

No. SC88986

**IN THE
SUPREME COURT OF MISSOURI**

STATE OF MISSOURI,

Respondent,

v.

EDWIN MINNER,

Appellant.

**Appeal from New Madrid County Circuit Court
Thirty-fourth Judicial Circuit
The Honorable Fred W. Copeland, Judge**

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for one count of distribution of a controlled substance near public housing or other governmental assisted housing, §195.218, obtained in the Circuit Court of New Madrid County, the Honorable Fred W. Copeland presiding. Following a trial by jury, Appellant was sentenced to eighteen years imprisonment. Appellant's conviction and sentence was affirmed on appeal. *State v. Minner*, --- S.W.3d ----, 2007 WL 3275940 (Mo. App. S.D. 2007). On January 22, this Court granted transfer pursuant to Supreme Court Rules 30.27 and 83.04. Therefore, jurisdiction lies in this Court under Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Edwin Minner, was charged by amended information as a prior and persistent offender with one count of the class A felony of delivery of a controlled substance near public housing or other governmental assisted housing, §195.218, RSMo Cum. Supp. 2003. (L.F. 36-37).¹ Appellant contests the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the following evidence was adduced:

On August 16, 2004, Chris Hensley of the New Madrid Co. Sheriff's Department, who was assigned to work with the Southeast Missouri Drug Task Force, arranged for a confidential informant to make a controlled buy. (Tr. 110-14). The confidential informant, Julie Albright, was an experienced informant. (Tr. 114, 136, 140). Albright had performed controlled buys for Hensley on multiple occasions and she had also worked with Hensley's partner, Detective Rataj. (Tr. 116, 140, 162).

Around 2:25 p.m. that afternoon, Hensley and Rataj met Albright at an undisclosed location where Albright was searched to ensure the integrity of the investigation. (Tr. 114, 141-42). Albright's pockets, shoes and socks were searched as well as her vehicle, including the console, ashtray, glove box, sunglasses case, seats, visors, steering wheel, floormats, purse, cigarette package, and anything else in the car. (Tr. 114, 115-16, 142-45, 162-63, 166). Nothing was found. (Tr. 116). Hensley also equipped Albright's car with two video

¹ The abbreviations "L.F." and "Tr." refer to the legal file and trial transcript which comprise the record on appeal. All statutory references are to RSMo 2000 unless otherwise noted.

cameras that were hidden in covert items in the front passenger seat and rear seat behind the driver. (Tr .116-17, 146-47). The cameras were positioned to record anything out of the driver's side windows. (Tr. 116-17). Albright was then given \$20.00 and told to drive up and down the Russell Street area in an attempt to get someone to sell her drugs. (Tr. 117, 147). Hensley then followed Albright to the area, but because he is known by the drug dealers in the area, he parked approximately 500 feet away in a restaurant parking lot where he watched the transaction. (Tr. 118).

When Albright turned onto Riley Street, she stopped her car and was approached by Appellant. (Tr. 119; State's Exhibits 2-3). Appellant then went into a residence at 315 Riley while Albright waited in the car. (Tr. 119; State's Exhibits 2-3). Soon thereafter, Appellant returned to the car with crack cocaine. (Tr. 119). Albright then drove away and followed Hensley back to their pre-determined location. (Tr. 119-20, 156).

When they returned to the location, Albright turned over the crack cocaine she had just purchased from Appellant, and her vehicle and person were again searched. (Tr. 120, 156, 158). The video equipment, which had been recording the entire time, was turned off and taken back by Hensley to be reviewed. (Tr. 125, 148; Ex. 2-3).

The recording devices consisted of a digital recorder and an 8mm recorder, each of which were converted to VHS tapes. (Tr. 127). Hensley reviewed the videos and determined that they were a fair and accurate portrayal of what he saw that day. (Tr. 125). One of the videos, State's Exhibit 2, was a view taken from the front passenger seat looking out of the front driver's side window. (Tr. 126; Ex. 2). The other video, State's Exhibit 3, was a recording taken from the back driver's side seat shooting out of the window behind the

driver's seat. (Tr. 126, State's Exhibit 3). No changes, additions, or edits had been made to either video; they were unedited from what was recorded from the car. (Tr. 126-27). The videos were admitted into evidence and played for the jury. (Tr. 133).

Hensley reviewed the videos and identified Appellant as the man who had walked up the car and sold Albright crack cocaine. (Tr. 127). 315 Riley Street, the residence Appellant went into after first speaking with Albright, was where Appellant and his mother lived. (Tr. 131-32, 160, 165). Hensley also identified Appellant at trial. (Tr. 127, 161). The corner of Riley and Russell Streets, where the transaction took place, was located 427.5 feet from 720 Hunter Street, a government assisted housing apartment. (Tr. 130-31; 159-60). Scott Workman, a forensic chemist with the Missouri State Highway Patrol, tested the substance Appellant sold to Albright which tested positive for .10 grams of cocaine base.² (Tr. 168, 172-73).

Before Appellant was arrested, Hensley spoke to Appellant about helping with the Southeast Missouri Drug Task Force. (Tr. 128). Appellant was given Hensley's phone number, and he was supposed to contact Hensley about working as an informant. (Tr. 128-29). A day or two after Appellant was arrested, Hensley went to the jail and spoke to Appellant about why Appellant had not contacted him. (Tr. 128-29, 130). Appellant began to talk about this case and denying his involvement. (Tr. 129). Hensley told him not to

² Hensley testified that the crack rock weighed .25 grams but Hensley weighed it in the plastic packaging whereas Workman removed the crack from the plastic before it was weighed. (Tr. 163, 175).

worry about it; Hensley just wanted to find out where Appellant had been and why he had not contacted Hensley. (Tr. 129). After Appellant repeatedly denied his involvement in this case, Hensley told Appellant that he had him on tape selling drugs, but that Appellant did not need to worry about it. (Tr. 129). Appellant then stated that he usually does not sell drugs but that sometimes, when his cousin was not out on the street, he 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).

Appellant did not testify at trial or present any evidence in his defense. (Tr. 177-78). At the close of the evidence, instructions, arguments, and less than an hour of deliberation, the jury found Appellant guilty of delivering a controlled substance near public housing or other governmental assisted housing. (Tr. 200-01, 203; L.F. 61). On May 9, 2006, the court sentenced Appellant as a prior offender to eighteen years.³ (Tr. 207, 214; L.F. 66-67).

³ Appellant had been charged as a prior and persistent offender but one of the charges listed on the amended information for which Appellant had pleaded guilty actually occurred after the date of the charged offense; therefore, it could not be counted towards Appellant's persistent offender status. §558.016.6, RSMo. Cum. Supp. 2006. (Tr. 9-11; L.F. 36-39).

ARGUMENT

I.

The trial court did not err, plainly or otherwise, in overruling Appellant's motion for judgment of acquittal at the close of the evidence and in entering judgment against Appellant for the class A felony of distribution of a controlled substance near public housing or other governmental assisted housing because there was sufficient evidence from which a reasonable jury could find Appellant guilty beyond a reasonable doubt in that the evidence showed that Appellant sold crack cocaine to a confidential informant within 1,000 feet of property comprising public housing or other governmental assisted housing. The State was not required to prove Appellant's knowledge of his proximity to the public or governmental housing or that Appellant knew the property was classified as such because §195.218 is a punishment-enhancement provision and not a separate crime from §195.211, distribution or delivery of a controlled substance, which §195.218 incorporates.

Appellant claims that there was insufficient evidence because the State failed to prove that Appellant knew that he was delivering cocaine within 1,000 feet of public or governmental assisted housing. (App. Br. 13, 23). Appellant argues that because a requisite mental state is not mentioned in §195.218, the State was required under §562.021(3) to prove that Appellant knew there was government housing within 1,000 feet of where he sold the crack cocaine to the informant. (App. Br. 23-42).

A. Preservation and Standard of Review

In *State v. Grim*, 854 S.W.2d 403, 414 (Mo. banc 1993), this Court explained that the standard to be applied in reviewing the sufficiency of the evidence “echoes the due process standard announced by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979).” *Id.* at 405.

[T]his inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson, 443 U.S. at 318-19 (quoted in *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998)).

In reviewing the sufficiency of the evidence, appellate courts do not act as a “super juror with veto powers,” but give great deference to the trier of fact. *Grim*, 854 S.W.2d at 414. Appellate “review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.” *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). In applying this standard, appellate courts do not reweigh the evidence or determine the credibility of witnesses; rather, they consider the record in the light most favorable to the verdict. *State v. O’Brien*, 857 S.W.2d 212, 215-16 (Mo. banc 1993). Appellate courts accept as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence. *Grim*, 854 S.W.2d at 405. “Thus, evidence that supports a finding of guilt is taken as true and all logical inferences that support a finding of guilt and that may reasonably be drawn from the

evidence are indulged. Conversely, the evidence and any inferences to be drawn therefrom that do not support a finding of guilt are ignored.” *O’Brien*, 857 S.W.2d at 215-16.

Respondent notes that Appellant did not challenge any of the evidence regarding the proximity of the government housing to his residence at trial or specifically argue that the State was required to prove that he knew that public housing was within 1,000 feet of where he delivered crack cocaine. Rather, in his motions for judgment of acquittal and his motion for a new trial, Appellant only made a general claim that the State failed to make a submissible case. (L.F. 40-43). The specific issue now before this Court was not raised before the trial court; therefore, the issue has not been properly preserved. *See State v. McQuary*, 173 S.W.3d 663, 668 fn2 (Mo. App. W.D. 2005) (challenge to sufficiency of evidence in distribution of controlled substance near a school case only made general argument that State failed to make a submissible case, but did not specifically challenge the evidence regarding the defendant’s proximity to the junior college).

In any event, as the Southern District Court of Appeals properly found, whether or not the issue was properly preserved is ultimately of no consequence in sufficiency cases because where the evidence is insufficient to sustain a conviction, then a manifest injustice would result. *See State v. Minner*, 2007 WL 3275940 at *3 (Slip op. at 7).

B. The State was not required to prove that Appellant knew of his proximity to the governmental assisted housing, nor was the State required to prove that Appellant knew that the property was classified as public or government housing.

Appellant contends that because a requisite mental state is not mentioned in §195.218, the State was required under §562.021(3) to prove that Appellant knew there was

government housing within 1,000 feet of where he sold the crack cocaine to the informant. (App. Br. 23-42). As explained below, Appellant's claim is without merit.

Under §195.218:

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. Section 195.218 is not a strict liability statute; rather, it is a punishment-enhancement provision and it does not create a separate crime. *State v. Hatton*, 918 S.W.2d 790, 794 (Mo. banc 1996); *see also State v. Wheeler*, 845 S.W.2d 678, 680 (Mo. App. E.D. 1993) (interpreting §195.214 – distribution near a school).

As this Court explained in *Hatton*:

The legislature has determined that the policy of this state is to attempt to create drug-free zones around public housing. To further that policy, it adopted and the governor approved a bill enhancing the punishment for distributing illegal drugs near public housing. Thus, section 195.218 expressly incorporates section 195.211 and requires a violation of the latter statute before a violation of section 195.218 occurs. Section 195.211 *contains a*

scienter element. §§562.016.1; 562.026(2)⁴ RSMo 1994 (emphasis added);
State v. Briscoe, 847 S.W.2d 792, 794 (Mo. banc 1993).

Id.

Therefore, as this Court explained, §195.218 is not a separate crime; it is only a punishment-enhancement provision. *Hatton*, 918 S.W.2d at 794. The statute only applies to persons already in violation of §195.211. Section 195.218 expressly incorporates §195.211, which already requires the conduct to be purposely or knowingly. Thus, the *mens rea* requirement is found in the required underlying violation of §195.211, which is met by the knowing sale of a controlled substance.⁵

⁴ Section 562.026(2) provides that for felony or misdemeanor offenses in which no culpable mental state is prescribed, a culpable mental state is not required to be imputed if it would clearly be inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result. § 562.026(2).

⁵ The sentence-enhancement provision in §195.218 is also akin to the sentence-enhancement provisions throughout Chapter 195 where the quantity or weight of the controlled substance elevates an offense to a different felony class. *See e.g.*, §195.202, §195.211, §195.222, §195.223. Under each of these statutes, the State is required to prove that a defendant possessed, controlled, distributed, produced, etc. the controlled substance, and the State is required to show the weight or quantity of the illegal substance, but the State is not required to show, for instance, that a defendant knew that the marijuana he possessed weighed more than 5 grams.

And because §195.211 provides the culpable mental state for an offense which carries the sentence-enhancement provision of §195.218, Appellant’s reliance on subsection three of §562.021, and therefore his argument that “knowingly” should apply to all of the elements of his offense, is without merit. Subsection three only provides a culpable mental state where no mental state is otherwise provided in the definition of the offense (and except as set forth in §562.026 – where a culpable mental state is not required to be imputed if it would clearly be inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result). *See* §562.021.3. But as this Court explained in *Hatton*, the culpable mental state is in §195.211 – the underlying offense. No other mental state is required for the additional sentence-enhancement provision of §195.218. While the State must still prove beyond a reasonable doubt⁶ that the unlawful delivery occurred within 1,000 feet of governmental housing, the State is not required to show that a defendant *knew* that he was within 1,000 feet of government housing or that he knew that the property was classified as such. *Hatton*, 918 S.W.2d at 794.

Hatton dealt with similar facts and specifically dealt with the issue at bar. In *Hatton*, the defendants sold crack cocaine to a confidential informant near a duplex owned by the City of Mexico Housing Authority. *Id.* at 792. The defendants claimed on appeal that because §195.218 did not contain a *mens rea* or knowledge requirement, it was

⁶ *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt).

unconstitutionally vague. *Id.* at 793. This Court rejected this argument and explained that the scienter element was in §195.211 which is incorporated in §195.218. *Id.* at 794.

This Court further found that the defendants' real complaint was that they did not know they were within 1,000 feet of public housing. *Id.* But as this Court explained:

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.

Id., citing *United States v. Falu*, 776 F.2d 46, 50 (2nd Cir.1985); *United States v. Ofarril*, 779 F.2d 791, 792 (2nd Cir.1985); *United States v. Holland*, 810 F.2d 1215, 1223-24 (D.C.Cir. 1987).

Appellant acknowledges this Court's holding in *Hatton* but claims that *Hatton* is dicta because the claim was a challenge that the statute was unconstitutionally vague rather than a challenge to the sufficiency of the evidence. (App. Br. 37). This Court's analysis in *Hatton* is not dicta. Indeed, while the defendants in *Hatton* purported to raise a vagueness challenge, this Court recognized that the defendants' "real complaint [was] that [the defendants] did not know they were within one thousand feet of public housing when they carried out their plan to sell crack cocaine." *Hatton*, 918 S.W.2d at 794. This Court's finding that the State was not required to prove the defendant's knowledge of his proximity to public housing was essential to the principle issue of the case.

Moreover, in both *Hatton* and the case at bar, the ultimate claim is a violation of due process of law. *Hatton* specifically held that the due process clause does not require that the state prove Appellant's knowledge of his proximity to public housing or that Appellant knew the property was classified as public housing. *Id.* at 794. Thus, *Hatton* is controlling and the Southern District Court of Appeals was constitutionally bound in the present case to follow *Hatton* – this Court's latest controlling decision. *State v. Tuter*, 920 S.W.2d 111, 112 (Mo. App. S.D. 1996).

This was also the position of the Eastern District Court of Appeals in *State v. Wheeler*, where the court was confronted with a similar issue raised under the statute for distribution of a controlled substance near a school, §195.214. *Wheeler*, 845 S.W.2d 678 (Mo. App. E.D. 1993). In *Wheeler*, the defendant claimed that because §195.214 did not set forth whether the accused must have knowledge that he was within 1,000 feet of school property, the statute was unconstitutional as it applied strict liability to a violation of a criminal statute without requiring proof of intent. *Id.* at 680. The court rejected this argument and explained that §195.214 was not a strict liability statute; rather, it incorporated §195.211 which defined the offense of distribution of a controlled substance. *Id.* A defendant must have, therefore, violated §195.211 before consideration could be given to §195.214. *Id.* If the defendant knew that the substance he distributed or delivered was a controlled substance, a crime was committed under §195.211. *Id.* “Therefore, anyone who violates §195.211 knows that distribution of a controlled substance is illegal, although the violator may not know that the distribution occurred within one thousand feet of a school.” *Id.* As a result, the court held

that §195.214 was not unconstitutional because “it does not require that defendant have actual knowledge of the proximity of a school.” *Id.* at 681.

The lack of a knowledge requirement is further supported by federal and state court decisions which have resolved similar issues and where the courts have repeatedly held that the government is not required to show that a defendant had the specific knowledge of the proximity of a school or housing facility. *See e.g.*, The Comprehensive Drug Abuse Prevention and Control Act - 21 U.S.C. §860(a)⁷; *United States v. Falu*, 776 F.2d 46, 50 (2nd Cir.1985); *United States v. Ofarril*, 779 F.2d 791 (2nd Cir. 1985); *United States v. Jackson*, 443 F.3d 293 (3rd Cir. 2006); *United States v. Dimas*, 3 F.3d 1015 (7th Cir. 1993); *United States v. Haynes*, 881 F.2d 586, 590 (8th Cir.1989); *United States v. Lewin*, 900 F.2d 145 (8th Cir. 1990); *United States v. Pitts*, 908 F.2d 458 (9th Cir. 1990); *United States v. Holland*, 810 F.2d 1215, 1223 (D.C. Cir. 1987); *United States v. Barnes*, 228 F.Supp.2d 82 (D. Conn. 2002); *United States v. Robles*, 814 F.Supp. 1249 (E.D. Pa 1993); *United States v. Edwards*, 765 F.Supp. 1112 (D.D.C. 1991). Similarly, state courts which have examined state counterparts to §195.214 have also upheld the lack of a knowledge requirement. *See*

⁷ The Comprehensive Drug Abuse Prevention and Control Act mirrors §§195.214 and 195.218. Section 860(a) states that a person who distributes, possesses with intent to distribute, or manufactures a controlled substance “in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, *or housing facility owned by a public housing authority ...*” 21 U.S.C. §860(a) (emphasis added).

e.g., *People v. Atlas*, 75 Cal.Rptr.2d 307 (Cal. App. 2 Dist. 1998); *State v. Myers*, 921 A.2d 640 (Conn. App. 2007); *State v. Burch*, 545 So.2d 279, 281 (Fla. Dist. Ct. App. 1989); *People v. Durdin*, 726 N.E.2d 120 (Ill. App. 2000); *Walker v. State*, 668 N.E.2d 243 (Ind. 1996); *State v. Prosper*, 926 P.2d 231 (Kan. 1996); *State v. Williams*, 729 So. 2d 1080 (La. Ct. App. 1999); *Smiley v. State*, 773 A.2d 606 (Md. App. 2001); *Commonwealth v. Alvarez*, 596 N.E.2d 325 (Mass. 1992); *State v. Benniefield*, 678 N.W.2d 42 (Minn. 2004); *State v. Morales*, 539 A.2d 769 (N.J. Super 1987); *State v. Harris*, 623 N.E.2d 1240 (Ohio App. 1993); *Coates v. State*, 137 P.3d 682 (Ok. App. 2006); *State v. Rodriguez-Berrera*, 159 P.3d 1201 (Or. App. 2007); *Commonwealth v. Murphy*, 592 A.2d 750 (Pa. Super. 1991); *State v. Moore*, 782 P.2d 497, 504-5 (Utah 1989); *State v. Graham*, 846 P.2d 578 (Wash. App. 1993); *State v. Hermann*, 474 N.W.2d 906 (Wis. App. 1991).

Appellant also argues that this Court's decision in *Hatton* should not be relied upon because §562.021.2 was amended after *Hatton* "and now requires the State to prove more than when *Hatton* was decided." (App. Br. 38). This argument is also without merit. Appellant argues that the State is now required to prove more than when *Hatton* was decided because prior to *Hatton*, a culpable mental state could be established if a person acted purposely or knowingly *or recklessly*. §562.021.2, RSMo. Supp. 1986 (emphasis added). The current version of §562.021, however, states that except as provided in §562.026, a culpable mental state is established if a person acts purposely or knowingly, "but reckless or criminally negligent acts do not establish such culpable mental state." §562.021.3 (emphasis added). This difference regarding recklessness, however, has no bearing on this case because the *mens rea* requirement is found in the underlying violation of §195.211, which is

and was met by the *knowing* sale of a controlled substance. And as this Court unanimously found in *Hatton*, the State is not required to prove Appellant's *knowledge* of his proximity to public housing before the State will be allowed to enhance the punishment for a crime Appellant *intentionally* committed. *Hatton*, 918 S.W.2d at 794. As such, *Hatton* is still controlling.

Additionally, in footnote 1 of this Court's opinion in *Hatton*, it acknowledged that §562.021.2 had been repealed; however, this Court stated that it still reached the same conclusion. *Hatton*, 918 S.W.2d at 794 fn1. In doing so, this Court cited §562.026(2), which provides that for felony or misdemeanor offenses in which no culpable mental state is prescribed, a culpable mental state is *not* required to be imputed if it would clearly be inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result. §562.026(2) (emphasis added). Therefore, this Court found that requiring the State to prove that a defendant knows that he is within 1,000 feet of public or governmental assisted housing when he sells drugs would clearly be inconsistent with the purpose of the statute to create drug-free zones or that it may lead to absurd or unjust results.

In support of his argument that the State was required to prove that he knew government housing was within 1,000 feet of where he sold the cocaine, Appellant relies on *State v. White*, 28 S.W.3d 391 (Mo. App. W.D. 2000). Respondent acknowledges that the Western District Court of Appeals' decision in *White* is in conflict with the Southern District's decision in this case. *White*, however, was directly in conflict with this Court's decision in *Hatton* and was wrongly decided.

In *White*, a detective testified that he used computer mapping software to make a map of the area. *Id.* at 395. The map showed that the residence where the defendant had sold marijuana and crack cocaine to a confidential informant was within 2,000 feet of two different schools. *Id.* At the close of the evidence, the defendant moved for judgment of acquittal, arguing that the State failed to prove that he knew he was within 2,000 feet of a school. *Id.* The motion was overruled and on appeal, the defendant again claimed that the State failed to prove that he knew the residence was located within 2,000 feet of a school. *Id.* at. 395-96. The court held that because there was no evidence that the map was drawn to scale, no evidence regarding the size, height, or visibility of the school from the residence, nor evidence that the defendant had ever traveled past the school or heard about the school's location, the evidence was insufficient to establish that the defendant knowingly distributed a controlled substance within 2,000 feet of a school. *Id.* at 397.

White is directly in conflict with this Court's decision in *Hatton* and the Eastern District's holding in *Wheeler*. Although the *White* court began its analysis by citing *Hatton* and *Wheeler*, and explaining that §195.214 is a penalty enhancement provision which incorporates §195.211 and requires a violation of §195.211 before a defendant can be convicted and sentenced under §195.214, the court then departed from *Hatton* and all precedent by requiring proof that the defendant had knowledge of the school's location. This is not how this Court has interpreted the penalty enhancement provision, nor is the *White* court's holding supported by the position of the federal courts and other state courts who have repeatedly rejected such a knowledge requirement. A requirement such as the one expressed in *White*, requiring proof that the defendant has ever traveled past the school,

heard about the school's location, or could see the school from the spot of the sale, could amount to an onerous task for law enforcement officials and prosecutors and would be contrary to the clear purpose of the statute to create drug-free zones. *See* §562.026(2) (cited in *Hatton*).

A knowledge requirement could also lead to absurd or unjust results. *See* §562.026(2) (cited in *Hatton*). Even if the State could prove that a defendant knew about a school's location, or the location of public housing, absent a confession that the defendant had personally measured the precise distance, it would be impossible for the State to ever prove that the defendant subjectively knew that he was committing the crime within 1,000 feet or 2,000 feet of the prohibited area. A defendant could simply assert that he is not good at judging distances or that he thought, for instance, that the school was 2,200 feet away. Such a requirement could lead to absurd results and could ultimately prevent all prosecutions under the statute, thus thwarting the clear intent of the legislature to create drug-free zones.

Respondent acknowledges that some of the confusion over a knowledge requirement seems to be the result of the jury instruction used not only in the case at bar, but also in *White*.⁸ There is no approved jury instruction for delivery or distribution of a controlled

⁸ Respondent notes that *White* was cited along with MAI-CR3d 325.30 in both *State v. McQuary*, 173 S.W.3d 663 (Mo. App. W.D. 2005), and *State v. Crooks*, 64 S.W.3d 887 (Mo. App. S.D. 2002). But, because the courts in *McQuary* and *Crooks* held that there was sufficient evidence that the defendant had knowledge that the sale was within 2,000 feet of a school, there was no need to analyze or actively distinguish *White*.

substance near public housing, §195.218; however, Instruction 5, the jury instruction used in this case, appears to have been patterned after MAI-CR3d 325.30, the jury instruction for §195.214 (distribution near a school), which was also the patterned instruction in *White*. (L.F. 53).

Instruction 5 reads, in relevant part:

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about August 16, 2004, in the County of New Madrid, State of Missouri, the defendant delivered cocaine, a controlled substance, to Confidential Informant #3685, and

Second, that the defendant did so within one thousand feet of the real property comprising New Madrid Housing Authority, a public housing or other governmental assisted housing, and

Third, that with regard to the facts and circumstances submitted in this instruction, defendant acted knowingly,

then you will find the defendant guilty of delivering a controlled substance near a public housing or other governmental assisted housing.

(L.F. 53); MAI-CR3d 325.30.

As the court in *White* noted, prior versions of MAI-CR3d 325.30 did *not* require the defendant to know that the delivery took place within 1,000 feet of a school. *White*, 28 S.W.3d at 396 fn2; *see also Wheeler*, 845 S.W.2d at 680-81 (noting that the verdict directing instruction submitting the mental state of knowingly as to the sale of cocaine did not require that the jury find that defendant had knowledge that he was within one thousand feet of a

school). Although the current version of MAI-CR3d 325.30 lists as the third element “that with regard to the facts and circumstances submitted in this instruction, defendant acted knowingly ...,” this instruction conflicts with the substantive law and should not be followed. “If an instruction following MAI-CR3d conflicts with substantive law, any court should decline to follow MAI-CR3d or its Notes on Use.” *Carson*, 941 S.W.2d at 520. To the extent that the MAI-CR conflicts with substantive law, it is “not binding.” *Id.*, (quoting *State v. Anding*, 752 S.W.2d 59, 61 (Mo. banc 1988)).

The court in *White* used MAI-CR3d 325.30 to change the substantive law by adding the additional requirement that the State must prove that the defendant knew of the location of the school; however, “[p]rocedural rules adopted by MAI cannot change the substantive law and must therefore be interpreted in the light of existing statutory and case law.” *Carson*, 941 S.W.2d at 520, citing Mo. Const. art. V, §5; *State v. Dixon*, 655 S.W.2d 547, 558 (Mo. App. 1983). The statutory language prohibiting the distribution of a controlled substance near public housing in §195.218 has remained unchanged since it was enacted in 1993. Moreover, the existing case law, *Hatton* and *Wheeler*, all held that there was no knowledge requirement. Therefore, the Southern District was correct in holding that they were constitutionally bound in the present case to follow the controlling decision of this Court. *Tuter*, 920 S.W.2d at 112. As a result, the Southern District was correct in declining to follow the erroneous analysis in *White*. The State was not required to show that Appellant knew there was government assisted housing within 1,000 feet of where he knowingly sold the crack cocaine to the confidential informant. Appellant’s first point on appeal is without merit and should be denied.

II.

The trial court did not err in overruling Appellant’s motion for judgment of acquittal at the close of the evidence and in entering judgment against Appellant for the class A felony of distribution of a controlled substance near public housing or other governmental assisted housing because there was sufficient evidence from which a reasonable jury could find Appellant guilty beyond a reasonable doubt in that the evidence showed that it was Appellant who sold crack cocaine to the confidential informant and did so within 1,000 feet of property comprising public housing or other governmental assisted housing.

Appellant claims that there was insufficient evidence that he is the person that sold the crack cocaine to the informant. (App. Br. 43-48). Appellant argues that Officer Hensley’s testimony that Appellant was the one who approached the car was insufficient because he was too far away to see who it was and he was not one-hundred percent sure it was Appellant after first looking at the video. (App. Br. 43, 47). Additionally, Appellant complains that because the informant did not testify, there was “no proof” that he delivered the crack cocaine to the informant because she could have hidden the cocaine from the officer before the sale and also hidden the money after the sale. (App. Br. 43, 46-48).

A. Standard of review

In *State v. Grim*, 854 S.W.2d 403, 414 (Mo. banc 1993), this Court explained that the standard to be applied in reviewing the sufficiency of the evidence “echoes the due process standard announced by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979).” *Id.* at 405.

[T]his inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson, 443 U.S. at 318-19 (quoted in *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998)).

In reviewing the sufficiency of the evidence, appellate courts do not act as a “super juror with veto powers,” but give great deference to the trier of fact. *Grim*, 854 S.W.2d at 414. Appellate “review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.” *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). In applying this standard, appellate courts do not reweigh the evidence or determine the credibility of witnesses; rather, they consider the record in the light most favorable to the verdict. *State v. O’Brien*, 857 S.W.2d 212, 215-16 (Mo. banc 1993). Appellate courts accept as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence. *Grim*, 854 S.W.2d at 405. “Thus, evidence that supports a finding of guilt is taken as true and all logical inferences that support a finding of guilt and that may reasonably be drawn from the evidence are indulged. Conversely, the evidence and any inferences to be drawn therefrom that do not support a finding of guilt are ignored.” *O’Brien*, 857 S.W.2d at 215-16.

B. The State presented sufficient evidence that Appellant was the person who sold crack cocaine to the confidential informant

Under §195.218, a person commits the offense of distribution of a controlled substance near public housing or other governmental assisted housing if he violates §195.211 and does so within 1,000 feet of public or other governmental assisted housing. §195.218.1, RSMo Cum. Supp. 2003. Section 195.211 provides that it is unlawful 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.

Appellant first claims that there was insufficient evidence to show that he was the person who sold the crack cocaine. There was sufficient evidence that it was Appellant who sold the crack cocaine to the informant. The confidential informant’s car was equipped with two video cameras that were hidden in covert items - one camera was in the front passenger seat and the other in the back seat behind the driver. (Tr. 116-17, 146-47). Both cameras were positioned to record whatever occurred on the driver’s side of the car. (Tr. 116-17; Ex. 2-3). The camera hidden in the front passenger seat also monitored the informant’s actions and captured what was occurring through the driver’s window. (Ex. 2). The evidence showed that when the informant stopped her car on Riley Street, Appellant approached the driver’s side window of the informant’s car. (Tr. 119; Ex. 2) Appellant then went into his residence at 315 Riley while the informant waited in her car. (Tr. 119, 131-32, 160, 165; Ex. 2). Shortly thereafter, Appellant returned to the car, leaned into the driver’s side window, spoke to the informant, and delivered the crack cocaine. (Tr. 119, Ex. 2). The video shows Appellant leaning into the window and speaking with the informant. (Ex. 2). Although the video (Ex. 2) is less than clear due to its dark quality, Hensley identified Appellant in the video and the jury not only saw the videos during the trial, but also watched them again

during their deliberations. (Tr. 133, 200-01). As a result, reviewing the evidence in the light most favorable to the verdict as the standard of review dictates, there was sufficient evidence so that a reasonable jury could determine that Appellant was the person who delivered the crack cocaine to the informant.

C. The State presented sufficient evidence that Appellant delivered crack cocaine to the confidential informant

Appellant also complains that the evidence was insufficient to prove that he delivered the crack cocaine to the informant because the informant “easily could have hidden the cocaine before the sale and the money after the sale without being detected.” (Tr. 47). This claim is also without merit and ignores the standard of review.

The evidence showed that before the informant made the buy, she met with Hensley and Detective Rataj at an undisclosed location where she was searched to ensure the integrity of the investigation. (Tr. 114, 141-42). Both the informant and her car were searched and nothing was found. (Tr. 114-16, 142-45, 162-63, 166). The informant was given \$20.00 and told to drive down the Russell Street area to get flagged down to buy drugs, which is exactly what she did. (Tr. 117, 147). Appellant approached her car, then went back into his house, and then returned with the crack cocaine and made the transaction. (Tr. 119; Ex. 2-3). After the transaction, the informant returned to the location where she turned over the crack cocaine that she had just purchased from Appellant. (Tr. 120, 156, 158). The informant and her car were re-searched and nothing was found, including the \$20.00. (Tr. 120, 156, 158).

Appellant alleges that because the informant was female, the officers could not do a complete search of her and therefore, “she easily could have hidden the cocaine before the

sale and the money after the sale without being detected.” (App. Br. 47). While it is apparently true that neither the informant’s undergarments nor her body cavities were searched, this argument ignores the standard of review. “[E]vidence that supports a finding of guilt is taken as true and all logical inferences that support a finding of guilt and that may reasonably be drawn from the evidence are indulged. Conversely, the evidence and any inferences to be drawn therefrom that do not support a finding of guilt are ignored.” *O’Brien*, 857 S.W.2d at 215-16. Moreover, there was no evidence to suggest that the informant hid drugs or money and ultimately framed Appellant. The evidence showed that the informant had worked with the officers many times and they had never had any problems with her. (Tr. 116, 140, 162). Additionally, Hensley testified that he had never had a confidential informant hide drugs in their undergarments or body cavities before a controlled buy. (Tr. 115). Moreover, the camera in the front passenger seat monitored the informant and there is nothing in the video to suggest that she reached into her undergarments or private regions to retrieve drugs or hide money. (Ex. 2).

Finally, Appellant complains that because the exchange of cocaine and money cannot clearly be seen on the videotape, there is “no proof” that Appellant delivered the cocaine to the informant. (App. Br. 47). The proof was obvious. Prior to meeting Appellant, the informant had \$20.00 and no crack cocaine. After making a transaction with Appellant, the informant no longer had \$20.00, but had crack cocaine. Appellant’s entire claim ignores the standard of review for sufficiency cases. Appellate courts do not reweigh the evidence or determine the credibility of witnesses; rather, they consider the record in the light most favorable to the verdict and give great deference to the trier of fact. *State v. O’Brien*, 857

S.W.2d 212, 215-16 (Mo. banc 1993). “[E]vidence that supports a finding of guilt is taken as true and all logical inferences that support a finding of guilt and that may reasonably be drawn from the evidence are indulged. Conversely, the evidence and any inferences to be drawn therefrom that do not support a finding of guilt are ignored.” *Id.* Considering the evidence in the light most favorable to the verdict, there is no question that there was sufficient evidence from which a reasonable jury could have found Appellant guilty beyond a reasonable doubt. Appellant’s second point is without merit and should be denied.

III.

The trial court did not err, plainly or otherwise, in overruling Appellant’s objection and in admitting the statements Appellant made to Officer Hensley while Appellant was in jail because these statements were admissible in that although Appellant was in custody, he was not being interrogated and thus he was not required to have been advised of his rights under *Miranda*. Hensley’s asking Appellant why he had not contacted him about working with the drug task force was not a question Hensley should have known was reasonably likely to elicit an incriminating response from Appellant.

Appellant claims that his statements were inadmissible because Officer Hensley did not read him his *Miranda* rights prior to speaking with him. (App. Br. 49). Appellant argues that he was subjected to “express questioning or its functional equivalent” when Hensley approached Minner about the drug task force. (App. Br. 49).

A. Preservation

1. Procedural facts

The day before trial, Appellant filed a motion to suppress statements. (L.F. 22-23). No hearing was held on the motion and on the day of trial, during pre-trial matters, the trial court explained that the motion to suppress would be taken up with the case. (Tr. 18).

During Officer Hensley’s direct examination, he was asked if he had an occasion to speak with Appellant. (Tr. 128). Hensley explained that he had spoken with Appellant before Appellant was arrested because Appellant wanted to help the Southeast Missouri Drug Task Force. (Tr. 128). Hensley stated that he took down Appellant’s information and

Appellant was supposed to call him. (Tr. 128). Hensley then explained that after Appellant was arrested, he went to the jail to talk with Appellant about what had happened with his assistance with the Drug Task Force. (Tr. 128). Following Hensley's response, defense counsel renewed his request "regarding the motion that was heard in pre-trial." (Tr. 128). The trial court responded, "And the objection will be overruled *at this time.*" (Tr. 128) (emphasis added). Hensley then testified that he talked to Appellant about what he could do with the Drug Task Force and specifically asked Appellant "where he had been, how come he hadn't called, and just, trying to see if, you know, what had happened." (Tr. 128-29). The prosecutor then asked Hensley what Appellant told him. (Tr. 129). Defense counsel made no objection nor had he previously asked for a continuing objection. (Tr. 128-29). Hensley proceeded to explain that Appellant began to talk about this case and that he was not involved, but Hensley told him not to worry about it because he was just trying to find out where Appellant had been and why Appellant had not called him. (Tr. 129). After Appellant continued to deny that he was involved in this case, Hensley stated that he had two videos that had Appellant on them but Appellant didn't need to worry about it. (Tr. 129). Appellant then stated that he usually does not sell drugs but sometimes when his cousin was not out on the street, he would run into the house, retrieve the drugs from his cousin, and bring them back outside to sell on the street for his cousin. (Tr. 129-30). No objection was made. (Tr. 128-30).

Additionally, it does not appear from the record that a ruling was ever made on the motion to suppress. Even after defense counsel elicited additional testimony during Hensley's cross-examination, counsel did not request that the court rule on the motion to

suppress. (Tr. 158, 161, 168). Similarly, at the close of the evidence, counsel made no additional argument regarding Appellant's statement or request that the trial court rule on the motion to suppress. (Tr. 176-79).

In his motion for a new trial, Appellant alleged that the motion to suppress had not been ruled upon and "[s]hould the court overrule the Motion to Suppress, Mr. Minner requests a new trial based on this error." (L.F. 64).

2. Appellant's claim was not properly preserved for appeal

Appellant's claim was not properly preserved for review. Appellant did not make a timely and specific objection at trial when counsel asked Hensley what Appellant told him. (Tr. 129). A specific objection is required when the evidence is offered at trial in order to preserve the issue for appellate review. *State v. Cardona-Rivera*, 975 S.W.2d 200, 203 (Mo. App. S.D. 1998). This is true notwithstanding that a motion to suppress evidence has been taken with the case. *State v. Fulliam*, 154 S.W.3d 423, 426 (Mo. App. S.D. 2005). Although Appellant had previously renewed his request "regarding the motion that was heard in pre-trial," the trial court responded, "And the objection will be overruled *at this time*." (Tr. 128) (emphasis added). Counsel did not ask for a continuing objection. (Tr. 128). At that time, Hensley had only been asked if he had spoken with Appellant and why he went to speak with Appellant. (Tr. 128). Therefore, at the time Appellant renewed his motion, Hensley had not yet been asked about any statements Appellant may have made. When the prosecutor did finally ask Hensley what Appellant told him, counsel failed to make any objection. (Tr. 129-30). Absent a continuing objection, that would have been the appropriate time for counsel to object. Because no objection to this specific testimony was made and because counsel did

not give the trial court an opportunity to rule at the time the evidence was introduced, the claim was not preserved for appeal. “A ruling on a motion to suppress is interlocutory and subject to change during the course of the trial.... Therefore, a specific objection is required when the evidence is offered at trial to preserve the issue for appellate review.” *State v. Christian*, 184 S.W.3d 597, 605 (Mo. App. E.D. 2006).

Additionally, Appellant did not request that the court rule on the motion to suppress after eliciting additional evidence during Hensley’s cross-examination or at the close of the evidence. The trial court must be given the opportunity to reconsider its ruling during the trial in light of the evidence that has been adduced in order to preserve a claim for appeal. *State v. Sandusky*, 761 S.W.2d 710, 713 (Mo. App. E.D. 1988). Consequently, Appellant’s claim is not properly preserved and should be reviewed, if at all, only for plain error.

B. Standard of review

Generally the appellate court affirms a trial court’s ruling on a motion to suppress unless the ruling was clearly erroneous. *State v. Goff*, 129 S.W.3d 857, 862 (Mo. banc 2004). If the ruling is plausible in light of the record viewed in its entirety, the appellate court will not reverse, even if it would have weighed the evidence differently. *State v. Lanos*, 14 S.W.3d 90, 93 (Mo. App. E.D. 1999). “The fact there is evidence from which the trial court could have arrived at a contrary conclusion is immaterial.” *State v. Kampschroeder*, 985 S.W.2d 396, 398 (Mo. App. E.D. 1999). The reviewing court considers the facts in the light most favorable to the trial court’s ruling and disregards contrary evidence and inferences. *Id.* The appellate court gives deference to the trial court’s determination of credibility of the witnesses. *Goff*, 129 S.W.3d at 862.

Trial courts have broad discretion to admit or exclude evidence at trial and this Court will reverse only upon a showing of a clear abuse of discretion. *State v. Chaney*, 967 S.W.2d 47, 55 (Mo. banc 1998). A trial court abuses its discretion when a ruling 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. Biggs*, 91 S.W.3d 127, 133 (Mo. App. S.D. 2002). If reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Id.* Error is not a basis for reversing the judgment of conviction without a showing that in the absence of the error, there is a reasonable probability that the verdict would have been different. *State v. Williams*, 936 S.W.2d 781, 786 (Mo. banc 1996).

Issues not properly preserved can be reviewed, if at all, as plain error under Rule 30.20. *State v. Brisco*, 934 S.W.2d 335, 36 (Mo. App. W.D. 1996). “Unless a claim of plain error facially establishes substantial grounds for believing that ‘manifest injustice or miscarriage of justice has resulted,’ this Court will decline to exercise its discretion to review for plain error under Rule 30.20.” *Id.* (quoting *State v. Brown*, 902 S.W.2d 278, 284 (Mo. banc 1995)). “The ‘plain error’ rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review.” *State v. Roberts*, 948 S.W.2d 577, 592 (Mo. banc 1997).

To prevail on plain error review, Appellant must show that the alleged error so substantially affected his rights that a manifest injustice or miscarriage of justice inexorably results if left uncorrected. *State v. Wolfe*, 103 S.W.3d 915, 916 (Mo. App. W.D. 2003). Manifest injustice depends on the facts and circumstances of the particular case, and

Appellant bears the burden of establishing manifest injustice amounting to plain error. *State v. Zindel*, 918 S.W.2d 239, 241 (Mo. banc 1996). Not all prejudicial or reversible error is plain error. *State v. Dowell*, 25 S.W.3d 594, 606 (Mo. App. W.D. 2000). “Plain error is evident, obvious and clear error.” *State v. Bailey*, 839 S.W.2d 657, 661 (Mo. App. W.D. 1992).

C. Relevant testimony

As referenced above, during Officer Hensley’s direct examination, Hensley testified that he had spoken with Appellant before Appellant was arrested because Appellant wanted to help the Southeast Missouri Drug Task Force. (Tr. 128). Then, after Appellant was arrested, Hensley went to the jail to speak with Appellant about why Appellant had not contacted him. (Tr. 128). Hensley testified that he spoke to Appellant about what Appellant could do with the Drug Task Force and specifically asked Appellant “where he had been, how come he hadn’t called, and just, trying to see if, you know, what had happened.” (Tr. 128-29). The prosecutor also asked Hensley what Appellant told him. (Tr. 129). Hensley’s response was as follows:

[Hensley]: He began to talk about this actual case, and, stated that, I had some paperwork and he actually said that, that’s not me, and, I told him, you know, don’t worry about that, I was just trying to find out where he had been, how come he hadn’t called, and he kept trying to make me understand that this case that he’s arrested on was not him, that he was not involved in this, and I assured him that it was him, I had two videos that has him in

them that shows that he's selling drugs, and, that he, you know, you don't need to worry about this. And, that's, that's when he

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[Prosecutor]: What did he say then?

[Hensley]: He told me that, well, he doesn't usually sell drugs, that, sometimes when his cousin wasn't out there on the street, he 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).

D. Analysis

“*Miranda* rights are required to be given before questioning a person who ‘has been taken into custody or otherwise deprived of his freedom of action in any significant way.’” *State v. Perkins*, 774 S.W.2d 484, 486 (Mo. App. E.D. 1989) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). *Miranda* applies only when an individual is “both in custody and interrogated.” *State v. Isaiah*, 874 S.W.2d 429, 436 (Mo. App. W.D. 1994). As the United States Supreme Court stated in *Rhode Island v. Innis*, “[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.” *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980). The Court defined this phrase as being “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Id.* at 301. As the *Innis* Court further explained,

“The concern of the Court in *Miranda* was that the ‘interrogation environment’ created by the interplay of interrogation and custody would ‘subjugate the individual to the will of his examiner’ and thereby undermine the privilege against compulsory self incrimination.” *Id.* at 299. “It is clear therefore that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation.” *Id.* “‘Interrogation,’ as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.” *Id.* (internal citation omitted).

Thus, not all statements obtained by the police after a person has been taken into custody are the product of interrogation. *Id.* As the Court in *Miranda* noted:

Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Miranda, 384 U.S. at 478.

With these principles in mind, it is evident that Appellant’s statements were not the product of custodial interrogation. Although Appellant was obviously “in custody” for purposes of *Miranda*, there was no interrogation. There was no measure of compulsion or coercion, and no evidence of trickery to induce Appellant’s statements or overcome his will. *See Innis*, 446 U.S. at 299; *Miranda*, 384 U.S. at 467; *Perkins*, 774 S.W.2d at 486.

Moreover, the evidence showed that Hensley's purpose in speaking with Appellant was not to interrogate him or even discuss the charged crime, but rather, to simply ask Appellant why he had not contacted Hensley about working with the Drug Task Force. When Appellant brought up the charged crime, Hensley told Appellant not to worry about it, that he was just trying to find out where Appellant had been and why he hadn't called him about the drug task force. Accordingly, it cannot be said that Hensley should have known that such an inquiry was reasonably likely to elicit an incriminating response from Appellant nor should Appellant have reasonably perceived Hensley's question as seeking a response to the charged crime. *See e.g. Innis*, 446 U.S. at 301-02 (officer's comment in the presence of the defendant that it would be too bad if a little girl found the shotgun used in the robbery and killed herself was held not to be interrogation even though it prompted the defendant to lead the officers to the shotgun).

In *State v. Mitchell*, 41 S.W.3d 574 (Mo. App. S.D. 2001), the court was confronted with a situation where the defendant was never advised of his *Miranda* rights despite being arrested and taken to the jail whereby two officers performed a "reverse rape kit" on him. *Id.* at 577. While the reverse rape kit evidence was being collected, the police officers did not ask the defendant any questions, but they did respond to the defendant's questions, and after these responses, the defendant made incriminating statements. *Id.* at 578. The court held that the statements were made voluntarily and the police did not know, nor should they have

known, that their actions or words would elicit incriminating statements.⁹ *Id.* As the court explained, “We cannot say that solely by attempting to collect evidence, the police should have known this was likely to lead to Defendant incriminating himself. ‘The police surely cannot be held accountable for the unforeseeable results of their words or actions....’” *Id.* (quoting *Innis*, 446 U.S. at 302).

In this case, similar to *Mitchell*, Hensley testified that his purpose in speaking with Appellant was to find out why Appellant had not contacted him about assisting with the Drug Task Force. Although Hensley did respond to Appellant’s denials that he was involved in the charged crime by first telling Appellant not to worry about it and then by telling Appellant that he had two videos showing that he was selling drugs, Hensley still reiterated to Appellant that he did not need to worry about the charge. (Tr. 129). Accordingly, Appellant’s subsequent statement that he sometimes sells drugs for his cousin when his cousin was not out on the street was spontaneous, unforeseeable, and voluntary. Appellant’s statement was not a response to any question from Hensley. By attempting to find out why Appellant had not contacted him, it cannot be argued that Hensley should have known this was likely to lead to Appellant incriminating himself.¹⁰

⁹ This Court noted that *Innis* indicates that the inquiry focuses primarily on the perceptions of the accused, but the intent of the police is not wholly irrelevant. *Id.* at fn4, citing *Innis*, 446 U.S. at 300-02.

¹⁰ Appellant also takes issue with the fact that Hensley had some “paperwork” in his hand. (App. Br. 44). Some paperwork cannot be argued to be more compulsive than a rape kit as

State v. Reese, 26 S.W.3d 323, 324-25 (Mo. App. E.D. 2000), is also instructive on this issue. In *Reese*, the defendant was taken into custody because of a check she had presented to a currency exchange. Prior to being advised of her *Miranda* rights, the defendant was taken into an interview room at the police station where the detectives explained that the check may or may not have been a good check but they could not verify it until the next day. *Id.* at 324. The defendant then stated that she did not want to waste the detectives' time, that she needed to make some money, and she knew the check was no good. *Id.* The court held that this was not an interrogation; rather, the detective was only explaining the purpose of his investigation when the defendant immediately came forth with her statement indicating guilt. *Id.* at 325. The court found that this admission was given spontaneously and without any indication of police pressure. *Id.* The court added that efforts of law enforcement officers that are within the law should not be impeded by unwarranted extensions of the prophylactic rules. *Id.*

Similarly in the case at bar, Appellant's incriminating statement that he sometimes sold drugs for his cousin was made spontaneously and without any indication of police pressure. There was no questioning about the charged crime and Hensley had already explained to Appellant that the purpose of his visit was to find out why Appellant had not

in *Mitchell* or even a statement about a young child killing herself as in *Innis*. See also *State v. Wade*, 866 S.W.2d 908, 910 (Mo. App. W.D. 1993) (officer mentioning that he was going to turn the case over to the ATF if the defendant would not talk to him was not interrogation).

contacted him about the Drug Task Force. It was Appellant who changed the subject and made an incriminating statement. *See also State v. Heyer*, 962 S.W.2d 401, 408 (Mo. App. E.D. 1998) (while officer was talking to the defendant about his dog, the defendant changed the subject and volunteered his involvement with the drugs seized); *Gregg v. State*, 446 S.W.2d 630, 632 (Mo. 1969) (held to be a spontaneous statement and not the result of any improper interrogation where prior to being read *Miranda* rights, an officer suggested to the defendant that the weapon “ought to be a good deer rifle,” to which the defendant replied, “I don’t know about a deer rifle, but it took care of old Bob.”); *State v. Morris*, 522 S.W.2d 93, 97-98 (Mo. App. 1975) (where the defendant was told that he was under arrest and he was wanted for a rape and robbery in St. Louis, the defendant’s response, “Goddamn, how did you get me so fast?” was held to be a spontaneous and voluntary statement and not the result of any question asked by a police officer).

Although Appellant does not cite to any analogous cases, he does cite to *State v. Williams*, 163 S.W.3d 522, 526 (Mo. App. E.D. 2005), in support of his argument that “what occurred was the ‘functional equivalent’ of questioning.” (App. Br. 53-55). *Williams*, however, is distinguishable. First of all, *Williams* was an appeal from the trial court’s ruling on a motion to suppress and thus, reviewed under a different standard. Additionally, the facts in *Williams* are distinguishable. In *Williams*, the police executed a search warrant on the defendant’s residence and while the defendant was in custody, but before she was advised of her *Miranda* rights, an officer confronted the defendant about multiple prescription bottles that were found containing hydrocodone and were made out to other persons. *Id.* at 524. The defendant responded that she knew what the officer was saying

about the bottles but she was not a drug dealer; she bought the pills for a dollar a pill and she mixed them up to get high. *Id.* The court held that the defendant responded to what the officer was “saying about the bottle” and therefore it could be “fairly inferred” that the defendant perceived that the officer was interrogating her about her use of the controlled substances. *Id.* at 526. As a result, the court concluded that under the circumstances, the officer should have known that confronting the defendant about the controlled substances was reasonably likely to elicit an inculpatory or exculpatory response and was thus the “functional equivalent” of questioning. *Id.*

In this case, it cannot be “fairly inferred” that Appellant perceived that Hensley was interrogating him about this case. Hensley explained that he went to speak with Appellant to find out why he had not contacted him about working with the Drug Task Force and he was not concerned with the charged crime. Hensley’s inquiry as to Appellant’s whereabouts was a completely different topic and was not reasonably likely to elicit a response from Appellant relevant to the charged crime. Nor should Appellant have reasonably perceived Hensley’s question as seeking a statement about the crime. As a result, it was not the “functional equivalent” of expressed questioning.

Even assuming, *arguendo*, that Hensley’s conversation with Appellant could be construed as the functional equivalent of express questioning, thus requiring Appellant to be advised of his *Miranda* rights prior to the conversation, Appellant still cannot demonstrate that he was prejudiced because there was overwhelming evidence of his guilt absent Appellant’s statement. Appellant claims that he was prejudiced because the informant did not testify, Hensley was too far away to observe the transaction, and the videotapes did not

clearly show a transaction. (App. Br. 55). This argument is without merit. First of all, this argument ignores the fact that Appellant was caught on tape. And even if the videos do not clearly show Appellant exchanging the crack cocaine for the money, the evidence speaks for itself. Prior to meeting with Appellant, the informant did not have any crack cocaine on her person or in her car. But after Appellant approached the informant's car, went back inside his house and then came back to the informant's car, the informant no longer had the twenty dollars she had been given, but had crack cocaine. Consequently, whether this Court reviews for abuse of discretion or manifest injustice, the bottom line is that there is no reasonable probability that the verdict would have been different. The jury did not convict Appellant because of his statement. Appellant was caught on tape making the sale, and Appellant's statement was "neither crucial to nor did it bear heavily upon the determination of his guilt." *State v. Ream*, 223 S.W.3d 874, 878 (Mo. App. S.D. 2007) (finding that mention of the defendant's unemployment gained from response after defendant invoked right to remain silent did not prejudice defendant). Appellant's third point should therefore be denied.

IV.

The trial court did not err in admitting State's Exhibits 2 and 3, the videotapes of the drug transaction, because the State laid a proper foundation in that Officer Hensley's testimony established that the videotapes were accurate representations of what they purported to show and Hensley was familiar with the subject matter and the authenticity of the tapes as he was the one who placed the video equipment in the informant's car, followed the informant and observed the transaction, reviewed the videotapes, and prepared the VHS copies admitted into evidence.

Appellant claims that there was an insufficient foundation for the admission of the videotapes. (App. Br. 56). Appellant argues 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. (App. Br. 56).

A. Standard of review

Whether or not a sufficient foundation has been laid for an exhibit is a decision within the broad discretion of the trial court. *State v. Copeland*, 928 S.W.2d 828, 846 (Mo. banc 1996). "Judicial discretion is abused when a trial court's ruling 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. Jackson*, 969 S.W.2d 773, 775 (Mo. App. W.D. 1998). If reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *State v. Biggs*, 91 S.W.3d 127, 133 (Mo. App. S.D. 2002).

B. Analysis

The same principles that govern the foundation for admissibility of photographs apply to the admission of videotapes. *State v. Powers*, 148 S.W.3d 830, 832 (Mo. App. E.D. 2004). The party offering the videotape must show that it is an accurate representation of what it purports to show and foundation may be established through the testimony of any witness who is familiar with the subject matter of the tape and competent to testify from personal observation. *Id.*

Officer Hensley laid a proper foundation for the videotape. Hensley was responsible for equipping the informant's car with the video equipment. (Tr. 116). After giving the informant instructions, Hensley also followed the informant and then watched the transaction take place from a nearby parking lot approximately four to five hundred feet away. (Tr. 118). Hensley testified to his personal observations of the transaction.¹¹ (Tr. 119). After the transaction took place, Hensley led the informant back to the pre-determined location where he turned off the videos and retrieved the video equipment. (Tr. 119-120). Hensley later reviewed the videos and stated that what was on the videos was a fair and accurate portrayal of what he saw that day. (Tr. 125). Additionally, Hensley testified that he had not

¹¹ Appellant also argues that Hensley was too far away to know the details of what was going on. (App. Br. 56, 60-61). Respondent notes, however, that Appellant did not make this objection at trial when he raised his lack of foundation objection. Rather, this argument relies on testimony elicited after the trial court had already ruled that a sufficient foundation for the videotapes had been established and the videos had been admitted and played to the jury.

made any changes or additions to either video and they were unedited from what he had taken out of the informant's car that day. (Tr. 126-27). Hensley did explain, however, that the videos were copies which had been transcribed to VHS tapes because one of the video cameras was a digital recorder and the other was an eight millimeter "which is a real small cassette that we made to a VCR where we can actually observe them." (Tr. 126-27). The correctness of a copy may be proved by the testimony of a person who has compared the copy with the original and found it to be correct. *Molasky v. State*, 710 S.W.2d 875, 878 (Mo. App. E.D. 1986); *see also Rogers v. King*, 684 S.W.2d 390, 392 (Mo. App. W.D. 1984). Therefore, as the trial court correctly found, Hensley's testimony was sufficient to provide a proper foundation for the admissibility of State's Exhibits 2 and 3.

Appellant's analysis as to the foundation of the videotapes is inapplicable in this case. In his brief, Appellant first acknowledges the appropriate standard for establishing the foundation for a videotape; however, in his analysis, Appellant applies the standard for the foundation of a sound recording. (App. Br. 59-60). Although the two standards are similar, the foundation for a sound recording consists of seven elements: (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. *State v. Wahby*, 775 S.W.2d 147, 153 (Mo. banc 1989).

Appellant concedes that elements 6 and 7 do not apply but argues “most” of the other requirements “would seem to apply” and that specifically, requirements 3 and 4 were not met. (App. Br. 60). Even applying this standard, the State laid a sufficient foundation to satisfy requirements 3 and 4. Hensley testified that he equipped the informant’s car with the video equipment, watched the transaction, and then turned off the videos and retrieved the video equipment afterwards. Hensley also reviewed the videos and stated that what was on the videos was a fair and accurate portrayal of what he saw that day. Additionally, as to the fourth requirement, Hensley testified that the videos were formatted to VHS tapes but no changes or additions to either video had been made and the tapes were unedited from what he had taken out of the informant’s car. Appellant’s fourth point is without merit and should be denied.

V.

The trial court did not plainly err in permitting Officer Hensley to identify Appellant as the man on the surveillance tapes because Hensley’s testimony was admissible and did not invade the province of the jury in that Hensley was more likely to correctly identify Appellant than was the jury and thus his testimony was helpful to the jury in determining an issue in dispute.

Appellant claims that the trial court plainly erred because the identity of the suspect in the surveillance tapes was a matter in dispute; therefore, Hensley’s testimony invaded the province of the jury. (App. Br. 62).

A. Standard of review

As Appellant concedes in his brief, he did not object to this evidence during trial, and as a result, he requests this Court to review for plain error. (App. Br. 64-65). Issues not properly preserved can be reviewed, if at all, as plain error under Rule 30.20. *State v. Brisco*, 934 S.W.2d 335, 336 (Mo. App. W.D. 1996). “Unless a claim of plain error facially establishes substantial grounds for believing that ‘manifest injustice or miscarriage of justice has resulted,’ this Court will decline to exercise its discretion to review for plain error under Rule 30.20.” *Id.* (quoting *State v. Brown*, 902 S.W.2d 278, 284 (Mo. banc 1995)). “The ‘plain error’ rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review.” *State v. Roberts*, 948 S.W.2d 577, 592 (Mo. banc 1997).

To prevail on plain error review, Appellant must show that the alleged error so substantially affected his rights, that manifest injustice or miscarriage of justice inexorably

results if left uncorrected. *State v. Wolfe*, 103 S.W.3d 915, 916 (Mo. App. W.D. 2003). Manifest injustice depends on the facts and circumstances of the particular case, and Appellant bears the burden of establishing manifest injustice amounting to plain error. *State v. Zindel*, 918 S.W.2d 239, 241 (Mo. banc 1996). Not all prejudicial or reversible error is plain error. *State v. Dowell*, 25 S.W.3d 594, 606 (Mo. App. W.D. 2000). “Plain error is evident, obvious and clear error.” *State v. Bailey*, 839 S.W.2d 657, 661 (Mo. App. W.D. 1992).

B. Analysis

Generally, a lay witness may not testify as to an opinion on a matter in dispute. *State v. Winston*, 959 S.W.2d 874, 877 (Mo. App. E.D. 1997). The rationale underlying this “opinion rule” is that since the lay witness does not possess specialized knowledge on the matter, the trier of fact is as capable as the witness to draw conclusions from the facts provided. *Id.*, *State v. Gardner*, 955 S.W.2d 819, 823 (Mo. App. E.D. 1997). “However, ‘[c]ourts 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.’” *State v. Saucy*, 164 S.W.3d 523, 529 (Mo. App. S.D. 2005) (*quoting Winston*, 959 S.W.2d at 877). Thus, in the identification context concerning the identity of a person depicted in a surveillance video, “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.” *Winston*, 959 S.W.2d at 877-78; *Gardner*, 955 S.W.2d at 824 (citing numerous federal and state cases).

This exception to the opinion rule was specifically applied in the context of identifying a suspect from a surveillance video in *State v. Gardner*, 955 S.W.2d 819, *State v. Winston*, 959 S.W.2d 874¹², and most recently in *State v. Bivines*, 231 S.W.3d 889 (Mo. App. S.D. 2007). In *Gardner*, a man robbed a gas station which had a surveillance camera that recorded the incident. *Gardner*, 955 S.W.2d at 821. The police were given the surveillance footage and an officer viewed the tape and recognized the suspect as being the defendant. *Id.* The officer explained that when he later questioned the defendant, he had the defendant stand next to the monitor and compared the defendant with the man on the tape. *Id.* at 822. The officer then testified that in his opinion, it was “without a doubt,” the defendant. *Id.* At trial, the officer testified as to his investigation and interview with the defendant, that he had known the defendant for approximately ten years, and that the defendant was the man on the videotape. *Id.*

¹² The court also applied the exception to the identification of a suspect in a surveillance video in *State v. Saucy*, 164 S.W.3d 523. The court held that the witness’s testimony was admissible on the basis that the defendant’s appearance had changed since the time of the robbery. *Id.* at 530. There is no evidence in this case that Appellant’s appearance had changed. *But see Gardner*, 955 S.W.2d at 824-25, (citing with apparent approval, *Robinson v. State*, 927 P.2d 381, 384 (Colo. 1996) (holding that “although the witness must be in a better position than the jurors to determine whether image captured by the camera is indeed that of the defendant, *this requires neither the witness to be ‘intimately familiar’ with the defendant nor the defendant to have changed his appearance.*”) (emphasis added).

On appeal, the defendant claimed that allowing the State to elicit the officer's opinion that the defendant was the man on the surveillance video invaded the province of the jury and was more prejudicial than probative because the jury simply deferred to the officer's opinion. *Id.* at 823. The court rejected the claim and held that the officer's identification "provided assistance to the trier of fact because of the poor quality of the tape and appellant's obscuring part of his face with his arm." *Id.* at 825. *See also State v. Robinson*, 908 P.2d 1152, 1154 (Colo. App. 1995) (cited in *Gardner*). The court also explained that even though the jury asked during deliberations if it was the jury's obligation to identify the appellant in the video or accept the verbal testimony, there was no indication that the jury simply deferred to the officer's opinion in light of other relevant evidence in the record. *Id.*

In *State v. Winston*, the sister of the defendant's girlfriend identified the defendant from a videotape taken from the surveillance camera at an auto care station that had been burglarized. *Winston*, 959 S.W.2d at 877. The defendant similarly claimed that the trial court was required to exclude this identification because it invaded the province of the jury. *Id.* The defendant argued that since the jury had the opportunity to see both the videotape and the defendant, the jury was in as good a position to determine if the defendant was the person as was the witness. *Id.* The court held that because the person in the video was moving quickly and was "somewhat difficult to see," and the witness was familiar with the defendant's features, there was a basis for concluding that the witness was more likely to correctly identify the defendant than was the jury. *Id.* at 878. *See also Bivines*, 231 S.W.3d at 891-94 (two officers permitted to testify that they had prior, unspecified dealings with the

defendant and could identify the defendant from the surveillance tape taken from burglarized elementary school).

In this case, similar to *Gardner*, *Winston*, and *Bivines*, the videotapes of the drug transaction were of rather poor quality, and due to the lighting on the tape, it was difficult to see Appellant's face.¹³ When Appellant was first seen approaching the car, his face was obscured by the door and roof of the car. (Ex. 2). When Appellant returned to the car and spoke with the informant, Appellant's face was blacked-out the majority of the time, due to the lighting of the tape, making it difficult to see his facial features. (Ex. 2). The evidence showed that Hensley was familiar with Appellant. Hensley testified that when he looked at the video, it appeared to be Appellant and he believed it to be Appellant based on his own knowledge. (Tr. 127, 160). Hensley also knew Appellant prior to Appellant's arrest because Appellant wanted to help the Drug Task Force. (Tr. 128). Additionally, Hensley had occasion to speak with Appellant while he was in jail. (Tr. 128-29). Therefore, given Hensley's familiarity with Appellant, he was more likely to correctly identify Appellant than was the jury and therefore his "testimony was sufficiently probative to outweigh the danger of unfair prejudice." *Gardner*, 955 S.W.2d at 825; *see also Robinson*, 927 P.2d at 384 (witness is not required to be intimately familiar with the defendant).

¹³ In the video shot from the back seat (Ex. 3), the position of the camera only allowed Appellant to briefly be seen walking up to and away from the car. (Ex. 3). Therefore, Respondent is only referencing Exhibit 2, the footage taken from the camera in the front passenger seat.

In *State v. Presberry*, 128 S.W.3d 80 (Mo. App. E.D. 2003), cited by Appellant in support of his claim, the court found that the admission of identification testimony was plain error. Consequently, Appellant argues that the case at bar is like *Presberry* rather than *Gardner*, *Winston*, or *Saucy*. *Presberry*, however, is distinguishable from the case at bar.

In *Presberry*, the defendant was alleged to have robbed two victims at the same ATM machine in the same month. *Id.* at 87. The first victim helped police create a composite sketch of the suspect but when the victim was later shown a photograph lineup, she did not choose the defendant. *Id.* The second victim provided a description of the suspect but he did not testify at trial, nor was there any evidence that he participated in any pre-trial identification procedures. *Id.* at 87-88. The lead detective investigating these incidents acquired the videotapes recorded by the ATMs during each incident and distributed photographs from the videotapes to other officers. *Id.* at 87. At trial, for purposes of identifying the defendant as the perpetrator, the State played the ATM videos while the detective described what was depicted in the tapes. *Id.* at 88. The detective also testified that he spent “numerous hours” watching the videotapes and comparing the different incidents, and as a result of his familiarity with the videotapes, pictures, and descriptions provided by the victims, he knew that the defendant was the person involved. *Id.* at 89. Another officer also testified it looked like the defendant based on photographs taken from the ATM videos and a description of the suspect that the detective had provided to him. *Id.* at 89.

In finding that the officers identification testimony was improperly admitted, the court explained that there was “no evidence or testimony that either [the Detective] or [the officer]

knew or had met Defendant at any time prior to his arrest.” *Id.* Consequently, the court held that “[a]ny identification by these two police officials is based solely on a review of the evidence that was equally available to the jurors trying the case. There was nothing that [the detective] or [the officer], given their limited familiarity with Defendant, offered to the jury that the jury could not have concluded on its own.” *Id.* Moreover, in finding that the defendant was prejudiced because the officers’ conclusive identifications may have preempted the jury’s decision, the court noted that the jury never asked to view the exhibits regarding the identification of the defendant during deliberations. *Id.* at 89-90.

In this case, distinguishable from *Presberry*, there was evidence that Hensley was familiar with Appellant prior to Appellant’s arrest. Hensley testified that when he looked at the surveillance footage, he believed the man who approached the car was Appellant based on his own knowledge. (Tr. 160). Additionally, Hensley’s testimony established that he knew Appellant prior to his arrest because Appellant had wanted to help the Drug Task Force and the two had exchanged information. (Tr. 128). Therefore, whereas the detective in *Presberry* based his identification on his familiarity with the videos and descriptions provided by the victims, Hensley’s identification of Appellant was based on his own personal familiarity with Appellant. Hensley’s identification, therefore, was not “based solely on a review of the evidence that was equally available to the jurors trying the case.” *Id.* at 89. *See also e.g., Bivines*, 231 S.W.3d at 894 (relying on *Gardner* and *Winston* and distinguishing *Presberry*, in part, because both officers who identified defendant on the surveillance tape were familiar with the defendant from prior, unspecified dealings).

Even assuming, *arguendo*, that Hensley's testimony was improper as in *Presberry*, the court's finding of prejudice in *Presberry* is also distinguishable from the case at bar. First, "There is no exact formula for determining whether plain error has occurred. 'Consequently, it has been judicially recognized that the existence or non-existence of "plain error" must be coped with on a case to case basis and rebalanced each time against the particular facts and circumstances of each case.'" *State v. Golden*, 221 S.W.3d 444, 446-47 (Mo. App. S.D. 2007)(quoting *State v. Miller*, 604 S.W.2d 702, 706 (Mo. App. W.D. 1980)). Whereas the *Presberry* court noted that the jury never asked to view the exhibits in finding that the officers' conclusive identifications of the defendant may have preempted the jury's decision whether the defendant was the person in the videotapes, in this case, the jury did request the videotapes and they viewed them again during their deliberations. Additionally, the *Presberry* court's finding of prejudice was also based on the fact that there was limited other evidence connecting the defendant to the crimes. *Presberry*, 128 S.W.3d at 90. In this case, however, there was also evidence that 315 Riley Street, the house the suspect went into after approaching the informant before returning to make the transaction, was where Appellant lived. As a result, Appellant has not, nor could he, demonstrate manifest injustice or miscarriage of justice.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 15,391 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 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 this 26th day of March, 2008, to:

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APPENDIX

Sentence and judgment.....	A1
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