IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,

Respondent,

v.

MICHAEL L. PHILLIPS,

Appellant.

No. ED91985

Appeal from the Circuit Court of the City of St. Louis
22nd Judicial Circuit
The Honorable Mark H. Neill, Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Michael L. Phillips appeals from the judgment and sentence of the Circuit Court of the City of St. Louis, entered on September 26, 2008. (LF 6-7, 75-82).[1] Because the notice of appeal was filed within ten days later, and Phillips' appeal does not raise any of the issues falling within the exclusive jurisdiction of the Missouri Supreme Court, this Court has jurisdiction. Mo. Const. art. V, § 3; MO. REV. STAT. § 477.050 (2005); Mo. Sup. Ct. R. 30.01(d).

[1] "LF" is reference to the Legal File; "TR," a reference to the transcript.

STATEMENT OF FACTS

Eight months pregnant and alone with a sick child asleep in an upstairs bedroom, Melva Dunlap heard a knock on her apartment door. (TR 188, 201, 204, 246-47, 324). She went to the door, looked through the peephole, and, seeing a man whom she thought she had seen the day before, asked who was there. (TR 188). He said, "Pumpkin" – her nickname – "you know who it is." (TR 188). Dunlap cracked the door open and saw a different, bigger man standing there. (TR 192). That man – whom Dunlap thought weighed about 300 pounds, was in his thirties, and stood about six foot, seven inches – pushed the door open and came inside with two other men, one armed with a handgun. (TR 193-95, 249, 263).

Calling Dunlap a "bitch," the big man demanded to know "where the money was at." (TR 196-97). He and his armed companion rummaged through the apartment, flipping over couches and pulling up vents. (TR 198-99, 205). Dunlap's hands and feet were bound. (TR 200-01). Their search fruitless, the big man and his armed companion came into the living room, where Dunlap was sitting; Dunlap screamed. (TR 200-01, 247). The armed companion told Dunlap that if she screamed again he would shoot her. (TR 247). After turning down the blinds, the three men then discussed whether to shoot Dunlap. (TR 205). The big man and the armed man urged shooting "that bitch," but the unarmed man disagreed. (TR 205). Eventually the three left without shooting Dunlap, taking with them a Sony PlayStation 2 and an assortment of video games. (TR 206-07).

The incident lasted between fifteen and twenty minutes. (*See* TR 216).

After calling her boyfriend, Ronnie Marshall, who was in upstairs apartment with Joe and Madelyn Hutchens, playing video games, Dunlap called the police. (TR 208). After the police arrived, Dunlap – "really shook up" from the "really traumatic experience," "constantly complaining" of labor pains, and dealing with her "very ill" child who was coughing a lot and crying – described the three men. (TR 209, 324-25). Soon thereafter, Dunlap was taken by ambulance to Barnes Jewish Hospital. (TR 209, 263).

The next day, Dunlap's boyfriend told her that the big man was Michael Phillips, Madelyn Hutchens' uncle. (TR 210-11). Dunlap called Hutchens, who also said that Phillips was the big man. (TR 212-13. *But see* TR 271). From the hospital, Dunlap called the detective assigned to her case and told him what she had been told. (TR 213, 303). Dunlap was later discharged from the hospital (not having gone into labor). (TR 213).

Two days after the burglary, the detective had Dunlap look at six photographs, including one of Phillips. (TR 214). (No dummy array – one without Phillips' photograph – was apparently done.) Dunlap chose Phillips' photograph; she was "positive" he was the big man. (TR 216, 306-07).

Sixteen days after the photo lineup, Dunlap and her boyfriend drove "up and down" the streets of St. Louis looking for Phillips. (TR 217-18). Dunlap saw Phillips, who was in his forties, TR 429, standing in front of a laundromat, and her boyfriend called the police. (TR 218, 292-93, 300). The police arrested Phillips (TR 292-93, 300), and he was charged with robbery in the first degree, Mo. Rev. Stat. § 569.020 (2005),

burglary in the first degree, Mo. Rev. Stat. § 569.160, kidnapping, Mo. Rev. Stat. § 565.110, and three counts of armed criminal action, Mo. Rev. Stat. § 571.015 (2005). (LF 22-23).

Almost thirty-two months after Phillips' arrest, the case went to trial. (*See* TR Index, 217-19, 300). The State's case turned on the eyewitness testimony of Dunlap. (TR Index, 203, 214-16, 306-07, 420). (No other eyewitness identified Phillips as the big man; no witness saw Phillips near Dunlap's apartment; and no fingerprints or DNA linked Phillips to the crime.) Phillips put on an alibi defense. (*See* TR 159-72; LF 32-33). His mother, Joann Hillard, testified that when the crimes took place, from noon till 1:00 pm on November 1, 2005, Phillips, who was missing two front teeth, was with her, chauffeuring her (and her disabled father) to a check-cashing business to cash her social security check. (TR 345, 351, 377). In corroboration, the manager of the check-cashing business testified that Phillips' mother had cashed her check there on November 1, 2005. (TR 381-83). Phillips' sister, Latoya Redd, testified, denying that she had ever heard Phillips talk about, or confess to having committed, the robbery or offer to sell her a PlayStation II. (TR 389-92, 402-09, 413-16).

After deliberating for an hour (TR 451), the jury found Phillips guilty as charged. (LF 69-74). Phillips was sentenced as a persistent offender to a total of twenty-two years imprisonment (he received multiple concurrent terms, but the longest was twenty-two years). (TR 315, 462-63).

POINTS RELIED ON

I. In violation of the Sixth Amendment, the trial court erred in denying Phillips' motion to dismiss the charges, because his right to a speedy trial was violated in that (a) it took nearly thirty-two months to bring him to trial, although his case was not complicated; (b) no good reason explains, let alone excuses, the prolonged delay; (c) Phillips promptly sought a speedy trial; and (d) not only was the delay presumptively prejudicial, it actually harmed him by undermining his sole (alibi) defense and by causing him to languish in jail for early thirty-two months, and the delay subverted the public's interest in a prompt trial.

U.S. Const. art. VI

Barker v. Wingo, 407 U.S. 514 (1972)

Doggett v. United States, 505 U.S. 647 (1992)

State ex rel. McKee v. Riley, 240 S.W.3d 720 (Mo. 2007).

II. In violation of state evidence law, the trial court erred in allowing the victim, her former boyfriend, their former upstairs neighbor, and the police to testify about out-of-court statements supposedly made by Phillips' sister inculpating him, because the statements were inadmissible hearsay in that (a) the defense never impugned the propriety of the police investigation, (b) the statements not only were more detailed than necessary or adequate to explain the course of the investigation, they also directly implicated Phillips in the crimes; (c) the prosecutor urged the jury to treat the statements as direct evidence of guilt,

and (d) no limiting instruction was given to prevent the jury from treating the statements as hearsay.

State v. Shigemura, 680 S.W.2d 256 (Mo. Ct. App. E.D. 1984)

State v. Robinson, 111 S.W.3d 510 (Mo. Ct. App. S.D. 2003)

State v. Garrett, 139 S.W.3d 577 (Mo. Ct. App. S.D. 2003)

State v. Hoover, 220 S.W.3d 395 (Mo. Ct. App. E.D. 2007)

STANDARD OF REVIEW

The two points on appeal are reviewed under different standards. The first point, because it raises a constitutional challenge, a question of law, is reviewed *de novo*; no deference is given to the trial court's ruling. *See State v. Martin*, 79 S.W.3d 912, 916 (Mo. Ct. App. 2002). The second point, because it challenges an evidentiary ruling, is reviewed for abuse of discretion. *State v. Kemp*, 212 S.W.3d 135, 145 (Mo. 2007). An abuse of discretion exists if ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *Id.*

ARGUMENT

I. In violation of the Sixth Amendment, the trial court erred in denying Phillips' motion to dismiss the charges because his right to a speedy trial was violated in that (a) it took nearly thirty-two months to bring him to trial, although his case was not complicated; (b) no good reason explains, let alone excuses, the prolonged delay; (c) Phillips had promptly sought a speedy trial; and (d) not only was the delay presumptively prejudicial, it actually harmed him by undermining his sole (alibi) defense and by causing him to languish in jail for nearly thirty-two months, and the delay subverted the public's interest in a prompt trial.

A. The Facts

Phillips was arrested on November 19, 2005. (TR 292-93, 300). On January 18, 2006, he was indicted. (LF 15-17). On June 5, 2007, a substitute information in lieu of indictment was filed. (LF 22-24). Trial was initially scheduled (on July 27, 2006) to take place on August 21, 2006. (LF 2-3). On its own motion, though, the trial court continued the case on seven separate occasions: on August 22, 2006 (to November 27, 2006); on November 30, 2006 (to January 16, 2007); on January 16, 2007 (to April 16, 2007); on April 20,23, 2007 (to June 4, 2007); on June 5, 2007 (to October 29, 2007); on November 1, 2007 (to December 31, 2007); January 2, 2008 (to February 25, 2008). (LF 2-4). On January 16, 2008, Phillips filed a *pro se* motion for a speedy trial. (LF 4). Phillips' counsel twice had the case continued, on February 21, 2006, and on February 26, 2008. (LF 2, 4). On July 10, 2008, defense counsel moved to dismiss the case, claiming that

Phillips' Sixth Amendment right to a speedy trial and his statutory right to a speedy trial under Mo. Rev. Stat. § 545.890 (2005) had been violated. (LF 34-37). On July 11, 2008, a judge was assigned to the case, and trial began on July 14, 2008. (LF 5-6). The next day, Phillips' motion to dismiss was denied. (LF 6).

B. The Law

"In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial," Const, art VI, a right that applies to state prosecutions, *Klopfer v. North Carolina*, 386 U.S. 213 (1967). This right is "generically different from any of the other rights enshrined in the Constitution for the protection of the accused." *Barker v. Wingo*, 407 U.S. 514, 519 (1972). There is a "societal interest in providing a speedy trial [that] exists separate from, and at times in opposition to, the interests of the accused." *Id.* "[U]nlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself," though courts must not "assum[e] that delay usually works for the benefit of the accused. *Id.* at 521, 526.

A balancing test is used to determine whether the right to a speedy trial has been violated. *Id.* at 522, 530. Four factors are weighed: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) prejudice. *Id.* at 530. The length of delay, which is a "triggering mechanism," must be "presumptively prejudicial." *Id.* at 530. The permissibility of delay turns on the complexity of the case: the more complex the case, as in conspiracy cases, the more

likely the delay was appropriate; the less complex the case, as in ordinary street crimes, the more likely the delay was inappropriate. *See id.* at 531.

C. Analysis

1. Phillips' Sixth Amendment right to a speedy trial was violated.

The lengthy delay between Phillips' arrest and trial, the paucity of any good reason for the delay, the promptness of Phillips' request for a speedy trial, and the resulting prejudice from the delay – these factors reveal that Phillips' Sixth Amendment right to a speedy trial was violated.

a. Length of delay

Phillips' right to a speedy trial attached when he was arrested, *see United States v. Marion*, 404 U.S. 307 (1971), on November 19, 2005 (LF 34-35; TR 299-300). The trial did not start until nearly thirty-two months later, on July 24, 2008 (TR 1) – nearly four times the eight-month delay that is presumptively prejudicial. *State ex rel. McKee v. Riley*, 240 S.W.3d 720 (Mo. 2007).

Phillips' case was not complex, but rather straightforward, like the burglary in *State v. Bolin*, 643 S.W.2d 806, 814 (Mo. 1983) (en banc). The parties presented their cases in a single day. (*See* TR Index). The State's case boiled-down to the victim's identification, in and out of court, of Phillips as the big man and his sister's statements to the same effect, whereas the defense's case rested on an alibi defense coupled with the sister's in-court vehement denial that she had ever made the inculpatory statements attributed to her. (*See* TR *seriatim*). Neither the prosecutor nor the defense counsel nor the trial court needed anywhere near thirty-two months to bring Phillips' case to trial.

b. Reason for delay

No good reason explains why, or excuses the fact that, it took nearly thirty-two months to bring Phillips to trial.

As noted, trial was initially set for August 21, 2006, but the trial court continued the case on *seven* separate occasions. (*See* LF 2-4). No reason was given for these continuances, to which the prosecutor never objected. So the delay counts against the State. *State v. Kirksey*, 713 S.W.2d 841, 845 (Mo. Ct. App. E.D. 1986); *State v. Black*, 587 S.W.2d 865, 875 (Mo. Ct. App. E.D. 1979).

Even if the continuances were the product of congestion (though no record evidence indicates that they were), the delay must still count against the State. *Barker*, 407 U.S. at 531. As the Missouri Supreme Court made clear:

> The right to a speedy trial is an important right that the courts of this state are duty-bound to honor, even in the face of heavy trial dockets and competing demands for trial. Protracted and unreasonable delays in criminal cases due to crowded dockets cannot become routine. Neither is it acceptable for the prosecuting attorney and defense counsel to accept or request such routine continuances without objection. The defendant's right to a speedy trial and the public's interest in timely resolution of criminal cases demand that this and other similar cases receive more expeditious treatment, even in the face of competing demands on counsels' and the court's time.

McKee, 240 S.W.3d at 731.

To be sure, Phillips' counsel continued the case twice – once on February 21, 2006; a second time on February 26, 2008. (LF 2, 4). Yet nothing indicates that Phillips personally acquiesced in the first continuance; and though he consented to the second continuance, that continuance was sought because defense counsel was unprepared for trial. (*See* LF 29). Counsel was appointed three months before trial was set; mistakenly believed trial was set for April 16, 2008; had met with Phillips only once; and needed additional time to prepare a defense. (*See* LF 4, 29, 36). Counsel's inability to proceed should not be charged to Phillips. The right to counsel is the right to *effective* assistance of counsel, *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) – the absence of which is charged to the State, *see Strickland v. Washington*, 466 U.S. 668 (1984) – and the accused cannot be forced to sacrifice either in order to safeguard the right to a speedy trial, *see Glover v. State*, 817 S.W.2d 409, 410 (Ark. 1991); *State v. Isaac v. Perrin*, 659 F.2d 279, 282-83 (1st Cir. 1981) (refusing to hold time between withdrawal of counsel and appearance of new appointed counsel against defendant's speedy-trial claim). Moreover, as the Missouri Supreme Court noted:

> [e]ven excellent defense counsel may not be prepared to go to trial and may seek a continuance, or multiple continuances, due to the press of other business or for other perfectly proper reasons unrelated to the defense of [the] defendant's case. The individual defendant, whose right to a speedy trial is at stake, may not care about those other cases or those other reasons. The defendant incarcerated while awaiting trial [such as Phillips] is properly concerned with his own need to resolve the charges against him.

McKee, 240 S.W.3d at 728.

In any event, even if the delay corresponding to defense counsel's two continuances are charged against Phillips, there would still remain a protracted and unjustifiable delay. Defense counsel's first continuance lasted 125 days (from February 21 to June, 2006), though counsel never sought such a lengthy continuance; defense counsel's second lasted 151 days (from February 21 to July 14, 2008). Consequently, a total of 692 days, almost twenty-three months of delay – nearly three times the eight months that are presumptively prejudicial – were solely the result of the trial court's seven *sua sponte* continuances.

c. Defendant's assertion of right to speedy trial

It is the "primary burden on the courts and the prosecutors to assure that cases are brought to trial"; the accused has "no duty to bring himself to trial." *Barker*, 407 U.S. at 529, 532. Here, though, Phillips sought to protect his right to a speedy trial. After seven court continuances – that is, after it looked like the trial court was disregarding Phillips' right to a speedy trial – Phillips filed his *pro se* motion[2] for a speedy trial, requesting an evidentiary hearing to ascertain whether his speedy-trial rights had already been violated. (LF 4, 26-27). And how did the trial court respond? It continued the case yet again and set a trial date for *seven months* later. (LF 4-5). The motion for a speedy trial having failed to achieve its aim, Phillips then moved (through counsel) to dismiss the charges against, on the grounds of his right to a speedy trial. (LF 34-37).

[2] That the motion was *pro se* is immaterial. *See McKee*, 240 S.W.3d at 728-29.

d. Prejudice

To establish a speedy-trial violation, proof of actual harm to the accused is not required. *Doggett v. United States*, 505 U.S. 647, 655 (1992); *Barker*, 407 U.S. at 532 (noting "possibility" that passage of time will harm the defense).[3] "*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial[.]" *Moore v. Arizona*, 414 U.S. 25, 27 (1973). "The . . . right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations." *United States v. Donald*, 456 U.S. 1, 8 (1982). Avoiding *potential* harm to the defense from delay is just one interest protected by the right to a speedy trial. *Doggett*, 505 U.S. at 655; *id.* at 659 (O'Connor, J., dissenting) (so characterizing the majority opinion);

[3] "[C]onsideration of prejudice is not limited to the specifically demonstrable, and . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim. *Barker* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.' And though time can tilt the case against either side, one cannot generally be sure which of them it has prejudiced more severely. Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett*, 505 U.S. at 655.

Barker, 407 U.S. at 532. Two other interests are preventing "oppressive pretrial incarceration" and minimizing "anxiety and concern of the accused." *Barker*, 407 U.S. at 532.

Not only did the thirty-two (or at least twenty-three) month delay have the potential to harm Phillip; it did harm him. To begin with, during the entirety of the thirty-two month delay Phillips languished in jail (he was unable to make bail). (LF 34, 36). This seriously interfered with his liberty by curtailing his associations with friends and family; doubtless prevented him from being employed, thereby draining his financial resources; and subjected him to public obloquy. *See Marion*, 404 U.S. at 320. Moreover, the prolonged delay undermined his sole (alibi) defense, in two ways. One, it vastly strengthened a key criticism of his alibi defense. Phillips' mother testified that he had taken her to get her social security check cashed when the crimes had taken place. (TR 345-52). Besides pointing out the mother's bias (but with whom else, besides friends and family, do people associate most of the time?), the prosecutor harped on the fact that the witness had waited "thirty-two months" to come forward with her alibi. (TR 354-55). Had Phillips got a prompt trial, though, the force of this criticism would have been blunted, perhaps extinguished.

Two, the delay caused multiple alibi witnesses to be lost, forcing Phillips to rely solely on his mother's (biased) testimony. The first lost alibi witness was Phillips' grandfather, who died in February 2007. (TR 360-61; LF 37). According to Phillips' mother, the grandfather was driving the car in which Phillips and his mother were passengers at the time of the crime. (TR 349). The other lost alibi witnesses, because of

significant lapse of time between the crime and the trial, could no longer remember the events on the day of the crime. (*See* LF 37). Had the trial been held on August 26, 2006, when it was originally set, or on November 27, 2006, after the first court-initiated continuance, or on January 17, 2006, after the second court-initiated continuance, these vital witnesses could have testified.[4] "If witnesses die or disappear during a delay," as happened here, "the prejudice is obvious." *Barker*, 407 U.S. at 532. "There is also prejudice if defense witnesses are unable to recall accurately events of the distant past." *Id*.

2. At a minimum, a remand is required because the record is inadequate to adjudicate Phillips' claim.

The Missouri Supreme Court has held that when the record is inadequate to adjudicate a speedy trial claim, the case must be remanded to the trial court for the limited purpose of creating an adequate record. *See McKee*, 240 S.W.3d at 729-31. Phillips believes the record adequately shows that his right to a speedy trial was violated. But there are gaps in the record that arguably make the record inadequate to review his claim. Of particular significance, here, as in *McKee*, *see id.* at 729-31, the record fails to

[4] That these witnesses might have undermined Phillips' alibi is immaterial. As *Barker* and its progeny have been at pains to emphasize, the speedy-trial right, unlike most other Sixth Amendment rights, is not exclusively concerned with protecting the defendant's interest. The public has an interest in a prompt trial, and it also has an interest in having the truth revealed, whether helpful to the defendant or not.

even hint why the Court on its own motion, on seven separate occasions, continued this case for a total of almost twenty-three months.

To conclude: Phillips' right to a speedy trial under the Sixth Amendment was violated. Hence, this Court should reverse and remand with instructions for the trial court to dismiss with prejudice the charges against Phillips. *See Strunk v. United States*, 412 U.S. 434 (1973) (holding that the sole remedy for a speedy trial violation is dismissal of charges). Alternatively, the record is inadequate to adjudicate his claim, so this Court should remand the case so that the record can be supplemented.

II. In violation of state evidence law, the trial court erred in allowing the victim, her former boyfriend, their former upstairs neighbor, and the police to testify about out-of-court statements supposedly made by Phillips' sister inculpating him, because the statements were inadmissible hearsay in that (a) the defense never impugned the propriety of the police investigation, (b) the statements not only were more detailed than necessary or adequate to explain the course of the investigation, they also directly implicated Phillips in the crimes; (c) the prosecutor urged the jury to treat the statements as direct evidence of guilt, and (d) no limiting instruction was given to prevent the jury from treating the statements as hearsay.

A. The Facts

Before trial, defense counsel filed a motion *in limine* to prevent the State from presenting hearsay from Madelyn Rucker and Ronnie Marshall – namely, that "Latoya Redd told them that [Phillips] made incriminating statements to [Redd] . . . and attempted to sell her a Playstation [*sic*] game system on the day of the robbery"; from the victim – namely, that "Ronnie Marshall and Madelyn Rucker told her that Latoya Redd told them . . . that [Phillips] made incriminating statements and attempted to sell her a Playstation game system on the day of the robbery"; and from the police – namely, that the victim "gave them [Phillips'] name as a suspect and that she told the police that [Ronnie Marshall] and Madelyn Rucker had told her [Phillips'] name and that [Phillips] incriminated himself to Latoya Redd" and that Rucker and Marshall told the police that Redd told that Phillips made incriminating statements. (LF 41-42). The motion *in limine*

argued that such testimony was both inadmissible hearsay and barred by the Confrontation Clause. (LF 41-42).

In his opening statement, the prosecutor referred to this anticipated testimony (and defense counsel objected). (TR 167-71). For instance, the prosecutor stated: "So Melva [the victim], after she's feeling well enough, decides to call Latoya, and she gets the last name Phillips while she's still at the hospital about this PlayStation and about the robber. She gets the name Michael Phillips, the defendant, *from his own relatives*." (TR 169) (emphasis added).

During the State's case in chief, the anticipated out-of-court statements were made. During the victim's testimony, the following colloquy took place:

Q: Who did you talk to first?

A: Ricky [the former boyfriend].

Q: And tell us what was that conversation.

A: He told me who it was.

Q: Did he give you a name?

A: Yes.

(TR 210). Defense counsel objected, based on her motion *in limine*; the objection was overruled. (TR 210). The colloquy then continued:

Q: And did he give you – that day you were in the hospital did he give you a name of an individual?

A: Yes.

Q: Was it a first name, last name?

A: First name.

Q: First name that he gave you was what?

A: Michael.

(TR 211).

During Madelyn Hutchens' testimony, the following colloquy, to which defense counsel objected, TR 266-67, took place:

Q: Did you talk about what had been taken [by the robbers] with her?

A: Yes.

Q: In that conversation [with Latoya] did she give you the name of an individual?

A: Yes.

Q: What name did she give you?

A: Her brother.

Q: Michael Phillips?

A: Yes.

(TR 268).

During the testimony of the victim's boyfriend, the following colloquy, to which defense counsel objected (TR 283, 289-90), took place:

Q: Did you describe what had happened?

A: Yes.

Q: What name did she relay to you?

A: Michael Phillips.

*   *   *   *

Q: Did you relay that information that Latoya had given you to [the victim]?

A: Yes.

(TR 290-91).

During the testimony of the detective assigned to the case, the following colloquy took place:

Q: And did she relay to you some information with regards to who might be responsible or one of the individuals that might be responsible?

A: Yes.

[Defense counsel]: Objection. This is based on my previously filed motion.

[Prosecutor]: Goes to subsequent conduct.

THE COURT: Overruled.

Q: She relayed to you the name of an individual, is that correct?

A: She did.

Q: What was the name she relayed to you?

A: The defendant's name, Mr. Phillips.

(TR 303).

In her testimony, Latoya Redd vehemently denied ever making the inculpatory statements attributed to her. (TR 390-92, 402-03, 405-06, 410-11, 415-16). The following colloquy took place during the State's rebuttal case:

Q: Okay. Did you ever tell Madelyn that Michael, your brother, showed up at your apartment with the PlayStation video game and numerous video games and DVDs right afterwards?

A: No, sir.

Q: That he attempted to sell you the merchandise, however, you decided or you felt it was stolen so you did not purchase it?

A: No, sir.

Q: Did you tell Madelyn that your brother thought that Ronnie [victim's boyfriend] inherited $4,000 from his mother passing and decided to rob him?

A: No, sir.

Q: Did you tell Madelyn that your brother went to South 10th Street with two other males and forcibly entered the residence?

A: No, sir.

Q: And that they were looking for Marshall, but he wasn't home?

A: I don't know who Marshall is.

Q: Ronnie Marshall. You didn't tell Madelyn that?

A: No, sir.

Q: Further, that Michael tied up Dunlap while the others looked for cash, you didn't say that?

A: Did I say that?

Q: To Madelyn?

A: No, I would have to be in her home to know that.

Q: Michael didn't tell you this? You didn't relay that information to Madelyn?

A: No, sir.

Q: That one of the individuals that he was with was armed with a pistol?

A: That would be something you would have to ask her. I was not in her home.

Q: You didn't tell Madelyn that?

A: No, sir.

Q: Your niece?

A: No, sir.

Q: And that one of the individuals wanted to shoot the female but Michael was the one that talked him out of it because she was pregnant, you didn't tell Madelyn that?

A: No, I'm at home. I wouldn't have no way of knowing that.

(TR 414-16).

In his closing argument, the prosecutor said the following regarding Latoya Redd's (supposed) statements inculpating her brother:

> Let's talk about Latoya's statements. Okay. Latoya is between a rock and a hard place. Madelyn is between a rock and a hard place.

> Madelyn is actually telling the police things, giving up her uncle to [the victim], to Ricky, and Latoya, I mean, she's the niece, but even a closer relationships is Latoya. It's her brother and her mother that depends on Michael. So don't you think she's got an incentive to try and, first of all, deny all the things that she supposedly said to Ricky? Supposedly said to Ricky and to Madelyn?
>
> I mean, she's got to come in here and testify in front of her family members. Don't you think if you were placed in that situation, hopefully, I mean, can't you see where someone would back off their statements? Hopefully, to have people coming in here telling the truth, and Madelyn did that knowing the stakes are high. That's her family sitting out there. But can't you see how Latoya would back off that stuff? Doesn't make that right, but you certainly don't disregard it all[.]

(TR 448-49).

B. The Law

It is the police's duty to solve crimes. To accomplish that goal, they must do a thorough investigation, questioning, and taking statements from, potential witnesses. These statements, truthful or not, often shape the course an investigation will take.

At trial, the failure of the police to do a thorough, unbiased investigation is sometimes alleged, to undermine the State's case. To rebut such charges, it is thus necessary for the police, and those helping with their investigation, to explain why their investigation targeted and ultimately charged the defendant. As Judge Easterbrook has

noted: "If a jury would not otherwise understand why an investigation targeted a particular defendant, the testimony could dispel an accusation that the officers were officious intermeddlers staking out [the defendant] for nefarious purposes." *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004).

There are times, then, when the prosecution can introduce out-of-court statements, not for the truth of the matter stated (that would be improper hearsay), but rather to explain the subsequent conduct of the hearers, ultimately the police. But "[a]n out-of-court statement . . . may not be admitted for the non-hearsay purpose of explaining an investigation where the propriety of the investigation is not a relevant issue at trial." *United States v Davis*, 154 F.3d 772, 778 (8th Cir. 1998). And it is a mistake to allow the police (or others)

> to relate [to the jury] historical aspects of the case, such as complaints and reports of others containing inadmissible hearsay. Such statements are sometimes erroneously admitted under the argument that the officers are entitled to give the information upon which they acted. The need for this evidence is slight, and the likelihood of misuse great. Instead, a statement that an officer acted 'upon information received,' or words to that effect, should be sufficient.

John W. Strong, *McCormick on Evidence* § 249, at 378 (5th ed. 1999). *Accord United States v. Maher*, 454 F.3d 13, 23 (1st Cir. 2006). *See, e.g., State v. Edwards*, 116 S.W.3d 511, 532 (Mo. 2003) ("The witnesses were directed not to repeat any statements by Mr. Wilson implicating defendant. . . . They attempted not to directly inform the jury of

statements made by Mr. Wilson, and on the few occasions when they spoke more directly about what Mr. Wilson told them, nothing that they said suggested that defendant was guilty."). Such out-of-court statements are prohibited from going beyond what is "necessary" or "adequate" to explain the conduct. *State v. Hoover*, 220 S.W.3d 395, 402 (Mo. Ct. App. E.D. 2007); *State v. Douglas*, 131 S.W.3d 818, 824 (Mo. Ct. App. W.D. 2004).[5] Statements embroidered with unnecessary detail (such as the statement that a driver was "slumped over the wheel" and "behind the wheel" when it was adequate just to say the police received a report of a parked car) are hearsay. *Douglas*, 131 S.W.3d at 824. It is also improper for the State to "elicit details directly connecting the defendant to the crime." *Hoover*, 220 S.W.3d at 407 (citing *State v. Robinson,* 111 S.W.3d 510, 515 (Mo. Ct. App. S.D. 2003)).

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[5] *Cf. Old Chief v. United States*, 519 U.S. 172 (1997) ("That reading would leave the party offering evidence with the option to structure a trial in whatever would produce the maximum unfair prejudice consistent with relevance. He could choose the available alternative carrying the greatest threat of improper influence, despite the availability of less prejudicial but equally probative evidence. . . . This would be a strange rule. It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation[.]").

C. Analysis

1. The out-of-court statements were inadmissible hearsay under state evidence law.[6]

Over defense counsel's objections, the prosecutor elicited, or attempted to elicit, damning hearsay testimony from the victim and her (former) boyfriend, their (former) upstairs neighbor, the police detective assigned to the case, and Phillips' sister – all directly implicating Phillips in the charged crimes.

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[6] Phillips does not argue that the admission of the hearsay statements violated the Confrontation Clause of the Sixth Amendment. There are various reasons why. One, it is unclear whether the statements are testimonial, as they must be for there to be a Confrontation Clause violation. *Davis v. Washington*, 547 U.S. 813 (2006). Apparently, no government agent actively procured the statements, by interrogation or otherwise, though the statements were likely "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004). Two, and more important, the hearsay declarant, Latoya Redd, along with those who reported her out-of-court statements, all testified at trial, so there can be no valid Confrontation Clause argument. *Crawford*, 541 U.S. at 69 n.9 (citing *California* v. *Green,* 399 U. S. 149, 162 (1970).).

The out-of-court statements purportedly[7] from Phillips' sister were admitted as direct evidence of Phillips' guilt (i.e., for the truth of the matter stated), and not merely to explain subsequent conduct, as revealed by four facts.

(1) At trial, the propriety of the police's (or others') investigation was neither a relevant issue nor questioned by the defense. This is not a case where the defense insinuated that the police made a rush to judgment, fabricated evidence, or in some other way botched the investigation. *Compare United States v. Watson*, 952 F.2d 982, 987 (8th Cir. 1991). "The central issue at [Phillips'] trial was not whether illegal activity occurred at the [victim's] residence, but whether [Phillips] participated in that illegal activity." *United States v. Cromer*, 389 F.3d 662, 677 (6th Cir. 2004).)

Why the police arrested and charged Phillips was simple, uncontested: The victim saw Phillips standing outside a laundromat, identified him as the big man involved in the robbery, and then her boyfriend, who was with her, called the police. (TR 291-92, 299). Why did she know it was him? Simple: She was an eyewitness – the only eyewitness – to the crime; and she had seen him for fifteen to twenty minutes. (TR 197). The jury did not need to know that her boyfriend told him that the culprit's likely name was in order to understand why she identified him as the robber. Nor did she need the name to identify him.

[7] She vehemently and repeatedly denied that she ever made the statements attributed to her. (TR 403-07).

To be sure, the police included Phillips' photograph in a photo lineup (from which the victim identified Phillips as the culprit) because the victim reported that the big man's name was "Michael Phillips." (TR 303). But, to repeat, the defense did not question the propriety of including Phillips' photograph in the lineup. Nor could the defense have done so: Phillips' physical characteristics significantly corresponded to those of the culprit. (TR 234, 304-05). Moreover, why Phillips' photograph was included in the lineup was not terribly important; whatever the reason was for including his photograph, the victim "instantly" identified him as the culprit. (TR 306-07).

But even if the victim's out-of-court statement to the police identifying the likely culprit as "Michael Phillips" explained the inclusion of his photograph in the lineup, in no way would that excuse the multiple other inculpatory excessively-detailed out-of-court statements adduced at trial (on which more below), which had no explanatory value.

(2) In direct contradiction of this Court's holding in *Hoover*, the prosecutor elicited, or sought to elicit, statements that not only included unnecessary detail, but also directly implicated Phillips in the charged offenses. *See United States v. Evans*, 950 F.2d 187, 191 (5th Cir. 1991) (evidence otherwise admissible as background "becomes inadmissible hearsay if it also points directly at the defendant and his guilt in the crime charged"); *United States v. Brown*, 767 F.2d 1078, 1084 (4th Cir. 1985) (error to admit out-of-court statements as "background" where statements implicated defendant in charged crime and "effect of the evidence could only have been a substantial bolstering of the government's case"). *Compare State v. Nabors*, 267 S.W.3d 789 (Mo. Ct. App. E.D. 2008) ("The informants did not specifically identify or implicate Defendant in any

criminal activities.”). The victim testified not only that her boyfriend had given her the defendant’s name, but also that her boyfriend had told her that Phillips was “who it was” that committed the crime. (TR 210). Phillips’ sister was asked by the prosecutor whether she told the upstairs’ neighbor that “Michael, your brother, showed up at your apartment with the PlayStation video game and numerous video games and DVDs right afterward”; whether Phillips “attempted to sell you the merchandise, however, you decided or you felt it was stolen so you did not purchase it”; whether she told the upstairs neighbor “that your brother thought that Ronnie [the victim’s boyfriend] inherited $4,000 from his mother passing and decided to rob him?”; whether she told her upstairs neighbor “that your brother went to South 10th Street with two other males and forcibly entered the residence” and “that they were looking for [the victim’s boyfriend], but he wasn’t home”; whether she had relayed to the upstairs neighbor what Phillips had said to her, namely, that “Michael tied up [the victim] while the others looked for cash” and that he was “one of the individuals that that he was armed with a pistol” and that “one of the individuals wanted to shoot the female but Michael was the one that talked him out of it because she was pregnant, you didn’t tell Madelyn that?” (TR 414-16). In other words, the prosecutor was allowed to tell the jury, through improper cross-examination of Phillips’ sister, that Phillips had confessed, in detail, to his sister, who in turn repeated the confession to the upstairs neighbor, and sought to sell the booty from his crime to his sister. This is a far cry from merely allowing the police to testify that they ultimately

arrested and charged Phillips because of "information received" from the victim and others, which would have sufficed to explain their conduct.[8] *See State v. Garrett*, 139 S.W.3d 577, 579-80 (Mo. Ct. App. S.D. 2003); *State v. Robinson*, 111 S.W.3d 510 (Mo. Ct. App. S.D. 2003).

(3) During his opening statement and closing argument, the prosecutor treated the out-of-court statements (supposedly) from Phillips' sister as substantive, direct evidence of guilt. *See Garrett*, 139 S.W.3d at 580 (noting that prosecutor's closing argument that informant's statements help "connect some more dots . . . betray to us the use, whether intentional or inadvertent" of the statement as hearsay); *United States v. Cass*, 127 F.3d 1218, 1224 (10th Cir. 1997); *United States v. Sallins*, 993 F.2d 344 (3rd Cir. 1993) (finding out-of-court "background" statements hearsay where the government relied on the contents of the statement for their truth during closing argument). In his opening statement, the prosecutor emphasized that these statements to the victim came "from his own relatives" (TR 169), a not so subtle assurance that the jury could rely on the statements. And in his closing argument, the prosecutor emphasized how difficult it was for Phillips' sister and her (former) upstairs neighbor to "come in here telling the truth" and how they were between a "rock and hard place" (since Phillips was a relative) and how the jury should not "disregard it all." (TR 448-49).

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[8] Granted, more information might have been necessary had the defense challenged the propriety of the police's investigation, urging the jury to acquit because of a shoddy investigation.

Disregard what? Not once did the prosecutor invoke the statements in order to explain why the police put Phillips' photograph in the lineup or why they arrested and charged Phillips (as opposed to someone else). Those matters weren't in controversy. No, the simple truth is that the prosecutor was urging the jury not to disregard the fact that Phillips' own sister had reported that Phillips' had confessed to having committed the crimes. After all, neither Phillips' sister nor the upstairs neighbor would be "between a rock and a hard place" (TR 448), as the prosecutor told the jury they were, if their statements were only explaining why the investigation ultimately concluded with Phillips' being arrested and charged. They are between a rock and a hard place only if the jury is allowed, or urged, to treat their out-of-court statements as direct evidence (i.e., a report of a confession) of Phillips' guilt.

In sum, the prosecutor's purported reason for admitting the statements was not his actual reason. This was a backdoor attempt to get improper and damning hearsay evidence before the jury.

(4) Finally, no limiting instruction was given the jury to prevent (to the extent possible given the prosecutor's urging) the jury from treating the out-of-court statements as affirmative evidence of guilt. *See State v. Shigemura*, 680 S.W.2d 256, 257 (Mo. Ct. App. E.D. 1984) (noting lack of limiting instruction as one factor warranting reversal).

2. The trial court's error prejudiced Phillips, mandating reversal.

The improper admission of hearsay evidence (and other evidence) requires reversal when there is a reasonable probability that, but for the improperly-admitted evidence, the jury's verdict would have been different. *State v. Roberts*, 948 S.W.2d 577,

592 (Mo. 1997); *Robinson*, 196 S.W.3d at 573. (This "reasonable probability" test for prejudice does not require the defendant to prove that the error more likely than not affected the jury's decision. *Strickland*, 466 U.S. at 693.) Here, there is a reasonable probability that had the jury not been exposed to the repeated, inculpatory hearsay statements (supposedly), the jury would have acquitted Phillips.

For starters, the State's case was not overwhelming – far from it. The only direct evidence of guilt was the victim's identification of Phillips as the big man. Granted, the victim saw the culprit for fifteen to twenty minutes (TR 197), and said she was "positive" and "had no doubt" that Phillips was the big man. (TR 216). But, one, eyewitness identification evidence is notoriously unreliable, *United States v. Wade*, 388 U.S. 218, 228 (1967); *Jackson v. Fogg*, 589 F.2d 108, 112 (2nd Cir. 1978) ("Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness [are] highly suspect."). Two, much lore to the contrary notwithstanding, "accuracy of recollection is not highly correlated with the recollector's confidence," *Krist v. Eli Lilly & Co.*, 897 F.2d 293, 297 (7th Cir. 1990) (Posner, J.).

Three, various circumstances in this case counsel in favor of placing little credence in the victim's identifications. The victim had never seen Phillips before (TR 191, 257), and the "identification of strangers is proverbially untrustworthy." *Wade*, 388 U.S. at 228 (quoting Justice Felix Frankfurter). The victim's boyfriend had told her that "Michael Phillips" was the big man, and he took her up and down the streets of St. Louis looking for him (TR 210), possibly predisposing her to identify as the culprit the first big

man she saw who was of similar appearance to the culprit. The victim, who was eight months pregnant and caring for a sick, crying child, was so "shook up" by the "really traumatic experience" that, fearing she had gone into labor, she was taken by ambulance to the hospital. (TR 209, 324-25). Highly stressful, traumatic events strongly decrease the reliability of eyewitness identifications. *See* Charles Morgan III, *et al*., 27 INTERNATIONAL J. OF PSYCHIATRY & THE LAW 265-79 (2004). "Contrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than 30 minutes, a large number of subjects in [the Morgan] study were unable to correctly identify their perpetrator." *Id*. at 274. The victim's in-court identification of Phillips also took place nearly thirty-two months after the crime. This is important because "[a]ccuracy of recollection decreases at a geometric rather than arithmetic rate (so passage of time has a highly distorting effect on recollection)." *Krist*, 897 F.2d at 297. Notably, too, no other eyewitness corroborated the victim's identification; and the victim never said that the big man, who talked throughout the robbery (*see* TR 196-206), was missing any front teeth, whereas, according to Phillips' mother, he had been missing two front teeth since 2003, (TR 352-53). What the foregoing reveals is that the State's case, resting as it did on suspect eyewitness evidence, was very shaky (which would explain why the prosecutor felt he had to have the hearsay testimony from Phillips' relatives).

Not only was the State's case shaky, the hearsay statements purportedly from Phillips' sister were quite damning. In effect, this hearsay allowed the State to convince the jury (1) that Phillips had confessed and (2) that his own sister and niece thought he

was guilty. The hearsay also likely nullified the alibi testimony of Phillips' mother. The jury likely concluded that, given the hearsay statements from Phillips' sister, the mother fabricated an alibi to protect her son. Without the hearsay statements, there is a good chance that (given the corroboration of the mother's testimony), the jury might have had a reasonable doubt about whether Phillips was elsewhere when the crimes transpired.

To summarize: The prosecutor repeatedly exposed the jury to inadmissible hearsay evidence. Because the State's case was shaky and because the hearsay evidence was highly inculpatory and strongly undermined Phillips' alibi defense, there is a reasonable probability that had the jury not been exposed to the hearsay, it would have acquitted Phillips.

CONCLUSION

The Court should reverse the judgment. Alternatively, the Court should remand the case to allow supplementation of the record so that an adequate record can be placed before this Court, to allow meaningful review of Phillips' speedy trial claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE & SERVICE

I certify that:

1. The attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 8,561 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. The floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were both e-mailed to shaun.mackelprang@ago.mo.gov and mailed on March 5, 2009, to:

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APPENDIX

Judgment..A-1