

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC94959
)	
ADRIANO CLARK,)	
)	
Appellant.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF
WEBSTER COUNTY, MISSOURI
THIRTIETH JUDICIAL CIRCUIT
THE HONORABLE DONALD CHEEVER, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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INDEX

	<u>Page</u>
TABLE OF AUTHORITIES.....	3
JURISDICTIONAL STATEMENT.....	5
STATEMENT OF FACTS.....	6
POINT RELIED ON (Insufficient evidence for possession of a controlled substance)	10
ARGUMENT	11
CONCLUSION	26
APPENDIX	

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES:</u>	
<i>Gorence v. Eagle Food Ctrs., Inc.</i> , 242 F.3d 759 (7th Cir.2001)	25
<i>In re Winship</i> , 397 U.S. 358 (1970)	11
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	11
<i>State v. Barber</i> , 635 S.W.2d 342 (Mo. 1982).....	14-15
<i>State v. Bateman</i> , 318 S.W.3d 681 (Mo. banc 2010)	12
<i>State v. Botts</i> , 151 S.W.3d 372 (Mo. App. W.D. 2004)	12, 22-23
<i>State v. Bowyer</i> , 693 S.W.2d 845 (Mo. App. W.D. 1985)	15, 16
<i>State v. Claycomb</i> , S.W.3d–, 2015 WL 3979728 (Mo. banc 2015).....	12-13
<i>State v. Driskell</i> , 167 S.W.3d 267 (Mo. App. W.D. 2005)	14, 15
<i>State v. Francis</i> , 455 S.W.3d 56 (Mo. App. E.D. 2014)	21, 22
<i>State v. Gonzalez</i> , 235 S.W.3d 20 (Mo. App. S.D. 2007)	15, 20
<i>State v. Grim</i> , 854 S.W.2d 403 (Mo. banc 1993)	12
<i>State v. Harris</i> , 358 S.W.3d 172 (Mo. App. E.D. 2011)	21-22
<i>State v. Howell</i> , 143 S.W.3d 747 (Mo. App. W.D. 2004).....	12
<i>State v. Hunter</i> , 840 S.W.2d 850 (Mo. banc 1992)	24-25
<i>State v. Ingram</i> , 249 S.W.3d 892 (Mo. App. W.D. 2008).....	14
<i>State v. Jackson</i> , 419 S.W.3d 850 (Mo. App. S.D. 2013)	24
<i>State v. May</i> , 71 S.W.3d 177 (Mo. App. W.D. 2002)	15
<i>State v. McMullin</i> , 136 S.W.3d 566 (Mo. App. S.D. 2004)	20

<i>State v. Mercado</i> , 887 S.W.2d 688 (Mo. App. S.D. 1994)	16
<i>State v. Metcalf</i> , 182 S.W.3d 272 (Mo. App. E.D. 2006)	14
<i>State v. Morris</i> , 41 S.W.3d 494 (Mo. App. E.D. 2000).....	14, 15, 16, 17, 18, 20, 24
<i>State v. Moses</i> , 265 S.W.3d 863 (Mo. App. E.D. 2008)	15
<i>State v. Politte</i> , 391 S.W.3d 537 (Mo. App. S.D. 2013)	15
<i>State v. Purlee</i> , 839 S.W.2d 584 (Mo. banc 1992).....	14
<i>State v. Ramsey</i> , 358 S.W.3d 589 (Mo. App. S.D. 2012)	15, 16, 19, 20, 21, 23
<i>State v. Smith</i> , 33 S.W.3d 648 (Mo. App. W.D. 2000)	15
<i>State v. Tomes</i> , 329 S.W.3d 400 (Mo. App. E.D. 2010)	16, 18, 19, 20, 23
<i>State v. West</i> , 21 S.W.3d 59 (Mo. App. W.D. 2000).....	15
<i>State v. Whalen</i> , 49 S.W.3d 181 (Mo. banc 2001)	12
<i>State v. Withrow</i> , 8 S.W.3d 75 (Mo. banc 1999).....	14, 15, 16, 17, 20, 23

CONSTITUTIONAL PROVISIONS:

United States Constitution, Fourteenth Amendment.....	11
Missouri Constitution, Article I, Section 10.....	11

STATUTES:

Section 195.010	13, 14
Section 195.202	13

JURISDICTIONAL STATEMENT

After a bench trial in Webster County, Missouri, Adriano Clark appeals his conviction for the class C felony of possession of a controlled substance, section 195.202.¹ (LF 19-20). On February 18, 2014, Judge Donald Cheever signed a final judgment and sentenced Mr. Clark as a prior and persistent drug offender to ten years in prison. (LF 19-20).

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, section 3, Mo. Const.; section 477.060. This Court thereafter granted Mr. Clark's application for transfer, so this Court has jurisdiction. Article V, sections 3 and 10, Mo. Const. and Rule 83.04.

¹ Statutory citations are to RSMo 2000.

STATEMENT OF FACTS

Adriano Clark was charged by a felony information as a prior and persistent drug offender with the class C felony of possession of a controlled substance. (LF 8). The information alleged that “on or about February 6, 2013 . . . [Mr. Clark] possessed methamphetamine, a controlled substance, knowing of its presence and nature.” (LF 8). At a bench trial held on November 26, 2013, the following evidence relevant to the issue on appeal was presented:

Officer Jeffrey Ford of the Marshfield Police Department testified that on February 6, 2013, he went to 222 North Fulton St. because a person at that address had called 9-1-1 and hung up the phone. (TR 6-7). He spoke with a woman named Autumn Dieckmeyer, who appeared to have been assaulted. (TR 7). Officer Ford asked her if anyone else was at the residence. (TR 7). Ms. Dieckmeyer motioned back toward the rear of the house. (TR 7).

Officer Ford went to the rear of the house, and he saw Mr. Clark sitting on a bed in the east bedroom. (TR 8). Mr. Clark was sitting on the west side of the bed, which was next to a nightstand. (TR 8). Officer Ford noticed a black velvet pouch with drawstrings sitting on the nightstand. (TR 9). Officer Ford arrested Mr. Clark and took him to jail.² (TR 9). Mr. Clark asked about getting his belongings from the west bedroom. (TR 10). Mr. Clark stated that everything in the west

² It is unclear from the record why Mr. Clark was placed under arrest or what he was being arrested for.

bedroom was his. (TR 10). Officer Ford testified that he found numerous items of clothes, a toolbox, and things of that nature in the west bedroom. (TR 10).

Officer Ford admitted on cross-examination that he did not see any contraband in plain sight in the east bedroom where he found Mr. Clark. (TR 11). He also admitted that he patted Mr. Clark down, and that he did not find any drugs or weapons on him. (TR 11).

Officer Richard Neal of the Marshfield Police Department testified that he conducted a search of the east bedroom after Ms. Dieckmeyer had given her consent to search the residence. (TR 17). He looked inside the black pouch that was on the nightstand next to the bed. (TR 19-20). The pouch had a substance later determined to be methamphetamine inside it. (TR 20). Officer Neal admitted that he did not see anything illegal in the bedroom in plain view. (TR 25). He also admitted that no drugs or weapons were found on Mr. Clark. (TR 25-26). He also specifically admitted that the methamphetamine was not in plain sight. (TR 27).

Joseph Taylor of the Marshfield Police Department testified that he conducted a search of the east bedroom. (TR 34-35). Ms. Dieckmeyer had given consent to search, and she had admitted it was her residence. (TR 39). She also told Officer Taylor that she was Mr. Clark's girlfriend. (TR 33). There were photographs of Mr. Clark and Ms. Dieckmeyer along the south wall of the bedroom. (TR 35-36). There was also a brown pouch hanging from the wall and another pouch on the nightstand. (TR 36). There was paraphernalia, scales, and methamphetamine in the pouch on the wall. (TR 36). Officer Taylor testified that

Mr. Clark had \$560 of cash on him when he was taken into custody. (TR 36-37). Officer Taylor admitted he had money on his own person when he testified, and that it was legal to possess money. (TR 41).

Officer Taylor testified that he found “large size shoes that appeared to be men’s shoes” by the nightstand in the bedroom. (TR 37). He also found a knife box and a cell phone that he believed was Mr. Clark’s and not Ms. Dieckmeyer’s. (TR 37, 47). Officer Taylor admitted, though, that there was nothing to indicate that the knife box belonged to Mr. Clark. (TR 47). He also admitted that he did not do anything to confirm that the shoes or the cell phone belonged to Mr. Clark. (TR 48). The officers did not find a wallet in the east bedroom. (TR 41). The officers also did not find any identification with Mr. Clark’s name on it. (TR 42). They did not find any of Mr. Clark’s clothes in the closet. (TR 46).

At the close of the State’s evidence, Mr. Clark filed a motion for judgment of acquittal. (LF 12-13). Mr. Clark additionally orally argued that the State had failed to prove he had any knowledge or control over the drugs found in the house. (TR 51). He further argued that nothing found in the east bedroom tied him to the room and that no drugs were in plain view. (TR 51, 53-54). The trial court overruled the motion for judgment of acquittal. (TR 54).

Mr. Clark called Abrieta Clark to testify in his defense. (TR 54-55). She testified that on February 6, 2013, she resided in Springfield, Missouri. (TR 56). She testified that Mr. Clark lived with her on February 6, 2013, and that he had lived with her for about a year. (TR 56). She testified that Mr. Clark had to live

with her as part of an agreement with Greene County. (TR 56). She also testified that Mr. Clark was required to wear an ankle monitor. (TR 57).

Mr. Clark filed an additional motion for judgment of acquittal at the close of all the evidence. (LF 16-18). The court overruled this motion. (TR 63). The Court found Mr. Clark guilty of possession of a controlled substance and sentenced him to ten years in the department of corrections. (TR 75). This appeal follows.

POINT RELIED ON

The trial court erred in overruling Mr. Clark's motion for judgment of acquittal after the close of all evidence and entering judgment and sentence for possession of a controlled substance because this violated Mr. Clark's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 10 of the Missouri Constitution, in that there was insufficient evidence to prove beyond a reasonable doubt either that Mr. Clark knew about the drugs in the east bedroom or that he exercised control over them; the drugs were found in closed pouches, and there was no further evidence presented connecting Mr. Clark to the drugs.

State v. Morris, 41 S.W.3d 494 (Mo. App. E.D. 2000);

State v. Ramsey, 358 S.W.3d 589 (Mo. App. S.D. 2012);

State v. Tomes, 329 S.W.3d 400 (Mo. App. E.D. 2010);

State v. Withrow, 8 S.W.3d 75 (Mo. banc 1999);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10;

Section 195.010; and

Section 195.202.

ARGUMENT

The trial court erred in overruling Mr. Clark’s motion for judgment of acquittal after the close of all evidence and entering judgment and sentence for possession of a controlled substance because this violated Mr. Clark’s right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 10 of the Missouri Constitution, in that there was insufficient evidence to prove beyond a reasonable doubt either that Mr. Clark knew about the drugs in the east bedroom or that he exercised control over them; the drugs were found in closed pouches, and there was no further evidence presented connecting Mr. Clark to the drugs.

A. Standard of Review and Preservation

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const., Amend. 14; Mo. Const. Art. I, § 10. This impresses “upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused” and thereby symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). There must be more than a “mere modicum” of evidence, because “it could not seriously be argued that such a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.” *Jackson*, 443 U.S. at 320.

In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). The State may rely upon direct and circumstantial evidence to meet its burden of proof. *State v. Howell*, 143 S.W.3d 747, 752 (Mo. App. W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative, or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375. “[T]he relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010).

Mr. Clark filed a motion for judgment of acquittal at the close of the State’s evidence and again at the close of all of the evidence. (LF 12-13, 16-18). Mr. Clark also orally argued to the trial court that the State had failed to prove that Mr. Clark had either knowledge of the drugs or control over the drugs. (TR 51). This issue is therefore preserved for review. Furthermore, this Court recently determined in *State v. Claycomb* that “[a] claim that the evidence was insufficient

to support [a] conviction is preserved on appeal even if not raised or not timely raised in the trial court.” –S.W.3d–, 2015 WL 3979728 (Mo. banc 2015).

B. Possession of a Controlled Substance

Section 195.202.1 provides that a person commits the crime of possession of a controlled substance if he possesses or has under his control a controlled substance. Any person who violates this section with respect to any controlled substance except thirty-five grams or less of marijuana is guilty of a class C felony. Section 195.202.2.

Section 195.010(34) provides that the terms “possessed” and “possessing a controlled substance” mean:

[A] person, with the knowledge of the presence and nature of a substance, has actual or constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. Possession may also be sole or joint. If one person alone has possession of a substance possession is sole. If two or more persons share possession of a substance, possession is joint.

In order to obtain a conviction for possession of a controlled substance, the State was therefore required to prove not only that Mr. Clark knew the

methamphetamine was in the bedroom, but also that he exercised dominion or control over it through actual or constructive possession. *State v. Ingram*, 249 S.W.3d 892, 895 (Mo. App. W.D. 2008).

Here, Mr. Clark did not *actually* possess the methamphetamine in the bedroom because he did not have exclusive possession of the premises and because the methamphetamine was found in two different closed pouches. (TR 20-21). *See State v. Driskell*, 167 S.W.3d 267, 269 (Mo. App. W.D. 2005) (rejecting the State's argument that the defendant had actual possession of drugs found in a closed console next to the driver's seat). Furthermore, Ms. Dieckmeyer admitted it was her residence when she consented to a search of the bedroom. (TR 39).

Where, as here, actual possession is not present, the State must prove constructive possession. *State v. Purlee*, 839 S.W.2d 584, 587 (Mo. banc 1992). A person has constructive possession of the substance when he has the power and the intention at a given time to exercise dominion or control over the items either directly or through another person or persons. *State v. Metcalf*, 182 S.W.3d 272, 274-75 (Mo. App. E.D. 2006). *See also*, section 195.010(34).

Although exclusive possession of the premises raises an inference of possession and control, since this is a case of joint possession of premises, further evidence is necessary to connect Mr. Clark to the methamphetamine found in the pouches. *State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999). Knowledge alone is not enough to convict on joint possession. *State v. Morris*, 41 S.W.3d 494, 498 (Mo. App. E.D. 2000). "Control is also a necessary element." *Id.*, citing *State v.*

Barber, 635 S.W.2d 342, 344-45 (Mo. 1982). The mere presence of the accused on shared premises where the drugs are found does not suffice to convict for possession. *State v. Bowyer*, 693 S.W.2d 845, 847 (Mo. App. W.D. 1985). The State had to present evidence of some incriminating circumstance that raised the inference of knowledge and control over the substance. *State v. West*, 21 S.W.3d 59, 63 (Mo. App. W.D. 2000). “Such evidence may include statements or actions indicating consciousness of guilt, routine access to the place where the drugs were found, commingling of the drugs with the defendant’s personal belongings, a large quantity of drugs, or the drugs were in plain view.” *State v. Driskell*, 167 S.W.3d at 269.

C. Relevant Case Law

Numerous Missouri cases have reversed drug-related convictions where there were either similar levels of evidence or *more* evidence than in the present case.³ Counsel for Mr. Clark has been unable to find a single case, though, where a

³ See *State v. Politte*, 391 S.W.3d 537 (Mo. App. S.D. 2013); *State v. Ramsey*, 358 S.W.3d 589 (Mo. App. S.D. 2012); *State v. Moses*, 265 S.W.3d 863, 866 (Mo. App. E.D. 2008); *State v. Gonzalez*, 235 S.W.3d 20 (Mo. App. S.D. 2007); *State v. Driskell*, 167 S.W.3d at 267; *State v. May*, 71 S.W.3d 177 (Mo. App. W.D. 2002); *State v. Morris*, 41 S.W.3d at 494; *State v. Smith*, 33 S.W.3d 648 (Mo. App. W.D. 2000); *State v. West*, 21 S.W.3d at 59; *State v. Withrow*, 8 S.W.3d at

defendant's conviction has been affirmed with similar (or less) evidence. Though *any* of the cases listed in footnote three could be used to show why Mr. Clark's conviction should be reversed, four cases in particular demonstrate this. *State v. Ramsey*, 358 S.W.3d 589 (Mo. App. S.D. 2012); *State v. Morris*, 41 S.W.3d 494 (Mo. App. E.D. 2000); *State v. Withrow*, 8 S.W.3d 75 (Mo. banc 1999); *State v. Tomes*, 329 S.W.3d 400 (Mo. App. E.D. 2010).

i. *State v. Withrow*, 8 S.W.3d 75 (Mo. banc 1999)

In *Withrow*, officers observed the defendant coming and going from a drug house on five or six occasions over a two day period. *Id.* at 77. They also saw the defendant's car parked in front of the house at least two times. *Id.* The officers obtained a search warrant for the house, and after no one answered the door to let them in, they were forced to "breach the door." *Id.* The officers saw the defendant leaving the east bedroom with his hands raised. *Id.*

The officers smelled a solvent-like odor coming from the east bedroom, and they testified that this odor is commonly associated with the production of methamphetamine. *Id.* The officers discovered a locked closet in the east bedroom that contained a sealed glass jar with a milky liquid and heavy white sediment along the bottom. *Id.* The jar's contents were indicative of the primary stage of

75; *State v. Mercado*, 887 S.W.2d 688 (Mo. App. S.D. 1994); and *State v. Bowyer*, 693 S.W.2d at 845.

methamphetamine production. *Id.* Also in the closet, the police found bottles of pseudoephedrine pills, lithium batteries, grain alcohol, and distilled water, which are all ingredients used to manufacture methamphetamine. *Id.* In the same bedroom, the officers found a propane tank with an adapter used to store anhydrous ammonia. *Id.* The officers also found coffee filters, glass cookware, a hotplate, and a plastic jug with plastic tubing in either the bedroom or the closet. *Id.* Additionally, firearms and ammunition were present in the room. *Id.* In a different bedroom, the officers found an old letter addressed to the defendant, along with scales, syringes, a spoon, and a marijuana pipe. *Id.*

This Court, in a unanimous decision, determined that this “evidence, at best, indicates that defendant was frequently present in a house in which there was an ongoing attempt to manufacture methamphetamine.” *Id.* at 81. This Court further determined that “[n]othing beyond being present in the room truly connect[ed] defendant to the manufacturing apparatus or the jar in the closet.” *Id.* This Court held that because the defendant did not possess the materials used in the drug-making process, there was insufficient evidence to support his conviction for attempted manufacturing. *Id.*

ii. *State v. Morris*, 41 S.W.3d 494, 498 (Mo. App. E.D. 2000)

In *Morris*, the defendant was in another person’s home doing laundry when officers executed a search warrant there. *Id.* at 496. When the defendant opened the door, the officers immediately forced him to the ground, placed his hands

behind his back, and searched his pockets. *Id.* He had \$900 cash in his front pocket, and during the search of the apartment, the deputies found two boxes of plastic bags beside the microwave, a small bag of marijuana inside the microwave, and seven small bags of marijuana under the sink. *Id.* at 497. A detective asked the defendant if there were any more narcotics in the apartment, and he said “No, you got it all.” *Id.*

The defendant challenged the sufficiency of the evidence to support his conviction for possession of more than 35 grams of marijuana. The Eastern District noted that the defendant was “neither in exclusive possession of the premises nor did he have actual, physical possession of any of the drugs seized from the apartment.” *Id.* Even when assuming that the defendant had joint control of the premises, the Court found that no additional incriminating evidence existed. *Id.* at 498. Although the Court pointed out that the defendant’s presence in the apartment where the drugs were found was potentially incriminating, it relied on the fact that knowledge of a controlled substance is insufficient to sustain a conviction based on possession, because control is also a necessary element. *Id.* The defendant’s statement arguably indicated knowledge of the presence of drugs; however, “it [did not] demonstrate that the drugs were Defendant’s or evince an intent to control the drugs[,]” therefore failing the test for constructive possession. *Id.*

iii. State v. Tomes, 329 S.W.3d 400, 401 (Mo. App. E.D. 2010)

In *Tomes*, officers responded to a house because of a reported assault. *Id.* at 401. The defendant admitted that she had stabbed her brother to stop him from assaulting her ex-husband. *Id.* The defendant shared a bedroom with her ex-husband in a reconciliation attempt. *Id.* at 401-402. When the officers were in the defendant's bedroom, they "discovered pieces of tin foil and a small plastic bag with white powder residue sitting inside an open manicure case on Defendant's dresser." *Id.* at 402. The white powder tested positive for methamphetamine. *Id.* The officers also discovered "a roll of foil behind the bed, and marijuana and paraphernalia in multiple locations throughout the house." *Id.* Despite the fact that the methamphetamine was found on top of the defendant's dresser, the Eastern District determined that there was insufficient evidence to support her conviction for possession of a controlled substance. *Id.* at 404.

iv. State v. Ramsey, 358 S.W.3d 589 (Mo. App. S.D. 2012)

In *Ramsey*, the defendant shared a bedroom with a woman in a one-bedroom home. *Id.* at 590. Police officers executed a search warrant one day as the defendant was coming home. *Id.* The officers took his key, searched the house, "and found 1.31 grams of cocaine in a bedroom wastebasket, hidden under an opaque trash bag liner." *Id.* The State argued that the defendant had routine access to the drugs because he slept in the bedroom. *Id.* at 592. However, the Court found that this was "not persuasive where the state's witness proved that a man and a

woman shared a house, with one bedroom, and it looked like no one slept elsewhere.” *Id.* The Court therefore reversed the defendant’s conviction for possession of a controlled substance.

D. Analysis

The holdings of these cases are consistent with the principle that “a criminal conviction cannot be based upon probabilities and speculation.” *Gonzalez*, 235 S.W.3d 20, 27 (Mo. App. S.D. 2007), *quoting State v. McMullin*, 136 S.W.3d 566, 573 (Mo. App. S.D. 2004). The Southern District’s slip opinion affirming Mr. Clark’s conviction is *inconsistent* with this principle.

Like the drugs in *Morris*, 41 S.W.3d at 496-97 and *Ramsey*, 358 S.W.3d at 590, the methamphetamine found in the present case was hidden. Officer Neal and Officer Ford both testified, for instance, that there were no drugs found in plain sight. (TR 11, 25, 27). Instead, the methamphetamine at issue was found in two different closed pouches. (TR 20-21). In contrast, the Courts found insufficient evidence in *Withrow*, 8 S.W.3d at 77 and *Tomes*, 329 S.W.3d at 401-02 despite the fact that the illegal substances at issue were found out in the open. Furthermore, in the present case, the State offered no evidence that Mr. Clark knew about the contents of the pouches. Likewise, the State did not allege that Mr. Clark made any inculpatory statements or that he showed signs of nervousness.

The Southern District’s slip opinion makes much of the fact that Mr. Clark was alone in the bedroom when the officers arrived. (Slip Opinion, *7). However,

the defendants in *Withrow*, 8 S.W.3d at 77 and *Morris*, 41 S.W.3d at 496 were also alone in the place where illegal materials were found. Furthermore, the defendant in *Ramsey* was about to enter an empty house, but he was stopped by the officer executing a search warrant. 358 S.W.3d at 590. Also, there was no evidence presented as to where Ms. Dieckmeyer was before she answered the door for the officers; she very well could have been in the bedroom with Mr. Clark.

The Southern District's slip opinion also relies on the fact that the hidden drugs were found near a cell phone, a pair of men's shoes, and a knife box. However, Mr. Clark was not holding any of these items, and the officers did not take any steps to confirm that these items actually belonged to Mr. Clark.

As for the phone, Detective Taylor testified that he did not take any steps to confirm that the phone belonged to Mr. Clark. (TR 147). Though Detective Taylor testified that he believed Ms. Dieckmeyer had a cell phone in her hand when he was speaking with her, he admitted that she could have two cell phones, or that she could have had one broken phone. (TR 147).⁴ Furthermore, there was no testimony that the phone's number belonged to Mr. Clark. In finding that the State proved the phone belonged to Mr. Clark on such shaky evidence, the Southern District's opinion is in conflict with two cases from the Eastern District Court of Appeals establishing the foundation necessary to admit text messages. *See State v.*

⁴ There was no evidence that the phone attributed to Mr. Clark was even a working phone.

Francis, 455 S.W.3d 56, 69-70 (Mo. App. E.D. 2014); *State v. Harris*, 358 S.W.3d 172, 175 (Mo. App. E.D. 2011). In *Harris*, for instance, the Court stated the following:

Applying these rules to text messages, the proponent of such evidence must present some proof that the message[s] were actually authored by the person who allegedly sent them. This should not be an unduly burdensome requirement and can be satisfied by circumstantial evidence. Proof could be in the form of admission by the author that he actually sent them, or simply an admission by the author that the number from which the message was received is his number and that he has control of that phone. Such proof could even be established by the person receiving the message testifying that he regularly receives text messages from the author from this number, or something distinctive about the text message indicating the author wrote it, such as a personalized signature.

Id. Though these cases discuss the foundation for admitting text messages, they are relevant here where the relevant question is whether or not the State proved that Mr. Clark owned the phone in question. Because the State failed to meet the foundation requirements established by *Francis* and *Harris*, the State also failed to prove that Mr. Clark owned the phone in question.

Next, the State failed to prove that the shoes belonged to Mr. Clark. In fact, Detective Taylor admitted that he did not do anything to confirm that the shoes belonged to Mr. Clark. (TR 48). Attributing the shoes to Mr. Clark without

determining that they even fit his feet contradicts the holding of *State v. Botts*, 151 S.W.3d 372, 378 (Mo. App. W.D. 2004)(“ No evidence was presented to demonstrate that the clothing was Mr. Botts’, not even that the size of the clothing was the same worn by Mr. Botts.”). Furthermore, the State never offered evidence that Mr. Clark was wearing a different pair of shoes when he was sitting on the bed. Therefore, even if the cell phone and shoes belonged to Mr. Clark, this does not connect Mr. Clark to the hidden drugs. Temporarily setting down a cell phone and taking off a pair of shoes before sitting on a bed does not prove a person has knowledge or exercised control over hidden drugs in closed pouches.

Finally, the State did nothing to prove that the knife box belonged to Mr. Clark and not to Ms. Dieckmeyer. Officer Taylor even admitted that the knife box *could* have been Ms. Dieckmeyer’s. (TR 47). He further testified that the knife box did not have Mr. Clark’s name on it, and that there was nothing to identify it as Mr. Clark’s. (TR 47). The Southern District’s opinion erroneously accepted that the knife box belonged to Mr. Clark without any analysis whatsoever. (Slip Opinion, *7).

The State failed to prove that Mr. Clark had any greater connection to the bedroom than the defendant in *Withrow*. In the present case, the officers did not find a wallet in the east bedroom or any identification with Mr. Clark’s name on it. (TR 41, 42). They also did not find any of Mr. Clark’s clothes in the closet. (TR 46). In fact, Mr. Clark unquestionably had *less* of a connection to the bedroom

where the drugs were found than the defendants in *Tomes* or *Ramsey* did in those cases.

The Southern District's opinion also makes much of the fact that Mr. Clark had \$560 on his person when he was taken into custody. First of all, even Officer Taylor admitted that he had money on his own person when he testified, and that it was legal to possess money. (TR 41). Next, the money Mr. Clark possessed consisted of five one hundred dollar bills and three twenty dollar bills. There is no evidence that hundred dollar bills are a common currency in drug transactions. *See State v. Jackson* for the proposition that the "presence of large sums of money held in small denominations may be consistent with drug dealing." 419 S.W.3d 850, 856 (Mo. App. S.D. 2013)(emphasis added). Finally, the Eastern District Court of Appeals determined in *State v. Morris* that the \$900 in cash found in the defendant's pocket was only "marginally relevant to an offense of possession of more than 35 grams and marijuana," and that "[t]he money does not show knowledge of the presence of the drugs or control over them." 41 S.W.3d 494, 498 (Mo. App. E.D. 2000). If the \$900 in *Morris* did not show possession, than certainly the amount of money found in the present case (\$560) does not show possession either.

The State asserted in its Suggestions in Opposition to Appellant's Application for Transfer that counsel for Mr. Clark "applies the law incorrectly by analyzing each item of evidence in a vacuum." (Sugg. in Opp. 3). Counsel agrees with the State that this Court should evaluate Mr. Clark's sufficiency claim by

examining the totality of the circumstances. *Morris*, 41 S.W.3d at 497. However, just as “[n]umerous non-errors cannot add up to error” (*State v. Hunter*, 840 S.W.2d 850, 869-70 (Mo. banc 1992)), numerous pieces of non-probative evidence cannot add up to probative evidence. See *Gorence v. Eagle Food Ctrs., Inc.*, 242 F.3d 759, 763 (7th Cir.2001)(“And it is simply not true, we want to emphasize, that if a litigant presents an overload of irrelevant or nonprobative facts, somehow the irrelevances will add up to relevant evidence of discriminatory intent. They do not; zero plus zero is zero.”).Furthermore, the State’s evidence as a whole cannot overcome the fact that Mr. Clark was in someone else’s bedroom, that the drugs in question were hidden in pouches, and that Mr. Clark did not appear nervous or make any incriminating statements.

In considering the totality of the circumstances, no rational juror could have found beyond a reasonable doubt that Mr. Clark either had knowledge of the drugs found in the closed pouches or that he exercised control over them. This Court should reverse his conviction for possession of a controlled substance and order him discharged from that conviction and sentence.

CONCLUSION

Because there was insufficient evidence that Mr. Clark had knowledge of the drugs in closed pouches or that he exercised control over them, his conviction for possession of a controlled substance must be reversed, and he should be ordered discharged from that count.

Respectfully submitted,

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Certificate of Compliance and Service

I, Samuel E. Buffaloe, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,534 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 20th day of July, 2015, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Samuel Buffaloe

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