STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
In the General Sessions Court
Hon. J. Mark Hayes, II

Appellant Case No. 2022-000358
Lower Case No. 2020GS4203001

State of South Carolina, ... Respondent

vs.

Wesley Ray Kyzer, ... Appellant

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES PRESENTED

Question I: Did the trial court err in failing to grant a new trial when a juror failed to disclose that he was a stand out wide receiver for Coach Christopher Miller at Byrnes High School in 2007 and 2008 when Coach Miller was a witness for the State?

Question II: Did the trial court err in failing to direct a verdict for Mr. Kyzer based upon the fact that the state never proved that Robert Wesley Brown was a certified teacher at the school?

Question III: Did trial court err in failing to direct a verdict when the alleged threat did not arise out of the duties of Coach Robert Brown as a teacher as required by the statute?

Question IV: Did the trial court err in failing to sustain the hearsay objection which permitted Coach Robert Brown to give testimony as to the reputation of Wesley Kyzer which was prejudicial to Mr. Kyzer's case?

Statement of the Case

Procedural Facts

On or about September 25, 2019, Wesley Ray Kyzer was arrested and charged with threatening the life of public school teacher and with first degree harassment. He was indicted on both charges on June 12, 2020. The charge arose from an incident that occurred on September 24, 2019. He was tried before the Honorable J. Mark Hayes, II and a jury on March 7-9, 2022. He was convicted of threatening the life of a public school teacher and acquitted of the first degree harassment. He was sentenced to five year in prison suspended upon the service of 90 days home detention, the payment of a $5,000 fine and five years probation.

Mr. Kyzer filed his Notice of Appeal on the office of the solicitor on March 14, 2022.

On August 25, 2022, Mr. Kyzer filed a Motion to Suspend the Appeal while a motion for a new trial on after discovered evidence was held. The after discovered evidence consisted of juror misconduct in failing to advise the court of his relationship with one of the witnesses. A hearing on the motion was held on December 9, 2022. By order dated and filed on January 9, 2023, the Motion for a new trial was denied.

A second Notice of Appeal was filed on January 18, 2023.

Factual History

On September 24, 2019, Wesley Ray Kyzer had a confrontation with Coach Robert Brown in a restaurant in Spartanburg, SC. Coach Brown had been the baseball coach for Mr. Kyzer's son. Rec. at 114, ll 18-21. While Mr. Kyzer's son was on the team, a dispute arose over a chain of text messages among the coaches which Mr. Kyzer perceived as bullying his son. Rec. at 255, ll 23-25. The dispute ultimately led Mr. Kyzer to meet with Dr. Russell Booker, the

school superintendent for Spartanburg School District 7, to request the dismissal of Coach Brown. This meeting occurred in 2018. Rec. at 168, ll 6-17. Coach Brown was not dismissed.

At the Mexican restaurant, Mr. Kyzer stopped by the table where Coach Brown was sitting with three other coaches. Coach Brown testified that Mr. Kyzer, after shaking hands with Coach Chris Miller, cussed Coach Brown and said, "[Y]ou better hope I don't see you outside of here or I will kill you." Rec. 97, ll 15-16. All of the other three coaches testified Mr. Kyzer cursed Coach Brown. None of them recalled hearing a threat. No threat was given in the initial statements given by the other three witnesses when they were interviewed by the Spartanburg City police.

Coach Andrew Caldwell only testified as to the cursing and a statement about "I hope to see you outside." Rec. at 145, ll 5-6. He affirmatively testified he did not hear any threat to kill Coach Brown. Rec. 148, ll 17-19. Coach Ryan Thomas also testified as to the cursing and the statement, "[Y]ou not let catch you outside here or something like that." Rec. 155, ll 3-5. Coach Chris Miller also testified as to the cursing. He also testified Mr. Kyzer said, "[I]f I catch you out in the community by yourself somewhere, its, it's gonna be me and you and - - I'm gonna get you." Rec. at 159, ll 22-24. He also affirmatively denied hearing any threat to kill. Rec. at 160, ll 15-25.

Mr. Kyzer was interviewed by Officer Ben Johnson. Officer Johnson testified that Mr. Kyzer admitted cursing Mr. Brown, but denied making a threat. He stated Mr. Kyzer told him, "[H]e had made the comment to Coach Brown during the intersection - - interaction that he was going to catch him slipping." Rec. At 185, ll 1-3. Officer Johnson testified "slipping" meant, "[H]e was looking for the opportunity to specifically seek out or run into Coach Brown's family

and to do everything he could to make them feel as though he felt that Coach Brown made, I guess, his family go through or the emotions his family went through." Rec. 186, ll 19-23. In his testimony, Mr. Kyzer admitted cursing Coach Brown but denied making any threat against him. Rec. 255, ll 8-25.

Prior to trial, defense counsel for Mr. Kyzer made a motion to dismiss the threatening a school teacher on the ground Coach Brown was not a certified teacher. Rec. at 38, l 21 to 40, l. 17. The State conceded that Coach Brown was not a certified teacher. The State withdrew the argument that Coach Brown qualified as public official. Rec. 50, l 24 to 51, l 3. The case was submitted with a public employee being a lesser included offense.

While the initial appeal was pending, the wife of Mr. Kyzer was doing research on the jurors who served on the case. Dec. 9, 2022 hearing at 11, l 18 to 13, l 10. Through his attorney a Motion was filed to hold the appeal in abeyance until a hearing could be held on this after discovered evidence. This Motion was granted on October 12, 2022. The hearing was held on December 9, 2022. After the hearing, Judge Mark Hayes issued an order on January 9, 2023 denying the Motion for a new trial.

STANDARD OF REVIEW

As to Issues I and IV, as they involved evidentiary rulings, the standard of review is abuse of discretion. "The admission or exclusion of evidence is also subject to an abuse of discretion standard of review." *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014). As to issues II and III, as they involve the application of the law to the facts of the case, the standard of review is de novo. "However, this Court reviews questions of law de novo." *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014)

Question I

Did the trial court err in failing to grant a new trial when a juror failed to disclose that he was a stand out wide receiver for Coach Christopher Miller at Byrnes High School in 2007 and 2008 when Coach Miller was a witness for the State?

A judicial system that depends upon jurors also depends upon honest answers from honest jurors. This is basic to our system of justice. For when a juror lies in their response to a voir dire question, we seldom will know what motivates the false answer. "Where a trial judge grants counsel's request that the judge ask a particular question on voir dire, counsel is entitled to a truthful answer to the question." *State v. Gulledge*, 277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982). United States Supreme Court has said, "The necessity of truthful answers by prospective jurors if the process is to serve its purpose is obvious." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). And this truthful answer must be so whether the responses be with an affirmative answer or through a failure to respond. A fair trial is not given the defendant if he does not have a fair jury. In this case Mr. Kyzer did not receive the honest answer from a juror to a voir dire question.

The South Carolina Supreme Court has established the basis upon which a new trial should be granted based upon juror misconduct in failing to properly respond to voir dire questions. The court said "A party seeking a new trial based upon the disqualification of a juror must show: (1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to verdict; and (3) the moving party was not negligent in failing to learn of the disqualification before verdict." *Gray v. Bryant*, 298 S.C. 285, 288, 379 S.E.2d 894, 896 (1989). In that case a juror failed to acknowledge that she was a patient of the medical doctor being sued for malpractice. A new trial was ordered. In this case, Mr. Kyzer meets all three requirements.

First, had Mr. Kyzer known of the fact that the juror had played football under Coach Miller, he would have used a strike for that juror. This court can almost take judicial notice of the fact that no lawyer would seat a juror who had been a player for a witness against his client. Second, this relationship between the juror and Coach Miller was not known prior to the verdict. Lastly, no reasonable means existed for Mr. Kyzer to obtain this information before the trial. Mr. Kyzer had the right to rely upon honest answers from the jurors. No reasonable means existed for Mr. Kyzer to know of this relationship prior to jury selection. No defendant should be burdened with the requirement to check, prior to jury selection, the names of all past and present players if a coach is a witness against their client.

The trial judge found that the juror did not conceal any information. This conclusion is not supported by the record. The record establishes that the juror recognized Coach Miller in the courtroom. Dec. 9, 2022 hearing at 6, ll 19-24. Interestingly, the juror may not have even known Coach Miller was a witness as he testified did not hear the name read out. Dec. 9, 2022 hearing at 6, ll 16 -18. He further testified he did not think a high school coach would be considered "a

personal relationship." Dec. 9, 2022 hearing, at 9, ll 12-13. He further testified that he did not think the question applied to him. Dec. 9, 2022 hearing at 9, ll 20-22. This statement is contradictory to the previous statement that he did not hear the question. One cannot believe the question did not apply to him if he did not hear the question.

In determining whether the juror withheld important information, this court must do more than simply accept the juror's statements. As so aptly said by the Missouri court, "A prospective juror is not the judge of his own qualifications." *Girratono v. Kansas City Pub. Serv. Co.*, 272 S.W.2d 278, 281 (Mo. 1954). Most jurors would not admit they could not be fair and impartial. The reason voir dire is asked is to determine relationships so the lawyers for both sides can use their peremptory strikes more intelligently.

This case should be controlled by *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). The facts, as to the juror not answering the questions were, "Juror B gave conflicting testimony regarding Question 1. Initially, she admitted hearing the question, but said she did not think it applied to her. She then said she could not recall the question being asked. When respondent's attorney read the question from the transcript, she replied that the question 'didn't phase [sic][her],' implying that she heard the question, but chose not to respond." *Id.* at 587, 550 S.E.2d at 284. As noted previously, in this case the juror took virtually the same inconsistent positions.

Mr. Kyzer was prejudiced by the failure of the juror to state the relationship he had with Coach Miller. As the South Carolina Supreme Court said in *Wood*, when,"[A] juror's response to voir dire amounts to an intentional concealment, the movant need only show that the information concealed would have supported a challenge for cause or would have been a material factor in

the use of the party's peremptory challenges." *Id.* at 589, 550 S.E.2d at 285. Mr. Kyzer would have used a peremptory strike to excuse this juror. As this juror was the first juror selected, Mr. Kyzer had such a strike to use. Rec. on App. at 30, ll 13-23.

This Court should reverse the conviction of Mr. Kyzer and order a new trial for the failure of the juror to disclose the relationship between Coach Christopher Miller and himself.

Question II

Did the trial court err in failing to direct a verdict for Mr. Kyzer based upon the fact that the state never proved that Robert Wesley Brown was a certified teacher at the school?

Issue preservation

In anticipation of the state raising the question of issue preservation, Mr. Kyzer will address that issue first. Rule 19 of the South Carolina Rules of Criminal Procedure uses the mandatory word "shall." It provides, "On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charges in the indictment." As the rule requires a judge to direct a verdict on his own motion, there is no need for counsel for the defendant to make a motion for a direct verdict. On the civil side, Rule 50a of the South Carolina Rules of Civil Procedure uses the word "may." The civil rule does not give a trial judge the right to direct a verdict. The motion must be made by the attorney for either party.

As the trial judge in a criminal case is required to make his own directed verdict motion, then the issue as to the sufficiency of the evidence is always preserved. The reason for this

conclusion is very simple. As the Alabama Supreme Court stated over 150 years ago, "The State has no interest in convicting an innocent person." *Lyman v. State*, 45 Ala. 72, 79 (1871). This court has stated, "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). If a defendant is entitled to a directed verdict and the Rule requires the trial judge to grant it on his own motion, then the issue is preserved. The United States Supreme Court has also expressed this same sentiment when it stated, "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. 298, 325 (1995). *State v. Cashen*, 789 N.W.2d 400, 407–08 (Iowa 2010) ("Because of the importance of the public interest in not convicting an innocent person of a crime, any standard should resolve doubts in favor of disclosure."). As concern about convicting the innocent is at the core of our criminal justice system, this court should hold the failure of a trial judge to address the issue of actual innocence should preserve the issue for appellate purposes.

As to the importance of protecting the innocent from a wrongful conviction, the Fifth Circuit Court of Appeals said, "While it is the general rule that unless a motion to direct a verdict was made, an appellate court will not consider the evidence in a criminal case, nevertheless, where there is not sufficient evidence to support the conviction and error is apparent, then it becomes the duty of the court to reverse the judgment." *Strickland v. United States*, 155 F.2d 167, 168 (5th Cir. 1946). If it is the duty of the appellate court to reverse the conviction, it is also the duty of the trial court to prevent the conviction. *See also*, *Wiborg v. United States*, 163 U.S. 632, 658 (1896)("And, although this question was not properly raised, yet if a plain error

was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.") Under Rule 19 of the Rules of Criminal Procedure, this court should find the issues as to a directed verdict based upon the failure of proof that Coach Robert Brown was not a teacher was preserved.

The issue of Coach Brown not being a certified teacher was first brought to the attention of the trial judge in a pre-trial motion. Rec. on App. at 39, ll 2-6. The State conceded that Coach Brown was not a certified teacher. Rec. on App. at 40, l 22 to 41, l 5. The trial judge, after hearing arguments from counsel for both sides stated, "I tell you both I don't know. I'm gonna take a look at it. I don't think the fact that I'm not gonna make a ruling right now is going to delay the proceeding of this trial." Rec. on App. at 48, ll 16-16.

At the close of the state's case, the issue of whether Coach Brown was a teacher within the meaning of the statute was not re-visited. At the close of the state's case, defense counsel, "I'm not gonna address the threat charge. I think that's a question for the jury." Rec. on App. at 225, ll 15-16. This statement by defense counsel did not relieve the trial judge of this obligation under Rule 16 to make an independent evaluation of the evidence and direct a verdict if the lack of evidence so requires.

At the close of all testimony, the issues of whether Coach Brown was a teacher was addressed in the discussion of the charge to the jury. Rec. on App. at 298, l 2 to 299, l 25. The trial judge, by charging the lesser included of threatening the life of a public employee, left to the jury the factual determination of whether Coach Brown was a teacher. He, at least by implication, ruled on the issue. He certainly ruled on the issue as the trial judge in making his own independent determination as to whether a directed verdict should be granted. In the charge

to the jury, the trial judge did not define teacher.

Coach Robert Brown was not a teacher within the meaning of the statute

During the trial, Coach Brown admitted he was not a certified teacher. Rec. on App. at 106, ll 13-16. The principle of Spartanburg High school stated, "I, I, I view him as a teacher." Rec. on App. at 218. He also admitted Coach Brown was not certified. Rec. on App. at 218, l 24 to 219, l 1. In describing his duties, Coach Brown stated, "I am the strength - - assistant strength coach at the high school. I'm also the head baseball coach and, and serve many other duties inside of that title." Rec. on App. at 93, ll 21-23. His testimony as to exactly what he teaches is vague. He stated he and the head strength coach "we actually lesson plan together." Rec. on App. at 94, ll 9-10. He concluded, "Roughly 350 kids come through our room every single day for every sport in the high school." Rec. on App. at 94, l 24 to 95, l 1.

South Carolina Code § 59-25-20 provides, "No board of school trustees shall hereafter employ any teacher who has not a certificate to teach in the free public schools of the State." This provision pre-dates the passage of South Carolina Code § 16-3-1040 which prohibits threatening a teacher. This section was amended to include teachers by 1990 Act № 579. The legislature is presumed to have known the requirement that a teacher must be a certified teacher. "[W[here a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997); *See also* 73 Am. Jur. 2d Statutes § 110 (2023)("The legislature is presumed to know existing law at the time it enacts a statute."). Thus, the legislature is presumed to have known that only certified teachers could be hired by the school district. If they had intended to include non-certified teachers or people in the role of teacher, they could have

easily so provided.

What in essence has happened in this case, is the principal of the high school has made the determination of whether Coach Brown is a teacher. As the principal said, "I, I, I view him as a teacher." Rec. on App. at 218. Had the principal not viewed him as a teacher, the judge would have directed a verdict as to the charge of threatening the life of a public official. The legislature cannot delegate its obligation to define a teacher to the principle of the high school. "It is well settled that the power to legislate cannot be delegated to private persons or corporations, nor to any other body." *State v. Watkins,* 259 S.C. 185, 202, 191 S.E.2d 135, 143-144 (1972). A conviction cannot be sustained on how an individual is viewed by the principal.

As Coach Robert Brown was not a teacher as defined within the statute, a directed verdict should have been granted.

Question III

Did trial court err in failing to direct a verdict when the alleged threat did not arise out of the duties of Coach Robert Brown as a teacher as required by the statute?

South Carolina Code § 16-3-1040 makes the threat to a teacher a crime against a public official only "if the threat is directly related to the public official's, teacher's, or principal's professional responsibilities." The alleged threat in this case did not arise out of the professional responsibilities of Coach Brown as a teacher. The alleged threat only arose out of Coach Brown's responsibilities as a baseball coach. The rule of statutory construction in South Carolina has long been "that if there be any doubt as to the proper construction it must be resolved in favor of the citizen as against the state." *State v. Lewis*, 141 S.C. 207, 139 S.E. 386, 391 (1927). When the statute says the threat be directly related to their professional responsibilities it must

mean the professional responsibilities that provide them protection under the law. Otherwise, a teacher having an argument with their neighbor over a fence dispute would violate the statute even if the individual knew the person was a teacher. A teacher staying after a ball game to clean up could have a confrontation with an individual that has nothing to do with their teaching position. But the person making the threat could be subject to five years imprisonment when he honestly thought the person was part of the clean up crew.

The record in this case shows that the confrontation between Mr. Kyzer and Coach Brown had nothing to do with Coach Brown duties as a strength coach. The cause of the confrontation arose many months earlier on an allegation that his son was bullied as a member of the baseball team coached by Brown. He was eventually kicked off the team. Rec. on App. at 114, l 3 to 115, l 1; Rec. on App. at 137, ll 9-17; Rec. on App. at 220, ll 1-23; Rec. on App. at 247, ll 16-18; Rec. on App. at 255, ll 23-25. The alleged threat simply did not involve Coach Brown as to any of his alleged teaching duties. The record establishes that Mr. Kyzer knew the dispute did not arise from Coach Brown's duties as a strength coach. As the threat did not involve Coach Brown's teaching responsibilities, the state has failed to prove a key element of its case. The trial judge, on his own motion, should have directed a verdict.

The obvious purpose of the statute is to protect teachers who are threatened for acts arising out of their teaching responsibilities. This is not what occurred in this case. The legislature did not intend to protect a teacher from all threats. If this were true, there would have been no need to limit the application of the law to events arising out of their responsibilities. Had Coach Brown not been deemed to be a strength coach teacher, the alleged incident would only have been a thirty day misdemeanor as Coach Brown would have only been a public

employee.

Question IV

Did the trial court err in failing to sustain the hearsay objection which permitted Coach Robert Brown to give testimony as to the reputation of Wesley Kyzer which was prejudicial to Mr. Kyzer's case?

During the re-direct testimony of Robert Brown, the solicitor asked Coach Brown about an incident with the son of Mr. Kyzer. According to the testimony, the son, after striking out in a baseball game, was approached by a coach and asked about his approach to his turn at bat. The testimony was the son then used vulgarity toward the coach. Coach Brown testified he asked the young man to apologize to the coach. Coach Brown testified the response from the minor child was, "[H]e said something to the effects of I'm not allowed to apologize. I'm not allowed to apologize." Rec. on App. at 136, ll 20-21. A timely hearsay objection was made.

The statement by the minor son does not qualify as a present sense impression, the basis upon which the trial judge admitted the statement. "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014). The primary reason it does not qualify is there was no event at the time the statement was made. The statement made at the time Coach Brown heard it related to a prior event at some unknown time. It was a simple hearsay statement by the minor son explaining why he would not apologize.

Rule 803(1) states a present sense impression is not hearsay. A present sense impression

is defined as "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." One writer has said, "Since by definition a present sense impression is uttered spontaneously while the declarant is perceiving the subject of the declaration, the guarantees of trustworthiness of the exception are agreed to be two: no possibility of memory loss and little or no danger of insincerity." Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907 (2001)

The objection was to the statement by the minor son, "I'm not allowed to [apologize]." Rec. on App. at 137, ll 9-10. This statement was not made immediately after the perceived event. The event in this case would have to be when he was told he could not apologize. The statement by the minor son makes reference to a prior time when he was told what he could or could not do. "The present tense statement is admissible as state of mind, the past tense statement is not. A declaration of past state of mind is properly excluded from evidence because it raises the danger of memory loss and greatly expands the opportunity for insincerity in the statement." *Id.* at 928.

Furthermore, as the statement makes reference to an event that occurred at some unknown time many months before, the statement is not admissible. As this court has said, "The victim gave her story to the officer at approximately 10:30 p.m., and she did not report to the hospital until approximately 11:00 p.m., nearly ten hours after the incident. Given this lapse of time, it cannot be said that the victim made the statements while she was 'perceiving the event or condition, or immediately thereafter,' as required by Rule 803(1)." *State v. Burroughs*, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct. App. 1997). Here the record is not clear if the event occurred

ten days or ten months before the statement was made.

During the testimony of Mr. Kyzer he twice testified the decision not to apologize was that of his son. Rec. on App. at 247, ll 19-22; Rec. on App. at 253, ll 14-16. The State never cross-examined Mr. Kyzer as to whether he told his son not to apologize. The inadmissible hearsay left the jury with the impression that Mr. Kyzer had ordered his son not to apologize to the coach. Such an impression was prejudicial to Mr. Kyzer. The jury would believe that Mr. Kyzer was a dominating man who refused to permit his son to apologize. Whether Mr. Kyzer did or did not order his son not to apologize was simply not relevant to the case. Even if marginally relevant, the statement was more prejudicial than probative under Rule 403 of the South Carolina Rules of Evidence.

Another factor to consider is whether the statement was reliable. The trial judge should have sustained the objection to the hearsay statement. From the record, the statement could have been made simply because the minor son wanted an excuse to give his coach as to why he would not apologize. The record does not establish who actually told him not to apologize. The statement has no inherent reliability. Mr. Kyzer was prejudiced by the admissibility of this statement.

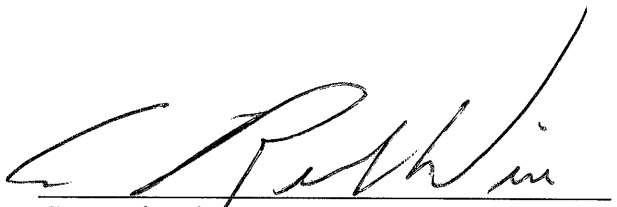
This was a complete credibility case. Coach Brown was the only person out of four people present who testified as to the threat. As noted previously, none of the other three people present at the table heard a threat to kill Coach Brown.

This court should hold the hearsay statement was inadmissible and prejudicial to Mr. Kyzer and reverse his conviction and remand for a new trial.

CONCLUSION

For the reasons in Questions II and III, this court should reverse the conviction of Wesley Kyzer on the ground that the facts were not sufficient to convict. In the event this court declares those two issues not to be preserved, then this court on the basis of Questions I and IV, reverse the conviction of Mr. Kyzer with instruction that the state must prove the complaining witness to be a certified teacher and that the alleged threat must arise out of the complaining witness's role as a teacher and not as a coach.

June 30, 2023



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