

No. 85726

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**IN THE  
MISSOURI SUPREME COURT**

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**MARCUS A. BUSEY,**

**Appellant.**

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**Appeal from the Circuit Court of Buchanan County, Missouri  
5th Judicial Circuit  
Honorable Randall R. Jackson, Judge**

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**RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT**

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**JEREMIAH W. (JAY) NIXON  
Attorney General**

**KAREN L. KRAMER  
Assistant Attorney General  
Missouri Bar No. 47100**

**P. O. Box 899  
Jefferson City, MO 65102  
(573) 751-3321**

**Attorneys for Respondent**

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### **JURISDICTIONAL STATEMENT**

This appeal is from convictions for second degree murder, §565.021, RSMo 2000, second degree robbery, §569.030, RSMo 2000, and two counts of armed criminal action, §571.015, RSMo 2000. Appellant was sentenced to a total of forty years imprisonment. This appeal does not involve any of the categories reserved for exclusive appellate jurisdiction of the Supreme Court of Missouri. On January 27, 2003, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

## STATEMENT OF FACTS

On May 25, 2001, appellant, Marcus Busey, together with his co-defendant Jamell Page, was charged by information with second degree murder, first degree robbery and two counts of armed criminal action (L.F. 48-52). The cases were severed on October 30, 2001, and the state was to choose which defendant was tried first (L.F. 107-09). Appellant was tried first, by a jury, on December 10-14, 2001, the Honorable Randall R. Jackson, presiding (L.F. 21-22; Tr. ii-viii, 94).

Considered in the light most favorable to the verdicts, the evidence presented at trial, and the inferences reasonably drawn therefrom, established the following:

Around 10:30 p.m., on January 14, 2001, Ryan Menschik, and his girlfriend, Michelle Flippin, received a telephone call from Tonya Page (no relation to co-defendant Jamell), asking that they come get her and then get appellant and Jamell Page (State's Exh. 8, p. 1; State's Exh. 9, p. 1 Tr. 444, 445, 505).

Subsequently, Tonya, Menschik and Flippin retrieved appellant and Jamell Page from the residence of their friend "Twist" at 15<sup>th</sup> Street and Sylvania in St. Joseph, Missouri (State's Exh. 8, p. 1; State's Exh. 9, p. 1; Tr. 445, 472, 505). Appellant and Page directed Menschik, who was driving, to drop them off at Tammy Franklin's house on South 15<sup>th</sup> Street in St. Joseph, Missouri (State's Exh. 8, p. 1; State's Exh. 9, p. 1; Tr. 325, 329, 446-448, 479, 506-07). They told Menschik to drive around the block and wait for them (State's Exh. 8, p. 1; Tr. 449-50, 506-07, 534). Menschik complied (State's Exh. 8, p. 1; Tr. 449-50, 506-07, 491). Menschik and Flippin believed that they were going to get some dope (Tr. 494, 534).

Once they pulled up in front of the Franklin residence, appellant told Page to go up into the house and use the telephone (Tr. 448). Page called the victim, Michael Mason, a drug dealer, and asked him to come to the Franklin residence (State's Exh. 8, p. 1; State's Exh. 9,

p. 1-2; Tr. 325, 330-31, 336, 359, 383, 386-87, 654-56, 896). Appellant then got out of the car and went into the Franklin residence (Tr. 448). Page and appellant began discussing how they were going to steal drugs and money from Mason (State's Exh. 8, p. 1; State's Exh. 9, p. 1-2; Tr. 330-35, 338, 360, 384-85, 387-91). Appellant was "wired up" (Tr. 409). Appellant said they would rob "that bitch ass nigger." (Tr. 330, 385). Appellant and Page said they would use a pipe and a knife to "get him for it." (Tr. 332). Appellant had both the pipe and the knife (Tr. 333). Appellant wiped his fingerprints from the knife and handed the knife to Page (Tr. 333-334, 387). Appellant hid the pipe up his sleeve (Tr. 337, 388). They talked about using a pipe to choke Mason if he did not give them the drugs they wanted, and also "put a scare in him" by hitting him a few times (Tr. 331-33, 338, 362, 388-91). Page was to sit in the front seat because he knew Mason better, and appellant would sit in the back seat (Tr. 338, 389, 391).

When Mason pulled up in his truck, Page and appellant went out to meet him (State's Exh. 8, p. 2; State's Exh. 9, p. 2; Tr. 339-40, 392, 394). Appellant got behind Mason and Page hopped into the passenger seat (State's Exh. 9, p. 2-3; Tr. 342-45). Appellant used the pipe to choke Mason who, in his panic, began stomping on the brake and accelerator pedals, causing the engine to rev and the brake lights to flash on and off (State's Exh. 9, p. 2-3; Tr. 342-45, 363, 369, 371, 395-99, 416). Mason reached for the pipe and tried to pull it away (Tr. 344, 398-399). Page then stabbed Mason and Mason fell out of his truck (State's Exh. 9, p. 3-4; Tr. 396-99, 405-06, 419).

Michael Moon was in his apartment at 915 S. 15<sup>th</sup> Street when he heard somebody out in the street say, "Nigga, what?" (Tr. 427-428). Moon looked out the door and saw someone lying in the street and someone in a black hooded sweatshirt running up the street (Tr. 429-431). Moon saw that the boots had been removed from the man lying on the street and were

lying beside him (Tr. 434). Moon went outside and tried to get the man lying in the street to respond, but failed (Tr. 435). The man was gasping for breath (Tr. 435). The man was still conscious, but his eyes were rolled back in his head (Tr. 436). Moon summoned police who arrived within minutes (Tr. 430, 433-34, 438-369, 542-45, 553, 558, 575).

When the police arrived, they found Mason lying in the street with a trail of blood running from his left shoulder (Tr. 544). Mason's breathing was very shallow (Tr. 544). His eyes were open, but the pupils were rolled up (Tr. 544). The police could not get a response from Mason (Tr. 544). The police lifted Mason's t-shirt and saw a small cut or hole in the skin of his solar plexus, an oval hole with sharp edges or points on either side, about a half an inch to an inch long (Tr. 546-547). The police saw a slightly smaller hole to the right of the first one (Tr. 547). A pair of boots were next to Mason in the street; Mason was shoeless (Tr. 547). An ambulance arrived soon after and transported Mason to the hospital where medical personnel struggled to revive him; they were unsuccessful and he died from multiple stab wounds (Tr. 545-47, 549, 556, 717-18, 771-777).

Officers began questioning witnesses and investigating the crime. Several subjects approached officers at the scene and claimed that they might know who the victim was and stated that the white F-150 Ford pickup at the scene belonged to the victim (Tr. 551). Police ran the plate on the pickup (Tr. 551).

Mason sustained a total of seven stab wounds (Tr. 700-706). Three were flesh wounds—one to his forearm and another to his hip, which cut through his jeans, and the third to his abdomen (Tr. 704-05, 711, 715). Two of the wounds penetrated his chest cavity and lacerated his liver, causing heavy bleeding (Tr. 709-711). Another wound struck his rib and punctured the right ventricle of his heart, causing massive amounts of blood loss (Tr. 711-714). The final wound pierced appellant's chest cavity allowing air to enter and impair his

breathing and other vital functions (Tr. 714). Mason was determined to have died from multiple stab wounds (Tr. 717).

After Page stabbed Mason, appellant wiped the inside of the truck down, using his jacket to wipe the console and the door handle (Tr. 401). Page and appellant then fled the scene and rendezvoused with Menschik and the others waiting in the car (State's Exh. 8, p. 2; State's Exh. 9, p. 4; Tr. 451-52, 494, 507-08, 717, 773-77). Appellant walked up first and then a few seconds later, Page walked up behind him (Tr. 451). Appellant and Page instructed Menschik to drive away (State's Exh. 8, p. 2; State's Exh. 9, p. 4; Tr. 452, 508). While driving, Menschik rolled down his window and either Page or appellant threw the pipe used to choke Mason out the window (State's Exh. 9, p. 4; Tr. 452-54, 495, 508-09, 534, 539-540). Either appellant or Page said something about not getting fingerprints on the pipe (Tr. 453).

They stopped at a Speedy's in St. Joseph where appellant used Mason's cellular telephone to call the Franklin residence and warn the occupants to "shut up," not to say anything, and not to leave the house (State's Exh. 9, p. 4; Tr. 348, 370, 403-04, 419, 455-56, 496, 509, 657, 897). Appellant also bought cigars for smoking blunts—cigars with marijuana inside (Tr. 457-58). They then went to Menschik's house where they smoked the blunts—containing marijuana appellant stole from Mason—and played games (State's Exh. 8, p. 2; Tr. 458-61, 499, 510-11).

Menschik returned Page, appellant, and Tonya Page to Tonya's house around 2:00 a.m. the next day (State's Exh. 8, p. 2-3; Tr. 462, 511). That afternoon—January 15, 2001—Menschik retrieved appellant, Page, Tonya, Michelle Flippin and her cousin and dropped appellant and Page off at different residences (Tr. 463-64, 512). Tonya found a knife wrapped in Flippin's pink shirt on the back dash of the car after Page was dropped off (Tr. 465-466). Tonya took the shirt and rubbed fingerprints off of the blade (Tr. 469). Tonya then wrapped the knife back

in the shirt and put it on the back dash where it could not be seen (Tr. 469). Later that day, appellant told Flippin and Menschick to tell police that he was not involved in the crime (Tr. 474-76, 522). That night, Menschik took the knife used to kill Mason and buried it near his house by stomping the knife into the ground (Tr. 465-71, 478-80, 499-503, 513-21, 536-37).

Police eventually arrested Menschik and Flippin (Tr. 479, 481, 483, 523-525, 547, 559-63, 567-73, 576-81, 594-603, 623-33, 785, 791). Both gave statements to police and were released (Tr. 484, 525). Flippin helped police find the pipe that was discarded as they fled the crime scene (Tr. 485, 487-89, 582-83, 671-73, 684-85, 786-88). Menschik and police looked for the knife he buried and were initially unsuccessful (Tr. 526-28, 564-66, 653-54). After several hours of searching, Menschik located the knife and called police to retrieve it (Tr. 529-32, 583-85). He was subsequently charged with tampering with evidence and placed on probation for that crime (Tr. 533). Scientific testing of the dirt around the knife Menschik buried revealed cotton fibers that were “indistinguishable” from those recovered from Mason’s pants (Tr. 846-48). All of the wounds Mason suffered were consistent with having been made by the knife that Menschik had buried in the ground and that the police had recovered (Tr. 716-717).

On January 15, 2001, the day after the murder, appellant saw the Franklins again at a relative’s house (Tr. 352). Appellant told them that he was not present at the stabbing, that it was a third party (Tr. 354-355, 406).

On January 16, 2001, two days after the murder, police arrested appellant (Tr. 661-62, 642-46, 794-96, 800, 819-20, 900). After receiving his Miranda warnings, appellant told police in an initial interview that he was not involved in Mason’s murder, but that he was at his girlfriend’s house (Tr. 646-50, 663-65, 801, 819-21). Appellant initially said that he had no knowledge of the stabbing and that he had been at his girlfriend’s house all night (Tr. 801). The

police told appellant that they had several witnesses, including his girlfriend, who had given contrary statements (Tr. 801). Appellant then changed his story and said that he had been over at “Twist’s” house all evening (Tr. 802). Appellant denied being in the area of the stabbing and denied ever being at the Franklin residence (Tr. 802). The police again told appellant that they had statements from other people including the Franklins and his girlfriend that indicated that what appellant was saying was not true (Tr. 803). Appellant changed his story again, saying that he had gone to Twist’s house at 15<sup>th</sup> and Sylvania and hung out with Page there for a while, and then had Tonya come pick him up (Tr. 803). Appellant reduced this statement to writing (State’s Exh. 8; Tr. 804-09, 821-22). In the statement, appellant said that he had known Page for five years and that they were friends, but did not spend a lot of time together (Tr. 811). Appellant said that he left his girlfriend’s house on Lafayette about 9:45 p.m. and walked over to Twist’s house on 15<sup>th</sup> and Sylvania (Tr. 811). Appellant said he called Tonya to pick up Page and himself (Tr. 811). Appellant said Tonya arrived with Ryan Menschik and Michelle Flippin, picked up appellant and Jamell, and dropped them off at the Franklins’ residence (Tr. 811). Appellant said he told Tonya to drive about a block away and wait while he and Page bought some weed (Tr. 811).

Appellant said that once inside the Franklin residence, Page called Mike Mason (Tr. 811-812). When Mason arrived in his truck, appellant and Jamell got into the truck (Tr. 812). Appellant said that Jamell handed him a sack of weed to see if the amount was right (Tr. 812). Appellant said that he approved of the amount, and then gave the sack back to Page and walked away to go find Tonya (Tr. 812). Appellant said that he found Tonya by 16<sup>th</sup> and Olive and got in her car (Tr. 812). Appellant said Page came behind him and that he must have run (Tr. 812). Appellant said that they went to Menschik’s house where they hung out until 2:30 a.m., drinking and smoking (Tr. 812). Then appellant said that they all went to Tonya’s house (Tr. 812).

Appellant said that the next day he heard about Mason being killed and that he and Page were considered suspects (Tr. 813). Appellant said he did not know that Mason was going to get killed (Tr. 813). Appellant said that when Page came over, he told Page that “it was fucked up that he had my name in some bullshit.” (Tr. 813).

However, in a second interview only hours after the first interview, police confronted appellant with Page’s written statement in which Page claimed that he and appellant got in Mason’s truck and appellant choked Mason from the back seat with a metal pipe (State’s Exh. 9, p. 5-6; Tr. 651-52, 666, 814, 823, 901, 905, 927, 930, 937-39). Appellant then admitted, in his second written statement, that he got in the backseat of Mason’s truck and “grabbed him by putting a metal pipe around his neck and pulling back for about 10-15 seconds” (State’s Exh. 9, p. 2-3; Tr. 910-24, 931-33, 936).

Appellant offered no evidence at trial. After the close of the evidence, the instructions and argument of counsel, the jury found appellant guilty of second degree murder, second degree robbery and two counts of armed criminal action (L.F. 162-65, 202-04; Tr. 1045). On January 14, 2002, Judge Jackson sentenced appellant to concurrent terms of 30 years’ imprisonment for second degree murder and 20 years’ imprisonment for armed criminal action and consecutive terms of five years’ imprisonment each for second degree robbery and armed criminal action, both of which are consecutive to the first two sentences for a total of 40 years imprisonment (L.F. 202-04; Tr. 1078-1079).

This appeal followed.

## ARGUMENT

### I.

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED THE STATE TO ENDORSE JAMELL PAGE AS A REBUTTAL WITNESS OR WHEN IT DID NOT GRANT APPELLANT’S REQUEST FOR A CONTINUANCE BECAUSE NEITHER RULING PREJUDICED APPELLANT IN THAT PAGE NEVER TESTIFIED AT TRIAL AND APPELLANT HAD AMPLE TIME TO PREPARE FOR PAGE’S TESTIMONY.**

Appellant presents two alternative claims in his first point on appeal (App. Br. 24). He alleges that the trial court erred when it allowed the state to endorse his co-defendant, Jamell Page, as a rebuttal witness after the commencement of trial (App. Br. 24, 31-36). In the alternative, he claims that the court should have granted him a continuance to retool his trial strategy for Page’s testimony (App. Br. 24, 37).

#### **A. Appellant’s Claim that the Trial Court Should Not Have Allowed the State to Endorse Page for Rebuttal**

##### **1. Standard of Review**

Regarding the late endorsement of witnesses, the trial court has “broad discretion.” *Moss v. State*, 10 S.W.3d 508, 515 (Mo. banc 2000). An abuse of that discretion only occurs when it causes “fundamental unfairness” to the defendant. *Hutchison v. State*, 957 S.W.2d 757, 763 (Mo. banc 1997).

##### **2. Factual Background**

At the outset of trial, the state advised appellant that it had extended a plea offer to Jamell Page (Tr. 94, 955). Appellant reacted by claiming he would be at an extreme disadvantage if Page pled guilty and subsequently testified for the state since he had not

prepared for that testimony (Tr. 94-96). He asked for a continuance (Tr. 96). The trial court denied the continuance, ruling that it would not continue the trial based “on a contingency that may never take place” (Tr. 97). However, the court said it would address any concerns that arose during trial if Page did plead guilty and planned to offer his testimony (Tr. 97).

On the evening of the second day of appellant’s trial, Page pled guilty and agreed to testify for the state (Tr. 608-09, 731-32, 736-37, 743-45, 757). The next morning, day three of appellant’s trial, the state moved to endorse Page as a witness (Tr. 610). The court heard testimony from Jamell Page’s attorney, Rick Euler, as to the events precipitating his client’s guilty plea as well as arguments from both the state and appellant (Tr. 728-58, 856-879).

Euler stated that at the outset of the proceedings against Page, Prosecuting Attorney Scroggins offered Page a plea agreement of second degree murder only and no additional charges (Tr. 730-31, 747). Part of that offer was that Page would testify against appellant (Tr. 734-37, 743-44, 757). That offer stood for several months before appellant’s trial (Tr. 730-31, 747-79, 758). At one point, Page indicated his willingness to accept the offer and a plea hearing was set, but Page reneged on the hearing and a trial date was subsequently set (Tr. 746-49).

On the morning of December 10, 2001, before the commencement of appellant’s trial, Scroggins spotted Euler in the hallway and briefly asked him if Page would consider a plea offer, which included Page testifying for the state at appellant’s trial (Tr. 731-32, 734, 743-44, 749, 751-52, 756). Scroggins offered Page 25 years imprisonment on second degree murder and 15 years imprisonment on armed criminal action with the plea court making the final decision on whether those sentences would be consecutive or concurrent (Tr. 732-33, 736-37, 743-44, 753-55).

After speaking with his family and making a counteroffer, Page accepted the offer the next day—day two of appellant’s trial—and entered his guilty plea at a hearing in the evening after the trial concluded for that day (Tr. 734-45).

Euler also testified that he had received, and he assumed that appellant’s counsel had received, a copy of Page’s statement to police in February of 2001, over nine months before appellant’s trial (Tr. 725, 753-54). He added that Page’s statement to police was “pretty close” to the factual basis he provided at his plea hearing (Tr. 754).

The next morning, the beginning of day four of appellant’s trial, Judge Jackson issued his ruling—which is included in the appendix to this brief (Tr. 880; L.F. 125-30). In that ruling, the judge noted first that the state had not violated Rule 25.08 since the state had apprized defense counsel “at the earliest possible time” of the possibility that Page might plead guilty (L.F. 125). The court noted that plea negotiations between Page and the state had been continuous since “[e]arly in the case” (L.F. 126). The court also noted that defense counsel had been in possession of Page’s written statement to police since February or March, 2001 (L.F. 126).

Even in the absence of any intent to deceive defense counsel, the timing of the negotiations were “unfortunate” and it would be unfair, the court found, to allow Page to testify in the state’s case-in-chief (L.F.127). On the other hand, the court noted, it would be unfair to completely preclude the state from introducing Page’s testimony (L.F. 128).

The court ruled that although the defense was surprised by the endorsement of Page, it would suffer no disadvantage or prejudice if Page was only allowed to testify in the rebuttal stage of appellant’s trial (L.F. 128-130). Further, the court ruled that Page would not be allowed to testify to “any previously undisclosed incriminating statements of the defendant” (L.F. 128).

The court scheduled a deposition for Page that day, December 13, 2001, at noon in the division III jury room (L.F. 130; Tr. 946-48; 880-81). The deposition lasted from noon to 2:30 p.m.; the court allowed the deposition to continue for an hour longer than originally scheduled (Tr. 956-57).

Following Page's deposition, appellant gave an offer of proof in which he testified that he had always planned to testify at trial, but that he would not because he "feared" Page would testify against him (Tr. 957-962). Neither appellant nor Page testified at trial.

### **3. Analysis**

Appellant's claim is without merit because he failed to show that he suffered fundamental unfairness or prejudice in that ultimately neither he nor Page testified at trial. *Hutchison, supra*. Appellant expressly took action to limit any prejudice he possibly could have suffered from Page's testimony by not tendering his own testimony, which may have been impeached by Page's rebuttal testimony. Appellant cites no authority to support his claim that because he failed to testify, he suffered prejudice.

To the contrary, in *State v. Johnson*, 901 S.W.2d 60 (Mo. banc 1995), this Court found that when defense counsel changed strategy based on the court's ruling, the defendant was not prejudiced because counsel was not forced to modify trial strategy. *Id.* at 62. In *Johnson*, the defendant was convicted of possession of crack cocaine. *Id.* at 61. Before trial, the court ruled that the prosecution could introduce his prior conviction for possession of powdered cocaine to prove that appellant knew he possessed cocaine. *Id.* During voir dire, defense counsel asked the panel whether they would be biased against a defendant who had a prior conviction for cocaine possession—nine jurors were dismissed for cause after indicating that such a conviction would influence them. *Id.*

After voir dire, defense counsel argued that there were material differences between the defendant's former conviction for powdered cocaine and his present conviction for crack cocaine, so the court reversed its earlier ruling and precluded the state from introducing the defendant's prior cocaine possession convictions. *Id.* After this ruling, defense counsel asked for a mistrial because he conducted voir dire based on the impending introduction of the prior conviction. *Id.* The trial court denied his request for a mistrial.

On appeal, this Court held that counsel was never "forced" to voir dire the panel on appellant's previous conviction, but had other options, such as waiting until the conviction was admitted and appealing based on that error. *Id.* at 62.

Likewise, in the case at bar, appellant was not "forced" to refrain from testifying on his own behalf. Rather, as the *Johnson* court noted, counsel in this case had other options. If appellant was so persuaded that the late endorsement of Page was erroneous he should have testified, objected to Page's testifying and then appealed based on the trial court's ruling. But, under the current circumstances, where neither appellant nor Page testified, thus removing any source of prejudice, appellant suffered no prejudice and has failed to establish otherwise.

His reliance on *State v. Scott*, 943 S.W.2d 730 (Mo. App. W.D. 1997), is misplaced. In *Scott*, the prosecutor failed to disclose to the defendant statements made by state's witnesses that strongly implicated the defendant in the crime. *Id.* at 733-34. The defendant did not know that these witnesses would offer such testimony until the second day of trial. *Id.* at 733. And, most importantly, the defendant had no other way of obtaining the witnesses' statements—the prosecutor told the judge he did not think he was under any compulsion to disclose the statements since they were not in writing. *Id.* Nor did they appear in police reports. *Id.* Thus, not only did the defendant in *Scott* not know about these statements, but he

also had no way of obtaining them before the prosecutor disclosed them after the commencement of trial.

In the present case, appellant concedes in his brief that he “knew the substance of Jamell’s testimony” (App. Br. 35-36). Thus, in this case, appellant knew the content of any incriminating testimony Page might have offered long before trial, as opposed to the situation in *Scott* where the state withheld the inculpatory statements until right before and during trial. *Id.*

Moreover, unlike *Scott*, where the prosecution had an obvious strategy to surprise the defendant, the prosecutor in the present case told appellant’s counsel *before* voir dire and *before* opening statement that he had made a plea offer to Page (Tr. 94). Thus, defense counsel was aware prior to voir dire and prior to opening statement that there was a real possibility that Page ultimately might testify. Defense counsel could have voir dired on this and could have reserved opening statement based on this knowledge, but opted not to. Thus, unlike *Scott*, defense counsel was made aware of the possibility of the codefendant’s testimony prior to trial and was not surprised in the middle of trial.

In addition, although under Rule 25.03(A)(2) the state is required to disclose statements of the defendant, the general rule regarding rebuttal witnesses, such as in the present case, is that the state does not have to disclose such witnesses. *State v. Schaller*, 937 S.W.2d 285, 290 (Mo. App. W.D. 1996); *State v. Clark*, 975 S.W.2d 256, 263 (Mo. App. S.D. 1998). *See also* Supreme Court Rule 23.01(f) (rebuttal witnesses not required to be listed on informations or indictments). Here, through the trial court’s ruling, Page could only testify during rebuttal and his testimony regarding appellant’s statements was limited to Page’s police report (L.F. 128-130). Thus even if the state was to call Page as a witness, they were under no

duty to inform appellant—but the state in *Scott* was compelled to disclose the defendant’s statements they concealed. *Scott, supra* at 733. As a result, *Scott* is inapposite.

Furthermore, the fact that Page might enter into a plea agreement with the state and testify against appellant was something that appellant should have contemplated and anticipated. Moreover, up until six weeks prior to trial, appellant and Page were actually to be tried together (Tr. 48, 94).<sup>1</sup> Appellant certainly could have and should have been anticipating that he might have to face Page’s testimony.

Moreover, appellant claims that “the prejudice resulted from the fact that they had no reason to anticipate or prepare their case in contemplation of Jamell’s testimony” (App. Br. 36). Appellant further alleges that he simply did not think Jamell would be “called at trial” (App. Br. 36). Appellant’s failure to prepare for the introduction of Jamell’s testimony, either through his live appearance at trial or through his written statement to police, is not the fault of the state or the trial court.

Ultimately, appellant has failed to show how his trial was fundamentally unfair because he has failed to show concretely how his defense was hampered as a result of the possibility that Page would testify on rebuttal. Appellant has not shown concretely how earlier “disclosure” of Page would have “affected the result of the trial.” *Scott*, 943 S.W.2d at 735-736. (And of course, appellant always knew about Page and Page’s statement so it’s not as if Page were a complete surprise and had not been “disclosed”). Appellant suggests he would have rethought his cross-examination of State’s witnesses had he known earlier about Page’s testimony, but does not explain how that cross-examination would have differed or how it

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<sup>1</sup>The motion to sever appellant and Page’s trial was not filed until October 25, 2001 (Tr. 48). The motion was granted October 30, 2001 (LF 16). Appellant’s trial began December 10, 2001 (LF 22; Tr. 94).

would have affected the outcome of the trial (App.Br. 33). Appellant contends that there was not time to prepare to depose Page, but makes no argument or explanation as to how the deposition of Page was in any way deficient (App.Br. 33).

And of course, appellant argues that he was “forced” not to testify. Appellant was not forced; he made a strategic choice. Moreover, appellant has made absolutely no argument or showing how his testimony would have affected the outcome of the trial. Indeed, the fact remains that appellant would not have been a credible witness. Trial testimony demonstrated that appellant gave no less than four different statements to the police.

Detective Coates testified that during appellant’s first interview, appellant gave Detective Coates three different stories of his involvement in the murder of Mason (Tr. 800-09). At first, appellant said he was not even in the area of the murder but at his girlfriend’s residence (Tr. 801). Next, he stated he was not at the scene but remained at “Twist’s” house (Tr. 801-02). His story changed a third time—in his first written statement, appellant stated he was not aware of Mason’s murder until hearing about it later, but was with Page when he took Mason’s drugs (State’s Exhibit 8; Tr. 803-09). Thus, based on Detective Coates’ testimony, appellant’s credibility was already in doubt.

Detective Wilson’s testimony cast further suspicion on appellant’s credibility when he testified that he reinterviewed appellant and appellant changed his story a fourth time (Tr. 905-23, 927-33). After Lewis confronted appellant with Page’s statement in which Page said appellant choked Mason from behind, appellant admitted—in his second written statement—that he had gotten in the back seat of Mason’s truck and used a pole to choke Mason (State’s Exhibit 9; Tr. 906-23). Both of appellant’s written statements—State’s Exhibits 8 and 9—were admitted at trial and their contents read to the jury (Tr. 810-13, 919-23).

Thus, before appellant even had an opportunity to testify at trial, the jury was fully aware of his proclivity for dishonesty and any testimony he offered was highly vulnerable to impeachment. Under these circumstances, appellant has failed to show that he suffered fundamental unfairness or that the court's ruling was an abuse of discretion and this claim on appeal fails.

## **B. Appellant's Claim that the Trial Court Should Have Granted Him a Continuance**

Appellant also claims that the trial court should have granted him a brief continuance to prepare for Page's deposition (App. Br. 24, 37). Appellant specifically alleges that he had no time to prepare to depose Page and that he needed time to "regroup and reevaluate" trial strategy (App. Br. 24, 37).

### **1. Standard of Review**

Whether or not a trial court grants a continuance is within the discretion of the court, and "[r]eversal is warranted only upon a very strong showing that the court abused its discretion and prejudice resulted." *State v. Christeson*, 50 S.W.3d 251, 261 (Mo. banc 2001) *cert. denied*, 534 U.S. 978 (2001). A trial court abuses its discretion when its decision is "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[.]" *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

### **2. Factual Background**

At trial, after the court issued its ruling permitting Page to testify for the state during rebuttal, defense counsel asked for a continuance until the next morning to prepare for Page's deposition (Tr. 952-53). The record shows that appellant received a copy of Page's statement to police over nine months before trial (L.F. 126; Tr. 725-26, 753-54). The record also shows that Page's sworn testimony at the guilty plea hearing was "pretty close" to the contents of his

statement to police (Tr. 754). Finally, the court ruled that Page would not be allowed to testify to “any previously undisclosed incriminating statements of the defendant” (L.F. 128).

### 3. Analysis

The trial court did not abuse its discretion when it did not grant counsel a continuance because counsel had adequate time to prepare for Page’s deposition and testimony. “Inadequate preparation does not justify a continuance where counsel had ample opportunity to prepare.” *State v. Middleton*, 995 S.W.2d 443, 465 (Mo. banc 1999) *cert. denied*, 528 U.S. 1167 (2000); *State v. Chambers*, 891 S.W.2d 93, 101 (Mo. banc 1994).

As noted above, the record reflects, and the trial court found, that appellant received a copy of Page’s statement to police in February 2001, which was over nine months before appellant’s trial in mid-December 2001 (L.F. 126; Tr. 725-26, 753-54). Further, also as noted above, any accusations Page may have made against appellant about statements appellant made on the night of the crime were limited to what Page claimed appellant said in Page’s statement to police (L.F. 128). Thus, because appellant had Page’s written statement nine months before trial and because Page’s testimony about appellant was limited to that statement, appellant had ample time to prepare for Page’s testimony. As a result, his claim fails.

Furthermore, the trial court arranged for counsel to depose Page during a lunch break and after that two-and-a-half-hour deposition, counsel did not again request a continuance to conduct more investigation into Page’s statements or prepare for his potential testimony (L.F. 130; Tr. 946-48; 880-81, 955-56). Thus, it is fair to assume that counsel was prepared for Page’s testimony.

Appellant implies that he needed more time to prepare for Page’s deposition, to consider recalling witnesses, and prepare to testify himself (App. Br. 37). Yet, he fails to specify what he would have done differently had the court granted a continuance—he neglects

to articulate what he would have done differently at Page's deposition, what new questions he would have developed for recalled witnesses or how he would have altered his own testimony.

In *State v. Thompson*, 985 S.W.2d 779, 785 (Mo.banc 1999), this Court addressed alleged discovery violations by the state in the guilt phase of a capital murder case. In *Thompson*, the defendant had claimed "that late and nondisclosures prejudiced his ability to investigate, prepare for trial, confront witnesses and rebut the evidence, and injected arbitrariness in the proceeding." *Id.* However, the Court noted that the defendant in *Thompson* did not, on appeal or before the trial court, specify how further investigation or preparation would have benefitted his defense. "Defendant's bare assertions of prejudice are not sufficient to establish fundamental unfairness nor do they demonstrate how the outcome of the case was substantively altered." *Id.* Thus, the Court found no abuse of discretion.

In *State v. Bucklew*, 973 S.W.2d 83, 93 (Mo.banc 1998), *cert. denied*, 119 S.Ct. 826 (1999), the defendant claimed "he could have crafted an alternative defense" if he had known beforehand that a witness would testify as to a statement he made in which he threatened the victim. This Court, in denying the defendant's claim, noted that the defendant did not indicate the nature of what the defense might have been "nor successfully articulate the prejudice that flowed from not presenting it." *Id.*

Appellant in the present case, while repeatedly arguing that his counsel did not have time to prepare for Page's testimony (which ultimately was never admitted), never explains concretely what would have been done differently or how the outcome of the case would have been substantively altered.

Moreover, Supreme Court Rule 24.09, as it read at the time of trial, requires that the an application for a continuance be made in writing and be accompanied by an affidavit listing

the facts supporting the application.<sup>2</sup> The record does not indicate that appellant made such a motion, nor does it show that the state waived the requirement of Rule 24.09. As a result, the trial court's denial of appellant's motion for a continuance was not an abuse of discretion because appellant's "[f]ailure to submit a written motion for a continuance accompanied by an affidavit is a sufficient ground to deny the motion." *Holt v. State*, 24 S.W.3d 708, 710 (Mo. App. E.D. 1999); *State v. Lopez*, 836 S.W.2d 28, 32 (Mo. App. E.D. 1992). Furthermore, "[f]ailure to comply with Rules 24.09 and 24.10 alone is sufficient to sustain the trial court's ruling." *State v. Dodd*, 10 S.W.3d 546, 554-555 (Mo. App. W.D. 1999). As a result, the trial court did not abuse its discretion when it denied appellant's oral motion for a continuance.

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<sup>2</sup>Rule 24.09, as amended and effective January 1, 2004, no longer requires an affidavit.

## II.

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FAILED TO GRANT APPELLANT A MISTRIAL WHEN, DURING CLOSING ARGUMENT, THE PROSECUTOR INADVERTENTLY COMMENTED THAT NO WITNESS TESTIFIED THAT APPELLANT “COULD NOT TESTIFY,” BECAUSE THE PROSECUTOR’S REMARK WAS PROPER IN THAT APPELLANT CLAIMED DURING OPENING STATEMENTS THAT HE WOULD TESTIFY AT TRIAL, BUT HE CHOSE NOT TO TESTIFY.**

Appellant claims the trial court erred when it overruled his motion for a mistrial during the state’s closing argument (App. Br. 22, 39, 47). Appellant alleges that the trial court should have granted him a mistrial when the prosecutor made a comment about no other witness testifying that appellant “could not testify” (App. Br. 22, 39, 42, 47).

### **A. Facts.**

During voir dire, defense counsel announced, “We do anticipate that Mr. Busey [the appellant] will testify sometime, I don’t know when it will be, depending on the course of the trial.” (Tr. 247). During appellant’s opening statement, defense counsel told the jury that appellant would testify. Defense counsel, in stating what the evidence would show, said, in pertinent part, as follows:

They traveled to Speedy’s because they planned on getting some cigars . . . for them to smoke marijuana. At that point, *Mr. Busey will testify* that he noticed that Jamell is really acting out of sorts, he is not himself, and Marcus is getting the impression that something has happened.

*And [appellant] will indicate* that they then traveled to Ryan Menschik’s house where they all stayed. [Appellant] did use Ryan’s phone to call his mother

and say, I'm okay, I wasn't involved, because it was Jamell Page who stabbed this young man to death.

(Tr. 293) (emphasis added).

However, although defense counsel indicated during opening statement that appellant would testify, ultimately appellant did not take the stand.

During the state's closing argument, the prosecutor made the following comment which on its face directly referenced appellant's failure to testify:

[Prosecutor Scroggins:] What witness said Marcus Busey could not testify? Not one single witness. The waiver of rights form says this man completed the tenth grade, and the inference that they would have you draw—

Ms. Holt [defense counsel]: Your Honor, may we approach, please?

(Counsel approached the bench and the following proceedings were held:)

The Court: Yes?

Ms. Holt: He just argued no, no witness indicated that Mr. Busey could not testify. At this time we move for a mistrial. It's wholly inappropriate on whether or not a witness—

The Court: When did he say no witness—anything about Mr. Busey testifying? He was talking about reading.

Ms. Holt: But he said “testify.” I'm asking you to check the record. We're requesting a mistrial.

The Court: Well, if that was a misstatement—I don't believe it was—but if you would clarify your statement. Overruled.

(The proceedings returned to open court.)

Mr. Scroggins: Did any witness say that Marcus Busey could not read?

The inference they would have you draw is that he can't read, but the waiver of rights form said he completed the tenth grade. Is it a reasonable inference that you complete the tenth grade in high school and you cannot read?

(Tr. 1023-24).

Appellant raised this issue in his motion for new trial and argued it at the sentencing hearing (Tr. 1049, *et seq.*). Ultimately, the trial court overruled appellant's motion for new trial, finding specifically as to this claim that the prosecutor had merely made a misstatement in that he was trying to say that no witness had testified that appellant could not read, and that the misstatement was "immediately and inconspicuously corrected and clarified to the jury and that the defendant was not prejudiced by the original misstatement." (Tr. 1061).

**B. The prosecutor's comment was not improper.**

Because defense counsel, in opening statement, promised the jury that appellant would testify, the prosecutor's comment was permissible. As other courts have noted, a prosecutor may properly comment on a defendant's failure to testify when counsel describes in opening statement a defendant's defense and says that the defendant will testify. *Lockett v. Ohio*, 438 U.S. 586, 595, 98 S.Ct. 2954, 2959-60, 57 L.Ed.2d 973 (1978); *State v. Dollens*, 878 S.W.2d 875, 876-77 (Mo.App.E.D. 1994).

In *Lockett*, Lockett's counsel outlined the contemplated defense in opening statement and later told the jury that Lockett would be the "next witness." The United States Supreme Court found that the prosecutor's closing remarks added nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by defense counsel and told that Lockett would take the stand. *Lockett*, 98 U.S. at 595, 98 S.Ct. at 2959-60.

In *United States v. Robinson*, 485 U.S. 25, 27, 108 S.Ct. 864, 866, 99 L.Ed.2d 23 (1988), defense counsel remarked during closing that the government had prevented Robinson from telling his side of the story. The Supreme Court found that the prosecutor's comments in rebuttal closing argument to the effect that Robinson could have explained his story to the jury were proper response to defense counsel's argument. *Id.* at 31, 868. Where the prosecutor's reference to a defendant's failure to testify is a fair response to a claim, argument, or statement made by defendant or his counsel, there is no violation of the defendant's Fifth Amendment privilege. *Id.* at 32, 869. "[T]he protective shield of the Fifth Amendment should [not] be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." *Id.*, quoting *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 1984, 76 L.Ed.2d 96 (1983).

In *State v. Dollens*, the Court of Appeals for the Eastern District found that the prosecutor's comment that there may be reasons why the defendant did not take the stand was a fair response to the defense's opening statement in which defense counsel told the jury that Dollens would take the stand and then proceeded to outline the details of Dollens's testimony to the jury. *Dollens*, 878 S.W.2d at 877. See also *State v. Graham*, 906 S.W.2d 701 (Mo.App.W.D. 1995) and *Graham v. Dormire*, 212 F.3d 437, 440 (8<sup>th</sup> Cir. 2000) (prosecutor's statement that whether defendant needed to testify was up to jury was permissible response to defense counsel's argument that defendant did not need to testify). "A prosecutor need not remain mute when the defendant himself raises the testimonial issue." *Graham v. Dormire, supra.*

In the present case, defense counsel ended its opening statement to the jury with assurances that appellant would testify as well as an outline of what he would testify to. These

statements by counsel thus “opened the door” to the prosecutor’s remark. See *Lockett*, 98 U.S. at 595, 98 S.Ct. at 2959-60; *Dollens*, 878 S.W.2d at 877.

Appellant argues that the prosecutor’s comment was not a “fair response” in light of the fact that appellant ultimately did not testify because of the state’s late decision to use Page as a rebuttal witness. Respondent is not aware, and appellant does not point to, any authority which states that a party’s change in strategy during trial means that the opposing party cannot comment upon what was promised to the jury in opening statement and was ultimately not presented because of a change in strategy. Appellant did not have to decide not to testify. Strategic decisions, successful or not, are made all the time by parties mid-trial.

Moreover, appellant always knew about Page and Page’s statements, and up until six weeks prior to trial, thought that appellant and Page would be tried together (Tr. 48, 94).<sup>3</sup> The prosecutor had actually offered Page at the outset of the proceedings against him a plea agreement of second degree murder only and no additional charges (Tr. 730-31, 747). Part of that offer was that Page would testify against appellant (Tr. 734-37, 743-44, 757). That offer stood for several months before appellant’s trial (Tr. 730-31, 747-79, 758). At one point, Page indicated his willingness to accept the offer and a plea hearing was set, but Page reneged on the hearing and a trial date was subsequently set (Tr. 746-49).

Furthermore, appellant knew on December 10, the first day of trial, prior to voir dire and opening statements, that the prosecutor had again extended a plea offer to Page (Tr. 94). Appellant thus knew there was a real chance that Page could accept the plea offer and be available to testify. Appellant could have reserved opening statement to see how things played

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<sup>3</sup>The motion to sever appellant and Page’s trial was not filed until October 25, 2001 (Tr. 48). The motion was granted October 30, 2001 (LF 16). Appellant’s trial began December 10, 2001 (LF 22; Tr. 94).

out, but rather, appellant made a decision to go ahead with opening statement and tell the jury that he intended to testify.

Thus, it was appellant's own strategic decisions, made in the face of the fact that there was always a chance that Page would plead and testify against him, that led appellant to promise the jury during opening statement that he would testify and then ultimately decide not to testify. It was fair for the prosecution to respond to this.

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

The only remedy appellant requested was a mistrial. 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). Thus, because appellant failed to present the trial court with a lesser remedy and has failed to show that such a remedy, like an objection or 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.

In addition, the prosecutor's comment was fleeting, inadvertent, and a slip of the tongue. "When considering a defendant's claim of an improper comment on his right to remain silent, the appellate court must also consider the comment in the context in which it appears." *State v. Neff*, 978 S.W.2d 341, 345 (Mo. banc 1998). In the case at bar, the trial court thought the prosecutor was referring to appellant's reading abilities and after appellant's objection the prosecutor corrected himself and made the proper argument (Tr. 1024). This comment—even in the absence of a sustained objection or an instruction to disregard—did not warrant a mistrial especially because it was "isolated, not directed at the jury, and not obviously intended to poison the minds of the jurors against the defendant." *See Id.* at 346-47 ("Moreover, it is absurd to conclude that Missouri trial judges have sufficient discretion to determine an appropriate response to improper comments except in this one instance in which our trial bench is uniformly incompetent to exercise its otherwise sound judgment and must order a mistrial.").

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. Instruction 16 compelled the jury not to draw an adverse inference from appellant's failure to testify because, "[u]nder the law, the defendant has the right not to testify" (L.F. 156). Jurors are presumed to follow the court's instructions. *State v. Staples*, 908 S.W.2d 189, 190 (Mo. App. E.D. 1995).

Thus, because the prosecutor's remark was proper in light of appellant's assertion in opening statement that he would testify, 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.

**CONCLUSION**

WHEREFORE, for the foregoing reasons, respondent prays that this Court affirm appellant's conviction and sentence.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON  
Attorney General

KAREN L. KRAMER  
Assistant Attorney General  
Missouri Bar No. 47100

P. O. Box 899  
Jefferson City, MO 65102  
(573) 751-3321  
Fax (573) 751-5391

Attorneys for Respondent

**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

1. That the attached brief (a) includes the information required by Rule 55.03, and (b) complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 8,831 words, excluding the cover, the signature block, and this certification, 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 April, 2004, to:

Amy Bartholow  
Office of State Public Defender  
3402 Buttonwood  
Columbia, MO 65201  
573-882-9855

JEREMIAH W. (JAY) NIXON  
Attorney General

KAREN L. KRAMER  
Assistant Attorney General  
Missouri Bar No. 47100  
P.O. Box 899  
Jefferson City, Missouri 65102  
(573) 751-3321  
Fax (573) 751-5391  
Attorneys for Respondent

No. 85726

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IN THE  
MISSOURI SUPREME COURT

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STATE OF MISSOURI,

Respondent,

v.

MARCUS A. BUSEY,

Appellant.

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Appeal from the Circuit Court of Buchanan County, Missouri  
5th Judicial Circuit  
Honorable Randall R. Jackson, Judge

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RESPONDENT'S APPENDIX

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