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 REPLY BRIEF FOR APPELLANT

Respectfully Submitted,

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I. THE TRIAL COURT ERRED IN SUBMITTING JURY INSTRUCTION NUMBERS FIVE AND TWELVE TO THE JURY, ACCEPTING THE VERDICT OF GUILTY, AND SENTENCING CASTON TO COUNT I BECAUSE THE JURY INSTRUCTIONS PROFFERED BY THE STATE AND GIVEN BY THE COURT FAILED TO SPECIFICALLY DESCRIBE THE ALLEGATIONS OF MULTIPLE AND SEPARATE CRIMINAL ACTS INTRODUCED INTO EVIDENCE AND FAILED TO PROPERLY INSTRUCT THE JURY THAT IT MUST AGREE ON A SPECIFIC ALLEGATION OF ATLEAST ONE CRIMINAL ACT IN EVIDENCE BEYOND A REASONABLE DOUBT IN THAT THAT THE INSTRUCTIONS' FAILURES DEPRIVED APPELLANT 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). Because the instructional error was properly preserved, Appellant "must only show a 'reasonable likelihood' that the jury misapplied the faulty instruction to deprive him of his constitutional right." *State v. Rycraw*, No. ED 103044, 2016 WL 5390198, at *13 n.6 (Mo. Ct. App. Sept. 27, 2016) (citing *State v. Erwin*, 848 S.W.2d 476, 483 (Mo. 1993)).

Relevant Record

Count I of the indictment charged Appellant with second-degree statutory rape in that, "on or about February 4, 2005 to October 17, 2005, in the City of St. Louis, State of Missouri, the defendant had sexual intercourse with A.T. and at that time A.T. was less than seventeen years old and the defendant was twenty-one years of age or older." (L.F. 20) (emphasis added).

Jury Instruction No. 5 provided that: "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 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. 333) (emphasis added).

Jury Instruction No. 12 provided that: "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." (L.F. 340) (emphasis added).

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). "The defendant is entitled to a concurrence of the minds of the 12 jurors upon one definite charge of crime." *Id*. (citing *State v. Jackson*, 146 S.W. 1166, 1169 (1912).

"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." *Id*. at 155-56 (emphasis added). In the brief filed with this Court, the State conceded that "[t]his was a multiple acts case." Resp.'s Br. 15. In multiple acts cases, this Court mandates that all instructing courts utilize the specific procedural safeguards created in *Celis-Garcia* to ensure that all 12

jurors unanimously convict the defendant of the same act. *Celis-Garcia*, 344 S.W.3d at 156.

The State concedes that *Celis-Garcia* "held that a defendant's right to a unanimous verdict would be protected . . . if the verdict director **specifically described** the separate criminal acts presented to the jury **and** the jury was instructed that it must agree unanimously that at least one of the acts occurred." Resp.'s Br. 16 (interpreting *Celis-Garcia*, 344 S.W.3d at 157) (emphasis added). The Court stated that, "As noted above, to comply with the constitutional mandate that the jury reach a unanimous 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**[1] in the verdict director." *Celis-Garcia*, 344 S.W.3d at 158 (emphasis added). The procedural safeguards created in *Celis-Garcia* are discussed at length in the Missouri Approved Instructions:

> The place of the offense may become of "decisive importance" under certain circumstances, such as . . . where the defendant may have committed **several separate offenses** against the same victim at the same general location within a short space of time. In such a situation, upon request of the defendant or on the Court's own motion, **the place should be**

[1] The verdict director in this case provided no specifics as to the criminal acts subsumed in the instruction.

> **more definitely identified**, such as "the front bedroom on the second floor," "the southeast corner of the basement," etc.

MAI-CR3d 304.02, Note on Use 6. *See also Id*. at Note on Use 7 ("If the state elects to submit multiple criminal acts, a separate verdict director must be submitted for each particular criminal act supported by the evidence, **and** an instruction based on MAI-CR 3d 304.16[2] shall be given immediately preceding the first verdict director of the series." (emphasis added); "The key to juror unanimity is a finding that encompasses the same criminal conduct and the same singular event." *Id*.

Notwithstanding the guidance provided by the MAI notes on use, this Court stated that notes on use are "insufficient to protect a defendant's constitutional right to a unanimous jury verdict in a multiple acts case." *Celis-Garcia*, 344 S.W.3d at 158. The Court explained how the MAI notes on use conflict with the substantive law established in *Celis-Garcia*:

> First, the note on use is written in **permissive** rather than **mandatory** language, stating only "upon the request of the defendant or on the court's own motion, the place should be more definitely identified." Second, the note limits the details identifying the separate offenses to location and does

[2] "The following instructions numbered _____ and _____, which I am about to read to you, submit the offense of [*name of offense from verdict director*]. These instructions are in the alternative and set forth different ways of committing [*name of offense from verdict director*]." MAI-CR 3d 304.16.

> not take into consideration the timing of the offenses or other distinguishing characteristics. Most significantly, while the note on use permits multiple acts to be more definitely described in the verdict director, the note does not require that the jury unanimously agree on the same criminal act that serves as the basis for the defendant's conviction. **It is insufficient to require only that the multiple acts be described with more specificity**, without also requiring the jury to agree which of those acts the defendant committed.

Id. (citations omitted) (emphasis added).

This Court has recently interpreted the holding of *Celis-Garcia* in a manner consistent with Appellant's argument. In *Hoeber v. State*, 488 S.W.3d 648 (Mo. 2016), evidence was presented at trial 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 rejected the broad verdict directors because they 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 directors fell outside the wide range of professional, competent assistance.[3] *Id*. at 660.

The State does not dispute that the jury instructions submitted by the trial court failed to specifically describe the separate criminal acts alleged to have been committed by Appellant. *See* Resp.'s Br. 16. Notwithstanding the obvious shortcomings of Jury Instruction Nos. 5 and 12, the State argues that the portion of the *Celis-Garcia* holding, which requires verdict directors to specifically describe the separate criminal acts alleged, is simply a suggestion that should be ignored when the jury is given an appropriate unanimity instruction. The language and logic of the holding in *Celis-Garcia* and the MAI Notes on Use do not support this argument. Even if the *Celis-Garcia* holding is stretched outside its specific directives[4], Jury Instruction No. 12 fails to properly instruct

[3] It is significant that the standard used in *Hoeber* was more demanding than the standard of review applied for Point I. Determining whether an attorney was constitutionally deficient requires a defendant to "show a reasonable probability that, but for counsel's errors, the outcome would have been different. A reasonable probability exists when there is a probability sufficient to undermine confidence in the outcome." *Hoeber*, 488 S.W.3d at 655 (citation omitted).

[4] "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

the jury on its obligations under Missouri's constitution because it was confusing, misdirecting, and misleading.

The State contends that Jury Instruction No. 12 is an "appropriate unanimity instruction" because it "fully protects a defendant's right to a unanimous verdict, and listing the specific acts in the verdict director is not necessary to the protection of that right in every case." Resp. Br. 20-21. In essence, the State interprets the holding of *Celis-Garcia* (and as if it did not contain language in the conjunctive mandating that verdict directors specifically describe the separate criminal acts **and** instruct the jury that it must agree unanimously that at least one of those acts occurred. Rather, the State construes the conjunction "and" as if it were in the disjunctive by offering two possible alternative options for verdict directors, rather than utilizing both safeguards. The State asserts that a unanimity instruction, without a specific description of the separate criminal acts, is sufficient to protect Appellant's right to a unanimous verdict. The State claims *State v. Watson*, 407 S.W.3d 180 (Mo. Ct. App. 2013), as support for ignoring the plain and obvious language of *Celis-Garcia*.[5]

Watson was tried and convicted of multiple sexual abuse crimes. *Id*. at 181. Watson appealed, arguing that the jury instructions used by the court for the charge of

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unanimously that at least one of those acts occurred." *Celis-Garcia*, 344 S.W.3d at 157 (emphasis added).

[5] Since Appellant in *Watson* did not seek transfer, it is fair to assume that this Court never received the appellate court's ruling.

statutory rape in the first degree failed to follow the requirements of *Celis-Garcia* because the instructions lacked specific descriptions of the separate criminal acts in evidence.[6] *Id*. at 184-85. Rather, the court used Jury Instruction No. 9, which "plainly told the jury that they must unanimously agree on one act, and that they must agree to the same act." *Id*. at 185. The court held that Jury Instruction No. 9 was sufficient because, unlike the evidence in Appellant's case and *Celis-Garcia*, the acts committed by Watson constituted a pattern of identical acts of abuse occurring in the same location over a period of time. *Id*. The court's ruling was based on a footnote in the *Celis-Garcia* opinion, which suggests that the procedural safeguards do not apply to "cases involving repeated, **identical sexual acts** committed at the **same location** and during a **short time span** because the victim would be unable to distinguish sufficiently among the acts." *Celis-Garcia*, 344 S.W.3d at 156 n.8 (emphasis added). Furthermore, the *Watson* court found no error with the jury instructions for the two counts of statutory sodomy because the instructions specifically described the separate criminal acts presented as evidence.[7]

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[6] For the charge of statutory rape in the first degree, that court submitted Jury Instruction No. 8, which was based on the applicable Missouri Approved Instruction in MAI–CR 3d 320.03.

[7] The jury instructions for the two counts of statutory sodomy "required the jury to find that Defendant inserted an object into Victim's vagina, and the other required the jury to find that Defendant placed his penis inside Victim's mouth. *Watson*, 407 S.W.3d at 187 n.2.

Although this Court is not bound by the appellate court's holding, the facts of *Watson* are readily distinguishable from Appellant's case. In *Watson*, the victim alleged repeated, **identical sexual acts** all committed at the victim's home. 407 S.W.3d at 181-82 (emphasis added). The victim could not distinguish between any of the specific acts in her testimony, and Watson failed "to point out how, given the evidence, the State could have differentiated between each of the acts of statutory rape alleged." *Id*. at 185-86. According to the victim, she was 12 years old when the sexual acts with Watson began, which likely affected her ability to distinguish between the sexual acts alleged in her testimony. *Id*. at 182. Furthermore, because *Watson* contained no evidence of uncharged sexual acts, the potential injustice of the jury unanimously convicting Watson based upon the occurrence of an uncharged act was absent. *Id*. at 187.

Unlike the facts of *Watson*, Appellant's case included evidence of several, separate incidents of sexual acts at different locations. For example, A.T.'s testimony provided details regarding the following separate incidents of sexual acts: (1) Appellant and A.T. performed oral sex on one another in the guest bedroom of Appellant's home after A.T. exited the shower (Tr. 316-18); (2) Appellant and A.T. had sexual intercourse in the changing room at the studio located in St. Louis County after a rehearsal (Tr. 330); (3) Appellant and A.T. had sexual intercourse on a bench at the same studio (Tr. 333) (4) Appellant and A.T. had sexual intercourse at several unique locations in Appellant's house (Tr. 336-37); and (5) Appellant and A.T. had sexual intercourse in Appellant's bed after A.T. turned 17 (Tr. 344-45). Clearly, A.T.'s testimony demonstrates that she was able to distinguish between at least five alleged incidents of sexual acts. Unlike the victim

in *Watson*, A.T.'s age at the time of the alleged sexual acts (16 years old), and at the time she testified (25 years old), is powerful evidence of her ability to distinguish between the alleged sexual acts.

A significant issue present in Appellant's case (but not in *Watson*) is that Jury Instruction No. 12 allowed the jury to unjustly convict Appellant of uncharged acts. The first sentence of 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." (emphasis added). Two of the alleged acts of sexual intercourse that the jury heard evidence of occurred at a studio located in St. Louis County. (Tr. 300, 333). Those acts were not part of any charge in Count I because the acts were not alleged to have occurred in the City of St. Louis. The following sentence of Jury Instruction No. 12 provided: "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." Jury Instruction No. 12 fails to reference Jury Instruction No. 5, the charge in Count I, or the fact that the agreed upon act or acts of sexual intercourse **must** have been committed in the City of St. Louis, and not in St. Louis County. Thus, Jury Instruction No. 12 failed to assure that the jury unanimously agreed upon an act of sexual intercourse that was charged in Count I and created a reasonable likelihood that the jury would convict Appellant for uncharged criminal acts. The shortcomings embodied in Jury Instruction No. 12 created a reasonable likelihood that the jury misapplied the faulty instruction to deprive Appellant of his constitutional right to a unanimous verdict.

Lastly, the State argues that Appellant did not suffer prejudice from the instructional error because the lack of specificity in Jury Instruction No. 5 was remedied by Jury Instruction No. 12 and the State's closing argument. *See* Resp's Br. 23. As discussed above, Jury Instruction No. 12 alone was so inadequate that it created a reasonable likelihood that the jury could unanimously agree upon an uncharged act. The comments made by the prosecutor during closing argument are just as confusing. The prosecutor stated:

> Count I is statutory rape in the second degree. And you have to find between **February 4th** of 2005 and October 17th of 2005, and here's that date range. Okay? February 4th Ayla tells you is that time in the studio in Webster Groves. That's the first time that there's sexual intercourse. And October 17th, 2005 is the day before Ayla turns seventeen.

Tr. 795. (emphasis added).

In the State's closing argument the prosecutor stated that the first allegation of a relevant sexual act occurred on February 4, 2005. This date serves as the commencement of the time period charged in Count I, despite the State's concession that the act alleged on this date is not part of the charged illegal act under Count I. Thus, the only rational result from Jury Instruction No. 12 which includes February 4th as the commencement of the relevant time period was to mislead the jury into including the uncharged act of February 4th into the provisions of Instruction 12.

Conclusion

The combined Jury Instructions Nos. 5 and 12 failed to secure Appellant's right to a unanimous jury in violation of the holding in *Celis-Garcia* and Article I, Sections 10, 18(a) and 22(a) of the Missouri Constitution.

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), RULE 25.03, 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

The Court reviews the denial of a *Brady*-based motion for new trial for abuse of discretion. *State v. Reed*, 334 S.W.3d 619, 625 (Mo. Ct. App. 2011) Abuse of discretion is the standard used for review of all discovery violations. *See State v. Zetina-Torres*, 400 S.W.3d 343, 353 (Mo. Ct. App. 2013). "We find such abuse when the trial court's ruling clearly offends the logic of the circumstances or when it becomes arbitrary and unreasonable." *State v. Kelly*, 851 S.W.2d 693, 695 (Mo. Ct. App. 1993).

Relevant Record

Prior to trial, Appellant specifically requested: "Any books, papers, documents, photographs, (including access to all the negatives) or objects, which the State intends to introduce into evidence at the hearing or trial, which were taken during the investigation or were obtained from or belong to the Defendant" and "Any material or information, within the possession or control of the State, which tends to negate the guilt of the Defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment." (LF. 31 at ¶¶ 7, 10).

A.T. testified that the dance show Hearts and Flowers was performed at Appellant's dance studio around February of 2005 (Tr. 326). A.T. testified about an incident that occurred at the dance studio after a rehearsal before for the show, where A.T. had sexual intercourse with Appellant (Tr. 330). A.T. testified that Appellant was wearing jeans, entered the changing room, and initiated sexual intercourse by unzipping

his jeans (Tr. 329-333), and that Appellant's zipper injured her during the sexual intercourse (Tr. 417). A.T. later testified that it was normal for Appellant to wear sweatpants when he rehearsed with his dancers. *Id*.

Appellant testified that he did not wear jeans when he was leading a dance rehearsal (Tr. 639), i.e., Appellant wore dance pants when he was actually engaged in rehearsing for a dance number. Rather, Appellant testified that he always wore dance pants or sweatpants without any zippers during actual dance rehearsals (Tr. 568). Appellant denied ever conducting dance rehearsals in jeans (Tr. 570). Appellant and Casey Weston testified that Appellant wore dance clothes, and not jeans, during the dance rehearsal on February 4th, 2005 (Tr. 592-93; Transcript of Videoconference Deposition of Casey Weston at 31).

In rebuttal, the State called Amanda Cobet as a witness to testify that Appellant at times wore jeans when he taught dance rehearsals (Tr. 765). The State then introduced photographs into evidence of Appellant wearing jeans as he was positioning Amanda Cobet and Casey Weston[8] students for particular dances poses (Tr. 766). Amanda Cobet testified that A.T. was not pictured in the photographs admitted into evidence and she had no recollection of when the photographs were taken (Tr. 768, 772, 778).

[8] Ms. Cobet and Mr. Weston were the two principal dancers in the Hearts and Flowers production. They were also the two dancers depicted in the photograph that the State suppressed. (Tr. 766)

After the jury reached its verdict, Appellant's counsel noticed that the State possessed more than just the three photos admitted into evidence, and he demanded that he be allowed to see all the photos (Tr. 838-839). The State allowed Appellant's counsel to review the photographs and he discovered that an undisclosed photograph showed Appellant wearing dance clothes during an actual dance rehearsal with Ms. Cobet and Mr. Weston A.T. (Tr. 839). The prosecutor admitted that she received the all the photographs, including the one that was concealed from defense counsel, "in the middle of the trial." (Tr. 842).

Argument

"[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). To prevail on a *Brady* claim, Appellant must satisfy three components: (A) the evidence at issue must be favorable to Appellant, either because it is exculpatory or because it impeaches an adverse witness; (B) the evidence must have been suppressed by the state, whether willfully or inadvertently; and (C) Appellant 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)).

A. The photograph of Appellant wearing dance pants during a rehearsal was favorable to Appellant because the photograph was both exculpatory and impeaching.

The State contends that the photograph of Appellant wearing dance pants was not exculpatory. Resp's Br. 28. The State's contention is unreasonable because the photograph, if seen by the jury, would have cast doubt on the State's theory of the case, impeached the State's witnesses, and supported the defense theory that Appellant did not wear jeans when he was leading an actual rehearsal. The State's theory of the case relied largely on the testimony of A.T., who specifically testified that Appellant was wearing jeans at the time they had sexual intercourse at the studio after Appellant finished the rehearsal (Tr. 329-33). A.T.'s testimony described how Appellant initiated sexual intercourse when he walked into the dance studio's changing room, unzipped his jeans, and pulled them down "far enough" to perform sexual intercourse (Tr. 331). A.T. testified that Appellant's zipper injured her during sexual intercourse (Tr. 417). The photos of Appellant in dance pants during an actual rehearsal would have confirmed the testimony of Appellant and Casey Weston, while casting doubt on the reliability of A.T.'s claims.

Furthermore, the suppressed photograph of Appellant would have impeached the testimony of another one of the State's witnesses, Amanda Cobet. The only purpose of Amanda Cobet's testimony was to rebut Appellant's testimony (and legal theory) that Appellant was not wearing jeans on February 4th, 2005 (or at any other time Appellant was leading a rehearsal). The State mainly used Amanda Cobet to authenticate the photographs of Appellant wearing jeans. The State did not introduce into evidence, or disclose the existence of, any photographs of Appellant wearing dance pants because this would have contradicted Amanda Cobet's testimony and the State's theory of the case.

While the State does not have an obligation to impeach its own witness in this situation, it does have an obligation to provide defense counsel with a photograph when it corroborates his legal theory of innocence or contradicts the State's witnesses. Here, the undisclosed paragraph does both.

In Respondent's brief, the State downplays the significance of its nondisclosure and the issue of whether Appellant wore jeans or dance pants while leading dance rehearsals. However, this begs the following question: why would the State call Amanda Corbet as a witness, introduce photographs of Appellant wearing jeans into evidence, and then hammer that point home in closing argument as proof that Appellant and his witnesses told "bold faced lies" about his attire at rehearsal (Tr. 818), and proclaim that "[Appellant] put people on the witness stand to lie to you" (Tr. 799) if, as the State now claims, it was insignificant and essentially meaningless. Clearly, the State recognized that Appellant's theory was important enough to be consistently addressed by the State throughout the trial and hammered during closing argument. The undisclosed evidence directly supported and advanced Appellant's theory that he wore dance pants when he was leading a dance rehearsal and the state knowingly, willingly, and intentionally suppressed it. This was no mistake, it was a calculated strategy to gain a tactical advantage and besmirch the defense witnesses who testified truthfully during the course of the trial.

B. The State failed to produce favorable evidence until after the jury's verdict.

The level of culpability of the State's nondisclosure, although patently obvious, is irrelevant because the rule set forth in *Brady* is intended to protect a defendant's

constitutional due process rights. Regardless of whether the State's nondisclosure was made in good faith or was entirely inadvertent, "an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *State v. Moore*, 411 S.W.3d 848, 854 (Mo. Ct. App. 2013) (citing *Strickler v. Greene*, 527 U.S. 263, 288 (1999)). "As such, to prevent running afoul of *Brady*, the State 'has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case' and disclose that information to the defendant." *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

At the sentencing hearing, the prosecutor admitted that she came into possession of the exculpatory photograph "[d]uring the middle of the trial." (Tr. 842). Neither appellant nor his counsel was informed of the photograph's existence until Appellant's counsel coincidentally noticed it after the jury returned its verdict. Appellant's counsel then contacted the prosecutor regarding the undisclosed photograph, and the prosecutor made all the photographs available (Tr. 838-39). The prosecutor did not disclose the photograph when she first received it supposedly because the prosecutor decided, on her own and despite her obvious bias, that it was not *Brady* material. (*See* Tr. 842). Of course this disingenuous claim ignores her obligation to provide **all** the photographs pursuant to Rule 25.03(A)(6) and **any** material which tends to negate the guilt of the defendant pursuant to Rule 25.03(A)(9), and Appellant's disclosure request (LF 31). *Brady* or not, all of the photographs should have been disclosed. The power to determine whether evidence is *Brady* material does not reside solely within the province of the prosecution.

The responsibility should be to err, if at all, on the side of caution. In this case, caution took up residence in the wind where the prosecutor launched it.

C. Appellant was prejudiced by the State's *Brady* violation.

"In determining prejudice, the United States Supreme Court has stated: '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.' *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 338 (Mo. 2013) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "Rather, to be entitled to 'a new trial under the *Brady* standard, a defendant must show a "reasonable probability" of a different result.'" *Id*. The following analysis is beneficial in determining prejudice:

> 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.

Kyles, 514 U.S. at 434.

When determining the materiality of the undisclosed evidence, the question for the Court is whether the evidence withheld would have "provided [Appellant] with plausible and persuasive evidence to support his theory of innocence or would it have enabled him to present a plausible, different theory of innocence?" *State v. Parker*, 198 S.W.3d 178,

180 (Mo. Ct. App. 2006). "If either question can be answered affirmatively, the evidence is material under a *Brady* analysis." *Id*.

Here, the untimely post-verdict disclosure insured the infliction of maximum damage, while affording the defense no opportunity to rebut, explain, or mitigate the inflicted damage, or to challenge the disingenuous closing argument. There was no chance to ask for any relief such as a mistrial, continuance, or exclusion of the evidence because the verdict had been received and the jury discharged. The State's calculated actions, or rather inactions, deprived Appellant of a fair trial by influencing the jury to return "a verdict [un]worthy of confidence." *State v. Smith*, 491 S.W.3d 286, 298 (Mo. App. ED 2016) (citing *Barton v. State*, 432 S.W.3d 741, 761 (Mo. 2014)). 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 State argues that its nondisclosure of the photograph is not a *Brady* violation because "the photograph was not relevant, it did not rebut Victim's or Amanda's testimony, and it did not prove Defendant was telling the truth." Resp's Br. 30. The State's argument is unreasonable.

The photograph corroborating Appellant's (and his witnesses) testimony and establishing a significant factual inconsistency in A.T.'s (and Amanda Cobet's) testimony is not only relevant, but is plausible and persuasive evidence in support of Appellant's theory that he could not have committed the crimes described by A.T. in a pair of zipper-less dance pants. The issue of whether Appellant wore dance pants at times when he was leading dance rehearsals is crucial to establishing Appellant's guilt or innocence because

the answer to this issue is vital to assist and educate the jury's perception of the witnesses' credibility.

If the jury believed that Appellant wore dance pants when he led rehearsals, then A.T.'s allegation of sexual intercourse at the dance studio was more than likely fabricated, and there is a reasonable probability that the jury would find A.T.'s entire testimony unreliable. Not only did A.T. specifically allege that Appellant was wearing jeans during the incident of sexual intercourse, but she also identified certain features of the jeans that could not have occurred if Appellant was wearing dance pants. For example, if Appellant was wearing dance pants it would be impossible for him to unzip his pants (as A.T. described) because Appellant's dance pants do not contain a zipper (Tr. 568). Likewise, A.T.'s testimony regarding an injury stemming from Appellant's zipper during sexual intercourse would have been shown to be false. It is obvious that if the jury believed she fabricated sex at the dance studio, she would likely have fabricated the stories of the sexual escapades at Appellant's house at times when his wife was present in the house. The State purposefully went to great lengths to put the kibosh on any chance Appellant had to establish that A.T.'s testimony (and the testimony of Ms. Cobet was unreliable.

Conclusion

Pursuant to the holding of *Brady v. Maryland*, and Missouri Supreme Court Rules the State's failure to disclose exculpatory and impeaching evidence, irrespective of good faith or bad faith, deprived Appellant of due process and a verdict worthy of confidence as guaranteed by Mo. Const. art. I, §§ 10 and 18(a) and U.S. Const. amends. V and XIV.

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.

Respondent it its brief mistakenly reconfigures Appellant's argument from one of sufficiency of the evidence, i.e. that there was not a shred of testimony from A.T. that all the acts of sexual intercourse in the City of St. Louis occurred before she had reached her 17th birthday, to suggesting that Appellant was claiming deficiency because "the victim did not give specific dates [of sexual intercourse]…." Resp. Br. P. 35. This is not the argument and beside the point. A.T. did not testify to any specific dates. She also did not

testify to any specific time frames, by referencing her age, calendar months or specific years. Nothing. Nor did she testify concerning "other events that occurred near those times" Resp. Br. P. 35 quoting from *State v. Wilson*, 256 S.W.3d 58, 63 (Mo. Banc 2008).

Respondent concludes that "there was sufficient evidence presented that Defendant had sexual intercourse with Victim during the time period charged" without a single citation to the record to support such a bold and demonstrably false claim.

It is also of significance that the State continues to reference the February 4th date as within the scope of Count I despite the fact that **all** of the evidence at trial establishes that if anything sexual occurred on that date, it was not in the City of St. Louis but was in St. Louis County. Again, conflating the County allegations with the charges over which the trial court had actual jurisdiction.

Conclusion

The State failed to present evidence that would establish beyond a reasonable doubt that A.T. was under the age of 17 at the time she claimed to have had intercourse with Appellant in St. Louis City. The conviction should be reversed and Appellant should be acquitted of that charge.

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 1st day of December, 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 6,257 words determined using the word count in Word. 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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