

MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)

STATE OF MISSOURI,)
)
 Plaintiff,)
)
v.) No. 1822-CR00642
) Div. 16
ERIC GREITENS,)
)
 Defendant.)

MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL AND FOR SANCTIONS

Defendant has moved to dismiss this prosecution on the basis of prosecutorial misconduct. The Circuit Attorney considers that this memorandum is warranted to clarify the record.

The hearing on this motion was based on a motion to compel production of additional documents and to re-depose the witness Tisaby, who was deposed in a marathon session lasting a full day and producing 377 pages of transcript. Defendant has excoriated the Circuit Attorney for belated disclosure of a video of the interview of the victim by Mr. Tisaby and of notes made by Mr. Tisaby during that interview. In the course of his motion argument, defendant accused the Circuit Attorney of suborning perjury. These attacks are unwarranted and appear to be an attempt to distract the Court's and the public's attention from the merits of this case.

The Circuit Attorney is a sworn officer of the law, and in response to defendant's motion to compel, she took extra steps to verify Mr. Tisaby's testimony concerning the video interview. She took these steps in part because of the attacks on Mr. Tisaby's

credibility raised by defendant. Although unable herself to view the video, she did not ignore the matter, but retrieved the camcorder that was used and arranged to have it examined by an IT professional in her office. She first learned that the video could be viewed on April 9, 2018. On April 10, after viewing the video in full for the first time, the Circuit Attorney realized that Mr. Tisaby's deposition testimony was incorrect. She proceeded to follow up with Mr. Tisaby and succeeded in obtaining notes that he utilized or made during the video interview, notes which had not been observed by the Circuit Attorney at the time. Those notes consisted in part of bullet points prepared by Mr. Tisaby from a briefing by the Circuit Attorney (based on a prior oral interview of the victim by the Circuit Attorney). Handwritten notes were added to these typewritten bullet points by Mr. Tisaby, but the Circuit Attorney was not aware of those notes until she viewed the video. The typescript bullet points were the work of Mr. Tisaby, not the Circuit Attorney.¹

The video is obviously the best evidence of what the victim said during the interview, rendering the "notes" issue largely irrelevant. Nevertheless, as soon as the Circuit Attorney obtained the Tisaby notes on April 11, she instructed an assistant to deliver the notes and the video, plus some briefing notes that the Circuit Attorney had written herself prior to the video interview. The assistant notified the defense of the existence of these materials at 4:38 p.m. on April 11. (The Court's standing order directed that "new documents or other

¹ Again, the Circuit Attorney's notes of her earlier interview with the victim were long ago provided to the defense.

discoverable materials obtained after March 15, 2018 will be produced within 48 hours of its receipt by the Circuit Attorney's Office."

Order of 3/8/18, para. 3.)

The Circuit Attorney begs leave to submit that the accusations of perjury and subornation of perjury are unfounded. The Circuit Attorney conformed to the law and her oath in pursuing additional discoverable and potentially exculpatory information, so as to seasonably supplement and correct prior disclosures.

The victim in this case has been interviewed by the Circuit Attorney, including the taped interview. Notes of the interviews and the tape have been disclosed to the defense. The victim testified before the grand jury. That testimony has been transcribed and disclosed to the defense. The victim has been subjected to a grueling deposition of approximately 9 hours. The defense has thoroughly explored the victim's testimony. There is simply no additional discovery to be had concerning the victim's testimony.

From the outset of this case, the defense strategy has been to attack in all directions in the hope of inducing the Court to abort the case without a trial. The credibility of the victim is a question for the jury.

Most importantly, the scorched earth strategy of the defense rests on diversionary tactics. The elements of the offense charged in this case are as follows (as set out in the applicable jury instruction):

First, that on or about March 21, 2015, in the City of St. Louis, State of Missouri, K.S. was in 4522 Maryland, and
Second, that 4522 Maryland was a place where a person would have a reasonable expectation of privacy, and

Third, that while K.S. was there, the defendant knowingly photographed her, and
Fourth, that at the time of such photographing, K.S. was in a state of full or partial nudity, and
Fifth, that such photographing was without the knowledge and consent of K.S., and
Sixth, that the defendant knew that such photographing was without the knowledge and consent of K.S., and
Seventh, that the defendant subsequently transmitted the image contained in the photograph in a manner that allowed access to that image via a computer.

The discovery dispute giving rise to the defense motion has little or nothing to do with the gravamen of the offense: invasion of privacy by taking a photograph of the victim without her knowledge and consent. To be sure, the only two people who know what actually happened on March 21, 2015, are the victim and the defendant, and so the victim's credibility is fair game. But it will not do to accuse the Circuit Attorney of misconduct, when the Circuit Attorney has acted properly to correct prior errors and misleading testimony. The erroneous testimony of Mr. Tisaby has been corrected in ample time to allow the defense to prepare for trial. The victim's testimony has been viewed and reviewed, over and over. The central premise of the testimony remains unshaken: the defendant photographed the victim in a state of full or partial nudity in a place where she had a reasonable expectation of privacy, and *without her knowledge and consent*. The State expects to prove further that the photograph was transmitted as specified in the statute, but the victim's core testimony remains consistent. It is for the jury to decide her credibility, not the defendant nor the Court on a motion to dismiss.

There is absolutely no prejudice to the defense in any of this.

The real issue in this case is the guilt or innocence of the defendant. The Circuit Attorney firmly believes in the justice of that charge and firmly believes that the trial should go forward. However, justice will not be served if the allegations against the Circuit Attorney become the focus of the case, instead of the defendant's illegal and reprehensible conduct toward the victim. The Court should not be misled by the diversionary tactics of the defense. The drastic remedy of dismissal will not serve justice or fairness, but will unfairly reward the defendant.

WHEREFORE, the State respectfully urges the Court to deny the motion to compel and for sanctions.

Respectfully submitted,
KIMBERLY M. GARDNER
CIRCUIT ATTORNEY OF THE
CITY OF ST. LOUIS
/s/Kimberly M. Gardner
/s/Robert H. Dierker 23671
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 12 day of April 2018.

/s/Robert H. Dierker

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/s/Robert H. Dierker