No. SC88274

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ROBERT SALTER,

Appellant.

Appeal from St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable John A. Ross, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction obtained in the Circuit Court of St. Louis County for the class D felony of failure to insure workers' compensation liability, section 287.128.5, RSMo,[1] for which Appellant was sentenced to one year in jail, a $5,000 fine, and a $25,000 penalty. This appeal involves the validity of a state statute, section 287.128, RSMo, which is being challenged by Appellant on the basis that the legislation enacting that section violated the single-subject and clear-title requirements of article III, section 23 of the Missouri Constitution. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const. art. V, § 3.

[1] All statutory references are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

On September 11, 2006, Appellant was charged in an information in lieu of indictment with the class D felony of failure to insure workers' compensation liability, section 287.182.5, RSMo. (L.F. 2, 17-18). Appellant was tried by a jury on October 23-26, 2006, before Judge John A. Ross. (L.F. 3). Appellant contests the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

Appellant was president of a corporation known as Housecalls, Inc. (hereafter "Housecalls"), which also did business under the name Business Management Corporation. (Tr. 99, 122). Uchechi Brown was the corporation's secretary. (Tr. 99, 123). On December 4, 2002, Appellant had pleaded guilty to the misdemeanor offense of failing to provide workers' compensation insurance. (Tr. 82; L.F. 19).

The Fraud and Noncompliance Unit of the Division of Workers' Compensation received a complaint about Housecalls in 2004. (Tr. 16). Investigator Randolph Wilkins checked a computer database that contains records on whether Missouri businesses have a current workers' compensation insurance policy. (Tr. 17). The database indicated that Housecalls had not carried workers' compensation insurance since February of 2003. (Tr. 94). Wilkins also inspected quarterly wage reports filed by Housecalls. (Tr. 18). The records showed that Housecalls had six employees in the first, second, and third quarters of 2003; and five employees in the fourth quarter of 2003, and in the first, second, and third quarters of 2004. (Tr. 26-29; State's Ex. 1).

Wilkins made an unannounced visit to Appellant's office in Olivette in November of 2004. (Tr. 37-38). When he arrived, Wilkins saw fifteen or sixteen people inside the office suite. (Tr. 39). Wilkins met with Appellant, and asked Appellant if Housecalls was carrying workers' compensation insurance. (Tr. 40-41). Appellant admitted that he did not have insurance for Housecalls and told Wilkins that he was not required to carry insurance because Housecalls had only five employees. (Tr. 40, 41, 70, 74). Wilkins informed Appellant that the law required him to carry insurance if he had five or more employees. (Tr. 70, 74-75). Appellant told Wilkins at another point in the conversation that he had only three employees. (Tr. 84). Appellant indicated that he managed another business called Day Star that had numerous employees. (Tr. 41). Appellant said that he carried workers' compensation insurance for that business, and he gave Wilkins a copy of the policy. (Tr. 41).

Appellant did not testify in the guilt phase of the trial. (Tr. 203). He presented one witness, Uchechi Brown. (Tr. 119). Brown testified that she was a registered nurse and that she met Appellant at a home health agency conference in 2002. (Tr. 120, 121). Brown had just sold her home health agency and Appellant had just started Housecalls, so the two discussed doing business together. (Tr. 121-22). Brown eventually decided to invest money in Housecalls, and received shares of stock in return. (Tr. 122).

Brown also served on the board of directors and was secretary of the corporation. (Tr. 123, 135; State's Ex. 2, pp. 23, 25). As secretary, she took minutes of the shareholder's and board of director's meetings. (Tr. 123, 135). She also kept the corporate meeting book, which contained the minutes and other documents pertaining to

Housecall's corporate status. (Tr. 123, 131). Brown also ensured that all required notices were properly given, and that the corporate seal was affixed to all stock certificates and on documents that required a seal. (Tr. 135). Brown also maintained records of the addresses of all shareholders in the corporation and had general charge of the corporation's stock transfer books. (Tr. 135). Brown was not compensated for those duties. (Tr. 136).

Brown testified that she worked for Housecalls as an independent contractor. (Tr. 137). Brown said that she entered into separate work for hire agreements with the corporation for the years 2003 through 2005. (Tr. 137-38). The contracts called for Brown to perform business development and marketing services to recruit clients to the company. (Tr. 140). Brown was not able to produce the original agreement that would have covered the year 2004. (Tr. 141, 156). Brown produced what she said was a reprint of the agreement that she signed on December 6, 2004. (Tr. 156, 172). That reprint contained an address for the corporation that it did not have until 2005. (Tr. 157, 172). The lease for that building was signed on December 14, 2004. (Tr. 201). Brown asked Appellant to withhold payroll taxes from the money she was paid under the contracts, and she received W-2 forms at the end of each year. (Tr. 144, 165).

After the jury found Appellant guilty of failing to provide workers' compensation insurance, it heard evidence and argument in the penalty phase of the trial and returned with a recommendation of two years imprisonment and a fine in an amount to be determined by the court. (L.F. 3, 49, 56). Appellant was sentenced on December 4, 2006 to a term of one year imprisonment in the custody of the St. Louis County Department of

Justice Services, and a fine of $5,000. (L.F. 4, 93-95; Tr. 336). The court also imposed a penalty of $25,000, pursuant to section 287.128.5, RSMo. (L.F. 91; Tr. 337). This appeal follows. (L.F. 4, 96-99).

ARGUMENT

I.

The trial court did not err in overruling Appellant's Amended Motion to Dismiss because section 287.128.5, RSMo 2000, is constitutional, in that Appellant has waived all constitutional claims except for the alleged violation of article III, section 23 of the Missouri Constitution and section 287.128.5, RSMo, complies with the single-subject and clear-title requirements of that constitutional provision since the statute regulates and enforces the Workers' Compensation Act, and workers' compensation was the subject of the enacting legislation.

Appellant claims that the statute under which he was convicted, section 287.128.5, RSMo, is unconstitutional. While Appellant raised numerous grounds for this claim before the trial court, the only theory argued in his brief is that the legislation enacting section 287.128 violated the single-subject and clear-title requirements of article III, section 23 of the Missouri Constitution.

A. Underlying Facts.

Appellant was indicted on February 23, 2005. (L.F. 1). He filed a motion to dismiss on January 13, 2006, followed by an amended motion to dismiss on February 9, 2006. (L.F. 1). The amended motion contained five claims: 1) that section 287.128.5 denies defendants due process of law in that the number of employees to be counted for an employer to suffer a criminal penalty is too vague because "executive officers" of a corporation is not defined in section 287.020.1, RSMo; 2) that the criminal penalty provisions of section 287.128.5 violates article I, section 11 of the Missouri Constitution

by punishing defendants for failing to pay a debt, namely a workers' compensation insurance premium, and using twice the annual premium as a penalty; 3) that section 287.128.5 violates due process of law by creating a criminal penalty and jail time without the defendant knowingly and intentionally failing to insure employees; 4) that Senate Bill 251 and House Bills 1237, 1409, 1166, 1154 and 1491 have different penalty provisions for section 287.128.5, and are therefore vague as to when a defendant can be charged with a misdemeanor or a felony; and 5) that the previously mentioned legislation violates the single-subject requirement of article III, section 23 of the Missouri Constitution. (L.F. 8-9).

The amended motion to dismiss was overruled on March 7, 2006. (L.F. 10-11). Appellant filed a Petition for Writ of Prohibition with the Missouri Court of Appeals, Eastern District, that was denied on April 11, 2006. (L.F. 104). Appellant then filed a Petition for Writ of Prohibition with this Court that was denied on July 13, 2006. (L.F. 105). An information in lieu of indictment was filed on September 11, 2006, that corrected a clerical error. (L.F. 17-18).

During the course of the trial, Appellant made motions for judgment of acquittal after the State's opening argument, at the close of the State's evidence, and at the close of all the evidence. (Tr. 11, 111-13, 203-06). The constitutional claims were not reasserted at those times. The day after the motion for judgment of acquittal at the close of all the evidence was denied, Appellant made a supplemental record, arguing that the criminal penalty in section 287.128 violates due process and equal protection because the burden of determining who is an employer under chapter 287 cannot be adequately defined to a

jury, and because the burden of proof is shifted to the defendant. (Tr. 208). The motion for new trial alleged that:

> The Court erred in overruling defendant's amended motion to dismiss, for all the reasons set forth in said amended motion to dismiss, including the unconstitutionality of § 287.128.5, R.S. Mo., in violation of Article I, Sections 10 and 11, and Article III, Section 23 of the Missouri Constitution, and the Fourteenth Amendment to the Constitution of the United States.

(L.F. 59).

B. Standard of Review.

Laws enacted by the legislature and approved by the governor have a strong presumption of constitutionality, and the use of procedural limitations to attack the constitutionality of statutes is not favored. *Trout v. State*, 231 S.W.3d 140, 144 (Mo. banc 2007). This Court interprets procedural limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act clearly and undoubtedly violates the constitutional limitation. *Id.* Appellant bears the burden of proving such a clear and undoubted violation. *Id.*

C. Analysis.

1. Waiver of Claims.

As noted above, Appellant challenged the constitutionality of section 287.128.5 in the trial court based on five different grounds. (L.F. 8-9). In his brief before this Court, Appellant declines to present any argument on the first four of those grounds, stating that they are so obvious that further discussion is not merited. (Appellant's Brf., p. 28). By failing to present any argument or authority in support of those claims, Appellant has waived them. *State v. Nicklasson*, 967 S.W.2d 596, 618 (Mo. banc 1998). By failing to develop any argument on those first four grounds, Appellant is asking this Court to take on the unwelcome role of serving as an advocate:

> When counsel fail in their duty by filing briefs which are not in conformity with the applicable rules and do not sufficiently advise the court of the contentions asserted and the merit thereof, the court is left with the dilemma of deciding that case (and possibly establishing precedent for

future cases) on the basis of inadequate briefing and advocacy or undertaking additional research and briefing to supply the deficiency. Courts should not be asked or expected to assume such a role. In addition to being inherently unfair to the other party to the appeal, it is unfair to parties in other cases awaiting disposition because it takes from them appellate time and resources which should be devoted to expeditious resolution of their appeals.

Thummel v. King, 570 S.W.2d 679 (Mo. banc 1978).

By omitting any argument in the brief, Appellant has also failed to properly preserve the four alleged constitutional errors. To preserve a constitutional question for review, the matter must be raised at the earliest opportunity, the sections of the constitution alleged to have been violated must be specifically asserted, the matter must be preserved in the motion for new trial, and *the questions must be adequately covered in the briefs*. *State v. Pullen*, 843 S.W.2d 360, 364 (Mo. banc 1992) (emphasis added). With the exception of the alleged violation of the single-subject and clear-title requirements of article III, section 23, Appellant has left this Court with nothing to review regarding his constitutional claims.

2. Single-subject and clear-title requirements.

Article III, section 23 of the Missouri Constitution provides:

No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may

embrace the various subjects and accounts for which moneys are appropriated.

Mo. Const. art. III, § 23.

The analysis of whether a bill meets the single-subject requirement turns on the general core purpose of the proposed legislation. *Trout*, 231 S.W.3d at 146. Article III, section 23 dictates that the subject of a bill include all matters that fall within or reasonably relate to that general core purpose. *Id.* In determining whether a bill violates the single-subject rule, the test is not whether individual provisions of the bill relate to each other, but whether the challenged provision fairly relates to the subject described in the title of the bill, has a natural connection to the subject, or is a means to accomplish the law's purpose. *Id.*

It should first be noted that Appellant's argument on section 287.128.5 discusses legislative enactments passed in 1993 and 1998. 1993 Mo. Laws 763-816; 1998 Mo. Laws 435-72. To the extent that Appellant is challenging Senate Bill 251, which was passed in 1993, that challenge is moot. *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 325 (Mo. banc 2000). House Bills 1237, 1409, 1166, 1154 and 1491 (hereafter "House Bill 1237"), passed in 1998, repealed "former" section 287.128 and enacted in lieu thereof a "new" section 287.128. 1998 Mo. Laws 436. The repeal of a law means its complete abrogation by the enactment of a subsequent statute. *Id.* Once the General Assembly repealed the "former" section 287.128, this Court's basis for deciding the constitutionality of that statute evaporated, and no relief can be granted concerning the validity of that statute. *Id.*

The version of the statute under which Appellant was convicted was enacted in 1998 in House Bill 1237. § 287.128, RSMo 2000. The title of that bill reads:

> AN ACT to repeal sections 287.030, 287.035, 287.061, 287.090, 287.123, 287.128, 287.140, 287.160, 287.170, 287.190, 287.197, 287.210, 287.220, 287.250, 287.270, 287.337, 287.380, 287.430, 287.460, 287.480, 287.495, 287.530, 287.610, 287.615 and 287.640, RSMo 1994, and sections 287.280 and 287.650, RSMo Supp. 1997, relating to workers' compensation, and to enact in lieu thereof twenty-nine new sections relating to the same subject, with penalty provisions.

1998 Mo. Laws 436. This Court has found that similar titles met the single-subject requirement.

One of those cases involved a challenge to provisions disqualifying certain persons from being candidates for political office. *See Trout*, 231 S.W.3d at 143. Those provisions were contained in a bill entitled: "An Act to repeal [thirteen sections] and enact in lieu thereof sixteen new sections related to ethics, with an effective date." *Id.* The Court found that the general core subject of the legislation was ethics, and that the "candidate disqualification amendments fit well within the core subject of ethics." *Id.* at 146.

In another case, provisions prohibiting tax increment financing districts in flood plain areas were sufficiently related to the subject of "emergency services" to pass constitutional muster. *City of St. Charles v. State*, 165 S.W.3d 149, 151-52 (Mo. banc 2005). A provision identifying the proper venue to bring action against a not-for-profit

corporation was held to be fairly related to the subject of "general not for profit corporations." *State ex rel. St. John's Mercy Health Care v. Neill*, 95 S.W.3d 103, 106 (Mo. banc 2003). A bill's provisions on insurance, health records, and pre-operation information on breast implantation were found to be incidents or means to the subject of "health services." *Missouri State Med. Ass'n v. Missouri Dept. of Health*, 39 S.W.3d 837, 841 (Mo. banc 2001). A provision regulating billboards was determined to be fairly related to the subject of transportation. *C.C. Dillon Co.*, 12 S.W.3d at 329.

A bill entitled "An Act . . . relating to environmental control" was challenged on the ground that it contained many provisions not within that subject, such as the establishment of certification and training requirements for asbestos contractors. *Corvera Abatement Tech. v. Air Conservation Com'n*, 973 S.W.2d 851, 860, 862 (Mo. banc 1998). This Court found that the bill included both substantive provisions that directly regulated environmental hazards, as well as administrative provisions that allowed for the enforcement of those and other provisions that protect the environment. *Id.* at 862. The Court concluded that, "[b]oth types of provisions fairly relate to and are a means of accomplishing environmental control – in fact, both are necessary for effective environmental regulation." *Id.* The same can be said of section 287.128, as enacted in House Bill 1237. The bill sets forth the substantive provisions of the workers' compensation law, the means for enforcing that law, the penalties for noncompliance, and programs that further the purposes of the law.

Section 287.128 is one of the sections setting forth enforcement and penalty provisions. § 287.128, RSMo 2000. It is necessary for effective regulation of the

workers' compensation law and fairly relates to the bill's subject of workers' compensation. In that regard, it is distinguishable from *State v. Persinger*, the 125-year-old case on which Appellant relies. The title of the challenged legislation in *Persinger* was, "An act to change the penalty for disturbance of the peace." *State v. Persinger*, 76 Mo. 346, 346 (1882). The Court found that a provision expanding the scope of the actual offense of disturbing the peace did not fall within the bill's title. *Id.* The bill title in *Persinger* was much more narrowly defined than the bill title at issue here, or in any of the cases cited above. Changing the scope of the offense of disturbing the peace did not, therefore, fairly relate to the purpose set forth in the bill's title, which was to change the penalty for the law as it then existed. *See id.*

House Bill 1237 further complies with the single-subject requirement because all the sections repealed by the bill, and most of the new sections created by it amend chapter 287 of the Missouri revised statutes. *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 327 (Mo. banc 1997). Provisions amending the workers' compensation chapter of the State code may be said to fairly relate to the bill's subject of laws "relating to workers' compensation." *Id.* The sections created by the bill that are not in chapter 287 also relate to workers' compensation, as they establish a program to provide scholarships to the children of workers who were seriously injured or killed in a work-related accident or occupational disease covered by worker's compensation and compensable under chapter 287. 1998 Mo. Laws 470-72 *codified as* § 173.254 *et seq.*, RSMo 2000. Funding for the scholarships comes from the premium tax collected pursuant to section 287.690, RSMo, and is deposited into the scholarship fund by the director of the Division

of Workers' Compensation. § 173.258, RSMo 2000. Those provisions have a natural connection with the subject of worker's compensation and they provide a means for carrying out the objectives of the workers' compensation act.

In his brief, Appellant refers to the clear-title requirements of article III, section 23. Appellant did not raise a clear-title challenge in his amended motion to dismiss and has thus not properly preserved such a challenge. *Pullen*, 843 S.W.2d at 364. Even if a clear-title challenge had been properly preserved, it would fail. The clear-title requirement is intended to keep legislators and the public fairly apprised of the subject matter of pending laws. *Jackson County Sports Complex Auth. v. State*, 226 S.W.3d 156, 161 (Mo. banc 2007). The clear-title requirement is infringed only if the title is either underinclusive or too broad and amorphous to be meaningful. *Id.* Appellant's argument seems to suggest that the title of House Bill 1237 is too broad and amorphous. The only cases in which this Court has found a title to be too broad and amorphous are those in which the title could describe the better part of all legislation passed by the General Assembly. *Id.* "In all other cases in which the bill's title 'does not describe most, if not all, legislation enacted' or include nearly every activity the state undertakes, the Court has rejected arguments that a title was overinclusive." *Id.*

The following titles have been upheld in the face of clear-title challenges: "political subdivisions," *Jackson County Sports Complex Auth.*, 226 S.W.3d at 162; "general not-for-profit corporations," *State ex rel. St. John's Mercy Health Care*, 95 S.W.3d at 106; "health services," *Missouri State Med. Ass'n*, 39 S.W.3d at 841; "transportation," *C.C. Dillon Co.*, 12 S.W.3d at 329-30; "environmental control,"

Corvera Abatement Tech., 973 S.W.2d at 861-62. Like those titles, "workers' compensation" is the type of broad umbrella category that this Court has found passes constitutional muster. It does not describe most of the legislation enacted by the General Assembly and does not include nearly every activity the State undertakes. House Bill 1237 does not violate the clear-title requirement of article III, section 23.

3. Other Constitutional Claims.

Appellant has waived review of the four consitutional claims that were not briefed on appeal. But, out of an abundance of caution, those claims are briefly addressed.

Appellant raises two vagueness claims. The first is that the term "executive officers" of a corporation is vague and that the State attempted to apply the term to Uchechi Brown, who not an executive officer of the corporation. (L.F. 8). The second claim is that enacting legislation created different penalty provisions for section 287.128.5 RSMo, making the statute vague as to when a charge is a misdemeanor or a felony. (L.F. 8)

A statute is unconstitutionally vague if it does not give a person of ordinary intelligence sufficient warning as to the prohibited behavior. *State v. Self*, 155 S.W.3d 756, 760 (Mo. banc 2005). When reviewing a vagueness challenge, it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing. *Id.* The language is to be treated by applying it to the facts at hand. *Id.*

Section 287.128.5 is not vague when applied to the facts of this case. Appellant claims that the term "executive officer" was applied improperly to Uchechi Brown. The evidence, including Brown's own testimony, established that she was the corporate

secretary for Housecalls, Inc. (Tr. 99, 123). She was elected to that position pursuant to a consent executed by the shareholders of the corporation. (State's Ex. 2, p. 23). Her duties as secretary were set forth in Article 5 of the corporation bylaws, which was labeled, "duties of officers." (Tr. 134). Missouri's General and Business Corporations law states:

> **Officers – how chosen – powers and duties. –** 1. Every corporation organized under this chapter shall have a president and a secretary, who shall be chosen by the directors, and such other officers and agents as shall be prescribed by the bylaws of the corporation. Unless the articles of incorporation or bylaws otherwise provide, any two or more offices may be held by the same person.

§ 351.360.1, RSMo 2000. Brown was clearly an executive officer of Housecalls, so the statutory term as applied to her in this case was not vague.

The penalty provisions of section 287.128.5 are also not vague. The statute makes an employer's failure to insure his workers' compensation liability a class A misdemeanor, unless the employer has previously pleaded guilty or been found guilty of violating the provisions of sections 287.128 or 287.129, in which case the offense is a class D felony. § 287.128.5, RSMo 2000. The statute sets out clear and understandable penalty provisions.

Appellant also contends that the criminal penalty provisions of section 287.128.5 violate article I, section 11 of the Missouri Constitution by punishing defendants for failing to pay a debt, namely a workers' compensation premium. (L.F. 8). This Court

has previously found that imprisonment for violation of the law does not violate that constitutional provision. *State v. Taylor*, 335 Mo. 460, 464, 73 S.W.2d 378, 380 (1934).

Finally, Appellant argues that section 287.128.5 violates due process by creating a criminal penalty and jail time without the defendant knowingly and intentionally failing to insure employees. (L.F. 8). Appellant presumably refers to the lack of a culpable mental state in the statute. In such a case, however, a culpable mental state of purposely or knowingly is imputed into the statute, unless such imputation would be inconsistent with the purpose of the statute or would lead to an absurd or unjust result. *Self*, 155 S.W.3d at 762; §§ 562.021.3 and 562.026.2, RSMo 2000.

The jury in this case was instructed that it had to find that Appellant knowingly performed or knowingly caused to be performed the failure of Housecalls to provide workers' compensation insurance for its employees.[2] (L.F. 41). The instruction also defined the term, "knowingly." (L.F. 42). Appellant's claim is not well taken.

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[2] Despite that instruction, section 287.128.5 could arguably be construed as a strict liability statute. The statute as originally enacted made it unlawful to "fraudulently fail to provide adequate workers' compensation coverage for every employee . . . ." § 287.128.1(2), RSMo Supp. 1992. It was changed the following year to state that "any employer failing to insure his liability pursuant to this chapter shall be guilty of a class A misdemeanor." § 287.128.5, RSMo Supp. 1993. The removal of "fraudulently" from the failure to insure provisions appears to evidence a clear legislative intent that the statute does not require a culpable mental state. *Self*, 155 S.W.3d at 762.

II.

The trial court did not err in overruling Appellant's motions for judgment of acquittal and in entering judgment against him because the jury's verdict was supported by sufficient evidence, in that Housecalls, Inc. had a duty under the law to insure its workers' compensation liability and Appellant is liable under section 562.061, RSMo for failing to procure insurance on Housecall's behalf.

Appellant contends there is insufficient evidence to sustain his conviction because he was under no duty to personally acquire workers' compensation insurance for the employees of Housecalls, Inc., so that the failure to procure insurance is not "conduct" giving rise to criminal liability.

A. Standard of Review.

In reviewing the sufficiency of the evidence to support a criminal conviction, the appellate court does not act as a "super juror" with veto powers, but gives great deference to the finder of fact. *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998). 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. *Id.* In applying this standard, this Court accepts as true all of the evidence favorable to the State, including all favorable inferences drawn from the evidence, and disregards all evidence to the contrary. *Id.* The credibility and the effects of conflicts or inconsistencies in testimony are questions for the jury, and the appellate court will not interfere with the jury's role of weighing the credibility of witnesses. *State v. Still*, 216 S.W.3d 261, 263 (Mo. App. S.D. 2007).

B. Analysis.

The Workers' Compensation Act requires every employer subject to chapter 287 to furnish compensation for personal injury or death of an employee arising out of and in the course and scope of employment. § 287.120.1, RSMo 2000. The statute under which Appellant was charged provides that:

> Any employer failing to insure his liability pursuant to this chapter shall be guilty of a class A misdemeanor and, in addition, shall be liable to the state of Missouri for a penalty in an amount equal to twice the annual premium the employer would have paid had such employer been insured or twenty-five thousand dollars, whichever amount is greater. Any person who has previously pled guilty to or has been found guilty of violating any of the provisions of this section or the provisions of section 287.129 and who subsequently violates any of the provisions of this section or the provisions of section 287.129 shall be guilty of a class D felony.

§ 287.128.5, RSMo 2000.

The jury was instructed that it had to find the following elements beyond a reasonable doubt in order to convict Appellant:

> First, that between February 1, 2004 and September 12, 2004, in the County of St. Louis, State of Missouri, Housecalls, Inc., was an employer, and
>
> Second, that Housecalls, Inc., did not have Workers' Compensation Insurance for its employees, and

> Third, that the conduct above described was knowingly performed or knowingly caused to be performed by Robert Salter, an agent of the corporation while acting within the scope of his employment and in behalf of Housecalls, Inc.

(L.F. 41).[3]

Criminal liability must be based on conduct which includes a voluntary act. § 562.011.1, RSMo 2000. A "voluntary act" includes "[a]n omission to perform an act of which the actor is physically capable." § 562.011.2(2), RSMo 2000. "A person is not guilty of an offense based solely upon an omission to perform an act unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law." § 562.011.4, RSMo 2000.

Both of the requirements of subsection four are met in this case. Every employer as defined in chapter 287 is subject to the provisions of that chapter and is required to furnish compensation as that chapter provides. §§ 287.060 and 287.120.1, RSMo 2000.

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[3] The information alleged that Appellant was an employer as defined in section 287.030, RSMo. (L.F. 17). Appellant has not raised any allegation of error regarding that variance between the information and the instruction. Even if he had, the variance is not fatal because the instruction did not submit a new and distinct offense to the jury. *State v. Jones*, 930 S.W.2d 453, 455 (Mo. App. E.D. 1996). Both the information and the instruction refer to the same offense of failing to insure workers' compensation liability. *Id.* (L.F. 17, 41).

Additionally, section 287.128.5, RSMo, makes it an offense for an employer to fail to insure his liability under chapter 287. § 287.128.5, RSMo 2000. The Workers' Compensation Act thus creates a duty on employers to provide liability coverage to their employees, and makes it an offense to fail to perform that duty.

Appellant argues that Housecalls, Inc. was an employer under the Act, and that he did not have any personal duty to provide insurance covering the corporation's employees. Individual liability for corporate conduct is governed by section 562.061, RSMo:

> A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation or unincorporated association to the same extent as if such conduct were performed in his own name or behalf.

§ 562.061, RSMo 2000. The definition of "employer" under the Workers' Compensation Act includes individuals. § 287.030.1(1), RSMo 2000 ("Every person . . . using the service of another for pay"). If Appellant had employed five or more persons in his own name, or on his own behalf, and failed to insure his workers' compensation liability, he would be guilty of an offense under section 287.128.5, RSMo. Appellant is therefore equally liable under section 562.061 for his failure to procure workers' compensation insurance on behalf of Housecalls.

That distinguishes this case from the *Parvin* case on which Appellant relies. *People v. Parvin*, 533 N.E.2d 813 (Ill. 1988). That decision was based on a construction of Illinois statutes governing the filing of tax returns by persons engaged in the business

of selling tangible personal property at retail. *Id.* at 815, 817. The court found those statutes specifically exempted corporate officers from criminal liability for the failure of a corporation to file returns. *Id.* at 815. Since the defendant, a corporate officer, could not be held liable for the failure to file a return in his own name or on his own behalf, he also could not be held liable for failing to file returns on the corporation's behalf. *Id.* at 817. Missouri's Workers' Compensation Act contains no similar provision that would exempt Appellant from liability for a failure to insure that was done in his own name or on his own behalf. *Parvin* thus does not support Appellant's claim.

Appellant nonetheless argues that the word "conduct" as used in section 562.061 does not equate to a failure to act because the statute does not contain the "omission to perform" language contained in section 562.011. Appellant is asking this Court to find that the word "conduct" has different meanings in different sections of chapter 562. Such a construction would be contrary to the rule that "[t]he provisions of a legislative act are not read in isolation, but construed together, and if reasonably possible, the provisions will be harmonized with each other." *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003). "The principle of construing statutes harmoniously when they relate to the same subject matter is all the more compelling when they are enacted at the same session of the General Assembly." *State v. Holmes*, 654 S.W.2d 133, 135 (Mo. App. E.D. 1983). Sections 562.011 and 562.061 were both enacted in 1977 through the passage of Senate Bill 60. 1977 Mo. Laws 676, 678. *Holmes* involved several other sections enacted as part of that same legislation, and found that the sections must be presumed to be compatible and given a harmonious interpretation. *Holmes*, 654

S.W.2d at 135. Applying those same principles to this case leads to the conclusion that the term "conduct" has the same meaning in both sections, and that an individual can be liable under section 562.061 for the failure to perform an act.

III.

The trial court did not abuse its discretion in denying Appellant's Motion for Continuance because Joel Kamil's testimony on whether Uchechi Brown was an independent contractor was not material to the case, and even if it were, Appellant did not exercise due diligence in securing Kamil's appearance at trial to testify, in that:

1. **Uchechi Brown met the statutory definition of "employee" due to the work she performed as the corporate secretary for Housecalls, so that whether she contracted to do other work for the corporation was irrelevant to determining her status, and**
2. **Defense counsel was aware throughout the twenty month pendency of the case that Brown's status as an independent contractor or an employee was an issue he wanted to pursue, yet he did not contact Kamil about testifying until the Friday before the Monday on which Appellant's second trial was scheduled to begin.**

Appellant contends the trial court abused its discretion in denying his Motion for Continuance based upon the absence of a witness.

A. Underlying Facts.

Appellant's first trial on the instant charge began on September 12, 2006, and ended the following day when the court declared a mistrial. (L.F. 2). The case was reset for trial on October 23, 2006. (L.F. 2). Appellant filed a Motion for Continuance on the first day of the second trial. (L.F. 3, 22-24). The motion alleged that Appellant planned to call as a witness Joel Kamil, a certified public accountant who had previously performed accounting services for Housecalls. (L.F. 22). Kamil was expected to offer an opinion that Uchechi Brown was an independent contractor with Housecalls and not an employee of Housecalls. (L.F. 23). The motion also alleged that Kamil had informed defense counsel that he had long-standing plans to be out of the St. Louis area from Monday, October 23, 2006, until late Wednesday, October 25, 2006. (L.F. 23).

At a pre-trial hearing on Monday, October 23rd, defense counsel indicated that he had spoken with Kamil late the previous Friday about his availability as a witness. (Tr. 3). At that time, Kamil informed defense counsel that he had out-of-town business meetings and would not be back until Thursday. (Tr. 4). The court noted that Kamil was not endorsed as a witness, even though the case had been pending since February 23, 2005, and there had been a previous trial in the matter. (Tr. 4). The court also noted that defense counsel had not mentioned Kamil during a hearing conducted the previous Thursday. (Tr. 4). The court denied the motion as untimely. (Tr. 5).

B. Standard of Review.

The decision to grant a continuance is within the sound discretion of the trial court. *State v. Christeson*, 50 S.W.3d 251, 261 (Mo. banc 2001). Reversal is warranted only upon a very strong showing that the court abused its discretion and prejudice resulted. *Id.*

C. Analysis.

An application for continuance on account of the absence of a witness must contain facts showing: (1) the materiality of the evidence sought to be obtained; (2) due diligence on the part of the applicant to obtain such testimony; (3) the name and address of the witness; and (4) the reasonable grounds for belief that the attendance of the witness will be procured in a reasonable time. Supreme Court Rule 24.10. In exercising its discretion whether to grant a continuance, the trial court is entitled to consider whether the application meets the requirements of the rule. *State v. McGinnis*, 622 S.W.2d 416, 420 (Mo. App. S.D. 1981).

1. Kamil's testimony was not material.

Kamil's proposed testimony on whether Uchechi Brown was an independent contractor did not involve a material issue in the case because it would not have affected the determination of whether Brown was an employee under the Worker's Compensation Act. For purposes of the Act, an "employee" is defined as: "every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations." § 287.020.1, RSMo 2000.

The Missouri Court of Appeals has noted that corporate officers are apt to be under less control in the performance of their duties than the typical employee, but are unlike independent contractors in that they are "intimately and permanently involved in the operation of the business." *Lynn v. Lloyd A. Lynn, Inc.*, 493 S.W.2d 363, 366 (Mo. App. St.L.D. 1973). As a result, the court concluded that: "the criteria by which independent contractor status is determined is not adequate to meet the needs of the unique problems created by executive officers of corporations." *Id.* Subsequent to *Lynn*, section 287.020.1 has been construed as providing employee status to those corporate executive officers who, in the performance of their duties, are involved in the operation of the business, or who are subjected to the hazards of the occupation or industry. *McFarland v. Bollinger*, 792 S.W.2d 903, 906-07 (Mo. App. S.D. 1990).

There was ample evidence that Brown was involved in the operation of Housecalls through her duties as corporate secretary and that she was "intimately and permanently involved" in the operation of Housecalls. Brown testified that she met Appellant at a home health agency conference in 2002. (Tr. 120, 121). Brown had just sold her home health agency and Appellant had just started Housecalls, so the two discussed doing business together. (Tr. 121-22). Brown eventually decided to invest money in Housecalls, and she received shares of stock in return. (Tr. 122).

Brown was elected secretary of the corporation on December 20, 2002. (State's Ex. 2, p. 23). As secretary, Brown took minutes of the shareholder's and board of director's meetings. (Tr. 123, 135). She also kept the corporate meeting book, which contained the minutes and other documents pertaining to Housecall's corporate status.

(Tr. 123, 131). Brown also ensured that all required notices were properly given and that the corporate seal was affixed to all stock certificates and on documents that required a seal. (Tr. 135). Brown also maintained records of the addresses of all shareholders in the corporation, and she had general charge of the corporation's stock transfer books. (Tr. 135).

Since Brown met the statutory definition of employee through her duties as corporate secretary, the fact that she might have provided other services for Housecalls through a contract for hire was irrelevant to determining her status. If the trial court made any error, it was in permitting Appellant to present irrelevant evidence and argument to the jury about the independent contractor issue.

2. Lack of due diligence.

Even if the issue of Brown's independent contractor status was material, Appellant's application for continuance was still deficient because it failed to set forth any facts establishing diligence on the part of Appellant or his counsel in obtaining Kamil's presence at trial or otherwise presenting his testimony. *Id.* Because the application was deficient in form and in substance, the trial court did not abuse its discretion in denying it. *Id.*

Furthermore, counsel's comments at the hearing on the motion showed that he failed to exercise due diligence in securing Kamel as a witness. By the time the motion was filed, the case against Appellant had been pending for about twenty months. (L.F. 1, 3). The trial date had been set about forty days before the motion was filed, and that setting was made after a previous trial ended in a mistrial. (L.F. 2). Despite all that,

defense counsel did not contact Kamil until the Friday before the Monday trial date. (Tr. 3, 4).

The issue on which Kamil was to testify was whether Uchechi Brown was an independent contractor with Housecalls as opposed to an employee. The trial court questioned whether Kamil would be able to give an opinion on that subject and whether such testimony would be admissible. (Tr. 6). Even if Kamil could have properly testified, the issue was one which should have been familiar to Appellant and his counsel from the beginning of the case. Appellant would also have been well aware during that time of the existence of the work for hire agreement between Housecalls and Brown. A trial court does not abuse its discretion in denying a request for a continuance where defense counsel had ample opportunity to seek expert advice. *State v. Knapp*, 534 S.W.2d 465, 467 (Mo. App. St.L.D. 1975).

Appellant would also have known of Kamil's existence based on the motion's allegation that he had previously done bookkeeping work for Housecalls. (L.F. 22). Despite that, counsel waited until the eve of trial to contact Kamil about his availability to testify. "A litigant ought not to wait until the trial to find out whether a witness he contends to be material to his defense is available." *State v. McDowell*, 525 S.W.2d 444, 446 (Mo. App. K.C.D. 1975). There is also nothing in the record to indicate that Appellant tried to secure Kamil's attendance through a subpoena. *See State v. Nunley*, 482 S.W.2d 503, 504 (Mo. 1972). A court acts within its discretion in denying a continuance where it can conclude that the defendant is not making every effort to secure

the attendance of a witness he claims is indispensible. *State v. Murry*, 580 S.W.2d 555, 557-58 (Mo. App. E.D. 1979).

Appellant also cannot show that he was prejudiced by the denial of the motion for continuance. To establish prejudice, Appellant has to show that Kamil's testimony would have changed the outcome of the trial. *State v. Dodd*, 10 S.W.3d 546, 554-55 (Mo. App. W.D. 1999). No prejudice results from denying a continuance to secure the testimony of a witness whose testimony would merely corroborate other testimony presented elsewhere in the case. *State v. Pride*, 1 S.W.3d 494, 507-08 (Mo. App. W.D. 1999); *State v. Weber*, 844 S.W.2d 579, 582 (Mo. App. E.D. 1992).

Appellant was able to put into evidence a document that purported to be a work for hire agreement between Brown and Housecalls. (Tr. 137-41, 189). Brown also testified about the work that she performed for Housecalls and the amount of control that she exercised over that work. (Tr. 145-50). Defense counsel was able to argue from the evidence that Brown was an independent contractor. (Tr. 232-38). Kamil's testimony would have been corroborative to the testimony provided by Brown, so that Appellant was not prejudiced by the denial of his request for a continuance.

IV.

The trial court did not err, plainly or otherwise, in refusing to prevent the State from cross-examining Appellant about the nature of his prior conviction because the State had an absolute right to cross-examine Appellant about his prior convictions if he testified, and Appellant eventually decided not to take the stand.

Appellant contends the trial court erred in refusing to prevent the State from cross-examining Appellant, in the event he testified, about the specific details and nature of his prior conviction.

A. Underlying Facts.

Before the presentation of the defense case-in-chief, defense counsel told the court that he wanted to call Appellant as a witness. (Tr. 114). Counsel conceded that Appellant had previously entered an *Alford*[4] plea to a charge of failing to carry workers' compensation insurance for another company with which he was involved. (Tr. 114). Counsel asked the court to bar the prosecutor from cross-examining Appellant about the nature of his prior conviction. (Tr. 114). The court denied the request. (Tr. 115). Appellant subsequently decided not to testify at trial. (Tr. 203).

[4] *North Carolina v. Alford*, 400 U.S. 25 (1970).

B. Standard of Review.

Since Appellant did not take the stand and was not impeached the denial of his motion, which was essentially a motion in limine, is not properly before this Court. *State v. Foster*, 684 S.W.2d 597, 598 (Mo. App. E.D. 1985). Appellant is at most entitled to plain error review, which requires this Court to find manifest injustice or miscarriage of justice has resulted from the trial court error. Supreme Court Rule 30.20; *State v. Middleton*, 995 S.W.2d 443, 452 (Mo. banc 1999). If this Court determines that Appellant's claim is properly preserved, the scope of review is whether the trial court abused its discretion in deciding the permissible scope of cross-examination. *State v. Oates*, 12 S.W.3d 307, 313 (Mo. banc 2000).

C. Analysis.

Cross-examination of a criminal defendant about prior convictions is authorized by section 491.050:

> Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

§ 491.050, RSMo 2000.[5] This Court has interpreted that statute to confer an absolute right to impeach a criminal defendant with his prior convictions. *M.A.B. v. Nicely*, 909 S.W.2d 669, 671 (Mo. banc 1995). The trial court had no discretion to prevent the State from cross-examining Appellant about his prior conviction and, accordingly, committed no abuse of discretion by denying Appellant's request. *State v. Henschel*, 159 S.W.3d 853, 856 (Mo. App. S.D. 2005); *State v. Simmons*, 825 S.W.2d 361, 364 (Mo. App. E.D. 1992).

Appellant's reliance on the United States Supreme Court case of *Old Chief v. United States*, 519 U.S. 172 (1996) is misplaced. The issue presented in that case was whether the trial court abused its discretion in rejecting the defendant's offer to stipulate to the fact of a prior conviction and instead admitting into evidence the full record of a prior judgment. *Id.* at 174. United States Supreme Court cases dealing with the admissibility of evidence based on the Federal Rules of Evidence and that are not decided on constitutional grounds are not binding on Missouri courts. *State v. Ellis*, 354 Mo. 998, 1005, 193 S.W.2d 31, 34 (1946); *State v. Smith*, 431 S.W.2d 74, 81 (Mo. 1968) *see also Edwards v. State*, 200 S.W.3d 500, 510-11 (Mo. banc 2006). *Old Chief* also did not

[5] If Appellant had testified and been impeached with his prior conviction, he would have been entitled to an instruction directing the jury that it could only consider the prior conviction for the purpose of deciding the believability of Appellant's testimony and the weight to be given to that testimony. MAI-CR 3d 310.10.

involve cross-examination about prior convictions, and is thus inapplicable to this case. *Old Chief*, 519 U.S. at 177.

In addition, as noted above, Appellant did not testify and was thus not subject to impeachment. (Tr. 203). He does not explicitly argue in his brief that the court's ruling erroneously prevented him from testifying, and such an argument would be unavailing if it had been made. *State v. Toliver*, 544 S.W.2d 565, 568-69 (Mo. banc 1976). Appellant thus suffered no prejudice.

V.

The trial court did not err, plainly or otherwise, in giving Instructions Nos. 5 and 6 and in refusing to give Instructions No. A, B, C, and D because the instructions that were given were supported by the evidence and the instructions that were refused were inconsistent with the substantive law, in that:

1. **The word "conduct" was properly used in Instructions Nos. 5 and 6 since Housecalls, Inc. had a duty under the law to insure its workers' compensation liability and Appellant is liable under section 562.061, RSMo for failing to procure insurance on Housecall's behalf.**
2. **Appellant was not entitled to have the jury instructed on whether Uchechi Brown was an independent contractor because she met the statutory definition of "employee" due to the work she performed as the corporate secretary for Housecalls, so that whether she contracted to do other work for the corporation was irrelevant to determining her status. Even if the issue were relevant, the refused instructions were not proper converse instructions, so that the trial court did not err in refusing them.**

Appellant contends the trial court erred in giving Instructions No. 5 and 6, and in refusing to give Appellant's proferred Instructions No. A, B, C, and D.[6]

A. Underlying Facts.

During the instruction conference at trial, Appellant objected to Instruction No. 5, which was the verdict-directing instruction submitted to the jury. (Tr. 213). Appellant objected to the instruction using the word "conduct," arguing that the failure to take action does not constitute conduct. (Tr. 213-14). That same allegation of error was included in the motion for new trial. (L.F. 64). The court submitted the instruction over Appellant's objection. (Tr. 216; L.F. 41-42).

Appellant submitted four instructions that were marked A, B, C, and D. (Tr. 217-18, 220). Instruction A was a proposed converse instruction that asked the jury to consider eight factors in determining whether Uchechi Brown was an independent contractor. (Tr. 217; L.F. 29). Appellant argued that it was a correct statement of the law and should be given. (Tr. 217). Instruction B was a proposed definition of the term "employee," and C and D were alternative definitions to be used if the court refused Instruction B. (Tr. 218; L.F. 31-34). Each of the instructions asked the jury to make a determination of independent contractor status. (L.F. 31-34). Appellant again argued

[6] Appellant's Point Relied On misidentifies Instruction No. 5 as Instruction No. 1, but it is clear from the context of the point and the argument which instruction Appellant is referring to. (Appellant's Brf., pp. 22, 55).

that the instructions contained correct statements of the law. (Tr. 218). The court refused all four of the instructions. (Tr. 220).

Appellant submitted a converse that was marked as Instruction No. 6 and was given by the trial court. Defense counsel indicated that he only offered the instruction because the court refused to give Instruction A. (Tr. 217). Appellant did not include any claim of error regarding Instruction No. 6 in the motion for new trial. (L.F. 64-66). By failing to do so, Appellant has not preserved his claim of error regarding Instruction No. 6. Supreme Court Rule 28.03.

B. Standard of Review.

Appellant's Point Relied On makes a general claim of instructional error and then goes on to list three legal reasons for that error. (Appellant's Brf., pp. 22-23, 55-56). A contention that the trial court erred for multiple unrelated reasons is not a proper point relied on. *Helmig v. State*, 42 S.W.3d 658, 666 n.1 (Mo. App. E.D. 2001). Separate issues should be stated in separate points relied on. *Id.* Improper points relied on, including multifarious points, preserve nothing for review. *Hines v. Smith*, 172 S.W.3d 437, 439 n.4 (Mo. App. S.D. 2005).

Should this Court decide to review Appellant's claims, and should it determine that Appellant has adequately preserved any of his claims, then Appellant must demonstrate both error in submitting an instruction and prejudice in order to be entitled to reversal on those claims. *State v. Taylor*, 944 S.W.2d 925, 936 (Mo. banc 1997). A claim of instructional error that was not properly preserved can be reviewed for plain error only. *State v. Baker*, 103 S.W.3d 711, 723 (Mo. banc 2003). Instructional error

does not rise to the level of plain error unless Appellant can demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident the instructional error affected the jury's verdict. *Id.*

C. Analysis.

1. State's Instructions Nos. 5 and 6.

Appellant's complaint about Instructions No. 5 and 6 is based on the same argument that he presents in Point II regarding the sufficiency of the evidence. Appellant presents no additional argument in support of his claim of instructional error. As discussed in Point II above, Appellant's insufficiency claim is not well taken, and his claim of instructional error fails for the same reasons.

2. Proferred Instructions No. A, B, C, and D.

Appellant claims that the jury should have been instructed to consider whether Uchechi Brown was an independent contractor who should not have been counted among the five employees necessary to trigger the requirement that Housecalls maintain workers' compensation coverage. In a case such as this, where there are no pattern instructions for the trial court to follow, the jury must be instructed consistently with the substantive law. *State v. Davis*, 203 S.W.3d 796, 799 (Mo. App. W.D. 2006); *State v. Neely*, 979 S.W.2d 552, 557 (Mo. App. S.D. 1998). The trial court is under no duty to instruct on the independent contractor exception to the worker's compensation statutes where that exception is not applicable to this case. *See State v. Flenoid*, 838 S.W.2d 462, 469-70 (Mo. App. E.D. 1992) (trial court had no duty to instruct on exception to unlawful use of weapons statute absent evidence the defendant was within an excepted category).

As noted in Point III above, Uchechi Brown was an employee of Housecalls by virtue of her position as corporate secretary, so that the issue of her independent contractor status was irrelevant. Appellant was therefore not entitled to an instruction on that issue.

Even if the independent contractor issue was relevant to the jury's consideration, the trial court did not err in refusing Instructions A, B, C, or D. Appellant submitted the proposed not-in-MAI instructions as converses of the State's verdict director. (Tr. 217-18; L.F. 29-35). Appellant also submitted as a converse Instruction No. 6, which was modeled after MAI-CR 3d 308.02. (Tr. 217; L.F. 43). An applicable MAI-CR instruction must be given to the exclusion of all other instructions. *State v. Gill*, 167 S.W.3d 184, 189 (Mo. banc 2005). MAI-CR 3d 308.02 is the approved form for converse instructions and must be given upon written request in proper form by the defendant. MAI-CR 3d 308.02, Notes on Use ¶ 2. "A converse instruction is a negative of a positive statement of an essential element or elements of a cause of action as stated in a verdict directing instruction." *State v. Collins*, 587 S.W.2d 303, 306 (Mo. App. E.D. 1979). Instructions A, B, C, and D did not follow the format of MAI-CR 3d 308.02 and were not proper converse instructions. The trial court did not err in rejecting those instructions and instead giving Instruction No. 6, which was a proper converse that followed the MAI-CR format. *Id.*; *State v. Urban*, 798 S.W.2d 507, 513 (Mo. App. W.D. 1990).

VI.

The trial court did not err, plainly or otherwise, in failing to overrule Appellant's Motion for New Trial because the State did not commit a *Brady* violation by failing to disclose a 2003 Annual Registration Report for another corporation that Appellant was involved with, in that the document was obtained by a different prosecutor in a separate case involving another corporation that Appellant was involved with, and the document was not material in that the defense would only have used it to rebut the State's attempted impeachment of a defense witness, and it was duplicative of other documents contained in State and defense exhibits.

Appellant contends the trial court erred in failing to take remedial action for the State's failure to produce an annual registration report involving another corporation in which Appellant was involved.

A. Underlying Facts.

During the cross-examination of Uchechi Brown, the prosecutor questioned Brown, over Appellant's objection, about page 23 of State's Exhibit 2. (Tr. 151-52). That page contained a "Statement of Correction for a General Business or Nonprofit Corporation," signed by Appellant and filed with the Missouri Secretary of State's Office on December 2, 2002. (State's Ex. 2, p. 23). The document indicated that Brown was secretary of Housecalls, Inc., and listed her address as 4374 McPherson in St. Louis. (State's Ex. 2, p. 23). Appellant had listed that same address for himself on Housecall's 2001 and 2002 Annual Registration Reports filed with the Missouri Secretary of State's

office. (State's Ex. 2, pp. 17-18). The prosecutor questioned Brown about whether she lived with Appellant. (Tr. 153-55). Brown denied that she had, and said that Appellant's address had been mistakenly attributed to her on the Statement of Correction. (Tr. 154-55). The prosecutor also pointed out page 25 of State's Exhibit 2. (Tr. 154). That page contained Housecall's 2003 Annual Registration Report filed with the Missouri Secretary of State's office. (Tr. 154; State's Ex. 2, p. 25). That document listed Brown's address as 6912 Candlewick in Florissant.[7] (Tr. 154; State's Ex. 2, p. 25). Brown testified that this was her correct address and that she had not lived anywhere else. (Tr. 154-55).

On redirect examination, Brown testified that she did not prepare or sign the Statement of Correction and that she did not receive a copy of it before it was filed with the Secretary of State. (Tr. 172-73). Brown also testified that none of the documents contained in Defendant's Exhibit C, which were corporate records in Brown's possession that she brought to court the day of trial, showed Appellant's address as her address. (Tr. 127, 175).

Appellant's Motion for New Trial alleged that a new trial should be granted due to newly discovered evidence. (L.F. 68). The motion alleged that Appellant was charged by information on June 21, 2006, in the Circuit Court of St. Louis County, with a violation of the Workers' Compensation Act in connection with a corporation called Day Star Health Services, Inc. (hereafter "Day Star"). (L.F. 68). The State was represented in

[7] The address appears twice on the document and is listed as both 6916 and 6912. (State's Ex. 2, p. 25).

that case by the Missouri Attorney General's Office. (L.F. 69). The motion alleged that despite prior discovery requests, the Attorney General's Office did not provide discovery until October 30, 2006, after the conclusion of the trial in the instant case. (L.F. 69-71). The discovery documents provided by the Attorney General's Office included an Annual Registration Report filed by Day Star on September 23, 2003. (L.F. 14). That report lists Uchechi Brown as a director of Day Star and lists her address as 6912 Candlewick Way in Florissant. (L.F. 71, 86). The motion alleged that if Appellant had been in possession of the document prior to the trial in the instant case, he could have used it to counteract the inference that Appellant and Brown had been involved in an improper relationship. (L.F. 71). The motion was accompanied by an affidavit executed by the attorney representing Appellant in the Day Star case. (L.F. 72, 87-88).

At the hearing on the motion for new trial, defense counsel indicated that the motion spoke for itself as to the claim of nondisclosure, and he presented no further argument. (Tr. 326). The trial court overruled the motion and imposed sentence. (Tr. 331, 336-37).

B. Standard of Review.

Appellant's claim of error on appeal is based on a purported failure to disclose exculpatory and material evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). However, the Motion for New Trial did not allege a *Brady* violation. (L.F. 68-72). The Motion does make reference to Supreme Court Rule 25.02, and seems to imply that the assistant Attorney General trying the Day Star case failed to comply with the rule, and that such failure should be imputed to the assistant St. Louis County Prosecuting

Attorney trying the instant case. (L.F. 69-71). Because the theory presented on appeal is different from that presented in the Motion for New Trial, Appellant's claim of error has not been preserved. *State v. Barnett*, 980 S.W.2d 297, 303 (Mo. banc 1998).

In addition, the *Brady* doctrine is based on due process concerns. *Anderson v. State*, 196 S.W.3d 28, 36 (Mo. banc 2006). Appellant failed to preserve his *Brady* claim by not raising the constitutional issue at the earliest opportunity. *Pullen*, 843 S.W.2d at 364. Issues that were not properly preserved for review may be reviewed for plain error only, requiring this Court to find manifest injustice or miscarriage of justice has resulted from the trial court error. Supreme Court Rule 30.20; *Middleton*, 995 S.W.2d at 452.

When properly preserved, review of the trial court's denial of a motion for new trial is for an abuse of discretion. *State v. White,* 81 S.W.3d 561, 567 (Mo. App. W.D. 2002). 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. *Id.* Rulings made within the trial court's discretion are presumed correct, and as a consequence, Appellant has the burden of showing that the trial court abused its discretion. *Id.*

C. Analysis.

Under *Brady*, due process is violated where the prosecutor suppresses evidence favorable to the defendant that is material to either guilt or punishment. *Anderson,* 196 S.W.3d at 36. Evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 36-37.

The 2003 Annual Registration Report of Day Star is not *Brady* material. As an initial matter, it has not been established that the prosecutor in this case was ever in possession of the report, or would have been under any duty to obtain it. The report concerned another corporation for which Appellant was being tried in a separate case that was being prosecuted by a different office. Appellant appears to treat the St. Louis County Prosecuting Attorney's Office and the Missouri Attorney General's Office as fungible entities, but he cites no authority to suggest that the actions taken by one governmental entity in a case it is prosecuting should be imputed to a different governmental entity prosecuting a separate case.

The report also would not fall under the *Brady* duty to disclose because it is not material. *State v. Brooks*, 960 S.W.2d 479, 495 (Mo. banc 1997). At best, the document would have served to rebut the State's effort to impeach Uchechi Brown, a defense witness. In *Brooks*, this Court found that prison records that would have been used for that same purpose were not reasonably likely to change the outcome of the proceeding, especially in light of substantial other evidence to support the jury's decision. *Id.* In this case, it was undisputed that Appellant did not procure workers' compensation insurance for the employees of Housecalls. Brown's testimony for the defense was largely aimed at trying to establish that she was an independent contractor. But as argued in Point III above, that issue was irrelevant since Brown fit the statutory definition of "employee" by virtue of the duties she performed as corporation secretary.

There is also no *Brady* violation in this case because *Brady* applies to the discovery after trial of information which was known to the prosecution but unknown to

the defense. *State v. Myers*, 997 S.W.2d 26, 33 (Mo. App. S.D. 1999). The State cannot be faulted for nondisclosure if the defendant had knowledge of the evidence at the time of trial. *Id.* This Court has found no *Brady* violation where the undisclosed evidence concerned subject matters of which the defendant was already aware. *Storey v. State*, 175 S.W.3d 116, 143 (Mo. banc 2005).

Appellant cannot reasonably claim to be unaware of either the 2003 Annual Report filed by Day Star, or with the general subject matter of Uchechi Brown's address as it was reflected on various documents. Defense counsel sought a bench conference when the prosecutor began to question Brown about page 23 of State's Exhibit 2, which was the record giving the same address for Brown and Appellant. (Tr. 151-52). Defense counsel indicated that the prosecutor had questioned Brown about that document during Appellant's previous trial. (Tr. 152). Appellant and defense counsel were thus aware that Brown's address was an issue that might come up at trial. Defense counsel could easily have obtained from the Secretary of State's Office all documents filed by the corporations with which Appellant and Brown were involved. The prosecution is under no obligation to disclose evidence of which the defense is already aware and which the defense can acquire. *Brooks*, 960 S.W.2d at 494; *Williams v. State*, 168 S.W.3d 433, 440 (Mo. banc 2005).

In addition to documents that could have been obtained from the Secretary of State's Office, there were other documents accessible to Appellant that showed Brown's address as 6912 Candlewick Way in Florissant. Brown, who testified for Appellant, produced a booklet of Housecalls corporate records which she had maintained in her role

as corporate secretary. (Tr. 131). Those records were marked as Defendant's Exhibit C and admitted into evidence. (Tr. 131, 134). Among the documents contained in the exhibit is a Work for Hire Agreement with an effective date of January 1, 2003. (Def.'s Ex. C, Tab 6). That agreement lists Brown's address as 6912 Candlewick Way in Florissant. (Def.'s Ex. C, Tab 6).

Appellant also cannot show prejudice because the Annual Report for Day Star would have been duplicative of other documents entered into evidence. The Annual Report for Housecalls that was contained on page 25 of State's Exhibit 2 and the January 1, 2003 Work For Hire Agreement that is contained in Defendant's Exhibit C both listed 6912 Candlewick Way in Florissant as Brown's address. (State's Ex. 2, p. 25; Def.'s Ex. C, Tab 6). No prejudice occurs where the nondisclosed evidence is similar to, or duplicative of, other evidence provided to the defendant. *Storey*, 175 S.W.3d at 143; *State v. Wise*, 879 S.W.2d 494, 509 (Mo. banc 1994).

Appellant also contends in the argument portion of his brief, though not in the Point Relied On, that the State violated Rule 25.03. That contention also fails. First, the record on appeal does not contain any Rule 25 disclosure requests by Appellant or responses by the prosecutor in this case, but only includes requests and responses in the case involving Day Star. (L.F. 78-79, 81-82, 83-85). And, second, Appellant has not shown that the State failed to disclose any material in its possession that would have been responsive to a proper request under Rule 25.03. *See State v. Cella*, 32 S.W.3d 114, 117 (Mo. banc 2000) (it is appellant's responsibility to provide a complete record on appeal).

Appellant would not be entitled to a new trial even if the prosecutor in this case had failed to adequately respond to a discovery request. The purpose behind Rule 25 disclosures is to permit a party to prepare for trial, eliminate surprise, and afford the accused information with which to formulate a defense and meet opposing evidence. *State v. Goodwin*, 43 S.W.3d 805, 813 (Mo. banc 2001). Given that the Annual Report for Day Star was duplicative of the Annual Report for Housecalls contained in State's Exhibit 2 and the Work for Hire Agreement in Defendant's Exhibit C, and given that Appellant had ample opportunity between the first and second trials to obtain records for any corporations with which he and Brown were involved, Appellant has not shown that his trial preparation was materially hindered. *See id.*

Appellant has failed to show either a manifest injustice or an abuse of discretion. His point should be denied.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should 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 12,492 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, 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 14th day of December, 2007, to:

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APPENDIX