiming the privilege somehow places the information provided in the context of a court proceeding. *State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340 (Mo. banc 1998). Finally, the privilege is not absolute in a sense that it gives way to larger societal interests and to the interests of justice. *State ex. rel. Lester E. Cox Medical Center v. Keet*, 678 S.W.2d 813, 815 (Mo. banc 1984); *Brandt v. Medical Defense Associates*, 856 S.W.2d 667, 671 (Mo. banc 1993).

Here, the actions of A.T. implicated all of the above-mentioned waivers of privilege. Under Missouri statutes, the privilege did not apply because the allegations made by A.T. involved the sexual abuse of a minor. A.T. also implicitly waived the privilege by disclosing confidential information to friends, relatives, and acquaintances about her mental health and by signing waivers for some of her mental health records for the State (LF at 185-7). Additionally, here A.T. has waived any privilege because she put the subject matter of the requested information at issue in that she has made allegations of an improper sexual relationship but has subsequently refused to answer questions of defense counsel regarding discussions she allegedly had with mental health care providers about the relationship, but agreed to provide the same information to the State and law enforcement. Id. at 187. Finally, there is a countervailing societal interest when it is in the interest of justice that the privilege is waived. In this case, Mr. Caston was charged with multiple felonies and the primary witness against him, his accuser, refused to answer questions when deposed by defense counsel.

Here, the courts in both venues ordered an in camera review, found the information relevant and ordered it turned over to defense counsel The court also ordered A.T. to answer questions involving these records. Despite the previous ruling by courts in two different circuits, the trial court still granted the State's motion in limine to prohibit Mr. Caston's defense counsel from asking A.T. about these records or her medical conditions in trial[14]. The court erred in granting this motion because the privilege of the records had been waived, the records were relevant to the defense, and the defense planned on using the aforementioned records to impeach the testimony of A.T. at trial. This resulted in fundamental unfairness to Mr. Caston and thus the trial court must be reversed.

In *State v. Davis*, 186 S.W.3d at 373, the court stated that, "allegations of prior inconsistent statements [are] sufficient to satisfy a showing when credibility is the sole determination for conviction. Prior inconsistent statements are relevant because they could lead to the discovery of admissible evidence, and they are material because such evidence could reasonably undermine the confidence of the outcome." In *Davis*, the court found that the court's failure to conduct an in camera review of an alleged victim's medical records which resulted in his inability to present evidence of these records at trial resulted in prejudicial error. *Id*. at 374. At trial, the defendant planned to use the records in his defense theory that the alleged victim fabricated allegations against him. Additionally, the defendant planned on using these records to challenge the credibility of the alleged victim, as she had a history of making false sexual assault allegations. The

[14] Refer to footnote 13 infra.

court in *Davis* found that the defendant was prejudiced by the exclusion, as there were no witnesses besides the alleged victim and the alleged offender, there was no physical evidence, and the defense sought to prove that the alleged victim fabricated the claims out of retaliation. *Id*.

Davis is factually on point with the case at hand. Here, as in *Davis*, the trial court prohibited the defense from questioning A.T. about her medical records. In both cases, the only witnesses were the alleged victim and the alleged offender, and there was no physical evidence. Also, as in Davis, the defense sought to prove that A.T. made the present allegations against Mr. Caston in retaliation for her not getting the dance roles she wanted. Finally, as in Davis, the excluded records undermined the defense theory that A.T. had a history of blaming others for her problems (LF at 358). Therefore as in *Davis*, the court's ruling prohibiting defense counsel from referring to A.T.'s medical and psychological history resulted in prejudice to Mr. Caston. This subjected Mr. Caston to an unfair trial in violation of Article I Sections 10 and 18(a) of the Missouri Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Thus his convictions must be reversed.

VI. THE TRIAL COURT ERRED IN PROHIBITING DEFENSE COUNSEL FROM COMMENTING OR ELICITING TESTIMONY CONCERING THE INTERVIEW OF MR. CASTON AND HIS WIFE BY THE WEBSTER GROVES POLICE DEPARTMENT BECAUSE THE STATEMENTS MADE AND PRESERVED IN THE VIDEOTAPES OF THE INTERVIEW WERE NOT OFFERED FOR THE TRUTH OF WHAT THE POLICE SAID BUT JUST THE OPPOSITE, THAT WHAT THE POLICE TOLD HIM AND HIS WIFE WAS NOT TRUE AND THE STATEMENTS AND THREATS WERE PART OF AN ATTEMPT TO COERCE OR TRICK MR. CASTON INTO MAKING INCRIMINATING STATEMENTS. BY SUSTAINING THE STATE'S MOTION AND OBJECTIONS, THE TRIAL COURT UNFAIRLY PREJUDICED MR. CASTON BY VIOLATING HIS RIGHT TO PRESENT A DEFENSE AND IMPROPERLY LIMITING HIS TESTIMONY. AS A RESULT HIS TRIAL WAS UNFAIR AND THE RIGHTS GUARANTEED TO HIM UNDER ARTICLE I SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED.

Standard of Review

Trial courts typically have broad discretion in deciding whether to admit evidence." *State v. Barriner*, 210 S.W.3d 285, 304 (Mo. App WD 2006) (citing *State v. Williams*, 976 S.W.2d 1, 2 (Mo.App.1998). "The trial court's decision will not be

disturbed unless a clear abuse of discretion is shown." *Id.* (citation omitted). Abuse of discretion is found when the decision "is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Id.*(citation omitted).

Argument

The trial court erred in prohibiting defense counsel from commenting on or eliciting testimony concerning portions of the interview of Mr. Caston and his wife by the Webster Groves police department. Mr. Caston and his wife were prohibited from testifying as to threats and statements made by the police to them and their responses (LF 360) (Tr. 255-8). All of the matters that defense counsel sought to elicit were on a videotape of the interview and thus there could be no dispute as to their authenticity. The defense wanted to present evidence from Mr. Caston and his wife that the police told Mr. Caston they would bring A.T. to the police station to confront him; that they intended to arrest and charge A.T. with filing a false police report, and requesting that Mr. Caston to submit to a polygraph examination (Tr. 256). At trial, the State sought to prove that the defense was a conspiracy of witnesses based on lies manufactured by Mr. Caston, and even referred to the defense witnesses as bold faced liars. (Tr. 799) Had defense counsel been able to elicit testimony from Mr. Caston and his wife about their encounter with the Webster Groves Police Department, it would have proven that Mr. Caston consistently denied the allegations A.T. made against him and that he fully cooperated with officers. This is relevant because it weighs in favor of Mr. Caston's veracity when testifying at

trial, which was a major issue in the case. The testimony would have shown that despite these threats and false statements of police intentions Mr. Caston continued to maintain his innocence. Further, allowing this testimony would not have prejudiced the State's case or its witnesses, because they were able to call the investigating officers for purposes of rebutting or explaining any testimony provided by the defense.

Also, during this interview, Mr. Caston's wife Shannon informed detectives that her husband was uncircumcised (LF 361). The state relied on A.T.'s supposed knowledge of this to prove that she had been sexually active with Mr. Caston. However, at trial A.T. testified that Detective Mulkenbur provided her with constant updates regarding the investigation. (Tr. 421) She knew that they had interviewed the Castons but she could not remember whether she provided this information after she had been told by Detective Mulkenbur that Ms. Caston had revealed that her husband was not circumcised during the interview. She had never described this physical characteristic to anyone else (Tr. 424). The State never questioned Detective Mulkenbur to deny that she had provided this information to A.T. as an update before A.T. was questioned about Mr. Caston's physical characteristics. Because the defense was prohibited from asking questions about the police interview, or the fact that Shannon had told the police that her husband was uncircumcised, the jury could infer A.T. knew this information from firsthand experience as a result of sexual contact rather than learning it from Detective Mulkenbur (Tr. 257-8)

At trial, the State sought to prohibit the defense from eliciting any testimony or making any comment about the substance of the Castons' interview with the Webster Groves Police Department on the grounds of hearsay (LF 288)(Tr. 283). The defense

countered that the statements were not offered to prove the truth of the "facts' contained in the statement. Quite to the contrary, there were being offered to demonstrate that the police were not truthful to Mr. Caston and were using deception as a ploy to secure a confession. (Tr. 255-6).

"All out-of-court statements are not hearsay which must be excluded unless shown to fall within a recognized exception. Hearsay is testimony containing an out of court statement, not made by the declarant nor under oath, offered to show proof of the matter." *State v. Foust*, 920 S.W.2d 949, 954 (Mo. App. ED 1996). "If the statement is not offered for the truth of the matter asserted, there is no basis for requiring the proponent of the testimony to fit within an exception to the hearsay rule, because the testimony is not hearsay." *Id.* Testimony of what another said, when offered as an explanation of conduct rather than as proof of facts in the other's statement, is not inadmissible hearsay. *State v. Leisure*, 796 S.W.2d 875, 880 (Mo.banc 1990) (*citing State v. Murray*, 744 S.W.2d 762, 773 (Mo. banc 1988), *cert. denied*, 488 U.S. 871 (1988). "Prior consistent statements are admissible to rehabilitate a witness whose credibility has been attacked by an express or implied claim of fabricated trial testimony." *State v. Campbell*, 254 S.W.3d 203 (Mo. App. SD 2008).

"The trial court erred in prohibiting the defense from referring to the police interview as the defense should have been allowed to show the coercive nature of the police conduct and the techniques that were used during the interviews. The evidence would demonstrate the extent the police were willing to go in an effort to secure incriminating statements from Mr. Caston and his wife, including providing A.T. with

facts developed during the interview to bolster the State's case. At trial, the court sustained the State's hearsay objection to the defense asking questions about this police interview (Tr. 257-8), stating that the information was also irrelevant because Mr. Caston did not confess during the interrogation. Id. However, if the court would have considered the entire substance of the interview, it would have found that the interview in the police report was not hearsay, because it was not offered for the truth of the matter and that there was no question as the reliability of this evidence, as it was preserved by video recording.

Therefore, by sustaining the State's motion, the trial court committed reversible error. The error was prejudicial to Mr. Caston, as there was no physical evidence in this case, and the only witnesses to these alleged incidents were A.T. and Mr. Caston. By sustaining the State's motion and objection, the trial court unduly prejudiced Mr. Caston subjecting him to an unfair and impartial trial and denied him his due process rights and his right to present evidence and testify in violation of his rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I §§10 and 18(a) of the Missouri Constitution. Therefore Mr. Caston's convictions must be reversed.

CONCLUSION

Wherefore, for the foregoing reasons, the trial court's decision should be reversed as to Count I and defendant should be acquitted on that Count or in the alternative the convictions on that Count and the remaining counts should be reversed and Mr. Caston should be granted a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 31st day of October, 2016, one true and correct copy of the foregoing brief, were served via the court's electronic filing system on:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c) this brief: 1) contained the information required by Rule 55.03; 2) complies with the limitations in Rule 84.06(b); and 3) contains 17,094 words determined using the word count in WordPerfect 12. A copy of this brief was submitted, in WordPerfect 12 format, via

electronic copy. All digital copies of this brief were scanned for viruses and found to be virus free as required pursuant to Rule 84.06(h).

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