



In the Missouri Court of Appeals Eastern District

DIVISION FOUR

STATE OF MISSOURI,)	No. ED110037
)	
Respondent,)	Appeal from the Circuit Court of
)	St. Charles County
vs.)	1611-CR00696-02
)	
ORLANDO KIM FERGUSON, II,)	Honorable Jon A. Cunningham
)	
Appellant.)	Filed: September 26, 2023

Thomas C. Clark, II, C.J., James M. Dowd, J., and John P. Torbitzky, J.

Opinion

Appellant Orlando Ferguson appeals the convictions at his June 2021 retrial on two counts of first-degree statutory sodomy and one count of first-degree child molestation arising from acts he committed against victim, A.R., between January 21, 2008 and January 20, 2013. At his first trial in 2017, a jury convicted Ferguson of those same crimes but this Court overturned those convictions in *State v. Ferguson*, 568 S.W.3d 533 (Mo. App. E.D. 2019).

Ferguson asserts three points of error. First, Ferguson argues the trial court plainly erred when it denied his motion to dismiss based on the Double Jeopardy Clause. In that motion, Ferguson claimed that the State, fearing an acquittal at the first trial due to the wholly insufficient evidence of Ferguson's guilt, adduced improper evidence for the knowing and intentional purpose of goading the defense into requesting a mistrial since double jeopardy

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would not apply after a mistrial but would apply after such an acquittal. We deny this point because Ferguson failed to show that the State's trial conduct was done with the intent to goad him into requesting a mistrial.

Second, Ferguson claims the trial court plainly erred in failing to *sua sponte* exclude from evidence the statement to A.R. by Dr. Anita Hampton, the school counselor to whom A.R. reported Ferguson's abuse, that A.R.'s mother "would believe her" because the testimony invaded the province of the jury as an improper comment by one witness on the credibility of another witness. We deny this point as well because Dr. Hampton's testimony as a fact witness to the conversation between her and A.R. at the time of A.R.'s disclosure of Ferguson's abuse did not invade the province of the jury. Moreover, the record supports a finding that counsel did not object as a matter of trial strategy.

Third, Ferguson claims, and the State concedes, the trial court plainly erred in ordering Ferguson's two statutory sodomy sentences to run consecutively based on its erroneous belief that the law required so. We agree and reverse and remand for re-sentencing for the limited purpose to decide whether to run the statutory sodomy charges consecutively or concurrently.

Background

In 2005, Ferguson and A.R.'s Mother (Mother) began a relationship. Early in their relationship, Mother learned she was pregnant with A.R. from a previous relationship. In January 2006, A.R. was born, and in September 2007, Mother and Ferguson married. Throughout the marriage, Ferguson, Mother, A.R., and A.R.'s sibling moved in and out of several apartments and family members' homes until Ferguson and Mother separated and later divorced in April 2013.

In February 2016, while in fourth grade, A.R. attended a sexual abuse lecture given to her class. During the presentation, A.R. began to sob and approached school counselor Dr. Anita Hampton telling her “it happened to me.” Dr. Hampton called Mother and then made a hotline¹ call to the Children’s Division of the Missouri Department of Social Services. A.R. then met with Michelle Stille (Stille), a forensic interviewer with the Child Center in Wentzville, Missouri. A.R. identified to Stille four instances of abuse by Ferguson that occurred while he and Mother were married. In August 2017, Ferguson was charged with two counts of first-degree statutory sodomy and one count of first-degree child molestation.

The First Trial

At the first trial which took place in August 2017, the State called Dr. Hampton who testified she had “[n]o doubt at all” about what A.R. told her or whether “this had actually happened to her.” For her part, Stille testified that A.R.’s responses to her questions were “fairly typical of kids that tend to not be suggestible.” It was on the basis of this testimony that we reversed Ferguson’s convictions and ordered a retrial in *Ferguson*, 568 S.W.3d at 533. In addition, after the trial court had granted Ferguson’s motion in limine to exclude any evidence of uncharged acts of domestic violence on the part of Ferguson, Mother testified that she sometimes kept the children “because [she] was physically abused.” Ferguson claims in this appeal that the foregoing testimony was part of the intentional scheme by the State to trigger a mistrial and that therefore double jeopardy should have barred his retrial.

The jury in the first trial found Ferguson guilty on all counts. Ferguson appealed those convictions and this Court reversed and remanded for a new trial in *Ferguson*, 568 S.W.3d at

¹ Dr. Hampton, as a mandatory reporter pursuant to § 210.115 RSMo, was required to report instances of abuse reported to her.

536.² In his first appeal, Ferguson did not raise the issue of prosecutorial misconduct that he does here.

The Second Trial

Before the retrial, Ferguson filed his motion to dismiss in which he raised the double jeopardy argument that is the subject of his first point on appeal here.

The second trial took place in June 2021. Dr. Hampton again testified that A.R. came into the hallway crying and told Dr. Hampton, “it happened to me,” and that she did not want Dr. Hampton to tell Mother. A.R. said she was afraid Ferguson would kill her for disclosing the abuse and that Mother would not believe her. Dr. Hampton then testified that she told A.R. “your mom will believe you” and that A.R.’s mother said “I believe you” upon picking A.R. up from the presentation.

Ferguson was again found guilty on all counts and on October 4, 2021, the court sentenced to ten years in prison on each statutory sodomy conviction ordering those sentences to run consecutively and to five years on the child molestation conviction to run concurrently for a total of twenty years. This appeal follows.

Standard of Review

Under certain circumstances, we may review unpreserved errors under our plain error standard of review. *See State v. Speed*, 551 S.W.3d 94, 97 (Mo. App. W.D. 2018) (citing *State v. Clay*, 533 S.W.3d 710, 718 (Mo. banc 2017)); Rule 30.20. Rule 30.20 states in relevant part that “[w]hether briefed or not, plain errors affecting substantial rights may be considered in the

² In that appeal, we found the trial court abused its discretion in allowing Dr. Hampton to testify that she had no doubts about A.R.’s allegations and in allowing Stille to provide particularized expert testimony that commented on A.R.’s credibility. *Ferguson*, 568 S.W.3d at 546. In addition, we affirmed an evidentiary ruling by the trial court which is not relevant to this appeal. *Id.*

discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.” *See Speed*, 551 S.W.3d at 98 (citing *State v. Taylor*, 466 S.W.3d 521, 533 (Mo. banc 2015)).

Plain error review is a two-step process. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009). First, we must determine whether the claim of error “facially establishes substantial grounds for believing that ‘manifest injustice or miscarriage of justice has resulted.’” *Id.* (quoting *State v. Brown*, 902 S.W.2d 278, 284 (Mo. banc 1995)); *State v. McKay*, 459 S.W.3d 450, 455-56 (Mo. App. E.D. 2014); Rule 30.20. Not every prejudicial error, however, constitutes plain error, as plain errors are “evident, obvious, and clear.” *Id.* If the claim of plain error facially establishes grounds for believing that manifest injustice or a miscarriage of justice resulted, we may elect to exercise our discretion and proceed to the second step to consider whether or not a miscarriage of justice or manifest injustice will occur if the error is left uncorrected. *Id*; *State v. Smith*, 370 S.W.3d 891, 894 (Mo. App. E.D. 2012).

In general, the party seeking review of a constitutional issue must raise the issue at the earliest possible opportunity. *State v. Liberty*, 370 S.W.3d 537, 546 (Mo. banc 2012) (citing *State v. Wickizer*, 583 S.W.2d 519, 523 (Mo. banc 1979)). However, because the right to be free from double jeopardy is a “constitutional right that goes ‘to the very power of the State to bring the defendant into court to answer the charge brought against him,’ *id.* (quoting *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)), a double jeopardy violation that can be determined from the face of the record is entitled to plain error review even if the defendant failed to preserve the issue.” *Id.* (quoting *State v. Neher*, 213 S.W.3d 44, 48 (Mo. banc 2007)).

Discussion

In Point I, Ferguson claims the trial court plainly erred in denying his motion to dismiss the charges against him because it subjected him to double jeopardy. Again, Ferguson argues that because the State anticipated an acquittal, which would bar a retrial, the State intentionally sought to goad the defense into requesting a mistrial, which would not bar a second trial, by eliciting the improper testimony during the first trial of its two expert witnesses regarding the credibility of A.R. and by improperly attempting to elicit Mother's testimony that Ferguson had abused her.

"The double jeopardy clause of the fifth amendment of the U.S. Constitution protects a criminal defendant from repeated prosecutions for the same offense." *State v. Willers*, 785 S.W.2d 88, 90 (Mo. App. S.D. 1990). "Under the federal and Missouri constitutions, if a conviction is reversed as a result of trial error rather than insufficient evidence, double jeopardy principles do not bar the defendant's retrial."³ *Liberty*, 370 S.W.3d at 537. In the mistrial context, the "[c]ircumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). Ferguson has the burden to prove the State's intent. *Willers* 785 S.W.2d at 90.

In *State v. Barton*, 240 S.W.3d 693 (Mo. banc 2007), the defendant claimed double jeopardy barred his retrial because of prosecutorial misconduct in the first trial consisting of the

³ The Double Jeopardy Clause of the Missouri Constitution guarantees that no person shall "be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury." Mo. Const. art. 1, § 19.

failure to disclose a witness's criminal history and aliases, the failure to correct the witness's perjury, and the failure to disclose the witness's prior forgery charge. *Id.* at 700-701. The court found that a retrial of Barton for murder in the first degree was not barred on double jeopardy grounds. *Id.* at 702. After noting that the only evidence regarding the State's intent would be "an inference from the misconduct itself," the Court concluded that "the fact of prosecutor's misconduct alone does not prove his intent to prevent an acquittal, much less that he believed an acquittal was likely to occur, and his misconduct may just as well be attributed to poor judgement." *Id.* at 702.

Here, Ferguson has failed to show that the improper testimony by the State's expert witnesses, which resulted in Ferguson gaining a new trial after this Court overturned his original convictions, subjected him to double jeopardy. Like *Barton*, the only evidence in this case of the State's intent would be "an inference from the misconduct itself," which is insufficient. *Id.* And we note that no mistrial was even requested here. "[P]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Kennedy*, 456 U.S. at 675-676.

Likewise, Ferguson has failed to show that Mother's testimony that she had been physically abused was part of some nefarious plan on the part of the State to avoid the impact of the Double Jeopardy Clause. The defense, not the State, called Mother as its witness and elicited the subject of the testimony of which it now complains when it asked Mother why she did not let Ferguson see A.R. and A.R.'s sibling. Only then, during its cross-examination of Mother, did the State ask if she was scared for herself and A.R. in the event Ferguson posted bond and was released. The prosecutor then asked if Mother had twice gotten orders of protection against Ferguson for her

and A.R. but the court sustained defense counsel's objection to that testimony. We find that this record fails to demonstrate an intent on the part of the State to trigger a mistrial. Point denied.

II.

In Point II, Ferguson claims the trial court plainly erred in failing *sua sponte* to exclude Dr. Hampton's testimony that she told A.R. that Mother would believe A.R. about the sexual abuse because it invaded the province of the jury by improperly vouching for the credibility of A.R.'s statement.

"When determining the admissibility of opinion testimony, expert witnesses should not be allowed to give their opinion as to the veracity of another witness's statement, because in so doing, they invade the province of the jury." *State v. Churchill*, 98 S.W.3d 536, 538–39 (Mo. banc 2003).

In cases involving the sexual abuse of a child, there are typically two types of expert testimony that give rise to a challenge: general and particularized. General testimony describes a "generalization" of behaviors and other characteristics commonly found in those who have been the victims of sexual abuse. Particularized testimony is that testimony concerning a specific victim's credibility as to whether they have been abused. The trial court has broad discretion in admitting general testimony, but when particularized testimony is offered, it must be rejected because it usurps the decision-making function of the jury and, therefore, is inadmissible.

Id.

"*Sua sponte* action should be exercised only in exceptional circumstances." *State v. Drewel*, 835 S.W.2d 494, 498 (Mo. App. E.D. 1992). A choice to object or not object must be analyzed in the context of the entire trial record. *State v. D.W.N.*, 290 S.W.3d 814, 820 (Mo. App. W.D. 2009).

Ferguson relies on *State v. Williams*, 858 S.W.2d 796 (Mo. App. E.D. 1993). In *Williams*, an expert in child trauma testified that sexual abuse victims generally do not lie and

that the victim's spontaneous identification of the defendant as her abuser to a nurse demonstrated that it was in fact the defendant who sexually abused her. *Id.* at 800. This Court reversed under plain error review because the expert's testimony "manifestly prejudiced appellant by usurping the province of the jury." *Id.* at 801.

Williams is distinguishable from this case. First, unlike the expert in *Williams*, Dr. Hampton was not only an expert witness at trial, but she was also a key fact witness to A.R.'s disclosure. Moreover, the expert in *Williams* directly and specifically vouched for the victim's veracity while Dr. Hampton's statement to A.R. at the time of her disclosure of the abuse that Mother would believe her, helped the jury understand A.R.'s unwillingness to come forward since the defense had raised the issue of A.R.'s delayed disclosure. In addition, unlike Dr. Hampton's testimony, the expert in *Williams* gave general opinions about the tendencies of abuse victims and then particularized them to the victim herself which is improper under the foregoing mandates of *Churchhill*, 98 S.W.3d at 538–39. Thus, we find that Dr. Hampton's testimony in this regard did not invade the province of the jury. *Id.*

Moreover, the record indicates that the defense strategically withheld objection to the testimony to bolster its argument that A.R. fabricated the abuse allegations to earn her Mother's affection and support. A trial court does not plainly err when it fails to prohibit *sua sponte* the introduction of objectionable evidence when the totality of the circumstances reflects a clear indication that trial counsel strategically chose not to object to the evidence. *D.W.N.*, 290 S.W.3d at 825. Here, Ferguson's counsel employed Dr. Hampton's testimony during his cross-examination of forensic interviewer Stille and during closing argument to suggest that Dr. Hampton's words and actions motivated A.R. to fabricate Ferguson's crimes in order to receive Mother's affection and support.

Ferguson seeks to excuse his own use of Dr. Hampton's testimony with his reliance on *State v. Hollowell*, 643 S.W.3d 329 (Mo. banc 2022). There, the State elicited an arguably inadmissible hearsay statement during direct examination. *Id.* at 336. Defense counsel objected, but then later elicited the same testimony on cross-examination. *Id.* The Court held that defense counsel's decision to employ the same testimony during cross-examination of the same witness in an effort to "break the force" of the improper evidence, did not waive the earlier objection. *Id.*

But *Hollowell* is readily distinguishable because here Ferguson did not object to Dr. Hampton's testimony. Ferguson allowed Dr. Hampton's testimony, in our judgment strategically, and then used the testimony not to "break the force" against the same witness, but in cross-examination of a different witness and in closing argument in an effort to argue A.R. made up the abuse allegations against Ferguson. Simply put, we will not convict the trial court of plain error under these circumstances for failing to "assist counsel in the trial of a lawsuit" on a *sua sponte* basis. *Drewel*, 835 S.W.2d at 498. Point II is denied.

III.

In Point III, Ferguson argues, and the State concedes, that the trial court plainly erred in ordering Ferguson's two sentences for statutory sodomy to run consecutively based on its mistaken belief, a belief shared by the State and the defense, that the law required it to do so.⁴

This notion of the law was incorrect. Inasmuch as Ferguson's statutory sodomy crimes occurred between January 21, 2008 and January 20, 2013, the pre-August 28, 2013 version of section 558.026 applied to Fergusons' sentencing in this case and that statute gave the trial court

⁴ Before sentencing, the State and defense counsel assured the trial court that the applicable law required the statutory sodomy sentences to run consecutively. After sentencing, the court asked Ferguson if his counsel had explained to him that his statutory sodomy convictions "were mandated to have consecutive sentences."

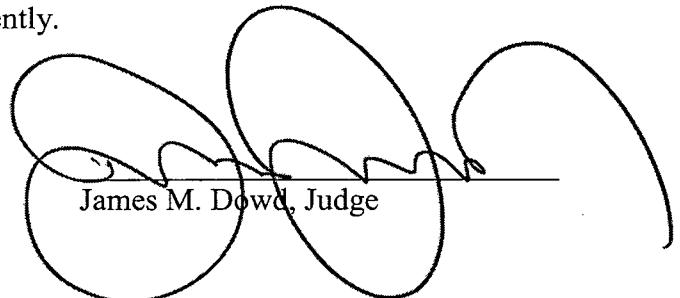
“maximum discretion” to decide whether to run the sentences for statutory sodomy consecutively or concurrently. *Williams v. State*, 800 S.W.2d 739, 739 (Mo. banc 1990). As amended, effective August 28, 2013, section 558.026 *required* consecutive sentences for statutory sodomy convictions.

“When the record demonstrates that the trial court imposed consecutive sentences instead of concurrent sentences based on a misunderstanding of the law, such conduct is plain error and the defendant is entitled to re-sentencing.” *State v. Elam*, 493 S.W.3d 38, 43 (Mo. App. S.D. 2016). We conclude therefore that the trial court’s misunderstanding of the law in this context constitutes plain error which requires that we remand for re-sentencing so that the trial court may exercise its discretion as mandated by section 558.026 for the limited purpose of deciding if the two statutory sodomy sentences should run concurrently or consecutively.⁵

Conclusion

Accordingly, Points I and II are denied. Point III is granted and the matter is reversed and remanded for re-sentencing for the limited purpose to decide whether to run the two statutory sodomy sentences consecutively or concurrently.

Thomas C. Clark, II, C.J., and
John P. Torbitzky, J. concur.



James M. Dowd, Judge

⁵ In this regard, we follow the decisions in *State v. Jones*, 534 S.W.2d 556, 558, (Mo. App. 1976) and *State v. McCollum*, 527 S.W.2d 710, 714 (Mo. App. 1975) which in similar circumstances limited the trial court’s decision on remand to solely whether the sentences imposed in the original sentencing should be ordered to run concurrently or consecutively.

(22)



IN THE ELEVENTH JUDICIAL CIRCUIT, STATE OF MISSOURI

Judge or Division: JON A. CUNNINGHAM DIV5		Case Number: 1611-CR00696-02 <input type="checkbox"/> Change of Venue County: _____	FILED OCT 04 2021 CIRCUIT CLERK ST. CHARLES COUNTY <small>(Date File Stamp)</small>
State of Missouri vs ORLANDO KIM FERGUSON		Prosecuting Attorney/MO Bar TIMOTHY A LOHMAR 48856 Defense Attorney/MO Bar MARK A HAMMER 61542	
DOB: 27-MAY-1986 SSN: XXX-XX-8586		Appeal Bond Set Date: Amount:	
<input type="checkbox"/> Pre-Sentence Assessment Report Ordered <input type="checkbox"/> Pre-Sentence Assessment Report Waived			

Judgment

Count No. 1 Charge Description: Stat Sodmy-1st-Dev Sex Intr W/Prs < 14-Ser Phy Inj/Dspl Deadly Weap/Dng Inst/Sbj Vlc Intr W/ Than One Per/Vic	Count No. 2 Charge Description: Stat Sodmy-1st-Dev Sex Intr W/Prs < 14-Ser Phy Inj/Dspl Deadly Weap/Dng Inst/Sbj Vlc Intr W/ Than One Per/Vic < 12	Count No. 3 Charge Description: Child Molestation - 1st Degree Charge Code: 566.067-003Y20003699.0 Statute: 566.067 Date of Offense: JANUARY 21, 2008
<input type="checkbox"/> Misdemeanor <input checked="" type="checkbox"/> Felony Class <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> Unclassified	<input type="checkbox"/> Misdemeanor <input checked="" type="checkbox"/> Felony Class <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> Unclassified	<input type="checkbox"/> Misdemeanor <input checked="" type="checkbox"/> Felony Class <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> Unclassified
On the above count, it is adjudged that the defendant has been: <input type="checkbox"/> Found Guilty upon a plea of guilty <input checked="" type="checkbox"/> Found Guilty by a jury/court <input type="checkbox"/> Dismissed/Nolle Pross/Found Not Guilty		
On the above count, it is adjudged that the defendant has been: <input type="checkbox"/> Found Guilty upon a plea of guilty <input checked="" type="checkbox"/> Found Guilty by a jury/court <input type="checkbox"/> Dismissed/Nolle Pross/Found Not Guilty		

The defendant has been found beyond a reasonable doubt to be a:

<input type="checkbox"/> Persistent Sexual Offender (566.125 RSMo)	<input type="checkbox"/> Predatory Sexual Offender (566.125 RSMo)
<input type="checkbox"/> Persistent Drug Offender (579.170 RSMo)	<input type="checkbox"/> Prior Drug Offender (579.170 RSMo)
<input type="checkbox"/> Persistent Misdemeanor Offender (558.016 RSMo)	<input type="checkbox"/> Dangerous Offender (558.016 RSMo)
<input type="checkbox"/> Persistent Offender (558.016 RSMo)	<input type="checkbox"/> Prior Offender (558.016 RSMo)
<input type="checkbox"/> Persistent Assault Offender (565.079 RSMo)	<input type="checkbox"/> Prior Assault Offender (565.079 RSMo)
<input type="checkbox"/> Persistent Offender (Intoxication-related Traffic Offense) (577.001 RSMo)	<input type="checkbox"/> Prior Offender (Intoxication-related Traffic Offense) (577.001 RSMo)
<input type="checkbox"/> Aggravated Offender (577.001 RSMo)	<input type="checkbox"/> Aggravated Boating Offender (577.001 RSMo)
<input type="checkbox"/> Chronic Offender (577.001 RSMo)	<input type="checkbox"/> Chronic Boating Offender (577.001 RSMo)
<input type="checkbox"/> Habitual Offender (577.001 RSMo)	<input type="checkbox"/> Habitual Boating Offender (577.001 RSMo)

 Not Applicable

on OCTOBER 4, 2021

The Court:

Informs the defendant of verdict/finding, asks the defendant whether he/she has anything to say why judgment should not be pronounced, and finds that no sufficient cause to the contrary has been shown or appears to the court.

Defendant has been advised of his/her rights to file a motion for post-conviction relief pursuant to Rule 24.035/29.15 and the court has found

Probable cause No probable cause
to believe that defendant has received ineffective assistance of counsel.

Finds the defendant has pled or been found guilty of a dangerous felony, as defined in section 556.061, RSMo, and if committed to the Department of Corrections, must serve at least 85% of the sentence.

Finds the defendant has pled or been found guilty of an offense for which probation and parole are not authorized.

Finds the defendant has pled or been found guilty of an offense that is subject to lifetime supervision pursuant to section 217.735 or 559.106, RSMo, and defendant must be supervised by Missouri Board of Probation and Parole for the duration of natural life, unless terminated after offender reaches age 65 or older.

Finds the defendant has pled or been found guilty of an offense that is subject to an extended term of imprisonment.

On count 1, the Court:

Suspends imposition of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.

Sentences and commits the defendant to the custody of MDOC for a period of 10 YEARS. Sentence to be served
 Concurrent Consecutive with COUNT II

Suspends execution of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.

Fines the defendant \$. The court stays \$ _____ with the remainder due by _____ (date).

On count 2, the Court:

Suspends imposition of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.

Sentences and commits the defendant to the custody of MDOC for a period of 10 YEARS. Sentence to be served
 Concurrent Consecutive with COUNT I

Suspends execution of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.

Fines the defendant \$. The court stays \$ _____ with the remainder due by _____ (date).

Appendix - B

On count 3, the Court:

Suspends imposition of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.

Sentences and commits the defendant to the custody of MDOC for a period of 5 YEARS. Sentence to be served
 Concurrent Consecutive with COUNTS I AND II

Suspends execution of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.

Fines the defendant \$. The court stays \$ _____ with the remainder due by _____ (date).

The Court orders:

The clerk to deliver a certified copy of the judgment and commitment to the sheriff.

Clerk to send certified copy of the judgment or order to Children's Division and prosecuting attorney. Children's Division shall list the individual as a perpetrator of child abuse or neglect in the central registry.

The sheriff to authorize one additional officer/guard to transport defendant to the Department of Corrections.

That judgment is entered in favor of the state of Missouri and against the defendant for the crime victims compensation fund for the sum of
 \$10.00 \$46.00 \$68.00
 Satisfied Unsatisfied

Judgment for the State of Missouri and against the defendant for appointed counsel services in the sum of \$ _____
 Satisfied Unsatisfied

Judgment for restitution in the sum of \$ _____
 Satisfied Unsatisfied

Costs taxed against

Costs waived.

Defendant to report immediately to the MDOC -ST CHARLES COUNTY JAIL for fingerprinting. The Defendant is ordered to submit to the fingerprinting, and is further ordered to provide all information necessary for the officer taking the fingerprints to fully complete all identification and photograph portions of the standard fingerprint cards.

Defendant to register as a sex offender with the chief law enforcement official of the county or city not within a county in which he/she resides within three (3) days of conviction, release from incarceration, or placement on probation.

§217.362 RSMo Court Ordered Long-Term Substance Abuse Program

§559.115.2 RSMo General Population Department of Corrections shall provide a report and recommendation whether probation should be granted.

The court recommends placement into a Department of Corrections 120-day program pursuant to §559.115:

Institutional Treatment Program (§559.115.3) Department of Corrections shall provide a report and may provide recommendations whether probation should be granted 30 days prior to the probationary release date.
 (Statutory Discharge)

Shock Incarceration Program (§559.115.3) Department of Corrections shall provide a report and may provide recommendations whether probation should be granted 30 days prior to the probationary release date.
 (Statutory Discharge)

Sexual Offender Assessment (§559.115.5) (Mandatory if the Defendant has pled guilty or been found guilty of sexual abuse, class B felony.) Upon completion of the assessment, Department of Corrections shall provide a report and may provide recommendations whether probation should be granted.

§217.785 RSMo Non-Institutional Post Conviction Drug Treatment Program
 §217.785, RSMo Institutional Post Conviction Drug Treatment Program
 Pursuant to RSMo § 558.019 and County Ordinance 16-106 Defendant is assessed a county law enforcement restitution fund judgement of \$ _____ (Not to exceed \$100.00).

The court further orders:

DEFENDANT TO RECEIVE ALL CREDIT FOR TIME SERVED WHILE WAITING TO GO TO TRIAL IN THE ST CHARLES COUNTY JAIL. CREDIT FOR TIME SERVED IN THE MDOC, IF ANY.
 All costs associated to the electronic monitoring shall be charged to the defendant.
 Defendant is unable to afford the costs associated with electronic monitoring. All costs associated with electronic monitoring will be paid by the county commission.

So Ordered:

OCTOBER 4, 2021



JON A. CUNNINGHAM 30398
 10-04-21

I certify that the above is a true copy of the original Judgment and Sentence of the court in the above cause, as it appears on record in my office.

(seal)

Issued on 10/4/21
 Date



B. Whitehead
 Clerk

Supreme Court of Missouri
en banc

MANDATE

SC100327
ED110037

September Session, 2023

State of Missouri,
Respondent,
vs. (TRANSFER)

Orlando Kim Ferguson II,
Appellant.

FILED
DEC 19 2023
LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Now at this day, on consideration of Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 2023, and on the 19th day of December, 2023, in the above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 19th day of December, 2023.



Betsy AuBuchon, Clerk

Christina L. Dunn, Deputy Clerk

Appendix C-1

CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been served e-filed upon the relevant parties on March 7, 2021.

/s/ Mark A. Hammer

Mark A. Hammer

IN THE 11th JUDICIAL CIRCUIT
STATE OF MISSOURI

STATE OF MISSOURI }
PLAINTIFF }
V. } CAUSE NO. 1611-CR00696-02
ORLANDO FERGUSON } DIVISION NO. 5
DEFENDANT }

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

On April 26, 2021, the court heard arguments from the attorneys regarding Defendant's Motion to Dismiss. The matter was taken under advisement.

The Court now denies the motion.

On August 7, 2021, Defendant was charged by Third Substitute Information in Lieu of Indictment with two counts of Statutory Sodomy First degree, unclassified felonies, and one count of Child Molestation in the First Degree, a Class B Felony.

Prior to trial, the Court granted Defendant's *motion in limine* to exclude any testimony relating to uncharged acts of domestic violence alleged to have been committed by the defendant. The trial commenced on August 15, 2017.

During the trial, school counselor Dr. Anita Hampton testified, over Defendant's objection, that she had "no doubt at all" about what Victim had told her or whether "this had actually happened to her."

Appendix - E

FILED

MAY 04 2021

CIRCUIT CLERK
ST. CHARLES COUNTY

B. Retrial is barred because prosecutorial misconduct was committed for the explicit purpose to avoid acquittal, subverting the protections afforded by the Double Jeopardy Clause.

In *State v. Barton*, the Missouri Supreme Court contemplated an extension of *Oregon v. Kennedy* precluding retrial of a defendant in the absence of a mistrial. 240 S.W.3d 693, 701 (Mo. 2007). In *Barton*, after the defendant's trial and conviction, it was discovered that the prosecutor had failed to disclose impeachment evidence regarding a jailhouse informant's criminal history. *Id.* The Court reasoned that, although the prosecutorial misconduct warranted a new trial, it did not necessarily follow that the prosecutor engaged in this misconduct for the purpose of avoiding an acquittal or that he believed at the time of the misconduct that an acquittal was forthcoming. *Id.* at 702. The Court held that retrial was not barred because the defendant had not met their burden of showing that the prosecutorial misconduct was motivated by the State's intention of avoiding an acquittal. *Id.* Additionally, the Court noted that even without the prosecutorial misconduct there was ample evidence of the defendant's guilt, including DNA evidence, so the prosecutor would have likely been confident of a conviction. *Id.*

Defendant incorporates the facts and argument from section II.A., *supra*. Unlike *Barton*, there was no evidence of Defendant's guilt except for the testimony of the alleged victim. As stated, the Court of Appeals recognized that the jury's verdict "hinged" on the testimony of the alleged victim and the jury's assessment of her credibility. There was no forensic or other direct or circumstantial evidence linking Defendant in any manner to the crimes for which he was charged. Anderson is a highly experienced trial attorney with almost two decades of experience practicing law. With no extrinsic evidence and the late report of a 10-year-old regarding an event that happened perhaps earlier than real memory would allow, Anderson called a school counselor, a forensic interviewer, and a friend of the alleged victim, who repeated the child's hearsay statements. These cases are tough, they are compelling, and they are emotional. But

that is no excuse to use a wealth of trial experience to avoid an acquittal at any cost. The battlefield has rules, and they are there to protect the rights of the accused. There is no jury instruction concerning the rights of the victim and conviction cannot be pursued at any cost. Anderson knew that eliciting improper bolstering testimony from two witnesses was unacceptable. She knew that an order *in limine* forbade her reference to an alleged domestic assault. And she knew that she left the jury with the impression that *everyone believed that child and so the jury should believe her too*. The intent is objectively clear. With Anderson's vast experience litigating cases of this nature her actions can only be explained as willful and targeted for the purpose of avoiding acquittal.

CONCLUSION

For the reasons stated above the Defendant respectfully requests this Court to dismiss the indictment. A retrial of this matter would violate Defendant's right against double jeopardy.

Respectfully submitted,

/s/ Mark A. Hammer

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During the trial, forensic interviewer Michelle Stille testified that Victim's interview "was pretty consistent" and that these responses are fairly typical of kids that tend to not be suggestible."

During the trial, Victim's mother testified, over defendant's objection, that she sometimes kept the children "because [she] was physically abused".

Defendant's counsel sought a mistrial, explaining that the solicited testimony was extremely prejudicial and specifically violated the Court's order *in limine* to exclude any testimony relating to uncharged acts of domestic violence. The Court denied the motion for mistrial but instructed the Victim's mother to not discuss any allegations of domestic abuse any further during her testimony.

At the close of evidence on August 18, 2017, the jury returned verdicts of *Guilty* on Counts I, II, and 3.

On August 28, 2017, the defendant filed a *Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative for a New Trial*. Defendant argued in his motion that the trial court erroneously admitted vouching testimony of Dr. Hampton and Stille, and erroneously admitted prejudicial testimony of Victim's mother that Defendant physically abused her and allowed Victim's sibling to watch *50 Shades of Grey*. The Court denied the motion.

On August 18, 2017, the Court sentenced Defendant to 18 years of imprisonment on each statutory sodomy in the first degree count and 15 years of imprisonment on the child molestation in the first degree count. All sentences were ordered to run concurrently.

On March 22, 2019, the Missouri Court of Appeals for the Eastern District of Missouri reversed the trial court's ruling, concluding that the trial court abused its discretion in allowing the two state's witnesses to vouch for the credibility of the victim, and ordered that the case be "remanded for further proceedings consistent with this opinion." *State v. Orlando Ferguson*, 568 S.W.3d 533, 541, 545 (Mo.App. 2019). The appellate court stated that in lieu of its decision to reverse on vouching grounds, it did not need to reach the question of whether the victim's mother's testimony during cross-examination about domestic violence also constituted reversible error. *Id.* At 545.

On appeal, defendant did not raise the issue raised in this Motion to Dismiss regarding a request to dismiss the case on double jeopardy grounds due to prosecutorial misconduct.

The Defendant has filed this motion to dismiss based upon the arguments that retrial is barred because the prosecutor deliberately engaged in misconduct to ~~quad~~ Defendant to move for a mistrial in violation of the Double Jeopardy Clause and that retrial is barred because prosecutorial misconduct was committed for the explicit purpose to avoid acquittal in violation of the protections afforded by the Double Jeopardy Clause.

At the hearing on the motion, the Court heard arguments from defense attorneys Mark Wayman and Mark Hammer, and the prosecutor, Larry Chrum. Jillian Anderson, the prosecutor at trial, was not at the hearing. Ms. Anderson is no longer employed by the St. Charles County Prosecutor's Office. She is now a U.S. Attorney. There is nothing in the record to indicate that Ms. Anderson had the

motive in asking the questions cited by the Defendant in this motion to goad defense counsel into requesting a mistrial or that she had the purpose, in asking these questions, to avoid an acquittal.

The Court finds that the Motion to Dismiss is denied. The Court finds that the Defendant failed to meet their burden to prove that Ms. Anderson's questions, which defendant cited in this motion, constituted prosecutorial misconduct designed to goad Defendant into moving for a mistrial. *State v. Simon*, 524 S.W.3d 163, 169 (Mo.App. 2017). Further, the Court finds that Defendant failed to meet their burden to show that these same questions by Ms. Anderson were asked for the purpose to avoid an acquittal.

The appropriate remedy in this case is the remedy that the Court of Appeals ordered; reversal of the convictions and remanding the case to this court for further proceedings. The case remains set for jury trial.

So Ordered,


Tom A. Cunningham
Circuit Judge, Div. 5
5-04-21

cc: all attorneys of record by e-filing

IN THE ELEVENTH JUDICIAL CIRCUIT
STATE OF MISSOURI

STATE OF MISSOURI,)
vs.) CAUSE NO. 1611-CR00696-02
ORLANDO KIM FERGUSON II)
) DIVISION NO. 5

MEMORANDUM OF LAW IN SUPPORT OF THE STATE'S INTRODUCTION OF
EVIDENCE OF THE CONTEXT OF THE RELATIONSHIP BETWEEN THE
VICTIM AND THE DEFENDANT

Comes now, the State of Missouri, by and through Assistant Prosecuting Attorney Casey M. Brooks, and hereby gives notice to the defendant that the state intends to offer as substantive evidence of the context of the relationship between the defendant and the victim, specifically: 1) physical abuse perpetrated by the defendant against the victim's mother and 2) uncharged sexual abuse perpetrated on the charged victim by the Defendant, for the purpose of showing why the victim delayed in reporting the incident, and also the Defendant's sexual desire towards the victim.

The State offers the following case law in support of this proposition:

As a general rule, evidence of uncharged misconduct is inadmissible to show that the defendant has a propensity to commit such acts. *State v. Bernard*, 849 S.W.2d. 10, 13 (Mo.

Appendix - E



SCANNED

In the Missouri Court of Appeals Eastern District

STATE OF MISSOURI,)
)
RESPONDENT,) No. ED110037
)
vs.)
)
ORLANDO KIM FERGUSON II,)
)
APPELLANT.)

ORDER

Appellant's Motion for Rehearing and/or Application for Transfer to Missouri Supreme Court is denied.

SO ORDERED.

DATED: OCT 30 2023

McClaske

Chief Judge
Missouri Court of Appeals Eastern District

RR