

IN THE CIRCUIT COURT OF LINCOLN COUNTY  
STATE OF MISSOURI

STATE OF MISSOURI, )  
)  
Plaintiff, )  
) Cause No. 12L6-CR001312  
vs. )  
) Division: 1  
RUSSELL SCOTT FARIA, )  
)  
Defendant. )

**DEFENDANT'S MOTION FOR JUDGEMENT OF ACQUITTAL  
NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE,  
MOTION FOR NEW TRIAL**

COMES NOW Defendant, Russell Faria, by and through counsel, pursuant to Missouri Supreme Court Rules 27.07 and 29.11 and moves this Court to enter an order setting aside the verdict entered, or in the alternative, to grant the Defendant a new trial. In support thereof, Defendant submits the following combined motion and memorandum.

**I. The Court Erred in Denying Defendant's Motions for Acquittal, and the Evidence Was Insufficient to Sustain a Guilty Verdict**

The evidence presented in no way established Defendant's culpability for the crimes for which he was accused. Despite the State's arguments at closing, the inappropriateness of which will be discussed in depth below, the evidence did not establish that Defendant was at his home or in the area during the time which the crime occurred, much less that he personally committed the crime. The only possible way for the evidence to support a conviction is for every inference to be taken against Defendant, and for the State to provide additional, unproven, facts during closing.

The trial court erred to the prejudice of the Defendant by denying Defendant's Motion for Judgment of Acquittal at the Close of the State's Case because the State failed to present evidence sufficient to support a verdict of guilty. The trial court's ruling denied Defendant's right to equal protection, due process, and a fair and impartial jury as guaranteed by the Fifth, Fourteenth and Sixth Amendments of the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution.

Similarly, the trial court erred to the prejudice of the defendant by denying Defendant's Motions for Judgment of Acquittal at the Close of All the Evidence in that the State failed to establish every element of the charge, and failed to establish a submissible case for the jury. The trial court's ruling denied Defendant's right to equal protection, due process, and a fair and impartial jury as guaranteed by the Fourteenth and Sixth Amendments of the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution.

## II. The Court Erred in Denying Defendant's Motion for Frye Hearing Regarding "Cadaveric Spasm"

The Court erred to Defendant's prejudice when it denied Defendant's *Motion for Frye Hearing and Motion to Exclude*. Prior to trial, Defendant moved the court to conduct a *Frye* hearing on the issue of "cadaveric spasm," a medical phenomenon that defense counsel anticipated, correctly, the State would attempt to introduce testimony of. In the alternative, Defendant moved the court exclude any testimony regarding "cadaveric spasm," as no evidence and been provided (nor was any introduced at trial) that would indicate it had occurred in this matter. In the alternative, Defendant requested a *Frye* hearing to determine how the phenomenon was identified here, and if the identification comported accepted methods used by the relevant scientific community.

Missouri courts evaluate the admissibility of evidence by applying a "two-tier" analysis for relevance, evaluating logical and legal relevance. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002); *State v. Smith*, 32 S.W.3d 532, 546 (Mo. banc 2000). Evidence is logically relevant "if it tends to make the existence of a material fact more or less probable." *Anderson*, 76 S.W.3d at 276. Logically relevant evidence is "admissible only if legally relevant," an analysis which "weighs the probative value of the evidence against its costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id.* See also *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992). Logically relevant evidence "is excluded if its costs outweigh its benefits." *Anderson*, 76 S.W.3d at 276.

No evidence was presented at trial that cadaveric spasm occurred in this case. No evidence was presented at trial that tests were performed to determine if cadaveric spasm occurred. And in fact, no evidence of either issue was available. Had there been a *Frye* hearing, the evidence would have been that there is no way to diagnose the condition. As such, the denial of the motion was error. Further, the Court based the denial on the timing of the motion in limine, immediately prior to trial. However, there is no rule of procedure or statute that specifies when a motion in limine can be filed. The issue of cadaveric spasm was nothing more than a red herring, was confusing to the jury was totally irrelevant, prejudiced Defendant, and violated Defendant's rights under Article I, Sections 10 and 18(a) of the Missouri Constitution, and the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

## III. The Court Erred in Permitting the Testimony of Lee Lester

The Court erred to the prejudice of Defendant when it permitted the State to call Lee Lester as a witness. Prior to opening arguments, defense counsel moved to have all witnesses excluded from the courtroom prior to the witness' release. *State v. Tracy*, 918 S.W.2d 847 (Mo. Ct. App. 1996). Nonetheless, Mr. Lester (who was endorsed as a witness less than a week prior to trial) was permitted to observe in the courtroom for an unknown before being called. When it became clear to defense counsel that Mr. Lester had been present in the courtroom, defense counsel objected to his being permitted to testify. The Court denied the objection, thus prejudicing Defendant and violating Defendant's rights under Article I, Sections 10 and 18(a) of the Missouri Constitution, and the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

## IV. The Court Erred in Permitting Margie Harrell's Testimony

During the State's case in chief, the State called Margie Harrell of the Lincoln County 911 Center. Ms. Harrell testified as the provenance of the 911 call Defendant made on December 27, 2011, which was then admitted into evidence. All testimony after this point was inappropriate speculation, indicates a discovery violation, should have been the subject of a *Frye* hearing and invaded the province of the jury. As such, the testimony violated Defendant's rights under Article I, Sections 10 and 18(a) of the Missouri Constitution, and the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

*A. Ms. Harrell's Testimony Included Significant Improper Speculation*

On direct examination, the State asked Ms. Harrell if, based on her experience as a 911 operator and supervisor, there was anything odd about the 911 call. Defense counsel objected on the grounds that the question called for speculation. The Court overruled the objection, and Ms. Harrell was not only permitted to testify as to the "normal" behavior of panicking or hysterical individuals, but that Defendant was not exhibiting those traits. To the extent that she provided specific testimony about Defendant, Ms. Harrell was providing nothing but speculation as to Defendant's state of mind.

*B. The State's Questioning, and Ms. Harrell's Responses, Indicate that State had relevant information that was not disclosed*

While the State did not formally qualify Ms. Harrell as an expert witness, she was asked to speculate based on her experience as a 911 operator. Prior to trial, Defendant submitted his Request for Discovery, which included the following language:

"Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons[.]"

The State, undoubtedly, had discussed this line of questioning with Ms. Harrell prior to trial, and was prepared to question Ms. Harrell. The State never disclosed Ms. Harrell's opinions, statements, or the State's intention, and therefore violated Supreme Court Rule 25 as pertains to discoverable material.

*C. Ms. Harrell's Testimony Should have Been Subject to a Frye Hearing*

Had the State properly disclosed Ms. Harrell's pre-trial statements, Defendant would have deposed her to more fully examine her experience, training, and opinion. Had the State properly disclosed their intent to question Ms. Harrell as whether or not Defendant's statements and behavior over the course of the 911 call were appropriate, defense counsel would have requested she be subject to a *Frye* hearing. Ms. Harrell did not simply testify as to the conduct of hysterical or panicking individuals making 911 calls, Ms. Harrell specifically testified that Defendant's behavior was not in accordance with that conduct. Such testimony should have been subject to a *Frye* hearing, outside the presence of a jury, to determine if Ms. Harrell used techniques generally accepted by the relevant community to arrive at her opinion.

*D. Ms. Harrell's Testimony Invaded the Province of the Jury*

Whether Ms. Harrell was an undisclosed expert or a lay witness, her regarding her evaluation of Defendant's 911 improperly invaded the province of the jury. The testimony of lay witnesses

must generally be restricted to statements of fact, rather than opinions or conclusions. *State v. Boyd*, 706 S.W.2d 461, 465 (Mo. App. E.D.1986). It is also not proper for a lay witness to state a conclusion concerning the ultimate issue for the jury, or to give an opinion as to another person's real or actual state of mind. *State v. Raine*, 829 S.W.2d 506, 510 (Mo. App. W.D. 1992). To the extent that Ms. Harrell was an undisclosed and improperly vetted expert, her general and specific opinions improperly invaded the province of the jury; both represent nothing more than the opinions as the credibility of Defendant's statements during the 911 call. Admission of such was improper. *See State v. Wright*, 247 S.W.3d 161, 165 to 168 (Mo. Ct. App. S.D. 2008) (Defendant's attempt to have an expert testify as to how police interrogations lead to false confessions was improper, and expert would facially not have been able to testify as whether defendant's confession).

Regardless of the capacity in which Ms. Harrell testified, she should not have been permitted to voice an opinion as to the appropriateness of Defendant's 911 call.

#### **V. The Court Erred in Granting the State's Objection to Defense Cross-Examine of Michael Lang**

During the State's case in chief, the State called Michael Lang of the Lincoln County Sheriff's Office, the State introduced evidence of Defendant's text messages and calls on the evening of December 27, 2011. Mr. Lang testified that he had reviewed the text messages and called. Defense counsel asked Mr. Lang if there were any gaps in the conversation recorded by text message, based on his review. The State objected on the grounds that the question called for speculation. The Court erred to Defendant's prejudice when it sustained the objection, especially in comparison to the Court's ruling with regards to Defendant's (overruled) objection to similar testimony by Margie Harrell, and violated Defendant's right to cross-examine the State's witness.

#### **VI. The Court Erred in Denying Defendant's Motion for a Bill of Particulars**

Prior to trial, Defendant filed a Motion for Bill of Particulars, requesting that the State specify what time the crime occurred. At hearing, for that motion counsel for the State stated that they would be unable to provide a specific time or specific theory of how Defendant allegedly committed the crime. As this Court phrased it, requiring the State to specify their theory of how the crime was committed would require them to "guess." The Court ultimately denied the motion.

A bill of particulars is to enable the accused to prepare for trial, prevent surprise, and restrict the stat to matters set forth in the bill. *State v. Hoover*, 220 S.W.3d 395 (Mo. Ct. App. 2007). The Court's denial of Defendant's Motion for a Bill of Particulars allowed the State to obscure their allegations, and to obscure their lack of facts. Because the State was not required to conform their evidence and argument to a set of specific allegations, the State filled in the whole in their case during closing.

This is doubly important, based on the nature of Defendant's alibi defense. The verdict directors submitted to the jury provided a best guess as to the time that the State would argue that the crime occurred, the alibi instruction covered the same period. A best guess was necessary, because the State had not established a definitive time of death or theory of guilt at the close of all evidence. During closing argument, the State indicated that she "believed" an additional

series of facts occurred. These were not facts that the State proved during the evidence phase of the trial.

Had the court granted Defendant's Motion for a Bill of Particulars, the State would not have been able to improperly argue the existence of imaginary facts at closing. The Court's ruling denied defendant's right to equal protection, due process, and a fair and impartial jury as guaranteed by the Fourteenth and Sixth Amendments of the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution

## **VII. The Court Erred in Denying Defendant's Request For a Mistrial**

During trial, the Court erred in refusing to grant a mistrial at the following incidents, thus denying Defendant right to equal protection, due process, and a fair and impartial jury as guaranteed by the Fourteenth and Sixth Amendments of the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution

1. During opening arguments, counsel for the State stated to the jury that this was a case about "greed" and that Ms. Faria had a number of insurance policies, and that the policies had been changed. This matter had been the subject of repeated motions in limine, and the Court's final holding on the matter stated discussions of the insurance policies would only serve to confuse the jury. Defense counsel objected and requested a mistrial, which the Court denied.
2. During the State's case in chief, the State called Officer Floyd, who testified that on January 4, 2013, he visited the Faria home and applied a solution of Bluestar/Luminol to various surfaces of the home with a positive result. Officer Floyd referred to his report in his testimony, no such report was ever provided to Defendant. Defense counsel has never received said report. Defense counsel objected on the grounds that the material had not been disclosed, requested a mistrial, and said request was denied.
3. During cross-examination, counsel for the State enquired of Defendant's alibi witnesses if they had refused to submit to a polygraph examination when interviewed by the police in December, 2011. This is both a misstatement of fact, as no police report reflects any such comment, and evidence regarding polygraphs are generally are inadmissible in Missouri criminal trials. *State v. Biddle*, 599 S.W.2d 182, 185 (Mo. banc 1980). Nor could this question be portrayed as inadvertent or inconsequential. The State's allegation was that Defendant's alibi witnesses were being untruthful in their testimony. The State had no legitimate purpose when it asked the witness if they had refused to take an alibi except to suggest to the jury that the witness was lying. Evidence regarding whether a polygraph examination was or was not taken is inadmissible, including for witnesses. *See State v. Woods*, 639 S.W.2d 818 (Mo. 1982). The State broached that subject, despite knowing of the inadmissibility, with no purpose other than to impeach the witness. Defense counsel objected and requested a mistrial; the request was denied.

## **VIII. The Court Erred in Permitting Testimony of Defendant's Prior Bad Acts**

Over defense counsel's objection, the state was permitted to call certain witnesses who testified that at some indeterminate point in years past, Defendant had directed foul language at his daughters, thrown a tantrum, and made some ill-considered statement. They were prior "bad" acts, in the loosest sense, but were years past and fell in to no recognized or cognizable exception to the general rule that prior uncharged misconduct is inadmissible at trial. Because no recognized exception applied, said evidence was neither legally nor logically relevant. *See State v. Roberts*, 948 S.W.2d 577, 591 (Mo. 1997) (listing the recognized exceptions, and stating that the exceptions represent a finding that the evidence is logically and legally relevant).

### **IX. The Court Erred in Granting the State's Motion in Limine Concerning the Possible Defense that Someone Else Committed this Crime**

Prior to trial, the State submitted a Motion in Limine requesting that the defense be ordered "not to bring to the attention of the jury in any way, whether in voir dire, opening statement, questioning of witnesses, or closing argument, that other could be responsible for victims death due to their motive or opportunity to commit the crime[.]" The Court granted the motion, as well as denying Defendant's Motion to Reconsider. The trial court's ruling denied Defendant's right to equal protection, due process, and a fair and impartial jury as guaranteed by the Fifth, Fourteenth and Sixth Amendments of the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution.

#### *A. Evidence the Defendant was Prevented from Presenting*

Absent the State's motion, Defendant would have presented the following evidence, via a combination of cross-examination and during his case in chief:

The week prior to her death, Ms. Faria stated to two friends that she was prepared to pass away, and that she had made plans for the care of her husband and children, via life insurance. One of those friends would further testify that the week prior to her death, Ms. Faria and the friend had been on vacation in Branson, MO, staying at Ms. Faria's timeshare. That friend and Ms. Faria left early, because Ms. Faria felt that she had to meet with Pamela Hupp. The friend would testify that Ms. Faria expressed some concern about meeting with Pamela Hupp.

It is impossible to state with accuracy Ms. Hupp's interactions with Ms. Faria, because Ms. Hupp has been consistently inconsistent in describing the last few meetings the two had. At some point on Friday, December 23, 2011, Ms. Hupp met with Ms. Faria. Ms. Hupp's has alternatively stated that it was a planned meeting and that it was spontaneous. Ms. Hupp has stated the Ms. Faria set up the meeting with the intent of making Ms. Hupp the beneficiary of her life insurance policy, but she has also stated that Ms. Faria expressed the idea for the first time on December 23, 2011. Ms. Hupp has, at various times, described going to the Winghaven Library to check out a book, to attempt to print documentation, and specifically to have the change of beneficiary form witnessed. Ms. Hupp has stated that the form was notarized, but on other occasions, that it was only witnessed (it was not notarized).

On December 28, 2011, Ms. Hupp told Major Case Squad officers that she had no idea if Ms. Faria mailed the form, and that Ms. Faria wanted Ms. Hupp to be the beneficiary to make sure that the money was available to Ms. Faria's daughters and mother. In January, 2012, Ms.

Hupp told employees of State Farm Insurance that she went with Ms. Faria to the post office to mail the form, and that Ms. Faria wanted her to have the money

On December 27, 2011, Ms. Hupp asked Ms. Faria if she should join Ms. Faria at her doctor's appointment. Ms. Faria said no, specifically stating that Ms. Faria wished to spend "one on one time" with another friend. Nonetheless, Ms. Hupp first attempted to intercept Ms. Faria prior to the doctor's appointment, and then went to the appointment regardless of Ms. Faria's wishes. Ms. Hupp stated that Ms. Faria wanted her to take Ms. Faria home to Troy that evening.

Later, Ms. Hupp returned Ms. Faria to 130 Sumac in Troy, arriving at after 7:00 PM. At 7:04 PM Ms. Hupp called her husband, and Ms. Faria allegedly got on the line to wish Mr. Hupp a Merry Christmas. The night of December 27, 2011, Ms. Hupp told Ms. Faria's mother that she dropped Ms. Faria off at home, but did not go into the house. On December 28, 2011, Ms. Hupp told police officers that she had not gone into the home, and then stated she had gone into the house, specifically, the living room and bed room. Ms. Hupp stated that she requested the Faria's dog be put outside.

Ms. Hupp told the officers that when she left, Ms. Faria was curled up on the couch. She has subsequently amended that story, and stated that she last saw Ms. Faria waving from the front door. Ms. Hupp, again, has never consistently said what time she left the 130 Sumac. She has stated that after arriving, she spent anywhere from 15 to 45 minutes in the home; e.g. leaving between 7:20 and 7:50.

At 7:27 PM she made a phone call to Ms. Faria's cell phone. On December 28, 2011, Ms. Hupp told police officers that she had made the call when she was at her home or near her home in O'Fallon. She was repeatedly and specifically questioned by the officers as to this point, and explicitly stated that she made the call was made at or near her home in O'Fallon..

Cellular records clearly indicate that when this call was made, Ms. Hupp's cell phone was somewhere in the vicinity of the Faria household; more specifically, cellular records unequivocally show that as of 7:27, Ms. Hupp's phone, and thus, Ms. Hupp, had not and could not have arrived in Troy.

The next morning, Ms. Hupp was met by officers of the Major Case Squad. She initially stated that she was driving her Nissan Sentra, and then stated she did not own a Nissan Sentra and was driving her Honda Accord. At one point during the interview, Ms. Hupp tells her brother that something happened to her friend "last night." An hour later, she later asks the officers if something happened to Ms. Faria this morning.

This rendition should not be construed to list all of the inconsistencies in Pamela Hupp's statements. It merely highlights the most glaring changes that Ms. Hupp has made and that Defendant was prevented from demonstrating at trial.

#### *B. The Order Erroneously Relied on the "Direct Connection Rule"*

The State's Motion In Limine, and the Court's order, invoked the so called "Direct Connection Rule." The Direct Connection Rule states that a defendant must establish a direct connection between the crime for which she is accused and a third party, before presenting evidence of that the third party's motive or opportunity to commit the crime.

It has been and continues to be Defendant's position that the "direct connection" was established by Ms. Hupp's prior inconsistent statements and cellular location data, as well as the presence of some third person's DNA under Ms. Faria's fingernail. But, more importantly, the direct connection rule was not at issue. Every case of record in which an appellate court has analyzed the direct connection rule has dealt with a third party who was not called as a witness;

instead, the defendant in these cases sought to present evidence of a third party who was neither charged, nor testified.

Here, Ms. Hupp was a State's witness. As the Missouri Supreme Court held two years ago:

In criminal cases, interest is shown by evidence that the witness has a stake in the outcome of a criminal proceeding. It is well-established that the interest of a witness is never irrelevant. Consequently, cross-examination about any issue is permissible if it shows the bias or interest of the witness "because a witness's bias or interest could affect the reliability of the witness's testimony on any issue." Although the trial court has discretion in limiting the scope and extent of cross-examination bearing on the witness's bias or interest, the court cannot bar cross-examination into that subject completely... [I]t is reversible error for a trial court to refuse to allow cross-examination of a prosecution witness suspected of committing the crime for which the defendant is on trial regarding the witness' motive for testifying against the defendant. *State v. Winfrey*, 337 S.W.3d 1, 7-9 (Mo. 2011) (internal Citations omitted).

This Court acknowledged as much after the pertinent witnesses had taken the stand, when the Court stated on the record that Defendant should have been permitted to enquire into prior inconsistent statements of Pamela Hupp. The Court noted that defense counsel was able to address some of those prior inconsistent statements; but the inconsistencies that defense counsel was able to address were a fraction of the whole.

Moreover, in a criminal trial "Notwithstanding any other provisions of law to the contrary, a prior inconsistent statement of any witness testifying in the trial of a criminal offense shall be received as substantive evidence, and the party offering the prior inconsistent statement may argue the truth of such statement." RSMo. 491.074. The Courts order regarding the Motion in Limine directly contradicts this statute. The inconsistencies that defense counsel was able to address were without context and defense counsel was precluded from arguing inferences of those inconsistencies. Based on both case law and statute, every single prior inconsistent statement of Ms. Hupp, every fact that suggested she would benefit from a particular verdict

#### *C. Defendant was Denied his Right to Confront Witnesses Against Him And Call Witnesses in His Defense*

Some of the above evidence would have been elicited on cross-examination of the State's witnesses. The right to confront witnesses and the right to cross-examine them are functionally congruent. However, the rights are violated if the scope of cross-examination has been restricted improperly or its purpose wholly frustrated. *U.S. v. Owens*, 484 U.S. 554, (1988). Here, the State was able to present a witness who had made voluminous inconsistent statements; Defendant was not permitted to elicit those. The State presented a witness, Ms. Hupp, who had a bias or interest in the conviction of Defendant; Defendant was unable to demonstrate that interest to the jury. Thus, Defendant was wholly stripped of his right to confront and cross examine witnesses. Similarly, Defendant was precluded from presenting witnesses who would have cast doubt on the State's theory of the case.

#### *D. Defendant Was Prevented From Arguing Essential Elements of his Defense*



Defendant's defense was alibi, that he was not the individual who committed the crime. But that was not the end of his defense, he had evidence that Ms. Hupp was the the last person to see Betsy Faria alive had been present at the crime scene during the period that Betsy Faria was killed, despite affirmatively stating that she had not. Ms. Hupp became the beneficiary of Betsy Faria's life insurance policy days before her murder. Ms. Hupp has repeatedly altered her story, depending on the person asking the questions. Ms. Hupp's whereabouts were never confirmed. Defendant should have been permitted to argue that these facts give rise to an inference that Ms. Hupp has some knowledge regarding the death of Ms. Faria.

Moreover, as stated above, pursuant to statute, Ms. Hupp's prior inconsistent statements should have been admitted and defense counsel should have been able to argue the truth of them. Ms. Hupp has stated that she was at the Faria house for up to 45 minutes; this would include a period of time during which the State concedes the crime might have occurred. Defendant should have been permitted to argue that Ms. Hupp may have been in the house during the time period that the crime occurred.

"[D]efense counsel has the right to make any argument to the jury that is essential to the defense of the accused and is justified by evidence and the reasonable inferences that might be drawn therefrom. It is an abuse of discretion for the trial judge to preclude any such argument." *State v. Barton*, 936 S.W.2d 781, 784 (Mo. 1996). Here, Defendant denied involvement and his presence, it is inconceivable that the interest of another witness in his conviction, the possible presence of another at the crime scene during the time when the crime was committed, was not an essential part of the defense.

By preventing Defendant from presenting his full defense, including all the relevant facts, deprived Defendant of his rights Article I, Sections 10 and 18(a) of the Missouri Constitution, and the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

#### **X. The State Violated The Motion in Limine During Closing Argument**

Immediately prior to closing arguments, counsel met with the Court and mutually agreed that, as Defendant was precluded from any argument regarding even the *possibility* that another individual might be culpable, the State should be precluded from alleging that Defendant must have committed the crime, because no other responsible individual had been identified. Even with this mutual agreement, counsel for the State could not restrain herself from asking rhetorically whether this was a "ghost crime." In doing so, Defendant's right to equal protection, due process, and a fair and impartial jury as guaranteed by the Fifth, Fourteenth and Sixth Amendments of the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution was violated.

#### **XI. The State's Closing Argument Was Improper and Argued Matters Not in Evidence**

At closing, the State alleged that Defendant and his alibi witness had been planning the murder of Betsy Faria for some time, even years. The State repeatedly claimed that Defendant and Ms. Faria were in an abusive, domestic-violence relationship. The State alleged that Defendant had delivered his cellular telephone to his friend's home, with instructions to bring it to him later. The State alleged that Defendant then returned to 130 Sumac and had sex with his wife. The State alleged that, while completely naked, Defendant killed his wife, cleaned up, let the family dog in, and let the family dog out. The State then alleged that Brandon Sweeney,

complicit in this crime, drove to Arby's, made a purchase, then drove to Troy and delivered the bag of Arby's food and Defendant's cell phone to Defendant, before leaving, just before the arrival of the police and first responders.

Not a single one of the above allegations was demonstrated through the evidence presented at trial. Not a single one was a necessary or even a logical inference from the evidence presented at trial. The State's closing argument consisted of the statement "I believe this happened," followed by a litany of facts for which the State was wholly incapable of presenting any proof, whether direct or circumstantial.

The State did not produce evidence of the above allegations, simply stating "I believe" this is what occurred. There was no evidence that Defendant ever physically abused his wife; there were scattered instances of foul language. There is no evidence that Defendant had sex with his wife on December 28, 2011, killed her while naked, and then cleaned up. There was evidence that Defendant and his wife were intimate two days prior to her death, and there was evidence that Betsy Faria was fully clothed at the time of her death. There was no evidence that family dog was let in to the home after Pamela Hupp asked for the dog to be put out; there was evidence that the dog was outside when law enforcement and first responders arrived. There is no evidence that the alibi witnesses conspired with Defendant; there was evidence that they have consistently made the same statements about the evening. There is no evidence that Defendant's phone left his possession that evening. There is no evidence that Brandon Sweeney drove to Troy on December 23, 2011. There is no evidence that Brandon Sweeney, rather than Defendant, purchased two sandwiches at Arby's. There is no evidence that Defendant conspired with his alibi witnesses to commit the crime.

An attorney should not argue matters not in evidence, *State v. Cuckovich*, 485 S.W.2d 16 (Mo.1972) (en banc), and should not misstate or pervert the evidence, *State v. Stiltz*, 647 S.W.2d 168, 169 (Mo.App.1983). Yet this is precisely what the State did; the State argued that events occurred that were not demonstrated. A prosecutor arguing facts outside the record is highly prejudicial, because it turns the prosecutor into "an unsworn witness not subject to cross-examination. The error is compounded because the jury believes—properly—that the prosecutor has a duty to serve justice, not merely to win the case." *State v. Storey*, 901 S.W.2d 886 (Mo. 1995.). The State improperly made a "statement of personal opinion or belief not drawn from the evidence," *Id.*, rather than argue the evidence and logical inference; by making statements of personal belief, the prosecutor implied special personal knowledge, and this is improper. See *Bucklew v. State*, 38 S.W.3d 395, 400 (Mo. 2001).

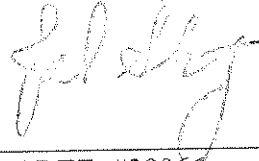
By arguing facts not in evidence, by implying that she had special awareness of additional facts, by injecting her belief in additional facts, the State deprived Defendant of the right to equal protection, due process, and a fair and impartial jury as guaranteed by the Fifth, Fourteenth and Sixth Amendments of the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution.

### **Conclusion**

For all the foregoing reasons, Defendant moves this honorable Court to enter an order for judgment of acquittal notwithstanding the verdict, or, in the alternative, enter an order for a new trial.

Respectfully submitted,

ROSENBLUM, SCHWARTZ, ROGERS & GLASS PC



By:

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**CERTIFICATE OF SERVICE**

Signature above is also certification that a true and correct copy of the above and foregoing document has been delivered this 16<sup>th</sup> day of December, 2013, to: Office of the Prosecuting Attorney, c/o Lincoln County Justice Center, 45 Business Park Drive, Troy, Missouri 63379.