IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 85651
	)	
DAVID B. GARRETT,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
TWENTY-NINTH JUDICIAL CIRCUIT, DIVISION TWO
THE HONORABLE DAVID C. DALLY, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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INDEX

Page

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

***MISSOURI COURT RULES*:**

***OTHER TREATISES*:**

JURISDICTIONAL STATEMENT

A Jasper County jury convicted Appellant, David Garrett, of possession of more than 5 grams of marijuana with the intent to distribute, Section 195.211, RSMo 2000, and possession of methamphetamine with the intent to distribute, Section 195.211, RSMo 2000. The Honorable David C. Dally sentenced Mr. Garrett as a prior and persistent drug offender to a total of forty years imprisonment without eligibility for parole. After the Missouri Court of Appeals, Southern District, issued its opinion in SD 25108, this Court granted the State's application for transfer pursuant to Rule 83.03. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

STATEMENT OF FACTS

Based on a tip from a confidential informant about drug activity, narcotics officer James Altic obtained a search warrant for 1624 Virginia in Joplin, Missouri (Tr. 160, 162-166). His suspect was Appellant, David Garrett (Tr. 9, 162-164).

On March 16, 2001, three narcotics officers arrived at that residence to execute the warrant (Tr. 166). Because of the possibility that there were weapons inside, the officers attempted to lure Mr. Garrett from the house under false pretenses (Tr. 144, 166-168). Officer Altic knocked and Mr. Garrett opened the door (Tr. 167, 209). Altic told Mr. Garrett that he had been in an accident with Mr. Garrett's car (Tr. 167). Mr. Garrett said that he did not care and closed the door (Tr. 167).

The officers then summoned a patrol officer to knock on the door and ask Mr. Garrett to come outside to discuss the car accident (Tr. 168, 209). When Mr. Garrett walked out of the house with the patrol officer he was detained (Tr. 169, 209). The officers informed Mr. Garrett that they had a search warrant and then they went upstairs to clear the apartment (Tr. 169).

A woman by the name of Samantha Overstreet was inside the residence, and she was detained as well (Tr. 170, 209-210). Mr. Garrett was brought upstairs to wait in the living room while the officers conducted the search (Tr. 170, 211).

Officers Cowdin and Stout searched the bedroom (Tr. 211). There was a mattress and box spring on the floor, a dresser, and men's and women's clothes

were scattered about the room (Tr. 211, 224-225, 229, 236). In the dresser, Officer Cowdin found 13 bags of marijuana, two loaded guns and $400 cash (Tr. 212-215). In a wallet underneath a pillow on the bed, Officer Cowdin found more money, for a total of $1144 (Tr. 216). He removed the money from the wallet and gave it to Officer Altic (Tr. 220). There was no identification in the wallet (Tr. 220). According to Altic, after placing Mr. Garrett under arrest, Mr. Garrett asked if he could get his shirt, shoes and wallet (Tr. 200, 220). These items were provided to him, and he did not deny that they were his (Tr. 200).

In the bedroom closet, Officer Stout found a large bag of marijuana (Tr. 217).[1] In a box on the floor next to the dresser they found 84 baggies -- some clear, some green -- of white powder,[2] more empty baggies, scales, pills, a mirror and some rolling papers (Tr. 219, 222-224).

After these items were found, Officer Altic placed Mr. Garrett under arrest (Tr. 172). According to Altic, he searched Mr. Garrett and found ten bags of methamphetamine in his pants pocket (Tr. 172-173, 183). The baggies were clear and green, similar to the ones found in the bedroom (Tr. 225). Officer Altic was not sure how much methamphetamine a person might use on a particular day

[1] The substance found tested positive as marijuana and weighed 100.3 grams (Tr. 255-256).

[2] The testing on a sampling of the baggies revealed the powder was methamphetamine (Tr. 246, 252).

because it differs from person to person (Tr. 195). Altic did not turn these ten baggies over to the evidence officer at the house where all of the other evidence was collected; rather, he put them in his pocket and handed them to Officer Cowdin later at the police station (Tr. 227-228).

The State charged Mr. Garrett with possession of methamphetamine with the intent to distribute and possession of more than 5 grams of marijuana with the intent to distribute (L.F. 12). A trial was held on these charges on May 23-24, 2002 (Tr. 1 *et seq*.). The defense presented evidence through a landlord and a utility employee that Mr. Garrett lived at a different residence than where the search warrant was executed (Tr. 272-286).

Defense counsel moved in limine to preclude two forms of hearsay: 1) mail collected at the residence as proof that Mr. Garrett was living there; and 2) information that other persons told the police about Mr. Garrett which prompted the search (Tr. 15-17, 32-33). The trial court decided that it would rule on hearsay objections at the time they were brought up at trial (Tr. 33).

When, in his opening statement, the prosecutor began to discuss what information the warrant was based upon, defense counsel posed the following objection: "I object to how Officer Altic got the warrant, I object to any information that he got from anybody that's not going to be a witness in this case as hearsay, violation of right to confront, cross-examine witnesses, and ask that it be excluded in opening statement." (Tr. 142-143). The objection was overruled and a continuing objection was granted (Tr. 143). Thereafter, the prosecutor told

the jury that "Officer Altic received some information from an informant that there was drug activity going on at this house at 1624 Virginia." (Tr. 142-143).

During Officer Altic's direct examination, the following exchange ensued:

STATE: Okay. Were you made aware of -- of any activity by the Defendant?

DEFENSE: Excuse me, Judge, may we approach the bench?

COURT: You can just state your objection, you've already made it.

DEFENSE: I renew the previous objections, Judge, and ask that they be shown as continuing.

COURT: I will show it. Objection overruled, you may continue.

(Tr. 161-162). Immediately thereafter, the prosecutor elicited that the "confidential informant stated that David Garrett was dealing narcotics from his residence at 1624 Virginia." (Tr. 162-163). The prosecutor repeated the question, and Officer Altic again answered that the confidential informant told him that Mr. Garrett "was dealing narcotics there and he was living at that residence." (Tr. 163). Again, defense counsel objected and asked to approach the bench:

DEFENSE: Your Honor, again, I renew my objection as to hearsay, inferential hearsay, right to confront, cross-examine. I know the Court has shown this as a continuing objection as overruled. Here he's throwing in additional element to Mr. Garrett supposedly living at this residence, something he's

heard, somebody we can't cross-examine. I renew that objection, Judge, ask that it be continued as well.

COURT: Mr. Smalley?

STATE: Judge, it's not hearsay, it still goes to explain course of conduct.

COURT: Objection's overruled, let's move on please. (Tr. 163).

Thereafter the prosecutor elicited for the third time that the confidential informant told Officer Altic that "David Garrett was dealing narcotics from that residence." (Tr. 163-164).

During the State's closing argument, the prosecutor argued that one way in which the jury could "connect some more dots" was to remember that "the informant told Altic that this Defendant was dealing drugs out of the house" (Tr. 307-308). Defense counsel again lodged a hearsay objection, arguing that the prosecutor had earlier stated that the statement was necessary to explain what the officer did next, but now he was arguing it for the truth that the defendant was dealing drugs (Tr. 307). When the trial court overruled the objection, the prosecutor repeated, "Like I said, Altic's informant told him that he was -- that this Defendant, right there, (indicating) was dealing dope out of that house at 1624 Virginia." (Tr. 308).

In his final closing argument, the prosecutor again urged:

The informant's statements, the Defendant was selling drugs at 1624 Virginia. Well, it sure panned out, didn't it? It sure panned

out, we got this meth, this marijuana, all those baggies, tools of the trade, the guns, the money, we got it on that informant's testimony. And where's that informant at? Does it matter? (Tr. 332-333).

Also at trial, the State introduced several letters that were obtained from a man named Mr. Nance, who lived in the downstairs portion of the house; the letters were addressed to Mr. Garrett at 1624 Virginia (Tr. 174-179). Defense counsel objected that there was insufficient foundation for their admission and that the letters were hearsay because somebody who is not a witness in the case determined that Mr. Garrett lived at 1624 Virginia (Tr. 175-176). Defense counsel could not cross-examine the writer of the letter about the basis for their belief, and the only reason to admit the letters was to prove that Mr. Garrett lived there (Tr. 176). The objection was overruled (Tr. 177).

In closing argument, the prosecutor discussed reasons why the jury should believe that Mr. Garrett was aware of the presence and nature of, and exercised dominion and control over the drugs in the apartment (Tr. 302-304). He asked the jury, "Did he ever tell you, did he ever deny to the police, that's what the police says; he never denied that the bedroom was his." (Tr. 304).

The jury found Mr. Garrett guilty (Tr. 339-340, L.F. 52-53). Judge Dally sentenced Mr. Garrett, as a prior and persistent offender to a total of forty years imprisonment (twenty years on each Count to run consecutively) without the possibility of parole (Tr. 350, L.F. 95-97). Notice of appeal was timely filed (L.F. 99-100). This appeal follows.

POINTS RELIED ON

I.

The trial court abused its discretion in overruling defense counsel's hearsay objections and allowing the prosecutor to repeatedly inform the jury in opening statement, closing argument and throughout the testimony of Officer Altic, that a confidential informant had made specific statements linking Mr. Garrett to the drugs at 1624 Virginia, because this ruling deprived Mr. Garrett of his rights to due process, confrontation and a fair trial, as guaranteed by the 5th, 6th and 14th Amendments to the U.S. Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the non-testifying informant's statement that "David Garrett was dealing narcotics from his residence at 1624 Virginia" was offered in evidence and then emphasized in argument to prove the truth of the matter asserted and not to show subsequent conduct by the police. Mr. Garrett was prejudiced because the State's evidence connecting Mr. Garrett to the drugs was tenuous, and the prosecutor urged the jury to use the confidential informant's hearsay statement to "connect some more dots" about Mr. Garrett's connection to the drugs, noting that the informant's statements that "the Defendant was selling drugs at 1624 Virginia and the Defendant lived at 1624 Virginia...it sure panned out, didn't it?"

Moore v. United States, 429 U.S. 20, 97 S.Ct. 29, 50 L.Ed.2d 25 (1976);

State v. Shigemura, 680 S.W.2d 256 (Mo. App., E.D. 1984);

State v. Robinson, 111 S.W.3d 510 (Mo. App., S.D. 2003);

State v. Bankston, 63 N.J. 263, 307 A.2d 65, 68 (1973);

U.S. Const., Amends 5, 6, & 14; and

Mo. Const., Art. I, Sections 10 & 18(a).

II.

The trial court abused its discretion in overruling defense counsel's objections to hearsay and insufficient foundation and allowing the prosecutor to use several letters seized during the search to be admitted as evidence that Mr. Garrett lived at 1624 Virginia because this ruling deprived Mr. Garrett of his rights to due process, confrontation and a fair trial, as guaranteed by the 5th, 6th and 14th Amendments to the U.S. Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the letters were offered and then emphasized in argument to prove the truth of the matter asserted -- that David Garrett lived at 1624 Virginia -- but they did not fall within any exception to the hearsay rule. Furthermore, the authenticity of a private writing must be established before it may be received into evidence, which did not occur here. Mr. Garrett was prejudiced because the State's evidence connecting him to the drugs was tenuous, and the prosecutor urged the jury to use the letters as proof that Mr. Garrett resided at 1624 Virginia, and thus, had knowledge, dominion and control of the drugs contained therein.

United States v. Patrick, 959 F.2d 991 (D.C. Cir. 1992);

United States v. Watkins, 519 F.2d 294 (D.C. Cir. 1975);

Shurbaji v. Commonwealth, 444 S.E.2d 549 (Va. Ct. App. 1994);

United States v. Hazeltine, 444 F.2d 1382 (10th Cir. 1971);

U.S. Const., Amends 5, 6, & 14; and

Mo. Const., Art. I, Sections 10 & 18(a).

III.

The trial court plainly erred in failing to declare a mistrial *sua sponte* or to instruct the jury to disregard the prosecutor's statement when the prosecutor asked the jury "Did he [Mr. Garrett] ever tell you, did he ever deny to the police, that's what the police says; he never denied that the bedroom was his," because allowing this argument violated Mr. Garrett's rights to due process and a fair trial, and not to be compelled to testify guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 19 of the Missouri Constitution, in that the prosecutor's argument contained a direct reference to Mr. Garrett's right not to testify. Mr. Garrett suffered manifest injustice because this argument had a decisive effect on the jury's verdict in a case where dominion and control were the contested issues in the case and the State's evidence connecting Mr. Garrett to the drugs was not overwhelming.

State v. Boyd, 91 S.W.3d 727 (Mo. App., S.D. 2002);

State v. Barnum, 14 S.W.3d 587 (Mo. banc 2000);

State v. Spencer, 50 S.W.3d 869 (Mo. App., E.D. 2001);

State v. Reynolds, 997 S.W.2d 528 (Mo. App., S.D. 1999);

U.S. Const., Amends 5, 6, & 14;

Mo. Const., Art. I, Sections 10, 18(a) & 19;

Section 546.270 and Rules 27.05(a) & 30.20.

ARGUMENT

I.

The trial court abused its discretion in overruling defense counsel's hearsay objections and allowing the prosecutor to repeatedly inform the jury in opening statement, closing argument and throughout the testimony of Officer Altic, that a confidential informant had made specific statements linking Mr. Garrett to the drugs at 1624 Virginia, because this ruling deprived Mr. Garrett of his rights to due process, confrontation and a fair trial, as guaranteed by the 5th, 6th and 14th Amendments to the U.S. Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the non-testifying informant's statement that "David Garrett was dealing narcotics from his residence at 1624 Virginia" was offered in evidence and then emphasized in argument to prove the truth of the matter asserted and not to show subsequent conduct by the police. Mr. Garrett was prejudiced because the State's evidence connecting Mr. Garrett to the drugs was tenuous, and the prosecutor urged the jury to use the confidential informant's hearsay statement to "connect some more dots" about Mr. Garrett's connection to the drugs, noting that the informant's statements that "the Defendant was selling drugs at 1624 Virginia and the Defendant lived at 1624 Virginia...it sure panned out, didn't it?"

The State elicited and argued inadmissible hearsay evidence from a non-testifying confidential informant to "connect the dots" in its case against Mr. Garrett (Tr. 307-308). The State repeatedly told the jury that a confidential informant told Officer Altic that "David Garrett was dealing narcotics from his residence at 1624 Virginia." (Tr. 162-163). But this Court has warned that prosecutors may not "with impunity elicit hearsay information received from an informant, particularly when the statement directly proves an issue crucial to the state's burden of proof and is offered for the truth of the matter asserted." ***State v. Dunn*, 817 S.W.2d 241, 243, fn 1 (Mo. banc 1991)**.

Not only did this informant's hearsay directly establish the crucial issues in the State's case, (Mr. Garrett's knowledge of and control over the drugs), but it was absolutely *unnecessary* to explain the conduct of the officers. In order to explain Officer Altic's conduct in going to the house, the State simply needed to elicit that Officer Altic went to 1624 Virginia because he had information that drugs were being sold from that residence - period. It was not necessary to further elicit that the informant specifically identified *Mr. Garrett* as selling the drugs and that Mr. Garrett *lived* at the residence. In addition, the prosecutor argued this hearsay for its truth in closing argument. The trial court abused its discretion in overruling multiple objections and allowing this hearsay to infect the jury's verdict. A new trial is required.

At trial, the defense presented evidence through a landlord and a utility employee that Mr. Garrett resided in a different residence than the one where the

search warrant was executed (Tr. 272-286). In order to meet its burden of proof that Mr. Garrett had knowledge of and control over the drugs that were found at 1624 Virginia, the State used hearsay of a confidential informant that "David Garrett was dealing narcotics from his residence at 1624 Virginia." (Tr. 162). Defense counsel moved in limine to exclude "inferential hearsay" and things that other persons told the police about Mr. Garrett (Tr. 32-33). Then, over hearsay objections during voir dire, opening statement, the State's case in chief and its closing argument, the court allowed the prosecutor to use this hearsay evidence to "connect the dots" in his case against Mr. Garrett (Tr. 44-45, 142-143, 161-164, 307-308).

The trial court is afforded broad discretion in the admission or exclusion of evidence at trial. ***State v. Mathews,* 33 S.W.3d 658, 660 (Mo. App., S.D. 2000)**. This Court will not disturb the trial court's ruling concerning the admission or exclusion of evidence absent a clear abuse of discretion by the trial court. ***Id.***

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him...." **U.S. CONST. Amend. VI**; ***see State v. Glaese,* 956 S.W.2d 926, 930 (Mo. App., S.D. 1997)**. The Sixth Amendment is applicable to criminal proceedings in state courts through the Fourteenth Amendment to the United States Constitution and prohibits the deprivation of life or liberty without due process of law. ***Glaese,* 956 S.W.2d at 930; *State v. Jackson,* 495 S.W.2d 80, 83 (Mo.App.1973)**. The Missouri Constitution goes further and provides that

"in criminal prosecutions the accused shall have the right to ... meet the witnesses against him face to face...." **MO. CONST. Art. I, § 18(a)**. The extremely prejudicial hearsay of the confidential informant, which fell within no exception, deprived Mr. Garrett of the opportunity to confront his accusers, thereby depriving him of due process and a fair trial.

During the State's opening statement, when the prosecutor began to discuss what information the warrant was based upon, defense counsel interjected: "I object to how Officer Altic got the warrant, I object to any information that he got from anybody that's not going to be a witness in this case as hearsay, violation of right to confront, cross-examine witnesses, and ask that it be excluded in opening statement." (Tr. 142-143). The objection was overruled and a continuing objection was granted (Tr. 143). Thereafter, the prosecutor informed the jury that "Officer Altic received some information from an informant that there was drug activity going on at this house at 1624 Virginia." (Tr. 142-143). Had the State limited its information to that statement alone, there would have been no prejudice to Mr. Garrett. Indeed, that statement was a perfectly reasonable way to explain why the officers went to that location. However, the State went far beyond that harmless description to elicit testimony *specifically linking* Mr. Garrett to residing at and selling drugs from that location.

During Officer Altic's direct examination, the following exchange ensued:

STATE: Okay. Were you made aware of -- of any activity by the Defendant?

DEFENSE: Excuse me, Judge, may we approach the bench?

COURT: You can just state your objection, you've already made it.

DEFENSE: I renew the previous objections, Judge, and ask that they be shown as continuing.

COURT: I will show it. Objection overruled, you may continue.

(Tr. 161-162). Immediately thereafter, the prosecutor elicited that the "confidential informant stated that David Garrett was dealing narcotics from his residence at 1624 Virginia." (Tr. 162-163). The prosecutor repeated the question and received a similar answer: *"he was dealing* narcotics there and *he was living* at that residence." (Tr. 163) (emphasis added). Again, defense counsel objected and asked to approach:

DEFENSE: Your Honor, again, I renew my objection as to hearsay, inferential hearsay, right to confront, cross-examine. I know the Court has shown this as a continuing objection as overruled. Here he's throwing in additional element to Mr. Garrett supposedly living at this residence, something he's heard, somebody we can't cross-examine. I renew that objection, Judge, ask that it be continued as well.

COURT: Mr. Smalley?

STATE: Judge, it's not hearsay, it still goes to explain course of conduct.

COURT: Objection's overruled, let's move on please. (Tr. 163).

Thereafter the prosecutor elicited for the third time that the confidential informant told Officer Altic that "David Garrett was dealing narcotics from that residence." (Tr. 163-164).

During the State's closing argument, the prosecutor argued that one way in which the jury could "connect some more dots" was to remember that "the informant told Altic that this Defendant was dealing drugs out of the house" (Tr. 307-308). Defense counsel lodged another hearsay objection, arguing that the prosecutor had earlier stated that the statement was necessary to explain what the officer did next, but now he was arguing it for the truth that the defendant was dealing drugs from that house (Tr. 307). After the trial court overruled the objection, the prosecutor repeated, "Like I said, Altic's informant told him that he was -- that this Defendant, right there, (indicating) was dealing dope out of that house at 1624 Virginia." (Tr. 308). In his final closing argument, the prosecutor returned to his theme:

> The informant's statements, the Defendant was selling drugs at 1624 Virginia. Well, it sure panned out, didn't it? It sure panned out, we got this meth, this marijuana, all those baggies, tools of the trade, the guns, the money, we got it on that informant's testimony. And where's that informant at? Does it matter?

(Tr. 332-333). The trial court's rulings on this issue were included as error in the motion for new trial (L.F. 77-78).

There can be no dispute that Officer Altic's testimony, about what the confidential informant told him, was hearsay:

> Hearsay evidence is in-court testimony of an extrajudicial statement offered to prove the truth of the matters asserted therein, resting for its value upon the credibility of the out-of-court declarant...[T]he underlying rationale for the hearsay rule is that for the purpose of securing trustworthiness of testimonial assertions, and of affording the opportunity to test the credit of the witness, such assertions are to be made in court, subject to cross-examination.

***State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981)**.

In ***Moore v. United States*, 429 U.S. 20, 97 S.Ct. 29, 50 L.Ed.2d 25 (1976)**, the defendant was convicted of possessing heroin. The trial court received into evidence, over defendant's hearsay objection, testimony that the police officers received a tip from an informant to the effect that Moore and others were in possession of heroin at "Moore's apartment." The Court said:

> There can be no doubt that the informant's out-of-court declaration that the apartment in question was 'Moore's apartment,' either as related in the search warrant affidavit or as reiterated in live testimony by the police officers, was hearsay and thus inadmissible in evidence on the issue of Moore's guilt. Introduction of this testimony deprived Moore of the opportunity to cross-examine the informant as to exactly what he meant by 'Moore's apartment,' and

> what factual basis, if any, there was for believing that Moore was a tenant or regular resident there. Moore was similarly deprived of the chance to show that the witness' recollection was erroneous or that he was not credible. The informant's declaration falls within no exception to the hearsay rule recognized in the Federal Rules of Evidence, and reliance on this hearsay statement in determining petitioner's guilt or innocence was error.

Id.*, 97 S.Ct. at 30**. The facts of ***Moore are nearly identical to Mr. Garrett's case. Here, too, the prosecution was allowed to introduce hearsay testimony from an informant, which was used to determine the defendant's guilt.

While the prosecution may provide context by eliciting testimony about why an officer approached a certain residence, the *specifics* of what another person told him concerning a crime by the accused violates the hearsay rule. As explained in ***State v. Bankston*, 63 N.J. 263, 307 A.2d 65, 68 (1973)**:

> It is well settled that the hearsay rule is no violated when a police officer explains the reason he approached a suspect or went to the scene of the crime by stating that he did so 'upon information received.' **McCormick, Evidence (2d ed. 1972), § 248, p. 587**. Such testimony has been held to be admissible to show that the officer was not acting in an arbitrary manner or to explain his subsequent conduct.... (Citing authorities, including ***State v. Barnes*, 345**

S.W.2d 130, 132 (Mo. 1961.) However, when the officer becomes more specific by repeating what some other person told him concerning a crime by the accused the testimony violates the hearsay rule."

This is exactly what happened here. Officer Altic went beyond saying that he had "information about drug activity," to specifically repeating what the confidential informant had told him concerning the alleged sale of drugs by Mr. Garrett at that location. The prosecutor offered the informant's statements as proof of the matter asserted, urging the jury to use that information to "connect some more dots" regarding Defendant's knowledge (Tr. 307).

In ***State v. Shigemura,*** **680 S.W.2d 256 (Mo. App., E.D. 1984)**, the defendant's conviction of receiving stolen property was reversed and the cause remanded because the trial court erroneously admitted testimony of a police officer to the effect that the officer was directed to a certain restaurant by a confidential informant "who advised me that [defendant] was in possession of stolen property which he intended to sell at that location." The state argued that the testimony was admissible because it was not offered for the truth of the statement's contents but rather to explain the subsequent conduct of the officer in staking out the restaurant.

The Eastern District held that the admission of the testimony was prejudicial error. It said that the state had to prove that defendant knew or believed that the items in his possession had been stolen, that the defense was

aimed solely at the knowledge element, and that the fact of the sale was not questioned at all and the evidence of knowledge "was not over-whelming." Although there was evidence to create a submissible case for the state, the state's evidence was "not strong."

The court said, at 257-258:

> The only other evidence that defendant knew or believed the items had been stolen was the hearsay statement by a confidential informant, testified to by the detective, that defendant was in possession of stolen property he intended to sell at the restaurant. That statement connected defendant with the crime. ***State v. Kirkland,* 471 S.W.2d 191, 194-95 (Mo. 1971)**. The high probability of prejudicial impact on the jury was exacerbated by the fact no limiting instruction was given, and thus the jury was apparently allowed to consider the statement as evidence linking defendant to the crime. Compare ***State v. Calmese,* 657 S.W.2d 662, 663 (Mo. App., E.D. 1983)**. The officer could have characterized his reason for being at the Parkmoor without, in effect, having testimony of an absent and unknown witness.

In the case at bar, the issue of whether Mr. Garrett lived at 1624 Virginia and whether he was dealing drugs from it were the crucial questions in the case. Even if the state had a right to show the reason for Officer Altic's trip to that residence, that purpose could have been satisfied by merely letting Altic testify

that he had been contacted by an informant about drug activity at that location. No other portion of the conversation should have been admitted over defense counsel's multiple hearsay objections.

In its transfer application, the State alleges that the Southern District's opinion is contrary to ***State v. Robinson,* 111 S.W.3d 510 (Mo. App., S.D. 2003)**, and ***State v. Howard,* 913 S.W.2d 68 (Mo. App., E.D. 1995)**. ***Robinson*** is identical to the present case, and the Southern District relied upon its opinion in ***Robinson*** in deciding the present case. ***See State v. Garrett,* 2003 WL 22228575, at 4 (Mo. App., S.D. 2003)**. Save for the State's hairsplitting, the holding in ***Robinson*** and ***Garrett*** are identical. In ***Robinson***, the Southern District declared that the hearsay of the confidential informant was inadmissible, holding that, "it was adequate for the officer to testify that the reason they went to the address was because of information received from the informant that marijuana and crack cocaine were present there." ***Robinson,* 111 S.W.3d at 514**. In ***Garrett***, the Southern District also found that "it would have been more than sufficient, if the State wished to provide the jury a context in which to view [Officer Altic's] subsequent actions, for [Officer Altic] to have testified that "he approached [Appellant] or went to [1624 Virginia] by stating that he did so 'upon information received.' " ***Garrett,* 2003 WL 22228575 at 4 (*citing State v. Bankston,* 63 N.J. 263, 307 A.2d 65, 68 (1973) (*quoting* MCCORMICK, EVIDENCE § 248 (2d ed.1972))**.

Obviously, Officer Altic, like Officer Sullivan in ***Robinson***, could have testified that he received information that drugs were being sold from 1624 Virginia and that is why he went to that address. He simply should not have been allowed to testify that Mr. Garrett was selling drugs or that Mr. Garrett lived there. The Southern District has not narrowed its ***Robinson*** opinion in the slightest, and the State's assertion of a conflict is simply not supported by a fair reading of the opinion. Undersigned counsel cited the Southern District to ***Bankston, supra***, in both ***Robinson*** and ***Garrett***. The only difference between the two cases is that the Garrett opinion cites to ***Bankston*** directly. The holdings of the two cases are identical.

The State is correct, however, in observing that the Southern District's ***Garrett*** opinion is contrary to ***State v. Howard, supra***. And the reason is that the Eastern District in ***Howard*** erroneously misinterpreted this Court's holding in ***State v. Dunn, supra***. Therefore, the Southern District was correct to ignore it.

It is necessary to look closely at the holding in ***Dunn*** to see where the Eastern District went off track. The following is the exchange in ***Dunn*** which contained the alleged inadmissible testimony:

> Q: All right, I'm going to direct your attention to the fourth day of April because we've already talked about it, and I ask you on that date, did you have an occasion to come into contact with an individual later known to you as Randy Dunn?

A: Yes, sir, I did.

Q: Where was that contact?

A: 700 East Walnut.

Q: Is that here in Greene County?

A: Yes, sir, it is.

Q: That's here in Springfield, as a matter of fact?

A: Yes, sir, it is.

Q: Why were you at that location?

A: I'd been contacted by an informant who stated that--

(by Ms. Bock): Objection, your Honor, hearsay.

THE COURT: Objection is overruled.

A: Stated that Randy and Jeff Dunn had been at his house earlier with some marijuana for sale and that they would return in thirty minutes if I was interested.

(by Mr. Cleek): Who was that informant?

A: Alvin Chastain.

State v. Dunn*, 817 S.W.2d at 243.** As a general matter, this Court stated that "statements made by out-of-court declarants that explain subsequent police conduct are admissible, supplying relevant background and continuity." ***Id. Therefore the question, "why were you at that location?" and the partial response, "I'd been contacted by an informant who stated that--" was not inadmissible. ***Id.***

However, this Court noted that, "Appellant did not seek a conference

outside the hearing of the jury to determine the nature of the remainder of the response that would be elicited upon the prosecutor's question. Even more significantly, appellant did not request, after the question had been answered, that the statement to which appellant now objects be stricken and the jury instructed to disregard it." ***Id.*** This Court continued, "The [trial] court, therefore, was not given an opportunity to consider corrective action, assuming, without deciding, that corrective action was required. When evidence is relevant but parts of it are claimed to be prejudicial, the attorney objecting has a duty to ask the court for specific relief from the prejudicial portion of the evidence." ***Id.***

Therefore, this Court in ***Dunn***, never decided the question of whether the specific hearsay about Appellant Dunn selling marijuana to the confidential informant was inadmissible. However, this Court did drop a footnote to caution prosecutors:

> The holding on this point should not be taken to suggest that prosecutors may with impunity elicit hearsay information received from an informant, particularly when the statement directly proves an issue crucial to the state's burden of proof and is offered for the truth of the matter asserted.

State v. Dunn, **817 S.W.2d at 243, fn 1.**

The ***Howard*** Court simply read far too much into the ***Dunn*** opinion. This is the exchange in ***Howard***:

Q. [by prosecutor] What did [confidential informant] tell you?

A. He just advised me that he knew of a subject which (sic) was selling cocaine.

Q. Did he tell you the subject's name?

A. Yes.

Q. And what name did he give you?

A. Derrick Howard.

Q. And did he tell you where that was going to--where that would take place?

A. Yes.

[defense counsel]: Your Honor, I'd like to make a continuing objection as to statements of [confidential informant].

THE COURT: Noted and overruled.

Q. [by prosecutor] Where did he indicate that this buy was to take place?

A. He advised me that it would probably take place at where the subject worked at the time because usually he worked on those hours....

State v. Howard*, 913 S.W.2d at 70**. The Eastern District held that this testimony was not inadmissible hearsay, citing ***Dunn for the proposition that, "Out-of-court statements that explain subsequent police conduct are admissible to supply relevant background and continuity." ***Id.*** However, the Court did not answer the

question left open and cautioned against in ***Dunn –*** the propriety of eliciting testimony about a confidential informant's statement that directly implicates Appellant in the charged crime. But the Southern District did answer that question. Relying on ***Moore, supra; Kirkland, supra;*** and ***Shigemura, supra,*** the Southern District held that the confidential informant's testimony was inadmissible hearsay that was not necessary to explain officer conduct.

Mr. Garrett suffered prejudiced by the introduction of this hearsay testimony because, through the erroneous introduction of those statements, the state obtained the benefit of an out-of-court statement by an unknown informant which supported the State's theory on the key question in the case. The contested issue at trial was whether Mr. Garrett had knowledge of or dominion and control over the drugs at that location. Defense counsel presented evidence that Mr. Garrett actually resided at another location (Tr. 272-286). Another person, Samantha Overstreet, was present at the house when the officers executed the search warrant (Tr. 170, 209-210). The officers did not find Mr. Garrett in the bedroom (Tr. 167, 209). The State tried to link him to the bedroom through evidence that there were male clothes in the bedroom and that after his arrest, Mr. Garrett allegedly asked for his shirt, shoes and wallet from the bedroom (Tr. 200, 211, 220, 224-225, 229, 236). The officers handed him a wallet they found in the bedroom which contained no identification, and Mr. Garrett did not deny that it was his (Tr. 200). Officer Altic allegedly found ten small packets of methamphetamine in Mr. Garrett's front pocket during a pat-down search, but Mr.

Garrett challenged this by confronting Officer Altic with the fact that he did not turn over this alleged evidence until after they had arrived at the police station (Tr. 172-173, 183, 227-228). All other evidence was given to the evidence officer at the scene (Tr. 226). No one else saw the drugs taken from Mr. Garrett's person (Tr. 228).

Perhaps the prosecutor was aware that the evidence linking Mr. Garrett to the drugs found in the bedroom dresser and closet was tenuous, and so, he decided to use the informant's statements to specifically link Mr. Garrett to the sale of drugs. The prosecutor clearly intended the jury to view the confidential informant's information for its truth, urging the jury to use it to "connect the dots." (Tr. 307-308). This tactic was improper and the evidence should have been excluded by the trial court. Defense counsel's hearsay objection was well-founded, and the trial court committed reversible error in receiving the challenged evidence. ***State v. Valentine*, 587 S.W.2d 859, 861-862 (Mo. banc 1979); *State v. Reynolds*, 723 S.W.2d 400, 403-404 (Mo.App.1986); *State v. Johnson*, 538 S.W.2d 73, 79 (Mo.App.1976). McCormick on Evidence, (3rd ed. 1984), § 249, p. 732; 23 C.J.S. Criminal Law, § 857**. This Court must reverse Mr. Garrett's convictions and remand for new trial.

II.

The trial court abused its discretion in overruling defense counsel's objections to hearsay and insufficient foundation and allowing the prosecutor to use several letters seized during the search to be admitted as evidence that Mr. Garrett lived at 1624 Virginia because this ruling deprived Mr. Garrett of his rights to due process, confrontation and a fair trial, as guaranteed by the 5th, 6th and 14th Amendments to the U.S. Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the letters were offered and then emphasized in argument to prove the truth of the matter asserted -- that David Garrett lived at 1624 Virginia -- but they did not fall within any exception to the hearsay rule. Furthermore, the authenticity of a private writing must be established before it may be received into evidence, which did not occur here. Mr. Garrett was prejudiced because the State's evidence connecting him to the drugs was tenuous, and the prosecutor urged the jury to use the letters as proof that Mr. Garrett resided at 1624 Virginia, and thus, had knowledge, dominion and control of the drugs contained therein.

Defense counsel moved in limine to exclude letters collected from 1624 Virginia that the State wanted to use as proof that Mr. Garrett was living at that address (Tr. 15-17). That motion was overruled (Tr. 17). At trial, the State introduced several letters that were obtained at some point during the search from

a man, Mr. Nance, who lived in the downstairs portion of the house; they were addressed to Mr. Garrett at 1624 Virginia (Tr. 174-179). Defense counsel objected that there was insufficient foundation for their admission and that the letters were hearsay because somebody who is not a witness in the case determined that Mr. Garrett lived at 1624 Virginia (Tr. 175-176). Defense counsel could not cross-examine the writer of the letter about the basis for their belief, and the only reason to admit the letters was to prove that Mr. Garrett lived there (Tr. 176). The objection was overruled (Tr. 177). This ruling was included as error in the motion for new trial (L.F. 82).

The trial court has broad discretion to admit and exclude evidence. ***State v. Clayton*, 995 S.W.2d 468, 474 (Mo. banc 1999)**. This court will find error by the trial court only where there was clearly an abuse of discretion. ***Id.*** The trial court abused its discretion in two ways. First, the letters were not properly authenticated. "The general rule is that the execution or authenticity of a private writing must be established before it may be received into evidence." ***State v. Swigert*, 852 S.W.2d 158, 163 (Mo. App., W.D. 1993)**. There was no attempt whatsoever to authenticate these documents before their admission into evidence. Officer Altic merely testified that the letters were retrieved from a man named Robert Nance who lived in the back of the house (Tr. 174, 178). It appears from the record that the letters were not even found in the upstairs apartment where the State alleged that Mr. Garrett was living (Tr. 174, 178).

Furthermore, the letters were inadmissible hearsay. Hearsay is any out-of-court statement used to prove the truth of the matter asserted. ***State v. Broussard,* 57 S.W.3d 902, 911 (Mo. App., S.D. 2001)**. The State's explicit purpose in using the letters was to prove that Mr. Garrett lived at 1624 Virginia (Tr. 15-16, 174).

When used in this way, the letter constituted a statement, namely that Mr. Garrett lived at 1624 Virginia, and the prosecutor used this address, as it appeared on the letter, to prove the truth of the matter asserted -- that the address was Mr. Garrett's residence. ***See United States v. Patrick*, 959 F.2d 991, 1000 (D.C. Cir. 1992)**[3]. In ***Patrick***, the government used a sales receipt, containing Patrick's name and an address, to prove that Patrick lived at that address shown on the receipt. ***Id.*** The appellate court overturned Patrick's conviction because the prosecutor's use of the receipt to prove the address of Patrick's residence was inadmissible hearsay. ***Id.***

Also, in ***United States v. Watkins*, 519 F.2d 294 (D.C. Cir. 1975)**, the defendant was charged with possession with intent to distribute based on drugs found in the apartment where she was arrested. The Court overturned the conviction, holding that a rent receipt in Watkins' name for that apartment was hearsay when offered "to show who was paying for the apartment and who was

[3] Appellant has not found any Missouri cases on point and thus refers the Court to other jurisdictions.

living there." ***Id.* at 296-297**. This is exactly what the prosecutor was using the letters for in the present case. They were equally inadmissible.

In certain circumstances, courts have found that these types of documents are admissible when they are offered, not for their truth, but as "circumstantial evidence that appellant received or stored his property, including his correspondence" in a certain location of the home, to prove that the appellant had control over that area. ***See Shurbaji v. Commonwealth*, 444 S.E.2d 549, 550-551 (Va. Ct. App. 1994)** (utility bills found in master bedroom and addressed to the accused not offered to prove for the truth that appellant lived at the address, but to prove that appellant controlled the room in which the bills and drugs were found); and ***United States v. Hazeltine*, 444 F.2d 1382, 1384 (10th Cir. 1971)** (envelope bearing inmate's name and address was not hearsay and properly admissible, without authentication, to establish that cell and locker in which heroin was seized were the inmate's cell and locker).

Here, however, the State was clearly offering the letters to show that Mr. Garrett lived at the address on the letters, and not that he had control or dominion over the bedroom in which the drugs were found (Tr. 15-16). Indeed, the letters were not found in the bedroom where the drugs were located (Tr. 174-179). They were not even located in the apartment that was searched; rather, they were found in the possession of a "Mr. Nance" who resided in the back of the house (Tr. 174-178). As such, they do not fall within the exception discussed above.

The admission of these letters prejudiced Mr. Garrett in that the issue of knowledge, dominion and control of the drugs was the key issue of contention in the case. The letters were yet another form of inadmissible hearsay that the State used as proof on this issue (See also Point I).

Defense counsel presented evidence that Mr. Garrett actually resided at another location (Tr. 272-286). Another person, Samantha Overstreet, was present at the house when the officers executed the search warrant (Tr. 170, 209-210). The officers did not find Mr. Garrett in the bedroom (Tr. 167, 209). The State tried to link him to the bedroom through evidence that there were male clothes in the bedroom and that after his arrest, Mr. Garrett allegedly asked for his shirt, shoes and wallet from the bedroom (Tr. 200, 211, 220, 223-225, 229, 236). The officers handed him a wallet they found in the bedroom which contained no identification, and Mr. Garrett did not deny that it was his (Tr. 200).

Officer Altic allegedly found ten small packets of methamphetamine in Mr. Garrett's front pocket during a pat-down search, but Mr. Garrett challenged this by confronting Officer Altic with the fact that he did not turn over this alleged evidence until after they had arrived at the police station (Tr. 172-173, 183, 227-228). All other evidence was given to the evidence officer at the scene (Tr. 226). No one else saw the drugs taken from Mr. Garrett's person (Tr. 228). Furthermore, even accepting personal possession of ten small packets, an inference can be made that 10 small baggies was an amount for personal use, and

that Mr. Garrett was not selling the drugs, but was merely in possession of an amount for personal use.

The State's evidence linking Mr. Garrett to the drugs found in the bedroom dresser and closet was not overwhelming, and just as the prosecutor used inadmissible hearsay of a confidential informant to specifically link Mr. Garrett to the sale of drugs, in the same manner he used inadmissible hearsay through these unauthenticated letters. This tactic was improper and the evidence should have been excluded by the trial court. Defense objections to the letters were well-founded, and the trial court committed reversible error in receiving the challenged evidence. This Court must reverse Mr. Garrett's convictions and remand for new trial.

III.

The trial court plainly erred in failing to declare a mistrial *sua sponte* or to instruct the jury to disregard the prosecutor's statement when the prosecutor asked the jury "Did he [Mr. Garrett] ever tell you, did he ever deny to the police, that's what the police says; he never denied that the bedroom was his," because allowing this argument violated Mr. Garrett's rights to due process and a fair trial, and not to be compelled to testify guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 19 of the Missouri Constitution, in that the prosecutor's argument contained a direct reference to Mr. Garrett's right not to testify. Mr. Garrett suffered manifest injustice because this argument had a decisive effect on the jury's verdict in a case where dominion and control were the contested issues in the case and the State's evidence connecting Mr. Garrett to the drugs was not overwhelming.

> In his opening argument, the prosecutor asked the jury:
>
> **Did he** [Mr. Garrett] **ever tell you**, did he ever deny to the police, that's what the police says; he never denied that the bedroom was his. I submit to you, under that evidence, he knew, he knew, that he was in possession of these drugs.

(Tr. 304) (emphasis added).

This argument contained an inappropriate comment on Mr. Garrett's right not to be compelled to testify at trial. Mr. Garrett's failure to testify was used as evidence of the key issue in the case -- dominion and control over the drugs.

As long recognized by the Courts of our state, a criminal defendant must be afforded a fair trial and the prosecutor has a duty to ensure he receives it. ***State v. Tiedt,* 357 Mo. 115, 206 S.W.2d 524, 526 (Mo. banc 1947)**. Like prosecutors, trial judges must also ensure that the defendant gets fairly tried. ***Tiedt, supra***. Although judges have wide discretion in controlling closing arguments, they have no discretion to allow plainly unwarranted and injurious arguments. ***Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)**. This is true even, as here, when counsel failed to object. After all, judges are not passive moderators. They must correct, even *sua sponte*, errors that could significantly impede a just determination of the trial. **I ABA Standards for Criminal Justice, Special Functions of the Trial Judge 6-1.1(2ed.1979)**. Mr. Garrett asks this Court for plain error review. **Rule 30.20**.

Improper argument warrants relief on plain error review when it has a decisive effect on the jury. ***State v. Reynolds,* 997 S.W.2d 528, 533-34 (Mo. App., S.D. 1999)**. It is true that courts hesitate to find plain error in a failure to *sua sponte* correct a statement made during closing arguments because "trial strategy looms as an important consideration in deciding whether to object during closing argument." ***State v. Cobb,* 875 S.W.2d 533, 537 (Mo. banc 1994)**. However, in regard to this specific argument, there could be no trial strategy in failing to object,

because Mr. Garrett's entire defense was that he was not in possession of the drugs. Allowing clearly impermissible argument on this very issue would be an odd trial strategy indeed.

Criminal defendants have the right not to testify and any comment by either party concerning the exercise of that right is forbidden. ***State v. Barnum,* 14 S.W.3d 587, 591 (Mo. banc 2000); U.S. CONST. Amend. V; MO. CONST. art. I section 18; Section 546.270; Rule 27.05(a)**. In pertinent part, **Section 546.270** provides that if "the accused shall not avail himself ... of his ... right to testify ... it shall not ... be referred to by any attorney in the case." ***State v. Boyd* 91 S.W.3d 727, 731 (Mo. App., S.D. 2002)**. "The purpose of this rule is to avoid focusing the jury's attention upon a defendant's failure to testify." ***Barnum* at 591-92**.

A direct reference to defendant's failure to testify occurs when the prosecutor uses words such as "defendant," "accused," and "testify" or their equivalent. ***State v. Spencer,* 50 S.W.3d 869, 876 (Mo. App., E.D. 2001)**. Clearly, the "he" the prosecutor was referring to was Mr. Garrett, and "tell you" is the equivalent of "testify." **"Did he ever tell you"** was a direct reference to Mr. Garrett's failure to testify (Tr. 304).

The trial court should have intervened and declared a mistrial when the prosecutor asked the jury if Mr. Garrett had told them anything, or at the very least, instructed the jury to disregard the argument. "A prompt instruction by the trial court to the jury to disregard the comment may cure any error in a particular

case." ***State v. Neff*, 978 S.W.2d 341, 345 (Mo. banc 1998)**. This argument had a decisive effect upon the jury because the State's evidence on the issue of possession of the drugs in the bedroom was not overwhelming, and reminding the jury that Mr. Garrett did not testify and deny possession improperly bolstered the State's weak case. This Court must reverse Mr. Garrett's convictions and remand for a new trial.

CONCLUSION

Because the State was allowed to: 1) use inadmissible hearsay of a confidential informant; 2) use inadmissible hearsay of letters addressed to Mr. Garrett; and 3) make a direct reference to Mr. Garrett's failure to testify during closing argument, Mr. Garrett respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully Submitted,

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Certificate of Compliance and Service

I, Amy M. Bartholow, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **9,166** words, which does not exceed the 31,000 words allowed for appellant's opening brief.
- ✓ The floppy disc filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which is updated every Sunday (i.e., last updated on December 14, 2003). According to that program, the disc is virus-free.
- ✓ True and correct copies of the attached brief and floppy disc were mailed, this 15th day of December, 2003, to Andrea K. Spillars, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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