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TRANSFER QUESTION

Are felonies committed “at different times” for purposes of persistent offender determination if one offense was committed inside a store and another immediately after in the parking lot?

The Southern District’s opinion is in conflict with:

State v. Williams, 800 S.W.2d 118 (Mo. App., E.D. 1990), which was decided under a prior statute but with a similar issue.

JURISDICTIONAL STATEMENT

Appellant was convicted following a jury trial in the Circuit Court of Greene County, Missouri, of two counts of kidnapping, Section 565.110,¹ two counts of armed criminal action, Section 571.015, one count of unlawful use of a weapon, Section 571.030.1(4), and one count of first degree arson, Section 569.040. The Honorable Don E. Burrell sentenced appellant to a total of twenty-two years in prison. The Missouri Court of Appeals, Southern District, affirmed appellant's conviction by opinion filed October 5, 2005. This Court took transfer of this cause on application of the appellant, and therefore has jurisdiction pursuant to Rule 83.04. Article V, Section 9, Mo. Const. (as amended 1976).

¹ Statutory citations are to RSMo 2000.

STATEMENT OF FACTS

Appellant told psychologists who evaluated him pretrial that he discovered that his girlfriend, Toni Selle, was participating in a pedophile cult (Tr. 51, 115, 129). This cult was confining and sexually torturing appellant's older daughter in tunnels located under their house (Tr. 51). Appellant told the psychologists that he held his girlfriend and younger daughter in the home to protect them from the cult (Tr. 51). The cult was going to kill him once he discovered their existence, and so he needed media exposure to protect them all (Tr. 52).

Toni and appellant had a child together, Renee, who was five months old at the time of the incident (Tr. 443-444, 447). Toni's son, Stevie, who was four, also lived with Toni and appellant (Tr. 444, 447). The couple had an argument on May 30, 2001, because appellant had not come home the night before (Tr. 450). Toni told appellant she was leaving him (Tr. 450). She took Stevie to day care, and returned home to pack (Tr. 450-451). Appellant was in and out of the house that day, as Toni took a nap and did her packing (Tr. 451-452). At about 3:00, Toni left to pick up Stevie, taking Renee with her (Tr. 452-453). Appellant asked Toni why she was taking Renee, although she normally took her everywhere (Tr. 452-453).

About 5:30, appellant said he had to go get rid of something (Tr. 454). Toni asked him what, and he said a gun (Tr. 454-455). Toni did not know there had been a gun in the house (Tr. 455). Appellant was gone about ten minutes; upon returning he slammed the front door, pulled out the gun, and said no one was

leaving the house (Tr. 455). He acted nervous, and said there were people following him ten cars back (Tr. 455, 493-494). He said if anyone tried to come in the house, he was going to burn down the house and “take them out” (Tr. 455). Appellant told Toni there was a torture room under the house (Tr. 495). People were torturing Toni and her children, along with appellant’s daughter Elizabeth who lived in California (Tr. 495-496). He told Toni that people from California had followed him there (Tr. 496).

Toni was hysterical, and appellant kept yelling and screaming (Tr. 456). About 6:00, she convinced appellant to let her call Stevie’s grandparents, Dotty and Russell Hunsaker (Tr. 457-458, 567). The Hunsakers came over and took Stevie (Tr. 459-461, 567-570, 606-607).

Toni stood at the front door holding Renee, and appellant was right behind her holding Toni’s shirt (Tr. 461, 570, 607-608). Toni mouthed to Dotty that appellant had a gun (Tr. 462, 572-573). Toni tried to leave with the Hunsakers, but appellant pulled her back in the door (Tr. 462-463, 573, 608). Toni dropped the baby, and appellant pushed Toni down on the floor (Tr. 463, 573-574).

Russell ran into the house, and appellant pointed the gun at him and threatened to shoot him (Tr. 463-464, 574, 609-610).² The Hunsakers left with Stevie, went to a convenience store and called the police (Tr. 464, 576-578, 611).

² This was the charge of unlawful use of a weapon (L.F. 18-20).

After the Hunsakers left, appellant had Toni call 911 and tell them nothing was wrong (Tr. 464). Toni sat in appellant's lap with Renee in her lap while she made the call (Tr. 465-466). Appellant held the gun to Toni's back (Tr. 466). After she made the call, appellant pulled the shades down and put a comforter over the front picture window (Tr. 466-467). When he did so, he saw three police officers standing by the tree outside (Tr. 467).

According to Toni, appellant believed that the police were involved with the torture ring (Tr. 415). He wanted television stations to come so that he could tell about the danger and expose the child abuse ring (Tr. 526). He kept talking about everyone being in a cult (Tr. 529). Toni called Dotty during the night and said that appellant wanted her to call KOLR 10 and have them go over there; if they came, he would come out and let everyone go (Tr. 580). Dotty did so (Tr. 580).

Appellant put a chair in front of the front door (Tr. 465). He brought a can of gasoline from the garage and put it by the living room chair (Tr. 474).

Throughout the night, the three sat in the chair together (Tr. 468). Appellant did not allow Toni to move around the house, eat or drink, or use the bathroom (Tr. 468-470). The Strategic Response Team of the Springfield Police Department had responded (Tr. 631-633, 716-720, 774-775). Negotiators talked to appellant on the phone throughout the night, and occasionally to Toni (Tr. 469, 635-638, 716-720, 722-732). At one point, they attempted to negotiate having a

television crew come, but they were unable to reach an agreement (Tr. 644-646, 732).

Appellant agreed to let Toni go, but she would not leave without Renee (Tr. 475). Toni convinced appellant to let her grandmother come and pick up Renee (Tr. 475-476). Appellant agreed with the SRT negotiator to put Renee out on the porch in the car seat, and a member of the SRT would get her (Tr. 735). But instead, appellant moved the chair away from the door, and Toni put Renee on the front porch in her car seat with a diaper bag of items she would need (Tr. 476-477). Appellant held the back of Toni's shirt while she did so and threatened to shoot her if she "tried anything" (Tr. 476-477, 845-846).

Toni spoke to negotiator John Truman, who told her that she needed to try to get herself out of the house (Tr. 478-479, 745-748). She went down the hall to the bathroom with appellant, and the negotiator called appellant on the phone (Tr. 478-479, 748). When appellant ran back to the living room to answer the phone, Toni dived out the bathroom window (Tr. 479-482, 748). The police took her to a police car (Tr. 483-484).

When Toni got out, Officer Truman was talking to him on the phone (Tr. 749). Appellant became extremely angry (Tr. 749). He said, "if you come in, I'm taking a couple of you with me" and then threatened to burn the house (Tr. 749). Truman heard liquid sloshing, as if in a can (Tr. 749-750). Another officer heard

appellant say “I poured gas all over the place, I’m going to torch it” (Tr. 787-788). At this moment, the front of the house went up in flames (Tr. 484, 750, 789).³

Appellant opened the back door of the garage and lay down in the doorway (Tr. 790). Officer Darrell Rader yelled at him to come out; finally appellant ran a few steps into the back yard holding a gun to his head (Tr. 793-794, 832-833). Other officers fired non-lethal bean bag pellets at appellant, and Rader fired at him twice with lethal rounds, although he did not hit him (Tr. 795-797, 833). The officers were standing in water from the fire hoses and the power lines above them were melting and they were worried they would be electrocuted (Tr. 799-800, 835, 854). So they went over the fence and tackled appellant and took him into custody after a struggle (Tr. 801-802, 835).

Appellant was charged with two counts of kidnapping, two counts of armed criminal action, unlawful use of a weapon, and arson in the first degree, in the Circuit Court of Greene County (L.F. 18-20). The two counts of kidnapping alleged that (I) appellant “unlawfully confined Toni Selle without her consent for a substantial period of time, for the purpose of inflicting physical injury on or terrorizing Toni Selle,” and (IV) appellant “unlawfully confined Toni Selle and

³ It was later determined that the cause of the fire was a burnable liquid poured in the living room then ignited with a match or lighter (Tr. 884). The fire department expert also testified that the house next door was in danger if the fire had gone on much longer (Tr. 885, 887).

R.S. without their consent for a substantial period of time, for the purpose of using Toni Selle and R.S. as a shield or hostage” (L.F. 18-19). Defense counsel objected that the two kidnapping counts were only one continuing course of conduct, and that charging both violated appellant’s right to be free from double jeopardy (Tr. 233-240). The objection was overruled (Tr. 254).⁴

Appellant was charged as a prior and persistent offender (L.F. 18-20). Pretrial, the state offered evidence on the prior and persistent allegations (Tr. 196 et. seq.). The prosecutor informed the court that they would not be presenting evidence on the third alleged prior from California, but would proceed on two counts from Mississippi County Circuit Court, as enumerated in State’s Exhibit 101 (Tr. 196-197, Ex. 101). The prosecutor also introduced Exhibit 102, appellant’s Department of Corrections records (Tr. 197, Ex. 102).

It appeared that the two priors the state alleged occurred in the same case and on the same day, so the state presented a witness to establish separate offenses committed at different times (Tr. 198). The information from Mississippi County charged:

⁴ The objection was renewed at the close of the evidence as a motion to strike one of the counts, and again at the instruction conference (Tr. 889-897, 913-914). Both were submitted to the jury and appellant was convicted and sentenced on both (Tr. 1001, 1041, L.F. 46, 49, 61-66). This issue was raised in the motion for new trial (Supp. L.F. 3).

Count I: “the defendant, in violation of Section 571.030.1(1), RSMo, committed the class D felony of unlawful use of a weapon punishable upon conviction under Sections 558.011.1(4) and 560.011, RSMo, in that on or about 01-04-97, in the County of Mississippi, State of Missouri, the defendant knowingly carried concealed upon or about his person a firearm, to-wit: a 380 automatic hand gun.”

Count II: “the defendant, in violation of Section 571.030.1(1), RSMo, committed the class D felony of unlawful use of a weapon, punishable upon conviction under Sections 558.011.1(4) and 560.011, RSMo, in that on or about 01-04-97, in the County of Mississippi, State of Missouri, the defendant knowingly exhibited, in the presence of one or more persons, a 12 gauge shotgun, a weapon readily capable of lethal use, in an angry or threatening manner.”

Officer Steve Coleman, formerly of the Charleston Police Department, testified that on January 4, 1997, they received a call from the Pizza Hut in the Charleston Plaza (Tr. 198-199). The dispatcher said there was a white male who had entered the door with a 12-gauge shotgun (Tr. 201). Coleman went to Pizza Hut with four other officers, and on the way they were advised that the suspect had left in an old Ford truck (Tr. 201). They entered the Plaza parking lot, saw the truck, and stopped it (Tr. 202).

According to Coleman, appellant was in the truck (Tr. 202). They got him out, patted him down, and located a concealed .380 automatic in his belt (Tr. 202-

203). The 12-gauge was lying on the seat of the truck (Tr. 203). The stop was about 100 yards from the Pizza Hut (Tr. 203).

The trial court wanted to review the statute and hear argument about whether the felonies were committed at different times (Tr. 205). Defense counsel argued that it was one continuing incident; the prosecutor argued that one crime was over when appellant left the Pizza Hut and the other was committed at the stop (Tr. 205-209). The court found appellant to be a prior and persistent offender based on those two priors (Tr. 210).

A jury trial was held. The defense sought to present a defense of diminished capacity based on appellant's delusional thinking (Tr. 541-546, L.F. 27-32). The state objected that since appellant's delusions were based on voluntary intoxication, the evidence was inadmissible (L.F. 27-32, Tr. 222-223). The court ruled that the defense of diminished capacity could not be argued, but that evidence of appellant's methamphetamine use would not be admissible either if offered by the state (Tr. 223, 541-546).⁵

⁵ Dr. Andrea Thronson testified pretrial that appellant suffered from delusional disorder (Tr. 51-53). He has not used methamphetamine for two years, but the delusions have persisted (Tr. 53). This indicated to her that there is an underlying psychosis (Tr. 53-54). According to the DSM, a substance induced psychosis persists only while the person is intoxicated or going through withdrawal (Tr. 54).

Defense counsel did present some evidence of the delusions during trial, as outlined above. During defense counsel's cross-examination of Toni, the prosecutor argued that they had opened the door to her testifying about appellant's drug use when they examined her about the cult and tunnels under the house (Tr. 541-546). Defense counsel argued that it was being offered to counter the mental element of intent to terrorize her (Tr. 546). The court disallowed testimony about appellant's drug use at that time (Tr. 553).

Defense counsel cross-examined the first negotiator, Officer Steve Lowe, about the cult and tunnels under the house (Tr. 660-666). After his testimony, the prosecutor told the judge that he wanted to call a drug expert, and again argued that the defense had opened the door (Tr. 669). He explained that the witness would be one of the hostage negotiators who thought appellant was acting as if he was under the influence of drugs (Tr. 669). The state made an offer of proof with Officer Truman, and the court determined to allow the testimony, over objection (Tr. 682-715).

Truman testified before the jury that when he was negotiating with appellant, appellant talked about caverns under the ground and tunnels under the neighborhood (Tr. 740). He said there was hair growing out of the walls of the tunnels (Tr. 741). He said there was a police conspiracy: that the police knew of the tunnels, and they were not there to help him but only to protect the evil people in the world (Tr. 741). Truman did not think appellant was rational; he thought his behavior was consistent with drug use (Tr. 741). Truman testified that he had no

idea whether appellant was actually under the influence but that he was acting that way (Tr. 743).

In closing argument, the prosecutor told the jury, “if there were [irrational thoughts] you would have heard from some doctors” (Tr. 980). The jury returned verdicts of guilty after only about an hour of deliberations (Tr. 988, 1001, L.F. 61-66).

On August 6, 2004, The Honorable Don E. Burrell sentenced appellant as a prior and persistent offender to fifteen years on Counts I, II, IV and V, all concurrently, five concurrent years on Count III, and seven consecutive years on Count VI. (Tr. 1009, 1040-1041, L.F. 75). Notice of appeal was filed that day (L.F. 76).

POINTS RELIED ON

I.

The trial court erred in finding appellant to be a prior and persistent offender and in sentencing him as such, because this violated appellant's right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, and further violated Section 558.016.3, because under the plain language of the statute, a persistent offender is one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times, and appellant was charged and convicted of two prior weapons offenses out of Mississippi County committed at the same time.

State v. Williams, 800 S.W.2d 118 (Mo. App., E.D. 1990);

State v. Rousan, 961 S.W.2d 831 (Mo. banc 1998).

State v. Reynolds, 161 S.W.3d 887 (Mo. App., E.D. 2005);

Matthews v. State, 123 S.W.3d 307 (Mo. App., E.D. 2003);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

Sections 558.011, 558.016, 558.019, 560.011 and 571.030; and

<http://www.m-w.com/cgi-bin/dictionary>.

II.

The trial court plainly erred in sustaining the prosecutor's objections to defense counsel's proposed defense of diminished capacity and delusional disorder because the prohibition of expert testimony on appellant's mental state at the time of the offenses deprived appellant of his fundamental rights to present a defense, to due process, and to a fair trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that this evidence was relevant and material because it would have negated an element of the offense of kidnapping, that appellant confined Toni for an improper purpose, because this evidence would have supported the defense theory that appellant's purpose instead was to protect Toni and Renee from what he believed were dangers to their safety, due to his delusions.

State v. Gary, 913 S.W.2d 822 (Mo. App., E.D. 1995);

Eddings v. Oklahoma, 455 U.S. 104 (1982);

Crane v. Kentucky, 476 U.S. 683 (1986);

Rock v. Arkansas, 483 U.S. 44 (1987);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a); and

Section 562.076.

III.

The trial court abused its discretion in overruling defense counsel's motion in limine and admitting evidence of that appellant may have been using methamphetamine at the time of the incident, because admission of that evidence deprived appellant of his rights to due process and to be tried only for the crime with which he was charged, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution, in that any probative value that this improper character evidence may have had to shed light on any material issue was clearly outweighed by its prejudicial impact and it was especially harmful to allow the state to offer evidence of appellant's voluntary intoxication without permitting appellant to offer expert testimony regarding his defense of diminished capacity. See Point II.

State v. Carter, 996 S.W.2d 141 (Mo. App., W.D. 1999);

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998);

State v. Williams, 673 S.W.2d 32 (Mo. banc 1984);

State v. Diercks, 674 S.W.2d 72 (Mo. App., W.D. 1984);

U.S. Const., Amends. V and XIV; and

Mo. Const., Art. I, Secs. 10, 17 and 18(a).

IV.

The trial court plainly erred in permitting the prosecutor to argue in closing that “if there were [irrational thoughts] you would have heard from some doctors” because this argument violated appellant's rights to due process and a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that appellant had attempted to present evidence of diminished capacity through expert witnesses, but such was excluded upon the prosecutor's motion. Allowing appellant's convictions to stand in the face of this prosecutorial misconduct would amount to a miscarriage of justice.

State v. Weiss, 24 S.W.3d 198 (Mo. App., W.D. 2000).

State v. Hammonds, 651 S.W.2d 537 (Mo. App., E.D. 1983);

State v. Luleff, 729 S.W.2d 530 (Mo. App., E.D. 1987);

U.S. Const., Amends. VI and XIV; and

Mo. Const., Art. I, Secs. 10 and 18(a).

V.

The trial court erred in overruling defense counsel's motion for judgment of acquittal at the close of all the evidence and in sentencing appellant upon his conviction for arson in the first degree, because such rulings violated appellant's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not prove beyond a reasonable doubt that appellant knowingly disregarded an unjustifiable risk that he was placing nearby persons in danger of death or serious physical injury.

State v. Letcher, 772 S.W.2d 795 (Mo. App., W.D. 1989);

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

Commonwealth v. Stefaniak, 44 Pa. D & C. 3d 523, 1987 WL 46864 (Pa. Com. Pl. 1987);

State v. McBean, 74 P.3d 1127 (Or. App. 2003);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10; and

Sections 562.016 and 569.040.

VI.

The trial court erred in sentencing appellant on two separate counts of kidnapping, because this violated appellant's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 556.041, in that the kidnapping was a continuing course of conduct despite the state's charging Count I as unlawfully confining Toni for the purpose of inflicting physical injury on or terrorizing her and Count IV as unlawfully confining Toni and Renee for the purpose of using them as a shield or hostage.

State v. Morrow, 888 S.W.2d 387 (Mo. App., S.D. 1994);

State v. French, 79 S.W.3d 896 (Mo. banc 2002);

State v. Matthews, 2004 WL 2381734 (Tenn. Crim. App. 2004);

North Carolina v. Pearce, 395 U.S. 711 (1969);

U.S. Const., Amends. V and XIV;

Sections 556.041 and 565.110; and

Wharton's Criminal Law (11th Ed.) Section 34.

ARGUMENT

I.

The trial court erred in finding appellant to be a prior and persistent offender and in sentencing him as such, because this violated appellant's right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, and further violated Section 558.016.3, because under the plain language of the statute, a persistent offender is one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times, and appellant was charged and convicted of two prior weapons offenses out of Mississippi County committed at the same time.

Standard of review

The trial court's finding was objected to and preserved in the motion for new trial (Tr. 205-209, Supp. L.F. 2-3). This is a preserved issue of law, which should be reviewed *de novo*, with no deference to the trial court's determination.

State v. Rousan, 961 S.W.2d 831, 845 (Mo. banc 1998).

Facts

Appellant was charged as a prior and persistent offender (L.F. 18-20). Pretrial, the state offered evidence on the prior and persistent allegations (Tr. 196 et. seq.). The prosecutor informed the court that they would not be presenting

evidence on the third alleged prior from California, but would proceed on two counts from Mississippi County Circuit Court, as enumerated in State's Exhibit 101 (Tr. 196-197, Ex. 101). The prosecutor also introduced Exhibit 102, appellant's Department of Corrections records (Tr. 197, Ex. 102).

It appeared that the two priors the state alleged occurred in the same case and on the same day, so the state presented a witness to establish separate offenses committed at different times (Tr. 198). The information from Mississippi County charged:

Count I: "the defendant, in violation of Section 571.030.1(1), RSMo, committed the class D felony of unlawful use of a weapon punishable upon conviction under Sections 558.011.1(4) and 560.011, RSMo, in that on or about 01-04-97, in the County of Mississippi, State of Missouri, the defendant knowingly carried concealed upon or about his person a firearm, to-wit: a 380 automatic hand gun."

Count II: "the defendant, in violation of Section 571.030.1(1), RSMo, committed the class D felony of unlawful use of a weapon, punishable upon conviction under Sections 558.011.1(4) and 560.011, RSMo, in that on or about 01-04-97, in the County of Mississippi, State of Missouri, the defendant knowingly exhibited, in the presence of one or more persons, a 12 gauge shotgun, a weapon readily capable of lethal use, in an angry or threatening manner."

Officer Steve Coleman, formerly of the Charleston Police Department, testified that on January 4, 1997, they received a call from the Pizza Hut in the

Charleston Plaza (Tr. 198-199). The dispatcher said there was a white male who had entered the door with a 12-gauge shotgun (Tr. 201). Coleman went to Pizza Hut with four other officers, and on the way they were advised that the suspect had left in an old Ford truck (Tr. 201). They entered the Plaza parking lot, saw the truck, and stopped it (Tr. 202).

According to Coleman, appellant was in the truck (Tr. 202). They got him out, patted him down, and located a concealed .380 automatic in his belt (Tr. 202-203). The 12-gauge was lying on the seat of the truck (Tr. 203). The stop was about 100 yards from the Pizza Hut (Tr. 203).

The trial court wanted to review the statute and hear argument about whether the felonies were committed at different times (Tr. 205). Defense counsel argued that it was one continuing incident; the prosecutor argued that one crime was over when appellant left the Pizza Hut and the other was committed at the stop (Tr. 205-209). The court found appellant to be a prior and persistent offender based on those two priors (Tr. 210). Appellant was convicted as a prior and persistent offender (L.F. 75).

Argument

Section 558.016.3 defines a persistent offender as one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times. While “different times” is not defined, it cannot mean in a continuing event

that occurs from the moment someone leaves a Pizza Hut until they are stopped 100 yards away by the police.⁶

In *State v. Williams*, 800 S.W.2d 118 (Mo. App., E.D. 1990), the issue was whether the defendant was properly convicted as a class X offender. Under Section 558.019.4(3), RSMo 1986, the priors also had to be committed at different times. The record in *Williams* showed that the crimes were committed on the same date and the businesses burglarized were on the same highway. 800 S.W.2d at 120. The *Williams* Court found this was insufficient proof beyond a reasonable doubt and remanded for a hearing on the issue.

In *State v. Reynolds*, 161 S.W.3d 887 (Mo. App., E.D. 2005), the Eastern District Court of Appeals remanded for a new evidentiary hearing on the defendant's persistent offender status where the transcript did not support finding that the defendant committed the felonies on "different *occasions*." 161 S.W.3d at 888 (emphasis added). "Occasion" is defined in Merriam-Webster as a "happening, incident, a time at which something happens; an instance." <http://www.m-w.com/cgi-bin/dictionary>. Reynolds had been convicted as a

⁶ Arguably, these facts found by a judge would violate the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that other than the *fact* of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.

persistent offender, with a showing that she pleaded guilty to stealing over \$150, in Cause No. 881-856, in 1988, and to stealing over \$150 by deceit, a class D felony, in Cause No. 881-976 on February 10, 1989. 161 S.W.3d at 888.

In *Matthews v. State*, 123 S.W.3d 307 (Mo. App., E.D. 2003), the Court of Appeals vacated and remanded for resentencing where the defendant's admission that he had pleaded guilty to three felonies set for in the indictment did not establish he was a persistent offender. The court held that although the defendant's admission was sufficient to show that he had two or more felony convictions, his admission did not establish beyond a reasonable doubt that the felonies were committed at different times. *Id.* at 310. Yet in the indictment the charged priors were pleaded to on February 14, 1996, April 29, 1987, September 12, 1985, and February 2, 1984; and found guilty of another on March 26, 1987. *Id.* at 309.⁷

⁷ *See also, Clayborne v. State*, 596 S.W.2d 820 (Tenn., 1980) (where defendant's two prior robbery convictions arose out of sequence in which a theft of automobile was committed within minutes of the stealing of two jackets for the purpose of escaping the latter robbery, the convictions were not committed at different times and on separate occasions for purposes of the habitual criminal statute, and where defendant's remaining two prior convictions were offenses that occurred at the same time, at the same place, and as a result of buying from one person property

So in *Williams*, *Matthews* and *Reynolds*, there was insufficient proof that the occasions of the priors were different, even though they were different cases charged and convicted at different times. Here, the two priors were committed in one continuing incident, only 100 yards apart. And the difference between being classified by the Department of Corrections as a prior offender and a persistent offender is far from inconsequential. It affects parole eligibility, housing level and ultimate out date for appellant.

In this case, the priors at issue were two counts; two offenses occurring at the same location – inside the Pizza Hut and in the nearby parking lot. Appellant respectfully requests that his sentences be vacated and remanded for a new sentencing hearing, where he shall be convicted as a prior offender and not a persistent offender.

stolen from two persons, the defendant had not committed three prior offenses within the ambit of the habitual criminal statute).

II.

The trial court plainly erred in sustaining the prosecutor's objections to defense counsel's proposed defense of diminished capacity and delusional disorder because the prohibition of expert testimony on appellant's mental state at the time of the offenses deprived appellant of his fundamental rights to present a defense, to due process, and to a fair trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that this evidence was relevant and material because it would have negated an element of the offense of kidnapping, that appellant confined Toni for an improper purpose, because this evidence would have supported the defense theory that appellant's purpose instead was to protect Toni and Renee from what he believed were dangers to their safety, due to his delusions.

Appellant told psychologists who evaluated him pretrial that he discovered that his girlfriend, Toni Selle, was participating in a pedophile cult (Tr. 51, 115, 129). This cult was confining and sexually torturing appellant's older daughter Elizabeth in tunnels located under their house (Tr. 51). Appellant told the psychologists that he held Toni and Renee in the home to protect them from the cult (Tr. 51). The cult was going to kill him once he discovered their existence, and so he needed media exposure to protect them all (Tr. 52).

Toni testified at trial that appellant believed that the police were involved with the torture ring (Tr. 415). He wanted television stations to come so that he could tell about the danger and expose the child abuse ring (Tr. 526). He kept talking about everyone being in a cult (Tr. 529).

The defense sought to present a defense of diminished capacity based on appellant's delusional thinking (Tr. 541-546, L.F. 27-32). The state objected that since appellant's delusions were based on voluntary intoxication, the evidence was inadmissible (Tr. 222-223, L.F. 27-32). The court ruled that the defense of diminished capacity could not be argued, and that evidence of appellant's methamphetamine use would not be admissible either if offered by the state (Tr. 223, 541-546).

Defense counsel did present some evidence of the delusions during trial, as outlined above. During defense counsel's cross-examination of Toni, the prosecutor argued that they had opened the door to her testifying about appellant's drug use when they examined her about the cult and tunnels under the house (Tr. 541-546). Defense counsel argued that it was being offered to counter the mental element of intent to terrorize her (Tr. 546).⁸ The court disallowed testimony about appellant's drug use at that time (Tr. 553).

⁸ This is consistent with Section 562.076.3, which says it may be admissible on the issue of conduct.

Defense counsel cross-examined the first negotiator, Officer Steve Lowe, about the cult and tunnels under the house (Tr. 660-666). After his testimony, the prosecutor told the judge that he wanted to call a drug expert, and again argued that the defense had opened the door (Tr. 669). He explained that the witness would be one of the hostage negotiators who thought appellant was acting as if he was under the influence of drugs (Tr. 669). The state made an offer of proof with Officer Truman, and the court allowed the testimony, over objection (Tr. 682-715).

Truman testified that when he was negotiating with appellant, appellant talked about caverns under the ground and tunnels under the neighborhood (Tr. 740). He said there was hair growing out of the walls of the tunnels (Tr. 741). He said there was a police conspiracy: that the police knew of the tunnels, and they were not there to help him but only to protect the evil people in the world (Tr. 741). Truman did not think appellant was rational; he thought his behavior was consistent with drug use (Tr. 741). Truman testified that he had no idea whether appellant was actually under the influence but that he was acting that way (Tr. 743).

Standard of Review

A trial court enjoys broad discretion in determining the relevance of evidence. ***State v. Ray***, 945 S.W.2d 462, 467 (Mo. App., W.D. 1997). While this Court generally will not interfere with the trial court's ruling on the admission or

exclusion of evidence, this Court will do so when there exists a clear showing of an abuse of that discretion. *Id.* This court will not disturb the trial court's ruling unless the abuse resulted in prejudice to the defendant. *Id.* at 469. Error in a criminal case is presumed to be prejudicial, unless rebutted by the facts and circumstances of the case. *Id.* Here, defense counsel did not offer the excluded evidence in an offer of proof, so review is for plain error. *State v. Hunter*, 957 S.W.2d 467, 470 (Mo. App., W.D. 1997).

Appellant was deprived of his right to present relevant evidence to the jury

“The Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) (citing, *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984)). The denial of the opportunity to present relevant and competent evidence negating an essential element of the State's case may constitute denial of due process. *Ray*, 945 S.W.2d at 469. Further, a defendant has a constitutional right to a fair and impartial trial. *State v. Hill*, 817 S.W.2d 584, 587 (Mo. App., E.D. 1991). If the defendant is deprived of the testimony of a defense witness, it may violate the defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. *Id.*

The relevancy of evidence depends on whether the evidence tends to confirm or refute a fact in issue or to corroborate evidence which is relevant. *Ray*,

945 S.W.2d at 467. Evidence need only be relevant, *not conclusive*, and it is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issues. *State v. Richardson*, 838 S.W.2d 122, 124 (Mo. App., E.D. 1992). Competent evidence which negates a culpable mental state is admissible. *State v. Horst*, 729 S.W.2d 30, 31 (Mo. App., E.D. 1987).

The trial court excluded evidence supporting appellant's diminished capacity defense because certain experts testified, in part, that appellant's mental problems were caused by methamphetamine use (Tr. 222-223). While it is true that voluntary intoxication alone is not a mental disease or defect, *State v. Gary*, 913 S.W.2d 822, 828 (Mo. App., E.D. 1995), not all of the evidence was about methamphetamine use. Dr. Andrea Thronson testified pretrial that appellant suffered from delusional disorder (Tr. 51-53). He has not used methamphetamine for two years, but the delusions have persisted (Tr. 53). This indicated to her that there is an underlying psychosis (Tr. 53-54). According to the DSM, a substance induced psychosis persists only while the person is intoxicated or going through withdrawal (Tr. 54). The question was one for the jury. With any evidentiary support for the defense position, the evidence should have come in. Exclusion of the evidence denied appellant his right to present a defense.

A criminal defendant has the right to present exculpatory evidence notwithstanding statutes, procedural rules or evidentiary doctrines that the state might otherwise use to preclude use at trial. In *Washington v. Texas*, 388 U.S. 14

(1967), the Court overturned a Texas statute that prevented codefendants from testifying for each other. The Court held, "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." 388 U.S. at 23. *Washington* was reaffirmed in *Chambers v. Mississippi*, 410 U.S. 284 (1973), where the Court held the "hearsay rule may not be applied mechanistically to defeat the ends of justice" and in *Davis v. Alaska*, 415 U.S. 308 (1974), where the Court held a witness's right to have his juvenile record kept private falls before the defendant's Sixth Amendment right to cross-examine the witness on bias.

In *Rock v. Arkansas*, 483 U.S. 44 (1987), the defendant could not remember the precise details of a shooting for which she was indicted for manslaughter. 483 U.S. at 45-46. She was hypnotized by a licensed neuropsychologist and recalled details she previously had not. *Id.* at 47. At the state's request, the trial court barred all hypnotically refreshed testimony and stated if the defendant testified, her testimony would be limited to what she remembered before the hypnotic sessions. *Id.* Arkansas, like Missouri, had a *per se* rule barring hypnotically refreshed testimony on the ground that such testimony is always unreliable. *Id.* at 56; see *Alsbach v. Bader*, 700 S.W.2d 823 (Mo. banc 1985).

Based on *Washington* and *Chambers*, the Supreme Court reversed Rock's conviction, holding,

Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it may also not apply a rule of evidence that permits a person to take the stand, but arbitrarily excludes material portions of his testimony. *Id.* at 55. The Court stated that hypnotically refreshed testimony is not always admissible, but a *per se* bar to it violates a defendant's right to present a defense where a defendant can show the evidence is reliable.

Id. at 61.

In *Gary, supra*, the issue was whether the state could offer evidence of voluntary intoxication to rebut the defendant's diminished capacity defense. 913 S.W.2d at 828. Here, the issue is whether diminished capacity evidence was admissible, especially after evidence of drug use was admitted. Appellant asserts that his diminished capacity defense should have been admitted, but at the very least, he should have been permitted to adduce such evidence once evidence of his drug use was admitted. See Points III and IV.

Some evidence of appellant's delusions was admitted through the testimony of Toni and other occurrence witnesses. Toni testified at trial that appellant believed that the police were involved with the torture ring (Tr. 415). He wanted television stations to come so that he could tell about the danger and expose the child abuse ring (Tr. 526). He kept talking about everyone being in a cult (Tr. 529). But without any context for this evidence, through expert testimony, this almost made the error worse. The evidence came in, but the jury lacked a

mechanism through which to give effect to the evidence. *See, Eddings v. Oklahoma*, 455 U.S. 104 (1982). In fact, in closing argument, the prosecutor told the jury, “if there were [irrational thoughts] you would have heard from some doctors” (Tr. 980).

Appellant was denied his right to present a defense by the exclusion of expert testimony to negate the specific mental elements of the crimes charged. This Court should reverse appellant’s convictions and remand for a new trial.

III.

The trial court abused its discretion in overruling defense counsel's motion in limine and admitting evidence of that appellant may have been using methamphetamine at the time of the incident, because admission of that evidence deprived appellant of his rights to due process and to be tried only for the crime with which he was charged, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution, in that any probative value that this improper character evidence may have had to shed light on any material issue was clearly outweighed by its prejudicial impact and it was especially harmful to allow the state to offer evidence of appellant's voluntary intoxication without permitting appellant to offer expert testimony regarding his defense of diminished capacity. See Point II.

The trial court abused its discretion in overruling defense counsel's motion in limine and in admitting into evidence testimony from Detective Truman that appellant appeared to be using drugs, because any probative value such evidence may have had was outweighed by its prejudicial effect, especially given that appellant's diminished capacity defense had been excluded. See Point II. The erroneous admission of this evidence deprived appellant of his constitutional rights to due process and to be tried only for the offense charged and requires that he be granted a new trial.

The trial court has broad discretion in the admission of evidence. *State v. Guinan*, 665 S.W.2d 325 (Mo. banc), *cert. denied*, 469 U.S. 873 (1984), and its decision may be overturned only upon an abuse of that discretion. *State v. Kincade*, 677 S.W.2d 361 (Mo. App., E.D. 1984). However, the trial court does not have unfettered discretion in the admission of evidence, and rulings on admissibility must be subject to appellate review as a question of law. *State v. Williams*, 673 S.W.2d 32, 35 (Mo. banc 1984). Even if the trial court finds evidence to be relevant, it must exclude that evidence if the prejudicial effect to the defendant outweighs other considerations that make the evidence useful to prove an issue in the case. *State v. Diercks*, 674 S.W.2d 72 (Mo. App., W.D. 1984). Evidence that tends to unnecessarily divert the jury's attention from the question before it should be excluded. *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984). The probative value of evidence must not be outweighed by its tendency to create undue prejudice in the mind of the jury. *Id.*

The prosecutor told the judge that he wanted to call a drug expert, and argued that the defense had opened the door (Tr. 669). He explained that the witness would be one of the hostage negotiators who thought appellant was acting as if he was under the influence of drugs (Tr. 669). The state made an offer of proof with Officer Truman, and the court determined to allow the testimony, over objection (Tr. 682-715).

Truman testified before the jury that when he was negotiating with appellant, appellant talked about caverns under the ground and tunnels under the

neighborhood (Tr. 740). He said there was hair growing out of the walls of the tunnels (Tr. 741). He said there was a police conspiracy: that the police knew of the tunnels, and they were not there to help him but only to protect the evil people in the world (Tr. 741). Truman did not think appellant was rational; he thought his behavior was consistent with drug use (Tr. 741). Truman testified that he had no idea whether appellant was actually under the influence but that he was acting that way (Tr. 743).

Evidence of other crimes is highly prejudicial. When evidence of uncharged misconduct is introduced to show the defendant's propensity to commit such crimes, the jury may improperly convict the defendant because of his propensity without regard to whether he is actually guilty of the charged crime. *State v. Carter*, 996 S.W.2d 141, 143 (Mo. App., W.D. 1999), citing, *State v. Burns*, 978 S.W.2d 759, 761 (Mo. banc 1998). In *Burns*, the Missouri Supreme Court held that admission of such improper propensity evidence violated the defendant's right under the Missouri Constitution, Article I, Sections 17 and 18(a), to be tried only on the offense charged. *Id.* at 760.

As more fully discussed in Point II, appellant wanted to present a diminished capacity defense. As part of the discussion pretrial, it was determined that both that evidence and evidence of appellant's drug use would be excluded (Tr. 222-223). However, as the trial developed, the court determined that the defense had "opened the door" to testimony about appellant's drug use (Tr. 682-715). At the same time, appellant was still not permitted to present evidence of his

delusional disorder, leaving the jury with the impression that the drug use was relevant only as proof of appellant's bad character.

The prejudice from admitting evidence of appellant's possible use of methamphetamine or other drugs outweighed any possible probative value, and violated appellant's rights to due process and to be tried only on the charged offense. Appellant therefore respectfully requests that this Court reverse his convictions and remand for a new and fair trial.

IV.

The trial court plainly erred in permitting the prosecutor to argue in closing that “if there were [irrational thoughts] you would have heard from some doctors” because this argument violated appellant's rights to due process and a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that appellant had attempted to present evidence of diminished capacity through expert witnesses, but such was excluded upon the prosecutor's motion. Allowing appellant's convictions to stand in the face of this prosecutorial misconduct would amount to a miscarriage of justice.

Appellant wanted to present a diminished capacity defense (Tr. 222-223). As part of the discussion pretrial, it was determined that both that evidence and evidence of appellant's drug use would be excluded (Tr. 222-223). However, as the trial developed, the court determined that the defense had “opened the door” to testimony about appellant's drug use (Tr. 682-715). At the same time, appellant was still not permitted to present evidence of his delusional disorder.

During the prosecutor's closing argument, the prosecutor told the jury, “if there were [irrational thoughts] you would have heard from some doctors” (Tr. 980). The prosecutor intentionally misrepresented the facts to the jury. At least one doctor was prepared to testify about appellant's delusional disorder, but that evidence was kept out only because of the state's objections. The prosecutor

should not have been allowed to argue that such a doctor did not exist. This "distasteful tactic" mandates a new trial. *See State v. Weiss*, 24 S.W.3d 198, 204 (Mo. App., W.D. 2000).

In *Weiss*, the prosecutor successfully prevented the defense from offering evidence of an alternate source for money in the defendant's checking account, which was relevant to show his mistake in accessing another person's bank account. 24 S.W.3d at 200. The prosecutor then argued that there *was no evidence* regarding the alternate source of funds. *Id.* at 202. Even though there was no objection to the prosecutor's closing argument, the Western District Court of Appeals reversed and remanded for a new trial. It is well-settled in Missouri that it is error for a prosecutor to 'comment on or refer to evidence or testimony that the court has excluded.'" *Id.*, *citing State v. Hammonds*, 651 S.W.2d 537, 539 (Mo. App., E.D. 1983).

Hammonds is even closer to the facts of this case. In *Hammonds*, the trial court sustained the state's objection and excluded the defendant's alibi witness as a sanction for failing to disclose him as a witness. 651 S.W.2d at 538. The prosecutor then argued that "no one ... would testify for this man because they don't want to perjure themselves" about the defendant's alibi. *Id.* at 539. This Court held that this was reversible error, even though a prosecutor can draw an unfavorable inference from the defendant's failure to produce an alibi witness. *Id.*

Furthermore, in both *Hammonds* and *Weiss*, the Courts of Appeals found this error to be so egregious that it caused a manifest injustice and was therefore

plain error. *Hammonds*, 651 S.W.2d at 539; *Weiss*, 24 S.W.3d at 199. *See also State v. Luleff*, 729 S.W.2d 530 (Mo. App., E.D. 1987) (*plain error for the prosecutor to argue in closing that the defendant had failed to produce a receipt for the sale of a tractor he was alleged to have stolen, where the state successfully prevented the receipt from being admitted into evidence*). Here, as well, the error is plain and resulted in a manifest injustice to appellant.

This Court cannot condone this misconduct on the part of the prosecutor. Appellant therefore respectfully requests that this Court reverse his convictions and remand for a new trial.

V.

The trial court erred in overruling defense counsel's motion for judgment of acquittal at the close of all the evidence and in sentencing appellant upon his conviction for arson in the first degree, because such rulings violated appellant's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not prove beyond a reasonable doubt that appellant knowingly disregarded an unjustifiable risk that he was placing nearby persons in danger of death or serious physical injury.

The trial court erred in overruling defense counsel's motion for judgment of acquittal because the state failed to introduce sufficient evidence to prove beyond a reasonable doubt that appellant committed arson in the first degree. Specifically, the state failed to prove that appellant's actions recklessly put others at risk of death or serious physical injury.

Before the state may deprive a person of his liberty, it must prove each element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-364 (1970). The constitution requires the fact finder to reach “a subjective state of near certitude” that the accused committed the charged offense. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). Without such certainty, a conviction cannot stand; however, the appellate courts must view the record in the

light most favorable to the verdict. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc), *cert. denied*, 510 U.S. 597 (1993). Thus, the critical inquiry for this Court is whether the evidence *could* reasonably support a finding of guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 318.

Section 569.040, provides that:

[a] person commits the offense of arson in the first degree when he knowingly damages a building or inhabitable structure, and when any person is then present or in near proximity thereto, by starting a fire or causing an explosion and thereby recklessly places such person in danger of death or serious physical injury.

Section 569.040.1. A person “acts recklessly” when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow. Section 562.016.4. Therefore, in order to convict appellant of first degree arson, the evidence must support a conclusion that appellant placed *someone* in danger of death or serious physical injury. *State v. Letcher*, 772 S.W.2d 795, 799 (Mo. App., W.D. 1989).

The evidence here established only the following. After Toni was able to get out of the house, appellant became angry (Tr. 749). He said, “if you come in, I’m taking a couple of you with me” and then threatened to burn the house (Tr. 749). Detective Truman heard liquid sloshing, as if in a can (Tr. 749-750). Another officer heard appellant say “I poured gas all over the place, I’m going to

torch it” (Tr. 787-788). At this moment, the front of the house went up in flames (Tr. 484, 750, 789).⁹

Appellant opened the back door of the garage and lay down in the doorway (Tr. 790). Officer Darrell Rader yelled at him to come out; finally appellant ran a few steps into the back yard holding a gun to his head (Tr. 793-794, 832-833). Other officers fired non-lethal bean bag pellets at appellant, and Rader fired at him twice with lethal rounds, although he did not hit him (Tr. 795-797, 833). The officers were standing in water from the fire hoses and the power lines above them were melting and they were worried they would be electrocuted (Tr. 799-800, 835, 854). So they went over the fence and tackled appellant and took him into custody after a struggle (Tr. 801-802, 835).

⁹ It was later determined that the cause of the fire was a burnable liquid poured in the living room then ignited with a match or lighter (Tr. 884). The fire department expert also testified that the house next door was in danger if the fire had gone on much longer (Tr. 885, 887). There was no evidence that appellant knew if there were people in their houses next door. *See State v. Whalen*, 49 S.W.3d 181 (Mo. banc 2001) (evidence was insufficient to support conviction for first-degree assault, where there was no evidence that defendant knew of presence of two back-up police officers in hallway when he shot other officer or that defendant had specific intent to cause serious injury to back-up officers).

This is not a case where appellant burned a structure containing other people. At most, the people at risk were police officers and firefighters; the sort of people who respond to every fire. This cannot be sufficient to elevate a simple arson to an arson in the first degree. There was no evidence that appellant was recklessly putting such people at risk. It looks more as if he was attempting to kill himself.

In *Commonwealth v. Stefaniak*, 44 Pa. D & C. 3d 523, 1987 WL 46864 (Pa. Com. Pl. 1987), the Pennsylvania Court of Common Pleas quashed an information for arson and recklessly endangering a person, where the charge was based on events that “could have occurred” to the firemen while extinguishing the fire. The Pennsylvania court held as a matter of law, that under such circumstances, the purpose of the law must be more than to protect against endangering the life or person of a firefighter. *Id.* at 527. Here also, something more must be meant by the statute. *See also State v. McBean*, 74 P.3d 1127 (Or. App. 2003) (no rational trier of fact could have found that stomping on a fire presented such a substantial risk of spreading it that conviction for reckless burning was sustainable).

The evidence was insufficient to support a conviction for first degree arson. This Court must reverse that conviction and discharge appellant from his sentence therefor.

VI.

The trial court erred in sentencing appellant on two separate counts of kidnapping, because this violated appellant's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 556.041, in that the kidnapping was a continuing course of conduct despite the state's charging Count I as unlawfully confining Toni for the purpose of inflicting physical injury on or terrorizing her and Count IV as unlawfully confining Toni and Renee for the purpose of using them as a shield or hostage.

Appellant was convicted of two counts of kidnapping Toni Selle based on the overnight events of May 30 and 31, 2001 (L.F. 18-20). Conviction of multiple offenses for the same acts and multiple punishments for the same offenses violated appellant's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. This is a question of law which this Court reviews *de novo*. ***State v. Mullenix***, 73 S.W.3d 32, 34 (Mo. App., W.D. 2002).

The United States Supreme Court has determined that defendants shall be free not only from successive prosecutions for the same offense, but also from multiple punishments for the same offense. ***North Carolina v. Pearce***, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 802 (1989). Double jeopardy analysis regarding multiple punishments focuses

therefore on whether cumulative punishments were intended by the legislature.

Missouri v. Hunter, 459 U.S. 359, 366-369 (1983). Section 556.041 governs the question of cumulative punishments in Missouri. *See, State v. McTush*, 827 S.W.2d 184 (Mo. banc 1992). Section 556.041 provides that:

When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if: . . . (4) the offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

In *State v. Morrow*, 888 S.W.2d 387 (Mo. App., S.D. 1994), this Court considered the question of whether two shots into a dwelling could support two counts of unlawful use of a weapon. The Court cited *State ex rel. Westfall v. Campbell*, 637 S.W.2d 94, 97 (Mo. App., E.D. 1982), for the proposition that the constitutional protection against double jeopardy "forbids the state from splitting a single crime into separate parts and then prosecuting the offense in piecemeal." The *Morrow* Court found no double jeopardy and held that firing two shots into a dwelling is not a "continuing course of conduct" because each offense is complete upon the firing of one shot. 888 S.W.2d at 393. In this regard it distinguished offenses which "by their nature" involve a continuing course of conduct. *Id.* "Examples include false imprisonment, bigamy, nonsupport, and operation of a house of prostitution." *Id.*

In *State v. French*, 79 S.W.3d 896 (Mo. banc 2002), the Missouri Supreme Court disagreed with *Morrow* insofar as the list of examples included criminal nonsupport. The Court held that criminal nonsupport was not defined as a continuing course of conduct but in “separate temporal units of prosecution.” *Id.* at 899. This makes nonsupport more akin to unlawful use of a weapon – where that crime can be defined as a separate offense for each shot fired, so can nonsupport be defined as a separate offense for each separate unit of time. *See also, State v. Yates*, 158 S.W.3d 798, 802 (Mo. App., E.D. 2005) (unlawful use of a weapon is not a continuing course of conduct, citing *Morrow* for other offenses which are).

Here, the charges of kidnapping involve one act of holding the victim in a house overnight. The two ways in which it was charged were two different *purposes*; two different *mental states*; but they were not two separate actions. Just as *Morrow* lists false imprisonment as an example of a continuing course of conduct, 888 S.W.2d at 393, so also is kidnapping where it is charged as confining a person for a substantial period of time. The language of the statute itself supports that:

A person commits the crime of kidnapping if he unlawfully removes another without his consent from the place where he is found or unlawfully confines another without his consent for a substantial period, for the purpose of

- (1) Holding that person for ransom or reward, or for any other act to be performed or not performed for the return or release of that person; or
- (2) Using the person as a shield or as a hostage; or
- (3) Interfering with the performance of any governmental or political function; or
- (4) Facilitating the commission of any felony or flight thereafter;
or
- (5) Inflicting physical injury on or terrorizing the victim or another.

Section 565.110.1. This is not different crimes which can be raised as different counts, but rather different ways of committing one continuing offense.

The test for a "continuing course of conduct" is "whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. If the latter, there can be but one penalty."

Morrow, 888 S.W.2d at 392, *citing* Wharton's Criminal Law (11th Ed.) Section 34. Appellant was charged with a course of conduct in kidnapping Toni Selle.

In *State v. Matthews*, 2004 WL 2381734 (Tenn. Crim. App. 2004), The Tennessee Court of Criminal Appeals held that the trial court in that case erred by failing to merge two kidnapping convictions into a single judgment of conviction. The defendant, Eric Matthews, had been charged in two separate indictments with especially aggravated kidnapping, a Class A felony, and aggravated kidnapping, a Class B felony. 2004 WL 2381734 at 1. The Court noted that the especially

aggravated kidnapping count alleged the defendant's use of a firearm to accomplish the kidnapping, and the aggravated kidnapping count alleged he committed the kidnapping to facilitate the felony of rape. *Id.* at 6. But, "kidnapping is a continuing offense." *Id.* (citation omitted.) "Notwithstanding the victim's attempt to escape, the defendant's actions in confining the victim constituted a continuing course of conduct and, as such, a single kidnapping offense. Therefore, the trial court should have merged the separate convictions into a single judgment of conviction." *Id.*

The state argued in the Southern District, and that Court found, that because Count IV was charged as kidnapping both Toni and Renee, one count pertained to each victim and there was no error. If kidnapping Toni could be struck as surplusage because of the double jeopardy problem, and the conviction be only for kidnapping Renee, then it might *appear* as if the conviction could be salvaged. That is because a jury may base a guilty verdict upon an instruction hypothesizing several acts in the conjunctive if at least one hypothesized act is supported by evidence.¹⁰ *State v. Stucker*, 518 S.W.2d 219, 221 (Mo. App., St.L.D. 1974).

¹⁰ This is why appellant has not challenged the sufficiency of the evidence for Point IV in a separate argument: even though there was insufficient evidence to support a conviction for using Renee as a shield, there was sufficient evidence to submit the charge of using Toni as a shield. But this does not cure the double jeopardy problem.

But Toni cannot be stricken as surplusage and still convict appellant under Count IV of kidnapping Renee for the purpose of using her as a shield or hostage, because the evidence does *not* support that conclusion. Appellant agreed during the standoff to put Renee out on the porch in the car seat, and a member of the SRT would get her (Tr. 735). But instead, appellant moved the chair away from the door, and Toni put Renee on the front porch in her car seat with a diaper bag of items she would need (Tr. 476-477). Appellant held the back of Toni's shirt while she did so and threatened to shoot her if she "tried anything" (Tr. 476-477, 845-846).¹¹ While appellant may have been using Toni as a shield, he was not using Renee as such.

The prejudice therefore from the double jeopardy violation is that appellant could not have been convicted of using Renee as a shield: it is *she* who must be stricken from Count IV as surplusage. What is left is two counts of kidnapping Toni, two charges which arise from a continuing course of conduct.

In *Idle v. State*, 587 N.E.2d 712 (Ind. App. 1992), the defendant was charged with multiple counts including two counts of kidnapping the same victim in two separate types of confinement: nonconsensual restraint in one place under subsection one of their statute, and removal from one place to another under subsection two of their statute. 587 N.E.2d at 715. The Court of Appeals of Indiana held that kidnapping is a continuous crime: it is continuously committed

¹¹ The negotiator said that appellant used Toni "as a shield" (Tr. 737).

so long as the unlawful detention lasts. *Id.* at 716. The victim was confined by removal, then she was restrained in a bedroom. *Id.* at 718. She was the victim of only one continuous episode of confinement, and the defendant could not be convicted twice for that single offense. *Id.*

Conviction of multiple offenses for the same acts and multiple punishments for the same offenses violated appellant's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and violated Section 556.041. This Court must reverse appellant's conviction of Count IV, class A kidnapping, and Count V, the concomitant armed criminal action conviction, and discharge him from those sentences.

CONCLUSION

For the reasons presented in Point I, appellant respectfully requests that this Court vacate his sentences and remand for a new sentencing hearing, where he shall be convicted as a prior offender and not a persistent offender. For the reasons presented in Point V, appellant respectfully requests that this Court reverse his conviction of Count VI, arson in the first degree, and discharge him from that sentence. For the reasons presented in Points II, III and IV, appellant respectfully requests that this Court reverse his convictions and remand for a new trial. For the reasons presented in Point VI, appellant respectfully requests that this Court reverse his conviction of Count IV, class A kidnapping, and Count V, the concomitant armed criminal action conviction, and discharge him from those sentences.

Respectfully submitted,

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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 11,797 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in December, 2005. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 7th day of December, 2005, to Shaun Mackelprang, Assistant Attorney General, 1530 P.O. Box 899, Jefferson City, Missouri, 65102.

Ellen H. Flottman

APPENDIX

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