No. SC87214

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

CHARLES SANCHEZ,

Appellant.

Appeal from the Circuit Court of Greene, Missouri
Thirty-First Judicial Circuit, Division One
The Honorable Don E. Burrell, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for two counts of kidnapping, §565.110 RSMo 2000, two counts of armed criminal action, §571.015, one count of unlawful use of a weapon, §571.030.1(4), and one count of first degree arson, §569.040, obtained in the Circuit Court of Greene County, the Honorable Don E. Burrell presiding. Appellant was sentenced to a total of twenty-two years imprisonment. The Missouri Court of Appeals, Southern District, affirmed appellant's conviction on October 5, 2005. This Court took transfer of this case on appellant's application, and therefore has jurisdiction. Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Charles Sanchez, was charged by amended information in the Circuit Court of Greene County with two counts of kidnapping, §565.110, two counts of armed criminal action, §571.015, one count of unlawful use of a weapon, §571.030.1(4), and one count of first degree arson, §569.040 (L.F. 18-20). Appellant's jury trial began on September 4, 2003, before the Honorable Don E. Burrell (Tr. 2).

Appellant challenges the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the following facts were adduced at trial: In May of 2001, Toni Selle and appellant lived at 2911 West Lombard in Springfield (Tr. 443, 445). Toni and appellant had a child together named Renee Sanchez, who was five months old in May 2001 (Tr. 444, 447). Toni's son, Stevie, who was four in May 2001, also lived with Toni and appellant (Tr. 444, 447).

The couple had an argument on May 30, 2001, because appellant had not come home that night (Tr. 450). Toni told appellant that 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 packed her belongings (Tr. 451-452). Toni and appellant spoke, and Toni again told appellant that she was leaving him (Tr. 451). Around 3:00 p.m., Toni left the house with Renee to pick up Stevie from day care (Tr. 452-453).

At 5:30 p.m., appellant said he had to go get rid of a gun (Tr. 454-455). He left the house, but returned within ten minutes (Tr. 454-455). When appellant returned, he slammed the front door and told Toni that nobody was leaving the house (Tr. 455). Appellant pulled

out a gun (Tr. 455). Appellant told Toni that people were following him and that if anybody tried to enter the house that he would kill them with the ammo he had; he also said that he would burn the house down (Tr. 455). Appellant blocked the front door with a love seat and put items in the hallway so he could hear if anyone came in the back (Tr. 465). He also made Toni bring a can of gasoline into the house and put it by the chair (Tr. 474). Appellant screamed and yelled at Toni to make the baby stop crying (Tr. 456-457).

It took Toni two hours to convince appellant to allow her to call Stevie's grandparents, Dottie and Russell Hunsaker, and have them come pick Stevie up (Tr. 457, 567). Appellant held a gun to Toni's head during the phone call (Tr. 459). They told Toni that they would come and get Stevie (Tr. 458, 567).

When the Hunsakers arrived, Toni answered the door, holding Renee (Tr. 461, 568-570, 606). Appellant was right behind her holding onto her shirt (Tr. 461). Stevie went outside (Tr. 461, 572). Toni tried to mouth to Dottie that appellant had a gun, but Dottie did not understand (Tr. 462, 572). Toni tried to leave with the Hunsakers and Stevie, but appellant pulled her back in the door (Tr. 462-463, 573, 608). Toni took a swing at appellant, but she accidentally dropped Renee and then appellant pushed her to the floor (Tr. 463, 575, 609). Russell ran in the house to help and appellant pointed the gun at his head (Tr. 463, 574-575, 610). Appellant told Russell to get out of the house or he would shoot him (Tr. 464, 577, 610-611). Russell left the house (Tr. 464, 576). The Hunsakers went to a convenience store and called the police (Tr. 464, 576-578, 611).

Once the Hunsakers left, appellant again blocked the front door with the love seat (Tr. 464-465). He made Toni sit on his lap, while she was holding Renee, and call 911 to tell them that nothing was wrong (Tr. 464-466). Appellant held the gun to Toni's back (Tr. 466). After she made the call, appellant pulled the window 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).

The Strategic Response Team of the Springfield Police Department responded to the scene (Tr. 631-633, 716-720, 774-775). Negotiators talked to appellant on the phone throughout the night, and occasionally spoke to Toni (Tr. 469-470, 475, 635-638, 716-720, 722-732). John Truman was one of the negotiators at the scene (Tr. 716, 719-720). When he was briefed on the situation, he was told that Toni and her baby were being held against their will inside the house (Tr. 721). Truman was also told that appellant was armed with a handgun and that he could possibly be under the influence of a narcotic (Tr. 721).

Appellant, Toni, and Renee spent most of the night sitting 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). Sometime during the night, Toni called Dottie and said that appellant wanted her to call a television station, KOLR 10, and have them come to the house (Tr. 580, 627). If they came, appellant said he would come out and let everyone go (Tr. 580). Dottie called the station (Tr. 580). Appellant also told the negotiator that he wanted to see his front door on television and that he had something he wanted to tell the media (Tr. 644-645). Nothing came of this (Tr. 646).

The negotiator talked appellant into letting Toni go, but she would not leave without Renee (Tr. 475-476, 734-735). Toni convinced appellant to let her grandmother come and pick up Renee (Tr. 475-476, 655). She put Renee on the front porch in her car seat (Tr. 476-477, 735). Appellant held the back of Toni's shirt while she did so and threatened to shoot her if she "tried anything" (Tr. 476-477, 737-738, 845-846). Renee was taken to safety by the emergency assault team (Tr. 738).

Appellant spoke with negotiator Truman about a variety of things, including caverns and tunnels running underneath his house and the neighborhood (Tr. 740). Appellant told Truman that there was a police conspiracy involving the tunnels (Tr. 741). Appellant said there was hair growing out of the walls on the tunnels (Tr. 741). Appellant's statements were irrational and were consistent with drug use (Tr. 741). During the standoff, Truman approached his conversations with appellant differently because he believed that appellant was under the influence of drugs (Tr. 742-743).

Toni also spoke with negotiator Truman, who told her that she needed to try to get herself out of the house because the SWAT team would not be attempting a rescue (Tr. 478-479, 745-748). She went down the hall to the bathroom with appellant, and the negotiator spoke to appellant on the phone (Tr. 478-479, 748). While appellant was talking to the negotiator, 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 of the house, Truman was talking to appellant on the phone (Tr. 749). Appellant became extremely angry (Tr. 749). He said that if the police came into the

house, he would take a couple of them with him and then threatened to burn the house (Tr. 749). Office Truman heard liquid sloshing 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). Officers tried to evacuate the nearby houses (Tr. 751). Because of the fire, the siding on the house immediately adjacent to 2911 was beginning to melt, and the officers were worried about the safety of the neighbors (Tr. 751-752).

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 Rader did not hit him (Tr. 795-797, 833). The officers were afraid that they would be electrocuted because they were standing in water from the fire hoses and the power lines above them were melting (Tr. 799-800, 835, 854). They quickly went over the fence, tackled appellant, and took him into custody after a struggle (Tr. 801-802, 835).

It was later determined that the fire was caused by a burnable liquid that was poured in the living room and then ignited with a match or lighter (Tr. 882-884). The fire department expert also testified that the house next door was in danger of catching fire if the fire had gone on much longer (Tr. 885, 887).

After the close of evidence and arguments of counsel, the jury found appellant guilty as charged (L.F. 61-66, 75; Tr. 988, 1001). On August 6, 2004, the court sentenced appellant

to concurrent terms of fifteen years on Counts I, II, IV, and V; five concurrent years on Count III; and seven consecutive years on Count VI (L.F. 75; Tr. 1009, 1040-1041). This appeal follows.

ARGUMENT

I.

The trial court did not err in finding appellant to be a prior and persistent offender and in sentencing him as such, because the State proved beyond a reasonable doubt that appellant had pleaded guilty to two felonies committed at different times in that the two felonies were distinct crimes that occurred at different times and locations.

Appellant claims that the trial court erred in finding him to be a prior and persistent offender because his two prior felony offenses were not committed at different times**,** but were allegedly part of a continuing course of conduct (App. Br. 24). Appellant's claim is without merit.

A. Relevant Facts

Appellant was charged as a prior and persistent offender (L.F. 18-20). Prior to the trial, a hearing was held to determine if appellant was a prior and persistent offender (Tr. 196). The State presented evidence on two prior felony counts from Mississippi County (Tr. 197). State's Exhibit 101 contained certified copies of the docket sheets, information, warrant, and sentence and judgment in Case No. CR297-10FX. State's Exhibit 102 was a certified copy of appellant's Department of Corrections Records.

The information that charged the prior convictions stated, for Count I, that on January 4, 1997, appellant committed the class D felony of unlawful use of a weapon in Mississippi County for "knowingly carry[ing] concealed upon or about his person a firearm, to-wit: a .380 automatic hand gun" (State's Exhibit 101). For Count II, the information stated that on

January 4, 1997, appellant committed the class D felony of unlawful use of a weapon in Mississippi County for "knowingly exhibit[ing], 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" (State's Exhibit 101).

On March 24, 1997, appellant pled guilty to both of these felony offenses (State's Exhibit 101). He received concurrent four year sentences (State's Exhibit 101).

The prosecutor acknowledged that the prior felonies occurred in the same case and on the same day, but argued that they were "two separate and distinct offenses committed at different times" (Tr. 198). To show that appellant's two prior felonies did, in fact, occur at different times, the State called Steven Coleman, a former patrol sergeant supervisor with the Charleston Police Department (Tr. 198-199).

Officer Coleman testified that they received a call on January 4, 1997, from the Pizza Hut in the Charleston Plaza (Tr. 199). The dispatcher said a white man came into the store with a 12-gauge shotgun (Tr. 201). Officer Coleman went to Pizza Hut with four other officers, and on the way they learned that the suspect had left in an old Ford truck (Tr. 201-202). As the officers entered the Charleston Plaza parking lot, they saw the truck about one hundred yards from the Pizza Hut, and stopped it (Tr. 202-203).

Officer Coleman testified that appellant was inside the Ford truck (Tr. 202). The officers got appellant out of the truck, patted him down, and located a concealed .380 automatic handgun concealed in his waistband (Tr. 202). The 12-gauge shotgun was lying on the seat in plain view (Tr. 203). Both guns were loaded (Tr. 203).

The prosecutor argued that the two crimes were "distinctly different" and occurred at two different times and in two different locations (Tr. 207). Defense counsel argued that if appellant had the handgun concealed in his waistband while he was brandishing the shotgun inside the Pizza Hut,[1] then appellant was engaged in a continuing course of conduct and the crimes did not occur at "different times." The trial court found that there was "a distinct moment in time that was separate from the Pizza Hut incident" (Tr. 209). The trial court found beyond a reasonable doubt that appellant qualified as a persistent offender under Missouri law (Tr. 210, 232).

Appellant raised this issue in his motion for a new trial (Supp. L.F. 2-3).

B. Analysis

Missouri law provides that "[t]he court may sentence a person who has pleaded guilty to or has been found guilty of an offense . . . to an extended term of imprisonment if it finds the defendant is a persistent offender or a dangerous offender." Section 558.016.1. A "persistent offender" is one who has pleaded guilty to or has been found guilty of two or more felonies committed at *different times*. Section 558.016.3.

Appellant complains that the two prior felonies the State used to prove that he was a persistent offender were not committed at "different times" because they were committed on the same day and close in time and location to each other (App. Br. 26-27). In support of his

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[1]Defense counsel admitted that there was no evidence that appellant had the gun in his waistband when he was inside Pizza Hut (Tr. 208).

argument, appellant cites *State v. Reynolds*, 161 S.W.3d 887, 888 (Mo. App. E.D. 2005), and *Matthews v. State*, 123 S.W.3d 307, 309 (Mo. App. E.D. 2003). In both of these cases, the actual dates on which the prior offense were committed were unknown. *Id.* The court was informed only of the dates the defendants pled guilty or were found guilty of the prior offenses the state attempted to use to prove prior offender status. *Id.* Thus, neither of the cases appellant cites address whether felonies that are known to have been committed on the same day, but at different times and locations and in different incidents are committed at "different times" under §558.016.3.

Appellant also cites *State v. Williams*, 800 S.W.2d 118 (Mo. App. E.D. 1990). In that case the issue was whether the defendant had properly been convicted as a class X offender. *Id.* at 119. Under the applicable statute in that case, the crimes underlying the prior convictions had to be "committed at different times." §558.019.4(3). Two of the three felonies relied on by the state to support a finding that the defendant was a class X offender were charged in the same information and charged that the defendant had burglarized two businesses on the same date, one possessed by Dunlop Shell and the other possessed by Treasured Times Video. *Id.* at 120. Both businesses were located on Highway 67. *Id.* The Missouri Court of Appeals, Eastern District, held that from the record in front of the court, the inference that the two crimes were committed at *different times* was not clear and thus the court could not conclude there was proof beyond a reasonable doubt. *Id.* The court remanded the case to the trial court for a hearing on whether the burglary offenses were committed at different times. *Id.*

It appears that the court acted with an abundance of caution in *Williams* because it seemingly would be difficult for a person to burglarize two separate businesses at the same time. Perhaps the court wanted to make sure that the two businesses were not housed in the same building; the record before the court merely showed that the two businesses were located on the same highway, but did not provide the exact addresses for the businesses. *Id.*

The fact that two crimes were committed within the same time frame does not mean that they could not have been committed at different times. *State v. Gilliehan*, 865 S.W.2d 752 (Mo. App. E.D. 1993), citing *State v. Davis*, 611 S.W.2d 384, 386 (Mo. App. S.D. 1981) ("A satyr might criminally sate his desires on the same date at different matings without having committed all of his felonious fornications at the same time"). In *Gilliehan*, the court found that the crimes underlying the prior convictions were committed at different times because they were committed at different times – 5:30 a.m. and 10:30 a.m. – albeit on the same day. *Gilliehan*, 865 S.W.2d at 755.

In this case, the State presented the testimony of an arresting officer as evidence that appellant's prior felonies were two separate and distinct offenses committed at different times in different locations. The first offense was committed when appellant entered a Pizza Hut brandishing a 12-gauge shotgun (Tr. 201). Appellant left the Pizza Hut and the incident with the shotgun was over. The second offense was committed some time after appellant left the Pizza Hut and was in a truck in the Charleston Plaza parking lot one hundred yards from

the Pizza Hut (Tr. 202-203). Officers got appellant out of the truck, patted him down, and located a concealed .380 automatic handgun in his waistband (Tr. 202). This second crime of carrying a concealed weapon was plainly committed at a different time (and place), even if the commission of the offense might have overlapped with the earlier offense. Additionally, there was no evidence that appellant had a concealed weapon in Pizza Hut.

The plain language of the statute states that the prior felonies must be committed at "different times." The statute does not state that the felonies must be committed on different days or in different months or in different years. The evidence in this case showed that appellant's two prior felonies were committed at different times. The trial court had the opportunity to hear the evidence presented by the state and determined that there was "a distinct moment in time [that appellant committed the crime of carrying a concealed weapon] that was separate from the Pizza Hut incident" (Tr. 209).

Finally, appellant appears to argue in footnote six on page twenty-seven of his brief that having a judge determine whether two felonies were committed at *different times,* for the purpose of determining persistent offender status, violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* ruled in applicable part 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 proved beyond a reasonable doubt. *Id.* at 490.

A judge finding that prior felonies were committed at different times is incidental to the judge finding that the prior felony convictions existed at all. By necessity, when a judge determines that a prior conviction exists, he determines the who, what, where, *and when* of that conviction. Moreover, all of the essential facts surrounding a prior felony conviction have been previously found by a fact finder or admitted to by the defendant, and thus are reliable. Accordingly, when a judge determines – as in the case – that two offenses occurred at "different times," the judge is simply making the legal determination of whether the established facts of the underlying convictions satisfy the statutory language of §558.016.3.

Having a jury determine the facts supporting a defendant's prior felony convictions would obviously make a jury aware that a defendant had prior convictions and would expose them to the details of those convictions. Such a system would not safeguard a defendant against the prejudice that flows from prior convictions.

Because appellant committed two prior felonies at different times, the trial court did not err in finding appellant to be a prior and persistent offender and in sentencing him as such. If this Court, however, determines that the trial court erred in finding appellant to be a prior and persistent offender, the proper remedy would be to correct the sentence and judgment *nunc pro tunc* so that it lists appellant as a prior offender and not a persistent offender.[2] This is the proper remedy because appellant did not actually receive an extended

[2]Notably, the sentence and judgment is also incorrect as to the classification of Count IV (Kidnapping) (L.F. 75). Count IV should be listed as a class A felony, not a class B

term of imprisonment under §558.016.1 and §558.016.7. Each of appellant's sentences was within the range of imprisonment authorized by §558.011 (L.F. 75). For example, first degree arson is a class B felony. §569.040.2. The regular term of imprisonment for a class B felony is a term of years not less than five years and not to exceed fifteen years. §558.011.1(2). Appellant was sentenced to seven years for the arson charge (L.F. 75). Appellant would have been sentenced under §558.011 and faced the same range of punishment for each of his convictions if he was found to only be a prior offender instead of a persistent offender. §558.016.1. Appellant does not dispute that he would at least be a prior offender (App. Br. 29).

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felony (L.F. 19, 49, 75).

II.

The trial court did not plainly err in excluding Dr. Thronson's testimony because the trial court's actions did not violate appellant's right to present a defense in that the defense failed to make an offer of proof regarding Dr. Thronson's purported testimony, and assuming that Dr. Thronson would have testified that appellant's delusions were brought on and precipitated by voluntary intoxication, that testimony would not have provided appellant with a viable defense because voluntary intoxication cannot be used to negate criminal responsibility or culpable mental state.

Appellant argues that the trial court plainly erred in prohibiting Dr. Thronson's expert testimony regarding appellant's mental state at the time of the offense (App. Br. 30). Appellant claims that Dr. Thronson's testimony would have negated an element of kidnapping, that appellant confined Toni for an improper purpose, and would have shown that his true purpose, due to his delusions, was to protect Toni (App. Br. 30).

A. Relevant Facts

The State filed a pretrial motion in limine to prohibit appellant from presenting evidence of voluntary intoxication or voluntary drug use on the issue of his state of mind (L.F. 27-32). The motion in limine also sought to exclude the testimony of Dr. Burstin, Dr. Blansett, and Dr. Thronson on the basis that all three doctors concluded that at the time of the alleged offense appellant suffered from methamphetamine induced delusions as a result of voluntary substance abuse (L.F. 27-32). The reports the doctors prepared were submitted

to the court (Tr. 12). All three doctors testified at a hearing regarding appellant's competency to proceed to trial (Tr. 13).

At that hearing, Dr. Andrea Thronson testified that she evaluated appellant to determine if he was competent to stand trial after receiving an order from the State of Missouri (Tr. 43, 47). Dr. Thronson testified that she diagnosed appellant as "presently suffering from a delusional disorder," and that the delusions "surround[ed] the events of the alleged offense" (Tr. 51). Dr. Thronson testified that she believed the delusions were related to the use of illicit substances, particularly methamphetamine, and that at the time of the offense appellant was "suffering from a methamphetamine-induced psychosis" (Tr. 52). She learned that appellant had been using excessive amounts of methamphetamine over a relatively prolonged period of time (Tr. 52). She believed that appellant had developed a delusional disorder that was brought on or precipitated by his prolonged and excessive use of methamphetamine (Tr. 52-54).

Dr. Blansett and Dr. Burstin were called by the State. Dr. Blansett testified that he was of the opinion that appellant suffered from a methamphetamine-induced psychosis at the time of the standoff (Tr. 123, 126). Dr. Burstin testified that he could not establish the presence of delusions in the absence of intoxication (Tr. 107). Dr. Burstin testified that he based his opinion on the fact that appellant had no mental health history and on a letter that appellant wrote him wherein he discussed his use of drugs near the day of the standoff and how the drugs affected his ability to think (Tr. 108-110). Dr. Burstin said it would be "very atypical for someone with no mental health history to develop a delusion disorder at exactly

the same time they were taking drugs. They typically cause people to be paranoid" (Tr. 110). Further, Dr. Burstin testified that in the letter appellant questioned the delusions he had surrounding the standoff, which indicated that he did not suffer from an ongoing delusional disorder (Tr. 111).

Based on the doctors' reports and their testimony at the competency hearing, the court granted the State's motion in limine (Tr. 223). During the trial, appellant did not ask the court to reconsider its ruling, nor seek to make an offer of proof regarding what Dr. Andrea Thronson's testimony would be.

B. Standard of Review

Trial courts have broad discretion to admit or exclude evidence at trial and this Court will reverse only upon a showing of a clear abuse of discretion. *State v. Chaney*, 967 S.W.2d 47, 55 (Mo. banc 1998). A trial court abuses its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Biggs*, 91 S.W.3d 127, 133 (Mo. App. S.D. 2002). If reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Id.*

C. Analysis

Appellant argues that the trial court erred in excluding Dr. Thronson's testimony, because it would have allegedly supported a diminished capacity defense (App. Br. 29). It is not clear from the record, however, that appellant sought to put on a diminished capacity defense.

Appellant did enter a plea of not guilty by reason of mental disease or defect (L.F. 21, 27; Tr. 12). To that end, appellant filed a motion for a state-ordered mental exam to determine if he was competent to stand trial and "[w]hether the defendant, at the time of the alleged offense, as a result of mental disease or defect, did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of confimring (sic) his conduct to the requirements of the law" (L.F. 21). The defense of mental disease or defect excluding responsibility is different than the defense of diminished capacity, which allows the defendant to introduce evidence of a mental disease or defect to prove that he did not have the requisite mental element of the crime charged. *See State v. Jones*, 134 S.W.3d 706, 713-714 (Mo. App. S.D. 2004)(comparing the defenses of mental disease or defect excluding responsibility and diminished capacity).

Defense counsel did not present the defense of diminished capacity in his opening statement or tell the jury that he planned to call any witnesses to that effect (Tr. 436). Further, defense counsel himself explicitly said that he was not pursuing a defense of diminished capacity (Tr. 674). As the trial progressed, appellant elicited some evidence that he was acting irrationally (Tr. 495-499, 515, 525, 530-531, 540, 666). The State argued to the court that the jury had not heard any possible reasons for the way he was acting, and that

if the State was not allowed to present evidence showing that appellant's behavior was consistent with drug use, the jury would be led to believe that appellant was in some way mentally ill (Tr. 669-715, 701). In response to the prosecutor's request, defense counsel made the following assertions to the court:

> But what I can tell you we're not going [to] argue is we're not going to argue that Mr. Sanchez, for some reason, had some diminished capacity, that Mr. Sanchez, that we're not, we're not going to argue that a jury would have any reason in the world to believe that, or any reason, or any way in the world to not convict him based upon some, you know, voluntary delusional state.

(Tr. 674).

The prosecutor then told the court that he was concerned that defense counsel would argue in closing that appellant acted as he did because he "he thought the secret society was chasing him," which he believed was really "just back dooring diminished capacity" (Tr. 674). The court also expressed concern that the jury might think appellant was "nuts and nobody can say anything about it without them offering some counter alternative to that explanation is just a way of backdooring diminished capacity" (Tr. 677). Despite the prosecutor and court's characterization of defense counsel's strategy as "backdooring diminished capacity," respondent cannot find anything on the record that shows that defense counsel was actually pursuing a diminished capacity defense, especially in light of counsel's statement that he was not pursuing such a strategy.

In any event, even if defense counsel was attempting to pursue a diminished capacity defense at trial, he did not ask the court to reconsider its ruling on the State's motion in limine, nor seek to make an offer of proof at trial regarding what Dr. Andrea Thronson's testimony would be. The purpose of a motion in limine is to "point [ ] out to the court and to opposing counsel which anticipated evidence might be objectionable." *State v. Mickle*, 164 S.W.3d 33, 54-55 (Mo. App. W.D. 2005). However, a trial court's ruling on a motion in limine seeking to exclude evidence is considered interlocutory in nature and is subject to change during the trial. *Id.*; *State v. Purlee*, 839 S.W.2d 584, 592 (Mo. banc 1992). As such, a motion in limine preserves nothing for appeal. *Id.* To properly preserve a challenge to the admission of evidence, the objecting party must make a specific objection to the evidence at the time of its attempted admission. *State v. Purlee*, 839 S.W.2d at 592. "Missouri courts strictly apply these principles based on the notion that trial judges should be given an opportunity to reconsider their prior rulings against the backdrop of the evidence actually adduced and in light of the circumstances that exist when the questioned evidence is actually proffered." *State v. McCullum*, 63 S.W.3d 242, 259 (Mo. App. S.D. 2001).

In this case, appellant never sought to put Dr. Thronson on the stand. In essence, his claim is merely that the court erred in sustaining the State's motion in limine. This claim is not appealable. Moreover, appellant did not preserve this issue for appellate review because he did not make an offer of proof regarding what Dr. Andrea Thronson's testimony was or why her testimony was admissible (App. Br. 33). Because this issue is not preserved, this

Court should decline to consider appellant's argument. See *State v. Lingle*, 140 S.W.3d 178, 188 (Mo. App. S.D. 2004).

If this Court chooses to address appellant's claim, it is reviewable for plain error only. *State v. Rousan*, 961 S.W.2d 831, 842 (Mo. banc 1998) *cert. denied* 524 U.S. 961 (1998). When conducting plain error review, appellate courts look for error that, "establishes substantial grounds for believing that manifest injustice or miscarriage of justice has occurred." *State v. Bozarth*, 51 S.W.3d 179, 180 (Mo. App. W.D. 2001). Plain error is error that is, "evident, obvious and clear." *Id.* Further, "The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." *State v. Roberts*, 948 S.W.2d 577, 592 (Mo. banc 1997) *cert. denied*, 118 S.Ct. 711 (1998).

The trial court did not plainly err in prohibiting Dr. Andrea Thronson's testimony because it would have not provided appellant with a viable defense. Respondent notes that because appellant failed to make an offer of proof at trial, it is impossible to know exactly what Dr. Thronson's testimony would have been. Dr. Thronson did testify at the competency hearing. However, competency and NGRI / diminished capacity are two separate issues and no doubt she would be asked different questions as to appellant's mental state at the time of trial as opposed to at the time of the crime. Thus, Dr. Thronson's testimony at the competency hearing would not serve as an offer of proof. If her testimony at the competency hearing were to serve as an offer of proof, her testimony would not have provided appellant with a viable defense.

Dr. Thronson testified at the pretrial competency hearing that she evaluated appellant to determine if he was competent to stand trial after receiving an order from the State of Missouri (Tr. 43, 47). Dr. Thronson testified that she diagnosed appellant as "presently suffering from a delusional disorder" and the delusions "surround[ed] the events of the alleged offense" (Tr. 51). Dr. Thronson testified that she believed the delusions were related to the use of illicit substances, particularly methamphetamine, and that at the time of the offense appellant was "suffering from a methamphetamine-induced psychosis" (Tr. 52). She learned that appellant had been using excessive amounts of methamphetamine over a relatively prolonged period of time (Tr. 52). She believed that appellant had developed a delusional disorder that was brought on or precipitated by his prolonged and excessive use of methamphetamine (Tr. 52-54).

Her purported testimony at trial, assuming it would have been similar to her testimony at the competency hearing, was not evidence that appellant suffered from diminished capacity that could legally be used to negate criminal responsibility or culpable mental state. All of the doctors that examined appellant, including Dr. Thronson, came to the same conclusion: that at the time of offense appellant suffered from methamphetamine-induced delusions as a result of voluntary substance abuse (L.F. 29-30; Tr. 52-54, 107, 126). Or, put another way, the doctors could not establish the presence of delusions in the absence of intoxication (Tr. 107). Defense counsel even admitted to the court that he did not know of any diagnosis that had ever been made of appellant "that was not based at least in part upon some substance abuse issues" (Tr. 10).

Thus, Dr. Thronson's testimony would not have provided appellant with a viable defense because it is well established in Missouri that evidence of voluntary intoxication is not admissible to negate the mental state of an offense. §562.076. Nor can voluntary intoxication "provide an insanity defense absent a **separate** mental disease that results in diminished capacity **without the voluntarily ingested drugs**." *State v. Rhodes*, 988 S.W.2d 521, 526 (Mo. banc 1999)(emphasis added).

In this case Dr. Thronson would not have been able to testify that appellant suffered from a mental disease or defect, not caused by voluntary drug use, that prevented him from having the requisite mental elements of kidnapping. Thus, the trial court did not plainly err in excluding her testimony.

III.

The trial court did not abuse its discretion in overruling appellant's objections and in allowing negotiator Truman to testify that appellant's behavior was consistent with drug use because that testimony did not constitute evidence of other crimes in that it did not definitely associate appellant with another crime and this evidence was not introduced to show appellant's propensity to commit the charged crimes in that it was admissible to present a complete and coherent picture of the events surrounding the charged offenses.

Appellant argues that the trial court abused its discretion in admitting negotiator Truman's testimony that appellant's behavior was consistent with drug use (App. Br. 38). Appellant claims this testimony of voluntary intoxication was improper character evidence and was harmful because appellant was not permitted to offer expert testimony regarding his alleged defense of diminished capacity (App. Br. 38).

A. Standard of Review

Trial courts have broad discretion to admit or exclude evidence at trial and this Court will reverse only upon a showing of a clear abuse of discretion. *State v. Chaney*, 967 S.W.2d 47, 55 (Mo. banc 1998). A trial court abuses its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Biggs*, 91 S.W.3d 127, 133 (Mo. App. S.D. 2002). If reasonable persons can differ about the propriety

of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Id.*

B. Relevant Facts

The State filed a pretrial motion in limine to prohibit appellant from presenting evidence of voluntary intoxication or voluntary drug use on the issue of his state of mind (L.F. 27-32).

As the trial progressed, however, appellant elicited evidence that he was acting irrationally (Tr. 495-499, 515, 525, 530-531, 540, 666). The State argued to the court that while appellant had elicited evidence that he was acting irrationally, the jury had not heard any possible reasons for the way he was acting (Tr. 669-715). The prosecutor argued that if the State was not allowed to present evidence showing that appellant's behavior was consistent with drug use, the jury would be led to believe that appellant was in some way mentally ill (Tr. 701). A lengthy debate was had on the record (Tr. 669-682, 701-714). The prosecutor argued that evidence that appellant's behavior was consistent with drug use would not be presented for the truth of the matter asserted, but to show how the negotiators handled appellant differently during the standoff because they believed he might be taking drugs (Tr. 672-673, 678).

The court allowed the State to make an offer of proof with negotiator John Truman, and then allowed Truman to testify before the jury (Tr. 682, 715). The court said that appellant had raised an inference that appellant was mentally ill, which would go uncontested unless the state was allowed to present evidence about another reason why appellant acted

the way he did (Tr. 712-714). The court said it had "cut off [the State's] arm completely as to have any way to counter" the inference that appellant was mentally ill (Tr. 714). The court said it would allow the evidence because it was "fair to at least raise the inference that [drug use was] one of the possibilities" why appellant acted the way he did (Tr. 714). Further, evidence that Truman thought appellant's behavior was consistent with drug use was a way of "painting the entire picture" and "explains how they handled the negotiation" (Tr. 714). The court said that it would preclude the evidence "if I thought it was somehow fundamentally unfair, but it's not" and said it was "not going to let this officer testify he's on drugs or not" (Tr. 714). The court told defense counsel that he could ask Truman whether appellant's behavior was also consistent with schizophrenia (Tr. 715).

When Truman began testifying before the jury, defense counsel renewed his objection to Truman's testimony and asked for his objection to be continuing (Tr. 720-721). Truman testified that appellant's statements were irrational and were consistent with drug use (Tr. 741). Truman also testified that during the standoff, he approached his conversations with appellant differently because he believed that appellant was under the influence of drugs (Tr. 742-743). The prosecutor also elicited Truman's testimony that he had no idea of whether or not appellant was under the influence on narcotics (Tr. 743).

During cross-examination, defense counsel questioned Truman about his testimony that appellant's behavior was consistent with drug use:

Q. You've indicated that this up and down demeanor of Mr. Sanchez was, could possibly be similar to what other people you've seen exhibit and may have, had been, had been using narcotics?

A. Yes, sir.

Q. And once again, you're not saying that Mr. Sanchez was utilizing narcotics?

A. No, I'm not, sir.

* * *

Q. And certainly you all had the – you know, you, you guys didn't find any methamphetamine or other drugs in his blood system, did you?

A. I don't know. I can't answer that.

* * *

Q. So you, you weren't supposing or speculating that this is consistent with potential methamphetamine use based on your knowledge that he had any kind of narcotics in his system, are you?

A. No scientific knowledge, no.

Q. All right. And, of course, what you said was is that some of the things he did, you've seen people who were on drugs that acted that same way?

A. Yes, sir.

Q. Of course there's people that aren't on drugs that act that way, too?

A. That'd be a fair statement.

(Tr. 765-767). Defense counsel also elicited testimony from Truman that the psychologist who was advising him during the negotiations told him that appellant could be displaying some signs of schizophrenia (Tr. 768-769). Counsel also elicited from Truman's testimony that the psychologist did not have any personal knowledge whether or not appellant had drugs in his system (Tr. 769).

C. Analysis

The general rule is that evidence that the defendant has committed uncharged crimes is not admissible to show the defendant's propensity to commit such crimes. *State v. Rousan*, 961 S.W.2d 831, 842 (Mo. banc 1998). Proffered evidence will run afoul of this rule if it shows that the defendant has committed, been accused of, been convicted of or definitely associated with another crime or crimes. *State v. Hornbuckle*, 769 S.W.2d 89, 96 (Mo. banc 1989). Vague references are not characterized as clear evidence associating a defendant with other crimes. *State v. Hornbuckle*, 769 S.W.2d 89, 96 (Mo. banc 1989). The testimony at issue in this case was not even a vague reference to a specific crime.

Truman merely testified that appellant's statements and behavior were consistent with drug use (Tr. 740). Truman did not testify that appellant was definitely under the influence of drugs, let alone testify that appellant possessed a certain quantity of a controlled substance. In fact, the prosecutor elicited Truman's testimony that he had no idea of whether or not appellant was under the influence of narcotics (Tr. 743). Additionally, defense counsel thoroughly cross-examined Truman and elicited evidence that Truman did not have any

scientific knowledge that appellant had any kind of narcotics in his system, that delusional behavior could be caused by things other than drug use, including schizophrenia, and that the psychologist advising Truman did not have any personal knowledge about whether appellant was using drugs (Tr. 765-769). Respondent also notes that *defense counsel* was the first one to suggest that appellant might be under the influence of methamphetamine in particular (Tr. 766).

Even if Truman's testimony can be construed as evidence of other crimes, there are a number of exceptions that allow the introduction of evidence of other crimes. As it pertains to this case, uncharged crimes are admissible when they are part of the circumstances or the sequence of events surrounding the offense charged. *State v. Harris*, 870 S.W.2d 798, 810 (Mo. banc 1994). The State may paint a complete and coherent picture of the offense that transpired and need not sift and separate the evidence. *Id.* It is within the trial court's discretion to determine whether the probative value of the proffered evidence outweighs its prejudicial effect. *State v. Simms*, 859 S.W.2d 943, 946 (Mo. App. E.D. 1993).

Truman's testimony that appellant's behavior was consistent with drug use helped the State paint a complete picture of why appellant might have behaved the way he did. *See State v. Myers*, 997 S.W.2d 26, 35-36 (Mo. App. S.D. 1999) (court found that evidence that defendant was under the influence of an illegal drug when he randomly shot at vehicles from an overpass was a part of the circumstances of the offenses that was logically and legally relevant to prove defendant's guilt and so was admissible at trial). The possibility that

appellant's behavior was caused by drug use rebutted what had been an uncontested inference, raised by appellant throughout the trial, that he was mentally ill.

Additionally, Truman's testimony helped explain how the negotiators dealt with appellant during the standoff. Truman testified that during the standoff, he approached his conversations with appellant differently because he believed that appellant was under the influence of drugs (Tr. 742-743). Specifically, Truman testified that people who are under the influence of drugs "tend to jump to conclusions rather quickly or want to be the first one to act and it's not necessarily the most rational of reactions" (Tr. 742). He testified that he would not want to say anything to someone who is under the influence of drugs that may make them believe that "we're taking steps that would really not enforce a confrontation" (Tr. 743). This testimony provided the jury with a complete and coherent picture of the events surrounding the offenses charged.

Moreover, appellant cannot show that he was prejudiced by Truman's testimony that his behavior was consistent with drug use. The jury did not convict appellant because of Truman's testimony. The jury convicted appellant because the evidence was undisputed that appellant prevented Toni Selle and their daughter from leaving their house over night, during which time he threatened Toni with a gun and used her and Renee as a shield to avoid being shot or captured by the police. The jury convicted appellant because the evidence was undisputed that he pointed a gun at Russell Hunsaker when Russell bravely tried to help Toni. The jury convicted appellant because the evidence was undisputed that he set his

house on fire when he knew that people were nearby. As such, there was clearly more than sufficient evidence to support appellant's convictions.

In sum, the trial court did not err in admitting Truman's testimony because it did not definitely associate appellant with other crimes. And, even if his testimony was evidence of other crimes, it was admissible under the complete story exception because it provided the jury with a complete and coherent picture of the events surrounding the standoff and provided them with another explanation, besides mental illness, of appellant's behavior. Finally, appellant cannot show that he was prejudiced by Truman's testimony given the overwhelming evidence of his guilt.

IV.

The trial court did not plainly err in not intervening, *sua sponte*, in the State's closing argument when the prosecutor stated that "There [were] no irrational thoughts going on there that day. If there were, you would have heard from some doctors" because trial strategy is an important consideration in any trial and assertions of plain error concerning matters in closing argument are generally denied without explication. Moreover, appellant did not suffer manifest injustice from the prosecutor's comments because the prosecutor did not intentionally misrepresent the facts or comment on excluded evidence in that there were no doctors that would have testified that appellant suffered from a mental disease or defect, not caused by voluntary drug use, that prevented him from having the requisite mental elements of kidnapping.

Appellant argues that the prosecutor impermissibly argued that there was no evidence that appellant suffered from diminished capacity when the state's motion in limine excluded such evidence (App. Br. 42). Appellant acknowledges that defense counsel did not object to the argument, but claims that the trial court nonetheless erred by not *sua sponte* intervening in the argument (App. Br. 42).

A. Standard of Review

The standard of review for an alleged error in closing argument depends upon whether defense counsel objects. *State v. Shurn*, 866 S.W.2d 447, 460 (Mo. banc 1993), *cert. denied* 513 U.S. 837 (1994). Where defense counsel does not object, appellate courts may review

only for plain error. *State v. Shurn*, 866 S.W.2d 447, 460 (Mo. banc 1993), *cert. denied* 513 U.S. 837 (1994); Supreme Court Rule 30.20.

B. Relevant Facts

The State filed a pretrial motion in limine to prohibit appellant from presenting evidence of voluntary intoxication or voluntary drug use on the issue of his state of mind (L.F. 27-32). The motion in limine also sought to exclude the testimony of Dr. Burstin, Dr. Blansett, and Dr. Thronson on the basis that all three doctors concluded that at the time of the alleged offense appellant suffered from methamphetamine induced delusions as a result of voluntary substance abuse (L.F. 27-32). The reports the doctors prepared were submitted to the court (Tr. 12). All three doctors testified at a hearing regarding appellant's competency to proceed to trial (Tr. 13).

At the competency hearing, Dr. Andrea Thronson testified that she evaluated appellant to determine if he was competent to stand trial after receiving an order from the State of Missouri (Tr. 43, 47). Dr. Thronson testified that she diagnosed appellant as "presently suffering from a delusional disorder" and the delusions "surround[ed] the events of the alleged offense" (Tr. 51). Dr. Thronson testified that she believed the delusions were related to the use of illicit substances, particularly methamphetamine, and that at the time of the offense appellant was "suffering from a methamphetamine-induced psychosis" (Tr. 52). She learned that appellant had been using excessive amounts of methamphetamine over a relatively prolonged period of time (Tr. 52). She believed that appellant had developed a

delusional disorder that was brought on or precipitated by his prolonged and excessive use of methamphetamine (Tr. 52-54).

Dr. Blansett and Dr. Burstin were called by the State. Dr. Blansett testified that he was of the opinion that appellant suffered from a methamphetamine-induced psychosis at the time of the standoff (Tr. 123, 126). Dr. Burstin testified that he could not establish the presence of delusions in the absence of intoxication (Tr. 107). Dr. Burstin testified that he based his opinion on the fact that appellant had no mental health history and on a letter that appellant wrote him wherein he discussed his use of drugs near the day of the standoff and how the drugs affected his ability to think (Tr. 108-110). Dr. Burstin said it would be "very atypical for someone with no mental health history to develop a delusion disorder at exactly the same time they were taking drugs. They typically cause people to be paranoid" (Tr. 110). Further, Dr. Burstin testified that in the letter appellant questioned the delusions he had surrounding the standoff, which indicated that he did not suffer from an ongoing delusional disorder (Tr. 111).

Based on the doctors' reports and their testimony at the competency hearing, the court granted the State's motion in limine (Tr. 223). As the trial progressed, however, the state revisited this issue and argued to the court that while appellant had elicited evidence that he was acting irrational, the jury had not heard any possible reasons for the way he was acting (Tr. 669-715).

The prosecutor argued that if the State was not allowed to present evidence showing that appellant's behavior was consistent with drug use, the jury would be led to believe that

appellant was in some way mentally ill (Tr. 701). The court allowed the State to make an offer of proof with negotiator John Truman, and then allowed Truman to testify before the jury (Tr. 682, 715). Truman testified that appellant's statements were irrational and were consistent with drug use (Tr. 741). Truman also testified that during the standoff, he approached his conversations with appellant differently because he believed that appellant was under the influence of drugs (Tr. 742-743). Appellant made no attempt to revisit the court's earlier ruling in limine that he could not present the testimony of Dr. Thronson.

During appellant's closing argument, defense counsel argued that the events of May 30 did not arise from any argument between Toni and appellant (Tr. 954). Rather, defense counsel argued that when appellant left the house and came back, he was "a person unlike [Toni] had ever seen before" (Tr. 954). Appellant was "fearful for himself, fearful for her, and fearful for her child" because he thought that there were people from California following him (Tr. 954). Defense counsel said that when appellant barricaded the door it was as much to keep the people he was scared of out, as to keep people in (Tr. 955).

Defense counsel argued to the jury that to find appellant guilty of kidnapping, they had to determine what appellant's purpose was when he barricaded the house (Tr. 956). Defense counsel argued that appellant did not confine Toni in order to terrorize her, but instead had an "irrational fear of danger to her" and an "irrational fear . . . about potential sexual abuse of [his] children" that caused him to keep her and Renee confined in the house (Tr. 956, 958, 959). Counsel argued that the State could not rebut appellant's fear that Toni

was in danger (Tr. 956). Counsel told the jury that they did not have to determine whether appellant's fear was rational or not (Tr. 958).

The prosecutor objected to counsel's argument that it did not matter whether appellant's fear was rational (Tr. 958). The court overruled the objection and said that the State could argue the issue in its closing (Tr. 958). Defense counsel then argued to the jury that appellant's intent when he unlawfully confined Toni and Renee "might be the most irrational thing you ever heard of, but nobody disputes that's all he ever talked about" (Tr. 959).

In the State's closing argument, the prosecutor argued to the jury that the case "is not about people crawling under, caverns under the house and child abuse, these irrational thoughts. There [were] no irrational thoughts going on there that day. If there were, you would have heard from some doctors" (Tr. 979-980). Defense counsel did not object to this argument. The prosecutor continued his argument and said that "[w]hat was going on that day is very plain and simple" and "was all about control" (Tr. 980).

C. Analysis

Appellant acknowledges that defense counsel did not object to the above argument (App. Br. 42). Under Rule 30.20, plain error will seldom be found in unobjected-to closing argument, since a holding that would require the trial judge to interrupt counsel would present myriad problems. *State v. Radley*, 904 S.W.2d 520, 524 (Mo. App. W.D. 1995). Trial judges are not expected to assist counsel in trying cases, and trial judges should act *sua sponte* only in exceptional circumstances. *Id.* Because trial strategy looms as an important

consideration in any trial, assertions of plain error concerning matters contained in closing argument are generally denied without explication. *State v. Vaughn*, 32 S.W.2d 798, 800 (Mo. App. S.D. 2000).

If this Court decides to address this claim, relief for improper argument is justified "under plain error only when the errors are determined to have a decisive effect on the jury. The burden is on the defendant to demonstrate the decisive effect of the statement." *State v. Cruz*, 971 S.W.2d 901, 903 (Mo. App. W.D. 1998); *State v. Parker*, 856 S.W.2d 331, 333 (Mo. banc 1993), *cert. denied*, 113 S. Ct. 636 (1993). For such a decisive effect to occur, "there must be a reasonable probability that, in the absence of these comments, the verdict would have been different." *State v. Roberts*, 838 S.W.2d 126, 132 (Mo. App. E.D. 1992).

In this case the prosecutor's argument in closing was not a comment on excluded evidence because there was no doctor that would have testified that appellant suffered from diminished capacity that could legally be used to negate criminal responsibility or culpable mental state. All of the doctors that examined appellant came to the same conclusion, that at the time of offense appellant suffered from methamphetamine-induced delusions as a result of voluntary substance abuse (L.F. 29-30; Tr. 52-54, 107, 126). Or, put another way, the doctors could not establish the presence of delusions in the absence of intoxication (Tr. 107). Defense counsel even admitted to the court that he did not know of any diagnosis that had ever been made of appellant "that was not based at least in part upon some substance abuse issues" (Tr. 10).

It is well established in Missouri that evidence of voluntary intoxication is not admissible to negate the mental state of an offense. §562.076. Nor can voluntary intoxication "provide an insanity defense absent a **separate** mental disease that results in diminished capacity **without the voluntarily ingested drugs**." *State v. Rhodes*, 988 S.W.2d 521, 526 (Mo. banc 1999)(emphasis added). In this case there was no doctor that would have testified that appellant suffered from a mental disease or defect, not caused by voluntary drug use, that prevented him from having the requisite mental elements of kidnapping. Thus, the prosecutor's argument that the case "There [were] no irrational thoughts going on there that day. If there were, you would have heard from some doctors" (Tr. 979-980), was not an improper misrepresentation of the facts or a comment on excluded evidence. In fact, it was true.

This is a different situation than those described in the cases cited in appellant's brief: *State v. Weiss*, 24 S.W.3d 198, 204 (Mo. App. W.D. 2000)(prosecutor excluded evidence of an alternate source of money in account and then argued that there was no evidence regarding the alternate source of funds), *State v. Hammonds*, 651 S.W.2d 537, 539 (Mo. App. E.D. 1983)(prosecutor excluded defendant's alibi witness because he was not disclosed and then argued that no one was willing to testify for defendant because they did not want to perjure themselves), and *State v. Luleff*, 729 S.W.2d 530 (Mo. App. E.D. 1987)(prosecutor excluded receipt because it was hearsay and then argued that defendant failed to produce a receipt for the tractor he was alleged to have stolen). In those cases, the prosecutors did misrepresent facts and comment on evidence that they had successfully excluded. Here, the prosecutor

successfully excluded the testimony of Drs. Thronson, Burstin, and Blansett through his motion in limine, but did not misstate the facts because none of the doctors would have testified that appellant suffered from a mental disease or defect (and had irrational thoughts), not caused by voluntary drug use, that prevented him from having the requisite mental elements of kidnapping. The comment the prosecutor made referred to evidence that simply did not exist, not to evidence that existed but the prosecutor kept out.

Because the prosecutor was not guilty of misconduct when he made this statement in closing argument, the trial court did not plainly err in not intervening *sua sponte*, in the State's closing argument. This point should be denied.

V.

The trial court did not err in overruling appellant's motion for judgment of acquittal at the close of all of the evidence as to the first degree arson charge and in submitting that offense to the jury because there was sufficient evidence to sustain such a conviction in that the evidence presented at trial established that appellant knowingly damaged his house, when there were people nearby, by starting a fire and thereby disregarded an unjustifiable risk that he was placing nearby people in danger of death or serious physical injury.

Appellant argues that the trial court erred in overruling his motion for judgment of acquittal at the close of all the evidence as to the charge of first degree arson, and in submitting that offense to the jury (App. Br. 45). In making this claim, appellant argues that the evidence was insufficient to sustain such a conviction in that there was no evidence presented that appellant knowingly disregarded an unjustifiable risk that he was placing nearby persons in danger of death or serious injury (App. Br. 45).

A. Standard of Review

"A directed verdict of acquittal is authorized only where there is insufficient evidence to support a guilty verdict." *State v. Holloway*, 992 S.W.2d 886, 889 (Mo. App. S.D. 1999). In reviewing the sufficiency of the evidence to support a criminal conviction, a reviewing court views the evidence, together with all reasonable inferences drawn therefrom, in the light most favorable to the state and disregards all evidence and inferences to the contrary. *State v. Silvey*, 894 S.W.2d 662, 673 (Mo. banc 1995). Review is limited to determining

whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *Id.* Appellate courts do not weigh the evidence or determine the reliability or credibility of the witnesses. *State v. Broseman*, 947 S.W.2d 520, 525 (Mo. App. W.D. 1997).

B. Factual Background and Analysis

Appellant was charged with the class B felony of first degree arson pursuant to §569.040.1 (L.F. 19). In this respect, the amended information charged that appellant, "knowingly damaged an inhabitable structure consisting of the residence located at 2911 W. Lombard, and the defendant did so by starting a fire at a time when persons were then in near proximity thereto and thereby recklessly placed such persons in danger of death or serious physical injury" (L.F. 19).

According to Section 569.040.1, a person commits the crime of first degree arson 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.

A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. §562.016.4.

Appellant argues that he did not knowingly disregard an unjustifiable risk that he was placing nearby persons in danger of death or serious injury when he started his house on fire. To support this argument, appellant says that he did not burn a structure containing people and that there was no evidence that he knew there were people in the neighboring houses (App. Br. 47). Appellant argues that the only people at risk were police officers and firefighters, people whose jobs were to deal with the fire, which was not sufficient evidence to sustain a conviction for first degree arson (App. Br. 48).

The evidence in this case showed that after Toni and Renee escaped the house, appellant told negotiator Truman that if the police entered his house he would burn the house and take a couple of officers with him (Tr. 749). Truman heard liquid sloshing 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).

When appellant came out of the burning house, officers had to tackle appellant in his front yard, which was full of standing water from the fire hoses (Tr. 801-802, 835). The power lines were melting above the officers and they were worried about being electrocuted (Tr. 799-800, 835, 854).

Officers tried to evacuate the nearby houses (Tr. 751). Because of the fire that appellant had set, the siding on the house immediately adjacent to 2911 was beginning to melt, and the officers were worried about the safety of the occupants inside the house (Tr. 751-752). Fire inspector Larry Giggy testified that the neighboring house would have caught

on fire if the fire had gone on very much longer because once the siding had been melted away, it would not take very long for the wooden structure of the house to catch fire (Tr. 866-867, 885)(State's Exhibits 4 and 18). In addition, the fire caused the power lines above the house to melt (Tr. 886). There was a danger that the power lines would fall and either electrocute someone or spark another fire (Tr. 886).

Inspector Giggy testified that many people were put in danger as a result of the fire, including the firefighters and police officers who were on the scene (Tr. 886). He said that whoever was inside 2911 also would have been in danger of dying (Tr. 887). Finally, Inspector Giggy testified that the people in the house next door to 2911 were in danger had they remained in the house and not been evacuated by officers once the fire started (Tr. 751-752, 887).[3]

The evidence in this case was sufficient to sustain a conviction for first degree arson. Appellant knowingly damaged his house, when there were people nearby, by starting a fire and thereby disregarded an unjustifiable risk that he was placing nearby people in danger of death or serious physical injury. Appellant does not dispute that he started his house on fire. Appellant does not contest that there were people nearby his house when the fire started, including people in the house next door, police officers, and firefighters. Appellant only

[3]During the standoff the people in the house next door to 2911 were required to stay in their house for their own safety (Tr. 887).

argues that there was no evidence that he knew that there were people in the neighboring houses (App. Br. 47).

It is not necessary, however, for appellant to have prior knowledge or intent that there were people in or in near proximity to the building when the arson occurred. *State v. Bowles*, 754 S.W.2d 902, 906 (Mo. App. E.D. 1988); *State v. Fetty*, 654 S.W.2d 150, 153 (Mo. App. W.D. 1983). This is because section 569.040 does not require any intent to burn a building when a person is present or near it. *Fetty*, 654 S.W.2d at 153 n. 3. It is sufficient if there actually is a person in or near the house when the fire is set. *Bowles*, 754 S.W.2d at 906; *Fetty*, 654 S.W.2d at 153; *State v. Aguila*, 14 Mo. 130, 132 (1851).

Here, there were people near appellant's house when he set his own house on fire. As a result of the arson, those people were in danger of dying or suffering serious physical injury as a result of burns, smoke inhalation, or electrocution from the melted power lines above appellant's house. By starting the fire when there were people nearby, appellant disregarded an unjustifiable risk that he was placing those people in danger of death or serious physical injury. There was sufficient evidence to support appellant's conviction of first degree arson, and thus the trial court did not err in overruling appellant's judgment for motion of acquittal at the close of all of the evidence.

VI.

The trial court did not err in sentencing appellant on two counts of kidnapping, one for each of the victims appellant unlawfully confined, because those convictions did not violate double jeopardy in that appellant's act subjected two people to the crime of

kidnapping and the unit of prosecution under the kidnapping statute is defined as "another person," meaning that each person who is victimized is a unit of prosecution.

Appellant argues that his double jeopardy rights were violated when the trial court submitted to the jury two counts of kidnapping: Count I charged that appellant unlawfully confined Toni for the purpose of inflicting physical injury on or terrorizing her and Count IV charged that appellant unlawfully confined Toni and Renee for the purpose of using Toni and Renee for the purpose of using them as a shield or hostage (App. Br. 49). Appellant alleges that the kidnapping was a continuing course of conduct because it involved one act of holding the victim in a house overnight (App. Br. 49). Appellant's claim is without merit.

A. Analysis

"The determination of whether the protections against double jeopardy apply 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).

Appellant is not entitled to relief on this point because it is not a violation of double jeopardy to convict a person of a count of kidnapping for each person who was kidnapped. The Fifth Amendment protection against double jeopardy guarantees a defendant protection against multiple punishments for the same offense. *State v. Murphy*, 989 S.W.2d 637, 639 (Mo. App. E.D. 1999). "It forbids the state from splitting a single crime into separate parts and then prosecuting it in piecemeal." *Id.* "However, it does not protect a defendant from punishment for more than one offense arising from the same set of facts if one has in law and fact committed separate crimes." *Id.* Thus, "a defendant may be subject to multiple

convictions for violation of the same statute if the defendant has in law and fact committed separate crimes." *State v. Barber*, 37 S.W.3d 400, 043 (Mo. App. E.D. 2001).

Appellant, in his brief, cites §556.041, which states that when the same conduct by a person may establish the commission of more than one crime, the person may be prosecuted for each offense (App. Br. 50). Appellant cites to an exception to that statute, §556.041(4), which states that one cannot be convicted of more than one crime based on the same facts when the offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted (App. Br. 50).

This is not the appropriate test when the conduct of a defendant involves more than one victim. *Horsey v. State*, 747 S.W.2d 748, 751 (Mo. App. S.D. 1988):

> In such cases an appropriate test is what, under the statute, the legislature "intended to be the allowable unit of prosecution . . . ." [citation omitted]. Or stated another way, once Congress has defined a statutory offense by its prescription of the allowable unit of prosecution . . . that prescription determines the scope of protection afforded by a prior conviction or acquittal. Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this congressional choice. *Sanabria v. United States*, 437 U.S. 54, 69-70, 98 S.Ct. 2170, 2181-2182, 57 L.Ed.2d 43, 57 (1978) (citation omitted).

Id.

Thus, the correct analysis to be applied in the present case is the "unit of prosecution" analysis. The question then becomes what the unit of prosecution is under §565.110.1, the kidnapping statute under which appellant was charged and convicted. See *State v. French*, 79 S.W.3d 896, 899 (Mo. banc 2002) (in double jeopardy analysis, to determine whether legislature intended multiple punishments, court looks to "unit of prosecution" allowed by statutes under which defendant was charged).

In the present case, the elements of the offense of kidnapping are set out in §565.110.1. It states in pertinent part:

> 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
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> * * *
>
> (2) Using the person as a shield or as a hostage; or
>
> * * *
>
> (5) Inflicting physical injury on or terrorizing the victim or another.

§565.110.1 (emphasis added).

As in *State v. Murphy*, which addressed the question of whether one could commit four counts of felonious restraint by driving off in a car with four children, the allowable unit of prosecution under §565.110.1 hinges on the word "another." The kidnapping statute

shows that a unit of prosecution exists for each person who is kidnapped. If the legislature had meant otherwise, it could have used a plural word, such as the word "others."

In *State v. Murphy*, 989 S.W.2d 637, 639-640 (Mo. App. E.D. 1999), the court found that the defendant had committed four separate counts of felonious restraint because each of the four child victims constituted an allowable unit of prosecution under the statute, which contained the word "another." This is similar to the statute discussed in *State v. Bowles*, 754 S.W.2d 902, 911 (Mo. App. E.D. 1988). In that case, the defendant was convicted of five counts of assault in the third degree, because he attempted to burn a house that contained five individuals. *Id.* at 904. In rejecting the defendant's double jeopardy claim, the court examined §565.070, RSMo 1986, which contained the word "another." *Id.* at 909. The double jeopardy claim was rejected because a single act of assault that affected two or more persons constituted multiple offenses. *Id.* at 911.

In this case, Count I charged that appellant committed the class B felony of kidnapping because he "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" (L.F. 18). Count IV charged that appellant committed the class B felony of kidnapping because he "unlawfully confined Toni Selle **and 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. 19) (emphasis added). The verdict directors for the kidnapping counts reflected the charges in the amended information (L.F. 46, 49). For example, the verdict director for Count IV

required the jury to find that appellant had confined Toni Selle **and R.S.** without their consent for the purpose of using them both as shields and hostages (L.F. 49).

Appellant kidnapped "another person" – Toni Selle – by unlawfully confining her for the purpose of inflicting physical injury on her or terrorizing her.[4] Appellant kidnapped yet "another person" – Renee (R.S.) – by unlawfully confining her for the purpose of using her as a shield or hostage. It is inconceivable that the legislature would have intended, in a situation such as this, that only one of these people would be considered a "victim" and that appellant could avoid multiple punishments because he unlawfully confined two people for different purposes. Thus, under the unit of prosecution analysis, appellant's convictions did not violate double jeopardy because the kidnapping statute allows a unit of prosecution for each person who is victimized.

Appellant's real claim is that he should not have been charged with kidnapping Toni in both kidnapping counts, even though the state charged different purposes in each count (App. Br. 53). However, the fact that Toni's name appears in both Count I and Count IV is not of consequence under the circumstances of this case because her name is mere surplusage in Count IV.

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[4]Appellant does not challenge the sufficiency of the evidence to sustain the kidnapping counts in a separate point, but does argue in his substitute brief that there was not sufficient evidence that appellant kidnapped Renee for the purpose of using her as a shield or hostage (App. Br. 54).

There was sufficient evidence to support both of the kidnapping charges, as there was sufficient evidence to show that appellant unlawfully confined Toni and Renee, albeit for different purposes. The State's inclusion of Toni Selle's name in addition to Renee's name in both the information and verdict director for Count IV was not an element of the crime. Thus, inclusion of her name was surplusage. For example, in *State v. Bradshaw*, 81 S.W.3d 14, 23 (Mo. App. W.D. 2002), the State included information in both the charging document and the verdict director that was not an element of the crime, specifically the phrase "the intent to use anhydrous ammonia to produce methamphetamine."

The defendant in *Bradshaw* claimed that there was insufficient evidence to support his conviction for stealing anhydrous ammonia because the State failed to prove that he or his co-defendant intended to use the anhydrous ammonia to produce methamphetamine *Id.* at 20. The State argued that it did not have to prove this because the stealing of any amount of anhydrous ammonia is a class D felony, regardless of the intent for which it was stolen. *Id.* The court noted that intent to use anhydrous ammonia to produce methamphetamine was not an element of the crime and thus the State's erroneous inclusion of that language in the information and verdict director was surplusage. *Id.* at 24. The court found that "[a]s the evidence supporting the *necessary elements* of stealing anhydrous ammonia was sufficient to find Mr. Bradshaw guilty beyond a reasonable doubt," Bradshaw suffered no prejudice from the inclusion of the unnecessary element in either the information or the instruction. *Id.* at 25 (emphasis added).

In *Ryan v. State*, 634 S.W.2d 529, 532 (Mo. App. W.D. 1982), the instruction submitted an assault with an "attempt to kidnap" as opposed to an assault with "intent to kidnap." The court ruled that the language of the instruction regarding the "attempt to kidnap" was surplusage. *Id.* "The state has assumed a greater burden than is necessary and the submission of the unsupported alternative is surplusage." *Id.*

The language of the instructions, therefore, cannot be considered controlling in determining whether appellant suffered a double jeopardy violation because Toni Selle's name appeared in both of the kidnapping counts. This is because Toni's name was not a necessary element of the Count IV in that there was sufficient evidence that appellant unlawfully confined Renee for the purpose of using her as a shield or hostage.

Despite appellant's argument to the contrary, there was more than sufficient evidence that appellant used Renee as a shield or hostage. Appellant kept five month old Renee in the house overnight (Tr. 455, 464-466). Appellant had barricaded the doors to the house and covered the front window (Tr. 466-467). Appellant made Renee's mother, Toni, sit on his lap, while Renee sat on Toni's lap (Tr. 464-466, 468). They spent most of the night sitting in a chair together (Tr. 468). And, at some point the negotiator talked appellant into letting Toni go, but not Renee (Tr. 475-476, 734-735). This was further evidence that appellant wanted to keep baby Renee as a hostage. Toni eventually convinced appellant to keep her and let Renee go (Tr. 475-476, 655).

In sum, appellant subjected two separate persons to kidnapping, and thus committed in law and fact, two separate crimes. Toni's name in Count IV was surplusage. Appellant

thus was not subjected to double jeopardy by being convicted of both counts of kidnapping. His claim is without merit and should be denied.

CONCLUSION

In view of the foregoing, the respondent requests that appellant's convictions and sentences be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains_____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of January, 2006, to:

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RESPONDENT'S APPENDIX