Case Law Update

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Editor's Note

March 31, 2024

Dear Readers:

This edition of *Case Law Update* contains all Missouri appellate opinions from Jan. 1 through March 31, 2024, which resulted in reversals, or, in my opinion, were otherwise noteworthy, as well as all criminal-law related U.S. Supreme Court opinions during time.

I do not know subsequent history on all cases. Before citing a case, be sure to Instacite it to be sure it remains good law.

Sincerely,

Greg Mermelstein
Deputy Director / General Counsel

Abandonment (Rule 24.035 and 29.15)

Joyner v. State, 2024 WL 1056287 (Mo. App. E.D. March 12, 2024):
Holding: (1) Even though appointed 29.15 counsel filed a "Sanders" motion which claimed her amended motion was filed late due to the fault of counsel, where the motion court found Movant was not abandoned, it was required to adjudicate the *pro se* motion, and its failure to do so meant there is no "final judgment" from which to appeal; and (2) appellate court cautions that if Movant wants to raise the motion court's ruling on the abandonment issue in a subsequent appeal, Movant should be aware that the record will need to be sufficient to show that the motion court clearly erred in finding no abandonment, including a transcript of an abandonment hearing.
Discussion: We remind Movant and the motion court that to adequately review the issue of abandonment, the record must clear enough to decide whether the motion court's findings are clearly erroneous. The burden is on Movant to show the untimeliness is not the fault of Movant, but that of counsel. Movant must allege facts, not conclusions, showing this. Here, the circuit court held an abandonment hearing, but Movant did not file a transcript of that hearing on appeal. Although an abandonment hearing can be informal, it is a Movant's responsibility to provide a sufficient record for appellate review.

Saddler v. State, 2024 WL 1261197 (Mo. App. E.D. March 26, 2024):
Holding: Even though (1) 29.15 counsel filed a "Sanders" motion which alleged the untimely filing of the Amended Motion was due to the fault of counsel, not Movant, and (2) the motion court issued Findings deeming the Amended Motion timely based on the "Sanders" motion, an unsworn statement by counsel in a motion is not sufficient to demonstrate on appeal that the motion court's abandonment determination is not clearly erroneous; remanded for abandonment hearing.
Discussion: The method of abandonment inquiry is left the motion court's discretion, and may be as formal or informal as the court deems necessary to resolve the issue of abandonment. It may be conducted by written response, opportunity to reply, telephone conference call, or a hearing. The motion court should inquire not only of counsel, but also ensure that Movant is informed of counsel's response and given opportunity to reply. A sufficient record must be made to demonstrate on appeal that the motion court's determination of abandonment is not clearly erroneous. This Court has repeatedly held that unsworn statements of counsel in a "Sanders" motion do not create a sufficient record to determine if the motion court's abandonment finding is clearly erroneous. Remanded for abandonment hearing.

Appellate Procedure

State v. Nowicki, 682 S.W.3d 410 (Mo. banc Jan. 30, 2024):
(1) Even though, in DWI case, the State introduced MULES records and some prior municipal conviction records to show Defendant's four prior DWI convictions, the evidence was insufficient to prove the prior offenses qualified as intoxication related traffic offenses (IRTOs) under Sec. 577.001, because the law at the time of the current conviction does not define IRTO's as including merely being in "physical control" of a vehicle, and the State's evidence did not prove Defendant was actually "physically driving" a vehicle in the priors; and (2) even though Defendant failed to include this issue in his new trial motion, a sufficiency-of-evidence claim need not be in a new trial motion under Rule 29.11(d)(3), so the claim is preserved for appeal and requires de novo review of the evidence to support enhancement.
Facts: Defendant was charged with DWI as a "chronic offender." The State introduced MULES records and a prior municipal conviction record to show Defendant had prior DWI convictions in 1986, 1990, 1994 and 2005. The court found Defendant to be a "chronic offender" and enhanced sentence accordingly.
Holding: Sec. 577.001(15) creates four categories of IRTOs – driving while intoxicated; driving with excessive BAC; driving under influence of alcohol or drugs in violation of county or municipal ordinance; and operating a vehicle while intoxicated … in violation of any state law, county or municipal ordinance, or any federal or military offense. A conviction qualifies as an IRTO only if the conduct constituted DWI "as defined at the time of the current offense for which the state seeks enhancement, not at the time of the conduct underlying the prior conviction." Sec. 577.001(9) requires "physically driving or operating a vehicle." The statute does *not* include an earlier version requiring only being in "physical control" of vehicle (for which defendants could be convicted in 1986, 1990 or 1994). In *State v. Shepherd*, 643 S.W.3d 346 (Mo. banc 2022), this Court held that certified copies of Colorado convictions (by themselves) did not prove defendant was "driving" a vehicle as opposed to being only in "physical control." *Shepherd* is not limited to out-of-state convictions, but applies equally to Missouri convictions. *Shepherd* was not based on where the conviction occurred, but was based on whether the prior convictions meet the current definition of IRTOs. Here, the State offered MULES records to prove three of Defendant's priors. Such records are admissible under Sec. 577.023.4. The State argues these records create a rebuttable presumption that Defendant's priors were for actually "driving." But Sec. 577.023.4 does not purport to provide missing evidence that Defendant was actually "driving" by rebuttable presumption or otherwise. By offering proof of the prior 1990 and 1994 convictions via MULES records, and *nothing more*, the State failed to prove Defendant was physically driving a vehicle. Regarding the 1986 conviction, the State also offered a MULES record and additional evidence the offense was a "local BAC offense." But there was no evidence as to what constituted a "local BAC" offense, and the municipal ordinance wasn't introduced into evidence. This evidence falls well short of proving beyond a reasonable doubt that the 1986 conviction was for physically driving. The State also claims that because Defendant was convicted for a stop sign violation the same day as the "local BAC offense," that this proves he was driving. But the fact that Defendant was *convicted* on the same day does not prove the offenses were *committed* on the same day.

As for the 2005 conviction, Defendant concedes it qualifies as an IRTO because the definition of "driving" in 2005 was the same as at the time of his present offense. Reversed and remanded for resentencing.

State v. Bryant, 2024 WL 1056228 (Mo. App. E.D. March 12, 2024):
Holding: Where (1) the trial court sustained State's objection to asking Victim certain questions about what she told Police Detective, and (2) for an Offer of Proof, Defendant called Police Detective to testify about what Victim said and also defense counsel stated how he believed Victim would answer the questions, the Offer of Proof was not sufficient to preserve issue for appeal because counsel did not call Victim herself to testify as part of the Offer; counsel's belief as to the testimony of an adverse witness does not make a sufficient Offer of Proof.

Joyner v. State, 2024 WL 1056287 (Mo. App. E.D. March 12, 2024):
Holding: (1) Even though appointed 29.15 counsel filed a "Sanders" motion which claimed her amended motion was filed late due to the fault of counsel, where the motion court found Movant was not abandoned, it was required to adjudicate the *pro se* motion, and its failure to do so meant there is no "final judgment" from which to appeal; and (2) appellate court cautions that if Movant wants to raise the motion court's ruling on the abandonment issue in a subsequent appeal, Movant should be aware that the record will need to be sufficient to show that the motion court clearly erred in finding no abandonment, including a transcript of an abandonment hearing.
Discussion: We remind Movant and the motion court that to adequately review the issue of abandonment, the record must clear enough to decide whether the motion court's findings are clearly erroneous. The burden is on Movant to show the untimeliness is not the fault of Movant, but that of counsel. Movant must allege facts, not conclusions, showing this. Here, the circuit court held an abandonment hearing, but Movant did not file a transcript of that hearing on appeal. Although an abandonment hearing can be informal, it is a Movant's responsibility to provide a sufficient record for appellate review.

State v. Emanuel, 2024 WL 377948 (Mo. App. S.D. Feb. 1, 2024):
Holding: (1) Trial court plainly erred in failing to give MAI-CR 4th 402.05 on juror unanimity, because this is a mandatory instruction, and failure to give it resulted in manifest injustice since this relieved State of its burden to prove every element of the crime charged through a unanimous verdict; and (2) the standard of review for plain error in jury instructions is evaluated under Rule 30.20's standard, regardless if the claims is statutory, structural, or constitutional.
Discussion: The State doesn't dispute that 402.05 wasn't given. Instead, the State argues Defendant cannot establish plain error under Rule 30.20, and cannot obtain reversal merely by claiming the error was "structural." We agree that Defendant can no longer obtain plain error relief regarding jury instructions merely be claiming "structural" error, and cases holding that should no longer be followed. The plain error standard of Rule 30.20 applies here. Defendant must show the failure to give the instruction "so misdirected or failed to instruction the jury that the error affected the jury's verdict." Defendant meets that burden here. The jury was never told by the judge or any party

anywhere during trial that its verdict must be unanimous. Thus, there is no instruction for us to presume the jury heard, understood, or followed. Even though Defendant didn't object to the failure to give the instruction and cannot take advantage of "self-invited" error, this doesn't preclude Defendant's claim here, because the State had the burden to prove each element of the crime charged and the burden to obtain a unanimous verdict. Failure to give 402.05 relieved the State of this burden. Reversed and remanded for new trial.

State v. Moore, 2024 WL 559502 (Mo. App. W.D. Feb. 13, 2024):
Holding: (1) Point Relied On which raised both a hearsay and Confrontation Clause issue was impermissibly multifarious, because a Point should contain only one issue; these are distinct issues because a hearsay objection is grounded in the rules of evidence and challenges a witness' out-of-court statement for its truth, but a Confrontation Clause objection is grounded in the 6th Amendment and challenges admission of a witness' testimonial statement; and (2) Rule 84.015's redaction requirements require redaction of given names of all witnesses in a case.

State v. Williams, 2024 WL 952486 (Mo. App. W.D. March 5, 2024):
Holding: A claim of immunity from criminal liability under Good Samaritan law, Sec. 195.205, must be raised in the trial court, and cannot be raised for the first time on direct appeal.
Discussion: Defendant, who was convicted of a drug offense after a person called 911 to report potential emergency about him, claims for the first time on appeal that he is immune from prosecution due to Sec. 195.205, which provides that a person who is the subject of a good faith request for medical assistance shall not be prosecuted. However, appellate courts merely review for trial error, and there can be no trial error if an issue wasn't raised in the trial court. At the very least, this issue must be raised before final disposition of the case in the trial court, or it is waived. This affords the State an opportunity to respond to the defense. Appellate court suggests, but does not decide, the issue can be raised as late as a post-trial motion in the trial court. But here, it wasn't raised at all, so it's waived.

State v. Karim, 2024 WL 1057231 (Mo. App. W.D. March 12, 2024):
Holding: Where Defendant filed his New Trial Motion 25 days after verdict, but there was nothing in the record indicating that the trial court had granted Defendant the permissible 10 additional days to file it, Defendant's Motion was due 15 days after verdict under Rule 29.11(b), and failure to timely file it meant his claims were not preserved for appeal.

Civil Procedure

Laramore v. Jacobsen, 2024 WL 1056233 (Mo. App. E.D. March 12, 2024):
Holding: Even though trial court granted State's motion for summary judgment in Petitioner's replevin action to recover property seized by police, where the State failed to include a statement of uncontroverted material facts in list form for Petitioner to respond to, the State did not comply with the mandatory requirements of Rule 74.04(c)(1), and grant of summary judgment is reversed.
Discussion: Rule 74.04(c)(1) requires a summary judgment movant include an uncontroverted statement of material facts in separately numbered paragraphs with reference to pleadings, discovery, exhibits or affidavits. Respondents are then required to admit or deny each fact.

*** Federal Bureau of Investigation v. Fikre, ___ U.S. ___, 2024 WL 1160994 (U.S. March 19, 2024):**
Holding: A citizen's challenge to being placed on government's "no fly list" was not moot even after government rescinded the listing because government failed to prove its conduct would not recur.

Closing Argument & Prosecutor's Remarks

State v. Weston, 2024 WL 1161446 (Mo. App. W.D. March 19, 2024):
Holding: (1) Prosecutor's cross-examination question to Defendant, "And I know you're going to deny that because, quite frankly, that's the only thing you can do right now" was improperly argumentative; (2) Prosecutor's statement during cross-exam of Defendant that "you must have gotten kicked out of the Air Force" was improper because not supported by any evidence and was not relevant to any issue at trial; and (3) Prosecutor's closing argument that "had the defendant been stopped then [in a prior incident], maybe we wouldn't be here [now]" was improper because sought to induce jury to act on passion (but none of the errors were prejudicial here).

Confrontation and Hearsay

State v. Moore, 2024 WL 559502 (Mo. App. W.D. Feb. 13, 2024):
Holding: (1) Point Relied On which raised both a hearsay and Confrontation Clause issue was impermissibly multifarious, because a Point should contain only one issue; these are distinct issues because a hearsay objection is grounded in the rules of evidence and challenges a witness' out-of-court statement for its truth, but a Confrontation Clause objection is grounded in the 6th Amendment and challenges admission of a witness' testimonial statement; and (2) Rule 84.015's redaction requirements require redaction of given names of all witnesses in a case.

Continuance

State ex rel. Woods v. Dierker, 2024 WL 942548 (Mo. banc March 5, 2024):
Holding: (1) In order for a court to extend the mandatory deadlines under Rule 22.09(a) for holding a preliminary hearing (30 days after initial appearance for defendants in custody or 60 days not in custody), the court must make "meaningful inquiry" into the reasons for a continuance, and "explicit findings" as to the good cause; and (2) an assertion by the State that it failed to summon any witnesses for a preliminary hearing because it is pursuing a grand jury indictment, with nothing more and without further inquiry by the court, will not constitute good cause for continuance of a preliminary hearing under Rule 22.09(a).
Discussion: Rule 22.09(a) sets out explicit, definite and mandatory time limits by which a preliminary hearing must be held. The Rule also is clear that no continuance can be granted without a showing of good cause. These mandatory deadlines ensure that a defendant is not subject to continuing prosecution without probable cause. In St. Louis, the State appears to have a general practice of obtaining continuances merely by asserting that the State will be seeking a grand jury indictment. But the State is not entitled to proceed at whatever pace it chooses, without putting on evidence establishing probable cause. And a judge cannot simply rubber stamp the State's requests for continuance. The Judge has a responsibility to make meaningful inquiry into the specific reasons for a requested continuance, and to make explicit findings whether the State has shown good cause for it. While an active grand jury investigation can be considered as one factor, an ongoing grand jury investigation, by itself, is not sufficient. The Judge must also consider factors such as the amount of time a defendant has been in custody, and the time elapsed since arraignment.

Detainer Law & Speedy Trial

Riley v. State, 682 S.W.3d 118 (Mo. App. W.D. Jan. 9, 2024):
Holding: Claim that trial court did not bring Defendant/Movant to trial within time required by Interstate Agreement on Detainers (IAD) was waived by Rule 29.15 Movant's failure to raise claim on direct appeal, and there are no "rare and exceptional circumstances" to consider it in 29.15 case.

Discovery

Goldstein v. Crane, 2024 WL 790898 (Mo. App. W.D. Feb. 27, 2024):
Holding: Even though Defendant-Doctor in malpractice case testified in a deposition that she had carpel tunnel syndrome (which Plaintiff alleged affected her ability to do surgery), and also told this to a co-worker and family members, her medical records regarding this condition were protected by patient-physician privilege, Sec. 491.030, and not discoverable, because her compelled deposition testimony by Plaintiff wasn't a

voluntary waiver of privilege and providing general information to co-workers or family about one's medical condition is too general to waive the privilege.
Discussion: Plaintiff hasn't cited any authority indicating a person waives the physician-patient privilege by discussing their medical condition with a friend. Persons undergoing medical treatment can regularly be expected to seek support from friends and family, and in doing so may disclose basic details about their medical condition. To find that a person waives privilege by disclosing any information to their friends or family would defeat the purpose of Sec. 491.030. We do not find that general discussions with friends of family waives the physician-patient privilege so as to make information otherwise protected by 491.030 (here, Defendant's medical records) discoverable. Writ of prohibition granted.

Double Jeopardy

*** McElrath v. Georgia, ___ U.S. ___, 144 S.Ct. 651 (U.S. Feb. 21, 2024):**
Holding: Double jeopardy bars retrial after a verdict of not guilty by reason of insanity even if that verdict is inconsistent with other verdicts in the case.

DWI

State v. Nowicki, 682 S.W.3d 410 (Mo. banc Jan. 30, 2024):
(1) Even though, in DWI case, the State introduced MULES records and some prior municipal conviction records to show Defendant's four prior DWI convictions, the evidence was insufficient to prove the prior offenses qualified as intoxication related traffic offenses (IRTOs) under Sec. 577.001, because the law at the time of the current conviction does not define IRTO's as including merely being in "physical control" of a vehicle, and the State's evidence did not prove Defendant was actually "physically driving" a vehicle in the priors; and (2) even though Defendant failed to include this issue in his new trial motion, a sufficiency-of-evidence claim need not be in a new trial motion under Rule 29.11(d)(3), so the claim is preserved for appeal and requires de novo review of the evidence to support enhancement.
Facts: Defendant was charged with DWI as a "chronic offender." The State introduced MULES records and a prior municipal conviction record to show Defendant had prior DWI convictions in 1986, 1990, 1994 and 2005. The court found Defendant to be a "chronic offender" and enhanced sentence accordingly.
Holding: Sec. 577.001(15) creates four categories of IRTOs – driving while intoxicated; driving with excessive BAC; driving under influence of alcohol or drugs in violation of county or municipal ordinance; and operating a vehicle while intoxicated … in violation of any state law, county or municipal ordinance, or any federal or military offense. A conviction qualifies as an IRTO only if the conduct constituted DWI "as defined at the time of the current offense for which the state seeks enhancement, not at the time of the conduct underlying the prior conviction." Sec. 577.001(9) requires "physically driving or operating a vehicle." The statute does *not* include an earlier version requiring only being in "physical control" of vehicle (for which defendants could be convicted in 1986, 1990 or 1994). In *State v. Shepherd*, 643 S.W.3d 346 (Mo. banc 2022), this Court held that

certified copies of Colorado convictions (by themselves) did not prove defendant was "driving" a vehicle as opposed to being only in "physical control." *Shepherd* is not limited to out-of-state convictions, but applies equally to Missouri convictions. *Shepherd* was not based on where the conviction occurred, but was based on whether the prior convictions meet the current definition of IRTOs. Here, the State offered MULES records to prove three of Defendant's priors. Such records are admissible under Sec. 577.023.4. The State argues these records create a rebuttable presumption that Defendant's priors were for actually "driving." But Sec. 577.023.4 does not purport to provide missing evidence that Defendant was actually "driving" by rebuttable presumption or otherwise. By offering proof of the prior 1990 and 1994 convictions via MULES records, and *nothing more*, the State failed to prove Defendant was physically driving a vehicle. Regarding the 1986 conviction, the State also offered a MULES record and additional evidence the offense was a "local BAC offense." But there was no evidence as to what constituted a "local BAC" offense, and the municipal ordinance wasn't introduced into evidence. This evidence falls well short of proving beyond a reasonable doubt that the 1986 conviction was for physically driving. The State also claims that because Defendant was convicted for a stop sign violation the same day as the "local BAC offense," that this proves he was driving. But the fact that Defendant was *convicted* on the same day does not prove the offenses were *committed* on the same day. As for the 2005 conviction, Defendant concedes it qualifies as an IRTO because the definition of "driving" in 2005 was the same as at the time of his present offense. Reversed and remanded for resentencing.

Craig v. Dir. of Revenue, 2024 WL 156523 (Mo. App. W.D. Jan. 16, 2024):
Holding: Even though Driver submitted an affidavit of her testimony at her administrative hearing regarding suspension of her license, the affidavit was not admissible under Sec. 302.312 at her trial de novo, because it was not a record of the Dep't of Revenue that could be certified, was self-serving, and was not the best evidence because Driver was available and could testify at her trial de novo.
Discussion: Sec. 302.312.1 provides for admissibility of "copies of all papers, documents, and records lawfully deposited in or filed *in the offices* of the department of revenue". Nothing in Sec. 302.312.1 provides that if papers, documents, or records are offered into evidence by Driver at an administrative hearing under Sec. 536.070, then they become part of the Dep't of Revenue records under 302.312.1. Driver's affidavit has not been "lawfully filed or deposited in the offices" of the Dep't within the plain meaning of 302.312. Records kept by the Dep't differ from the administrative hearing record. Sec. 302.535.1 provides that a trial de novo is conducted pursuant to the "rules of civil procedure and not as an appeal of an administrative decision pursuant to chapter 536." The administrative hearing record is not filed in the circuit court as part of the trial de novo. The case is heard anew pursuant to the rules of civil procedure. Evidence offered at the administrative hearing is not automatically admissible at the trial de novo. Driver cannot bypass the normal rules of evidence – such as hearsay – by sending documents to the Dep't and then demanding they be admitted under Sec. 302.312.1. Driver's affidavit was intended to be offered in lieu of her testimony at the trial de novo, which is not permitted when Driver was available to testify.

Sanning v. Dir. of Revenue, 2024 WL 1259564 (Mo. App. W.D. March 26, 2024):
Holding: (1) Even though Director introduced a letter from the "Office of the Provost Marshall, Registry of Motor Vehicles, U.S. Army Europe" which notified Missouri that Driver had been "sanctioned" for driving while intoxicated with a BAC of at least .08 and her "driving privileges had been revoked", this letter was insufficient evidence to suspend Driver's Missouri license, because notice of conviction entered in a foreign jurisdiction must, at a minimum, include the court in which the action was taken; the letter here did not even refer to a "conviction," let alone identify a court; and (2) where Driver contended she never was "convicted" of DWI in Europe, trial court erred in holding this was an impermissible "collateral attack" on a prior conviction, since Driver wasn't challenging the legitimacy of the prior conviction but the *existence* of the prior conviction.
Discussion: There are no specific requirements describing the type of documentary evidence Director must present to a trial court to sustain Director's burden of presenting a *prima facie* case for suspension of a Missouri license based on an out-of-state conviction. But the notice received by the Director must, at a minimum, identify the court in which action was taken. This requirement exists so Driver has reasonable notice as to why their Missouri license was suspended, and can meaningfully appeal. The "Provost Marshall" letter fails to identify the court in which Driver was allegedly "convicted." While it is true that Driver cannot collaterally attack the legitimacy or propriety of a foreign conviction, Driver is not doing that. Instead, she claims she was never "convicted" of any offense at all. Driver can point out that the evidence failed to prove a prior conviction. The Provost letter never states Driver was "convicted" of anything. It merely states she was "sanctioned" and had had her military driving privileges revoked. Suspension of Missouri license reversed.

Escape Rule

State v. Farless, 2024 WL 1056299 (Mo. App. E.D. March 12, 2024):
Holding: Where Defendant received a suspended execution of sentence and, while her direct appeal was pending, failed to communicate with her Probation Officer and absconded from supervision, appellate court applies escape rule to dismiss her appeal.

Evidence

State v. Holtmeyer, 681 S.W.3d 363 (Mo. App. E.D. Jan. 2, 2024):
Holding: (1) Trial court erred in admitting telephone records as "business records" under Sec. 490.680, because the records were not notarized as required by Sec. 490.692, but only contained a digital signature, but (2) even though the telephone records were the only evidence linking Defendant to the crime, appellate court does not consider Defendant's sufficiency-of-evidence claim, because when appellate court reverses for inadmissible evidence, the State is given an opportunity to present additional evidence at a re-trial.
Facts: Defendant was charged with harassment, Sec. 565.090, for allegedly making harassing phone calls. At a bench trial, the State submitted telephone records of

Defendant showing the calls originated from Defendant's phone. Defendant objected to admission of the records as business records on grounds there was not a notarized business records affidavit, as required by Sec. 490.692.
Holding: (1) The records did not comply with Sec. 490.692, because they did not contain an affidavit or written declaration under oath, such as a notary public. An unnotarized digital signature may be good enough for AT&T but it is insufficient under the laws of Missouri. (2) However, admissibility of evidence and sufficiency of evidence are separate inquiries. When an appellate court reverses for inadmissible evidence, the defendant is not entitled to a determination whether the evidence was sufficient to convict him, since such inquiry might prejudice the State, if the inadmissible evidence were ignored and the State weren't given an opportunity to present additional evidence. Here, the State would likely have been able to present additional or alternative evidence of the caller's identity if the trial court had found the records inadmissible. Reversed for new trial.

State v. Bryant, 2024 WL 1056228 (Mo. App. E.D. March 12, 2024):
Holding: Where (1) the trial court sustained State's objection to asking Victim certain questions about what she told Police Detective, and (2) for an Offer of Proof, Defendant called Police Detective to testify about what Victim said and also defense counsel stated how he believed Victim would answer the questions, the Offer of Proof was not sufficient to preserve issue for appeal because counsel did not call Victim herself to testify as part of the Offer; counsel's belief as to the testimony of an adverse witness does not make a sufficient Offer of Proof.

State v. Cummings, 2024 WL 1161871 (Mo. App. E.D. March 19, 2024):
Holding: (1) Even though Defendant requested the trial court make certain findings of fact regarding the legality of his eviction from his residence (which was relevant to the defense), a trial court cannot make findings of fact in a criminal case; Defendant could have presented this evidence via an expert witness to testify regarding eviction law, or adduced other evidence of lawful possession; and (2) where the trial court orally sentenced Defendant to multiple 50-year sentences but the written sentence and judgment stated "999 years," this was plain error because a sentence greater than the maximum allowed by law results in manifest injustice; a written sentence must conform to the sentence orally pronounced.
Discussion: Rule 27.06 provides that a court shall not comment upon any matter of fact in a criminal case. A trial judge may not issue findings of fact to the jury, which must reach its own factual determinations. A trial court commits prejudicial error by stating what the facts are "as a matter of law."

Schultz v. Great Plains Trucking, Inc., 2024 WL 1261196 (Mo. App. E.D. March 26, 2024):
Holding: Even though, in auto accident case, Plaintiff-Driver had THC in her blood (which the defense claimed caused Plaintiff to be impaired and caused the accident), trial court did not abuse discretion in excluding the defense's Expert-Pathologist-Medical Examiner's testimony about the THC and that Plaintiff was impaired, because such

testimony was not reliable and was speculative in that Missouri does not provide for a set presumption of impairment for marijuana.
Discussion: Plaintiff's blood had a level of 3.5 nanograms per milliliter of THC. The defense Expert-Pathologist-Medical Examiner made several statements in her deposition indicating Plaintiff was impaired because she had *any* amount of THC in her blood. However, Expert admitted a person cannot draw a relationship between the degree of impairment and the blood-THC concentration. Expert could not measure or quantify Plaintiff's degree of impairment. Expert could not say what effect the level of THC in Plaintiff's blood would have had on Plaintiff at time of the accident. Expert agreed THC can remain in the blood for at least three days after marijuana use. Expert was unable to provide a methodology or cite any symptoms exhibited by Plaintiff to support Expert's opinion that Plaintiff was impaired. The probative value of Expert's opinion on the issues of THC impairment and causation was outweighed by the likely prejudicial effect of allowing the jury to hear Expert's speculative opinions on such issues. Missouri case law has consistently recognized a substantive distinction between evidence required to sustain a finding a person is impaired as a result of alcohol versus other drugs. There is no presumption of impairment currently set by statute in Missouri with respect to other drugs, legal or illegal. It is not the rule that any level of any drug in a person's system results in an automatic permissible inference of impairment. There must be evidence beyond the mere fact that a drug was present in someone's system in a particular quantity before a reasonable inference of impairment can be made.

State v. Moore, 682 S.W.3d 436 (Mo. App. S.D. Jan. 11, 2024):
Holding: In order to lay a proper foundation to admit child-sex Victim's video interview under Sec. 492.304 to impeach Victim by their demeanor, Defendant must (1) cite the statute, and (2) call the interviewer to confirm that no attorney for either party was present during the interview, authenticate the recording as accurate and not altered, and identify each voice in the recording.

Experts

State v. Cummings, 2024 WL 1161871 (Mo. App. E.D. March 19, 2024):
Holding: (1) Even though Defendant requested the trial court make certain findings of fact regarding the legality of his eviction from his residence (which was relevant to the defense), a trial court cannot make findings of fact in a criminal case; Defendant could have presented this evidence via an expert witness to testify regarding eviction law, or adduced other evidence of lawful possession; and (2) where the trial court orally sentenced Defendant to multiple 50-year sentences but the written sentence and judgment stated "999 years," this was plain error because a sentence greater than the maximum allowed by law results in manifest injustice; a written sentence must conform to the sentence orally pronounced.
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Schultz v. Great Plains Trucking, Inc., 2024 WL 1261196 (Mo. App. E.D. March 26, 2024):

Holding: Even though, in auto accident case, Plaintiff-Driver had THC in her blood (which the defense claimed caused Plaintiff to be impaired and caused the accident), trial court did not abuse discretion in excluding the defense's Expert-Pathologist-Medical Examiner's testimony about the THC and that Plaintiff was impaired, because such testimony was not reliable and was speculative in that Missouri does not provide for a set presumption of impairment for marijuana.

Discussion: Plaintiff's blood had a level of 3.5 nanograms per milliliter of THC. The defense Expert-Pathologist-Medical Examiner made several statements in her deposition indicating Plaintiff was impaired because she had *any* amount of THC in her blood. However, Expert admitted a person cannot draw a relationship between the degree of impairment and the blood-THC concentration. Expert could not measure or quantify Plaintiff's degree of impairment. Expert could not say what effect the level of THC in Plaintiff's blood would have had on Plaintiff at time of the accident. Expert agreed THC can remain in the blood for at least three days after marijuana use. Expert was unable to provide a methodology or cite any symptoms exhibited by Plaintiff to support Expert's opinion that Plaintiff was impaired. The probative value of Expert's opinion on the issues of THC impairment and causation was outweighed by the likely prejudicial effect of allowing the jury to hear Expert's speculative opinions on such issues. Missouri case law has consistently recognized a substantive distinction between evidence required to sustain a finding a person is impaired as a result of alcohol versus other drugs. There is no presumption of impairment currently set by statute in Missouri with respect to other drugs, legal or illegal. It is not the rule that any level of any drug in a person's system results in an automatic permissible inference of impairment. There must be evidence beyond the mere fact that a drug was present in someone's system in a particular quantity before a reasonable inference of impairment can be made.

Findings of Fact & Conclusions of Law (Rules 24.035 & 29.15)

Elston v. State, 2024 WL 356945 (Mo. App. S.D. Jan. 31, 2024):

Holding: Where (1) motion court granted partial relief on "Claim A" of Movant's 24.035 motion, but did not address "Claim B"; (2) Movant and the State each filed motions to amend the judgment; (3) motion court then vacated relief on "Claim A" and denied the all Claims "for the reasons set forth in the State's response; and (4) Movant then moved to amend judgment because of the lack of Findings, motion court erred in failing to issue Findings and Conclusions on all claims as required by Rule 24.035(j). Reversed and remanded for Findings.

Discussion: The motion court could have adopted the State's Findings, if the State had set forth such Findings and Conclusions in its own motions. But the State did not. Without Findings to review, the appellate court would be forced to conduct improper *de novo* review.

Immigration

*** Wilkinson v. Garland, ___ U.S. ___, 2024 WL 1160995 (U.S. March 19, 2024):**
Holding: The family "hardship exception" to cancellation of removal of noncitizens, 8 U.S.C. Sec. 1229b(b)(1)(D), is a mixed question of fact and law which is reviewable by the Court of Appeals under Sec. 1252(a)(2)(D).

Indictment and Information

State v. Williams, 2024 WL 952486 (Mo. App. W.D. March 5, 2024):
Holding: A claim of immunity from criminal liability under Good Samaritan law, Sec. 195.205, must be raised in the trial court, and cannot be raised for the first time on direct appeal.
Discussion: Defendant, who was convicted of a drug offense after a person called 911 to report potential emergency about him, claims for the first time on appeal that he is immune from prosecution due to Sec. 195.205, which provides that a person who is the subject of a good faith request for medical assistance shall not be prosecuted. However, appellate courts merely review for trial error, and there can be no trial error if an issue wasn't raised in the trial court. At the very least, this issue must be raised before final disposition of the case in the trial court, or it is waived. This affords the State an opportunity to respond to the defense. Appellate court suggests, but does not decide, the issue can be raised as late as a post-trial motion in the trial court. But here, it wasn't raised at all, so it's waived.

State v. Salcedo, 2024 WL 1057071 (Mo. App. W.D. March 12, 2024):
Holding: (1) Where (a) Defendant was taken into custody after his Mother obtained a court order for a 96-hour evaluation pursuant to Sec. 632.305.2 on grounds Defendant was a danger to himself or others, and (b) drugs were found on Defendant when he was taken into custody, Defendant was not entitled to immunity from prosecution under "Good Samaritan" law, Sec. 195.205, because a legal action under Sec. 632.305.2 is not a medical emergency based on a drug or alcohol overdose; and (2) as a matter of first impression, a warrantless search after a person is taken into custody pursuant to 632.305 is governed by the same 4th Amendment principles as a search in a criminal matter; here, search was justified as incident-to-arrest for protection of Officers since Defendant may have had a weapon.
Discussion: Sec. 195.205 grants immunity to the subject of a request for medical assistance for a drug or alcohol overdose or "other medical emergency." Defendant contends that his situation meets the definitions of "medical assistance" and "medical emergency" in the statute. But the phrase "medical emergency" evidences an intent to limit the statute to people needing immediate medical attention. An action under 632.305.2 is "qualitatively distinguishable" from reporting a medical emergency to law enforcement, 911, or a healthcare provider. The Officers were not responding to a "medical emergency" but took Defendant into custody pursuant to an involuntary commitment order, so "Good Samaritan" law immunity doesn't apply.

Ineffective Assistance of Counsel

King v. State, 682 S.W.3d 853 (Mo. App. S.D. Jan. 23, 2024):
Holding: An ineffective assistance claim for failure to object at trial is cognizable in a 29.15 motion where the appellate court declined to exercise plain error review on direct appeal regarding admission of the underlying evidence.
Discussion: The State argues Movant's failure to object claim is not cognizable because the appellate court declined plain error review on direct appeal regarding admission of the underlying evidence. However, the issues relevant to ineffective assistance analysis under *Strickland* are not necessarily decided in such circumstances. When an appellate court declines plain error review, it makes no ruling as to whether the trial court erred or whether the alleged error was prejudicial. Here, Movant is entitled to a determination as to whether his trial would have had a different outcome had trial counsel objected to the evidence. Other times, though, this would not be the case, such as where the appellate court determined on direct appeal that there was no error by the trial court (so there would be no objection to make), or "presumably" where the appellate court had determined there was trial court error but it was harmless or not prejudicial, which would preclude a finding of prejudice under *Strickland*.

McConnell v. State, 2024 WL 748702 (Mo. App. S.D. Feb. 23, 2024):
Holding: Where Victim in child sex case testified the sexual acts between her and Defendant happened on "Wednesday nights" at Defendant's house when Defendant's Wife was at church during a two-month period, trial counsel was ineffective in failing to investigate Wife's church attendance records and medical records, which would have shown that Wife was unable to drive during that time period and had been absent from church.
Discussion: For trial counsel to be ineffective for failing to investigate impeachment evidence, such evidence must have provided a viable defense or changed the outcome at trial. Here, Victim testified the charged acts occurred on multiple Wednesday nights at Defendant's house when Wife was at church. But Wife's church attendance and medical records for that time period (obtained for the postconviction case) showed Wife was absent from church during the relevant time period, because she had a medical condition that prevented her from driving. Trial counsel never obtained these records, because trial counsel thought the Victim was claiming the events occurred outside of the house at some different times. Counsel cannot make strategic decisions without a thorough investigation. The decision not to investigate the records was unreasonable given that counsel had numerous discussions before trial about Wife's medical condition, and was aware Wife had not attended church. The decision was also unreasonable in light of counsel's "ignorance" of their own case, because the Victim's testimony was clear that the charged acts occurred at the house on Wednesday nights. Even though this was bench trial and the same Judge presided over both the trial and postconviction cases, there is a reasonable probability Defendant would have been acquitted had these records been presented. The postconviction court clearly erred in finding the records to be merely impeaching and finding that Victim had testified the abuse happened elsewhere besides the house. Reversed for new trial.

Jury Instructions

Jones v. State, 2024 WL 924766 (Mo. App. E.D. March 5, 2024):
Holding: Where, in unlawful exhibiting weapon, Sec. 571.030.1(4), case, (1) Defendant was diving his car near where a murder had just occurred and a large crowd was gathered, (2) a Bystander and Defendant's Passenger got into an argument through the car window, (3) Defendant thought Bystander was about to shoot Passenger and Passenger "ducked down", and (4) Defendant testified he was in fear for his life, stopped car, and got out with his gun (which was the subject of the charged crime), trial court plainly erred in failing to, *sua sponte*, give instruction on use of force in defense of another.
Discussion: Even though Defendant stated "no objection" to the State's instructions, this does not waive plain error review. Sec. 571.031 provides a defendant may be exempt from criminal liability if he acted in self-defense of another. A defendant has the burden of injecting justification into the case; the State then bears the burden of proving beyond a reasonable doubt that defendant did not reasonably believe force was necessary. Here, substantial evidence showed (1) Passenger was not the initial aggressor, (2) Defendant reasonably believed physical force was necessary to defend Passenger from what he reasonably believed to be the imminent use of unlawful force by Bystander, (3) Defendant reasonably believed deadly force was necessary to protect Passenger from death, serious physical injury, or forcible felony and (4) Defendant did not have duty to retreat. "Substantial evidence" is the proof necessary to require a self-defense instruction, and can come from Defendant's testimony alone (since the evidence is viewed in the light most favorable to giving the instruction). If the evidence establishes defendant's theory of self-defense, or supports differing conclusions, Defendant is entitled to self-defense instruction. Manifest injustice occurred in failing to give the instruction, because both the State and defense alluded to Defendant "standing his ground" in opening statement or closing argument, and the jury sent a question during deliberations about "standing your ground" (which the court answered by merely telling the jury to be guided by the evidence). Critical here, Defendant was on a public street where he had a right to be, and Sec. 563.031 includes a provision that a person has no duty to retreat from any place they have a right to be. Thus, the legislature has sanctioned a person's refusal to retreat from a dangerous or threatening situation, regardless of how careless or imprudent that refusal may seem. By omitting a defense of another instruction, the trial court relieved the State of its burden to prove Defendant was not justified in using force. The State also claims Defendant's actions were not "necessary." But a "necessity defense" is not the same as "self-defense" under Sec. 563.031.1, which depends on whether a defendant "reasonably believes" force is necessary to defend himself. The necessity defense of Sec. 563.026 requires no such analysis. Reversed for new trial.

State v. Emanuel, 2024 WL 377948 (Mo. App. S.D. Feb. 1, 2024):
Holding: (1) Trial court plainly erred in failing to give MAI-CR 4th 402.05 on juror unanimity, because this is a mandatory instruction, and failure to give it resulted in manifest injustice since this relieved State of its burden to prove every element of the crime charged through a unanimous verdict; and (2) the standard of review for plain error

in jury instructions is evaluated under Rule 30.20's standard, regardless if the claims is statutory, structural, or constitutional.
Discussion: The State doesn't dispute that 402.05 wasn't given. Instead, the State argues Defendant cannot establish plain error under Rule 30.20, and cannot obtain reversal merely by claiming the error was "structural." We agree that Defendant can no longer obtain plain error relief regarding jury instructions merely be claiming "structural" error, and cases holding that should no longer be followed. The plain error standard of Rule 30.20 applies here. Defendant must show the failure to give the instruction "so misdirected or failed to instruction the jury that the error affected the jury's verdict." Defendant meets that burden here. The jury was never told by the judge or any party anywhere during trial that its verdict must be unanimous. Thus, there is no instruction for us to presume the jury heard, understood, or followed. Even though Defendant didn't object to the failure to give the instruction and cannot take advantage of "self-invited" error, this doesn't preclude Defendant's claim here, because the State had the burden to prove each element of the crime charged and the burden to obtain a unanimous verdict. Failure to give 402.05 relieved the State of this burden. Reversed and remanded for new trial.

Mental Disease or Defect – Competency – Chapter 552

*** McElrath v. Georgia, ___ U.S. ___, 144 S.Ct. 651 (U.S. Feb. 21, 2024):**
Holding: Double jeopardy bars retrial after a verdict of not guilty by reason of insanity even if that verdict is inconsistent with other verdicts in the case.

Order of Protection

J.R.C. v. S.L.F., 2024 WL 1056300 (Mo. App. E.D. March 12, 2024):
Holding: (1) Even though Defendant pushed Petitioner against a wall which "kind of startled" her, sent unspecified texts and social media messages to Petitioner, and left various belongings on Petitioner's porch by mutual agreement of parties, trial court erred in granting Order of Protection because the evidence was insufficient to prove domestic violence or stalking; and (2) even though trial court checked a "box" on a judgment form that stated the Order was based on "sexual assault," where Petitioner did not allege sexual assault, appellate court does not consider it.
Discussion: Under Sec. 455.010(1) "abuse" constitutes "domestic violence" and includes "assault," "battery" and "harassment." "Battery" means causing physical harm. Although Petitioner testified Defendant pushed her against a wall which "kind of startled" her, she admitted she was the initial aggressor and did not allege pain, injury or physical harm. "Assault" means placing a person in fear of physical harm. Although Petitioner testified she was "afraid" of Defendant because he texted her, she did not testify to any facts that would establish such claim, did not testify what the text messages said, and her petition (which did contain factual allegations) was not self-proving. "Harassment" means a course of conduct that serves no legitimate purpose and would

cause a reasonable adult to suffer substantial emotional distress and actually causes substantial emotional distress. Defendant's conduct of leaving belongings on Petitioner's porch by mutual consent had a legitimate purpose. "Stalking" is a course of conduct that causes "alarm," meaning fear of physical danger. Although Petitioner testified she was "afraid," she gave no testimony detailing that she feared physical harm.

Privileges

Goldstein v. Crane, 2024 WL 790898 (Mo. App. W.D. Feb. 27, 2024):
Holding: Even though Defendant-Doctor in malpractice case testified in a deposition that she had carpel tunnel syndrome (which Plaintiff alleged affected her ability to do surgery), and also told this to a co-worker and family members, her medical records regarding this condition were protected by patient-physician privilege, Sec. 491.030, and not discoverable, because her compelled deposition testimony by Plaintiff wasn't a voluntary waiver of privilege and providing general information to co-workers or family about one's medical condition is too general to waive the privilege.
Discussion: Plaintiff hasn't cited any authority indicating a person waives the physician-patient privilege by discussing their medical condition with a friend. Persons undergoing medical treatment can regularly be expected to seek support from friends and family, and in doing so may disclose basic details about their medical condition. To find that a person waives privilege by disclosing any information to their friends or family would defeat the purpose of Sec. 491.030. We do not find that general discussions with friends of family waives the physician-patient privilege so as to make information otherwise protected by 491.030 (here, Defendant's medical records) discoverable. Writ of prohibition granted.

Rule 24.035/29.15 & Habeas Postconviction Procedural Issues

Martin v. State, 682 S.W.3d 111 (Mo. App. S.D. Jan. 5, 2024):
Even though 24.035 Movant filed his pro se motion more than five years late, where he included with the motion a letter stating that he had been in administrative segregation when the motion was due and, before it was due, he had placed his motion on his cell door for mailing in accord with DOC mailing procedures, these allegations, if proven, would establish third-party interference to allow motion to be deemed timely filed, and motion court erred in dismissing case without allowing postconviction counsel to file an amended motion.
Facts: Motion court dismissed *pro se* motion as untimely, without allowing for an amended motion. Counsel filed a 78.06 motion to reconsider, alleging third-party interference. That motion was denied by operation of law.
Holding: The precise question here is whether Movant's submission of a letter simultaneously with his *pro se* motion to explain why his *pro se* motion was untimely was sufficient to meet his burden to show a valid legal reason to excuse the untimeliness. It was. Form 40 does not include a space to explain why a motion is untimely. However, Form 40 does instruct movants they can include information "on an additional blank page." Movant's letter satisfied this blank page instruction. *Pro se* pleadings are to be

interpreted less stringently than those by counsel. To hold that the letter would be considered part of the *pro se* pleading only if it was "stapled" to that pleading (as opposed to being in the same envelope, as here) would be "absurd." Reversed for hearing on timeliness.

King v. State, 862 S.W.3d 853 (Mo. App. S.D. Jan. 23, 2024):
Holding: An ineffective assistance claim for failure to object at trial is cognizable in a 29.15 motion where the appellate court declined to exercise plain error review on direct appeal regarding admission of the underlying evidence.
Discussion: The State argues Movant's failure to object claim is not cognizable because the appellate court declined plain error review on direct appeal regarding admission of the underlying evidence. However, the issues relevant to ineffective assistance analysis under *Strickland* are not necessarily decided in such circumstances. When an appellate court declines plain error review, it makes no ruling as to whether the trial court erred or whether the alleged error was prejudicial. Here, Mvant is entitled to a determination as to whether his trial would have had a different outcome had trial counsel objected to the evidence. Other times, though, this would not be the case, such as where the appellate court determined on direct appeal that there was no error by the trial court (so there would be no objection to make), or "presumably" where the appellate court had determined there was trial court error but it was harmless or not prejudicial, which would preclude a finding of prejudice under *Strickland*.

Williams v. State, 2024 WL 331975 (Mo. App. W.D. Jan. 30, 2024):
Even though 24.035 Movant had filed an amended motion and had an evidentiary hearing on that motion, where the guilty plea and sentencing transcripts had not been filed at that time, the time for filing an amended motion had not begun, so Movant could file a second amended motion; nothing in Rule 24.035 prohibits a timely second amended motion.
Facts: Movant pleaded guilty in 2017, but the trial court then, *sua sponte*, set that plea aside before sentencing. Movant pleaded guilty again in late 2017 and was sentenced. Movant timely filed a *pro se* 24.035 motion. Appointed counsel filed a timely amended motion raising certain claims. Movant then hired private counsel. The court then held an evidentiary hearing on the amended motion. After that hearing, new counsel discovered that the transcripts of the second plea proceeding were never filed – only transcripts of the first plea proceeding (which had been set aside). Counsel then filed a second amended motion with additional claims. The motion court rejected the second amended motion and ruled only on the first amended motion. Movant filed a motion to amend under Rule 78.07(c), arguing the court was required to rule on the merits of the second amended motion.
Holding: The applicable version of 24.035(c) (2017) provided that it was the duty of the clerk and court reporter to prepare and file complete transcripts of the plea and sentencing. 24.035(g) provided that an amended motion was due within 60 days of that filing. Because a transcript of the second plea and sentencing had not been filed when the original amended motion was filed or at the time of the evidentiary hearing, the time for filing never commenced. Thus, when counsel did file the transcripts (after the hearing), counsel had 60 days to file an amended motion, which counsel did. Nothing in

24.035 prohibits filing more than one timely amended motion. The cases rejecting second amended motions had *untimely* motions filed in them. The court was required to consider Movant's *timely* second amended motion. Because the court did not rule on those claims, the judgment fails to address all claims, and thus, is not "final" under Rule 74.01(b). Appeal dismissed to permit motion court to consider all claims.

Sentencing Issues

State v. Johnson, 2024 WL 675537 (Mo. App. E.D. Feb. 20, 2024):
Holding: Where at sentencing for armed criminal action (1) Judge said "I want to help you" but "my hands are tied" and "the most I can do for you is give you the … statutory minimum", and (2) Judge sentenced Defendant to five years, trial court plainly erred because the statutory minimum for a Defendant who lawfully possessed the firearm used in the underlying crime (as here) is three years, Sec. 571.015.1 RSMo. Cum. Supp. 2020.
Discussion: To obtain plain error relief on a claim a trial court misunderstood the range of punishment, it is not enough to merely show that the trial court held a mistaken belief. Defendant must show the sentence was actually "based" on that mistaken belief. Here, Sec. 571.015.1 mandates a prison term of not less than three years and not to exceed 15, unless the person unlawfully possessed a firearm, in which case it is not less than five. The Judge's remarks at sentencing show Judge intended to impose the statutory minimum. This shows the 5-year sentence was based on a mistake of law, and if left uncorrected, would result in manifest injustice. Remanded for resentencing.

State ex rel. Bailey v. Tschannen, 2024 WL 1056299 (Mo. App. E.D. March 12, 2024):
Holding: Even though Sec. 217.703.2 provides a sentencing court may make a finding that defendants convicted of second-degree statutory rape and second-degree statutory sodomy are ineligible for Earned Compliance Credits (indicating they are eligible absent such finding), such defendants are *not* eligible for ECC's because Sec. 217.703.1(2) explicitly declares that offenses defined as sexual assault under Sec. 589.015 (which includes these offenses), are excluded from ECC's.
Discussion: The issue here is whether Defendant, who was convicted of second-degree statutory rape and second-degree statutory sodomy, was eligible for ECC's, such that his probation has expired and cannot now be revoked. Secs. 217.703.2 and 217.703.1(2) are in conflict over this issue. Hence, canons of statutory construction must be used to determine which controls. Usually, the more specific statute (217.703.2) controls, but that's not always the case. Since ECC's were first enacted, the legislature has gradually amended the ECC statutes to make sex offenses ineligible for ECC's. This is a clear expression by the legislature that sexual crimes aren't eligible, and serves the greater public good by protecting the public from these offenders. Trial court is prohibited from awarding EEC's here. State's writ of prohibition granted.

State v. Cummings, 2024 WL 1161871 (Mo. App. E.D. March 19, 2024):
Holding: (1) Even though Defendant requested the trial court make certain findings of fact regarding the legality of his eviction from his residence (which was relevant to the defense), a trial court cannot make findings of fact in a criminal case; Defendant could have presented this evidence via an expert witness to testify regarding eviction law, or adduced other evidence of lawful possession; and (2) where the trial court orally sentenced Defendant to multiple 50-year sentences but the written sentence and judgment stated "999 years," this was plain error because a sentence greater than the maximum allowed by law results in manifest injustice; a written sentence must conform to the sentence orally pronounced.
Discussion: Rule 27.06 provides that a court shall not comment upon any matter of fact in a criminal case. A trial judge may not issue findings of fact to the jury, which must reach its own factual determinations. A trial court commits prejudicial error by stating what the facts are "as a matter of law."

State ex rel. Stevens v. Beger, 2024 WL 260098 (Mo. App. S.D. Jan. 24, 2024):
Holding: Where oral pronouncement and written judgment sentenced Defendant to 4-years in the DOC but "pursuant to Sec. 557.011.6 … the first year of that confinement to be under house arrest", and the form language for probation in the written judgment was crossed out, the trial court was without authority one year later to issue a *nunc pro tunc* order placing Defendant on probation.
Discussion: A judgment in a criminal case is final when sentence is imposed, and a trial court lacks jurisdiction to take further action after that except in limited circumstances. One such circumstance is a *nunc pro tunc* order, but such orders can only be used to correct "clerical mistakes" in judgments. "Clerical mistakes" occur when the judgment fails to accurately denominate the counts and convictions, fails to accurately memorialize the jury's verdicts; or fails to accurate memorialize the oral pronouncement. Here, no "clerical mistake" occurred. The original sentence and judgment accurately reflected what the court had orally pronounced. In addition, the court could not have originally entered the sentence it purported to do *nunc pro tunc* because under Section 568.060.5(1), defendants convicted of D felony child abuse and neglect are not eligible for probation or parole during the first year of their incarceration, although the trial court retains discretion to determine the *location* of confinement. The *nunc pro tunc* order relates back to the time of original judgment. The *nunc pro tunc* order fundamentally changed Defendant's sentence. The court was without authority to enter it. Writ of mandamus vacating *nunc pro tunc* order made permanent.

State v. Flood, 2024 WL 807179 (Mo. App. S.D. Feb. 27, 2024):
Holding: Where (1) trial court sentenced Defendant in July to one-year in jail, suspended execution of sentence, with two years probation, but also stated in its written judgment that Defendant would pay restitution in an amount "to be determined by the court" in September, and (2) after subsequent hearings on restitution in later months, the court ultimately ordered Defendant pay $21,000 in restitution, the later restitution Order was void because the court had no authority to act after entry of "final judgment," which occurred when the court imposed sentence in July.

Discussion: A final judgment is rendered when the trial court orally announces judgment and imposes sentence. That occurred in July. Secs. 559.105.1 and .3, and 570.145.7(2), set forth procedures to collect restitution. Although the trial court, in its July judgment, expressed an intention to order restitution, the failure to announce a specific amount was insufficient. The court had no authority after a "final judgment" to make any specific amount of restitution an enforceable part of Defendant's sentence. The later $21,000 restitution Order was void. Remanded with directions to vacate the void Order.

State v. Robinson, 2024 WL 674556 (Mo. App. W.D. Feb. 20, 2024):
Holding: (1) Where the written sentence stated Defendant was sentenced to "life without parole" but the oral pronouncement and range of punishment was was only for "life," this is a clerical error that can be corrected *nunc pro tunc*; and (2) appellate court notes that some cases decide errors in a written sentence as a matter of plain error under Rule 29.12(b), but others cases call it a "clerical mistake" under Rule 29.12(c) without addressing preservation.

State v. Denham, 2024 WL 1057024 (Mo. App. W.D. March 12, 2024):
Holding: Where trial court's oral pronouncement of sentence was silent as to whether certain sentences were concurrent or consecutive, but the written judgment stated they were consecutive, the oral pronouncement controls because Rule 29.09 creates a bright line rule that if a court fails to orally pronounce a sentence to be consecutive, then it is concurrent; the written sentence can be corrected *nunc pro tunc*.

State v. Denham, 2024 WL 1057024 (Mo. App. W.D. March 12, 2024):
Holding: Even though Sec. 570.030.3(a) (2014) states that any offenses in which "the value of property … is an element" is enhanced to a Class C felony if the propery consists of a motor vehicle, this enhancement did not apply to Defendant for stealing a motor vehicle since 570.030.1 (2014) defines stealing as depriving a person of property but does not include "value" as an element, as held in *Bazell*; offense is only a misdemeanor.

State v. Wilkinson, 2024 WL 1259554 (Mo. App. W.D. March 26, 2024):
Holding: Where jury convicted Defendant of a lesser-included offense, trial court plainly erred in sentencing Defendant for the greater offense because its sentence exceeded the maximum authorized sentencing range for the lesser; remanded for resentencing.

*** Pulsifer v. U.S., ___ U.S. ___, 2024 WL 1120879 (U.S. March 15, 2024):**
Holding: In order to avoid a mandatory minimum sentence, a defendant seeking criminal-history "safety valve" relief under the First Step Act, 18 U.S.C. Sec. 3553(f)(1), must not fall into any of the three listed ineligible categories: (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense; (B) a prior 3-point offense; or (C) a prior 2 point-violent offense. If a defendant falls into even one of these three categories, they are not eligible for safety-valve relief.

Com. v. Mattis, 2024 WL 118188 (Mass. Jan. 11, 2024):
Holding: Mandatory life without parole for persons 18 to 20 years old violates state constitution's cruel and unusual punishment clause.

Statutes – Constitutionality -- Interpretation – Vagueness

State v. Williams, 2024 WL 952486 (Mo. App. W.D. March 5, 2024):
Holding: A claim of immunity from criminal liability under Good Samaritan law, Sec. 195.205, must be raised in the trial court, and cannot be raised for the first time on direct appeal.
Discussion: Defendant, who was convicted of a drug offense after a person called 911 to report potential emergency about him, claims for the first time on appeal that he is immune from prosecution due to Sec. 195.205, which provides that a person who is the subject of a good faith request for medical assistance shall not be prosecuted. However, appellate courts merely review for trial error, and there can be no trial error if an issue wasn't raised in the trial court. At the very least, this issue must be raised before final disposition of the case in the trial court, or it is waived. This affords the State an opportunity to respond to the defense. Appellate court suggests, but does not decide, the issue can be raised as late as a post-trial motion in the trial court. But here, it wasn't raised at all, so it's waived.

State v. Salcedo, 2024 WL 1057071 (Mo. App. W.D. March 12, 2024):
Holding: (1) Where (a) Defendant was taken into custody after his Mother obtained a court order for a 96-hour evaluation pursuant to Sec. 632.305.2 on grounds Defendant was a danger to himself or others, and (b) drugs were found on Defendant when he was taken into custody, Defendant was not entitled to immunity from prosecution under "Good Samaritan" law, Sec. 195.205, because a legal action under Sec. 632.305.2 is not a medical emergency based on a drug or alcohol overdose; and (2) as a matter of first impression, a warrantless search after a person is taken into custody pursuant to 632.305 is governed by the same 4th Amendment principles as a search in a criminal matter; here, search was justified as incident-to-arrest for protection of Officers since Defendant may have had a weapon.
Discussion: Sec. 195.205 grants immunity to the subject of a request for medical assistance for a drug or alcohol overdose or "other medical emergency." Defendant contends that his situation meets the definitions of "medical assistance" and "medical emergency" in the statute. But the phrase "medical emergency" evidences an intent to limit the statute to people needing immediate medical attention. An action under 632.305.2 is "qualitatively distinguishable" from reporting a medical emergency to law enforcement, 911, or a healthcare provider. The Officers were not responding to a "medical emergency" but took Defendant into custody pursuant to an involuntary commitment order, so "Good Samaritan" law immunity doesn't apply.

Sufficiency Of Evidence

State v. Holtmeyer, 2024 WL 13260 (Mo. App. E.D. Jan. 2, 2024):
Holding: (1) Trial court erred in admitting telephone records as "business records" under Sec. 490.680, because the records were not notarized as required by Sec. 490.692, but only contained a digital signature, but (2) even though the telephone records were the only evidence linking Defendant to the crime, appellate court does not consider Defendant's sufficiency-of-evidence claim, because when appellate court reverses for inadmissible evidence, the State is given an opportunity to present additional evidence at a re-trial.
Facts: Defendant was charged with harassment, Sec. 565.090, for allegedly making harassing phone calls. At a bench trial, the State submitted telephone records of Defendant showing the calls originated from Defendant's phone. Defendant objected to admission of the records as business records on grounds there was not a notarized business records affidavit, as required by Sec. 490.692.
Holding: (1) The records did not comply with Sec. 490.692, because they did not contain an affidavit or written declaration under oath, such as a notary public. An unnotarized digital signature may be good enough for AT&T but it is insufficient under the laws of Missouri. (2) However, admissibility of evidence and sufficiency of evidence are separate inquiries. When an appellate court reverses for inadmissible evidence, the defendant is not entitled to a determination whether the evidence was sufficient to convict him, since such inquiry might prejudice the State, if the inadmissible evidence were ignored and the State weren't given an opportunity to present additional evidence. Here, the State would likely have been able to present additional or alternative evidence of the caller's identity if the trial court had found the records inadmissible. Reversed for new trial.

State v. Watts, 2024 WL 559501 (Mo. App. W.D. Feb. 13, 2024):
Holding: (1) Even though Defendant stole an SUV, where Defendant was charged with stealing property valued at more than $750 under Sec. 570.030.5(1), and the State presented no evidence as to the SUV's value, the evidence was insufficient to convict of Class D felony stealing; and (2) even though Sec. 570.030.5(3)(a) makes stealing a motor vehicle a class D felony, Defendant's felony conviction cannot be affirmed on this ground because Defendant was not charged under this statute, but charged as stealing more than $750.
Discussion: Chapter 570 defines "value" as the market value of the property, or replacement value if the market value cannot be determined. The State presented no evidence at all as to the SUV's value. The victim didn't testify as to value, and the State didn't even present any evidence as to the make, model, age or condition of the SUV. The State argues a court can infer the value was more than $750. But there is no evidentiary basis to infer value, other than sheer speculation. Western District questions whether cases that have held that testimony about the property's purchase price, the amount of time between purchase and the stealing, and its condition when stolen remain viable to establish value. But even if they do, the State didn't present such evidence here. Remedy is to vacate conviction for Class D felony stealing, enter conviction for lesser-

included offense of misdemeanor stealing (which is supported by the evidence), and remand for resentencing.

State v. Denham, 2024 WL 1057024 (Mo. App. W.D. March 12, 2024):
Holding: Even though Sec. 570.030.3(a) (2014) states that any offenses in which "the value of property … is an element" is enhanced to a Class C felony if the propery consists of a motor vehicle, this enhancement did not apply to Defendant for stealing a motor vehicle since 570.030.1 (2014) defines stealing as depriving a person of property but does not include "value" as an element, as held in *Bazell*; offense is only a misdemeanor.

Sunshine Law

The Sunshine and Gov't Accountability Project v. Mo. House of Rep., 2024 WL 952492 (Mo. App. W.D. March 4, 2024):
Holding: Attorney does not have standing to bring a Sunshine Law violation on behalf of Client who requested records (the "requester"), because Sec. 610.027 provides standing only to an "aggrieved person, taxpayer … or citizen" of Missouri, and Attorney did not fall into these categories since he sought standing only as a "concerned Missouri *resident*", which is different than "citizen"; remanded with directions to dismiss petition without prejudice.

Trial Procedure

State ex rel. Woods v. Dierker, 2024 WL 942548 (Mo. banc March 5, 2024):
Holding: (1) In order for a court to extend the mandatory deadlines under Rule 22.09(a) for holding a preliminary hearing (30 days after initial appearance for defendants in custody or 60 days not in custody), the court must make "meaningful inquiry" into the reasons for a continuance, and "explicit findings" as to the good cause; and (2) an assertion by the State that it failed to summon any witnesses for a preliminary hearing because it is pursuing a grand jury indictment, with nothing more and without further inquiry by the court, will not constitute good cause for continuance of a preliminary hearing under Rule 22.09(a).
Discussion: Rule 22.09(a) sets out explicit, definite and mandatory time limits by which a preliminary hearing must be held. The Rule also is clear that no continuance can be granted without a showing of good cause. These mandatory deadlines ensure that a defendant is not subject to continuing prosecution without probable cause. In St. Louis, the State appears to have a general practice of obtaining continuances merely by asserting that the State will be seeking a grand jury indictment. But the State is not entitled to proceed at whatever pace it chooses, without putting on evidence establishing probable cause. And a judge cannot simply rubber stamp the State's requests for continuance. The Judge has a responsibility to make meaningful inquiry into the specific reasons for a requested continuance, and to make explicit findings whether the State has shown good cause for it. While an active grand jury investigation can be considered as one factor, an

ongoing grand jury investigation, by itself, is not sufficient. The Judge must also consider factors such as the amount of time a defendant has been in custody, and the time elapsed since arraignment.

State v. Williams, 2024 WL 952486 (Mo. App. W.D. March 5, 2024):
Holding: A claim of immunity from criminal liability under Good Samaritan law, Sec. 195.205, must be raised in the trial court, and cannot be raised for the first time on direct appeal.
Discussion: Defendant, who was convicted of a drug offense after a person called 911 to report potential emergency about him, claims for the first time on appeal that he is immune from prosecution due to Sec. 195.205, which provides that a person who is the subject of a good faith request for medical assistance shall not be prosecuted. However, appellate courts merely review for trial error, and there can be no trial error if an issue wasn't raised in the trial court. At the very least, this issue must be raised before final disposition of the case in the trial court, or it is waived. This affords the State an opportunity to respond to the defense. Appellate court suggests, but does not decide, the issue can be raised as late as a post-trial motion in the trial court. But here, it wasn't raised at all, so it's waived.

State v. Bryant, 2024 WL 1056228 (Mo. App. E.D. March 12, 2024):
Holding: Where (1) the trial court sustained State's objection to asking Victim certain questions about what she told Police Detective, and (2) for an Offer of Proof, Defendant called Police Detective to testify about what Victim said and also defense counsel stated how he believed Victim would answer the questions, the Offer of Proof was not sufficient to preserve issue for appeal because counsel did not call Victim herself to testify as part of the Offer; counsel's belief as to the testimony of an adverse witness does not make a sufficient Offer of Proof.

State v. Bryant, 2024 WL 1056228 (Mo. App. E.D. March 12, 2024):
Holding: The proper objection for when a Prosecutor discusses the meaning of "reasonable doubt" is that the Prosecutor misstated the law on reasonable doubt, not that the Prosecutor is "defining" reasonable doubt.
Discussion: Old appellate cases state that a Prosecutor cannot "define" reasonable doubt. But most of those cases were decided before there was a definition of reasonable doubt in Sec. 546.070(4) and MAI. Because the law now includes an approved definition, the question is not whether the Prosecutor "defined" reasonable doubt, but whether the Prosecutor misstated the law. Counsel can ask jurors if they believe they can follow the instructions, but anything further risks mischaracterizing the carefully worded definition in MAI-CR 402.04, which can prejudice the defendant.

State v. Salcedo, 2024 WL 1057071 (Mo. App. W.D. March 12, 2024):
Holding: (1) Where (a) Defendant was taken into custody after his Mother obtained a court order for a 96-hour evaluation pursuant to Sec. 632.305.2 on grounds Defendant was a danger to himself or others, and (b) drugs were found on Defendant when he was taken into custody, Defendant was not entitled to immunity from prosecution under "Good Samaritan" law, Sec. 195.205, because a legal action under Sec. 632.305.2 is not a

medical emergency based on a drug or alcohol overdose; and (2) as a matter of first impression, a warrantless search after a person is taken into custody pursuant to 632.305 is governed by the same 4th Amendment principles as a search in a criminal matter; here, search was justified as incident-to-arrest for protection of Officers since Defendant may have had a weapon.

Discussion: Sec. 195.205 grants immunity to the subject of a request for medical assistance for a drug or alcohol overdose or "other medical emergency." Defendant contends that his situation meets the definitions of "medical assistance" and "medical emergency" in the statute. But the phrase "medical emergency" evidences an intent to limit the statute to people needing immediate medical attention. An action under 632.305.2 is "qualitatively distinguishable" from reporting a medical emergency to law enforcement, 911, or a healthcare provider. The Officers were not responding to a "medical emergency" but took Defendant into custody pursuant to an involuntary commitment order, so "Good Samaritan" law immunity doesn't apply.