

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,)	
)	
	Respondent,	
)	
vs.)	No. SC88986
)	
EDWIN MINNER,)	
)	
	Appellant.	
)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF NEW MADRID COUNTY, MISSOURI
THIRTY-FOURTH JUDICIAL CIRCUIT
THE HONORABLE FRED W. COPELAND, JUDGE**

APPELLANT'S SUBSTITUTE BRIEF

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WHAT THIS COURT GRANTED TRANSFER ON

The Southern District held that although there was no evidence that Appellant knew the alleged drug sale was taking place within 1000 feet of governmental assisted housing, the State did not have to prove this knowledge, and this holding:

- (1) Is contrary to a previous appellate decision of this state, *State v. White*, 28 S.W.3d 391 (Mo. App. W.D. 2000), which held that the State is required to prove that defendant knew he delivered a controlled substance within 2000 feet of a school, and the MAI-CR3d instruction, which requires Appellant to act knowingly regarding the facts and circumstances including that the sale occurred within the specified distance of the specified premises; and
- (2) Presents a question of general interest and importance of whether such knowledge is required under §§ 195.214, 195.218 and 562.021, to support convictions for the offenses of delivery of a controlled substance within 1000 feet of governmental assisted housing or within 2000 feet of a school.

Because all jury trials involving §§ 195.214 and 195.218 that follow MAI-CR3d and *White* will require instructions making the State prove knowledge as to the distance element, whereas courts following the Southern District's opinion in *Minner* will modify these instructions to conform to that opinion, this Court should transfer this case so it can give guidance to the trial courts. The required elements in the verdict director should not differ based upon what part of this State the case is tried in -- a situation likely to occur until this Court rules on this issue.

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JURISDICTIONAL STATEMENT

Appellant, Edwin Minner, was convicted after a jury trial in the Circuit Court of New Madrid County, Missouri, of delivery of a controlled substance near public housing or other governmental assisted housing, §195.218, RSMo Cum.Supp. 2003.¹ On May 9, 2006, he was sentenced to eighteen years imprisonment (L.F. 66-67; Tr. 214). On May 17, 2006, he timely filed a notice of appeal, in *forma pauperis* (L.F. 68-70). Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, § 3, Mo. Const.; § 477.060. But on January 22, 2008, this Court granted Minner's application for transfer, so this Court has jurisdiction. Article V, §§ 3 and 10, Mo. Const. and Rule 83.03.

¹ All statutory citations are to RSMo 2000 unless otherwise indicated. All Rule references are to Missouri Court Rules (2007), unless otherwise indicated. The Record on Appeal consists of a trial transcript ("Tr."), and a legal file ("L.F").

STATEMENT OF FACTS

Chris Hensley is an investigator with the New Madrid County Sheriff's Department and he also works with the Southeast Missouri Drug Task Force (Tr. 110-11). On August 16, 2004, Hensley was working with a paid female informant (Tr. 114, 136, 138, 142-43). During his pre-search of the informant he did not find any contraband (Tr. 114-15). He searched her socks, shoes and pockets, if she had any (Tr. 115, 143). But because the informant was a female he did not look under her clothing or check her undergarments (Tr. 115). Hensley also searched her car (Tr. 115, 142-45, 166). Nothing was found (Tr. 115-16, 166).

Hensley placed a video camera in the passenger seat and another one in the driver's side rear window (Tr. 116, 146-47). Hensley gave the informant twenty dollars and told her to "frequent" the Russell Street area in an attempt to get "flagged down" to purchase crack cocaine (Tr. 117, 147). Hensley followed her (Tr. 117).

When the informant turned onto Russell Street, Hensley turned on another parallel street so that he would not be seen (Tr. 118). He then parked in a parking lot about three blocks away so he could watch the transaction (Tr. 118, 149). He was somewhere between 400 to 1000 feet away (Tr. 118, 149). He did not use any binoculars (Tr. 149).

When the informant came to a stop on Riley Street, Hensley saw an African American male walk up to her vehicle (Tr. 119, 167).² Hensley could not tell who the male was because of the distance (Tr. 119). The car then pulled up and stopped again and the man walked in front of the car and into a residence at the corner of Riley and Hunter Streets while the informant remained outside (Tr. 119). That residence is at 315 Riley Street where Edwin Minner, his mother, and Derrick Williamson live (Tr. 131-32, 165). Hensley based this conclusion upon that he had pulled a booking sheet of Minner, “driver’s license information,” an interview of other officers, and his subsequent interview of Minner (Tr. 160, 167). After a few minutes, the man exited the residence, walked back to the informant’s vehicle, leaned into it for a few seconds, and then the informant drove away and the man walked away (Tr. 119).

Hensley turned his car around and waited at a stop sign until the informant was behind him and he led her to a pre-determined location (Tr. 119). Once there, the informant turned over a controlled substance (a purported quarter gram of crack cocaine) and Hensley re-searched her and her car, and he found nothing on her (Tr. 120, 156, 158, 163-64). She no longer had the money that she had been

² Although the video tapes showed two people approach the vehicle at different times, Hensley only saw one person (Tr. 156, 167; State’s Exhibits No. 2 and 3). Hensley admitted he was too far away to see any detail about what was going on (Tr. 156).

given (Tr. 120). Hensley placed the controlled substance into a bag and placed it into an evidence locker (Tr. 120-21, 124; State's Exhibit No. 1). Later, the substance was submitted to the Missouri State Highway Patrol Crime Lab (Tr. 120-22; State's Exhibit No. 1). When the substance was later examined by a chemist in September of 2004, it was determined to be .10 grams of cocaine base (Tr. 168, 171-75).

Hensley viewed the video recordings (Tr. 125-26; State's Exhibits No. 2 and 3). They were a fair and accurate portrayal of what Hensley saw that day (Tr. 125).³ There were not additions or changes to the videos (Tr. 126). They were unedited from what Hensley took out of the car that day (Tr. 126-27). One recording was a digital recording and the other was an eight millimeter; they were later transferred to VHS tapes (Tr. 127, 147; State's Exhibits No. 2 and 3). When Hensley watched the tapes it appeared to him that it was Minner who walked up to the car (Tr. 127, 160). When he first looked at the videos he was not a hundred

³ Minner objected that the videos should not be played until a proper foundation was laid (Tr. 126). When the videos were offered into evidence Minner objected that because Hensley was not able to view the actual transaction there was insufficient foundation for the tapes (Tr. 132). The trial court overruled the objection and the videos were played for the jury except that the audio portion of the tape was muted so the jury could not hear it (Tr. 133).

percent sure that it was Minner (Tr. 165). In an earlier deposition Hensley said he was not a hundred percent sure it was Minner (Tr. 161).

A residence at 720 Hunter Street, apartment 89, is 427 ½ feet from the corner of Riley and Russell streets where the alleged transaction occurred (Tr. 131). The 720 Hunter Street Apartment is a governmental assisted housing operated by the New Madrid Housing Authority (Tr. 131). Hensley knew that it was governmental housing because he had a list of address of every house in New Madrid County that was a housing unit (Tr. 160).

At some point, Hensley spoke with Minner before his arrest (Tr. 128). Minner wanted to help the Drug Task Force, but he never called Hensley back about it (Tr. 128). A day or two after his arrest in this case, which was about a year after the charged crime, Hensley went to the jail to talk to Minner about what had happened regarding the Drug Task Force (Tr. 128, 130, 158). Hensley did not advise Minner of his rights or have him sign any waiver of his rights (Tr. 158).⁴ Hensley asked him about what had happened and why he had not called about the Drug Task Force (Tr. 129).

Minner began to talk about “this actual case” (Tr. 129). Hensley had some “paperwork” and Minner said “that’s not me” (Tr. 129). Hensley said “don’t worry about that” because Hensley was just trying to find out why Minner had not

⁴ Minner objected and renewed his request regarding his pre-trial motion to suppress (Tr. 128; L.F. 22-24). The trial court overruled that objection (Tr. 128).

called (Tr. 129). Minner kept trying to tell Hensley that the case he had been arrested on “was not him, that he was not involved in this,” and Hensley assured him that it was him, that Hensley had two videos that showed Minner selling drugs, and that Minner did not “need to worry about this” (Tr. 129).

Finally, Minner said that he did not usually sell drugs, but that, sometimes when his cousin wasn’t “out there on the street” that Minner would run into the house and retrieve “the dope” from his cousin and bring it back outside to sell on the street for his cousin (Tr. 129-30).

As a result of the foregoing evidence, Minner was charged by amended information with the class A felony of delivery of a controlled substance (cocaine base) near public housing or other governmental assisted housing, §195.218, RSMo Cum.Supp. 2003 (L.F. 36-38). He was tried by a New Madrid County jury on March 29, 2006 (L.F. 5).

At that trial, Minner moved for judgment of acquittal at the close of the evidence, which was denied by the trial court (Tr. 178; L.F. 42-43). After the jury found him guilty of the charged offense (Tr. 203; L.F. 61), the trial court granted him the full twenty-five days to file a motion for new trial (L.F. 5), which was timely filed on April 21, 2006 (L.F. 62-65).

At sentencing, the trial court overruled the motion for new trial (Tr. 209) and sentenced Minner to eighteen years imprisonment (L.F. 66-67; Tr. 214). Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

POINTS RELIED ON

I.

The trial court erred in overruling Minner's motion for judgment of acquittal at the close of all the evidence and in sentencing him upon his conviction for delivery of a controlled substance near public or other governmental assisted housing, §195.218, RSMo Cum.Supp. 2003, because the State did not prove that Minner knew that he was delivering cocaine within 1000 feet of such housing, as required under §195.218, RSMo Cum.Supp. 2003, and §§ 562.016 and 562.021, violating Minner's right to due process of law as guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that there was no evidence presented that Minner knew that there was public or governmental assisted housing nearby or that the housing was visibly marked as such, the only reason that the officer who witnessed the delivery knew about the nearby public housing apartment was because he had a record of all the residences in that county that were public or governmental assisted housing, and there was no evidence that such a record was available to Minner or that he had knowledge of such a record.

State v. White, 28 S.W.3d 391(Mo. App., W.D. 2000);

State v. Self, 155 S.W.3d 756, 762 (Mo. banc 2005);

Apprendi v. New Jersey, 530 U.S. 466 (2000);

Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc., v. Nixon, 185 S.W.3d 685, 690 (Mo. banc 2006);
U.S. Const., Amend. XIV;
Mo. Const., Art. I, § 10;
§§ 195.211, 195.214 and 195.218, RSMo Cum.Supp. 2003;
§§ 562.016 and 562.021, RSMo 2000;
Rule 29.11;
MAI-CR3d 325.30; and
Black's Law Dictionary (6th Ed.1990).

II.

The trial court erred in overruling Minner's motion for judgment of acquittal at the close of all the evidence and in sentencing him upon his conviction for delivery of a controlled substance near public or other governmental assisted housing, §195.218, RSMo Cum.Supp. 2003, because the State did not prove beyond a reasonable doubt that Minner delivered cocaine, violating his right to due process of law guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that the informant who was involved in the alleged sale did not testify; although Officer Hensley testified that he saw Minner approach the informant's car then go to a house and then return to the car he admitted that he was too far away to see any detail about what was going on; although Hensley searched the informant before the alleged transaction and found no cocaine and then searched her again afterwards and did not find the money he had given her, he admitted that because she was a female he did not do a complete search of her and only searched her socks, shoes and pockets; and although surveillance videotapes were played for the jury, an exchange of cocaine for money cannot be seen on the tape.

State v. Pierce, 906 S.W.2d 729 (Mo. App. W.D. 1995);

State v. Gregory, 339 Mo. 133, 96 S.W.2d 47 (Mo.1936);

State v. Dawson, 985 S.W.2d 941 (Mo. App. W.D. 1999);

State v. Whalen, 49 S.W.3d 181 (Mo. banc 2001);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10; and

§§ 195.211 and 195.218, RSMo Cum.Supp. 2003.

III.

The trial court erred in overruling Minner’s objections to and in admitting his statements made to Officer Hensley while in jail on offense alleged in this case, because this violated Minner’s privilege against self-incrimination and his right to due process of law, as guaranteed by the 5th and 14th Amendments to the U.S. Constitution and Article I, § 19 of the Mo. Constitution, in that his statements were inadmissible because Officer Hensley did not read Minner his *Miranda* rights when Minner was in custody – he was in jail regarding the charged offense – and Minner was subjected to express questioning or its functional equivalent because when Hensley approached Minner about the drug task force Minner began to talk about “this actual case,” Hensley had some “paperwork” concerning this case and Minner said “that’s not me” and that “he was not involved in this,” and Hensley assured him that it was him, that Hensley had two videos that showed Minner selling drugs, and that Minner did not “need to worry about this.”

Miranda v. Arizona, 384 U.S. 436 (1966);

State v. Williams, 163 S.W.3d 522 (Mo. App. E.D. 2005);

Rhode Island v. Innis, 446 U.S. 291 (1980);

Mathis v. U.S., 391 U.S. 1 (1968);

U.S. Const., Amends. V and XIV; and

Mo. Const., Art. I, § 19; and

Rule 29.11.

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IV.

The trial court abused its discretion in admitting over Minner's objections State's Exhibits 2 and 3, the surveillance videotapes of the alleged drug transaction, because there was an insufficient foundation for the admission of these tapes and the admission of them violated Minner's rights to due process and a fair trial guaranteed by the 14th Amendment to the United States Constitution and Article I, §10 of the Missouri Constitution, in that Officer Hensley's testimony did not establish the authenticity and correctness of the tapes or prove that changes, additions, or deletions had not been made because Hensley admitted that he would have to agree that he was probably about 1000 feet away from transaction and he did not use any visual aids to view the transaction, from his vantage point he saw only one person approach the informant's car yet the tapes showed that a second person approached the car, he admitted he was too far away to know any detail about these people or what was going on.

Phiropoulos v. Bi-State Development Agency, 908 S.W.2d 712 (Mo. App.

E.D. 1995);

State v. Wahby, 775 S.W.2d 147 (Mo. banc 1989);

State v. Powers, 148 S.W.3d 830 (Mo. App. E.D. 2004);

State v. Seaton, 674 S.W.2d 214 (Mo. App. S.D. 1984);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10; and

Rule 29.11.

V.

The trial court plainly erred in permitting Officer Hensley to testify that Minner was the alleged drug seller in the surveillance tapes of the transaction, because this denied Minner his rights to due process and a fair trial guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution, resulting in a manifest injustice, in that the identity of the suspect in the surveillance tape was a matter in dispute, and Hensley's testimony that the man was Minner was an opinion that the jury was just as capable as Hensley to evaluate, therefore his testimony invaded the province of the jury on the ultimate issue to be determined. The admission of the opinion was prejudicial because the confidential informant did not testify, so Hensley was the only witness to identify the suspect, Minner specifically denied to Hensley that he was the person involved in the alleged drug sale, and thus there is a reasonable probability that the jury would have reached a different conclusion but for the erroneously-admitted opinion evidence.

State v. Presberry, 128 S.W.3d 80 (Mo. App. E.D. 2003);

State v. Saucy, 164 S.W.3d 523 (Mo. App. S.D. 2005);

State v. Gardner, 955 S.W.2d 819 (Mo. App. E.D. 1997);

State v. Winston, 959 S.W.2d 874 (Mo. App. E.D. 1997);

U.S. Const., Amend. VI and XIV;

Mo. Const., Art. I, § 10; and

Rule 30.20.

ARGUMENT

I.

The trial court erred in overruling Minner's motion for judgment of acquittal at the close of all the evidence and in sentencing him upon his conviction for delivery of a controlled substance near public or other governmental assisted housing, §195.218, RSMo Cum.Supp. 2003, because the State did not prove that Minner knew that he was delivering cocaine within 1000 feet of such housing, as required under §195.218, RSMo Cum.Supp. 2003, and §§ 562.016 and 562.021, violating Minner's right to due process of law as guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that there was no evidence presented that Minner knew that there was public or governmental assisted housing nearby or that the housing was visibly marked as such, the only reason that the officer who witnessed the delivery knew about the nearby public housing apartment was because he had a record of all the residences in that county that were public or governmental assisted housing, and there was no evidence that such a record was available to Minner or that he had knowledge of such a record.

WHAT THIS COURT GRANTED TRANSFER ON:

The Southern District held that although there was no evidence that [Minner] knew the alleged drug sale was taking place within 1000 feet of governmental assisted housing, the State did not have to prove this knowledge, and this holding:

- (1) is contrary to a previous appellate decision of this state, *State v. White*, 28 S.W.3d 391 (Mo. App. W.D. 2000), which held that the State is required to prove that [Minner] knew he delivered a controlled substance within 2000 feet of a school, and the MAI-CR3d instruction, which requires [Minner] to act knowingly regarding the facts and circumstances including that the sale occurred within the specified distance of the specified premises; and
- (2) presents a question of general interest and importance of whether such knowledge is required under §§ 195.214, 195.218 and 562.021, to support convictions for the offenses of delivery of a controlled substance within 1000 feet of governmental assisted housing or within 2000 feet of a school.

Because all jury trials involving §§ 195.214 and 195.218 that follow MAI-CR3d and *White* will require instructions making the State prove knowledge as to the distance element, whereas courts following the Southern District's opinion in *Minner* will modify these instructions to conform to that opinion, this Court should transfer this case so it can give guidance to the trial courts. The required elements in the verdict director should not differ based upon what part of this State the case is tried in – a situation likely to occur until this Court rules on this issue.

Introduction

The verdict director in this case, which was based upon *MAI-CR3d 325.30*, instructed the jury that it could not find Minner guilty of delivery of a controlled substance near public or other governmental assisted housing, §195.218, RSMo Cum.Supp. 2003, unless it found that he acted knowingly with regard to all of the facts and circumstances, including that the delivery of the controlled substance was within 1000 feet of such real property (L.F. 53).

Thus far, neither the State nor the Southern District Court of Appeals has disputed that the State failed to prove that Minner knew that the alleged delivery took place within 1000 feet of public or other governmental assisted housing, which was an apartment that was on a different street than where the delivery took place. There was no evidence that the housing was visibly marked as public or governmental assisted housing. In fact the only reason that the officer who witnessed the delivery knew about the governmental assisted housing apartment was because he had a record of all the residences in that county that were public or governmental assisted housing. There was no evidence that such a record is available to anyone who wants a copy of it.

Based upon this lack of evidence and the verdict director submitted in this case, the trial court erred in overruling Minner's motion for judgment of acquittal at the close of all the evidence because the State failed to prove beyond a reasonable doubt that Minner knowingly delivered cocaine base within 1000 feet of public or other governmental assisted housing.

Relevant facts

The State failed to present sufficient evidence that Minner *knowingly* sold cocaine within 1000 feet of the real property comprising New Madrid Housing Authority, a public housing or other governmental assisted housing. The only evidence presented regarding the proximity element was Officer Hensley's testimony that there was a residence at 720 Hunter Street, apartment 89, that was 427 ½ feet from the corner of Riley and Russell Streets, where the alleged drug transaction occurred, and that the Hunter Street residence was governmental assisted housing operated by the New Madrid Housing Authority (Tr. 131). Hensley knew that it was governmental assisted housing because he had a list of addresses of every house in New Madrid County that was that type of housing (Tr. 160).

There was no evidence that such a record is available to anyone who wants a copy of it. There also was no evidence presented that Minner knew that there was public or governmental assisted housing nearby or that the housing was visibly marked as such.

As a result, the Southern District's opinion in this case noted that the State did not argue that there was any evidence in the record that Minner knew that the alleged drug sale was taking place within 1000 feet of public or governmental assisted housing. *State v. Minner*, 2007 WL 3275940, at * 2 (Mo. App. S.D.) (Slip op. at 5). The Southern District agreed that "[a]fter reviewing the record, we find none either." *Id.*

Preservation

Respondent argued in its brief in the Southern District (Resp. Br. at 18-19) and the Southern District in its opinion found that this issue was not properly preserved for appellate review because the specific ground was not raised in the motions for judgment of acquittal and timely motion for new trial. *Minner*, 2007 WL 3275940, at * 3 (Slip op. at 6-7). Minner disagrees.

Minner's motion for judgment of acquittal at the close of all the evidence asserted that: (3) "[t]he evidence fails to establish ... that [Minner] possessed the requisite mental state;" and, (7) "[t]he state has failed to establish by proof which comes up to the requirements for submission to the jury in a criminal case that [Minner] committed the alleged offense with the requisite mental state" (L.F. 42-43). And Minner's timely motion for new trial presented a claim that the trial court erred in overruling his motion for judgment of acquittal at the close of all the evidence "because of the allegations contained therein" (L.F. 62; claim 2). This issue is properly preserved for appeal.

Further, *Rule 29.11(d)* specifically provides that questions concerning the sufficiency of the evidence to sustain the conviction are not required to be included in a motion for new trial to be preserved for appellate review. This rule also supports Minner's position that his challenge to the sufficiency of the evidence to support his conviction – including that the State did not prove that he knew he was delivering cocaine within 1000 feet of public or other governmental assisted housing - is properly preserved for appeal.

In any event, whether or not the issue was properly preserved, if the evidence is insufficient to sustain a conviction, then plain error affecting substantial rights is involved from which manifest injustice must have resulted. *State v. Withrow*, 8 S.W.3d 75, 77 (Mo. banc 1999).

Standard of Review

The due process clause protects Minner against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). Upon review of Minner's challenge to the sufficiency of the evidence, this Court must determine if the State presented sufficient evidence from which a reasonable juror could have found him guilty beyond a reasonable doubt. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc), *cert. denied*, 534 U.S. 1030 (2001). The same standard of review applies when this Court reviews a motion for a judgment of acquittal. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004).

This standard of review requires this Court to look to the elements of the crime and consider each in turn. *Whalen*, 49 S.W.3d at 184. In doing so, this Court is required to take the evidence in the light most favorable to the State and to grant the State all reasonable inferences from the evidence. *Id.* This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *Id.* Taking the evidence in this light, this Court considers whether a reasonable juror

could find each of the elements beyond a reasonable doubt. *Id.* But this Court cannot supply missing evidence or give the State the benefit of unreasonable speculative or forced inferences. *Id.*

The Southern District's holding

Because there was no evidence in the record that Minner knew that the alleged drug sale was taking place within 1000 feet of public or other governmental assisted housing, the Southern District correctly noted that the dispositive issue involved in this point is whether or not the State has the burden of proving that Minner knew that the alleged drug sale was taking place within 1000 feet of public or governmental assisted housing. *Minner*, 2007 WL 3275940, at * 2 (Slip op. at 5).

Relying upon this Court's opinion in *State v. Hatton*, 918 S.W.2d 790, 794 (Mo. banc 1996), the Southern District held that "the State did not have to prove that [Minner] knew he was within one thousand feet of public housing or governmental assisted housing." *Minner*, 2007 WL 3275940, at * 2 (Slip op. at 5). As will be shown below, the Southern District's holding was wrong and this Court's opinion in *Hatton* does not control the issue.⁵

⁵ Because of similarities in statutes, Minner's argument would also apply to a conviction for delivery of a controlled substance within 2000 feet of a school, § 195.214, RSMo Cum.Supp. 2003.

***The Southern District's holding is contrary
to previous appellate decisions of this state and MAI-CR3d***

The State's suggestions in opposition to the application for transfer that was filed in this case acknowledges that the Southern District's holding regarding this point is in conflict with both a previous Missouri appellate decision (*State v. White*, 28 S.W.3d 391 (Mo. App. W.D. 2000) (*White I*),⁶ and the current version of *MAI-CR3d 325.30* (State's suggestions at 4-6). Thus, the Southern District's holding regarding this point is wrong unless *White I* was incorrectly decided and *MAI-CR3d* incorrectly reflects the substantive law.

(a) Contrary to previous appellate decisions of this state

The Southern District held that the State did not have to prove that Minner knew he was within 1000 feet of governmental assisted housing in order to support his conviction for delivery of a controlled substance near public or other governmental assisted housing, §195.218, RSMo Cum.Supp. 2003. *Minner*, 2007 WL 3275940, at * 2-4 (Slip op. at 5-9). This holding is contrary to *White I*, which found that the evidence in that case was insufficient to prove that the defendant knowingly delivered a controlled substance within 2000 feet of a school. The

⁶ *Mandate recalled on other grounds, State v. White*, 70 S.W.3d 644 (Mo. App. W.D. 2002) (*White II*),

Southern District admitted that its opinion was in conflict with *White I. Minner*, 2007 WL 3275940, at *4 (Slip op. at 7-9).

In *White I*, the State introduced into evidence a map depicting the distance between the residence and a school as 896 feet. *White*, 28 S.W.3d at 397. The map was insufficient to establish that the defendant knew about the school. *Id.* Evidence that the school premises was a large complex, with one or more large and highly visible buildings, and that normal ingress and egress from the residence would have taken the defendant by the school would have permitted an inference that he had knowledge of the location and distance of the school. *Id.* But there was no such evidence presented. *Id.* Thus, the evidence was insufficient to prove that the defendant knew he had delivered the controlled substance within 2000 feet of a school. *Id.* at 396-97.

Although *White I* dealt with a conviction under § 195.214, RSMo Cum.Supp. 2003, the only significant differences between that statute and § 195.218, RSMo Cum.Supp. 2003, is the distance and the type of real property involved. § 195.214, RSMo Cum.Supp. 2003, requires that the drug delivery be within 2000 feet of a school whereas § 195.218, RSMo Cum.Supp. 2003, requires the drug delivery to be within 1000 feet of public housing or other governmental assisted housing.

Thus, the reasoning set forth in *White I* compels a reversal of Minner's conviction for delivering a controlled substance near governmental assisted housing *if* this Court agrees with *White I* and other cases that have cited *White I*

with approval. *See, State v. Crooks*, 64 S.W.3d 887 (Mo. App. S.D. 2002) and *State v. McQuary*, 173 S.W.3d 663 (Mo. App. W.D. 2005) (but both cases found there was evidence that the defendants knew that the sales were within the specified distance of the specified premises). *In accord, State v. Derenzy*, WL 1566662, *2-3 (Mo. App. W.D. 2001), which also cited *White I*, but distinguished it based upon the facts present in that case. That case was later transferred to this Court, but this Court reversed on other grounds and thus did not reach the issue involved in this case. *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. banc 2002).

(b) Contrary to MAI-CR3d

The Southern District's holding in this case also conflicts with *MAI-CR3d 325.30*, which, like *White I*, requires the State to prove that the defendant knew he was delivering the controlled substance within the specified distance of the specified type of real property set forth in §§ 195.214 and 195.218, RSMo Cum.Supp. 2003.⁷

⁷ *MAI-CR3d 325.30* is the pattern instruction for distribution of a controlled substance near schools. There is no *MAI-CR3d* pattern instruction for distribution of a controlled substance near public or other governmental assisted housing. As a result, the verdict director used here was patterned after *MAI-CR3d 325.30* except that the distance was changed from 2000 feet to 1000 feet, and the location was changed from schools to public housing or other governmental assisted housing. Thus reference to *MAI-CR3d 325.30* is relevant.

Here, the verdict director instructed the jury that it could find Minner guilty of delivering a controlled substance within 1000 feet of public or other governmental assisted housing if it found: (1) that Minner delivered cocaine (2) that the delivery was within 1000 feet of the real property comprising New Madrid Housing Authority, a public housing or other governmental assisted housing, and (3) he acted knowingly with regard to all of the facts and circumstances (L.F. 53).

The combination of paragraphs “second” and “third” of that instruction required the State to prove that Minner knew he had delivered the controlled substance within 1000 feet of such housing. This is because paragraph “third” required that the State prove that “defendant acted knowingly” “with regard to the facts and circumstances” submitted in that instruction, including that the sale occurred within the specified distance of the specified type of real property. It is undisputed that the State failed to prove this knowledge. *Minner*, 2007 WL 3275940, at * 2 (Slip op. at 5).

Minner acknowledges, however, that although it might be persuasive that *MAI-CR3rd* requires that the State prove that Minner knew that the drug delivery was within 1000 feet of public or other governmental assisted housing, that this is not dispositive. This is because if an approved instruction conflicts with a statute, then the statute prevails. *State v. Taylor*, 238 S.W.3d 145, 148 (Mo. banc 2007).

Missouri Statutes support the conclusions reached by MAI-CR3rd and White I

A review of the relevant Missouri statutes leads to the conclusion that

White I and *MAI-CR3d 325.30* are correct, and thus the Southern District’s opinion regarding this point was wrongly decided.

It should be first noted that “Missouri law generally requires a mental state as an element to any crime.” *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc., v. Nixon*, 185 S.W.3d 685, 690 (Mo. banc 2006). Where a specific mental state is not prescribed in a statute, ‘a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly ...’” *State v. Self*, 155 S.W.3d 756, 762 (Mo. banc 2005), *quoting*, § 562.021.3. As this Court noted in *Self*,

A culpable mental state will be imputed to *each* statutory element, unless its imputation would be inconsistent with the purpose of the statute or ‘lead to an absurd or unjust result.’ Sec. 562.026.2. Legislative intent not to require a culpable mental state for each element of the crime must be *clearly apparent* before a particular statute will be construed not to require proof of such culpability.

Self, 155 S.W.3d at 762 (emphasis added).

Section 195.218, RSMo Cum.Supp. 2003, provides that:

[a] person commits the offense of distribution of a controlled substance near public housing or other governmental assisted housing if he violates section 195.211 by unlawfully distributing or delivering any controlled substance to a person in or on, or within one thousand feet of the real

property comprising public housing or other governmental assisted housing.

§ 195.218.1, RSMo Cum.Supp. 2003.⁸

Thus, not only does § 195.218, RSMo Cum.Supp. 2003, incorporate by reference the elements of § 195.211, RSMo Cum.Supp. 2003, but it also requires the jury to find the additional element that the distribution or delivery of drugs took place within 1000 feet of public or other governmental assisted housing for a defendant to be guilty of the offense of distribution of a controlled substance near public or other governmental assisted housing. *Also see, White*, 28 S.W.3d at 396 (dealing with distribution of drugs near schools rather than public housing).

But because a specific mental state is not expressly prescribed in § 195.218, RSMo Cum.Supp. 2003, a culpable mental state is still required and is only established if Minner acted purposely or knowingly. *Self*, 155 S.W.3d at 762. This is because although § 195.218, RSMo Cum.Supp. 2003, does not specifically mention a requisite mental state, § 562.021.3 provides that “if the definition of any

⁸ §195.211, RSMo Cum.Supp. 2003, provides that “it is unlawful for any person to distribute, deliver, manufacture, produce or attempt to distribute, deliver, manufacture or produce a controlled substance or to possess with intent to distribute, deliver, manufacture, or produce a controlled substance.” § 195.211.1, RSMo Cum.Supp. 2003.

offense does not expressly prescribe a culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly; but reckless or criminally negligent acts do not establish such culpable mental state.” (Emphasis added). “A person ‘acts knowingly’ or with knowledge, (1) With respect to his conduct or attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist ...” § 562.016.3(1).

Thus, as correctly submitted by the State in its verdict director, the State had to prove that Minner knew that the drug delivery was within 1000 feet of public or other governmental assisted housing (L.F. 53). But the Southern District’s opinion in this case excused the State from proving what MAI-CR3d and the above stated statutes require. That erroneous opinion was based upon its misplaced reliance upon this Court’s 1996 opinion in *Hatton, supra*.

The Southern District’s misplaced reliance on State v. Hatton

In departing from both the Western District’s opinion in *White I* and MAI-CR3d, the Southern District did so in misplaced reliance upon this Court’s opinion in *Hatton*, 918 S.W.2d at 794. *Minner*, 2007 WL 3275940, at * 3-4 (Slip op. at 7-9). Minner acknowledges that this Court in *Hatton* wrote:

Appellants’ real complaint is that they did not know they were within one thousand feet of public housing when they carried out their plan to sell crack cocaine. This ignorance is not a product of appellants’ inability to

understand the statute. It is the result of their failure to determine the existence of and their distance from public housing. The burden of ascertaining those facts lies with appellants under the statute. The due process clause simply does not require that the state prove appellant's knowledge of his proximity to public housing, nor does it require the state prove appellant's knowledge that the property is classified as public housing, before it will allow the state to enhance the punishment for a crime appellant intentionally committed.

Hatton, 918 S.W.2d at 794.

But that language was only dicta because that case did not involve a challenge to the sufficiency of the evidence; rather it was a challenge that the statute was unconstitutionally vague, which was rejected, in part, because there was a scienter element contained in § 195.211. *Id.* *Black's Law Dictionary (6th Ed.1990)* defines "dicta" as:

[o]pinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in [the] court's opinion which go beyond the facts before [the] court and therefore are individual views of [the] author of [the] opinion and not binding in subsequent cases as legal precedent.

Id. at 454.

The defendants in *Hatton* had *not* maintained that the State was required to prove they knew that the sales were taking place within the specified distances of

the specified premises, nor had they challenged the sufficiency of the evidence. Thus, the *Hatton* language relied upon by the Southern District is dicta and was not binding on Southern District, contrary to its opinion.

Another reason that the Southern District's reliance upon *Hatton* is misplaced is because § 562.021.3 was amended after *Hatton* and now requires the State to prove more than when *Hatton* was decided.

Prior to *Hatton*, § 562.021.2, RSMo 1986, had provided that, “[e]xcept as provided in section 562.026 if the definition of an offense does not expressly prescribe a culpable mental state, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly or recklessly, but criminal negligence is not sufficient.” But 1993, S.B. No. 167 deleted that subsection. Thus that subsection did *not* exist at the time *Hatton* was decided in 1996.

The year following *Hatton*, however, the legislature in S.B. No. 89 added two new subsections, which are still present in the current version of § 562.021:

2. If the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of that offense, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the offense.
3. Except as provided in subsection 2 of this section and section 562.026, if the definition of any offense does not expressly prescribe a culpable mental

state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly; but reckless or criminally negligent acts do not establish such culpable mental state.

§ 562.021.2, .3.

As a result of this change in § 562.021, *MAI-CR3d 325.30* (10-1-1998) was changed to require the jury to find that the defendant “acted knowingly” regarding “the facts and circumstances submitted” in the verdict director, including that the delivery was within the prescribed distance of the specified premises. This change was required by the amendments to § 562.021. This Court apparently approved of the change to *MAI-CR3d 325.30*, and an instruction patterned after *MAI-CR3d 325.30* was given in Minner’s case.

It was after the revision of *MAI-CR3d 325.30*, which was prompted by the amendment to § 562.021, that the Western District of this Court decided *White I*. In reaching its conclusion that the State must prove that the defendant *knew* that the place where he delivered the controlled substance was within 2000 feet of a school, that court relied upon the current versions of § 562.021 and *MAI-CR3d 325.30*.

After *White I* was decided in 2000, § 195.214 was amended in 2003 by SB 39 (2003). The only change in the amendment was an addition to the punishment section of the following language: “which term shall be served without probation or parole if the court finds the defendant is a persistent drug offender.”

§ 195.214.2, RSMo Cum.Supp. 2003. If the legislature had believed that *White I* was wrongly decided and it had wished to exclude a mental state regarding the proximity element, it could have amended § 195.214, to clearly and expressly provide that such a mental state was not required. It did not. That it failed to do so supports Minner's contention that the decision in *White I* and the amendment of the patterned instruction in 1998 to conform to the newly amended § 562.021, were correct.

Another reason why *Hatton* is not dispositive is because after *Hatton*, the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that any fact that increases penalty for a crime must be submitted to jury and proved beyond reasonable doubt. § 195.218, RSMo Cum.Supp. 2003, specifically notes that it is a different crime than § 195.211, RSMo Cum.Supp. 2003 – it is “the offense of distribution of a controlled substance near public housing or other governmental assisted housing.” § 195.218, RSMo Cum.Supp. 2003. That offense includes the additional element that the delivery must be within 1000 feet of public or other governmental assisted housing. § 562.021.3, RSMo 2000, provides that “if the definition of any offense does not expressly prescribe a culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly” (emphasis added). Thus, under *Apprendi, supra*, and § 195.218, RSMo Cum.Supp. 2003, the distance of the delivery from public housing is an element of “the offense of distribution of a controlled substance near public housing or other

governmental assisted housing.” § 195.218, RSMo Cum.Supp. 2003. Therefore, the State had to prove that Minner acted knowingly regarding that element of the offense. *Also see, Jones v. United States*, 526 U.S. 227 (1999) (any fact increasing the maximum penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt; provisions of a carjacking statute that established higher penalties to be imposed when the offense resulted in serious bodily injury or death set forth additional elements of the offense, not mere sentencing considerations).

Finally, even if this Court finds that the language quoted above from *Hatton* is not dicta, *Hatton* is not controlling because it merely stated that “[t]he due process clause” does not require that the State prove a defendant’s knowledge of his proximity to public housing before it will allow the State to enhance the punishment for a crime the defendant intentionally committed. *Hatton*, 918 S.W.2d at 794. But while the due process clause might not require legislatures to enact statutes wherein a mental state is required for each element, legislatures can decide to enact statutes that do require it. It is this Court’s task to determine whether the Missouri legislature intended to dispense with a culpable mental state regarding knowledge of the distance from public or other governmental assisted housing. But it must be “clearly apparent” that the legislature intended to dispense with a culpable mental state for each element of the crime before a particular statute will be construed not to require proof of such culpability. *Self*, 155 S.W.3d at 762. If it is not clearly apparent, then a culpable mental state will be imputed to each statutory element. *Id.*

It is not clearly apparent that the legislature intended to dispense with a culpable mental state for the proximity element contained in § 195.218, RSMo Cum.Supp. 2003. In fact, § 562.021 requires that if the definition of any offense does not expressly prescribe a culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly. § 562.021.3. The distance of the delivery from public or other governmental housing is an element of “the offense of distribution of a controlled substance near public housing or other governmental assisted housing.” § 195.218, RSMo Cum.Supp. 2003. Thus, § 562.021 required that Minner acted knowingly regarding that element of that offense.

Conclusion

To convict Minner of knowingly delivering cocaine within 1000 feet of public or governmental housing would have required the jury to engage in mere speculation. Accordingly, the evidence was insufficient to support Minner’s conviction under § 195.218, RSMo Cum.Supp. 2003. As in *White I*, however, the remedy is for this Court to remand for an entry of conviction for the class B felony of delivery of a controlled substance under § 195.211, RSMo Cum.Supp. 2003.

II.

The trial court erred in overruling Minner's motion for judgment of acquittal at the close of all the evidence and in sentencing him upon his conviction for delivery of a controlled substance near public or other governmental assisted housing, §195.218, RSMo Cum.Supp. 2003, because the State did not prove beyond a reasonable doubt that Minner delivered cocaine, violating his right to due process of law guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that the informant who was involved in the alleged sale did not testify; although Officer Hensley testified that he saw Minner approach the informant's car then go to a house and then return to the car he admitted that he was too far away to see any detail about what was going on; although Hensley searched the informant before the alleged transaction and found no cocaine and then searched her again afterwards and did not find the money he had given her, he admitted that because she was a female he did not do a complete search of her and only searched her socks, shoes and pockets; and although surveillance videotapes were played for the jury, an exchange of cocaine for money cannot be seen on the tape.

Standard of Review & Preservation

The due process clause protects Minner against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). It is the

State's burden to prove each and every element of a criminal offense. *State v. Keeler*, 856 S.W.2d 928 (Mo. App. S.D. 1993).

In reviewing a challenge to sufficiency of the evidence, this Court considers whether, in light of the evidence, the jury could have reasonably found Minner guilty beyond a reasonable doubt of the charged offense. *State v. Dawson*, 985 S.W.2d 941, 951 (Mo. App. W.D. 1999). In applying this standard, this Court must look to the elements of the crime and consider each in turn, taking the evidence in the light most favorable to the State and granting the State all reasonable inferences from the evidence. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *Id.* But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001).

At trial, Minner moved for judgment of acquittal at the close of all the evidence, which was overruled by the trial court (Tr. 178; L.F. 42-43). In his timely motion for new trial, he raised that the trial court erred in overruling his motion for judgment of acquittal at the close of all the evidence (L.F. 62; claim 2). This issue is properly preserved for appeal.

Analysis

§ 195.218, RSMo Cum.Supp. 2003, provides that “[a] person commits the offense of distribution of a controlled substance near public housing or other

governmental assisted housing if he violates section 195.211 by unlawfully distributing or delivering any controlled substance to a person in or on, or within one thousand feet of the real property comprising public housing or other governmental assisted housing. § 195.218.1, RSMo Cum.Supp. 2003.

§195.211, RSMo Cum.Supp. 2003, provides, in pertinent part, that “it is unlawful for any person to distribute, deliver, manufacture, produce or attempt to distribute, deliver, manufacture or produce a controlled substance or to possess with intent to distribute, deliver, manufacture, or produce a controlled substance.” § 195.211.1, RSMo Cum.Supp. 2003.

Consistent with these statutes, the verdict director in this case instructed the jury that before it could find Minner guilty of delivering a controlled substance within 1000 feet of public or other governmental assisted housing it had to find beyond a reasonable doubt that: (1) Minner delivered cocaine to an informant (2) the delivery was within 1000 feet of the real property comprising New Madrid Housing Authority, a public housing or other governmental assisted housing, and (3) he acted knowingly with regard to all of the facts and circumstances (L.F. 53).

Although this Court does not weigh the evidence, it still must scrutinize the entire record to assure that the evidence was indeed substantial. *State v. Gregory*, 339 Mo. 133, 96 S.W.2d 47 (Mo.1936); *State v. Pierce*, 906 S.W.2d 729, 730 (Mo. App. W.D. 1995). When this Court does so it should conclude that the State failed to present sufficient evidence that Minner delivered cocaine to the informant.

During Officer Hensley pre-search of the informant he did not find any contraband (Tr. 114-15). He searched her socks, shoes and pockets, if she had any (Tr. 115, 143). But because the informant was a female, he did not look under her clothing or check her undergarments (Tr. 115). Hensley also searched her car (Tr. 115, 142-45, 166). Nothing was found (Tr. 115-16, 166). Hensley gave the informant twenty dollars and told her to purchase crack cocaine (Tr. 117, 147). Henley followed her (Tr. 117). He parked in a parking lot about three blocks away so he could watch the transaction (Tr. 118, 149). He was somewhere at least 400 feet away and agreed with defense counsel that he was probably 1000 feet away (Tr. 118, 149).

When the informant's vehicle came to a stop, Hensley saw an African American male walk up to her vehicle (Tr. 119, 167). Hensley admitted he was too far away to see any detail about what was going on (Tr. 156). He could not tell who the male was because of the distance (Tr. 119). The car then pulled up and stopped again and the man walked in front of the car and into a residence at the corner of Riley and Hunter Streets while the informant remained outside (Tr. 119). That residence is at 315 Riley Street where Minner, his mother, and Derrick Williamson live (Tr. 131-32, 165). After a few minutes, the man exited the residence, walked back to the informant's vehicle, leaned into it for a few seconds, and then the informant drove away and the man walked away (Tr. 119).

Hensley turned his car around and waited at a stop sign until the informant was behind him and he led her to a pre-determined location (Tr. 119). Once there,

the informant turned over crack cocaine, and Hensley re-searched her and her car, and he found nothing on her (Tr. 120, 156, 158, 163-64, 168, 171-75). She no longer had the money that she had been given (Tr. 120).

Hensley viewed the video recordings (Tr. 125-26; State's Exhibits Nos. 2 and 3). When Hensley watched the tape it appeared to him that it was Minner who walked up to the car (Tr. 127, 160) (See Point V, which challenges this testimony). When he first looked at the video tape he was not a hundred percent sure that it was Minner (Tr. 165). In an earlier deposition Hensley said he was not a hundred percent sure it was Minner (Tr. 161). The videotapes were introduced into evidence over Minner's objections (See Point IV), although the audio portion of the tape was not played for the jury (Tr. 126-33).

The informant did not testify in this case. Hensley's testimony established that Minner approached the informant's car, went inside his residence, and then returned to the car (But see Point V regarding Hensley's identification of Minner). But there was no proof that Minner delivered cocaine to the informant. Although the informant and her car were searched both before and after the alleged transaction, Hensley admitted that because the informant was a female he did not do a complete search of her. Thus, she easily could have hidden the cocaine before the sale and the money after the sale without being detected. And although the surveillance videotapes were played for the jury (But see Point IV), appellate counsel for Minner has viewed those tapes several times closely, with the audio off as ruled by the trial court, and believes that it cannot be detected that there was

an exchange of cocaine for money (State's Exhibits Nos. 2 and 3). The suspect's hands are seen reaching into the car and it can be seen that the informant gives the suspect a cigarette and fumbles with the cigarette package after the suspect puts his hand into the car, but an exchange of cocaine for money cannot be seen (State's Exhibits Nos. 2 and 3).

If the informant had testified that she received cocaine from Minner, then the evidence would be sufficient. But she did not testify. Or if a complete search of the informant had been made such that there would be an assurance that she did not already have crack cocaine on her prior to the sale, then possibly the evidence would have been sufficient. But that did not occur. Accordingly, this evidence was insufficient to support Minner's conviction under § 195.218, RSMo Cum.Supp. 2003, and his conviction must be reversed.

III.

The trial court erred in overruling Minner's objections to and in admitting his statements made to Officer Hensley while in jail on offense alleged in this case, because this violated Minner's privilege against self-incrimination and his right to due process of law, as guaranteed by the 5th and 14th Amendments to the U.S. Constitution and Article I, § 19 of the Mo. Constitution, in that his statements were inadmissible because Officer Hensley did not read Minner his *Miranda* rights when Minner was in custody – he was in jail regarding the charged offense – and Minner was subjected to express questioning or its functional equivalent because when Hensley approached Minner about the drug task force Minner began to talk about “this actual case,” Hensley had some “paperwork” concerning this case and Minner said “that’s not me” and that “he was not involved in this,” and Hensley assured him that it was him, that Hensley had two videos that showed Minner selling drugs, and that Minner did not “need to worry about this.”

Relevant facts and preservation

Prior to trial, Minner filed a motion to suppress statements, alleging, in part, that statements he made to Officer Hensley were taken in violation of his rights against self-incrimination and due process, as guaranteed under the 5th and 14th Amendments to the United States Constitution and Article I, § 19 of the Missouri Constitution (L.F. 22-24). Minner alleged that he was not advised of his rights to

remain silent, that anything that he said could and would be used against him, that he had a right to consult with a lawyer and to have a lawyer present with him during the interrogation, and that a lawyer would be appointed for him if he was indigent (L.F. 22-23). Minner did not knowingly and intelligently waive his right to remain silent or his right to counsel, or his right to have counsel appointee for him (L.F. 23). The trial court took the motion to suppress with the case (Tr. 15-18).

Hensley testified that at some point he spoke with Minner before his arrest (Tr. 128). Minner wanted to help the Drug Task Force, but he never called Hensley back about it (Tr. 128). A day or two after Minner's arrest in this case, Hensley went to the jail to talk to Minner about what had happened regarding the Drug Task Force (Tr. 128, 130, 158). Hensley did not advise Minner of his rights or have him sign any waiver of his rights (Tr. 158).

Hensley asked Minner about what had happened and why he had not called about the Drug Task Force (Tr. 129). Minner began to talk about "this actual case" (Tr. 129). Hensley had some "paperwork" and Minner said "that's not me" (Tr. 129). Hensley said "don't worry about that" because Hensley was just trying to find out why Minner had not called (Tr. 129). Minner kept trying to tell Hensley that the case he had been arrested on "was not him, that he was not involved in this," and Hensley assured him that it was him, that Hensley had two videos that showed Minner selling drugs, and that Minner did not "need to worry about this" (Tr. 129). Minner said that he did not usually sell drugs, that,

sometimes when his cousin wasn't "out there on the street" Minner would run into the house and retrieve "the dope" from his cousin and bring it back outside to sell on the street for his cousin (Tr. 129-30).⁹

During Hensley's testimony, Minner objected and renewed his request regarding his pre-trial motion to suppress (Tr. 128; L.F. 22-24). The trial court overruled that objection prior to Hensley testifying about the statement (Tr. 128). Minner's motion for new trial alleged that his constitutional rights against self-incrimination, to counsel, and to due process were violated because he was not advised of his right to remain silent, he was not advised that anything he said could and would be used against him in court, he was not advised of his right to consult with a lawyer/have a lawyer present, and he was not advised that a lawyer would be appointed for him if he was indigent (L.F. 64).¹⁰ Minner never waived his right to remain silent or his right to counsel (L.F. 64). Minner asserts that this Court ought to find based upon this record that this issue is properly preserved for appellate review. *Rule 29.11*.

⁹ At the preliminary hearing Hensley said that Minner had not confessed to anything regarding this case (Tr. 159). There is no report made by Hensley that sets forth this alleged statement (Tr. 159).

¹⁰ The motion also asserts that the motion to suppress was not ruled upon. But that is incorrect (Tr. 128).

Standard of Review

The burden is on the State to show by a preponderance of the evidence that the motion to suppress should be overruled. *State v. Birmingham*, 132 S.W.3d 318 (Mo. App. S.D. 2004). When the issue to be decided involves the constitutional protection against forced self-incrimination, this Court defers to the trial court's determinations of witness credibility and findings of fact, but considers the court's conclusions of law *de novo*. *State v. Williams*, 163 S.W.3d 522, 525 (Mo. App. E.D. 2005). Thus, factual issues on motions to suppress are mixed questions of law and fact. *State v. Werner*, 9 S.W.3d 590, 595 (Mo. banc 2000). The "trial court's superior capacity to resolve credibility issues is not dispositive of the 'in custody' inquiry." *Id.*, quoting *Thompson v. Keohane*, 516 U.S. 99, 111, 113 (1995). *In accord*, *State v. Tally*, 153 S.W.3d 888, 892 (Mo. App. S.D. 2005).

Analysis

The Fifth Amendment to the United States Constitution states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This provision applies to the States in all criminal prosecutions. *Dickerson v. United States*, 530 U.S. 428, 432 (2000). Protection against self-incrimination under article I, § 19 of the Missouri Constitution is commensurate with that provided in the federal constitution. *Tally*, 153 S.W.3d at 892.

In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the United States Supreme Court held that custodial interrogation by police must not occur prior to a

suspect being informed of his right to assistance of counsel and his right against self-incrimination. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona*, 384 U.S. at 444. In such a context, statements are inadmissible when made without the benefit of having been informed of his rights under the Fifth Amendment. *Id.*

Thus, *Miranda* safeguards apply whenever an individual is: (1) in custody; and (2) subjected to express questioning or its functional equivalent. *Williams*, 163 S.W.3d at 526, *citing, Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The “functional equivalent” of questioning is any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Williams*, 163 S.W.3d at 526, *citing, Innis*, 446 U.S. at 301. In making this determination, the focus is on the perception of the suspect, not the intent of the officer. *Id.*

Here, Minner was in custody – he was in jail. Even if he had been in jail for some other offense, *Miranda* would still apply. *See, Mathis v. U.S.*, 391 U.S. 1 (1968) (Fact that questions asked of defendant by IRS agents while defendant was incarcerated in state jail were part of routine tax investigation where no criminal proceedings might even be brought and that defendant had not been put in jail by agents questioning him but was there for entirely separate offense would not justify departure from conclusions of *Miranda* decision with reference to warnings to be given prior to custodial interrogation); *State v. Perkins*, 753 S.W.2d 567

(Mo. App. E.D. 1988) (tape-recorded conversation between defendant and his brother while in jail was obtained in violation of defendant's Fifth Amendment rights were no *Miranda* warning was given). And here, Hensley testified that he knew that Minner was in jail after his arrest in this case when Hensley went to the jail to talk to Minner (Tr. 128, 130, 158). Yet Hensley did not advise Minner of his *Miranda* rights or have him sign any waiver of his rights (Tr. 158). Because Minner was questioned while he was in custody without being read his *Miranda* rights, the oral statements he made to Hensley were inadmissible.

Further, the statements Minner made were the product of a custodial interrogation. Although Hensley at first only asked Minner why he had not called about the Drug Task Force (Tr. 129), what occurred was the "functional equivalent" of questioning. *Williams*, 163 S.W.3d at 526, *citing*, *Innis*, 446 U.S. at 301. Hensley had some "paperwork" about "this actual case" and Minner said "that's not me" (Tr. 129). Hensley said "don't worry about that" because Hensley was just trying to find out why Minner had not called (Tr. 129). Minner kept trying to tell Hensley that the case he had been arrested on "was not him, that he was not involved in this," and Hensley assured him that it was him, that Hensley had two videos that showed Minner selling drugs, and that Minner did not "need to worry about this" (Tr. 129). Finally, Minner said that he did not usually sell drugs, that, sometimes when his cousin wasn't "out there on the street" Minner would run into the house and retrieve "the dope" from his cousin and bring it back outside to sell on the street for his cousin (Tr. 129-30). Hensley's words and

actions, including having “paperwork” concerning this case and telling Minner about viewing the videotapes were reasonably likely to elicit an incriminating response from Minner. *Williams*, 163 S.W.3d at 526, *citing*, *Innis*, 446 U.S. at 301. *Miranda* warnings were required, but they were not given.

The admission of this oral statement prejudiced Minner in this case. The informant did not testify, Hensley was too far to observe the transaction, and the videotapes did not clearly show a transaction. It cannot be said that the admission of Minner’s statements was harmless beyond a reasonable doubt. *State v. March*, 216 S.W.3d 663, 667 (Mo. banc 2007). This court should reverse and remand for a new trial, which is held without Minner’s statements made to Hensley.

IV.

The trial court abused its discretion in admitting over Minner's objections State's Exhibits 2 and 3, the surveillance videotapes of the alleged drug transaction, because there was an insufficient foundation for the admission of these tapes and the admission of them violated Minner's rights to due process and a fair trial guaranteed by the 14th Amendment to the United States Constitution and Article I, §10 of the Missouri Constitution, in that Officer Hensley's testimony did not establish the authenticity and correctness of the tapes or prove that changes, additions, or deletions had not been made because Hensley admitted that he would have to agree that he was probably about 1000 feet away from transaction and he did not use any visual aids to view the transaction, from his vantage point he saw only one person approach the informant's car yet the tapes showed that a second person approached the car, he admitted he was too far away to know any detail about these people or what was going on.

Facts and Preservation

Prior to trial, Minner filed a Motion to Exclude Evidence (surveillance video) (L.F. 25-28). In part, that motion asserted that the authenticity of the video should be evaluated in the same manner as a photograph, "i.e., the foundation must be laid showing it is what it purports to be, a true and accurate depiction of the recorded events, citing *State v. Lusk*, 452 S.W.2d 219, 224 (Mo. 1970) (L.F.

25-26). Minner asserted that the video could not be properly authenticated without testimony from the confidential informant, who did not testify at trial (L.F. 26). Hensley was several blocks away from the event and observed the event from a completely different angle, so he could not truthfully testify that the videotape accurately depicted the event – it is logically impossible (L.F. 26). Admission of the surveillance video would violate Minner’s rights to due process and a fair trial (L.F. 27). The trial court overruled the motion to exclude after it was agreed that the surveillance tape would be played without the audio (Tr. 12-14).

At trial, Officer Hensley testified he placed a video camera in the passenger seat of the informant’s car and another one in the driver’s side rear window (Tr. 116, 146-47). After the alleged transaction, he removed the cameras from the car and he later reviewed videos taken from those cameras (Tr. 125). State’s Exhibit No 2 is a “working copy” of the video that was taken from the passenger seat – looking out the front driver’s side window (Tr. 126). State’s Exhibit No. 3 is a “working copy” of the video that was recording from the back driver’s side seat shooting out of the window through the driver’s side (Tr. 126). On direct examination, Hensley was asked by the State, “And, was that the video, what was effected in the video a fair and accurate portrayal of what you saw that day?” (Tr. 125). Hensley, replied, “Yes, sir.” (125).

When the State offered the videotapes into evidence, Minner objected that “before they’re played that a proper foundation be laid” (Tr. 126). The trial court

received the videotapes into evidence (126). Hensley testified that he did not make any changes, or additions or “anything” to those videos (Tr. 126). They are “basically, unedited” from what Hensley took out of the car that day (Tr. 126). Hensley then made copies of them on the videotapes (Tr. 127). Minner renewed his objection when State later requested to play the videotapes (Tr. 132). Minner argued that Hensley was not able to view the actual transaction that the videotapes were supposed to portray because he was down the street (Tr. 132). The trial court overruled the objection, ruling that Hensley had laid an adequate foundation (Tr. 132-33). The videotapes were then played without audio because of a previous hearsay objection (Tr. 133).

Hensley admitted that he would have to agree that he was probably about 1000 feet away from transaction (149). He did not use any visual aids to view the transaction (Tr. 149). From his vantage point he saw only one person approach the vehicle (Tr. 156, 167). The videotapes showed that a second person had approached the vehicle (Tr. 156, 167; State’s Exhibits 2 and 3). Hensley admitted he was too far away to know any detail about these people or what was going on (Tr. 156).

In Minner’s motion for new trial he raised the claim that the trial court erred when it overruled his Motion to Exclude and further objection at trial because the surveillance video should have been excluded due to the lack of foundation for the tape due to the absence at trial of the informant, Hensley was several blocks away from the transaction and observed the event from a

completely different angle and thus could not testify as to the accuracy of the video (L.F. 62-63). The admission of the video violated Minner's rights to due process and a fair trial (L.F. 63). This point is properly preserved for appellate review. *Rule 29.11*.

Standard of Review

A trial court has broad discretion in determining the admissibility of evidence, and that determination will not be disturbed on appeal absent a clear abuse of discretion. *State v. Wahby*, 775 S.W.2d 147, 153-154 (Mo. banc 1989). The lack of a proper foundation for the admission of videotape results in an abuse of discretion. *Phiropoulos v. Bi-State Development Agency*, 908 S.W.2d 712, 714-15 (Mo. App. E.D. 1995).

Analysis

The party offering a videotape in evidence must show that it is an accurate and faithful representation of what it purports to show. *Phiropoulos*, 908 S.W.2d at 714. The foundation may be established by any witness who is familiar with the subject matter of the tape and is competent to testify from personal observation. *Id.* In accord, *State v. Powers*, 148 S.W.3d 830, 832 (Mo. App. E.D. 2004). The tape does not prove itself and some foundation for its use must be made. *State v. Seaton*, 674 S.W.2d 214, 216 (Mo. App. S.D. 1984).

A proper foundation for the admission of a sound recording consists of: (1) A showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the

authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement. *Wahby*, 775 S.W.2d at 153. Although in the instant case a video recording rather than a sound recording is at issue, most of these foundation requirements would seem to apply, except numbers 6 and 7. Here, requirements 3 and 4 were not met.

It is true that upon the leading question by the State, “And, was that the video, what was effected in the video a fair and accurate portrayal of what you saw that day?,” that Hensley, replied, “Yes, sir.” (125). And Hensley also testified that he did not make any changes, or additions or “anything” to those videos and that they were “basically, unedited” from what Hensley took out of the car that day (Tr. 126). But Hensley’s testimony established that he could not establish the authenticity and correctness of the tapes or prove that changes, additions, or deletions had not been made.

Hensley admitted that he would have to agree that he was probably about 1000 feet away from transaction (149). He did not use any visual aids to view the transaction (Tr. 149). From his vantage point he saw only one person approach the vehicle (Tr. 156, 167). Yet the videotapes showed that a second person had approached the vehicle (Tr. 156, 167; State’s Exhibits 2 and 3). Hensley admitted he was too far away to know any detail about these people or what was going on (Tr. 156). It is clear from his testimony that he could not establish the authenticity

or correctness of the videotapes because he was too far away to witness what were on the videotapes.

The trial court abused its discretion in allowing the State to admit and the jury to view the surveillance tapes. The admission of videotapes of the alleged transaction cannot be held to be harmless beyond a reasonable doubt. *State v. March*, 216 S.W.3d 663, 667 (Mo. banc 2007). The informant did not testify and Hensley was too far away to make an identification (Tr. 119, 156). As a result, the trial court's ruling deprived Minner of his rights to due process and a fair trial as guaranteed by the 14th Amendment to the United States Constitution and Article I, §10 of the Missouri Constitution. Therefore his conviction should be reversed and the case remanded for a new trial.

V.

The trial court plainly erred in permitting Officer Hensley to testify that Minner was the alleged drug seller in the surveillance tapes of the transaction, because this denied Minner his rights to due process and a fair trial guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution, resulting in a manifest injustice, in that the identity of the suspect in the surveillance tape was a matter in dispute, and Hensley's testimony that the man was Minner was an opinion that the jury was just as capable as Hensley to evaluate, therefore his testimony invaded the province of the jury on the ultimate issue to be determined. The admission of the opinion was prejudicial because the confidential informant did not testify, so Hensley was the only witness to identify the suspect, Minner specifically denied to Hensley that he was the person involved in the alleged drug sale, and thus there is a reasonable probability that the jury would have reached a different conclusion but for the erroneously-admitted opinion evidence.

Facts

Prior to trial, Minner filed a motion in limine that in part moved to prohibit Officer Hensley from identifying Minner as the person on the video tape of the alleged transaction (L.F. 33-34). The motion noted that Hensley did not have any personal, first-hand knowledge of who was involved in the alleged drug sale,

Hensley said he was not certain that the suspect seen in the video tape is Minner, and that Hensley “became certain after he talked with fellow officers” (L.F. 33).

This issue was addressed on the morning of trial (Tr. 20-21). The State maintained that case law indicated that it would be appropriate for Hensley to testify that he believed the person on the tape is Minner (Tr. 21). The trial court stated that it believed that it was proper for someone to testify that once they observed the video tape they were able identify Minner (Tr. 21). The trial court then stated,

And, I don't know what foundation Officer Hensley is going to testify, and I'll make sure before he offers any type of identifying testimony to this jury that a proper foundation is laid as to the basis of his reason for his belief of identification, but, again, I'll hold the State to laying a proper foundation, to, as to the identification.

(Tr. 21).

During Hensley's testimony he said that he viewed the videotapes of the alleged transaction (Tr. 125-26; State's Exhibits No. 2 and 3). When he watched the tape it appeared to him that it was Minner who walked up to the car (Tr. 127, 160). When he first looked at the videotapes he was not a hundred percent sure that the suspect was Minner (Tr. 165). In an earlier deposition Hensley said he was not a hundred percent sure it was Minner (Tr. 161).

In his timely motion for new trial Minner complained that the trial court erred by overruling parts of Minner's motion in limine and that Hensley should

have been precluded from testifying as to the identify of the person on the surveillance tape “as it was shown, through his own testimony, that Officer Hensley was not certain, based on his own knowledge, who the person actually was on the video tape” (L.F. 63-64; claim 4).

Standard of Review and Preservation

A trial court has wide discretion in admitting the testimony of a lay witness into evidence, and an appellate court reviews such rulings for abuse of discretion. *State v. Saucy*, 164 S.W.3d 523, 529-530 (Mo. App. S.D. 2005). Minner filed a motion in limine that in part moved to prohibit Hensley from identifying Minner as the person on the video tape of the alleged transaction, citing such cases as *State v. Presberry*, 128 S.W.3d 80, 86 (Mo. App. E.D. 2003) and *State v. Gardner*, 955 S.W.2d 819, 823 (Mo. App. E.D. 1997) (L.F. 33-34). The trial court ruled that it was proper for Hensley to testify that once he observed the videotape he was able identify Minner, but stated that it would make sure that the State laid a proper foundation as to the basis of Hensley’s identification (Tr. 21). Minner also included the claim in his timely motion for new trial (L.F. 63-64; claim 4).

But Minner’s trial counsel did not object at the time of Hensley’s testimony, so he asks this Court to review for plain error under *Rule 30.20*. Plain error review is limited to determining whether there was error affecting substantial rights that resulted in manifest injustice or a miscarriage of justice. *Presberry*, 128 S.W.3d at 86 (granting plain error relief on an identical claim).

Analysis

Generally, a lay witness may not testify regarding his opinion about a matter in dispute because the jury and lay witness are in equal positions to form an accurate opinion. *Presberry*, 128 S.W.3d at 86. When the jury is as capable as the witness to draw conclusions from the facts provided, opinion testimony is usually inadmissible. *Id.* But courts have created an exception to the opinion rule by allowing lay witnesses to testify as to their opinion if the lay witness is in possession of knowledge that the jury does not also possess since it would be helpful to the jury in determining an issue in dispute. *Saucy*, 164 S.W.3d at 529. In the identification context, a lay witness' opinion testimony is admissible if there is a basis for concluding that the witness is more likely to correctly identify the defendant than is the jury. *Id.*

A review of Hensley's testimony as well as the surveillance videos show that Hensley should not have been allowed to give his opinion that the suspect in surveillance videos was Minner. Issues similar to Minner's claim were raised before panels of the Eastern District of this Court in *Presberry, supra, Gardner, supra*, and *State v. Winston*, 959 S.W.2d 874 (Mo. App. E.D. 1997), and before the Southern District in *Saucy, supra*.

In *Gardner*, a man robbed a gas station, threatening the cashier with a knife. 955 S.W.2d at 821. A surveillance video camera recorded the incident. *Id.* At trial, the videotape was admitted in evidence. *Id.* at 822. The cashier identified the videotape and identified the defendant as the man who robbed him. *Id.* A

police officer who investigated the robbery testified over defendant's objection that, in his opinion, the defendant was the man on the videotape. *Id.*

The Eastern District of this Court determined that the trial court did not err in admitting the officer's identification. *Id.* at 825. The court acknowledged that generally, opinion testimony is inadmissible when the jury is as capable as the witness to draw conclusions from the facts provided. *Id.* at 823. The officer's identification of the defendant provided assistance to the jury because of the poor quality of the videotape, and the defendant's face was partially obscured by his arm. *Id.* at 825. The officer's "testimony was sufficiently probative to outweigh the danger of unfair prejudice, *given his familiarity of the appellant for ten years.*" *Id.* (emphasis added). The court also noted that the officer's testimony was not the sole identification evidence but was accompanied by the cashier's identification. *Id.*

Similarly, in *Winston*, the Eastern District of this Court determined that there was no error in allowing a witness to identify the defendant from a print generated from a surveillance videotape where the witness was familiar with the defendant's appearance. 959 S.W.2d at 878. The identifying witness in *Winston* was the defendant's girlfriend's sister. *Id.* at 877. The court acknowledged the general rule prohibiting a lay witness from offering an opinion on a disputed matter, but stated that:

courts have created an exception to the opinion rule by allowing lay witnesses to testify as to their opinion if the lay witness is in possession of

knowledge that the jury does not also possess since it would be helpful to the jury in determining an issue in dispute. Thus, in the identification context, a lay witness' opinion testimony is admissible if there is a basis for concluding that the witness is more likely to correctly identify the defendant than is the jury.

Id.

In *Winston*, the defendant's girlfriend's sister had spent time with the defendant during the time period immediately surrounding the charged offenses and she was familiar with the defendant's features. *Id.* at 878. The court found that there was a basis for concluding that the sister was more likely to correctly identify the defendant than was the jury. *Id.*

In *Saucy*, Sherry Counts and Saucy were living together around the time of a charged robbery, and she would probably have been familiar with his appearance on that date. *Saucy*, 164 S.W.3d at 530. At trial, there was testimony from witnesses that Saucy's appearance had changed since the time of the robberies, in that at trial he had no hair at all, he was heavier, and he wore glasses, unlike his appearance in the videotape. *Id.* On this basis, the Southern District found that Counts was more likely to correctly identify Saucy in the videotape than was the jury; thus the trial court did not abuse its discretion in allowing her to identify Saucy. *Id.*

In contrast to *Gardner*, *Winston*, and *Saucy* is the opinion in *Presberry*, *supra*. There, the videotapes and photographs from the videotapes depicted at

most either a profile of the suspect or a front view of a covered face of the suspect. *Presberry*, 128 S.W.3d at 86. The eight clearest prints from the videotapes showing people involved in two incidents showed a profile of the suspect, who appeared to be wearing a long-sleeved jacket or coat and a band or cap around his forehead. *Id.* The six clearest prints from the videotape of another incident depicted a front view of the suspect wearing a long-sleeved jacket or coat, at least one collared shirt, a band around his forehead, and something covering the end of his nose and all of his mouth. *Id.*

While it was not easy to identify the person depicted in the videotapes and photographs from the videotapes, the Eastern District of this Court was convinced that the admission of the identification testimonies of two officers was plain error because there was no indication of record that either one of the witnesses had met or knew *Presberry* at any time prior to these incidents. *Id.* Therefore, those witnesses were in no better position than the jury to identify the person or clothing in the photographs and videotapes in evidence. *Id.*

This case is more like *Presberry* than *Gardner*, *Winston*, and *Saucy*. Like *Presberry* there was no indication of record that Hensley had met or knew Minner at any time prior to the charged offense. And Hensley admitted that when he first looked at the videotapes he was not a hundred percent sure that the suspect was Minner (Tr. 165) and that in an earlier deposition he said he was not a hundred percent sure it was Minner (Tr. 161).

Thus, this case is distinguishable from *Gardner*, where the witness knew the defendant for ten years, the identifying witness in *Winston*, who was the defendant's girlfriend's sister, had spent time with the defendant during the time period immediately surrounding the charged offenses, and was familiar with the defendant's features, and *Saucy*, where the witness was living together with Saucy around the time of a charged robbery.

All of the factors above lead to the conclusion that there was not a basis for concluding that Hensley was more likely to correctly identify the person on the surveillance tapes than was the jury. The jury was as capable as Hensley to draw a conclusion from the facts provided. Hensley was in no better position than the jury to identify the suspect. Thus, the lay opinion testimony by Hensley regarding Minner's identification was inadmissible. *Presberry*, 128 S.W.3d at 85-90.

The evidence of prejudice is clear in this case. Because the confidential informant did not testify, Hensley was the only witness to identify the suspect. Further, Minner specifically denied to Hensley that he was the person involved in the alleged drug sale (Tr. 129). Minner was prejudiced because Hensley's opinion might have tipped the scales of justice against Minner. If the jury was unable to reach their own conclusion whether Minner was the person depicted in the videotape, it might have been swayed by Hensley's assertion that Minner was the person. There is a reasonable probability that the jury would have reached a different conclusion but for the erroneously-admitted evidence. *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000). Minner is therefore entitled to a new trial.

CONCLUSION

For the reasons presented in Points I, this Court should remand for an entry of conviction for the class B felony of delivery of a controlled substance under § 195.211. For the reasons presented in Point II, this Court should reverse Minner's conviction and sentence and order him discharged. For the reasons presented in Points III, IV, and V, this Court should reverse Minner's conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 15,549 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated on March 5, 2008. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of March, 2008, to Joshua N. Corman, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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