

**MISSOURI COURT OF APPEALS-WESTERN DISTRICT  
SPECIAL DIVISION  
EDWARD R. ARDINI, PRESIDING JUDGE,  
MARK D. PFEIFFER, JUDGE, AND GARY D. WITT, JUDGE  
APRIL 2, 2019  
UNIVERSITY OF MISSOURI SCHOOL OF LAW  
COLUMBIA, MISSOURI**

**WD81784**

**State of Missouri, Appellant,**

**v.**

**Dymon D. Thompson, Respondent.**

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The State of Missouri appeals from the circuit court's dismissal of count I of an information in lieu of indictment charging Dymon Thompson with the class C felony of possession of a controlled substance. In addition to the count charging Thompson with the class C felony of possession of a controlled substance for possessing cocaine, the State charged Thompson with the class D felony of unlawful use of a weapon for possessing a Glock Model 27 firearm and an extended clip while also committing a felony. Before trial, Thompson filed a motion to dismiss the count for possession of a controlled substance, arguing that it was a lesser-included offense to the second count. Thompson argued that dismissal was warranted because the State ultimately could not convict him of both offenses. On the morning of trial, the circuit court directed the State to elect which count it wished to dismiss. The State objected, and the circuit court provided the parties the opportunity to brief and reargue the issue. After re-briefing and argument, the circuit court granted Thompson's motion to dismiss the possession of a controlled substance charge. The court held that "the Double Jeopardy Clause [was] presumably violated" because every element of the possession of a controlled substance charge was found in the unlawful use of a weapon charge. Section 571.030 (11) of the Missouri Revised Statutes provides that a person commits the offense of an unlawful use of a weapon if he knowingly "[p]ossesses a firearm while also knowingly in possession of a controlled substance that is sufficient for a felony violation of section 579.015." The court concluded that possession of the controlled substance was a lesser-included offense of unlawful use of a weapon in Thompson's case and dismissed the possession charge. Thompson now appeals

Appellant's points on appeal:

- (1) The trial court erred in dismissing Count I because the Double Jeopardy claim was not ripe in that the Double Jeopardy Clause's protection against multiple punishments does not apply until sentencing which had not and could not occur before trial.
- (2) The trial court erred in dismissing Count I because punishment under both section 571.030.1(11) and section 195.202 does not offend the Double Jeopardy Clause in that the Double Jeopardy Clause does not prohibit punishment under more than one statute when the legislature intended to allow cumulative punishments and the Missouri General Assembly intended to permit cumulative punishments under section 571.030.1(11) and section 195.202.

**WD81919**

**ROH Farms, LLC, Appellant,**

**v.**

**Richard W. Cook, Jr., and Dawn K. Cook, Respondents;**

**Joyce Bremer and To the Top, Inc., d/b/a ReMax Jefferson City**

**d/b/a ReMax Jeff City, Defendants.**

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ROH Farms, LLC, appeals from the circuit court's judgment in favor of Richard and Dawn Cook on ROH Farms' First Amended Petition for Damages seeking specific performance of two contracts for the sale of farm property and residential property owned by the Cooks. On March 17, 2011, the Cooks entered into a contract with ROH Farms, agreeing to sell farm property they owned in Centertown, Missouri, to ROH Farms. The farm contract excluded the Cooks' residence and five acres surrounding the house. Margaret Rehman-Boulch, a licensed real estate broker for ReMax, represented the buyer in the farm contract transaction. Joyce Bremer, a licensed real estate salesperson with ReMax, was the sellers' agent. Because both parties to the farm contract were represented by ReMax agents, both Rehman-Boulch and Bremer became "dual agents" acting on behalf of both the buyer and sellers. After the parties entered into the contract for the sale of the farm property, the Cooks entered into a contract to sell their residence to ROH Farms. Rehman-Boulch and Bremer represented ROH Farms and the Cooks as dual agents acting on behalf of both the buyer and the sellers under the terms of the residential contract. On December 3, 2011, the parties signed an amendment to the contracts, mutually agreeing to a closing date of March 9, 2012. In late December 2011, Danny Harris, who manages ROH Farms, allegedly told Rehman-Boulch that he lost \$250,000, that his daughter was going to have a baby, and that he was not going to close on the Cooks' property. Rehman-Boulch allegedly relayed Harris's statements to Bremer, who in turn relayed those statements to the Cooks. The Cooks accepted those statements of Harris as a repudiation of the contract on behalf of ROH Farms. Harris, however, denies that he ever said he would not close on the contracts. In reliance on Harris's statements, the Cooks leased their farm property for the 2012 crop year to Steve Cook, cancelled plans for construction of a new residence, terminated their relationship with a different realtor who was searching for rental property for them to live in, and made a verbal agreement to sell the farm property to Steve Cook. Bremer drafted a "Mutual Release" acknowledging termination of the contract and tendered it to ROH Farms, but ROH Farms never signed the release. The Cooks also did not sign the Mutual Release. For approximately two months following the receipt of the information that ROH Farms would not close on the property, Rehman-Boulch and Bremer made numerous efforts to contact Harris without success. In late February 2012, Harris contacted Rehman-Boulch and indicated that ROH Farms wanted to close on the contract on the scheduled closing date. The Cooks, however, after consulting legal counsel, informed their agent that they did not intend to go to closing because they believed the contracts became invalid when ROH Farms repudiated the contracts. In the meantime, Harris pre-signed a number of documents in preparation for the putative closing. These documents showed the "buyer," "borrower," "owner," and "grantor" as "Harris Ventures, Inc.," and not ROH Farms. Harris signed these documents in his capacity as president of Harris Ventures. Days before the closing date, Bremer called the Cooks and asked whether they intended to attend the closing. Mr. Cook told her that they believed the contracts were invalid after ROH Farms repudiated the contracts and that they would not be attending the closing. Thereafter, ROH Farms filed suit against the Cooks seeking specific performance of the contracts. The circuit court entered judgment in favor of the Cooks finding that ROH Farms anticipatorily breached the contracts by

repudiation and that ROH Farms failed to prove it was ready and able to perform on its contractual obligations given that Harris Ventures attempted to close on the contracts. The Court also ruled that specific performance should be denied based on equitable considerations. ROH Farms now appeals.

Appellant's points on appeal:

- (1) The trial court erred in denying buyer specific performance of the contracts on the basis of buyer's alleged anticipatory repudiation because, even assuming buyer did repudiate the contracts, any alleged repudiation was retracted when seller did not treat the repudiation as a material breach by accepting and acting on it, in that Ms. Bremer's representation that seller would release buyer from the contracts subject to the terms of a mutual release was binding on seller as a dual agent for both parties and it is undisputed neither party signed the mutual release as to terminate the contracts.
- (2) The trial court erred in denying buyer specific performance on the basis of buyer's alleged anticipatory repudiation of the contracts because the contracts could not be unilaterally terminated by seller and the plain and unambiguous language of the contracts required seller provide buyer with written notice and an election of a remedy upon the belief of buyer's default and all modifications to the contracts must be in writing signed by both parties in that it is undisputed seller did not provide written notice or modify the contracts in writing; therefore, the contracts remained in full force and effect and any alleged repudiation was retracted.
- (3) The trial court erred in denying buyer specific performance of the contracts on the basis that buyer did not establish it was able to perform because tendering the purchase price is not a requirement to enforce the contracts when seller fails to appear at closing, in that buyer appeared at closing ready, willing, and able to perform and sellers knowingly and intentionally refused to appear at closing.
- (4) The trial court erred in ruling specific performance should be denied on the basis of equitable considerations because enforcing the contracts would not be unjust, in that seller voluntarily entered into the contracts and will not suffer an injury if the contracts are enforced and buyer did not engage [in] inequitable conduct.

**WD81233**

**State of Missouri, Respondent,**

**v.**

**Teddy Charles Hammer, Appellant.**

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Teddy Charles Hammer appeals from the circuit court's judgment convicting him of one count of sexual misconduct involving a child less than 15 years of age and one count of sexual misconduct in the second degree. Hammer does not contest the sufficiency of the evidence to support his convictions. Instead, he complains that the circuit court erred in precluding him from

presenting evidence of his diminished capacity at trial. On May 10, 2016, the Saline County Prosecutor entered into a “Deferred Prosecution Agreement” with Hammer, which required Hammer to waive all his trial rights, including his right to present evidence of his diminished capacity at the time of the alleged crime. In addition, the agreement required that Hammer live at a rehabilitation center, that Hammer admit that the State’s evidence established beyond a reasonable doubt that he committed the crimes charged, that this admission could be used to prove his guilt at a criminal trial if he violated the terms of the agreement, and that he stipulate to the admission of the paragraph admitting his guilt as “conclusive proof” that he committed two felonies and acknowledge that he understood that this statement alone may constitute all of the evidence presented on behalf of the State in a trial if he violated the agreement. The agreement was signed by the Saline County Prosecutor, Hammer’s attorney, Hammer’s guardian, and Hammer. Approximately two months after the agreement was signed, the prosecutor determined that Hammer did not live up to the terms of the agreement, so the prosecutor refiled the charges against Hammer in July 2016. The prosecutor sought to enforce the terms of the agreement by introducing Hammer’s admissions to all elements of the crimes at trial and preventing the defense from introducing any evidence regarding Hammer’s mental health issues. Hammer’s new defense counsel filed a motion in limine seeking to prevent the admission of the agreement and seeking approval to present evidence of Hammer’s mental health at trial. At a pretrial hearing, evidence was presented about Hammer’s deficits in cognitive functioning. Dr. Leonberger, a clinical neuropsychologist, testified that Hammer would not have been able to understand the Deferred Prosecution Agreement. Dr. Leonberger said that, although Hammer was not competent to understand the agreement, Hammer was competent to proceed to trial and assist his attorney with a diminished capacity defense. Whitney Fuller, Hammer’s daughter and guardian, testified that she did not read the agreement before signing it and that she did not talk to an attorney about the agreement. She said that, if she had understood what Hammer was giving up, she would have not signed the agreement and would have told Hammer to not sign the agreement. The circuit court denied the motion in limine and ruled that evidence of Hammer’s admissions made in the agreement would be admissible at trial and that evidence of Hammer’s diminished mental capacity would be inadmissible. A jury found Hammer guilty of both counts of sexual misconduct, and the trial court sentenced Hammer to seven years in the Department of Corrections and six months in jail, with the sentences to be served concurrently. Hammer now appeals.

Appellant’s point on appeal:

The trial court erred in precluding the defense from presenting evidence of Teddy’s diminished capacity at trial because this ruling violated Teddy’s rights to due process of law, a fair trial, and to present a defense, in violation of the U.S. Constitution, Amends 6 & 14, and the Missouri Constitution, Article I, Sections 10 & 18(a), in that the deferred prosecution agreement, which contained a complete waiver of “any defense based upon a mental disease or defect [or] diminished capacity” is unenforceable as it was not entered into knowingly, intelligently or voluntarily, and completely excluding evidence of Teddy’s mental health prevented Teddy’s jury from fully evaluating the circumstances of the alleged crimes, including Teddy’s mental state at the time and whether he could have acted with a knowing mental state.

**WD82353**

**Seth Reynolds, Appellant,**

**v.**

**Boone County Missouri, Respondent.**

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Seth Reynolds appeals from the circuit court's judgment of civil contempt against him. On May 18, 2017, the Circuit Court of Boone County entered a judgment finding that Reynolds had unlawfully constructed and maintained a building, a fence, and a satellite dish on his property. The positioning of these structures violated Boone County's Zoning Ordinances and encroached on Boone County's road right-of-way. The circuit court entered a mandatory injunction against Reynolds, ordering him to remove all the structures within 60 days of the date of the judgment. Reynolds appealed from that judgment, and this Court affirmed. The Missouri Supreme Court denied transfer, and the Mandate was issued by this Court on July 5, 2018. As of August 2018, Reynolds had not removed the structures and had failed to comply with the judgment. On August 15, 2018, Boone County filed a motion for contempt and application for show cause order, asking the circuit court to find Reynolds in contempt of court for failing and refusing to comply with the previously entered judgment. Four different hearings were held on the motion. At each of these hearings, Reynolds described the various efforts that he had made to comply with the judgment and the obstacles he had encountered in trying to comply with the judgment. Reynolds also filed a motion, pursuant to Rule 74.06, to correct the judgment ordering Reynolds to remove the building. Reynolds asserted that the judgment ordered removal of the back of the building which was not in violation of any zoning setback or right-of-way. The circuit court denied that motion. On December 3, 2018, the circuit court found Reynolds in civil contempt of court because he continued to "willfully and contumaciously fail and refuse to comply with the terms" of the judgment. The court ordered Reynolds to be committed to the Boone County Jail from December 13, 2018, to December 24, 2018, and, after that time, to be committed "from 8 pm until . . . 6:30 am each and every day until further judgment of this court that Reynolds has purged himself of his contempt." Reynolds now appeals.

Appellant's points on appeal:

- (1) The trial court erred in entering a judgment of contempt and ordering Appellant incarcerated upon a finding that he had the present ability to purge himself of contempt because there is no substantial evidence to support such a finding in that Respondent Boone County offered no evidence whatsoever to suggest or tend to prove such a present ability and Appellant offered considerable evidence, much of it in third party documentary form, showing that he did not have such a present ability to purge contempt.
- (2) The trial court erred in entering a judgment of contempt and ordering Appellant incarcerated upon a finding that he had the present ability to purge himself of contempt because such a finding is against the weight of the evidence in that all evidence adduced at the four show cause hearings established that Appellant has no such present ability.
- (3) The trial court erred in overruling Appellant's Rule 74.06 motion to amend the original 2017 judgment due to irregularity or because it is no longer just that it be enforced as to the approximate rear 13 feet of the building which is not in violation

of any laws, regulations or ordinances because the trial court misapplied the law by not correcting that portion of the judgment which is irregular and which it is no longer just that that portion be enforced in that it was included in a prepared form of judgment submitted by Respondent Boone County and signed by the trial court which was in direct contradiction of Respondent Boone County's own evidence from its own surveyor that only a part of the building encroached into right-of-way or the zoning setback area, which it previously admitted in the brief it filed in this court in WD80846.