

No. SC87193

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

GLEN E. McGOWAN,

Appellant.

**On Transfer from the Missouri Court of Appeals, Eastern District
Twelfth Judicial Circuit
The Honorable Keith M. Sutherland, Judge**

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for one count of first degree tampering in violation of § 569.080, RSMo 2000,¹ obtained in the Circuit Court of Montgomery County, the Honorable Keith Sutherland presiding. Appellant was sentenced as a prior and persistent offender to ten years imprisonment.

On September 27, 2005, the Missouri Court of Appeals, Eastern District issued its opinion reversing the judgment and remanding for a new trial. Judge Kenneth Romines dissented on one issue and transferred this case to the Missouri Supreme Court pursuant to Rule 83.03.

¹All statutory references will be to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

Appellant, Glen McGowan, was charged as a prior and persistent offender by amended information in the Circuit Court of Montgomery County with one count of tampering in the first degree and two counts of possession of a controlled substance (cocaine and codeine) (L.F. 16-17). Appellant's jury trial began on June 16, 2004, before the Honorable Keith Sutherland (Tr. 2).

Appellant does not contest the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the facts adduced at trial were as follows:

On March 20, 2003, Charles Brown stole a red and white Chevrolet S-10 truck that belonged to Ocbai Tekla (Tr. 88-92).² Two days later, around 11 p.m. on March 21, Mr. Brown and his girlfriend, Sharon Malone, picked up Barbara Bost in the stolen Chevy truck (Tr. 179-180, 207-208). Ms. Malone knew the red and white truck was stolen (Tr. 220). They drove around for a couple of hours doing drugs (Tr. 180-181). Around 3 or 4 a.m., they arrived at appellant's apartment and went to sleep (Tr. 181-182, 209). Appellant and Mr. Brown were friends (Tr. 202, 212). When they woke, Mr. Brown, Ms. Malone, and Ms. Bost did drugs; appellant did not take drugs (Tr. 182, 209, 219).

²Mr. Brown has several aliases, including "Red," "Charlie Brown," "James Gillespie," and "Moody" (Tr. 116, 125, 165, 207, 214).

All four of them decided to go to Columbia to party (Tr. 182-183, 211). They left in the red and white stolen Chevy truck; Mr. Brown drove the truck, Ms. Malone sat in the front passenger seat, and appellant and Ms. Bost sat in the back seat (Tr. 183, 211). They stopped to get more drugs, but appellant did not use them (Tr. 183-184). Around noon, they stopped to eat at a White Castle (Tr. 185-186).

After eating, Mr. Brown continued driving toward Columbia on I-70 (Tr. 186). He exited at Wentzville and pulled into a lumber yard (Tr. 186). Mr. Brown and Ms. Malone got out of the red and white truck and got into a black Ford F150 pickup truck that was parked in the lot (Tr. 96-98, 211-212). Charles Marks, the owner of the truck, had left the keys in the truck when he went inside the store (Tr. 97).

Mr. Brown drove off in the black Ford truck with Ms. Malone in the passenger seat (Tr. 187, 211-212). Ms. Bost and appellant followed in the red and white truck (Tr. 187). Ms. Bost figured that the red and white truck was stolen because Mr. Brown was always driving a different truck (Tr. 188, 196). Somewhere on I-70, Ms. Bost started “nodding off,” so she pulled over on the highway and asked appellant to drive (Tr. 187). They were far behind the black truck (Tr. 188).

Trooper Mark Broniec received a call about the stolen black Ford truck, along with its license plate number (Tr. 111, 123). On the off chance the truck was traveling westbound on I-70, Trooper Broniec parked his car in a cross-over just east of the Warrenton exit (Tr. 111). He saw the truck drive past him almost immediately (Tr. 112). Trooper Broniec pulled out and caught up with the truck near the Truxton exit (Tr. 112). Mr. Brown saw the trooper and

started to speed up and weave through traffic (Tr. 112-113). Trooper Broniec activated his lights (Tr. 113). Mr. Brown went from the passing lane toward the exit and got onto the ramp past the normal entrance (Tr. 113-114).

A third of the way up the ramp, Mr. Brown stopped the truck, got out, and started running across the median toward westbound I-70 (Tr. 114). Mr. Brown yelled that his truck was rolling back into the trooper's car, which it did (Tr. 115, 118). Ms. Malone also got out of the truck and ran toward the service road (Tr. 115, 212-213). Trooper Broniec drew his gun and pointed it at Mr. Brown and Ms. Malone (Tr. 114). The trooper went after Ms. Malone and arrested her, but lost sight of Mr. Brown (Tr. 115). He called for backup to help find Mr. Brown (Tr. 116-117). During the stop Trooper Broniec found heroin and cocaine in the truck and on Ms. Malone (Tr. 120-121).

Nicole Barnes was driving on I-70 toward Fulton when she exited at Truxton to go to a gas station and witnessed the confrontation between Trooper Broniec, Mr. Brown, and Ms. Malone (Tr. 100-103). Ms. Barnes saw Mr. Brown run across the highway and get into the bed of the red and white truck driven by appellant that was parked on the left hand shoulder underneath the overpass (Tr. 103-105, 190-191). Ms. Barnes believed the red and white truck was waiting for Mr. Brown (Tr. 105). The truck headed west on I-70 (Tr. 117). At some point, Mr. Brown got into the back seat of the truck (Tr. 193, 138). Ms. Barnes told Trooper Broniec what she had seen and the trooper called in a description of the truck and its location (Tr. 105-106, 116-117).

Trooper Anthony Maddox heard the information about the stolen truck and parked his vehicle in a cross-over point on I-70 to watch for the red and white Chevy truck (Tr. 134). He saw the truck drive by in the passing lane and made eye contact with appellant (Tr. 135-136). When Trooper Maddox pulled out onto the interstate with his lights activated, appellant abruptly got into the right hand lane and exited at Highway 19 (Tr. 135-136). The truck came to a stop at the top of the exit ramp and Trooper Maddox got out of his car with his gun drawn and told appellant to turn the engine off and to throw the keys outside the vehicle (Tr. 137-139). Appellant stuck his head out the driver's door and yelled that there were no keys (Tr. 139). Ms. Bost was sitting in the passenger seat and Mr. Brown was in the back seat of the truck (Tr. 140). Eventually, Mr. Brown showed Corporal Matthew Broniec how to turn the truck off with a screwdriver (Tr. 175).

After searching the truck, officers found a baggy with a white powdery residue in it that later tested positive for cocaine and the lower portion of an aluminum can with a small cotton ball in it that tested positive for codeine (Tr. 142-146, 171-172, 228-229). During the search, Trooper Maddox and Corporal Matthew Broniec noticed that the steering column of the red and white truck had been broken so someone could bypass the ignition and start the truck with a tool (Tr. 147-148, 171-172). The damage was immediately obvious to the troopers (Tr. 148, 172-173). Appellant said he did not know anything about the damage to the steering column (Tr. 169). In response to questions about the truck's owner, appellant "stammered" a bit as if he was searching for an answer before telling the trooper that Mr. Brown provided him with the truck (Tr. 169, 176).

Appellant, Ms. Bost, and Mr. Brown were taken into custody (Tr. 141, 151). Later, Ms. Malone and Mr. Brown were taken to the hospital because they were high on heroin (Tr. 125-127, 130).

At trial, appellant called Carol Hawkins as a witness (Tr. 242). Ms. Hawkins took care of time records for employees at Elliot Tool and Manufacturing Company where appellant worked (Tr. 242-243). Ms. Hawkins testified that appellant worked on March 21, 2003 from 6:22 a.m. until 2:56 p.m. and did not work at all on March 22, the day appellant was arrested (Tr. 243-244).

At the close of the evidence and arguments of counsel, the jury found appellant guilty of tampering in the first degree (Tr. 271; L.F. 51-53). The jury acquitted appellant of the two counts of possession of a controlled substance (cocaine and codeine) (Tr. 271; L.F. 51-53). On September 9, 2004, the court sentenced appellant as a prior and persistent offender to ten years imprisonment (Tr. 286; L.F. 51-53). This appeal follows.

ARGUMENT

I.

The trial court did not abuse its discretion in overruling appellant's motion for mistrial after the prosecutor commented, "Mr. McGowan, did you want to take the stand?" because appellant waived the right to be free from the prosecutor's commenting on his failing to testify in that appellant offered testimony without being subject to cross-examination when appellant said, "He's lying" during the testimony of Trooper Maddox.

Appellant contends that the trial court abused its discretion in overruling his motion for mistrial when the prosecutor asked appellant "Mr. McGowan, did you want to take the stand?" in response to appellant's statement "He's lying" during the testimony of Trooper Maddox (App. Br. 18). He claims the prosecutor's comment was an impermissible comment on his right not to testify, in violation of his Fifth Amendment right to be free from compelled self-incrimination (App. Br. 18).

A. Standard of Review

The standard of review for a trial court's refusal to grant a mistrial is abuse of discretion. *State v. Clark*, 112 S.W.3d 95, 100 (Mo. App. W.D. 2003). That is due to the trial court's superior opportunity to observe the incident that precipitated the request for mistrial. *Id.* Judicial discretion is abused when a trial court's ruling is so clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.* A mistrial is a

drastic remedy and should be granted only in extraordinary circumstances where the prejudice to the defendant cannot be removed any other way. *Id.*

B. Relevant Facts

The comment in question was made during Trooper Maddox's testimony as the prosecutor questioned the trooper about appellant's relationship with Ms. Bost:

Q. And he basically told you he had no interest in Ms. Bost?

A. Yes, that's correct.

Q. Okay. So the thing that Mr. Gabel [defense counsel] is trying to do here is trying to basically confuse the jury and twist it around. It's not what you said.

The Defendant: He's lying.

Mr. Wright: Mr. McGowan, did you want to take the stand?

(Tr. 235-236). Defense counsel asked to approach the bench, requested a mistrial, and argued that the prosecutor's comment was a direct reference to appellant's refusal to testify (Tr. 236). The court denied the request and said it was going to let the comment pass without mentioning it to the jury and telling them to disregard it (Tr. 236). Defense counsel said he would "rather it not be highlighted to the jury" (Tr. 236). The court agreed that it did not intend to highlight the comment, but denied the request for mistrial (Tr. 236).

The prosecutor told the court that this was the second time appellant had spoken up in the middle of the trial and that he felt it was inappropriate (Tr. 236). The court told defense counsel that he needed to speak to appellant about making comments during the trial (Tr.

237). Appellant chose not to testify under oath (Tr. 248-249). Defense counsel renewed his objection to the prosecutor's comment in the motion for new trial (Tr. 280-281; L.F. 45). **C.**

Analysis

At issue is whether the trial court abused its discretion in denying appellant's motion for a mistrial. In this case, the circumstances did not warrant a mistrial because the prosecutor's comment only came after appellant blurted out, "He's lying," during Trooper Maddox's testimony. Appellant waived his right to no reference to his failure to testify under oath because he *did* testify at trial, though not under oath. Appellant's statement, although only two words, was an attempt to challenge Trooper Maddox's credibility and cast doubt on his testimony. Moreover, the prosecutor's comment was isolated, not directed at the jury, and not intended to poison the minds of the jurors against appellant; nor is there any evidence that the jurors were misled by the prosecutor's comment.

1. The prosecutor's comment was not improper

As the prosecutor was attempting to clarify Trooper Maddox's testimony regarding the relationship between appellant and Ms. Bost, appellant blurted out "He's lying" (Tr. 235-236). Appellant's statement was a plain attempt to challenge Trooper Maddox's credibility and cast doubt on his testimony. Because appellant offered testimony without taking the stand, appellant waived his Fifth Amendment privilege by testifying (or opened the door to comment upon his unsworn testimony). *See generally State v. Stidham*, 305 S.W.2d 7, 18 (Mo. 1957) ("when an accused takes the stand in his defense, as in the instant case, his failure to testify on specific facts involved in the case is a legitimate subject for comment by the

state in argument”); Cf. *United State v. Robinson*, 485 U.S. 25, 26-34 (1988) (defense counsel opened the door to direct and certain reference to the defendant’s failure to testify); *State v. Clark*, 913 S.W.2d 399, 405-406 (Mo. App. W.D. 1996), *overruled on other grounds*, *Deck v. State*, 68 S.W.3d 418, 427 n. 4 (Mo. banc 2002) (prosecutor properly contrasted the in-court testimony of the state’s witnesses with the defendant’s videotaped statement after defense counsel argued that the videotaped statement was “testimony”).

In *State v. Clark*, 759 S.W.2d 372 (Mo. App. E.D. 1988), for example, while defense counsel was cross-examining the victim, the defendant injected himself into the proceedings and stated that he had an alibi for the charged offense. Specifically, he stated that had been in custody at the time of the crime. *Id.* at 373. In closing argument, the prosecutor pointed out that the alleged alibi was refuted by the evidence, and he argued that the defendant had been “lying . . . [and] trying to con you.” *Id.* at 373. The prosecutor then went on to say, in rebuttal:

What about the false alibi? Does that sound like an innocent man? *To lie to you and try to convince you outside the rules of evidence* he was in St. Louis police custody when this happened, when he wasn’t. *If he has an alibi why wasn’t it here in court?*

Id. at 373-374 (emphasis added). The defendant’s objection and request for a mistrial based on the prosecutor’s “comment[ing] on the failure of the defendant to testify” was overruled. *Id.* at 374. On appeal, the court noted that the privilege against self-incrimination can be waived if the defendant elects to testify, either under oath or while not under oath. *Id.* The court further observed that “when a defendant, arguing *pro se*, clearly goes beyond the

evidence in the record on a material point, the unsworn testimony constitutes at least a partial waiver of his immunity from self-incrimination and, thus, of the prohibition against a prosecutor commenting on a defendant's failure to take the stand." *Id.* Thus, the court concluded that the "defendant's statement in the case before us constituted a waiver of the privilege against self-incrimination," and that "any prosecutorial comment as to defendant's failure to testify so as to support the statement was clearly permissible." *Id.* The same should be true in the case at bar.³

The Missouri Court of Appeals, Eastern District, however, determined that the State's question to appellant was a direct reference to his failure to testify; that appellant's outburst did not open the door to the State's direct reference; that the State had other means available to it to prevent further unsworn comments by appellant; and that the State's question was not a fair response to appellant's outburst because it was a direct reference to his failure to testify. *State v. McGowan*, No. 85114, *slip op.* (Mo. App. E.D. September 27, 2005). Citing *State v.*

³ While appellant in this case was not representing himself, he did in effect, argue a part of his case *pro se*. The fact that he was otherwise represented by counsel does not change the nature of his unsworn testimony.

Neff, 978 S.W.2d 341, 345 (Mo. banc 1998), the court held that the trial court's denial of appellant's motion for mistrial was an abuse of discretion. *Id.*

In so holding, the court misapplied the principle set out in *Neff* because that case does not compel the result the majority reached. That case states in pertinent part:

Section 546.270 was first enacted in 1877. 1877 Mo. Laws 356. Its primary purpose was to negate the common law rule that a defendant could not testify in his own defense. See *State v. Chyo Chiagk*, 92 Mo. 395, 4 S.W. 704, 707-08 (1887). It also preserved the pre-existing constitutional prohibition against commenting on a defendant's exercise of his right to remain silent.

By its terms, this statute does not mandate a mistrial in every case where there is a reference, direct or otherwise, to a defendant's failure to testify. Neither has this Court held that a direct reference always requires a mistrial. For example, it is hard to imagine a more direct reference to the defendant's failure to testify than for the trial court to give a jury an instruction on the subject. . . .

No sound historical argument, rooted in the statute or the precedent of this Court, supports the sweeping claim that *regardless of the circumstances, a direct reference to the defendant's failure to testify mandates a mistrial.*

Neff, 978 S.W.2d at 344-345 (emphasis added). As the dissent correctly noted, *Neff* does not set out a hard and fast rule that a direct reference to the defendant's failure to testify mandates a mistrial regardless of the circumstances. *Id.* Instead, *Neff* sets out the principle that an

appellate court must consider a comment on a defendant's right to remain silent in the context in which it appears. *Id.* at 345.

The circumstances of this case did not warrant a mistrial because the prosecutor's comment was proper in that it only came after appellant blurted out, "He's lying," during Trooper Maddox's testimony. The Missouri Court of Appeals, Eastern District, recognized that a defendant may waive his right to no reference to his failure to testify, and noted that such a waiver may occur when a defendant testifies, though not under oath. The court, however, summarily denied that appellant's statement opened the door to the prosecutor's comment because his statement consisted of only two words. There is no precedent that a defendant does not waive his right to no reference to his failure to testify, even though he testifies at trial (though not under oath), because his testimony constituted a simple two-word clause. Appellant's statement, although only two words, was an attempt to challenge Trooper Maddox's credibility and cast doubt on his testimony.

Appellant also cites *State v. Neff*, 978 S.W.2d 341 (Mo. banc 1998), in his brief for the proposition that if an objection to a prosecutor's direct reference is made and overruled, a new trial will be ordered on appeal (App. Br. 20). Appellant also relies on *State v. Jackson*, 792 S.W.2d 21 (Mo. App. E.D. 1990), to argue that the prosecutor may not make reference to the defendant's failure to testify (App. Br. 20-22). However, while that is generally true, those cases deal with instances of alleged error in cases where the defendant did not take the stand and did not attempt to testify in some other fashion.

This Court has pointed out the inapplicability of such cases when dealing with a case in which the defendant has offered or attempted to offer testimony through examination of witnesses or argument. In *State v. Brannson*, 679 S.W.2d 246, 249-250 (Mo. banc 1984), the defendant claimed that the prosecutor's objections, which accused the defendant of attempting to testify, were an impermissible comment upon his Fifth Amendment right to remain silent. This Court disagreed and stated:

This is not a case in which a defendant sits mute at counsel table and the prosecution points up the defendant's failure to testify. [citations omitted]. On the contrary, this is a case in which defendant undertook his own defense and during his protracted trial participation effectively injected himself into the mainstream of the evidence. He attempted not only to argue the various points in issue but in the presentation of evidence through his lengthy interrogation of the State's witnesses, sought repeatedly to state as facts items not otherwise in evidence and in certain instances to establish as fact matters of which the witnesses had no knowledge.

* * *

As previously noted this is not a case in which defendant failed or refused to testify and in which comment was made on that fact. Indeed it is the opposite. Defendant sought in the jury's presence to state as evidence matters not in proof and in so doing he sought to testify without having been sworn and the prosecutor objected for that reason in those terms.

State v. Brannson, 679 S.W.2d at 249. This Court then concluded that the prosecutor's questions were proper, and that they did not result in manifest injustice under the plain error standard. *Id.* at 249-250. See also *Raffel v. United States*, 271 U.S. 494, 499 (1926) ("The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do. . . . We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial, or to any tribunal, other than that in which the defendant preserves it by refusing to testify.").

Likewise, in this case appellant waived his right to no reference to his failure to testify under oath because he *did* testify at trial, though not under oath. The prosecutor's comment under the circumstances of this case was therefore proper. To hold otherwise is to simply condone the outbursts of a defendant who decided not to abide by the rules of the court and not to subject himself to cross-examination.

2. Even if prosecutor's statement constituted error, the trial court did not abuse its discretion in failing to declare a mistrial.

The only remedy appellant requested was a mistrial. *Appellant* stated that he did not want the court to tell the jury to disregard the comment because he did not want it to be "highlighted" (Tr. 236). As a result, this Court's review is limited to whether or not the trial court abused its discretion when it denied appellant's motion for a mistrial. The denial of a mistrial was not an abuse of discretion because the law is well-settled that "[m]istrial is a drastic remedy reserved for the most extraordinary circumstances, and the decision whether

to grant a mistrial is left to the sound discretion of the trial court.” *State v. Brown*, 998 S.W.2d 531 (Mo. banc 1999) *cert. denied*, 528 U.S. 979 (1999).

“Appellate courts are loathe to reverse judgments for failure to declare a mistrial unless they are convinced that the trial court abused its discretion as a matter of law in refusing to do so.” *State v. Crawford*, 619 S.W.2d 735, 740 (Mo. banc 1981). A mistrial should only be granted when the prejudice to the defendant cannot be removed in any other way. *State v. Williams*, 922 S.W.2d 845, 851 (Mo. App. W.D. 1996). Furthermore, “[the] failure on the part of defendant to present the trial court with ‘a choice of some form of corrective relief short of a mistrial, dulls any inclination on the part of this court to label the trial court with an abuse of discretion for not declaring a mistrial.’” *State v. Smith*, 934 S.W.2d 318, 321 (Mo. App. W.D. 1996). The trial court normally cures error by instructing the jury to disregard the matter in question, rather than by declaring a mistrial. *State v. Kalagian*, 833 S.W.2d 431, 435 (Mo. App. E.D. 1992); *State v. White*, 856 S.W.2d 917, 920 (Mo. App. S.D. 1993).

At the hearing on appellant’s motion for new trial, the court stated that it did not think that the prosecutor’s comment “in the circumstances and in the whole context of the trial . . . was sufficient to justify a new trial” (Tr. 281). Thus, because appellant failed to present the trial court with a lesser remedy and has failed to show that such a remedy, like an instruction to disregard, would not have cured the alleged error, the trial court’s denial of his motion for a mistrial was not an abuse of discretion.

3. Appellant did not suffer any prejudice

Further, even assuming that the prosecutor's isolated remark was a direct comment on appellant's failure to testify, there is no reason to suspect that the jury drew an adverse inference from the remark or from appellant's failure to testify. A comment upon a defendant's failure to testify does not automatically result in prejudice. See *State v. Busey*, 143 S.W.3d 6, 13 (Mo. App. W.D. 2003) (holding that a direct comment on the defendant's failure to testify was not prejudicial as to two counts in light of the uncontested evidence of the defendant's guilt on those two counts). And here, under the facts of this case, there was no prejudice to appellant. The jury acquitted appellant of the two drug possession charges, so the jury obviously did not hold appellant's failure to testify against him (L.F. 51-53). As the dissent correctly points out, "It is difficult to reconcile that the Jury was misled by the prosecutor's comments as to tampering but not as to the two drug counts. The answer is of course that the prosecutor's comment had no impact on this Jury at all."

Further, the evidence against appellant on the tampering charge was overwhelming. Although Ms. Bost and Ms. Malone's testimony did not reveal whether appellant knew the red and white Chevy truck was stolen, Trooper Maddox and Corporal Matthew Broniec testified that it was immediately obvious that the truck's steering column had been broken so the truck could be started without keys (Tr. 147-148, 171-173). Appellant was driving the truck without keys, and he told Trooper Broniec that he could not turn the truck's engine off because there were no keys (Tr. 137-139). Trooper Broniec could not turn the truck off until Mr. Brown showed him how to do so with a screwdriver (Tr. 175).

Moreover, there was nothing in the prosecutor's statement that suggested to the jury that the burden of proving his innocence was on appellant. The jury was instructed that the State had the burden of proving beyond a reasonable doubt that appellant was guilty (L.F. 31)

Thus, because the prosecutor's remark was proper in light of the fact that appellant offered testimony without being subject to cross-examination, and in any event because appellant gave the court no choice but to declare a mistrial and the circumstances did not require such an extraordinary remedy, the court's denial of appellant's motion for a mistrial was not error. As a result, appellant's claim fails.

II.

The trial court did not err in failing to instruct the jury as to a claim of right defense with respect to the tampering charge because appellant did not have a special negative defense to the charge in that appellant's purported defense to tampering – that he did not know he was operating the truck without the consent of the owner – was not a “special negative defense.”

Appellant claims that the trial court erred in refusing to submit to the jury appellant's Instruction A regarding appellant's purported belief in the legality of his conduct in operating the stolen red and white Chevy truck without the owner's consent (App. Br. 24). According to appellant, he was justified in operating the stolen truck because Ms. Bost asked him to drive the truck because she was high on heroin and was “nodding off” while driving on the highway (App. Br. 24).

A. Relevant Facts

At trial, appellant's theory of defense was that appellant did not know that the red and white Chevy truck was stolen when Ms. Bost asked him to drive the truck (Tr. 264). In support of this theory, defense counsel argued in closing that Ms. Bost and Ms. Malone did not testify that they told appellant that the truck was stolen and no one testified that appellant knew the steering column was broken (Tr. 264). Defense counsel told the jury to “[a]sk yourself has [the prosecutor] showed me that Glen knew Barbara [Bost] didn't have the right to tell him to drive” (Tr. 265-266).

The instruction appellant wished to submit at trial read as follows:

INSTRUCTION NO. A

As to Count ____, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about March 22, 2003, in the County of Montgomery, State of Missouri, the defendant knowingly operated a certain 1992 red and white Chevrolet S-10 pick-up truck, VIN: 1GCCS19SZ0N2108631, being an automobile owned by Zaid Adhanom, and

Second, that he operated the automobile without the consent of the owner, and

Third, that he operated it, knowing that he did so without the consent of the owner, and

Fourth, that defendant did not reasonably believe that he had a right to operate the automobile without the consent of the owner, then you will find the defendant guilty (under Count ____) of tampering in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, in order for a belief to be reasonable, there must be reasonable grounds for such belief.

(L.F. 41).

Appellant objected to Instruction No. 5, the State's version of the verdict director for tampering in the first degree, which did not contain the fourth paragraph contained in appellant's Instruction A (Tr. 250-251; L.F. 32, 41). The court overruled appellant's objection to Instruction No. 5 and declined to submit appellant's Instruction A to the jury (Tr. 251). Appellant raised this issue in his motion for new trial arguing that he had met his burden of interjecting a claim of right through Ms. Bost's testimony that she had asked appellant to drive the truck and had never told him that the vehicle was stolen (L.F. 45-46).

On appeal, appellant argues that Ms. Bost's testimony that she asked appellant to drive the truck provided reasonable grounds for him to believe that he had a right to operate the truck without the owner's consent (App. Br. 24). Appellant also argues that Ms. Bost's testimony that she was high and was "nodding off" while driving also supported a claim of right instruction (App. Br. 24, 27).

B. Analysis

The instruction at issue was based on MAI-CR3d 323.22. The Notes on Use to that instruction allow the jury to be instructed on the defense of claim of right in a tampering case if the defendant acts "under a claim of right and has reasonable grounds to believe he has such a right" provided evidence presented at trial supports that claim. MAI-CR3d 323.22, Notes on Use 3. In order to be entitled to an instruction on claim of right, "there must be, apart from testimony of the defendant . . . as to his subjective belief, sufficient evidence to enable the court to infer that the relevant person honestly held that belief." *State v. Sloan*,

664 S.W.2d 41, 43 (Mo. App. W.D. 1984) (quoting *State v. Quisenberry*, 639 S.W.2d 579, 584 (Mo. banc 1982)). “[C]laim of right is a special negative defense and inherent in its concept is that the act charged occurred, but by reason of the defense, the act did not possess the qualities of criminality.” *State v. Bell*, 743 S.W.2d 907, 909 (Mo. App. E.D. 1988).

If an MAI-CR instruction is applicable and is not given in accordance with the Notes on Use, it shall constitute error and its prejudicial effect is to be judicially determined. *State v. Kinder*, 942 S.W.2d 313, 333 (Mo. banc 1996). The Notes on Use for MAI-CR 3d 323.22, the instruction which sets forth the defense appellant wished to use, state: “The burden of injecting such claim of right is on the defendant. If there is evidence supporting a claim of right, a paragraph must be added to this instruction.” *See also* § 569.130, RSMo 2000.

Appellant argues that Ms. Bost’s testimony supports his claim that he had a reasonable belief that he had the right to operate the red and white truck *without the owner’s consent* (App. Br. 24). In his brief, appellant acknowledges that he did not have the truck owner’s consent to drive the red and white truck, but claims he derived consent from Ms. Bost because she asked him to drive the truck (App. Br. 24; Tr. 187). Implicit in this acknowledgment, is appellant’s admission that Ms. Bost was not the owner of the truck. However, appellant does not explain how Ms. Bost had the authority to consent to him driving the red and white truck or why he would believe that she did.

Appellant’s real defense is not a claim of right, rather appellant’s proposed defense at trial was that he had a mistaken belief as to whether he had the owner’s consent to operate the

truck. This is not a claim of right defense, but simply a defense that he did not have the requisite *mens rea* to commit the crime.

Under the Missouri Approved Instructions, evidence of a belief (mistaken or not) that is inconsistent with the mental element required for an offense is simply evidence that the defendant lacked the required culpable mental state, and is not a special negative defense such as a claim of right. Any separate instruction based on such beliefs will simply be a converse to the mental element it negatives. *See* MAI-CR3d 304.11.B. In appellant's case, if he wished to properly instruct the jury on his defense that he did not have the requisite *mens rea*, appellant could have requested a converse instruction on the knowing element in Instruction No. 5 (L.F. 32).

Respondent also notes that appellant argues in his brief that he had a claim of right to drive the truck for safety reasons because Ms. Bost was high on drugs and began "nodding off" while driving the stolen pickup truck on I-70 (App. Br. 24; Tr. 187). Appellant began driving the truck not far past Wentzville (Tr. 187-188). Respondent notes gratuitously that there were numerous exits after Wentzville that appellant could have taken, including the Warrenton exit. Instead of exiting, however, appellant continued driving down I-70, presumably on his way to Columbia to party (Tr. 182-183, 211). Even assuming that appellant had a right to drive the truck to the next exit or town for safety reasons, the evidence shows that appellant drove further than what was necessary for safety.

In short, appellant's defense is simply that he did not have the *mens rea* to commit the crime of tampering in the first degree in that he did not knowingly operate the truck without

the owner's consent. It is a defense, but not a special negative defense, and thus does not require a claim of right instruction. Further, even if appellant had a right to drive the truck to a safe location off of I-70, he went far beyond that when he continued to drive to Columbia. Appellant was not entitled to a claim of right instruction, Instruction No. 5 submitted by the court was correct in all respects, and thus there was no error. Appellant's claim is without merit and should be denied.

III.

The trial court did not plainly err in allowing the prosecutor to elicit evidence that Ms. Bost and Ms. Monroe pled guilty to some of the same crimes for which appellant was on trial because the evidence did not result in manifest injustice in that evidence of their plea dispositions actually aided appellant's defense and there is a presumption that defense counsel made a strategic choice not to object.⁴

⁴Appellant argues that the prosecutor impermissibly elicited evidence from Ms. Malone that she pled guilty to the same crimes for which appellant was on trial (App. Br. 28). However, Ms. Malone's charges were not identical to appellant's; appellant was charged in Montgomery County with tampering with the red and white Chevy and Ms. Malone pled guilty in Warren County to tampering with the black truck (Tr. 218). Ms. Bost did plead guilty in Montgomery County to the same crimes as appellant (Tr. 195, 198-199).

Additionally, the trial court did not plainly err in not intervening, *sua sponte*, in the State's closing argument when the prosecutor mentioned the plea dispositions because trial strategy is an important consideration in any trial and assertions of plain error concerning matters in closing argument are generally denied without explication. Further, appellant's failure to request a mistrial at the time of the allegedly improper argument is fatal to his claim on appeal because trial courts should avoid granting *sua sponte* mistrials.

Appellant acknowledges that defense counsel did not object to the evidence or argument, but argues that the trial court's failure to take *sua sponte* corrective action when the prosecutor elicited evidence that Ms. Bost and Ms. Malone had pled guilty and when the prosecutor mentioned the pleas in closing argument resulted in manifest injustice (App. Br. 28). Appellant claims that the prosecutor used the two women's pleas as a substantive argument for why the jury should also punish appellant (App. Br. 28).

A. Relevant Facts

At trial, Barbara Bost testified that she did not see appellant doing drugs and did not know that the red and white truck was stolen, but only "kind of figured it was" (Tr. 182-184, 188, 197-198, 202-203). Ms. Bost testified that she did not think that appellant had any idea what was going on (Tr. 185). She said that she had not told appellant that the truck was stolen (Tr. 205). The State elicited testimony from Ms. Bost that she was arrested in Montgomery County due to this incident (Tr. 195, 198). Ms. Bost testified that she pled guilty to two counts of possession of a controlled substance and to first degree tampering of

the red and white truck, and thus knew that the truck was stolen (Tr. 198-199). The charges Ms. Bost pled guilty to alleged that she and appellant had “joint control over the items and jointly possessed the items being the codeine and the cocaine” (Tr. 200-202).

At trial, Sharon Malone testified that she had not seen appellant doing drugs (Tr. 209-210, 217, 219). However, the prosecutor elicited that at prior depositions Ms. Malone had testified that appellant had used drugs with the rest of them and that she knew appellant through her use of drugs (Tr. 210, 215-216). Ms. Malone testified that she knew the red and white truck was stolen, but had not told appellant that it was stolen (Tr. 220). The State elicited testimony from Ms. Malone that she was arrested in Warren County (Tr. 214). Ms. Malone testified that she pled guilty in Warren County to tampering of the black truck and two counts of possession of a controlled substance (Tr. 218).

During the State's initial closing argument, the prosecutor argued that appellant knew the truck was stolen:

Either way Glen McGowan knew that this thing was broken and by looking at that you've got to know that there is something wrong that this thing is stolen.

Even Barbara Bost said yeah I probably knew it was stolen, too. She didn't want to admit it, although she had pled guilty to it.

(Tr. 256). In appellant's closing argument, defense counsel argued that the testimony of Ms. Bost and Ms. Malone showed that appellant did not know that the truck was stolen:

The two women took the stand and said [appellant] didn't do drugs. We did it.

[Appellant] was out here to party with us and we were going to Columbia to

party and we didn't tell him the car was stolen. No one says they told him the car was stolen.

(Tr. 265). Then in the State's rebuttal closing argument, the prosecutor referred to defense counsel's closing argument and stated the following:

[Defense counsel] talks about the two women that came in and testified.

Think back on their testimony. I find it somewhat ironic, although not surprising, they come in today to say there was just the three of us, the four of us hung together as friends but only three of us are bad people. Mr. McGowan had nothing to do with it. This happens after they have pled. Before through depositions, through pleas, Mr. McGowan's part of it. He jointly possessed those drugs with me, knew that the truck was stolen, those type of things come out. But now after they're done with their plea then they want to come up and help their friend again.

(Tr. 267). Appellant acknowledges that defense counsel did not object to the above testimony or argument (App. Br. 30).

B. Analysis

1. The trial court did not plainly err in allowing Ms. Bost and Ms. Malone to testify that they had pled guilty.

Because appellant did not object to the testimony at trial, this claim is unpreserved and is reviewable on appeal, if at all, for plain error. *State v. Rousan*, 961 S.W.2d 831, 842 (Mo. banc 1998) *cert. denied* 524 U.S. 961 (1998). When

conducting plain error review, appellate courts look for error that, “establishes substantial grounds for believing that manifest injustice or miscarriage of justice has occurred.” *State v. Bozarth*, 51 S.W.3d 179, 180 (Mo. App. W.D. 2001). Plain error is error that is, “evident, obvious and clear.” *Id.* Further, “[t]he ‘plain error’ rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review.” *State v. Roberts*, 948 S.W.2d 577, 592 (Mo. banc 1997) *cert. denied*, 118 S.Ct. 711 (1998).

The general rule regarding a prosecutor’s telling the jury about the disposition of a co-defendant’s case is that “it is reversible error to allow the state to admit evidence or even disclose to the jury that a co-defendant has been convicted or pled guilty to the charges.” *State v. Dansberry*, 18 S.W.3d 518, 523 (Mo. App. E.D. 2000). The exception to this rule is that:

although evidence of a co-defendant’ related criminal disposition could not be used as substantive evidence to prove his guilt or innocence, it could be used by the state to preemptively rehabilitate a testifying co-defendant who it anticipated would be subject to impeachment attempts by the defendant on the basis that the co-defendant’s testimony against him was influenced by the disposition in the related case.

Id. Although the record in the present case does not reveal if Ms. Bost or Ms. Malone testified in exchange for a plea bargain, appellant cannot have suffered a manifest injustice by the evidence that the two woman pled guilty to largely the same charges as appellant.⁵

At trial, Ms. Bost and Ms. Malone repeatedly denied that the appellant did drugs or knew that the red and white Chevy truck was stolen (Tr. 182-185, 197-198, 202-203, 205, 209-210, 217, 219-220). In fact, Ms. Bost and Ms. Malone were hostile witnesses for the State who actually aided appellant's defense — by testifying that appellant did not possess drugs and did not know that the red and white truck was stolen. Evidence that Ms. Bost and Ms. Malone each pled guilty to two counts of possession of a controlled substance also aided appellant's defense that he did not possess the drugs found in the truck, but rather the drugs belonged to Ms. Bost, Ms. Malone, and Mr. Brown (Tr. 265). Indeed, the jury acquitted appellant of the two drug possession charges, so the jury obviously believed appellant's defense that the drugs were not his (L.F. 51-53). Further, Ms. Malone's testimony that she pled guilty to tampering with the black truck has no direct bearing on the charge that appellant tampered with the red and white truck (Tr. 218).

⁵As stated at the beginning of this point, Ms. Malone did not plead guilty to the exact same charges as appellant (Tr. 218).

While Ms. Bost did testify that she pled guilty to tampering with the red and white truck, the same crime appellant was charged with, appellant did not suffer a manifest injustice from the testimony because the evidence against appellant on the tampering charge was overwhelming. Although Ms. Bost and Ms. Malone's testimony did not reveal whether appellant knew the red and white Chevy truck was stolen, Trooper Maddox and Corporal Matthew Broniec testified that it was immediately obvious that the truck's steering column had been broken so the truck could be started without keys (Tr. 147-148, 171-173). Appellant was driving the truck without keys, and told Trooper Broniec that he could not turn the truck's engine off because there were no keys (Tr. 137-139). Trooper Broniec could not turn the truck off until Mr. Brown showed him how to do so with a screwdriver (Tr. 175). In light of this evidence, the jury would have convicted appellant of first degree tampering even absent evidence of Ms. Bost's plea.

State v. White, 952 S.W.2d 802 (Mo. App. E.D. 1997), relied on by appellant, is inapposite in that it involved a preserved claim of error, not an unpreserved claim of error like the testimony at issue in this case. The trial court should not be cited for error when it does not intervene, *sua sponte*, because the presumption is that defense counsel made a strategic choice not to object. See *State v. Basile*, 942 S.W.2d 342, 356 (Mo. banc 1997), *cert. denied* 118 S.Ct. 213 (1997). The fact that Ms. Bost and Ms. Malone's testimony and plea dispositions aided the overall defense may explain why defense counsel chose not to object to the testimony appellant now challenges on appeal.

Therefore, the testimony of Ms. Bost and Ms. Malone regarding the disposition of their cases, largely related to the same crimes for which the appellant was on trial, does not amount to manifest injustice or result in a miscarriage of justice.

2. The trial court did not plainly err in not intervening, *sua sponte*, in the State's closing argument.

Defense counsel did not object to the prosecutor's comments in closing argument at issue in this appeal. Under Rule 30.20, plain error will seldom be found in unobjected-to closing argument, since a holding that would require the trial judge to interrupt counsel would present myriad problems. *State v. Radley*, 904 S.W.2d 520, 524 (Mo. App. W.D. 1995). Trial judges are not expected to assist counsel in trying cases, and trial judges should act *sua sponte* only in exceptional circumstances. *Id.* Because trial strategy looms as an important consideration in any trial, assertions of plain error concerning matters contained in closing argument are generally denied without explication. *State v. Vaughn*, 32 S.W.2d 798, 800 (Mo. App. S.D. 2000).

If this Court decides to address this claim, relief for improper argument is justified “under plain error only when the errors are determined to have a decisive effect on the jury. For such a decisive effect to occur, “there must be a reasonable probability that, in the absence of these comments, the verdict would have been different.” *State v. Roberts*, 838 S.W.2d 126, 132 (Mo. App. E.D. 1992). “The burden is on the defendant to demonstrate the decisive effect of the statement.” *State v. Cruz*, 971 S.W.2d 901, 903 (Mo. App. W.D.

1998); *State v. Parker*, 856 S.W.2d 331, 333 (Mo. banc 1993), *cert. denied*, 113 S. Ct. 636 (1993). Appellant has not done so here.

Further, appellant's failure to request a mistrial at the time of the prosecutor's allegedly improper statements during closing argument is fatal to his argument on appeal that the trial court erred in failing to grant a mistrial based on the statements. A trial court should avoid granting a mistrial on its own motion because a defendant has the right to have his trial completed by the jury that was sworn to hear his case and a retrial would be barred by the Double Jeopardy Clause if any prejudice could have been cured by a less drastic remedy. *State v. Marlow*, 888 S.W.2d 417, 420 (Mo. App. W.D. 1994); *State v. Weeks*, 982 S.W.2d 825, 838 n. 13 (Mo. App. S.D. 1998).

Appellant claims that the prosecutor's statement in closing argument suggested to jurors that because Ms. Bost and Ms. Malone pled guilty, the jury should also punish appellant (App. Br. 28). However, the record reveals that the prosecutor did not argue that because Ms. Bost and Ms. Malone pled guilty, appellant was also guilty.

Instead, the State in its initial closing argument, argued that appellant had to have known the truck was stolen because the steering column was obviously broken (Tr. 256). The prosecutor also referred to Ms. Bost's trial testimony wherein she said that she did not know if the truck was stolen, but only "kind of figured" that the truck was stolen (Tr. 188, 256). The prosecutor's comment that while Ms. Bost "didn't want to admit" at trial that she knew the truck was stolen, she had "pled guilty to it," was a comment on her credibility due

to her non-committal statement at trial regarding whether she knew the truck was stolen (Tr. 256).

The second comment at issue was the prosecutor's argument that the jury should think about the testimony of Ms. Bost and Ms. Malone (Tr. 267). The prosecutor argued that prior to trial, both woman had said that appellant used drugs and knew that the truck was stolen (Tr. 267). The prosecutor said it was not surprising that after they pled guilty, Ms. Bost and Ms. Malone were now testifying at trial that appellant "had nothing to do with it" (Tr. 267). The prosecutor said, "But now after they're done with their plea then they want to come up and help their friend again" (Tr. 267).

Again, the prosecutor did not use the evidence of Ms. Bost and Ms. Malone's plea dispositions as a substantive argument why the jury should also punish appellant, and was instead commenting on the credibility of their trial testimony since they pled guilty. Additionally, as stated above, there is no reasonable probability that in the absence of the prosecutor's remarks, the jury would have acquitted appellant of the tampering charge. The evidence against appellant on the tampering charge was overwhelming because appellant was driving the stolen red and white truck with no keys; the truck obviously had a broken steering column; and it had to be turned off with a screwdriver (Tr. 137-139, 147-148, 171-173, 175).

In sum, the trial court did not plainly err in allowing the prosecutor to elicit evidence that Ms. Bost and Ms. Monroe pled guilty to some of the same crimes for which appellant was on trial because the evidence did not result in manifest injustice in that the evidence of their plea dispositions actually aided appellant's defense and there is a presumption that

defense counsel made a strategic choice not to object. Additionally, the trial court did not plainly err in not intervening, *sua sponte*, in the State's closing argument when the prosecutor mentioned the plea dispositions. Appellant suffered no manifest injustice because the evidence against him on the tampering charge was overwhelming. Appellant's third point should be denied.

CONCLUSION

For the foregoing reasons, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06 of this Court and contains 9,189 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of November, 2005, to:

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APPENDIX

Sentence and Judgment A1-A3