

IN THE MISSOURI SUPREME COURT

SC94081

STATE OF MISSOURI,

Respondent,

vs.

CHRISTOPHER ERIC HUNT,

Appellant.

Appeal from the Circuit of Montgomery County, Missouri

Case No. 12AA-CR00039

SUBSTITUTE BRIEF OF APPELLANT CHRISTOPHER ERIC HUNT

Edward D. Robertson, Jr. #27183
Mary D. Winter #38328
Anthony L. DeWitt #41612
BARTIMUS FRICKLETON
ROBERTSON & GOZA
715 Swifts Highway
Jefferson City, Missouri 65109
[573] 659-4454
[573] 659-4460 FAX
chiprob@earthlink.net

Ronnie L. White, #31147
HOLLORAN WHITE SCHWARTZ &
GAERTNER
2000 S. 8th St.
St. Louis, MO 63104
314-772-8989
314-772-8990 fax
Email: rwhite@holloranlaw.com

Attorneys for Appellant Christopher
Eric Hunt

TABLE OF CONTENTS

TABLE OF AUTHORITIES 13

JURISDICTIONAL STATEMENT 17

STATEMENT OF FACTS 17

 Personnel Key: 17

 Phil Alberternst 19

 The Plan to Arrest Alberternst 21

 The Approach to the Trailer 23

 Officer Hunt’s Invitation and Arrival at the Trailer 24

 Events Inside the Trailer 25

 Officer Training to Assist in Subduing Persons Resisting Arrest 28

 Testimony Relevant to Assignments of Error 29

POINTS RELIED ON 31

ARGUMENT 41

 Introduction to All Points 41

 I. THE TRIAL COURT ERRED AND PLAINLY ERRED IN
 SUBMITTING INSTRUCTION 5 (FIRST DEGREE BURGLARY)
 AGAINST DEPUTY HUNT TO THE JURY BECAUSE A CONVICTION

FOR BURGLARY IN THE FIRST DEGREE (§ 596.160,
RSMO) REQUIRES PROOF BEYOND A REASONABLE DOUBT THAT
THE ENTRY INTO AN INHABITABLE STRUCTURE BY THE
DEFENDANT IS KNOWINGLY UNLAWFUL IN THAT THE STATE
CONCEDES THAT HUNT HAD LEGAL AUTHORITY TO ARREST
ALBERTERNST AND INSTRUCTION 5 DID NOT INSTRUCT THE
JURY THAT DEPUTY HUNT WAS CLOTHED IN THE PRIVILEGES OF
A LAW ENFORCEMENT OFFICER AND THAT IT COULD NOT
CONVICT DEPUTY HUNT UNLESS IT FOUND THAT DEPUTY HUNT
KNOWINGLY ENTERED ALBERTERNST’S RESIDENCE
UNLAWFULLY..... 47

A. Standard Of Review 47

B. The Statutory Argument 48

C. Judicial Officers in Warren County and in Lincoln County had issued
felony arrest warrants for Alberternst that were active on February 5, 2009.
..... 51

D. Section 544.200 permits the use of force to effect an arrest following
the announcement of officers’ presence and purpose. 53

E. Section 544.200 draws no distinction in its grant of authority between
the residence of the arrestee and the residence of a third-party. 54

F. No Judicial Authority Exists For The Proposition That Forcible Entry Into A Dwelling To Arrest A Person For Whom Judicial Officers Have Issued A Felony Arrest Warrant Is A Knowingly Unlawful Entry..... 54

G. The trailer was the residence of Phillip Alberternst. 59

H. Deputy Hunt properly injected the defense of execution of a public duty, § 563.021, RSMo, which presented a question of law for the Court, which the Court failed to rule as a matter of law. 61

I. CONCLUSION 64

II. THE TRIAL COURT ERRED AND PLAINLY ERRED IN SUBMITTING INSTRUCTION 5 TO THE JURY BECAUSE A CONVICTION FOR BURGLARY IN THE FIRST DEGREE CAN STAND ONLY IF THE PREDICATE PURPOSE HERE CHARGED, ASSAULT, IS PROPERLY DEFINED IN THAT INSTRUCTION 5 FAILED TO INSTRUCT THE JURY THAT HUNT WAS ACTING AS A LAW ENFORCEMENT OFFICER AND THAT IN LIGHT OF THE SECTION 563.046.1, RSMO, PRIVILEGE HE COULD ONLY BE CONVICTED OF BURGLARY IF THE JURY BELIEVED THAT HE ENTERED THE ALBERTERNST DWELLING WITH THE PREDICATE PURPOSE OF USING MORE FORCE THAN HE BELIEVE WAS REASONABLY NECESSARY TO MAKE THE ARREST. 66

A. Standard of Review 66

B. The Statutory Argument 66

C. Instruction 5 Did Not Accommodate The Statute 68

D. CONCLUSION 70

III. THE TRIAL COURT ERRED AND PLAINLY ERRED IN REFUSING TO SUBMIT DEPUTY HUNT'S PROFFERED INSTRUCTION C ON THE CHARGE OF BURGLARY IN THE FIRST DEGREE BECAUSE INSTRUCTION 5, AS SUBMITTED, REMOVED FROM THE JURY'S CONSIDERATION THE DEFENSE OF JUSTIFICATION, § 563.021, RSMO, IN THAT THE LAW OF MISSOURI, § 544.200, RSMO, EXPRESSLY PERMITS A LAW ENFORCEMENT OFFICER TO USE FORCE TO ENTER THE DWELLING OF ANOTHER WHEN THE DWELLING IS OCCUPIED BY A PERSON WHO IS THE SUBJECT OF A FELONY ARREST WARRANT AND INSTRUCTION C REQUIRED THE JURY TO FIND THAT DEPUTY HUNT WAS NOT ACTING AS A LAW ENFORCEMENT OFFICER WHEN HE ENTERED THE DWELLING TO ARREST ALBERTERNST..... 71

A. Standard of Review 71

B. Argument in the Alternative 72

C. CONCLUSION 76

IV. THE TRIAL COURT ERRED AND PLAINLY ERRED IN GIVING INSTRUCTION 6 REGARDING PROPERTY DAMAGE IN THE

SECOND DEGREE BECAUSE INSTRUCTION 6 FAILED TO INSTRUCT THE JURY THAT DEPUTY HUNT COULD EMPLOY FORCE TO BREAK PROPERTY TO MAKE AN ARREST IN THAT SECTION 544.200 PERMITS A LAW ENFORCEMENT OFFICER TO USE SUCH FORCE TO MAKE AN ARREST. 77

A. Standard of Review 77

B. The Trailer in Which Hunt Arrested Alberternst was a Dwelling House. 77

C. The State’s Concession Makes it a Manifest Injustice for the Trial Court to Have Failed to Instruct the Jury that Deputy Hunt had Authority to Break the Door to Effect the Arrest. 79

D. CONCLUSION 80

V. THE TRIAL COURT ERRED AND PLAINLY ERRED IN SUBMITTING INSTRUCTION 7 REGARDING ASSAULT IN THE THIRD DEGREE BECAUSE INSTRUCTION 7 PERMITTED THE JURY TO FIND THAT DETECTIVE HUNT WAS *NOT* ACTING AS A LAW ENFORCEMENT OFFICER WHEN HE ARRESTED ALBERTERNST IN THAT THE STATE HAS CONCEDED THAT DEPUTY HUNT HAD AUTHORITY TO ARREST ALBERTEERNST AND INSTRUCTION 7 DID NOT REQUIRE THE JURY TO FIND THAT DEPUTY HUNT USED

MORE FORCE THAN HE REASONABLY BELIEVED WAS
NECESSARY TO MAKE THE ARREST. 81

 A. Standard of Review 81

 B. Argument 81

 C. CONCLUSION 90

VI. THE TRIAL COURT ERRED AND PLAINLY ERRED SO
SUBSTANTIALLY THAT IT COMMITTED CUMULATIVE ERROR
BECAUSE IT FAILED TO INSTRUCT THE JURY ON DEPUTY HUNT’S
LEGAL AUTHORITY TO ARREST ALBERTERNST AND THE
PRIVILEGES THAT ATTACH TO THAT AUTHORITY IN THAT EVEN
IF THE ASSAULT INSTRUCTION WAS ARGUABLY CORRECT, THE
AFFECT OF THE ASSAULT DEFINITION IN THE BURGLARY
INSTRUCTION (INSTRUCTION 5), WHICH DID NOT INSTRUCT THE
JURY ON THE PRIVILEGES DEPUTY HUNT ENJOYED AS A LAW
ENFORCEMENT OFFICER, WAS SUCH THAT INSTRUCTION 5
CREATED A MANIFEST INJUSTICE IN THE JURY’S
CONSIDERATION OF THE ASSAULT CHARGES..... 91

 A. Standard Of Review 91

 B. Manifest Injustice and Prejudice 92

 C. CONCLUSION 96

VII. THE TRIAL COURT ERRED IN SUBMITTING FIRST DEGREE BURGLARY AGAINST DEPUTY HUNT AND IN FAILING TO SUSTAIN DEPUTY HUNT’S MOTION FOR ACQUITTAL AT THE CLOSE OF THE EVIDENCE BECAUSE A CONVICTION FOR BURGLARY IN THE FIRST DEGREE (§ 596.160, RSMO) CANNOT STAND IF THE ENTRY INTO AN INHABITABLE STRUCTURE BY THE DEFENDANT IS NOT KNOWINGLY UNLAWFUL IN THAT THE STATE FAILED TO ADDUCE EVIDENCE BEYOND A REASONABLE DOUBT THAT DEPUTY HUNT TO ENTERED THE PREMISES WHERE PHILLIP ALBERTERNST WAS FOUND KNOWINGLY UNLAWFULLY TO ARREST PHILLIP ALBERTERNST FOR WHOM TWO FELONY ARREST WARRANTS WERE THEN OUTSTANDING. 97

 A. Standard of Review 97

 B. Statutory Argument 98

 C. CONCLUSION 105

VIII. THE TRIAL COURT ERRED IN SUBMITTING FIRST DEGREE BURGLARY AGAINST DEPUTY HUNT TO THE JURY AND IN FAILING TO SUSTAIN DEPUTY CHRISTOPHER HUNT’S MOTION FOR ACQUITTAL AT THE CLOSE OF THE EVIDENCE BECAUSE A CONVICTION FOR BURGLARY IN THE FIRST DEGREE (§ 596.160, RSMO) CAN STAND ONLY IF THERE IS EVIDENCE BEYONFD A RE

ASONABLE DOUBT OF DEPUTY HUNT’S PURPOSE AND INTENT TO COMMIT A CRIME IN THAT THE STATE FAILED TO ADDUCE EVIDENCE BEHYOND A REASONABLE DOUBT THAT DEPUTY HUNT INTENDED TO ASSAULT PHILLIP ALBERTERNST WHEN DEPUTY HUNT ENTERED THE TRAILER LAWFULLY..... 106

A. Standard of Review 106

B. Statutory Argument 106

C. The Evidence of Hunt’s Purpose 107

1. “He drove so far.” 108

2. “everyone else agreed he shouldn't be there.” 112

3. “Ruth Ann Blake said he shouldn't be there because she was afraid he would assault Phil” 113

4. “we know it by his actions, by what he did when he came inside, by how he beat a naked, helpless man on the floor.” 115

D. Conclusion..... 117

IX. THE TRIAL COURT ERRED IN OVERRULING DEPUTY HUNT'S MOTION FOR ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE AND IN SUBMITTING THE CHARGE OF PROPERTY DAMAGE IN THE SECOND DEGREE AS STATED IN INSTRUCTION NO. 6 TO THE JURY BECAUSE DEPUTY HUNT HELD LEGAL AUTHORITY TO USE

FORCE TO ENTER ALBERTERNST'S DWELLING IN THAT § 544.200
 AUTHORIZED DEPUTY HUNT TO "BREAK OPEN ANY OUTER OR
 INNER DOOR" TO ARREST PHILLIP ALBERTERNST, FOR WHOM
 JUDICIAL OFFICERS HAD ISSUED TWO FELONY ARREST
 WARRANTS. 118

 A. Standard of Review 118

 B. Statutory Legal Authority 118

 C. CONCLUSION 119

X. THE TRIAL COURT PREJUDICIALLY ERRED IN SUSTAINING
 THE STATE’S OBJECTION TO THE TESTIMONY OF EXPERT BRIAN
 CLAY BECAUSE A CRITICAL ELEMENT OF THE VERDICT
 DIRECTING INSTRUCTION FOR ASSAULT IN THE THIRD DEGREE
 REQUIRED THE JURY TO DETERMINE WHETHER DEPUTY HUNT
 SOUGHT TO INJURE ALBERTERNST IN THAT CLAY WAS
 PREPARED TO TESTIFY THAT DEPUTY HUNT STRUCK
 ALBERTERNST ONLY IN THE PLACES LAW ENFORCEMENT
 OFFICERS ARE TRAINED TO STRIKE RESISTING ARRESTEES AND
 CLAY’S TESTIMONY WOULD HAVE SHOWN THAT DEPUTY HUNT
 ONLY STRUCK ALBERTERNST IN A PATTERN CONSISTENT WITH
 SUBDUING AN ARRESTEE AND THUS USED ONLY THE FORCE

THAT DEPUTY HUNT BELIEVED WAS NECESSARY TO MAKE THE
ARREST 121

A. Standard of Review 121

B. The Striking Techniques Matter 122

C. CONCLUSION 125

XI. THE TRIAL COURT ERRED AND PLAINLY ERRED IN
ALLOWING SERGEANT TRAVIS HITCHCOCK TO OFFER OPINION
TESTIMONY ON AN ISSUE OF LAW, TO WIT, THAT IT WAS
UNLAWFUL FOR DEPUTY HUNT TO ENTER PHILLIP
ALBERTERNST'S RESIDENCE, BECAUSE SERGEANT HITCHCOCK
WAS NOT QUALIFIED TO GIVE SUCH AN OPINION IN THAT SUCH
TESTIMONY IS NOT ADMISSIBLE BECAUSE IT ENCROACHES ON
ISSUES RESERVED FOR THE TRIAL COURT AND PREJUDICIALLY
MISLED THE JURY ON A CRITICAL ISSUE OF LAW IN THIS CASE. ...

..... 126

A. Standard of Review 126

B. It Was Error To Allow Hitchcock's Testimony 126

1. The "Unlawful Entry" Testimony 126

2. The "Desperately Wrong" Testimony 130

C. CONCLUSION 132

CONCLUSION..... 133

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b) 134

CERTIFICATE OF SERVICE 135

TABLE OF AUTHORITIES

Cases

<i>Carter v. State</i> , 320 S.W.3d 177, 182 (Mo. Ct. App. 2010)	49, 99
<i>Deck v. State</i> , 68 S.W.3d 418, 424 (Mo. banc 2002).....	44
<i>Draper v. Louisville & N.R. Co.</i> , 348 Mo. 886, 156 S.W.2d 626, 630 (1941)	112
<i>Ford Motor Co. v. City of Hazelwood</i> , 155 S.W.3d 795, 798 (Mo. App. E.D. 2005)	48
<i>Good Shepherd Manor Found., Inc. v. City of Momence</i> , 323 F.3d 557, 564 (7 th Cir. 2003)	129
<i>Kline v. City of Kansas City</i> , 334 S.W.3d 632, 649 (Mo. Ct. App. 2011)	91
<i>Koontz v. Ferber</i> , 870 S.W.2d 885, 894 (Mo.App. W.D.1993).....	91
<i>Nettie’s Flower Garden, Inc. v. SIS Inc.</i> , 869 S.W.2d 226, 229 (Mo.App.E.D. 1993)	131
<i>Payton v. New York</i> , 445 U.S. 573 (1980)	55, 58
<i>People v. Gibian</i> , 76 A.D.3d 583, 588-89, 907 N.Y.S.2d 226 (2010).....	93
<i>S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.</i> , 320 F.3d 838, 841 (8 th Cir. 2003).....	128
<i>Semayne's Case</i> , 5 Co.Rep., at 93a, 77 Eng.Rep. at 128.	57
<i>State ex rel. Logan v. Shouse</i> , 257 S.W. 827, 828 (Mo. App. 1924)	60
<i>State v. Avery</i> , 120 S.W.3d 196, 200 (Mo. banc 2003).....	72, 76
<i>State v. Ballard</i> , 394 S.W.2d 336, 340 (Mo. 1965)	128

State v. Biddle, 599 S.W.2d 182, 192 (Mo. 1980) 109

State v. Brokus, 858 S.W.2d 298, 302 (Mo.App.1993) 47

State v. Bunton, 453 S.W.2d 949, 953 (Mo.1970) 109

State v. Burton, 320 S.W.3d 170, 174 (Mo. App. E.D. 2010) 98

State v. Chaney, 967 S.W.2d 47, 54 (Mo. 1998) 111

State v. Cline, 808 S.W.2d 822, 824[5] (Mo. banc 1991)..... 48

State v. Collis, 849 S.W.2d 660, 663[1] (Mo.App.1993)..... 47

State v. Cox, 352 S.W.2d 665, 670 (Mo. 1961) 109

State v. Davis, 814 S.W.2d 593, 603 (Mo. banc 1991)..... 121

State v. Dublo, 243 S.W.3d 407, 409 (Mo. Ct. App. 2007)..... 109

State v. Ecford, 239 S.W.3d 125, 127 (Mo.App.2007)..... 97

State v. Grim, 854 S.W.2d 403, 414 (Mo. 1993) 111

State v. Harney, 51 S.W.3d 519, 533–34 (Mo.App.2001)..... 32, 69

State v. Hodges, 575 S.W.2d 769, 772 (Mo.App.1978)..... 109

State v. Hunt, 2014 WL 298631..... 80

State v. Irby, 254 S.W.3d 181 (Mo.App. E.D.2008)..... 122

State v. Johnson, 207 S.W.3d 24, 34 (Mo. banc 2006)..... 122

State v. Jones, 106 Mo. 302, 17 S.W. 366 (1891)..... 109

State v. Kelly, 367 S.W.3d 629 (Mo.App. E.D.2012) 59

State v. McCoy, 90 S.W.3d 503, 505 (Mo.App.2002) 97

State v. McMullin, 136 S.W.3d 566, 573 (Mo.App. 2004)..... 112

State v. Mendoza, 75 S.W.3d 842, 845 (Mo. App. S.D. 2002)..... 48, 126, 129

State v. Mullin, 501 S.W.2d 530 (Mo. App. 1973) 103

State v. Northcutt, 598 S.W.2d 130, 131 (Mo. 1980) 78

State v. Parkus, 753 S.W.2d 881, 888[13] (Mo. banc 1988) 48

State v. Regazzi, 379 S.W.2d 575, 578 (Mo. 1964) 109

State v. Roberts, 948 S.W.2d 577, 587 (Mo. 1997) 49, 99

State v. Storey, 40 S.W.3d 898, 910 (Mo. banc 2001)..... 121

State v. Westfall, 75 S.W.3d 278, 280 (Mo. banc 2002) 71

State v. Whalen, 49 S.W.3d 181, 184 (Mo. banc 2001)..... 98

State v. White, 92 S.W.3d 183, 192 (Mo.App.2002) 69

State v. Williams, 858 S.W.2d 796, 798 (Mo. App. E.D. 1993) 127

State v. Younger, 386 S.W.3d 848, 855 (Mo. App. W.D. 2012)..... 59, 60

Steagald v. United States, 451 U.S. 204 (1981)..... 56, 57, 58

United States v. Gay, 240 F.3d 1222, 1227 (10th Cir. 2001)..... 102, 130

United States v. Risse, 83 F.3d 212, 217 (8th Cir. 1996)..... 60

Valdez v. McPheters, 172 F.3d 1220, 1225 (10th Cir. 1999)..... 60, 102

Viacom Outdoor, Inc v. Taouil, 254 S.W.3d 234, 237 (Mo.App.E.D. 2008) 131

Woolford v. State, 58 S.W.3d 87, 89 (Mo.App.2001)..... 98

Statutes

§ 1.030.2 RSMo. (2012)..... 53, 77

§ 195.505, RSMo (2012)..... passim

§ 544.200, RSMo. (2012)..... passim

§ 563.026, RSMo. (2012)..... 64

§ 563.031, RSMo. (2012)..... 62

§ 563.046.1, RSMo. (2012)..... passim

§ 565.050, RSMo. (2012)..... 116

§ 569.010, RSMo (2012)..... 49, 50, 99

§ 589.414, RSMo. (2012)..... 59

§ 596.160 RSMo. (2012)..... 48, 66, 98, 106

§563.021.3 RSMo. (2012)..... 75

Other Authorities

BLACK'S LAW DICTIONARY 588 (5th Ed.) 67, 107

Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 *FORDHAM L. REV.* 23 (1951) 44

T. Lineberry, *Methamphetamine Abuse: A Perfect Storm of Complications* 81

MAYO CLIN PROC. 77-84 (2006)..... 113

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH

LANGUAGE 1910 (2002)..... 54, 59

Constitutional Provisions

Mo. Const. art. V, § 10..... 17

JURISDICTIONAL STATEMENT

This Court granted transfer following a decision of the Court of Appeals, Eastern District. Jurisdiction in this Court is founded on Mo. Const. art. V, § 10.

STATEMENT OF FACTS

Personnel Key:

Phil Alberternst is a known methamphetamine cook and is wanted on two felony arrest warrants.

Deputy Christopher Hunt is the defendant in this case and is a St. Charles County Deputy Sheriff assigned to the St. Charles County Regional Drug Task Force. The St. Charles County Regional Drug Task Force is a multidistrict enforcement group “(MEG)” operating under authority of § 195.505, RSMo.

Eric Luechtefeld is a Detective with the East Central Drug Task Force, a multidistrict enforcement group operating under authority of section 195.505, RSMo.

Ruth Ann Blake is an informant operating under the direction of Deric Dull and the former lover of, and mother of a child father by, Phil Alberternst.

Chad Fitzgerald is a Warren County Detective who is trying to locate Alberternst because of an outstanding Warren County felony arrest warrant for child endangerment. Fitzgerald was not a member of a multidistrict enforcement group. He had no authority to act outside of Warren County on February 5, but

participated in the arrest of Alberternst in Montgomery County. He was not charged with any crime.

Jeff Doerr is a Warren County Detective. Doerr was not a member of a multidistrict enforcement group. He had no authority to act outside of Warren County on February 5, but participated in the arrest of Alberternst in Montgomery County. He was not charged with any crime.

Tom Mayes is a Montgomery County Deputy. He is not a member of a multijurisdictional enforcement group. As a Montgomery County Deputy he had authority to arrest in Montgomery County.

Scott Schoenfeld is a Lieutenant with the Warren County Sheriff's Office. Fitzgerald was not a member of a multidistrict enforcement group. Schoenfeld had no authority to act outside of Warren County on February 5, but participated in the arrest of Alberternst in Montgomery County. He was not charged with any crime.

Aaron Sutton is an officer with the East Central Drug Task Force, a multidistrict enforcement group operating under authority of section 195.505, RSMo.

Deric Dull is an officer in the O'Fallon Police Department assigned to the St. Charles County Regional Drug Task Force. The St. Charles County Regional Drug Task Force is a multidistrict enforcement group, operating under authority of section 195.505, RSMo.

William Rowe is a St. Charles County Deputy and a member of the St. Charles County Regional Drug Task Force. The St. Charles County Regional Drug Task Force is a multidistrict enforcement group, operating under authority of section 195.505, RSMo.

Dion Wilson is a Lake St. Louis police officer assigned to the St. Charles County Regional Drug Task Force. The St. Charles County Regional Drug Task Force is a multidistrict enforcement group operating under authority of section 195.505, RSMo.

The arrest at issue in this appeal occurred on the evening of February 5, 2009.

Phil Alberternst

Prior to February 5, 2009, St. Charles County Deputy Sheriff, Christopher Hunt, the defendant in this case, had arrested Phil Alberternst, a known methamphetamine (“meth”) manufacturer and seller, several times. Tr.508. Following the last arrest, Alberternst agreed to become an informant for Deputy Hunt. Tr.508-09. As part of the agreement reached with every informant, Alberternst agreed that he would not break the law. Tr.509.

Consistent with Alberternst's status as an informant, Hunt had produced Alberternst to other law enforcement agencies investigating meth operations in east, central Missouri. Chad Fitzgerald, a Warren County detective, testified that Hunt and Alberternst had met him (Fitzgerald) at the TA truck stop in O’Fallon. Hunt served as the go-between for Fitzgerald and Alberternst. Alberternst had

required assurances that he would not be arrested if he and Hunt met Fitzgerald. Tr.284. There, Fitzgerald questioned Alberternst about a felony child endangerment case related to meth cooking then pending against Alberternst in Warren County. Tr.283. Alberternst and Hunt were in the same truck alone at the TA truck stop prior to meeting Fitzgerald. Tr.513.

Fitzgerald testified that Alberternst was known to be violent. Tr.284.

By February 5, 2009, Alberternst had acquired two felony arrest warrants. Tr.128. Alberternst was wanted for endangering the welfare of a child in Warren County. Tr.278. Another was from Lincoln County and related to the manufacture of methamphetamine. Tr.279.

Alberternst was hiding from law enforcement on February 5, 2009. Tr.362. He admitted that he had been up “cooking” meth for “four or five days” prior to that. Tr.387. He was using Carla Reed’s trailer as his hiding place. He had lived there for several days. Tr.386. He had free reign of the house. *Id.* “Nobody else was there.” *Id.* He had a key to the trailer. Tr.387. He could come and go as he wanted. Tr.386. He left and returned to the trailer. Tr.386. He was not looking for another place to live or move to. Tr.387. He had been cooking meth in the woods around the trailer. Tr.367, 384. Reed’s trailer was in Montgomery County. Tr.250. Alberternst was counting on Ruth Ann Blake, a woman by whom he had fathered a child, Tr.216, to bring him pseudoephedrine so that he could cook another batch of meth. Tr.362. He had the rest of the necessary tools

for making meth with him on the covered porch of Carla Reed's trailer on February 5. Tr.386

The Plan to Arrest Alberternst

Chad Fitzgerald had been looking for Alberternst because of the outstanding felony arrest warrants. Tr.242. Ruth Ann Blake, Alberternst's former lover, feared that Alberternst would be injured if he was arrested. Blake heard there was a shoot to kill order out on Alberternst. Tr.179. She believed that Chris Hunt was going to hurt Alberternst. *Id.* She was "afraid of [sic] the safety" of Alberternst. *Id.* She felt that if police officers other than Chris Hunt were to find him that Alberternst would be more safe. *Id.* Thus, Blake "set up an arrangement to meet to set up for me leading them to take them to Phil so that he wouldn't get hurt." *Id.* Blake asked that Hunt not participate in the arrest. Tr.181.

Ruth Ann Blake agreed to meet with Deric Dull, an O'Fallon Police Officer. Tr.472-73. Dull worked with Hunt, Bill Rowe and Dion Wilson as part of the St. Charles County Regional Drug Task Force, an MEG Tr.521. Chad Fitzgerald (the Warren County Detective), Sheila Singelton and Cindy Burke also attended the meeting, which took place in O'Fallon, in St. Charles County. Tr.472-73. Blake stated her concerns about Hunt participating in the arrest. Chad Fitzgerald had heard that Hunt's wife was sick and "so he wouldn't be working anyway." Tr.243. Fitzgerald told Deric Dull to tell Hunt not to attend the arrest. Tr. 244. Deric Dull never told Hunt not to participate in the arrest. Tr.489. No

evidence exists that Hunt was ever asked not to participate in the arrest of Alberternst.

Blake agreed to take four boxes of pseudoephedrine to Alberternst. Tr.181 She agreed to take pseudoephedrine because Alberternst would not believe her if she came to him empty handed. Tr.473.

Chad Fitzgerald gave Blake the pseudoephedrine. Tr.244. Ruth Ann Blake was to call Deric Dull to report to him every hour until Alberternst called Blake and told her his (Alberternst's) location. Tr.244. Warren County officers also put a tracker on Blake's car, as well as on Sheila Singleton's car. Tr.244. Neither woman was aware that officers had placed trackers on their cars. Tr.183. Officers followed the cars but ultimately lost the signal to the tracker on Blake's car. Tr.248. Singleton had gone home and stayed there. Tr.247.

Sheila Singleton called Officer Dull. Singleton told Dull that Blake was going to Carla Reed's trailer. Tr.250. Dull contacted task force detectives when he learned that Alberternst was not in St. Charles County. Tr.480. Chad Fitzgerald called Eric Luechtefeld, a detective with the East Central Drug Task Force and told him an informant knew Alberternst's location in Montgomery County. Tr.127-28. Cindy Burke later called Dull. Burke told Dull that Blake had called her, gave the address of Reed's trailer, and told Dull that Alberternst was there and was taking a bath. Tr.476. Detective Luechtefeld, Officer Menconi and Officer Aaron Sutton met Fitzgerald, Lt. Scott Schoenfeld, Det. Doerr, Det. Mitchell, Deputy Bill Rowe (St. Charles County) and Deputy Tom Mayes (Montgomery

County) near a power station in Middletown, Missouri. Tr.129. Chris Hunt was not there. They were advised that Alberternst was known to be violent. Tr.284. They were also advised that Alberternst would be in the presence of the informant, Ruth Ann Blake. *Id.* 284. Dull and Dion Wilson, two St. Charles County Regional Task Force officers, were already in the woods trying to find the trailer. Tr.129. The plan was that if they saw him, all of the officers assembled at the power station would join Dull and Wilson in arresting Alberternst. Tr.130. They could not find the trailer. Tr.131. Dull and Wilson went back to meet the other officers. *Id.* Ruth Ann Blake subsequently called Cindy Burke who called Dull and gave the trailer's location. Tr.184. The officers, now all together, decided to do a knock and talk. Tr.132. Lt. Scott Schoenfeld (Warren County Sheriff's Office) testified that it was important to get the pseudoephedrine back. Tr.431. The officers decided that the East Central Task Force Officers Sutton and Luechtefeld and non-MEG Warren County Deputy Fitzgerald plus Montgomery County Deputy Sheriff Tom Mayes would do the knock and talk. 132. Mayes and Sutton (of the East Central Task Force, but assigned to Montgomery County) were in the lead car. Tr.132.

The Approach to the Trailer

As the officers (Mayes, Sutton, Luechtefeld and Fitzgerald) approached the trailer in two cars, an old pickup truck was leaving the trailer; Deputy Mayes, in the lead car with Sutton, saw that the driver of the truck had noticed police and

was trying to drive away without lights on. Tr.320 Mayes activated his emergency lights and he and Sutton stopped the pickup truck. Tr.133.

Some testified that there were no lights on in the trailer. Tr.139, 320. Fitzgerald testified “When we got in there there was a bathroom light that was on where Phillip was at and I think there was a small lamp on a, like a table back in the living room where Ruth Ann was at.” Tr.291 The windows were covered with plastic. Tr.195, 264. Ruth Ann Blake looked out the window and saw a line of cars coming toward the trailer. Tr.193. She woke Alberternst, who was sleeping nude on the couch, and told him “cops were there.” Tr.196. Alberternst ran into the bathroom. Tr.222.

Luechtefeld and Fitzgerald knocked on the trailer door. Tr.136, 258. They announced they were police officers. Tr.197. Blake testified that she had no intention of answering the door when police knocked. Tr.197. Luechtefeld and Fitzgerald left and took up positions around the trailer. Tr.139. Ruth Ann Blake's car was at the trailer. Tr.272. Fitzgerald retrieved the tracker from Blake's car there. *Id.*

Officer Hunt’s Invitation and Arrival at the Trailer

Chad Fitzgerald had called Hunt on February 3 and 4 to tell Hunt that they had a lead on Alberternst's location. Tr.514. On February 4, Hunt told Fitzgerald to call Officer Dull because he was not available. Tr.514. Dull then met with Ruth Ann Blake, Cindy Burke and Sheila Singleton as previously described.

As the events of February 5 unfolded, Dion Wilson and Bill Rowe called Hunt to apprise him of their activities. Tr.498, 515. When asked, "Why was Chris Hunt there?" Officer Dull answered, "Because he was called to the scene." Tr.496. And when asked by the State "Why was he called?" Dull answered, "For assistance I am assuming." *Id.* Dull did not call Hunt. *Id.* Wilson and Rowe did.

Dull, Wilson, Rowe and Hunt worked as a unit, a multidistrict enforcement group. Tr.521. Hunt believed Alberternst was armed and dangerous. Tr.516. Officer Fitzgerald also testified that Alberternst was believed to be violent. Tr.284. Wilson guided Hunt in to the trailer area. Tr.522. Hunt arrived as Leuchtefeld and Fitzgerald were leaving the trailer. Tr.140, 264. Hunt pulled his official sheriff's department truck up to the trailer. Tr.140, 264. He put on his tactical vest. Tr.141. Chad Fitzgerald did not see Hunt look in any windows. Tr.266. Hunt kicked in the door. He, Rowe, Dull, and Wilson, went into the trailer. Tr.268. Montgomery County Deputy Tom Mayes also followed them into the trailer. Tr.324.

Events Inside the Trailer

When the officers entered the trailer, Luechtefeld heard yelling and screaming. Tr.142. Jeff Doerr (a non-MEG Warren County Detective) also heard a commotion in the trailer. Tr.308. There were no lights on in the trailer. Tr.139, 320. "It was dark." Tr.326.

Deputy Mayes, who entered the trailer when he believed exigent circumstances existed because of the screaming and yelling, Tr.324, heard Hunt give "the standard commands." Tr.325. Doerr heard officers shouting: "Show me your arms" and "stop resisting." Tr.310, 312. Chad Fitzgerald had also followed the officers into the trailer. Tr.268. Fitzgerald never saw Hunt strike Alberternst. Tr.278

Mayes testified on direct for the State that

Phil was trying to close the door. Uh, he was obviously naked. He was trying to close the door, get away from the situation and Chris Hunt was able to get his hand on him and take him to the ground.

Tr.325. Detective Doerr, who also responded to the inside of the trailer following the noise, Tr.308, saw Alberternst put his arms out of the bathroom in what Doerr believed was a surrender position. Tr.317. Mayes testified, however, that "It appears he was resisting at the time and kicking and it was a very tight area." Tr.325. When asked, "Do you remember describing Phillip Alberternst's actions the night of February 5th, 2009, as being pretty violent?" Mayes answered, "Yeah, it did seem to be very violent at the time." Tr.357.

Ultimately, officers forced Alberternst to the floor. Alberternst testified that his face fell into a kitty litter tub. Tr.394. Someone repeated, "Show me your hands." Tr.310. Officers also told Alberternst to get on the ground and "stop resisting." Tr.312. Luechtefeld, who had gone into the trailer, saw Alberternst lying on the floor "and the officers were trying to apprehend him, put him in

handcuffs.” Tr.143. Mayes testified that he grabbed Alberternst's left leg as part of the effort to subdue him. Mayes testified on direct for the State:

"Uh, got him on the ground, and like I said, he was -- he was kicking and screaming and I gained control, I believe it was his left leg, and was holding his left leg and I remember Alberternst saying okay, okay. You've got me, I give up or whatever. And then the, uh, control tactics continued."

Tr.326. Control tactics are strikes designed to disable a suspect. According to Mayes these continued after Alberternst was subdued. "Well, there's some strikes being made and it was really dark so I can't say exactly. It was his upper -- upper area, shoulders and head area." *Id.* At his deposition Mayes testified that “there were a few control maybe pressure point strikes, but no, not like beating him up.”

Tr.342.

Doerr did not see Alberternst kicking. Tr.313. Dull testified that Alberternst was on the ground, “trying to push up, keeping his hands underneath him, trying to push off the ground as if he was trying to get up and would not follow their commands.” Tr.484. Luechtefeld “wouldn’t describe him as resisting, but he wasn’t following their commands.” Tr.144. Alberternst’s hands “were flailing.” *Id.* The movements "looked defensive." Tr.144. But Alberternst was kicking his legs. Tr.151. No one saw anyone strike Alberternst once the arrest was completed. Schoenfeld, a lieutenant with the Warren County Sheriff’s Office who was not a member of an MEG, saw Hunt striking Alberternst on the back of

the head and the soft spot in the back of the head with his fist. Tr.418. Schoenfeld believed Alberternst was trying to comply. Tr.418

Following the fracas, Alberternst had a cut on his face and left leg area and rug burns. Tr.329. Alberternst did not know whether the kitty little tub had caused the cut to his face. Tr.394. Ruth Ann Blake testified that Hunt was hitting Alberternst in the face and kicking him. Tr.234. No one corroborated this specific testimony as to Hunt. Alberternst was limping when he walked. Tr.277. Alberternst said he didn't need medical attention. Tr.344. Deputy Mayes transported Alberternst to the jail. Tr.345. Mayes's commander ordered him to take Alberternst to the hospital. Tr.344. Mayes complied. Alberternst was released immediately from the hospital. Tr.345. He received no stitches or other treatment beyond examination. Tr.344.

Officer Training to Assist in Subduing Persons Resisting Arrest

Brian Clay is the departmental instructor for the St. Charles County Sheriff's Department. Clay testified that when dealing with non-compliant individuals officers are trained to employ a force continuum. Tr.647. This "philosophy" encourages officers to "meet a level of resistance that is offered by the suspect with one level higher than that in our use of force." Tr.648. At the lower end of the continuum is "hard empty hand control." Tr.651. "We encourage [officers] to strike certain areas due to the effectiveness of striking that area." Tr.652. "We call them "nerve motor points and the reason we teach people to strike there is

because medical studies have been conducted to show that in those large muscle areas ... there's usually a bundle of nerves... [and by striking those areas] the muscle group will temporarily shut down." Tr.652-53. "The first area [officers are trained to strike] is the super scapula group. This is the area that's up here in the shoulders near the base of the neck." Tr.654. Also officers are taught to strike "on the back of the triceps...." *Id.*

The trial court refused to allow Clay to testify that the pictures of Alberternst's injuries showed that the strikes to Alberternst were consistent with Hunt's training to deliver control tactics.

Testimony Relevant to Assignments of Error

On rebuttal, the State called Travis Hitchcock of the Highway Patrol. He was the tactical coordinator for the East Central Drug Task Force. Tr.657. Hitchcock was asked by the prosecutor "What constitutional concerns are at play [when considering whether to enter a residence]?" Tr.660. Defense counsel objected to the witness offering a legal conclusion. Tr.661. The trial judge overruled the objection. Hitchcock testified that a residence is protected by the constitution and generally requires a search warrant before it's entered. "There's some exceptions to that but—" Tr.661. The prosecutor interrupted the answer with a question. Subsequently, Hitchcock testified when asked about what had occurred at the trailer in which Alberternst was staying that "I knew there was something

desperately wrong.....” Tr.661. Hitchcock also described what occurred as “an unlawful entry.” Tr.668.

POINTS RELIED ON

- I. **THE TRIAL COURT ERRED AND PLAINLY ERRED IN SUBMITTING INSTRUCTION 5 (FIRST DEGREE BURGLARY) AGAINST DEPUTY HUNT TO THE JURY BECAUSE A CONVICTION FOR BURGLARY IN THE FIRST DEGREE (§ 596.160, RSMO) REQUIRES PROOF BEYOND A REASONABLE DOUBT THAT THE ENTRY INTO AN INHABITABLE STRUCTURE BY THE DEFENDANT IS KNOWINGLY UNLAWFUL IN THAT THE STATE CONCEDES THAT HUNT HAD LEGAL AUTHORITY TO ARREST ALBERTERNST AND INSTRUCTION 5 DID NOT INSTRUCT THE JURY THAT DEPUTY HUNT WAS CLOTHED IN THE PRIVILEGES OF A LAW ENFORCEMENT OFFICER AND THAT IT COULD NOT CONVICT DEPUTY HUNT UNLESS IT FOUND THAT DEPUTY HUNT KNOWINGLY ENTERED ALBERTERNST'S RESIDENCE KNOWINGLY UNLAWFULLY.**

State v. Collis, 849 S.W.2d 660, 663[1] (Mo.App.1993)

Carter v. State, 320 S.W.3d 177, 182 (Mo. Ct. App. 2010)

Steagald v. United States, 451 U.S. 204 (1981)

§ 569.160 RSMo (2012)

§ 569.010(8) RSMo (2012)

§ 195.505, RSMo (2012)

§ 544.200, RSMo (2012)

II. THE TRIAL COURT ERRED AND PLAINLY ERRED IN SUBMITTING INSTRUCTION 5 TO THE JURY BECAUSE A CONVICTION FOR BURGLARY IN THE FIRST DEGREE CAN STAND ONLY IF THE PREDICATE PURPOSE HERE CHARGED, ASSAULT, IS PROPERLY DEFINED IN THAT INSTRUCTION 5 FAILED TO INSTRUCT THE JURY THAT HUNT WAS ACTING AS A LAW ENFORCEMENT OFFICER AND THAT IN LIGHT OF THE SECTION 563.046.1, RSMO, PRIVILEGE HE COULD ONLY BE CONVICTED OF BURGLARY IF THE JURY BELIEVED THAT HE ENTERED THE ALBERTERNST DWELLING WITH THE PREDICATE PURPOSE OF USING MORE FORCE THAN HE BELIEVE WAS REASONABLY NECESSARY TO MAKE THE ARREST.

§ 569.160 RSMo (2012)

§ 563.046.1, RSMo (2012)

State v. Harney, 51 S.W.3d 519, 533–34 (Mo.App.2001)

State v. White, 92 S.W.3d 183, 192 (Mo.App.2002)

III. THE TRIAL COURT ERRED AND PLAINLY ERRED IN REFUSING TO SUBMIT DEPUTY HUNT'S PROFFERED INSTRUCTION C ON THE CHARGE OF BURGLARY IN THE FIRST DEGREE BECAUSE INSTRUCTION 5, AS SUBMITTED, REMOVED FROM THE JURY'S CONSIDERATION THE DEFENSE OF JUSTIFICATION, § 563.021, RSMO, IN THAT THE LAW OF MISSOURI, § 544.200, RSMO, EXPRESSLY PERMITS A LAW ENFORCEMENT OFFICER TO USE FORCE TO ENTER THE DWELLING OF ANOTHER WHEN THE DWELLING IS OCCUPIED BY A PERSON WHO IS THE SUBJECT OF A FELONY ARREST WARRANT AND INSTRUCTION C REQUIRED THE JURY TO FIND THAT DEPUTY HUNT WAS NOT ACTING AS A LAW ENFORCEMENT OFFICER WHEN HE ENTERED THE DWELLING TO ARREST ALBERTERNST.

State v. Avery, 120 S.W.3d 196, 200 (Mo. banc 2003)

§ 563.021.3 RSMo (2012)

§ 544.200 RSMo (2012)

§ 195.505 RSMo (2012)

IV. THE TRIAL COURT ERRED AND PLAINLY ERRED IN GIVING INSTRUCTION 6 REGARDING PROPERTY DAMAGE IN THE SECOND DEGREE BECAUSE INSTRUCTION 6 FAILED TO INSTRUCT THE JURY THAT DEPUTY HUNT COULD EMPLOY FORCE TO BREAK PROPERTY TO MAKE AN ARREST IN THAT SECTION 544.200 PERMITS A LAW ENFORCEMENT OFFICER TO USE SUCH FORCE TO MAKE AN ARREST.

§ 544.200 RSMo (2012)

State v. Northcutt, 598 S.W.2d 130, 131 (Mo. 1980)

V. THE TRIAL COURT ERRED AND PLAINLY ERRED IN SUBMITTING INSTRUCTION 7 REGARDING ASSAULT IN THE THIRD DEGREE BECAUSE INSTRUCTION 7 PERMITTED THE JURY TO FIND THAT DETECTIVE HUNT WAS NOT ACTING AS A LAW ENFORCEMENT OFFICER WHEN HE ARRESTED ALBERTERNST IN THAT THE STATE HAS CONCEDED THAT DEPUTY HUNT HAD AUTHORITY TO ARREST ALBERTEERNST AND INSTRUCTION 7 DID NOT REQUIRE THE JURY TO FIND THAT DEPUTY HUNT USED MORE FORCE THAN HE REASONABLY BELIEVED WAS NECESSARY TO MAKE THE ARREST.

§ 563.046.1, RSMo (2012)

VI. THE TRIAL COURT ERRED AND PLAINLY ERRED SO SUBSTANTIALLY THAT IT COMMITTED CUMULATIVE ERROR BECAUSE IT FAILED TO INSTRUCT THE JURY ON DEPUTY HUNT'S LEGAL AUTHORITY TO ARREST ALBERTERNST AND THE PRIVILEGES THAT ATTACH TO THAT AUTHORITY IN THAT EVEN IF THE ASSAULT INSTRUCTION WAS ARGUABLY CORRECT, THE AFFECT OF THE ASSAULT DEFINITION IN THE BURGLARY INSTRUCTION (INSTRUCTION 5), WHICH DID NOT INSTRUCT THE JURY ON THE PRIVILEGES DEPUTY HUNT ENJOYED AS A LAW ENFORCEMENT OFFICER, WAS SUCH THAT INSTRUCTION 5 CREATED A MANIFEST INJUSTICE IN THE JURY'S CONSIDERATION OF THE ASSAULT CHARGES.

Koontz v. Ferber, 870 S.W.2d 885, 894 (Mo.App. W.D.1993)

People v. Gibian, 76 A.D.3d 583, 588-89, 907 N.Y.S.2d 226 (2010)

Kline v. City of Kansas City, 334 S.W.3d 632, 649 (Mo. Ct. App. 2011)

§ 563.046.1, RSMo (2012)

VII. THE TRIAL COURT ERRED IN SUBMITTING FIRST DEGREE BURGLARY AGAINST DEPUTY HUNT AND IN FAILING TO SUSTAIN DEPUTY HUNT'S MOTION FOR ACQUITTAL AT THE CLOSE OF THE EVIDENCE BECAUSE A CONVICTION FOR BURGLARY IN THE FIRST DEGREE (§ 596.160, RSMO) CANNOT STAND IF THE ENTRY INTO AN INHABITABLE STRUCTURE BY THE DEFENDANT IS NOT KNOWINGLY UNLAWFUL IN THAT IT WAS LAWFUL FOR DEPUTY HUNT TO ENTER THE PREMISES WHERE PHILLIP ALBERTERNST WAS FOUND TO ARREST PHILLIP ALBERTERNST FOR WHOM TWO FELONY ARREST WARRANTS WERE THEN OUTSTANDING.

State v. Burton, 320 S.W.3d 170, 174 (Mo. App. E.D. 2010)

Carter v. State, 320 S.W.3d 177, 182 (Mo. Ct. App. 2010)

State v. Roberts, 948 S.W.2d 577, 587 (Mo. banc 1997)

United States v. Gay, 240 F.3d 1222, 1227 (10th Cir. 2001)

§ 569.160 RSMo (2012)

VIII. THE TRIAL COURT ERRED IN SUBMITTING FIRST DEGREE BURGLARY AGAINST DEPUTY HUNT TO THE JURY AND IN FAILING TO SUSTAIN DEPUTY CHRISTOPHER HUNT'S MOTION FOR ACQUITTAL AT THE CLOSE OF THE EVIDENCE BECAUSE A CONVICTION FOR BURGLARY IN THE FIRST DEGREE (§ 596.160, RSMO) CAN STAND ONLY IF THERE IS EVIDENCE BEYOND A REASONABLE DOUBT OF DEPUTY HUNT'S PURPOSE AND INTENT TO COMMIT A CRIME IN THAT THE STATE FAILED TO ADDUCE EVIDENCE BEYOND A REASONABLE DOUBT THAT DEPUTY HUNT INTENDED TO ASSAULT PHILLIP ALBERTERNST WHEN DEPUTY HUNT ENTERED THE TRAILER LAWFULLY.

§ 569.160 RSMo (2012)

State v. Regazzi, 379 S.W.2d 575, 578 (Mo. 1964)

State v. Biddle, 599 S.W.2d 182, 192 (Mo. 1980)

State v. Chaney, 967 S.W.2d 47, 54 (Mo. 1998)

State v. Grim, 854 S.W.2d 403, 414 (Mo. 1993)

IX. THE TRIAL COURT ERRED IN OVERRULING DEPUTY HUNT'S MOTION FOR ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE AND IN SUBMITTING THE CHARGE OF PROPERTY DAMAGE IN THE SECOND DEGREE AS STATED IN INSTRUCTION NO. 6 TO THE JURY BECAUSE DEPUTY HUNT HELD LEGAL AUTHORITY TO USE FORCE TO ENTER ALBERTERNST'S DWELLING IN THAT § 544.200 AUTHORIZED DEPUTY HUNT TO "BREAK OPEN ANY OUTER OR INNER DOOR" TO ARREST PHILLIP ALBERTERNST, FOR WHOM JUDICIAL OFFICERS HAD ISSUED TWO FELONY ARREST WARRANTS.

§ 544.200 RSMo (2012)

§ 1.030.2 RSMo (2012)

X. THE TRIAL COURT PREJUDICIALLY ERRED IN SUSTAINING THE STATE'S OBJECTION TO THE TESTIMONY OF EXPERT BRIAN CLAY BECAUSE A CRITICAL ELEMENT OF THE VERDICT DIRECTING INSTRUCTION FOR ASSAULT IN THE THIRD DEGREE REQUIRED THE JURY TO DETERMINE WHETHER DEPUTY HUNT SOUGHT TO INJURE ALBERTERNST IN THAT CLAY WAS PREPARED TO TESTIFY THAT DEPUTY HUNT STRUCK ALBERTERNST ONLY IN THE PLACES LAW ENFORCEMENT OFFICERS ARE TRAINED TO STRIKE RESISTING ARRESTEES AND CLAY'S TESTIMONY WOULD HAVE SHOWN THAT DEPUTY HUNT ONLY STRUCK ALBERTERNST IN A PATTERN CONSISTENT WITH SUBDUING AN ARRESTEE AND THUS USED ONLY THE FORCE THAT DEPUTY HUNT BELIEVED WAS NECESSARY TO MAKE THE ARREST

State v. Davis, 814 S.W.2d 593, 603 (Mo. banc 1991)

State v. Williams, 858 S.W.2d 796, 798 (Mo. App. E.D. 1993)

State v. Irby, 254 S.W.3d 181 (Mo.App. E.D.2008)

XI. THE TRIAL COURT ERRED AND PLAINLY ERRED IN ALLOWING SERGEANT TRAVIS HITCHCOCK TO OFFER OPINION TESTIMONY ON AN ISSUE OF LAW, TO WIT, THAT IT WAS UNLAWFUL FOR DEPUTY HUNT TO ENTER PHILLIP ALBERTERNST'S RESIDENCE, BECAUSE SERGEANT HITCHCOCK WAS NOT QUALIFIED TO GIVE SUCH AN OPINION IN THAT SUCH TESTIMONY IS NOT ADMISSIBLE BECAUSE IT ENCROACHES ON ISSUES RESERVED FOR THE TRIAL COURT AND PREJUDICIALLY MISLED THE JURY ON A CRITICAL ISSUE OF LAW IN THIS CASE.

State v. Mendoza, 75 S.W.3d 842, 845 (Mo. App. S.D. 2002)

State v. Ballard, 394 S.W.2d 336, 340 (Mo. 1965)

S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc., 320 F.3d 838, 841 (8th Cir. 2003)

Viacom Outdoor, Inc v. Taouil, 254 S.W.3d 234, 237 (Mo.App.E.D. 2008)

ARGUMENT

Introduction to All Points

A single sentence in the State's Brief in the Court of Appeals radically altered the trajectory of this appeal. The State wrote:

There is little question that Mr. Hunt, a deputy sheriff in St. Charles County, and a member of a multi-jurisdictional enforcement group, had (in the general sense) legal authority to arrest Mr. Alberternst.

See § 195.505, RSMo Cum. Supp. 2012.

(Ct.App.Resp.Br. 25.)

Until that sentence the State's position had been that Deputy Hunt was nothing more than a rogue cop, operating without authority outside of his home county and seeking revenge against Alberternst. With that sentence the State admitted that three privileges attached to all of Deputy Hunt's acts:

1. Deputy Hunt had authority to arrest Alberternst in Montgomery County. By February 5, 2009, Alberternst had acquired two felony arrest warrants. Tr.128. Alberternst was wanted for endangering the welfare of a child in Warren County. Tr.278. Another was from Lincoln County and related to the manufacture of methamphetamine. Tr.279.
2. Deputy Hunt had the privilege to make the arrest by breaking into the dwelling where Alberternst was. That privilege flows from §

544.200, RSMo. (2012), which provides the statutory license or privilege that permitted Deputy Hunt to “break open any outer or inner door ... of a dwelling house” to make an arrest.

3. Deputy Hunt had the privilege to use “such physical force as he reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody.” § 563.046.1, RSMo. (2012).

The State’s sentence turned this into a case about legal privilege. The trial court, misled by the State at trial, did not permit any of these privileges to inform the jury’s deliberations. So misinformed, the jury convicted Deputy Hunt of burglary in the first degree, a felony; property damage, a misdemeanor, and assault in the third degree. The trial court sentenced Hunt to five years in the Department of Corrections for the burglary. The trial court sentenced Deputy Hunt to three months on the property damage conviction and six months on the assault conviction, all to run concurrently. T.827-28.

That this is a privilege case is reinforced by the State’s further explanation to the Court of Appeals.

In a case like this—where competing, and legitimate, societal interests clash—care must be taken to ensure that law enforcement officers are not convicted in the absence of proper instruction. Law enforcement officers must not be arbitrarily placed at risk while carrying out their duties.... This will require that the applicable MAI

be modified to provide for the sorts of situations that entitle law enforcement officers to enter a home when other citizens would not have similar *privileges*.

(Ct.App.Resp.Br.at 63)(emphasis added).

Given the State's about-face on appeal, the Court of Appeals determined that plain error occurred regarding the burglary and property damage instructions because the trial court did not instruct about privilege – that is, the jury was never asked to consider whether Deputy Hunt, as a law enforcement officer, had a license or privilege to enter the dwelling to arrest Alberternst and to break open the door to do so. The plain error occurred because the jury was never asked to determine with a proper instruction whether Hunt entered unlawfully – a conclusion that necessarily invokes the privileges established in the statute to arrest and to break and enter to effect the arrest.

Yet curiously, the Court of Appeals found no plain error when the trial court failed to instruct the jury regarding the assault charge that: (1) it must believe that Deputy Hunt was acting with full authority to make the arrest (as the State now concedes) and, (2) as a fully authorized law enforcement officer, Hunt was clothed with the license to assault Alberternst using “such physical force as he [Hunt] reasonably believes is immediately necessary to effect the arrest.” Section 563.046.1. The fact of Hunt's reasonable belief as to the amount of force necessary to make the arrest was the only fact that the jury should have been

permitted to consider given Hunt's now-conceded lawful authority to arrest Alberternst.

When plain error is involved, fundamental precepts of justice are at stake. "For instructional error to rise to the level of plain error, *the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict.*" *Deck v. State*, 68 S.W.3d 418, 424 (Mo. banc 2002)(italics original)(citation omitted). The formulation, which is equitable rather than legal, finds its roots deep in Anglo-Saxon jurisprudence when the Chancellor, acting as the King's/Queen's conscience, could effectively overrule the harsh application of the rules to assure justice. *See, generally* Howard L. Oleck, Historical Nature of Equity Jurisprudence, 20 FORDHAM L. REV. 23 (1951).

Here, the plain error that the Court of Appeals found created the manifest injustice for the burglary and property damage convictions necessarily washed over onto the assault conviction. This is because Deputy Hunt carried the legal privileges afforded law enforcement officers with him into the jury's consideration of the assault issue. That it suddenly was not outcome determinative for the assault conviction – even though it was the product of the same legal error by the trial court – cannot be reconciled as a matter of law, logic or equity.

The Court of Appeals opinion is important for what it concludes about the burglary and property damage convictions. Because this case is before this Court as though on original appeal, Deputy Hunt must argue all the points of error,

including those favorably disposed by the Court of Appeals. But if the Court begins with the premise that the Court of Appeals properly reversed the burglary and property damage convictions, the Court need only concern itself with the assault conviction. It must be reversed for the identical reason. Once the State conceded that Deputy Hunt had authority to be at the scene of the arrest and to make the arrest, it follows that the privileges that attach to that official law enforcement role apply to the assault charge as well. The jury must be instructed to apply the privilege when considering assault by taking as a matter of law that Hunt was clothed with the full authority of law enforcement to make the arrest.

In sum, the trial court made substantial, prejudicial legal errors that were outcome determinative resulting in manifest injustice.

This is an odd procedural posture for a criminal case to say the least. Thus, this brief must proceed along two lines – the assignments of trial court error and the errors that became plain when the State made its legal concession.

In the end, that concession requires outright reversal of the burglary and property damage convictions and reversal and remand of the assault conviction.

A brief word on the ordering of the argument may help the Court going forward.

The first 5 points relate to both plain and preserved instructional error. Points VI is a cumulative error point. Points VII-IX argue that even under a proper instruction, the State failed to make a submissible case on both the burglary

and property damage charges. Point X and XI assign error related to the trial court's evidentiary rulings.

I. THE TRIAL COURT ERRED AND PLAINLY ERRED IN SUBMITTING INSTRUCTION 5 (FIRST DEGREE BURGLARY) AGAINST DEPUTY HUNT TO THE JURY BECAUSE A CONVICTION FOR BURGLARY IN THE FIRST DEGREE (§ 596.160, RSMO) REQUIRES PROOF BEYOND A REASONABLE DOUBT THAT THE ENTRY INTO AN INHABITABLE STRUCTURE BY THE DEFENDANT IS KNOWINGLY UNLAWFUL IN THAT THE STATE CONCEDES THAT HUNT HAD LEGAL AUTHORITY TO ARREST ALBERTERNST AND INSTRUCTION 5 DID NOT INSTRUCT THE JURY THAT DEPUTY HUNT WAS CLOTHED IN THE PRIVILEGES OF A LAW ENFORCEMENT OFFICER AND THAT IT COULD NOT CONVICT DEPUTY HUNT UNLESS IT FOUND THAT DEPUTY HUNT KNOWINGLY ENTERED ALBERTERNST'S RESIDENCE UNLAWFULLY.

A. STANDARD OF REVIEW

Appellate courts use the plain error rule sparingly and limit its application to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice. *State v. Collis*, 849 S.W.2d 660, 663[1] (Mo.App.1993). Instructional error is rarely plain error. *State v. Brokus*, 858 S.W.2d 298, 302 (Mo.App.1993). More than mere prejudice must be shown for plain error to exist.

Id. For instructional error to rise to the level of plain error, the trial court must have so misdirected the jury as to cause manifest injustice or a miscarriage of justice. *State v. Parkus*, 753 S.W.2d 881, 888[13] (Mo. banc 1988). The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. *State v. Cline*, 808 S.W.2d 822, 824[5] (Mo. banc 1991).

Review of legal questions is *de novo*. “[W]here, as here, a trial court is charged with applying statutory requirements, any such application is a question of law rather than fact.” *Ford Motor Co. v. City of Hazelwood*, 155 S.W.3d 795, 798 (Mo. App. E.D. 2005). *See also, State v. Mendoza*, 75 S.W.3d 842, 845 (Mo. App. S.D. 2002)(“Whether the Fourth Amendment has been violated is a legal question which this court reviews *de novo*”).

B. THE STATUTORY ARGUMENT

Section 569.160 RSMo. (2012), which defines the crime of Burglary in the First Degree, provides in part pertinent to Point I:

A person commits the crime of burglary in the first degree if he ***knowingly enters unlawfully*** or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein....

Id. (Emphasis added). By its plain language, the statute requires that a conviction for first degree burglary depends on proof beyond a reasonable doubt that the

person charged *actually know* that his entry into a habitable structure is unlawful or actually know that his presence in the dwelling is unlawful.

“Knowingly” requires a guilty mind,¹ that is, “a person acts knowingly with respect to his conduct when he is aware of the nature of his conduct,…” *Carter v. State*, 320 S.W.3d 177, 182 (Mo. Ct. App. 2010). *See*, § 569.010, RSMo (defining “enter unlawfully or remain unlawfully” as occurring only when a person “is not licensed or privileged to do so”).

Thus, in this case, Deputy Hunt cannot be convicted of burglary in the first degree if (1) the law actually permitted him to enter (and remain in) the trailer where Alberternst was living to arrest Alberternst or (2) Deputy Hunt had a reasonable belief that the law permitted him to enter (and remain in) the trailer where Alberternst was living to arrest Alberternst. In other words, a conviction for first-degree burglary required proof that Deputy Hunt actually believed that he had no legal authority to enter the premises. The State now concedes that Deputy Hunt possessed general legal authority to arrest Alberternst. With that concession, it is manifest that the trial court plainly erred in employing Instruction 5 because Instruction 5 failed to instruct the jury concerning the privilege Deputy Hunt had to arrest Alberternst. The State believes this problem is solved by defining

¹ “A crime generally consists of two elements: the physical, wrongful deed (the **actus reus**) and the guilty mind that produces the act (the **mens rea**).” *State v. Roberts*, 948 S.W.2d 577, 587 (Mo. 1997)

“knowingly unlawfully.” (Ct.App.Resp.Br.61-62). But this definition necessarily becomes relevant only if there is a privilege in the defendant to enter. Indeed, § 569.010(8) states that if there is a privilege, the entry is not unlawful.

The State tried to walk a narrow line that avoided the plain meaning of § 569.010(8) when it wrote in its brief to the Court of Appeals:

Such a definition would have necessarily included the statutory definition of “enter unlawfully.” Under § 569.010(8), RSMo 2000, “a person ‘enters unlawfully or remains unlawfully’ in or upon premises when he is not licensed or privileged to do so.” The statute then goes on to discuss entry into places open to the public and buildings that are only partly open to the public. § 569.010(8), RSMo 2000.

As relevant here, the definition would have informed the jury that if Mr. Hunt were licensed or privileged to enter, his entry would be lawful. But beyond that, a definition of “enter unlawfully” in a case like Mr. Hunt’s case might also need to explain to the jury when a law enforcement officer might be privileged to enter. To that end, the definition could have informed the jury that in certain situations, it is lawful for a law enforcement officer to enter a residence without a search warrant, and that such situations include, for example, (1) when the officers are in hot pursuit of a person they are trying to arrest, (2) when there are exigent circumstances, (3)

when the owner of the residence consents to the entry, (4) when there is an arrest warrant for a person who lives in the residence, or (5) when there is an arrest warrant for a person who the officer reasonably believes lives at the residence and who the officer reasonably believes is then present in the residence. One or more of these circumstances were implicated by the factual controversies in this case, and, thus, upon request by either of the parties, it would have been the trial court's duty to include a definition of "enter unlawfully."

Including a definition that instructed the jury on these legal principles would have been consistent with the law, and it would have served to balance society's competing interests in this case. Put simply, law enforcement officers must be allowed to carry out their duties under the law, but law enforcement officers are also not above the law.

Ct App.Resp.Br.61-62. But even that narrow line leads to a finding of plain error.

C. JUDICIAL OFFICERS IN WARREN COUNTY AND IN LINCOLN COUNTY HAD ISSUED FELONY ARREST WARRANTS FOR ALBERTERNST THAT WERE ACTIVE ON FEBRUARY 5, 2009.

By February 5, 2009, Alberternst had acquired two felony arrest warrants.

Tr.128. Alberternst was wanted for endangering the welfare of a child in Warren

County. Tr.278. The second was from Lincoln County and related to manufacturing methamphetamine. Tr.279.

The legislature knows that meth cooks do their illegal work on a moving basis. For this reason § 195.505, RSMo (2012), expressly authorizes multijurisdictional enforcement groups (“MEG”) to fight the scourge of illegal drugs. Members of an MEG have authority to make arrests in any county. *See* § 195.505 (“multijurisdictional enforcement group” are formed “for the purpose of intensive professional investigation of ... drug law violations”). That Chris Hunt was a member of an MEG is not disputed and is now conceded by the State on appeal. (“There is little question that Mr. Hunt...had legal authority to arrest Mr. Alberternst.” (Ct.App.Resp.Br. 25.)) He was acting under that authority on February 5, 2009, when he led a group of fellow MEG members into Alberternst’s trailer and arrested him.

The evidence was that Deputy Bill Rowe and Officer Dion Wilson (also members of the MEG) kept Deputy Hunt advised of the MEG’s activities on February 5 and that Dion Wilson guided Hunt to Alberternst’s trailer by cell phone that evening. Tr.522. The MEG had been called together for the purpose of arresting Phillip Alberternst. The plan to arrest Alberternst had been hatched over a three-day period and initially included Hunt, whom Fitzgerald called. Tr.514. Officer Dull had informed Hunt earlier in the day that they were trying to find the address for Alberternst’s residence. Tr.489. The plans came together on the evening of February 5 while the assembled MEG and non-MEG officers waited

for Ruth Ann Blake's call. Tr.132.

D. SECTION 544.200 PERMITS THE USE OF FORCE TO EFFECT AN ARREST FOLLOWING THE ANNOUNCEMENT OF OFFICERS' PRESENCE AND PURPOSE.

Section 544.200, RSMo provides as follows:

To make an arrest in criminal actions, the officer may break open any outer or inner door or window of a dwelling house or other building, or any other enclosure, if, after notice of his office and purpose, he² be refused admittance.

Id.

The statute permits forcible entry on the condition that the occupant first be permitted to allow peaceable entry. (The property damage conviction will be discussed at Point IV, *infra*.) It is not disputed that MEG member Luechtefeld and non-MEG member Fitzgerald knocked on the trailer door. Tr.136, 258. Ruth Ann Blake heard them announce they were police officers. Tr.197. They received no answer. *Id.* Blake testified that she had no intention of answering the door when police knocked. Tr.197. To be "refused admittance" is not to be permitted to

² Section 1.030.2 provides that a reference to a single person in statute, "several ... persons ... are included" within the meaning of the statute. Thus, the statute cannot be read to require the same officer who knocked and announced also to enter.

enter.³

E. SECTION 544.200 DRAWS NO DISTINCTION IN ITS GRANT OF AUTHORITY BETWEEN THE RESIDENCE OF THE ARRESTEE AND THE RESIDENCE OF A THIRD-PARTY.

Section 544.200 simply refers to a dwelling house. Dwelling house is a description of a kind of building without reference to its actual occupant. Thus, § 544.200 does not limit its grant of authority to officers to use force to enter only the dwelling of the person named in an arrest warrant. Here, the distinction does not matter because, as shown, the trailer was Alberternst's residence. (See, Section I.G., *infra*). Even if it were not Alberternst's residence, the statute permits the forcible entry.

F. NO JUDICIAL AUTHORITY EXISTS FOR THE PROPOSITION THAT FORCIBLE ENTRY INTO A DWELLING TO ARREST A PERSON FOR

³ "Refuse" does not require a positive act. It means "to decline to accept." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1910 (2002). As an example, the dictionary provides: "refuse to follow advice." *Id.* One can refuse to follow advice simply by not following it. In the same way, one can be "refused admittance" by the occupant not opening the door.

**WHOM JUDICIAL OFFICERS HAVE ISSUED A FELONY ARREST
WARRANT IS A KNOWINGLY UNLAWFUL ENTRY.**

Payton v. New York, 445 U.S. 573 (1980) holds that New York's statutes permitting forcible entry to a private residence to effect a warrantless arrest upon probable cause violates the Fourth Amendment absent exigent circumstances. "We ... hold that the Fourth Amendment ... prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." *Id.* at 576 (emphasis added). *Payton* never says that a criminal *mens rea* exists whenever a police officer guesses wrong on the reasonableness of an arrest.

Importantly, *Payton* also reminds that the existence of a felony arrest warrant changes the Fourth Amendment calculus.

If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Id. at 602-03. This is, of course, a Fourth Amendment analysis not a § 544.200 analysis.

Subsequent to *Payton*, the Supreme Court decided *Steagald v. United*

States, 451 U.S. 204 (1981). There the Court wrote that

the narrow issue before us is whether an arrest warrant—as opposed to a search warrant—is adequate to protect the Fourth Amendment interests of persons not named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances.

Id. at 212 (emphasis added). *Steagald* involved the arrest of the occupant of the home in which the person for whom the arrest warrant had been issued, Lyons, was hiding. The Supreme Court was not asked to decide whether the arrest of Lyons was valid; rather the case held that the arrest of Steagald, the resident of the house, was not valid. Nor did the case conclude that the entry into Steagald's house was unlawful. As the Court noted, the common law of England and the Court's cases suggested a different answer when the complaint of the arrest arises from the person who is the subject of the arrest warrant.

Thus, in *Semayne's Case* the Court observed:

“[T]he house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods.” 5

Co.Rep., at 93a, 77 Eng.Rep. at 128.

The common law thus recognized, as have our recent decisions, that rights such as those conferred by the Fourth Amendment are personal in nature, and cannot bestow vicarious protection on those who do not have a reasonable expectation of privacy in the place to be searched.

Id. at 219. On this basis the Supreme Court left for another day the issue of the reasonableness of the arrest of a person for whom there is an arrest warrant in the home of a third person without a *search* warrant. As the Supreme Court made clear:

The issue here, however, is not whether the subject of an arrest warrant can object to the absence of a search warrant when he is apprehended in another person's home, but rather whether the residents of that home can complain of the search.

Id. at 220.

U.S. v. Gay, 240 F.3d 1222 (10th Cir. 2001) decided the question left open by *Steagald*, finding that an arrestee for whom there is a warrant cannot complain as to the validity of his arrest when there is a warrant for his arrest and the police have a reasonable basis for concluding that the subject of the warrant is in the home of a third person.

In *Gay*, an arrest warrant existed for Mr. Gay. Searches of other places law enforcement believed Gay lived proved fruitless. An informant told officers

where Gay could be found and that he was at that location – a duplex owned by a third person. Gay argued that “officers could not lawfully enter the Pottinger Street residence without a search warrant supported by probable cause because it was not his home, but a third person’s home.” *Id.* at 1226. Gay relied on *Steagald* in hopes of gaining his freedom.

The Tenth Circuit rejected the argument, holding that *Payton* controlled. “In a *Payton* analysis, this court recognizes a two-prong test: officers must have a reasonable belief the arrestee (1) lived in the residence, and (2) is within the residence at the time of entry.” *Id.* It did not matter that the property was owned by a third party. What mattered was whether Gay exercised common authority over the property. Because Gay had common authority over the property, it was his residence. For this reason, *Payton* controlled, not *Steagald*. And for the same reason, *Payton* (and *Gay*) properly state the applicable law in this case.

Gay’s facts are remarkably similar to the case *sub judice*. An informant, Ruth Ann Blake, provided the officers with Alberternst’s location. Tr.272. Hunt was made aware of that information by Rowe and Wilson. Tr.498, 515. Blake had also told the officers earlier that Alberternst was home – that is, at the trailer. Tr.476. Her car was at the trailer. Tr.272. These facts were sufficient to permit Hunt and the other officers to form a reasonable belief that Alberternst was in the trailer and then to enter the residence to arrest Alberternst, even without visual confirmation of his presence.

G. THE TRAILER WAS THE RESIDENCE OF PHILLIP ALBERTERNST.

Alberternst had used the trailer for at least two weeks. Tr.223. He had free reign of the house. Tr.387. "Nobody else was there." Tr.386. He had a key to the trailer. Tr.387. He could come and go as he wanted. Tr.386. He left and returned to the trailer. Tr.386. He had been cooking meth in the woods around the trailer. Tr.367, 384. He had not looked for and was not intending to look for any other place to live. Tr.387.

State v. Younger, 386 S.W.3d 848, 855 (Mo. App. W.D. 2012) recently explained the plain meaning of "residence."⁴

The word "residence" is defined in Webster's Third New International Dictionary 1993, p. 1931 as:

[T]he act or fact of abiding or dwelling in a place for some time:
an act of making one's home in a place....

⁴ Were Alberternst a registered sex offender, he would have been required to register the trailer as his residence under § 589.414, RSMo. That is the holding of *State v. Younger*. See, also *State v. Kelly*, 367 S.W.3d 629 (Mo.App. E.D.2012)(when sex offender left his registered residence with no intent to return and was transient for three months with no fixed address he violated § 589.414 because he failed to update his residence information).

[T]he place where one actually lives or has his home as distinguished from his technical domicile[.] **[A] temporary or permanent dwelling place, abode, or habitation to which one intends to return** as distinguished from a place of temporary sojourn or transient visit.

State v. Younger, 386 S.W.3d at 855(emphasis added). *Accord*, *State ex rel. Logan v. Shouse*, 257 S.W. 827, 828 (Mo. App. 1924) ("Domicile' and 'residence' are frequently used synonymously, but technically the *latter word indicates merely the present place of abode of a person, whether temporary or permanent*, whereas "domicile" always means a permanent home").

Thus, when a person "possesses common authority over, or some other significant relationship to,' the dwelling entered by the police," that dwelling is the arrestee's residence." *Valdez v. McPheters*, 172 F.3d 1220, 1225 (10th Cir. 1999)(citation omitted). Further,

"we are guided by the principle that, so long as Rhoads possesses common authority over, or some other significant relationship to... the Huntington Road residence, ... that dwelling "can certainly be considered [her] 'home' for Fourth Amendment purposes, even if the premises are owned by a third party and others are living there, and even if [Rhoads] concurrently maintains a residence elsewhere as well."

United States v. Risse, 83 F.3d 212, 217 (8th Cir. 1996)(citation omitted).

The trailer was Alberternst's present place of abode – his residence for Fourth Amendment purposes. His presence there was not the result of a temporary visit. He was hiding there from law enforcement. Tr.362. Each day he left to cook meth, he returned to this dwelling. Tr.386. Again, he was not looking for somewhere else to live. Tr.387. Ruth Ann Blake testified on cross examination:

Q. Do you remember telling me earlier in a deposition that he'd been there for two weeks?

A. I had been there with him two weeks prior to that.

Q. Okay. And was he there then?

A. Yes.

Q. And was he staying there then?

A. Yes.

Q. Did he have all his worldly possessions on the front porch there, all his clothes and everything?

A. Yes.

Tr.223. This testimony is not refuted in the record. For purposes of the law, the trailer was his residence for determining whether Deputy Hunt's entrance was lawful.

H. DEPUTY HUNT PROPERLY INJECTED THE DEFENSE OF EXECUTION OF A PUBLIC DUTY, § 563.021, RSMO, WHICH PRESENTED A

**QUESTION OF LAW FOR THE COURT, WHICH THE COURT FAILED
TO RULE AS A MATTER OF LAW.**

The defense of justification is a legal question under the facts of this case. This is because the claim of authority arises under a statute, rather than from a factual question. For example, § 563.031, RSMo permits self-defense as a defense to a crime against a person. But whether that self-defense is a justification is a *fact* question for a jury because whether the force used is "necessary to defend" against "imminent unlawful force" is a question of fact, not law.

As a member of an MEG, Deric Dull testified that he understood that he had authority to arrest Alberternst in Montgomery County. "A. Well, as a member of the Regional Drug Task Force gives me powers of arrest throughout the State of Missouri." (sic) Tr.500. Eric Luechtefeld, a Detective with the East Central Drug Task Force -- an MEG -- expressed the same understanding.

Q. So if you would have seen him inside the residence you would of gone in, you would of forced open the door and gone in after him?

A. Yes, sir.

Tr.160. Deputy Hunt testified:

Q. Now, once you got on the St. Charles County Sheriff's Department, and specifically in February 5th of 2009, how were you -- what were your duties?

A. On February 5th, 2009, I was assigned as a detective with the Regional Drug Task Force.

Q. And the Regional Drug Task Force -- Well, first of all when you're a police officer in St. Charles County, is that what's considered a first class county?

A. Yes, it is.

Q. And being a police officer in a first class county does that give you certain powers throughout the State of Missouri?

A. It gives you the power to enforce the laws throughout the State of Missouri.

Q. And when you work in this Regional Drug Task Force are you also working under a state statute?

A. Yes, that governs. It gives us the ability to, also it's covered in that statute also, allows us to enforce the law throughout the state.

Q. And the requirement under that statute, which is 195.505, is that when you go into another county you have a requirement; is that correct?

A. That is correct.

Q. And what is that requirement?

A. To notify the local law enforcement agency that you're there working.

Q. And on the night of February 5th to the best of your knowledge was somebody from Montgomery County notified that you were in their county, within the county?

A. Yes, Deputy Mayes was.

Q. And that was the purpose of Deputy Mayes being there; is that correct?

A. Yes, sir.

Tr.507-508.

However, where, as here, a law enforcement officer injects his legal authority to act as a matter of statute, whether the officer falls under the protections of the statute are not fact questions when the State concedes the law enforcements officer's authority.⁵

I. CONCLUSION

It was error and plain error for the trial court to fail to instruct the jury that Deputy Hunt was operating under the full authority of the law when he arrested

⁵ See, for example, § 563.026, RSMo, which seems not to apply here because § 536.026.2 references § 563.026.1. (The justification claimed here arises from § 536.021 (execution of a public duty), not § 536.026.). Nevertheless, even where the issue has a factual component, § 536.026.2 makes the issue of justification a question for the court to rule "as a matter of law" when the circumstances establish justification.

Alberternst and to fail to instruct the jury on the privileges that cloak such a law enforcement officer. Reversal is required on the conviction for first-degree burglary.

II. THE TRIAL COURT ERRED AND PLAINLY ERRED IN SUBMITTING INSTRUCTION 5 TO THE JURY BECAUSE A CONVICTION FOR BURGLARY IN THE FIRST DEGREE CAN STAND ONLY IF THE PREDICATE PURPOSE HERE CHARGED, ASSAULT, IS PROPERLY DEFINED IN THAT INSTRUCTION 5 FAILED TO INSTRUCT THE JURY THAT HUNT WAS ACTING AS A LAW ENFORCEMENT OFFICER AND THAT IN LIGHT OF THE SECTION 563.046.1, RSMO, PRIVILEGE HE COULD ONLY BE CONVICTED OF BURGLARY IF THE JURY BELIEVED THAT HE ENTERED THE ALBERTERNST DWELLING WITH THE PREDICATE PURPOSE OF USING MORE FORCE THAN HE BELIEVE WAS REASONABLY NECESSARY TO MAKE THE ARREST.

A. STANDARD OF REVIEW

The standard of review for this Point is the same as is set out in Point I.

B. THE STATUTORY ARGUMENT

Section 569.160 provides in pertinent part:

A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure *for the purpose of committing a crime* therein....

Id. (Emphasis added).

By its plain language, the statute requires that the entry by Deputy Hunt, in addition to being knowingly unlawful, must have been “for the purpose of” committing an assault on Phillip Alberternst. The jury must find both elements to convict.

When one acts “for the purpose of” one intends the results of an act when one undertakes the act. See, BLACK'S LAW DICTIONARY 588 (5th Ed.)(defining “for the purpose of” as “with the intention of”).

The now-conceded fact of Deputy Hunt’s authority to arrest Alberternst necessarily changes the nature of the assault that can serve as the predicate purpose to support burglary. Given the Section 563.046.1 privilege, any burglary conviction of Deputy Hunt depends on proof beyond a reasonable doubt that Hunt intended to use force that he knew was greater-than-reasonably necessary against Alberternst when he entered the dwelling to make the arrest.

Section 563.046.1, RSMo provides:

1. A law enforcement officer need not retreat or desist from efforts to effect the arrest, or from efforts to prevent the escape from custody, of a person he reasonably believes to have committed an offense because of resistance or threatened resistance of the arrestee. In addition to the use of physical force authorized under other sections of this chapter, he is, subject to the provisions of subsections 2 and 3, justified in the use of such physical force as he

reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody.

Id.

C. INSTRUCTION 5 DID NOT ACCOMMODATE THE STATUTE

Instruction 5 made no accommodation either for Hunt's authority or the Section 563.046.1 privilege. Rather, Instruction 5 required the jury to find as part of the burglary verdict director that "Second, that [Defendant] did so for the purpose of committing the crime of assault." Instruction 5. LF100. Instruction 5 went on to define assault as though this was a bar fight, not a case involving a law enforcement officer making an arrest.

The crime of "assault" occurs when a person knowingly or recklessly causes or attempt to cause physical injury to another person, or purposefully places another person in apprehension of immediate physical injury, or knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative.

LF100. Instruction 5 thus carried no reference to the privileges afforded Deputy Hunt to use the force he reasonably believed was necessary to arrest Alberternst nor did it require the jury to find that Hunt intended to use more-than-reasonable force when he entered the Alberternst dwelling.

The State's concession makes manifest the injustice that occurred when the burglary instruction defined assault as it did. When an instruction so misdirects the jury, plain error requiring reversal is evident.

“In the context of instructional error, [reversible] plain error results when the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict.” *Id.* (citation omitted). In that regard:

an appellate court will be more inclined to reverse in cases where the erroneous instruction “did not merely allow a wrong word or some other ambiguity to exist, [but] excused the State from its burden of proof on [a] contested element of the crime.” Additionally, this court has previously held that where a verdict director effectively omits an essential element of the offense, such an instruction rises to the level of plain error if the evidence in the case fails to establish the existence of the omitted element “beyond serious dispute.”

State v. Harney, 51 S.W.3d 519, 533–34 (Mo.App.2001) (citation omitted).
State v. White, 92 S.W.3d 183, 192 (Mo.App.2002). This is exactly what happened here.

D. CONCLUSION

For the reasons stated, reversal is required.

III. THE TRIAL COURT ERRED AND PLAINLY ERRED IN REFUSING TO SUBMIT DEPUTY HUNT'S PROFFERED INSTRUCTION C ON THE CHARGE OF BURGLARY IN THE FIRST DEGREE BECAUSE INSTRUCTION 5, AS SUBMITTED, REMOVED FROM THE JURY'S CONSIDERATION THE DEFENSE OF JUSTIFICATION, § 563.021, RSMO, IN THAT THE LAW OF MISSOURI, § 544.200, RSMO, EXPRESSLY PERMITS A LAW ENFORCEMENT OFFICER TO USE FORCE TO ENTER THE DWELLING OF ANOTHER WHEN THE DWELLING IS OCCUPIED BY A PERSON WHO IS THE SUBJECT OF A FELONY ARREST WARRANT AND INSTRUCTION C REQUIRED THE JURY TO FIND THAT DEPUTY HUNT WAS NOT ACTING AS A LAW ENFORCEMENT OFFICER WHEN HE ENTERED THE DWELLING TO ARREST ALBERTERNST.

A. STANDARD OF REVIEW

In determining whether a refusal to submit an instruction was error, “the evidence is viewed in the light most favorable to the defendant.” *State v. Westfall*, 75 S.W.3d 278, 280 (Mo. banc 2002). “If the evidence tends to establish the defendant's theory, or supports

differing conclusions, the defendant is entitled to an instruction on it.”

Id.

State v. Avery, 120 S.W.3d 196, 200 (Mo. banc 2003).

B. ARGUMENT IN THE ALTERNATIVE

This is an alternative assignment of error.

Deputy Hunt's theory of the case was that he had lawful authority to enter the dwelling where Alberternst was to arrest Alberternst and to use force to do so. The State's theory was that Hunt entered the dwelling without legal justification to do so -- that he was not acting as a police officer at all. The State argued at closing:

Chris Hunt, there to protect everyone, pulls up on scene in his pickup truck, breaks through the perimeter, doesn't tell any of these officers what he's doing, none of them know who he is or why he's there? Is that someone making an arrest? Is that someone acting like a police officer? That's not acting like a police officer.

Tr.722-23. The burglary case thus turned on whether Hunt was acting under authority of the law, a legal conclusion that the State now concedes on appeal. (“There is little question that Mr. Hunt...had legal authority to arrest Mr. Alberternst.” (Ct.App.Resp.Br. 25.))

Section 195.055, RSMo, expressly permits members of a multijurisdictional enforcement group (MEG) to arrest persons outside of their

county. As a member of an MEG, Deric Dull testified that he understood that he had authority to arrest Alberternst in Montgomery County. "A. Well, as a member of the Regional Drug Task Force gives me powers of arrest throughout the State of Missouri." (sic) Tr.500. Eric Luechtefeld, a Detective with the East Central Drug Task Force -- an MEG -- expressed the same understanding.

Q. So if you would have seen him inside the residence you would of gone in, you would of forced open the door and gone in after him?

A. Yes, sir.

Tr.160. Deputy Hunt testified:

Q. Now, once you got on the St. Charles County Sheriff's Department, and specifically in February 5th of 2009, how were you -- what were your duties?

A. On February 5th, 2009, I was assigned as a detective with the Regional Drug Task Force.

Q. And the Regional Drug Task Force -- Well, first of all when you're a police officer in St. Charles County, is that what's considered a first class county?

A. Yes, it is.

Q. And being a police officer in a first class county does that give you certain powers throughout the State of Missouri?

A. It gives you the power to enforce the laws throughout the State of Missouri.

Q. And when you work in this Regional Drug Task Force are you also working under a state statute?

A. Yes, that governs. It gives us the ability to, also it's covered in that statute also, allows us to enforce the law throughout the state.

Q. And the requirement under that statute, which is 195.505, is that when you go into another county you have a requirement; is that correct?

A. That is correct.

Q. And what is that requirement?

A. To notify the local law enforcement agency that you're there working.

Q. And on the night of February 5th to the best of your knowledge was somebody from Montgomery County notified that you were in their county, within the county?

A. Yes, Deputy Mayes was.

Q. And that was the purpose of Deputy Mayes being there; is that correct?

A. Yes, sir.

Tr.507-508.

This amounts to a defense of justification. Just as the State is permitted to present its theory of the case, so is Deputy Hunt. And Deputy Hunt, because of his status as a member of an MEG, claimed that he was justified under the laws of Missouri in entering the dwelling where Alberternst was to arrest Alberternst. This goes directly to the element of "knowingly entered *unlawfully*" that is required for first-degree burglary.

And while §563.021.3 also places on the defendant "the burden of injecting the issue of justification," Deputy Hunt met that burden of injecting by the evidence recited. He (as well as the other MEG officers) claimed that they had authority under § 544.200 and § 195.505 to enter the dwelling to make the arrest because he was a member of an MEG.

This Point thus asserts that if the issue of justification is a factual one,⁶ the jury should have been allowed to consider it. It was Hunt's theory of the case. But the trial court did not permit the jury to consider Hunt's theory of the case despite Hunt's timely request and even though Instruction C gave the trial court the opportunity to follow the law.

Instruction C required the jury to find that Hunt "did not act as a law enforcement officer lawfully using force to make an arrest...." LF 114. The trial

⁶ It is not a factual issue. The question of Hunt's authority to act pursuant to statute is a legal question that the trial court should have resolved on a motion for judgment of acquittal at the close of the evidence.

court refused the instruction. Indeed, in addressing this very question the trial court doubted its own rectitude.

THE COURT: Let me mark that as Instruction No. C. We got so much potential instruction error here the Court of Appeals will love this. Instruction No. C, the proffered 323.52 offered by defendant is refused.

Tr.698.

State v. Avery, 120 S.W.3d 196, 200 (Mo. banc 2003) commands reversal because “[i]f the evidence tends to establish the defendant's theory, or supports differing conclusions, the defendant is entitled to an instruction on it.” *Id.* The trial court denied Hunt the opportunity for the jury to consider his theory of the case.

C. CONCLUSION

For the reasons stated, reversal is required.

IV. THE TRIAL COURT ERRED AND PLAINLY ERRED IN GIVING INSTRUCTION 6 REGARDING PROPERTY DAMAGE IN THE SECOND DEGREE BECAUSE INSTRUCTION 6 FAILED TO INSTRUCT THE JURY THAT DEPUTY HUNT COULD EMPLOY FORCE TO BREAK PROPERTY TO MAKE AN ARREST IN THAT SECTION 544.200 PERMITS A LAW ENFORCEMENT OFFICER TO USE SUCH FORCE TO MAKE AN ARREST.

A. STANDARD OF REVIEW

The applicable standard of review is set out in Point I.

B. THE TRAILER IN WHICH HUNT ARRESTED ALBERTERNST WAS A DWELLING HOUSE.

Section 544.200, RSMo, provides:

To make an arrest in criminal actions, *the officer may break open any outer or inner door or window of a dwelling house* or other building, or any other enclosure, if, after notice of his office and purpose, he⁷ be refused admittance.

⁷ Section 1.030.2 provides that a reference to a single person in statute, “several ... persons ... are included” within the meaning of the statute. Thus, the

Id. (Emphasis added). The phrase dwelling house was statutorily defined for purposes of the former arson statute as:

Every house, prison, jail or other edifice, which shall have been usually occupied by persons lodging therein, shall be deemed a dwelling house of any person having charge thereof or so lodging therein; but no warehouse, barn, shed or other outhouse shall be deemed a dwelling house, or part of a dwelling house, within the meaning of this section or section 560.010, unless the same be joined to or immediately connected with and is part of a dwelling house.

State v. Northcutt, 598 S.W.2d 130, 131 (Mo. 1980).

First, the statute does not limit the application of the privilege to the home of the person for whom an arrest warrant is outstanding. The statute simply describes a kind of building without reference to ownership or occupancy.

Second, the statute permits forcible entry on the condition that the occupant first be put on notice that he/she may allow peaceable entry. It is not disputed that Officers Luechtefeld and Fitzgerald knocked on the trailer door. Tr.136, 258. Ruth Ann Blake heard them announce they were police officers. Tr.197. They received no answer. *Id.* Again, Blake testified that she had no intention of answering the door when police knocked. Tr.197. To be "refused admittance" –

statute cannot be read to require the same officer who knocked and announced also to enter.

the statutory condition precedent to breaking – is not to be permitted to enter.⁸

All of the statutory conditions for a forceful entry were met. The State concedes on appeal that: “There is really no question that Mr. Hunt could use force and break down the door pursuant to the provisions of § 544.200—so long as it was lawful for him to enter at all.” Ct.App.Resp.Br.59.

C. THE STATE’S CONCESSION MAKES IT A MANIFEST INJUSTICE FOR THE TRIAL COURT TO HAVE FAILED TO INSTRUCT THE JURY THAT DEPUTY HUNT HAD AUTHORITY TO BREAK THE DOOR TO EFFECT THE ARREST.

Once the State agreed to what the trial court denied – that Deputy Hunt was acting with authority to arrest – any instruction submitted to the jury on the crime of property damage was required to instruct the jury that if Deputy Hunt did not know he was entering the trailer unlawfully he carried the privilege to break the door to enter.

The Court of Appeals reasoned:

Further, we note at oral argument the State conceded “it was arguable” that the same error was made [as was made in the burglary instruction]. As a result, because Defendant is entitled to a new trial on the first-degree burglary due to the trial court’s failure to define “entered unlawfully” or to describe when a law enforcement officer might be justified in entering for the jury, Defendant is also entitled to a new trial on the charge of property

⁸ See Footnote 3, *supra*.

damage for the same reason.

State v. Hunt, 2014 WL 298631 at 9.

D. CONCLUSION

Deputy Hunt damaged the trailer to gain entry to make the arrest under the authority granted him by Section 544.200. The trial court plainly erred in submitting Property Damage in the Second Degree without reference to that privilege.

V. THE TRIAL COURT ERRED AND PLAINLY ERRED IN SUBMITTING INSTRUCTION 7 REGARDING ASSAULT IN THE THIRD DEGREE BECAUSE INSTRUCTION 7 PERMITTED THE JURY TO FIND THAT DETECTIVE HUNT WAS *NOT* ACTING AS A LAW ENFORCEMENT OFFICER WHEN HE ARRESTED ALBERTERNST IN THAT THE STATE HAS CONCEDED THAT DEPUTY HUNT HAD AUTHORITY TO ARREST ALBERTEERNST AND INSTRUCTION 7 DID NOT REQUIRE THE JURY TO FIND THAT DEPUTY HUNT USED MORE FORCE THAN HE REASONABLY BELIEVED WAS NECESSARY TO MAKE THE ARREST.

A. STANDARD OF REVIEW

The applicable standard of review is set out in Point I.

B. ARGUMENT

Section 563.046.1, RSMo, states the law of Missouri. A law enforcement officer is "justified in the use of such physical force as he reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody."

Id.

The issue whether Deputy Hunt had the legal authority to use force against the person of Phillip Alberternst to arrest and enter the dwelling is necessarily conceded by the State when it admits that Deputy Hunt had legal authority to

make the arrest. Instruction 7, the assault verdict directing instruction, simply failed to instruct the jury that that legal conclusion (Deputy Hunt's authority) is the legal premise from which it must determine whether Deputy Hunt used more force than he (Hunt) reasonably believed was necessary to arrest Alberternst.

Instruction 7 provided in pertinent part:

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

Second, that [Defendant] *did not act as a law enforcement officer* lawfully using force to make an arrest as submitted in Instruction No. 8.

LF102 (emphasis added).

Instruction 7, ¶ Second, is a two-stage instruction. In order to proceed to the privilege question under Instruction 7, the jury must first find that Deputy Hunt was acting as a police officer. The State has conceded that Deputy Hunt was acting as a police officer when he arrived at the Alberternst trailer. The arrest that followed was an arrest made by Hunt cloaked in full legal authority.

Importantly, unlike burglary, assault is a stand-alone crime; it does not require proof of an intent to commit another crime. Thus, the legal authority with which Hunt was cloaked makes application of the privilege to use reasonable force mandatory. Instruction 7 made application of the privilege dependent on the jury

finding that Hunt was in fact Deputy Hunt when he made the arrest. That is plain error.

To highlight the importance of the State's concession on appeal that Hunt was acting under full legal authority to arrest Alberternst, the State argued at trial that Hunt was not acting as a police officer.

Chris Hunt, there to protect everyone, pulls up on scene in his pickup truck, breaks through the perimeter, doesn't tell any of these officers what he's doing, none of them know who he is or why he's there? Is that someone making an arrest? Is that someone acting like a police officer? That's not acting like a police officer.

Tr.722-23.

Thus, the second fact posited in Instruction 7, ¶ Second (whether Hunt was lawfully using force to make an arrest), need not be considered by the jury at all if the jury does not first believe that Deputy Hunt was acting as a law enforcement officer. Said differently, unless the jury believed that Deputy Hunt was acting as a law enforcement officer, it never needed to consider whether Hunt was using lawful force.

Instruction 8 accentuated the error because it expressly told the jury that the use of force was lawful “*if* [Defendant] was a law enforcement officer making or attempting to make a lawful arrest.....” Instruction 8 LF103. Thus, Instruction 8

also left the factual issue of Deputy Hunt's authority to make the arrest and to use force open for the jury's determination, expressly stating that Hunt's authority was an issue for them to decide.

One of the issues as to Count III is whether the use of force by [Defendant] against [Alberternst] was the lawful use of force by a law enforcement officer in making an arrest.

Inst. 8:LF103 (italics added). The issue put to the jury in Instruction 7, positing assault in the third degree, was not whether Hunt used force he reasonably believed was excessive, but whether Hunt "attempted to cause physical injury to Phillip Alberternst by striking him." Instruction 7, ¶ First, LF102. A law enforcement officer can attempt to cause physical injury if he/she reasonably believes that force-causing injury is necessary to make an arrest. That is the very purpose of the §563.046.1 privilege.

If Hunt's status under the law was a *factual* issue *before* the State's admission on appeal, it became a *legal conclusion* that bound the jury in its deliberations once the State offered its concession. Hunt was acting as a law enforcement officer. Whether the force Hunt used in subduing the struggling Alberternst was force Hunt believed was reasonable under the privilege granted

law enforcement officers by § 563.046.1, was the only factual issue that should have been posited in the instructions Paragraph 2.⁹

Given the State's admission, Instruction 7 should have read:

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

* * *

Second, that [Defendant] *used more force to make an arrest than Defendant reasonably believed was necessary as submitted in Instruction No. 8.....*

A proper Instruction 8 should have informed the jury:

One of the issues as to Count III is whether the [Defendant], *acting as a law enforcement officer, used more force than*

⁹ Admittedly, the preservation of the error in the assault instruction is problematic. Yet counsel's failure to object to the assault verdict directing instruction was a function of the hard line the trial court had drawn on the issue of Hunt's authority after the trial court adopted the State's position that Hunt was acting without authority. That the assault instruction provided the jury the opportunity to conclude that Hunt was possibly acting as a law enforcement officer was a minor step in the right direction at the trial court. But to the extent that that small step resulted in a clear failure to object to the specific obstruction at trial, that concession could not have foreseen the State's concession on appeal.

Defendant reasonably believed was necessary [Alberternst] in making an arrest....

* * *

If you believe that the Defendant who is acting as a law enforcement officer... used only such force as reasonably appeared to be necessary to Defendant to effect the arrest or to prevent the escape of [Alberternst]... you must find [Defendant] not guilty under Count III.

These instructions would have allowed the jury to decide the issue that ought to face a law enforcement officer charged with assault: whether the force used was greater than the officer reasonably believed was necessary to make the arrest. These instructions would have avoided the jury deciding whether the person using the force was a law enforcement officer at all.

The facts at trial permit the Court to conclude that the issue of reasonable force from Hunt's perspective was a live one.

These facts support Deputy Hunt's reasonable belief as to the need for force.

- Alberternst ran into the bathroom. Tr.222. This is not the act of a compliant arrestee.
- Luechtefeld and Fitzgerald knocked on the trailer door. Tr.136, 258. They announced they were police officers. Tr.197. Blake testified

that she had no intention of answering the door when police knocked. Tr.197. These are not the acts of a compliant arrestee.

- Deputy Mayes, who entered the trailer when he believed exigent circumstances existed because of the screaming and yelling, Tr.324, heard Hunt give "the standard commands." Tr.325. Doerr heard officers shouting: "Show me your arms" and "stop resisting." Tr.310, 312. Chad Fitzgerald had also followed the officers into the trailer. Tr.268. Fitzgerald never saw Hunt strike Alberternst. Tr.278.

- Mayes testified on direct for the State that:

Phil was trying to close the door. Uh, he was obviously naked. He was trying to close the door, get away from the situation and Chris Hunt was able to get his hand on him and take him to the ground.

Tr.325. These are not the acts of a compliant arrestee.

- Mayes testified, however, that "It appears he was resisting at the time and kicking and it was a very tight area." Tr.325. When asked, "Do you remember describing Phillip Alberternst's actions the night of February 5th, 2009, as being pretty violent?" Mayes answered, "Yeah, it did seem to be very violent at the time." Tr.357.
- Mayes testified that he grabbed Alberternst's left leg as part of the effort to subdue him. Mayes testified on direct for the State:

"Uh, got him on the ground, and like I said, he was -- he was kicking and screaming and I gained control, I believe it was his left leg, and was holding his left leg and I remember Alberternst saying okay, okay. You've got me, I give up or whatever. And then the, uh, control tactics continued."

Tr.326. These are not the acts of a compliant arrestee.

As Mayes testified, Deputy Hunt delivered control tactics. These are strikes designed to disable a suspect. Mayes testified: "Well, there's some strikes being made and it was really dark so I can't say exactly. It was his upper -- upper area, shoulders and head area." *Id.* At his deposition Mayes testified that "there were a few control maybe pressure point strikes, but no, not like beating him up."

Tr.342.

Dull testified that Alberternst was on the ground, "trying to push up, keeping his hands underneath him, trying to push off the ground as if he was trying to get up and would not follow their commands." Tr.484. Luechtefeld "wouldn't describe him as resisting, but he wasn't following their commands." Tr.144. Alberternst hands "were flailing." *Id.* The movements "looked defensive." Tr.144. But Alberternst was kicking his legs. Tr.151. No one saw anyone strike Alberternst once the arrest was completed.

Schoenfeld saw Hunt striking Alberternst on the back of the head and the soft spot in the back of his head with his fist. Tr.418.

These strikes were consistent with training Hunt had received to subdue resistant arrestees. Brian Clay, the officer charged with training St. Charles County deputies in techniques to overcome resistance from persons attempting to avoid arrest, broke resistance down into various degrees. The first is passive resistance. "Passive resistance would be a subject who, for example, ... simply goes limp when I try to escort him out or if he's in a seated position he'll just refuse to get up." Tr.648. The proper level of force for passive resistance is "hard empty hand control." *Id.* "Hard empty hand control is basically using your hands without weapons to control resistant behavior or to defend yourself against combative behavior." *Id.* "With hard empty hand control we're talking about strikes." Tr.649.

The next level of resistance is "defensive resistance." Tr.649. That occurs when somebody is "pulling away when you're trying to grab them or bringing their hands up to their chest and not letting their hands out or trying to, basically trying to evade arrest and resist arrest" without assaulting the officer. *Id.* Defensive resistance is met with "intermediate weapons." *Id.* These include taser and mace. *Id.*

When an arrestee is holding his hands beneath him and kicking his legs, that is "defensive resistance and it borders on assaultive -- assaultive behavior." Tr.650. This is because "once he starts kicking his legs he's likely to cause injury to an officer who's trying to apprehend him." *Id.* Hard empty hand control is

appropriate. Tr.651. An officer encountering that type of resistance "would actually be authorized to use a higher level of force." *Id.*

"The two primary strikes ... [are] the palm heel strike... and [use of a] closed fist and deliver a strike with a closed fist to the subject." *Id.* The blows are to be delivered to nerve bundles that affect large muscle groups. Tr.652. These cause "motor dysfunction." *Id.* The proper places to strike include "the super scapular area. This is the area that's up here in the shoulders near the base of the neck." Tr.654. Also "on the back of the leg approximately half way between the hip and the knee is what's called the peroneal nerve point." Tr.655.

Officers are taught "to strike as hard as they possibly can..." until the resistive behavior ceases." *Id.*

Recall that Schoenfeld saw Hunt striking Alberternst on the back of the head and the soft spot in the back of his head with his fist. Tr.418. This is consistent with control tactic strikes.

C. CONCLUSION

Because Deputy Hunt had authority to use the force he reasonably believed was necessary to arrest Alberternst, the trial court erred in submitting Instructions 7 & 8, which failed to require the jury to assume as a matter of law Deputy Hunt's authority to make the arrest and to consider on the question whether Deputy Hunt used more force than Deputy Hunt believed was necessary to make the arrest. Reversal and remand is required.

VI. THE TRIAL COURT ERRED AND PLAINLY ERRED SO SUBSTANTIALLY THAT IT COMMITTED CUMULATIVE ERROR BECAUSE IT FAILED TO INSTRUCT THE JURY ON DEPUTY HUNT'S LEGAL AUTHORITY TO ARREST ALBERTERNST AND THE PRIVILEGES THAT ATTACH TO THAT AUTHORITY IN THAT EVEN IF THE ASSAULT INSTRUCTION WAS ARGUABLY CORRECT, THE AFFECT OF THE ASSAULT DEFINITION IN THE BURGLARY INSTRUCTION (INSTRUCTION 5), WHICH DID NOT INSTRUCT THE JURY ON THE PRIVILEGES DEPUTY HUNT ENJOYED AS A LAW ENFORCEMENT OFFICER, WAS SUCH THAT INSTRUCTION 5 CREATED A MANIFEST INJUSTICE IN THE JURY'S CONSIDERATION OF THE ASSAULT CHARGES.

A. STANDARD OF REVIEW

“An appellate court may grant a new trial based on the cumulative effects of errors, even without a specific finding that any single error would constitute grounds for a new trial.” *Koontz v. Ferber*, 870 S.W.2d 885, 894 (Mo.App. W.D.1993). “However, relief will not be granted for cumulative error when there is no showing that prejudice resulted from any rulings of the trial court.” *Id. Accord, Kline v. City of Kansas City*, 334 S.W.3d 632, 649 (Mo. Ct. App. 2011).

B. MANIFEST INJUSTICE AND PREJUDICE

As previously argued, manifest injustice and thus prejudice creating plain error resulted from the trial court's failure to instruct the jury that Deputy Hunt had authority to arrest Alberternst. To further compound the manifest injustice that proceeded from the plainly erroneous Instruction 5 (Burglary), Instruction 5 defined "assault" without reference to any law enforcement exception. LF100. Thus, the jury was required to find as part of the now-condemned burglary instruction that "Second, that [Defendant] did so¹⁰ for the purpose of committing the crime of assault." *Id.* Thus, the jury was required to find as part of the burglary submission – *before* it ever considered the actual third-degree assault submission – that Hunt intended to assault Alberternst – all without any reference to the law's privileges that attached to Deputy Hunt under 563.046.1, RSMo. When the jury reached the assault instructions, it had already determined that Hunt intended to assault Alberternst when he entered the trailer. It was less than a short step for the jury to find Hunt guilty of assault, the jury having first found beyond a reasonable doubt his intent to assault Alberternst using the wrong definition of assault.

Several courts that have considered the issue have determined that when such profound error exists, and the evidence of guilt is not overwhelming, the jury's verdict may not have been the product of honest fact finding. The

¹⁰ That is, knowingly entered the trailer unlawfully....

application of this rule is limited to only those cases where the proof of guilt is not overwhelming. Where the proof of guilt is overwhelming, the harmless error standard applies,

Where proof of a defendant's guilt is not overwhelming, “every error of law (save, perhaps, one of sheerest technicality) is, *ipso facto*, deemed to be prejudicial and to require a reversal, unless that error can be found to have been rendered harmless by the weight and the nature of the other proof” [citation omitted].

People v. Gibian, 76 A.D.3d 583, 588-89, 907 N.Y.S.2d 226 (2010). Thus,

When, as here, proof of a defendant's guilt is not overwhelming, there is no occasion to apply the harmless error doctrine, and reversal is required [citations omitted] In sum, we find the conclusion inescapable “that the verdict of guilt in this case may not be the result of honest fact-finding,” but rather, the result of the combination of errors by the trial court....

Id.

But this Court need not even accept this less-than-overwhelming standard for reversal in the face of overwhelming trial court error. Missouri law could, and respectfully should, adopt a rule that would have far more narrow precedential application as follows: where a trial court’s adoption of a legal standard for its verdict directing instructions is plain error resulting in manifest injustice requiring

reversal and where that same legal error likewise infects the remaining conviction, the probability of injustice is so great that the better course of action is not to risk the conviction of an innocent person, but to correct all of the errors at a new trial.

The errors committed by the trial court in this case were overwhelming – plain error. The trial court refused to accept for purposes of any ruling it made on the evidence or on any disputed legal matters, or to instruct the jury what the State has now conceded – that Deputy Hunt had legal authority to arrest Alberternst. The State’s trial argument¹¹ told the jury the opposite of what the State has now admitted – that Deputy Hunt had legal authority to arrest Alberternst. Instructions 7 & 8 invited the jury to determine as a disputed fact what the State now says is not disputed – that Deputy Hunt had legal authority to arrest Alberternst. And Instruction 5 completely ignored the privilege a law enforcement officer has to strike the subject of an arrest warrant when that force is necessary to make the arrest.

¹¹ The State argued to the jury at trial:

Chris Hunt, there to protect everyone, pulls up on scene in his [it was his official sheriff’s vehicle] pickup truck, breaks through the perimeter, doesn't tell any of these officers what he's doing, none of them know who he is or why he's there? Is that someone making an arrest? Is that someone acting like a police officer? That's not acting like a police officer.

At stake here is the career of a public servant. A law enforcement officer is not immune from criminal prosecution. But a law enforcement officer who faces such charges, particularly charges as curious as these, ought to have his or her fate decided by instructions that accurately reflect the legal authority of the officer. And where, as here, the State concedes on appeal that an issue the instruction left to the jury was not disputed and thus should not have been left to the jury, the law's proper concern for those who enforce the law ought to require instructions that assure that the jury's verdict is based on honest fact finding limited to disputed facts. In these unusual circumstances, where charges were brought only against St. Charles County officers even though officers from other counties admittedly participated in the alleged assault of this meth cook who was the subject of two felony warrants, the Court's concern for justice ought, respectfully, to be heightened.

Again respectfully, an appellate court's finding that plain error so infected the jury's deliberations that manifest injustice occurred cannot be so easily quarantined within the instructional environment as the Eastern District believed. And this is particularly so when the refusal to inform the jury that the certain application of the privileges the law affords to law enforcement officers to arrest felons is not required by the trial court.

By defining assault in Instruction 5 as though this was a bar fight case, that definition washed over onto Instructions 7 & 8. This error is both prejudicial and

cumulative when considered across the breadth of the instructional error in this case.

C. CONCLUSION

For the reasons stated, reversal and remand is required.

VII. THE TRIAL COURT ERRED IN SUBMITTING FIRST DEGREE BURGLARY AGAINST DEPUTY HUNT AND IN FAILING TO SUSTAIN DEPUTY HUNT'S MOTION FOR ACQUITTAL AT THE CLOSE OF THE EVIDENCE BECAUSE A CONVICTION FOR BURGLARY IN THE FIRST DEGREE (§ 596.160, RSMO) CANNOT STAND IF THE ENTRY INTO AN INHABITABLE STRUCTURE BY THE DEFENDANT IS NOT KNOWINGLY UNLAWFUL IN THAT THE STATE FAILED TO ADDUCE EVIDENCE BEYOND A REASONABLE DOUBT THAT DEPUTY HUNT TO ENTERED THE PREMISES WHERE PHILLIP ALBERTERNST WAS FOUND KNOWINGLY UNLAWFULLY TO ARREST PHILLIP ALBERTERNST FOR WHOM TWO FELONY ARREST WARRANTS WERE THEN OUTSTANDING.

A. STANDARD OF REVIEW

In reviewing a sufficiency of the evidence claim, this Court determines whether sufficient evidence permits a reasonable trier of fact to find guilt. *State v. Ecford*, 239 S.W.3d 125, 127 (Mo.App.2007) (quoting *State v. McCoy*, 90 S.W.3d 503, 505 (Mo.App.2002)). We view the evidence and the inferences therefrom in the light most favorable to the verdict, and disregard all evidence

and inferences to the contrary. *Id.* However, this Court cannot provide missing evidence or give the State the benefit of speculative, unreasonable, or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). The State has the burden of proving each and every element of the charged offense beyond a reasonable doubt. *Ecford*, 239 S.W.3d at 127. There cannot be a conviction “ ‘except upon evidence that is sufficient to support a conclusion that every element of the crime has been established beyond a reasonable doubt.’ ” *Woolford v. State*, 58 S.W.3d 87, 89 (Mo.App.2001)

State v. Burton, 320 S.W.3d 170, 174 (Mo. App. E.D. 2010).

B. STATUTORY ARGUMENT

To repeat for the Court’s convenience: Section 569.160 RSMo. (2012), which defines the crime of Burglary in the First Degree, provides:

A person commits the crime of burglary in the first degree if he ***knowingly enters unlawfully*** or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein....

Id. (Emphasis added). By its plain language, the statute requires that a conviction for first degree burglary depends on proof beyond a reasonable doubt that the person charged *actually know* that his entry into a habitable structure is unlawful or actually know that his presence in the dwelling is unlawful.

“Knowingly” requires a guilty mind,¹² that is “a person acts knowingly with respect to his conduct when he is aware of the nature of his conduct,...” *Carter v. State*, 320 S.W.3d 177, 182 (Mo. Ct. App. 2010). *See*, § 569.010, RSMo (defining “enter unlawfully or remain unlawfully” as occurring only when a person “is not licensed or privileged to do so”).

Thus, in this case, Deputy Hunt cannot be convicted of burglary in the first degree unless the evidence shows beyond a reasonable doubt that Deputy Hunt believed he had no legal authority to enter the trailer to arrest Alberternst. The evidence at trial must be viewed now in light of the State’s concession that Hunt had authority to arrest Alberternst.

It has already been shown that two arrest warrants were outstanding for Alberternst, one from Warren County for endangering the welfare of a child, the other from Lincoln County related to the manufacture of methamphetamine. Tr.278-79.

The State has conceded that Deputy Hunt had authority to arrest Alberternst in Montgomery County.

No evidence exists that anyone told Deputy Hunt not to join the other members of the St. Charles County Regional Drug Task Force in attending the scene of Alberternst’s hiding or of participating in the arrest of Alberternst.

Nor is there any basis for a legal conclusion that Ruth Ann Blake had

¹² See Footnote 1, *supra*, discussing the necessity of a *mens rea*.

authority to rescind Hunt's duties as a member of an MEG by suggesting that he not be allowed to participate in the arrest of a wanted felon. Rather, the undisputed evidence was that Hunt never knew that Blake did not want him to attend the arrest of Alberternst.

- Warren County Detective Chad Fitzgerald (who was not part of an MEG but who assisted in the arrest out of his county anyway and was not charged with any crime) believed Hunt was not available on February 5 so he did not tell Hunt to stay away. Tr.243. Fitzgerald testified that he told Dull to tell Hunt to stay away. *Id.* Officer Dull did not tell Hunt to stay away from the arrest. Tr.496.
- Further, on February 3, Fitzgerald had contacted Hunt, Tr.514, because Hunt knew Alberternst and Hunt was using Alberternst as an informant. Tr.393. Further, Hunt was a member of a multijurisdictional enforcement group investigating drug law violations, Tr.472, and because of that, could go into other counties to make arrests. Fitzgerald was not part of an MEG.
- That phone call from Fitzgerald to Hunt, and the one Fitzgerald initiated on February 4 to Hunt, started the process that led to Ruth Ann Blake's becoming the informant who would lead the multijurisdictional enforcement group to Alberternst's dwelling/hiding place. Tr.181.
- Ruth Ann Blake called Officer Dull and told him to contact Cindy

Burke to get the trailer location. Tr.476. Burke gave the location of the trailer and the fact that Alberternst was there "taking a bath." Tr.476.

- Ruth Ann Blake's car was outside the trailer. Chad Fitzgerald identified the car because he had placed a tracking device on it earlier, Tr.244, and wanted to make sure to retrieve it when he was in the trailer area during the arrest. Tr.272.

Id.

As Detective Luechtefeld testified for the State, if the officers saw Alberternst inside they would have authority to enter the residence by force.

Q. And why were you hoping to see him inside?

A. That way we would enter the residence if he didn't come to the door and we could arrest him for his active warrant.

Q. So if you would have seen him inside the residence you would of gone in, you would of forced open the door and gone in after him?

A. Yes, sir.

Tr.160. Detective Luechtefeld of the East Central Drug Task Force, an MEG, believed he had the authority to arrest Alberternst in Montgomery County if he had saw Alberternst in the trailer. As will be shown, such an objective evidence is not required. Deputy Hunt could reasonably believe, based on what he knew and had been told, that he had similar authority.

For purposes of Fourth Amendment analysis, all that is required to permit

lawful entry is a reasonable belief in Hunt and the other officers that Alberternst was in the trailer.

“We recognize the ‘officers’ belief need not prove true in fact[;] it is sufficient if the belief was objectively reasonable at the time of entry.” *Valdez*, 172 F.3d at 1225. The reasonable belief can arise from “an informant’s personal knowledge concerning [the suspect’s] residence.

United States v. Gay, 240 F.3d 1222, 1227 (10th Cir. 2001).

The officer need not actually see the suspect to have a reasonable belief that he is in the residence.

The officers are not required to actually view the suspect on the premises. *Id.* “Indeed the officers may take into account the fact that a person involved in criminal activity may be attempting to conceal his whereabouts.”

Id., quoting *Valdez*, 172 F.3d at 1226. Of course, this is exactly what Ruth Ann Blake testified. Immediately when she informed Alberternst that there were “cops” there, he ran to hide in the bathroom. Tr.213. She testified that she had no intention of opening the door. Tr.197.

Section 544.200, RSMo provides as follows:

To make an arrest in criminal actions, the officer may break open any outer or inner door or window of a dwelling house or other building, or any other enclosure, if, after notice of his office and

purpose, he¹³ be refused admittance.

Id. Section 544.200 simply refers to a dwelling house. It does not limit its grant of authority to officers to use force to enter only the dwelling of the person named in an arrest warrant.

Further, no judicial authority exists for the proposition that forcible entry into a dwelling to arrest a person for whom judicial officers have issued a felony arrest warrant is an unlawful entry. In response to the defendant's motion for directed verdict and motion for new trial, as well as to the earlier filed motion to dismiss as a matter of law, the State provided not a single case to contest these motions to the trial judge. LF50. At the trial, in response to the motion for directed verdict, the state cited only *State v. Mullin*, 501 S.W.2d 530 (Mo. App. 1973) for the proposition that lack of consent to enter a premises can be proved by circumstantial evidence. Tr.639. Though it seemed persuasive to the trial court, that case simply does not address the issue of a police officer's lawful authority to enter a dwelling to arrest a person under authority of an arrest warrant.

Section 544.200 is the only law that informs a Missouri law enforcement officer of his/her authority to arrest a person in a dwelling house. The statute's plain language does not require that there absolute proof that the subject of an arrest warrant is in the dwelling. The authority given by the statute is more broad than that. To require an actual sighting before the statutory privilege attaches is to

¹³ See Footnote 7, *supra*.

rewrite the statute – a task properly left to the legislature, not a court. And that rewriting would effectively handcuff the police in making arrests when all of the signs reasonably point in one direction, but there is no absolute proof that the signs are right.

The § 544.200 question is: Do all the facts known to the law enforcement officer add up to a subjectively reasonable inference that the subject of the warrant is in the trailer? And it is not just Hunt's knowledge that is at issue here. The State simply ignores the fact that Hunt was accompanied by Rowe and Dull (and the uncharged Montgomery County Deputy Mayes), both of whom had been in on the plans to arrest Alberternst all that night, who had called Hunt, who had found the trailer with the others, who knew Blake's car was there, and who knew that Blake had informed officers that Alberternst was asleep in trailer.

Civil damage actions and suppression of arrests and evidence are the proper remedies when an arrest/search violates the Fourth Amendment. A criminal case against the police officer is not a remedy that the privilege to enter to arrest contemplates. That is the reason the statute protects an officer in making an arrest pursuant to an arrest warrant. Indeed, the statute is designed to protect law enforcement officers from just the sort of prosecutorial mischief afoot in this case.

No evidence existed that Deputy Hunt *knowingly* entered the Alberternst trailer unlawfully. The only evidence supports the conclusion that he was called to the trailer to assist in an arrest, that he had full legal authority to be at the trailer to do so and that he entered the trailer possessed of the authority granted him by §

544.200. The reasonable facts and inferences here show that Hunt had the authority under the statute to enter to make the arrest. It follows, then that the facts do not support any conclusion beyond a reasonable doubt that he knowingly entered the trailer unlawfully.

Given the State's concession, the evidence considered in the light most favorable to the verdict fails to make a submissible case of burglary.

C. CONCLUSION

Outright reversal is required on the conviction for first-degree burglary.

VIII. THE TRIAL COURT ERRED IN SUBMITTING FIRST DEGREE BURGLARY AGAINST DEPUTY HUNT TO THE JURY AND IN FAILING TO SUSTAIN DEPUTY CHRISTOPHER HUNT'S MOTION FOR ACQUITTAL AT THE CLOSE OF THE EVIDENCE BECAUSE A CONVICTION FOR BURGLARY IN THE FIRST DEGREE (§ 596.160, RSMO) CAN STAND ONLY IF THERE IS EVIDENCE BEYOND A REASONABLE DOUBT OF DEPUTY HUNT'S PURPOSE AND INTENT TO COMMIT A CRIME IN THAT THE STATE FAILED TO ADDUCE EVIDENCE BEYOND A REASONABLE DOUBT THAT DEPUTY HUNT INTENDED TO ASSAULT PHILLIP ALBERTERNST WHEN DEPUTY HUNT ENTERED THE TRAILER LAWFULLY.

A. STANDARD OF REVIEW

The applicable standard of review is set out in Point VII.

B. STATUTORY ARGUMENT

Section 569.160 provides in pertinent part:

A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure *for the purpose of committing a crime* therein....

Id. (Emphasis added). By its plain language, the statute requires that the entry by Deputy Hunt, in addition to being knowingly unlawful, must have been “for the purpose of” committing an assault on Phillip Alberternst. When one acts “for the purpose of” one intends the results of an act when one undertakes the act. See, BLACK'S LAW DICTIONARY 588 (5th Ed.)(defining “for the purpose of” as “with the intention of”). If the conviction *sub judice* is to stand, there must be proof beyond a reasonable doubt that Deputy Hunt’s entering the trailer was to assault Alberternst.

C. THE EVIDENCE OF HUNT’S PURPOSE

There was no evidence -- none -- that Chris Hunt ever threatened to assault or harm Phillip Alberternst. There was no evidence -- none -- that any one had ever heard him say that if he had the chance to get to Alberternst, he would strike him or use physical force against Alberternst. At most, Alberternst testified that Hunt had backhanded him during a prior arrest. Tr.368. The State elicited no details about that arrest, nor was there any showing that Hunt was acting outside his authority when he then arrested Alberternst.

In its closing argument, the State summarized the evidence supporting the “for the purpose of” element of first degree burglary as follows:

And what the offense of burglary is is simple. It's going in to a residence when there's someone else inside, you go in with the purpose to commit a crime. That's what happened here. We know

Chris Hunt entered unlawfully. Where it says unlawfully we know that because he kicked in the door and we know what his purpose was. His purpose was assault. We know it because [1] he drove so far. [2] We know it because everyone else agreed he shouldn't be there. [3] We know it because Ruth Ann Blake said he shouldn't be there because she was afraid he would assault Phil, and [4] we know it by his actions by what he did when he came inside by how he beat a naked, helpless man on the floor.

Tr.701-02. These arguments, by which the State attempted to summarize the evidences and the inferences, cannot withstand careful submissibility scrutiny.

1. “He drove so far.”

The claim that Hunt's driving from his home in St. Charles County to Montgomery County is evidence of his purpose to assault Alberternst is not direct evidence of Hunt's *mens rea*, that is, his purpose in making the drive. Officers were there from a number of counties, all of whom drove so far. At most it is circumstantial evidence.

Direct evidence is said to be ‘evidence which if believed proves the existence of the fact in issue without inference or presumption; while circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist.’

State v. Regazzi, 379 S.W.2d 575, 578 (Mo. 1964), quoting *State v. Cox*, 352 S.W.2d 665, 670 (Mo. 1961).

For circumstantial evidence to support a criminal conviction, it must preclude all other *equally* reasonable hypotheses of innocence.

[I]f the [circumstantial] evidence does not preclude a reasonable hypothesis of innocence, it is not sufficient to support a conviction.

State v. Hodges, 575 S.W.2d 769, 772 (Mo.App.1978). It has long been the law in this state that ““(m)ere suspicion, however strong, will not supply the place of evidence when life or liberty is at stake.”” *State v. Bunton*, 453 S.W.2d 949, 953 (Mo.1970), citing *State v. Jones*, 106 Mo. 302, 17 S.W. 366 (1891).

State v. Biddle, 599 S.W.2d 182, 192 (Mo. 1980). Moreover, “[t]he intent element, however, is generally not susceptible of proof by direct evidence; and may be shown by circumstantial evidence.” *State v. Dublo*, 243 S.W.3d 407, 409 (Mo. Ct. App. 2007). Thus, circumstantial evidence claiming to show that Hunt had the intent to assault Alberternst when he left his home in St. Charles County after being invited to the arrest scene by his fellow officers must be such that it also rules out all other possible motives.

The undisputed evidence here is:

(1) Chad Fitzgerald consulted with Deputy Hunt about the operation to nab Alberternst beginning on February 3, 2009. Tr.288.

(2) Hunt indicated he could not participate because of his wife's illness on February 4, 2009. Tr.243; 514.

(3) Officer Dull took Hunt's place in the nab-Alberternst operation on Hunt's recommendation. Tr.514.

(4) Rowe and Wilson kept Hunt apprised of events on February 5.

(5) No one told Hunt not to come to the arrest scene.

(6) The only two persons who were aware of Ruth Ann Blake's request, Tr.181, did not tell Hunt to stay away.

(a) Dull, with whom Blake dealt directly, testified that he did not tell Hunt not to come. Tr.489.

(b) Fitzgerald, who gave Blake the pseudoephedrine, believed that Hunt would not be available and never told him to stay away. Tr.243.

Thus, based on the undisputed evidence, an *equally* plausible, reasonable inference arises from the fact that Hunt "drove so far." It is that Hunt was a conscientious police officer who took his anti-drug law enforcement duties seriously. He was on call as part of his unit, the MEG to which he was assigned. Hunt knew that he was the person most familiar with Alberternst. Hunt believed he could assist in the arrest, as did the officers who called him. And, because Alberternst was his informant, Hunt remained interested in making sure that Alberternst was arrested.

This inference is equally supported by the evidence. And because it is *equally* plausible, the fact that Hunt “drove so far” is not probative of whether Hunt did so for the purpose of assaulting Alberternst.

The State will likely argue as it did at the Court of Appeals that the circumstantial evidence rule’s apparent abrogation in *State v. Grim*, 854 S.W.2d 403 (Mo. 1993) and the standard of review make it unnecessary for the Court to consider Hunt’s argument that there are *equally* plausible explanations for his long drive to Alberternst’s trailer beyond the State’s argument that he went there to assault Alberternst irrelevant.

The State misunderstands Hunt’s argument. Hunt agrees that “the standard to be applied is the due process standard set forth in *State v. Grim* and *Jackson v. Virginia*.” *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. 1998).

The circumstantial evidence rule properly stated holds no more than what what due process requires: one cannot be guilty beyond a reasonable doubt if there are two *equally* believable inferences – one supporting guilt and the other innocence – that can be drawn from the circumstantial evidence. Due process requires that one be more credible than the other if the criminal burden of proof is applied. *State v. Grim*, 854 S.W.2d 403, 414 (Mo. 1993) merely rejects a formulation of the circumstantial evidence rule that allows *conjecture* to trump inferences to defeat a jury’s fact finding. All *Grim* does is deny conjecture/ possibility/ speculation/ mere supposition the weight of an inference, an error that some courts had made in applying the circumstantial evidence rule.

“ “An “*inference*” is a conclusion drawn by reason from *facts* established by *proof*; “a deduction or conclusion from facts or propositions known to be true.” ... A *supposition* is a *conjecture* based on the *possibility* that a thing could have happened. It is an idea or a notion *founded on the probability that a thing may have occurred, but without proof that it did occur.*” ”*Draper v. Louisville & N.R. Co.*, 348 Mo. 886, 156 S.W.2d 626, 630 (1941)(citation omitted).

State v. McMullin, 136 S.W.3d 566, 573 (Mo.App. 2004).

Here, the choice is between two equally plausible inferences, not between an inference versus a probability. And where that is the case, a beyond-a-reasonable-doubt standard cannot be squared with due process if each of two competing – one supporting guilt and the other innocence – theories is *equally* plausible from the evidence and this or any court permits a conviction to stand.

2. “everyone else agreed he shouldn't be there.”

The State’s argument that “everyone else agreed he should not be there” is not only false but irrelevant. It is false because Rowe and Wilson asked Hunt to come. Tr.498, 515. It is irrelevant because even if everyone agreed he would not be there, no one told Hunt about that agreement. This is not evidence at all, but argument unrelated to the evidence. It cannot form the basis of a criminal conviction.

3. “Ruth Ann Blake said he shouldn’t be there because she was afraid he would assault Phil”

The issue for burglary in the first degree is proof beyond a reasonable doubt that Deputy Hunt intended to assault Alberternst when he entered the trailer. Intent is a state of mind. That state of mind can be shown in any number of ways, but all of them must be probative of Hunt’s state of mind, not Ruth Ann Blake’s state of mind. That she had generalized, non-specific fears is not enough. The assault, if it occurred, was of Alberternst, not Blake. Thus, there must be something that makes her fears for Alberternst more than localized paranoia¹⁴. To prove Hunt’s state of mind, there must be proof that Hunt had said something or done something that revealed his state of mind toward Alberternst. Blake offered no such evidence.

The entirety of her testimony on this issue follows:

Q. At some point in time did you talk to police officers about his active warrants?

A. Yes.

Q. Why'd you do that?

A. Somebody came to me and told me that, uhm, there was a threat of shoot

¹⁴ Psychological effects observed with methamphetamine use include ... paranoia, ... anxiety, ... and psychosis. T. Lineberry, *Methamphetamine Abuse: A Perfect Storm of Complications* 81 MAYO CLIN PROC. 77-84 (2006).

to kill on him.

Tr.179. It is necessary to interrupt the testimony here to make a point. The threat here to “shoot to kill” is not specified as to a shooter. Blake never says that Hunt had threatened to shoot or otherwise harm Alberternst. Such an order, if it existed, would have been broadly disseminated among law enforcement officers. If Blake actually believed this, she would have been afraid that *any* officer who saw Alberternst would execute that shoot to kill order. Further, there is no evidence that anyone ever told Blake that Chris Hunt had threatened to shoot to kill Alberternst.

The testimony continues:

Q. And who are you afraid was going to hurt Phil Alberternst?

A. Chris Hunt.

Tr.179. Again, there is no evidentiary or even hearsay basis for this fear. Blake may fear, but that fear must arise from some event or statement attributed to Hunt for it to be probative of Hunt’s mental state.

The testimony continues:

Q. And so what did you do about your fear for Phil's safety?

A. I contacted a friend of mine who contacted some officers in O'Fallon to set up -- we set up an arrangement to meet to set up for me leading them to take them to Phil so that he wouldn't get hurt.

Q. And so if you could just describe for us what was the purpose for you in leading police officers to Phil Alberternst?

A. I was afraid of the safety.

Q. And so did you feel that if police officers other than Chris Hunt were to find him that he would be more safe?

A. Yes.

Tr.180. Again, the State fails to solicit any evidence that Blake had any basis for her fears. She simply “feels” that Alberternst might be more safe if officers other than Hunt make the arrest. And again, her own feelings/paranoia are simply not evidence of Hunt’s state of mind. Moreover, Ruth Ann Blake’s request, even if conveyed to Hunt, which it was not, had no legal authority to de-authorize Hunt’s authority to act as part of an MEG.

4. “we know it by his actions, by what he did when he came inside, by how he beat a naked, helpless man on the floor.”

For purposes of Burglary in the First Degree, the evidence must show beyond a reasonable doubt that Hunt had the intent to assault Alberternst when he entered the trailer (or remained there). That is, the intent to assault must have been formulated by Christopher Hunt before he went in. Assault must have been the purpose for which he went into or stayed in the trailer.

Appellant may concede, for purposes of this point only and only for the sake of argument here, that the jury found sufficient evidence to convict Deputy Hunt of assault in the third degree. As the Court knows, that conviction does not require proof that Hunt intended to assault Alberternst before he entered the trailer. Nor does it require proof that Hunt went into the trailer for the purpose of

assaulting Alberternst. Rather, Instruction 7 merely required the jury to find that “defendant attempted to cause physical injury to Phillip Alberternst by striking him....” Instruction 7, LF 102.

“The assault crimes are graded ... primarily according to the mental state of the actor.” § 565.050 RSMo, (First Degree Assault)(Comment). Thus, under the Assault, third degree, instruction, there was no need for the jury to find any pre-existing mental state.

The assault the jury found could have occurred with no more than the provocation of the moment once Hunt was already in the trailer and Alberternst would not leave the bathroom.

Moreover, all of this evidence shows that there was some delay between Hunt’s entry and any physical altercation involving Hunt and Alberternst that occurred following.

Blake testified that Alberternst ran into the bathroom. Tr.122.

Deputy Mayes, who entered the trailer when he believed exigent circumstances existed because of the screaming and yelling, Tr.324, heard Hunt give "the standard commands." Tr.325. Doerr heard officers shouting: "Show me your arms" and "stop resisting." Tr.310, 312. Chad Fitzgerald had also followed the officers into the trailer. Tr.268. Fitzgerald never saw Hunt strike Alberternst. Tr.278

Mayes testified on direct for the State that:

Phil was trying to close the door. Uh, he was obviously naked. He was trying to close the door, get away from the situation and Chris Hunt was able to get his hand on him and take him to the ground.

Tr.325. Detective Doerr, who also responded to the inside of the trailer following the noise, Tr.308, saw Alberternst put his arms out of the bathroom in what Doerr believed was a surrender position. Tr.317. Mayes testified, however, that "It appears he was resisting at the time and kicking and it was a very tight area." Tr.325. When asked, "Do you remember describing Phillip Alberternst's actions the night of February 5th, 2009, as being pretty violent?" Mayes answered, "Yeah, it did seem to be very violent at the time." Tr.357.

These facts give rise to the conclusion that Hunt's first acts were not to assault but to demand compliance so that the arrest could occur. If an assault occurred, an issue that Appellant vigorously contests, there is no evidence that its impetus (and therefore the mental state that the burglary in the first degree statute requires) arose as Hunt's reason for being in the trailer.

D. CONCLUSION

For the reasons stated, the trial court erred in submitting Burglary in the First Degree to the jury and in failing to sustain Deputy Hunt's motion for acquittal at the close of the evidence.

IX. THE TRIAL COURT ERRED IN OVERRULING DEPUTY HUNT'S MOTION FOR ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE AND IN SUBMITTING THE CHARGE OF PROPERTY DAMAGE IN THE SECOND DEGREE AS STATED IN INSTRUCTION NO. 6 TO THE JURY BECAUSE DEPUTY HUNT HELD LEGAL AUTHORITY TO USE FORCE TO ENTER ALBERTERNST'S DWELLING IN THAT § 544.200 AUTHORIZED DEPUTY HUNT TO "BREAK OPEN ANY OUTER OR INNER DOOR" TO ARREST PHILLIP ALBERTERNST, FOR WHOM JUDICIAL OFFICERS HAD ISSUED TWO FELONY ARREST WARRANTS.

A. STANDARD OF REVIEW

The applicable standard of review is set out in Point VII.

B. STATUTORY LEGAL AUTHORITY

Section 544.200, RSMo, provides as follows:

To make an arrest in criminal actions, the officer may break open any outer or inner door or window of a dwelling house or other building, or any other enclosure, if, after notice of his office and purpose, he¹⁵ be refused admittance.

¹⁵ See Footnote 7, *supra*.

Id.

The statute permits forcible entry on the condition that the occupant first be permitted to allow peaceable entry. It is not disputed that officers Luechtefeld and Fitzgerald knocked on the trailer door. Tr.136, 258. Ruth Ann Blake heard them announce they were police officers. Tr.197. They received no answer. *Id.* Again, Blake testified that she had no intention of answering the door when police knocked. Tr.197. To be "refused admittance" is not to be permitted to enter.¹⁶

All of the statutory conditions for a forceful entry were met. Indeed, the State concedes that “[t]here is really no question that Mr. Hunt could use force and break down the door pursuant to the provisions of § 544.200—so long as it was lawful for him to enter at all.” Ct.App.Resp.Br.59.

Points VII and VIII show that it was legal for Deputy Hunt to enter the trailer. Those arguments are not repeated here, but incorporated for the purpose of letting the State’s concession about Deputy Hunt’s authority to break the door make Hunt’s point: The State failed to make a submissible case in the property damage charge.

C. CONCLUSION

Deputy Hunt damaged the trailer to gain entry to make the arrest under the authority granted him by Section 544.200. The trial court erred in submitting

¹⁶ See Footnote 3, *supra*.

Property Damage in the Second Degree. It also erred in failing to sustain the motion for acquittal at the close of the evidence. Reversal of the conviction for Property Damages in the Second Degree is required.

X. THE TRIAL COURT PREJUDICIALLY ERRED IN SUSTAINING THE STATE’S OBJECTION TO THE TESTIMONY OF EXPERT BRIAN CLAY BECAUSE A CRITICAL ELEMENT OF THE VERDICT DIRECTING INSTRUCTION FOR ASSAULT IN THE THIRD DEGREE REQUIRED THE JURY TO DETERMINE WHETHER DEPUTY HUNT SOUGHT TO INJURE ALBERTERNST IN THAT CLAY WAS PREPARED TO TESTIFY THAT DEPUTY HUNT STRUCK ALBERTERNST ONLY IN THE PLACES LAW ENFORCEMENT OFFICERS ARE TRAINED TO STRIKE RESISTING ARRESTEES AND CLAY’S TESTIMONY WOULD HAVE SHOWN THAT DEPUTY HUNT ONLY STRUCK ALBERTERNST IN A PATTERN CONSISTENT WITH SUBDUING AN ARRESTEE AND THUS USED ONLY THE FORCE THAT DEPUTY HUNT BELIEVED WAS NECESSARY TO MAKE THE ARREST

A. STANDARD OF REVIEW

The trial court is vested with broad discretion to admit or exclude expert testimony. *State v. Davis*, 814 S.W.2d 593, 603 (Mo. banc 1991). Review is for abuse of discretion. *State v. Storey*, 40 S.W.3d 898, 910 (Mo. banc 2001). The trial court abuses its discretion when its ruling is “clearly against the logic of the

circumstances then before the court, and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.” *State v. Irby*, 254 S.W.3d 181 (Mo.App. E.D.2008). Reversal is required if prejudice exists such that the defendant is deprived of a fair trial. *Storey*, 40 S.W.3d at 903. Trial court error is prejudicial when there is a reasonable probability that the trial court's error affected the outcome of the trial. *State v. Johnson*, 207 S.W.3d 24, 34 (Mo. banc 2006).

B. THE STRIKING TECHNIQUES MATTER

One of the issues critical to the assault submission was whether Deputy Hunt “attempted to cause physical injury to Phillip Alberternst by striking him.” Instruction 7, LF102. Another critical issue following the State’s concession that Hunt was acting with authority to arrest Alberternst was whether Hunt used more force than he (Hunt) believed was necessary to effect the arrest of Alberternst.

Those issues required the jury to determine the purpose of Hunt’s striking. It was thus highly relevant and material whether the strikes Hunt delivered were consistent with control strikes that he was trained to deliver or were not. If the former, the strikes were intended to subdue, not cause physical injury; if the latter, then the jury could reasonably conclude that Hunt had a different purpose.

The placement of the strikes thus matters in a substantial way. The witness most focused on Hunt’s actions testified that Hunt struck Alberternst in the back of the head, the upper arm and the shoulder. Tr.326.

Brian Clay testified that those were the places officers were trained to strike passively resisting arrestees. *See generally*, Tr.648, 654-55. Specifically, Clay testified:

As far as striking is concerned starting from the head and working down the first area would be the super scapular area. This is the area that's up here in the shoulders near the base of the neck. We do teach that as a striking point. On the back of the triceps, there's a large bundle of nerves back there that we teach to apply pressure to.

Tr.654-55. These, of course, are the places Officer Mayes and Officer Schoenfeld testified Hunt struck Alberternst.

Deputy Hunt also wanted the trial court to permit Brian Clay to testify as an expert as to where the blows actually landed, defense counsel argued:

he is going to review the photos and see if those photos and the injuries depicted in them are consistent with his training. I think he is allowed to do that and I think that evidence needs to go to the jury to show that it was consistent with the training that the officers received.

Tr.641.

The State objected. The trial court sustained the objection. That seemed to be the way things went in this case.

“An expert may testify as to his/her opinion on an ultimate issue in a criminal case: “ [O]pinions of experts are often admissible upon vital issues

which only the trier of fact may decide,'...." *State v. Williams*, 858 S.W.2d 796, 798 (Mo. App. E.D. 1993)(citation omitted).

The law permits both sides to present their theory of the case. Here, over objection, the trial court permitted the State to put on as rebuttal the testimony of Trooper Hitchcock. Hitchcock offered all manner of improper opinions on the law and on Hunt's conduct. See Point XI. These opinions were devastating. They allowed the jury to take as holy writ the incorrect legal conclusions of a non-lawyer on critical issues in the case – specifically the legality of Hunt's entry into the Alberternst dwelling.

When Deputy Hunt wanted an expert, who was otherwise properly qualified, to testify as to the placement of the strikes to Alberternst by reviewing photographs of his bruises, the trial court did not permit that testimony. Again, that testimony was critical to the issue in Instruction 7 – whether Hunt used more force than he reasonably believed was necessary to arrest Alberternst so that he could attempted to injure him. If the strikes were where Clay had taught Hunt to make them, and not in other places, then they supported Hunt's theory of the case – that he only struck Alberternst in the way and in the places that a police officer is authorized under police procedures to strike a resisting arrestee. Clay was not permitted to confirm the placement of the strikes.

This was error. It was prejudicial because it went to a critical element of Instruction 7. There is a reasonable probability that the trial court's failure to

permit Clay to testify influenced the outcome of the trial. This is definitional reversible error.

C. CONCLUSION

The conviction for assault in the third degree should be reversed.

XI. THE TRIAL COURT ERRED AND PLAINLY ERRED¹⁷ IN ALLOWING SERGEANT TRAVIS HITCHCOCK TO OFFER OPINION TESTIMONY ON AN ISSUE OF LAW, TO WIT, THAT IT WAS UNLAWFUL FOR DEPUTY HUNT TO ENTER PHILLIP ALBERTERNST'S RESIDENCE, BECAUSE SERGEANT HITCHCOCK WAS NOT QUALIFIED TO GIVE SUCH AN OPINION IN THAT SUCH TESTIMONY IS NOT ADMISSIBLE BECAUSE IT ENCROACHES ON ISSUES RESERVED FOR THE TRIAL COURT AND PREJUDICIALLY MISLED THE JURY ON A CRITICAL ISSUE OF LAW IN THIS CASE.

A. STANDARD OF REVIEW

“Whether the Fourth Amendment has been violated is a legal question which this court reviews *de novo*.” *State v. Mendoza*, 75 S.W.3d 842, 845 (Mo. App. S.D. 2002). As to the remainder of the issues here, the applicable standard of review is set out in Point X.

B. IT WAS ERROR TO ALLOW HITCHCOCK’S TESTIMONY

1. The "Unlawful Entry" Testimony

¹⁷ There was a contemporaneous objection at trial. The issue was not presented in the renewed motion for acquittal or in the motion for new trial.

Sergeant Travis Hitchcock was the tactical coordinator for the East Central Drug Task Force. He was not on the scene at the time of the arrest. He only came to the scene after the fact to debrief his men and determine whether they should seize evidence against Alberternst. He offered his opinion based on a telephone call to him from Detective Luechtefeld who sought Hitchcock's advice on the issue of whether to seize evidence for use against Alberternst. Hitchcock testified that he told the other officers not to seize the evidence "[b]ecause an unlawful entry then deems any evidence found in that residence, you can't, I mean it's -- you can't charge it. It's illegal to do that, basically, so I told my guys not to seize anything, to leave." Tr.668. (Emphasis added).

Sergeant Hitchcock's statement was a clear and definite legal conclusion that he was not qualified to give and which misled the jury on a critical element of the State's case. Sergeant Hitchcock did not testify based on teaching given at the Highway Patrol Academy or based on Highway Patrol procedures. Instead he stated an unqualified and uninformed opinion in the form of a conclusion of law; it was an "unlawful entry." An expert – if Hitchcock was one – may not "express an opinion as to whether the defendant is guilty of the charges." *State v. Williams*, 858 S.W.2d 796, 798 (Mo. App. E.D. 1993)(citation omitted). That is exactly what Hitchcock did – he declared Hunt guilty by declaring that his entry was unlawful.

Whether arresting officers can seize evidence without a search warrant, even if they have an arrest warrant, is a different -- and difficult -- question. It is

so technical that the legal opinion of a member of the highway patrol, at best partially informed, could easily (and did) confuse whether the entry was unlawful for purposes of gathering evidence with a conclusion that the entry was unlawful pursuant to a valid felony arrest warrant. The legal imprecision of the testimony -- which should never have been permitted in the first instance -- was prejudicial to Deputy Hunt because the jury cannot be expected to draw the fine lines that Hitchcock (and the trial court) appeared not to understand. For the jury, "illegal" is "illegal." The fine lines drawn in the cases exonerate Hunt. Hitchcock's testimony ran rough shod over those critical lines.

In *State v. Ballard*, 394 S.W.2d 336, 340 (Mo. 1965), the Missouri Supreme Court unequivocally held:

One of the cornerstones of our system of jurisprudence is the principle that questions of facts are to be determined by a jury and that matters of law are to be determined and declared by the court. Consequently, a witness may not be allowed to state his opinion of existing law.

Id. See also, *S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003)(expert not permitted to testify about meaning of federal regulations because “expert testimony on legal matters is not admissible...Matters of law are for the trial judge, and it is the judge’s job to instruct the jury on them.”); *Good Shepherd Manor Found., Inc. v. City of*

Momence, 323 F.3d 557, 564 (7th Cir. 2003)(law professor precluded from offering legal conclusions as to party's liability).

Whether the entry of the officers into the trailer to arrest Phillip Alberternst was unlawful was a determination for the judge. It was fundamentally impermissible for a witness to appropriate this determination to himself.

Moreover, Sergeant Hitchcock is not a lawyer and no foundation whatsoever was laid for him to offer such a legal opinion by his knowledge, skill, training, or education. As *Mendoza* makes clear: "Whether the Fourth Amendment has been violated is a legal question ..." 75 S.W.3d at 845. Sergeant Hitchcock's statement can be considered as nothing more than an improperly permitted, personal and subjective reaction/opinion to hearsay facts stated to him after an occurrence about which he had no personal knowledge and for which he had laid no foundation for the offering of expert legal opinion (which he could not under any circumstances anyway). As such it was highly prejudicial to Deputy Hunt.

Earlier in Sergeant Hitchcock's testimony, an objection was made to this specific line of questioning.

Q. And does that training include the – I guess let me phrase it this way. What is the concern in entering a residence? What constitutional concerns are in play?

A. The Fourth Amendment protects a residence from unlawful

MR. MCCULLOCH: Judge, I'm going to argue that she's asking him for a legal conclusion, within the jurisdiction of the Court.

MRS. VOLKERT: Your Honor –

THE COURT: Well, we're getting close. Overruled for now. Go ahead.

Once the objection was overruled, the state drove home its point.

And the point was important to the state's case. In closing argument the state argued Hitchcock's point as though it was definitive. "But it was an unlawful entry and you heard Sergeant Hitchcock tell you when someone breaks into a home unlawfully they can't seize the evidence." Tr.724.

Both the trial court and the prosecutor were well aware of defendant's objection. Hitchcock's legal conclusion was wrong on the issue of the legality of the arrest and entry. See *United States v. Gay*, 240 F.3d 1222, 1227 (10th Cir. 2001)(permitting entry to arrest when arrestee had common authority over dwelling). It was also a legal conclusion that the jury took as gospel when it was asked to decide whether Hunt "knowingly entered unlawfully."

2. The "Desperately Wrong" Testimony

At trial Sergeant Hitchcock also testified that he received a call from Detective Luechtefeld and, over objection¹⁸ testified that "there was something desperately wrong" about the events at the trailer.

The transcript reads:

¹⁸ Again, the objection was timely. The issue was not raised in post trial motions.

Q. After you – I guess going back to the phone call that you received from Officer Luechtefeld did he tell you anything else besides the, uh, the entry into the home.

A. Uh

MR MCCULLOCH: Judge, again I'm going to object that that calls for hearsay evidence. Officer Luechtefeld has been here to testify about his observations.

THE COURT: Well, overruled. Go ahead. You can answer.

THE WITNESS: The details, which I don't recall exactly what he said to me. Obviously the report will reflect that and his testimony, but I knew that ***there was something desperately wrong*** and I – I drove to the scene to debrief the team and ascertain what had happened.

Tr.662. (Emphasis added). Sergeant Hitchcock's testimony was obviously hearsay, based solely on information told to him by Officer Luechtefeld over the phone, details of which he didn't recall exactly, resulting in the inflammatory restatement of fact and opinion -- that "there was something desperately wrong."

The inadmissibility of hearsay statements, and in this case exaggerated restatements and unwarranted opinions based on hearsay, is a bedrock principle of evidence. Hearsay is the out-of-court statement of another offered in evidence to prove the truth of the matter asserted. *Viacom Outdoor, Inc v. Taouil*, 254 S.W.3d 234, 237 (Mo.App.E.D. 2008); *Nettie's Flower Garden, Inc. v. SIS Inc.*, 869 S.W.2d 226, 229 (Mo.App.E.D. 1993).

This evidence was offered to establish the truth of the matter asserted, that something was "desperately wrong" concerning the actions of the law enforcement officers at the scene, including Christopher Hunt. It was prejudicial to Christopher Hunt in that a Missouri Highway Patrol Sergeant stated as a matter of law that the entering officers, including Christopher Hunt, did something "desperately wrong," a legal conclusion based on facts that Sergeant Hitchcock did not know of his own knowledge, but might only have been deduced by him matters that he didn't "recall exactly" that were told to him by Detective Luechtefeld. Detective Luechtefeld was at trial and testified. He was available to the prosecutor to answer any question. It was improper to try to exaggerate his knowledge by hearsay questions to Sergeant Hitchcock.

This evidence goes directly to the elements of Burglary and Assault. The objection was specific, timely and on point. The error of admission of this hearsay evidence is clear, obvious and prejudicial. It requires reversal.

C. CONCLUSION

The trial court erred and plainly erred in permitting Sergeant Hitchcock to testify concerning legal conclusions and legal opinions. The prejudice is obvious to Deputy Hunt. The testimony permitted manifest injustice and a miscarriage of justice resulted from it.

CONCLUSION

For the reasons argue, this Court should reverse outright the convictions for Burglary and Property Damages. Alternatively, those convictions should be reversed and remanded for trial with proper instructions that account for Deputy Hunt's legal authority to enter and arrest Alberternst. As to the assault charge, the convictions should be reversed and remanded for a new trial.

Dated: June 9, 2014

Respectfully submitted,

/s/ Edward D. Robertson, Jr.

Edward D. Robertson, Jr. #27183

Mary Winter

Anthony L. DeWitt

**BARTIMUS, FRICKLETON,
ROBERTSON & GOZA, P.C.**

715 Swifts Highway

Jefferson City, MO. 65109

573-659-4454

573-659-4450 (fax)

chiprob@earthlink.net

Ronnie L. White #31147

**Holloran, White, Schwartz &
Gaertner, LLP**

2000 S. 8TH ST.

ST. LOUIS, MO 63104

OFFICE: (314) 772-8989

FAX: (314) 772-8990

Attorneys for Appellant Christopher Eric Hunt

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(B)

The undersigned certifies that this brief complies with the word limitations found in Rule 84.06(b) in that the brief contains 25,493 words. The word count was obtained from Microsoft Word.

Briefs were scanned and certified as virus free by Norton Antivirus.

/s/ Edward D. Robertson, Jr.

Edward D. Robertson, Jr. #27183

Mary D. Winter #38328

Anthony L. DeWitt #41612

Bartimus, Frickleton,

Robertson & Goza, P.C.

715 Swifts Highway

Jefferson City, Missouri 65109

[573] 659-4454

[573] 659-4460 FAX

chiprob@earthlink.net

CERTIFICATE OF SERVICE

I certify that in filing this document with the MO Supreme Court through the electronic filing system an electronic copy of this document and Appendix was served on counsel named below on this 9th day of June, 2014.

Chris Koster
Shaun J. Mackelprang
P.O. BOX 899
Jefferson City, MO 65102
shaun.mackelprang@ago.mo.gov

ATTORNEYS FOR RESPONDENT

Joseph McCulloch
415 North Second Street, Suite 200
St. Charles, MO 63301
mctodt@aol.com

TRIAL COUNSEL FOR APPELLANT

/s/ Edward D. Robertson, Jr.