

APPENDIX F



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

JEAN FINNEY,)	
)	
Respondent,)	
)	
v.)	WD84902
)	(Consolidated with
MISSOURI)	WD84949)
DEPARTMENT)	Order filed: December
OF CORRECTIONS,)	27, 2022
)	
Appellant.)	

**APPEAL FROM THE CIRCUIT COURT OF
BUCHANAN COUNTY, MISSOURI THE
HONORABLE KATE H. SCHAEFER, JUDGE**
Division One: W. Douglas Thomson, Presiding
Judge, Alok Ahuja, Judge and Edward R. Ardini, Jr.,
Judge

ORDER**PER CURIAM:**

The Missouri Department of Corrections appeals from a judgment entered by the Circuit Court of Buchanan County following a jury verdict in favor of Jean Finney on her discrimination claims brought under the Missouri Human Rights Act alleging the trial court committed constitutional error when it struck certain members of the venire for cause. We affirm. Because a published opinion would have no precedential value, we have provided the parties an unpublished memorandum setting forth the reasons for the order. Rule 84.16(b).



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Appellant.)	

**MEMORANDUM SUPPLEMENTING ORDER
AFFIRMING JUDGMENT PURSUANT TO
RULE 84.16(b)**

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

The Missouri Department of Corrections (“DOC”) appeals from a judgment entered by the Circuit Court of Buchanan County following a jury verdict in favor of Jean Finney (“Finney”) on her discrimination claims brought under the Missouri Human Rights Act (“MHRA”) alleging the trial court committed constitutional error when it struck certain members of the venire for cause.

We affirm.

Factual and Procedural Background

Since 2002, Finney has been an employee of the DOC, spending her entire career as a corrections officer at the Western Reception, Diagnostic, and Correctional Center (“WRDCC”) in St. Joseph, Missouri. Finney worked with Gaye Colborn (“Gaye”) and Jon Colborn (“Jon”)¹ at WRDCC from 2002 until Gaye was transferred to another DOC institution in 2010. Gaye and Jon had been married but divorced in 2003.

In 2010, after Gaye had been transferred, Finney and Gaye began a romantic relationship. After learning of Finney’s relationship with Gaye, Jon repeatedly sent Gaye text messages about Finney, calling her names including “lesbo, lessie, just derogatory statements like that.” Gaye did not initially report the text messages to her superiors because she wanted to maintain a peaceful relationship with Jon out of respect for their children.

However, beginning in 2015, when Finney was chosen for a promotion over Jon, Jon’s actions intensified. Jon kept information from Finney that she needed to safely perform her duties, he spread rumors that Finney was romantically involved with a

¹ To avoid confusion, we refer to certain individuals by their first names; no disrespect or familiarity is intended.

female subordinate, and he submitted multiple complaints to supervisors about Finney and threatened to lodge additional complaints about employees he believed were friends of Finney. Finney complained to her supervisor about these incidents in 2016. Also, in 2016, Gaye reported the text messages Jon had sent indicating that Finney was attempting to sleep with a subordinate at WRDCC. No investigations came from either of these reports, so Finney again reported the conduct in 2017.

After Finney's second complaint, the warden of WRDCC sent a memo to his supervisors and human resources personnel detailing an "increasing level of hostility and aggression from [Jon,]" including "erratic, aggressive [behavior], inciting and retaliatory in nature." The warden expressed concern that Jon would bring a gun to work to shoot Finney and others. Based on Jon's conduct, the warden determined that Jon was creating a harassing, discriminatory, and retaliatory work environment for Finney based on her sexual orientation.

Finney filed suit against DOC, alleging that DOC had violated the MHRA by discriminating against her, creating a hostile work environment, and by retaliating against her. Finney alleged that she is a lesbian who presents masculine, and she was improperly stereotyped and discriminated against based on sex.

During *voir dire*, Finney's counsel sought information about the venire's views on homosexuality:

How many of you went to a religious organization growing up where it was taught that people that are homosexuals shouldn't have the same rights as everyone else because it was a sin with what they did?

A number of people raised their hands, including venirepersons 4 and 45. Counsel for Finney continued, asking how many people could not set aside these views. Several more people raised their hands, including Venireperson 13. Venireperson 13 then made the following comment:

The comment is that according to my belief, homosexuality is a sin. But you still have to love those people, and you still have to treat them right in society. . . . You don't have the right to judge them. Therefore, I think I could be a fair juror. Everybody sins. All of us here do. So that sin isn't any more or worse than any other.

Finney's counsel asked if anyone else shared those views. Several veniremembers raised their hands, including venireperson 45. Counsel for DOC followed up with venireperson 13:

[Counsel for DOC:] Okay. Thank you. Earlier I think that you had raised your paddle on the question about growing up in a religion

where it was taught that homosexuality was a sin. Do you – can you – was that something that you were taught when you were growing up?

[Venireperson 13:] No, it's in the Bible. The Bible talks about it. But as I tried to say, a sin is a sin. And every one of us here sins. And I don't imagine any of you would deny it. We all do. It's just part of our nature. And it's something we struggle with, hopefully, throughout our life. So there isn't – homosexuality isn't any worse sin than stealing something. It's all – a sin is a sin. It's all on the same level.

[Counsel for DOC:] Do you think that would impact your ability to be a fair and impartial juror in this case?

[Venireperson 13:] Absolutely not. That has really nothing to do with – in a negative way with whatever this case is going to be about. Finney's counsel later inquired of venireperson 4's views on homosexuality:

. . . I firmly stand on the word of God and what the word of God says. And much like what this other man said, a sin is a sin. And thank goodness they're all the same. But, you know, none of us can be perfect. And so I'm here because it's an honor to sit in here and to perhaps be a part of, you know, a civic

duty. But, yes, homosexuality, according to the Bible, is a sin. So is gossiping, so is lying, so is – I mean, we could go on and on.

After *voir dire*, Finney's counsel sought to strike venirepersons 4, 13, and 45 for cause. Counsel for DOC objected, arguing that venirepersons 4 and 13 indicated they could be fair and impartial despite their views on homosexuality and that venireperson 45 did not state that she continued to hold negative views concerning homosexuality. DOC's counsel further stated that, "I would have a categorical exclusion like that. It starts getting into the bounds of religious discrimination." The trial court sustained Finney's request to strike all three venirepersons for cause.

The jury returned verdicts in favor of Finney on the discrimination and hostile work environment claims and for DOC on the retaliation claim and awarded Finney a total of \$175,000.00 in non-economic damages and \$100,000.00 in punitive damages.

In its motion for new trial, DOC argued that "[t]he Court's blanket exclusion of potential jurors during voir dire based on their religious background and beliefs, despite such jurors testifying that they could be fair and impartial, violated the Equal Protection Clause of the U.S. Constitution and the Equal Protection Clause of the Missouri Constitution, and Article I section 5 of the Missouri

Constitution.” The trial court denied DOC’s motion for new trial. DOC appeals.

Discussion

DOC raises three points on appeal, all arguing that the trial court’s decision to strike veniremembers 4, 13, and 45 for cause violated provisions of the United States and Missouri constitutions. Specifically, in Point I, DOC claims that the trial court’s actions violated article I, section 5 of the Missouri Constitution, which prohibits the disqualification of jurors based on their religious beliefs or persuasion. In Points II and III, DOC asserts that the trial court violated the Equal Protection Clauses contained in the United States and Missouri constitutions, arguing again that the jurors were improperly struck based on their religion.

Standard of Review

When properly preserved, “[a] strike for cause is reviewed for abuse of discretion.” *State v. Johnson*, 284 S.W.3d 561, 580 (Mo. banc 2009) (citation omitted). However, “[f]or an allegation of error to be considered preserved and to receive more than plain error review, it must be objected to during the trial and presented to the [circuit] court in a motion for new trial.” *State v. Minor*, 648 S.W.3d 721, 729 (Mo. banc 2022) (quoting *State v. Loper*, 609 S.W.3d 725, 732 (Mo. banc 2020) (additional citation omitted). Moreover, “[a] claim of constitutional error must be

raised at the first opportunity and with citation to specific constitutional objections.” *Id.* (citing *State v. Driskill*, 459 S.W.3d 412, 426 (Mo. banc 2015)). Here, although DOC objected to the strikes at issue during jury selection, it did not cite to specific constitutional provisions or in any manner put forth an argument founded on constitutional principles, relying instead on the claim that the strikes could “get[] into the bounds of religious discrimination.” Counsel never stated an *objection* on the basis of religious discrimination, claimed that exclusion of veniremembers 4, 13 and 45 would actually *constitute* religious discrimination, or identified the legal authority which would prohibit such discrimination. Counsel’s ambiguous and ambivalent statement falls well short of the specificity required to preserve a constitutional objection. *See G.B. v. Crossroads Acad.-Central St.*, 618 S.W.3d 581, 593 (Mo. App. W.D. 2020) (stating that the assertion that a form violated “the Missouri Constitution regarding freedom of religion, separation of religion, as well as the Missouri RFRA” was insufficient to preserve an Equal Protection claim); *State v. Steidley*, 533 S.W.3d 762, 777 (Mo. App. W.D. 2017) (stating that a general argument that evidence “would violate [the defendant’s] rights ‘under the Missouri Constitution and the Constitution of the United States’” was insufficient to preserve a Sixth Amendment confrontation clause claim).

DOC also argues that, despite any deficiencies in its statement of an objection, opposing counsel and the circuit court *understood* that DOC was invoking constitutional principles, and the issues should accordingly be treated as preserved. We disagree. The single, ambiguous statement to which DOC refers occurred in the middle of a lengthier discussion concerning whether veniremembers 4, 13 and 45 had exhibited a disqualifying bias and whether they had been successfully rehabilitated. This broader discussion involved typical, “run-of-the-mill” questions presented to a trial court whenever a litigant seeks to strike a veniremember for cause. Nothing in the broader discussion would have alerted the trial court that DOC was raising some sort of religion-specific, constitutional objection requiring a different legal analysis and a heightened level of scrutiny. Confirming that the trial court did not view this as a constitutional issue, following DOC counsel’s “objection,” the court stated that it would “err on the side of caution” by striking the challenged veniremembers – a statement which invokes general, *non-constitutional* caselaw concerning for-cause strikes. *See, e.g. Brown v. Collins*, 46 S.W.3d 650, 652 (Mo. App. W.D. 2001) (“It is better for the trial court to err on the side of caution by sustaining a challenge for cause than to create the potential for retrial . . . by retaining the questionable juror.”)

Because DOC's claims are not preserved, we can review them only for plain error. *See* Rule 84.13(c).² “Appellate courts ‘will review an unpreserved point for plain error only if there are substantial grounds for believing that the trial court committed error that is evident, obvious and clear and when the error resulted in manifest injustice or miscarriage of justice.’” *Veal v. Kelam*, 624 S.W.3d 172, 178 (Mo. App. E.D. 2020) (quoting *Williams v. Mercy Clinic Springfield Cmtys.*, 568 S.W.3d 396, 412 (Mo. banc 2019)) (additional citation omitted). “Reversal for plain error in a civil case further requires the injustice to be ‘so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case.’” *Id.* (quoting *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 176 (Mo. App. W.D. 2012)) (additional citation omitted).

Point I

In its first point, DOC asserts that the trial court erred in granting Finney's request to strike for cause veniremembers 4, 13, and 45, arguing that they were excluded “on the grounds that they were Christians who believed homosexual acts are sinful[.]” DOC further argues that the strikes were improper because veniremembers 4 and 13 stated that they “believed that everyone was a sinner and

² Rule references are to the Missouri Supreme Court Rules (2017).

would follow the law;” and there was no evidence that venireperson 45 was unwilling to follow the law.

Article I, section 5 of the Missouri Constitution states, in relevant part, that “no person shall, on account of his or her religious persuasion or belief, . . . be disqualified from . . . serving as a juror[.]” This safeguard enshrined in our constitution serves as an invaluable tool to prohibit the exclusion from jury service of individuals based on their chosen religion. DOC attempts to trigger the protections of article I, section 5 by arguing that the removal of the prospective jurors at issue in this appeal was based on their status as Christians. This effort mischaracterizes the nature of the inquiry pursued during *voir dire* and ignores the broader proposition that article I, section 5 does not render an individual’s views on issues relevant to the pending case immune from scrutiny during the jury selection process when those views are grounded in or evolve from religious sources or teachings. Indeed, “no person who has formed or expressed an opinion concerning the matter or any material fact in controversy in any case that may influence the judgment of such person[] . . . shall be sworn as a juror in the same cause.” § 494.470.1, RSMo.³ While *voir dire* unquestionably touched upon religion, contrary to DOC’s assertion, it did not serve to

³ Statutory citations are to the Missouri Revised Statutes (2016).

identify and exclude prospective jurors of certain religious persuasions. Rather, the questioning was appropriately focused on identifying those members of the venire who possessed strong feelings on the subject of homosexuality – a central issue in the case. DOC’s efforts to narrowly cast the challenged strikes for cause as being based on the prospective jurors being Christians – as opposed to an issue-based determination founded on their views on homosexuality – is further undermined by the fact that several other prospective jurors who identified as religious or Christian but did not express strong views on homosexuality were not struck for cause.⁴ Based on this record, we are simply not persuaded that the relevant venirepersons were “disqualified” from jury service “on account of [their] religious persuasion or belief” in violation of article I, section 5 of the Missouri Constitution; rather we conclude those individuals were disqualified as jurors based on strongly held views relevant to the predominant issue in the case. *See Thomas by and through Thomas v. Mercy Hosps. E. Cmty.*, 525 S.W.3d 114, 118 (Mo. banc 2017) (citing Mo. Const. art. I, § 22(a)) (additional citation omitted) (stating that civil litigants have a constitutional right to a fair and

⁴ For example, veniremembers 8, 12, 19, 52, and 56, each indicated that they were raised in or went to conservative Christian churches. Juror 19 served on the jury. Juror 56 was struck for cause on other grounds.

impartial jury); *Catlett v. Ill. Cent. Gulf R.R. Co.*, 793 S.W.2d 351, 353 (Mo. banc 1990) (“Even in a civil trial, where a jury decision need be made by only a three- fourths majority, the civil litigant is still entitled to a jury of twelve impartial persons”).

Finney’s sexual orientation and her same-sex relationship with Gaye were at the heart of her claim of discrimination against DOC and it was not a clear, evident and obvious violation of article I, section 5 of the Missouri Constitution for the trial court to strike for cause those prospective jurors who expressed strong feelings on the topic of homosexuality during the *voir dire* process.

At least two additional considerations persuade us that there was no plain error injustice here. As reflected in our description of the relevant facts, Finney’s counsel asked extensive questions during voir dire, explicitly asking veniremembers whether they harbored *religious-based views* concerning homosexuality. Despite this extensive questioning, DOC’s counsel never lodged an objection that it was inappropriate to examine veniremembers about their religiously based beliefs. In addition, it is not at all clear that either the State or federal constitutions prohibit exclusion from jury service based on an individual’s *beliefs* – even *religiously based* beliefs – which prevent the juror from serving impartially in a particular case. See, e.g., *United States v. Brown*, 352 F.3d 654, 669-70 (2d Cir. 2003)

(drawing a distinction between an arguably improper strike based on a venire member’s “religious *identity*,” versus a permissible strike based on a venire member being a “religious *activist*” (emphasis added)); *United States v. DeJesus*, 347 F.3d 500, 511 (3d Cir. 2003) (“The distinction drawn by the District Court between a strike motivated by religious beliefs and one motivated by religious affiliation is valid and proper.”); *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) (“It would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, [or] a Muslim,” but it would be “proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing”).

As we have explained above, this case involved claims by Finney that she was mistreated, harassed, disparaged, and vilified by Jon *based on her homosexuality*. Given that the stricken veniremembers believed that Finney’s conduct was sinful (meaning immoral and wrong), it is not “evident, obvious and clear” that the circuit court erred in concluding that they could not impartially and fairly decide her claim that she was unlawfully harassed due to her homosexuality – even if those veniremembers claimed that their religious beliefs would not prevent them from serving. *Henderson v. Fields*, 68 S.W.3d 455, 475 (Mo. App. W.D. 2001)

(“The trial court is not required to accept as credible a venireperson's testimony that he or she will be able to overcome previously disclosed biases, prejudices and affiliations in rendering a verdict”).

Finally, even if we were to find the trial court committed plain error when it excluded the three veniremembers for cause (a finding we do not make), DOC's claim on appeal would still fail as manifest injustice is not shown where, as here, there is no allegation that any of the twelve jurors who decided the case were unqualified. *See Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189, 203 (Mo. App. W.D. 2012) (quoting *State v. Robinson*, 26 S.W.3d 414, 418 (Mo. App. E.D. 2000) (“A party ‘do[es] not have a right to a specific juror or to representation on the jury of a particular point of view”). No manifest injustice exists “where there is no claim or suggestion from the record that any of the jurors selected to deliberate on the case was biased and should have been removed.” *Id*; see also *State v. Reynolds*, 502 S.W.3d 18, 28 (Mo. App. E.D. 2016) (finding no manifest injustice from the dismissal of two female jurors when there was no indication that the jurors who served were not impartial).

Point denied.

Points II and III

In Points II and III, DOC alleges that the trial court's striking of veniremembers 4, 13, and 45 for cause violated the Equal Protection Clauses of the

United States and Missouri constitutions.

The Equal Protection Clause, found in the United States Constitution, states, in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. Similarly, the equivalent provision contained in the Missouri Constitution states, in relevant part, that “all persons are created equal and are entitled to equal rights and opportunity under the law[.]” Mo. Const. art. I, § 2. The Equal Protection Clause prohibits striking a juror on the basis of race, gender, or another legally protected class. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-42 (1994).

DOC argues that because religion is a legally protected classification, the trial court’s granting of the for-cause strikes must comply with strict scrutiny. However, consistent with our finding in Point I, the premise of DOC’s arguments in Points II and III is incorrect as the strikes at issue in this appeal were not based on the veniremembers’ religion; instead the strikes were founded on the veniremembers’ views regarding an issue central to

Finney's case. As a result, DOC's claims in Points II and III must fail.

Because the strikes at issue were not based on the veniremembers' status as Christians and instead were based on specific views held by the prospective jurors directly related to the case, as we reasoned in Point I, the trial court did not commit plain error by granting Finney's for-cause strikes. Points II and III denied.

Conclusion

The judgment of the trial court is affirmed, and the case is remanded to the trial court for a determination of attorney fees.⁵

⁵ Finney filed a motion for attorney's fees and motion to deem the motion for attorney's fees timely filed. Both motions were taken with the case. Finney had attempted to electronically file her motion for attorney's fees on November 15, 2022 – a day prior to the case being submitted. However, due to an issue with two supporting exhibits, and not the motion itself, the clerk's office rejected the filing of both the motion and the exhibits. This rejection was electronically communicated to Finney's counsel. Finney subsequently filed – after the case was submitted – an Amended Motion for Attorneys' Fees Incurred on Post-Trial Motions and on Appeal with Suggestions in Support Thereof that rectified the issues related to the two exhibits that "did not scan correctly."

Our Local Rule 29 requires that a party must file "a separate written motion [for attorney's fees] before submission of the cause." In this instance, there was no deficiency identified in the motion for attorney's fees that was timely submitted for

filing by Finney on November 15, 2022. Nevertheless, the motion was “returned to filer” due to issues related only to the exhibits. Under these circumstances, we will deem that Finney’s motion for attorney’s fees was timely filed under Local Rule 29. As the prevailing party, Finney’s motion for attorney’s fees is granted and we remand to the trial court for determination of the appropriate award. *Gray v. Mo. Dep’t of Corr.*, 635 S.W.3d 99, 108 (Mo. App. W.D. 2021) (“[W]hile appellate courts have the authority to award attorney fees on appeal, because the trial court is better equipped to hear evidence and determine the reasonableness of the fee requested, we remand to the trial court to determine a reasonable award of attorney[’s] fees on appeal.”).

Finney’s motion to dismiss this appeal or, in the alternative, to strike DOC’s brief, which was also taken with the case, is denied.