

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
v.)	No. SC87748
)	
ROBERT W. DAVIS,)	
)	
Appellant.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT, DIVISION NO. 3
THE HONORABLE LUCY D. RAUCH, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant was convicted after a jury trial in the Circuit Court of St. Charles County, Cause No. 04CR124025-02, of seven counts of the Class C felony of felonious restraint, § 565.120 (Counts 3, 5, 7, 9, 11, 13, and 15); eight counts of the unclassified felony of armed criminal action, § 571.015 (Counts 2, 4, 6, 8, 10, 12, 14, and 16); the class A felony of robbery in the first degree, § 569.020 (Count 1); the class B felony of burglary in the first degree, § 569.160 (Count 17); and the class D felony of resisting arrest, § 575.150 (Count 18) [*see* A1].¹

On May 13, 2005, the Honorable Lucy D. Rauch, Judge of Division No. 3, sentenced Mr. Davis as a prior and persistent felony offender to consecutive terms of imprisonment in the Missouri Department of Corrections of life (Counts 1 and 17); fifty years (Counts 2, 4, 6, 8, 10, 12, 14, and 16); fifteen years (Counts 3, 5, 7, 9, 11, 13, and 15); and seven years (Count 18), for a total of two life terms plus 512 years.

Mr. Davis appealed his convictions to the Missouri Court of Appeals, Eastern District, which on June 6, 2006, issued its opinion transferring his case to this Court. Jurisdiction therefore lies in this Court, the Supreme Court of Missouri. Mo. Const., Art. V, § 10; Rule 83.02.

¹ All statutory references are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

The Frontier IGA grocery store in St. Charles, Missouri was robbed on January 3, 2004 at 8:20 p.m. by two white men wearing dark-colored ski masks [Tr. 342-44, 397, 420, 464, 479].² The men apparently entered the store through the back entrance connected to the loading dock because no one saw them enter the front of the store [Tr. 375, 618]. When the store manager, Brian Moore, walked into the back room of the store, where there was storage for dry goods and an office, one of the men pointed a gun at him and said, “All we want is the money. No one is going to get hurt. We’re going back to the safe” [Tr. 344].

Mr. Moore’s son, Sean Moore, who was also working that night, came into the back room and saw the men had guns pointed at his father [Tr. 345, 390-91]. Mr. Moore told Sean, “We’re going up [front]. We’re going to do what they tell us . . . all they want is the money. No one is going to get hurt” [Tr. 345]. The robbers then escorted Brian and Sean Moore to the front of the store and told the customers in the store to stand in front of the cigarette display [Tr. 391, 393].

² Appellant will cite to the record on appeal as follows: legal file, “[L.F.]”; August 19, 2004 pre-trial hearing transcript, “[PTr.-I]”; January 24, 2005 pre-trial hearing transcript, “[PTr.-II]”; March 3, 2005 pre-trial hearing transcript, “[PTr.-III]”; March 7-14, 2005 trial transcript (volumes I-VI), “[Tr.]”; and May 13, 2005 sentencing transcript, “[Str.]”

Rachel Wilman and Renee Hudson were working near the front of the store – Ms. Wilman at the second cash register, and Ms. Hudson cleaning – when the robbers walked Mr. Moore towards them at gunpoint [Tr. 419, 469-70]. The robbers ordered everyone to get on the floor, then asked Sean Moore and Ms. Hudson to empty the cash registers [Tr. 394-95, 401, 471, 479]. During the robbery, one of the robbers referred to the other as “Paul,” then corrected himself and said “Ed” several times [Tr. 395, 420, 472].

The men demanded that Mr. Moore give him all the money in the store, from the cash registers, safe, and front office [Tr. 345-46]. The safe was empty, as it always is when the store is open [Tr. 340, 345]. But Mr. Moore emptied the cash drawers from the front office into a black plastic bag [Tr. 346]. In the cash drawers were rolls of quarters in white paper wrapping with orange print and cash bundled together with rubber bands, including \$1 bills in twenty-bill bundles, \$5 bills in 50-bill bundles, \$10 bills in 50-bill bundles, and \$20 bills in 25-bill bundles [Tr. 347, 363]. The robbers stole a total of approximately \$4,400 from the IGA [Tr. 365].

After the robbers had put all the money into their bag, they ordered everyone to go into a 10' x 15' meat cooler in the rear of the store [Tr. 341, 349, 395, 464, 473, 484-87]. The meat cooler was a refrigerated room kept at a temperature in the “low

thirties” [Tr. 341].³ Then Mr. Moore; his employees Rachel Wilman, Renee Hudson, J.R. Vails, and son Sean Moore; and two customers, Kenneth Condor and Terry Pointer, waited in the meat cooler for the robbers to leave the store [Tr. 349, 407]. The meat cooler only locked from the outside; anyone in the meat cooler would be able to open the door from the inside [Tr. 349, 473]. After two or three minutes, Mr. Moore opened the meat cooler door, walked into the store to make sure that the robbers were gone, and called the police [Tr. 349].

Police could not view a surveillance tape from the robbery because the robbers apparently had taken it from the store [Tr. 368, 618]. In addition, no identification could be made from the three fingerprints lifted from the scene [Tr. 884-85].

Because the robbers were wearing ski masks, no one could see the robbers’ faces, except to tell that the robbers were Caucasian because the skin around their eyes was visible [Tr. 343-44]. Those in the store said the first robber was 6’1””; weighed 240-50 lbs.; had blond eyebrows; carried a large black “Dirty Harry” gun with a six-inch barrel and an orange sight; and wore either dark or light-blue sweatpants, a dark ski mask, and dark gloves [Tr. 343, 391, 400, 404, 420, 461-62, 470, 483-84]. They said the second robber was 5’7” or 5’9””; weighed 160 or 230 lbs.; had brown,

³ Mr. Moore testified the temperature in the meat cooler was in the “low thirties” and the temperature in the meat prep room was in the “middle fifties” [Tr. 341]. He said the meat cooler was “technically not a freezer” [Tr. 366].

brownish-green, or hazel eyes; carried a smaller handgun; and wore scuffed black military-style boots, stained bluish-gray sweatpants, a denim Marlboro jacket, dark gloves, and a dark ski mask [Tr. 344-45, 406-09, 420-21, 462-63, 472, 475, 480-83].

The next day an O'Fallon, Missouri police officer attempted to pull over a white Chevy pickup truck with license plate # 260FK1 for stolen plates, but after the officer got out of his patrol car and approached the truck with his gun drawn, the truck sped away [Tr. 608, 514, 519, 521-22, 535]. Soon police were in pursuit of the truck [Tr. 522-23]. The truck entered I-70 heading east via the westbound exit lane, driving against traffic, then stopped in a grassy median between I-70 and the North Outer Road [Tr. 525-528].

The two men in the truck, defendants Robert Davis and Paul Bainter, climbed the fence separating the interstate from the outer road, and fled into the adjacent neighborhood on foot [Tr. 538-40]. Mr. Davis had a red Marlboro duffle bag with him, and Mr. Bainter carried a camouflage fanny pack [Tr. 540-44, 895, 907].

After a foot chase, police apprehended Mr. Bainter and Mr. Davis [Tr. 538, 542-44, 563-67, 576]. In Mr. Bainter's camouflage fanny pack, the police found .44 and .22-caliber ammunition, an address book, road flares, and rolls of quarters [Tr. 551-52, 895-903, 895-903]. Police also found a pair of black gloves and a gun holster on the ground near the bag, and .44-caliber revolver under nearby bushes [Tr. 545, 893]. In Mr. Davis' red Marlboro bag, the police found a black tie-top bag filled with "a large amount of money bundled in rubber bands" and "rolls of coins," as well as

some jeans, winter caps, a red bandana, and a ski mask [Tr. 580, 593-94, 907-14]. The cash and coins found in Mr. Davis' bag totaled over \$1500 [Tr. 915-21]. Included in the bundle of cash were sixteen stacks of \$1 bills rubber-banded together in \$20 increments [Tr. 921]. A stain inside the ski mask was later found to contain Mr. Davis' DNA [Tr. 822, 848].

The police took Mr. Davis into custody at the scene, but Mr. Bainter was taken by ambulance to the hospital due to injuries sustained during his struggle with police during his arrest [Tr. 604-05]. At the hospital, police seized Mr. Bainter's clothing, which included a green and black flannel jacket, shorts, sweatpants, black spray-painted tennis shoes, and a maroon ski mask [Tr. 607, 966]. Police also found a large amount of cash, almost \$1800, in Mr. Bainter's shorts and sweatpants [Tr. 607-08, 965-79]. The \$1 bills were rubber-banded together in \$20 increments [Tr. 971]. In addition, the police seized Mr. Davis' clothes when he was booked, which included black military boots and black gloves [Tr. 930-32].

The police impounded the pickup truck and had it towed to the saliport at the O'Fallon Police Department [Tr. 555]. In the truck, the officers found a denim Marlboro jacket containing a brown paper bag stuffed with \$2200 cash and an envelope addressed to Mr. Davis; two Wal-Mart bags containing a navy blue ski mask, light blue sweat pants, and a white tube sock concealing a loaded .22 caliber revolver; and a Famous Barr bag containing black spray-painted Reebok tennis shoes, a can of black spray paint, a green ski mask, and a black T-shirt with red trim [Tr. 949-59]. In

addition, rolls of coins were found on the floor of the truck's cab [Tr. 936-45, 960]. Some of the rolls of coins were in white wrappers with orange print, and others were in brown paper [Tr. 963].⁴ Believing that the items found in Mr. Davis' and Mr. Bainter's bags could be related to the IGA robbery, the O'Fallon police contacted the St. Charles County Sheriff's Department [Tr. 593-94, 619].

On January 6, 2004, the police showed photo arrays with photographs of Mr. Davis and Mr. Bainter to Samantha Dussold, a clerk at a Citgo convenience store near McDonald's Bar in Hazelwood, Missouri, which had been robbed on December 30, 2003, five days before the IGA robbery [Tr. 646, 655, 667-68].⁵ After the robbery in Hazelwood, which was also committed by two white men in ski masks, the police had gone to surrounding businesses to see if men matching the description of the McDonald's Bar robbers could be seen on surveillance tapes [Tr. 647-48, 746-49, 809]. The police thought two men seen on the surveillance video of the Citgo taken

⁴ A criminalist for the St. Charles County Sheriff's Department testified that approximately \$4500 was seized in the case, but the amounts found between Mr. Davis, Mr. Bainter, their belongings, and the truck exceeded \$5500 [Tr. 985; 942-45, 965-79]. Of the cash seized in the case, four identifiable prints were found, but they matched neither Mr. Davis nor Mr. Bainter [Tr. 983-84, 996, 1001].

⁵ The Citgo was not robbed [Tr. 687]. Both the Citgo and McDonald's Bar are in St. Louis County.

the evening of the McDonald's Bar robbery matched the robbers' descriptions [Tr. 647-48, 773-74, 784]. Ms. Dussold identified Mr. Davis and Mr. Bainter from the photo arrays shown to her on January 6, 2004 as the men that had been in the Citgo store on December 29, 2003 [Tr. 667-68, 668, 679, 716, 719-22]. She recognized Mr. Davis, who lived in the vicinity of the Citgo and McDonald's Bar, from frequenting the convenience store [Tr. 668, 680].

The State of Missouri charged Mr. Davis and Mr. Bainter with eight counts of armed criminal action (Counts 2, 4, 6, 8, 10, 12, 14, and 16), seven counts of felonious restraint (Counts 3, 5, 7, 9, 11, 13, and 15), robbery in the first degree (Count 1), burglary in the first degree (Count 17), and resisting arrest (Count 18) related to the robbery of Frontier IGA in St. Charles, Missouri [*see* A1; L.F. 72-82, Tr. 1074-78].

Prior to trial, the prosecutors asked Rachel Wilman and James Vails to come to a court setting Mr. Davis was to attend to see if they recognized him from the robbery, but instructed them to not say anything because they did not want the public defender to know they were in the courtroom [Tr. 501]. Ms. Wilman made a written statement identifying Mr. Davis as the shorter robber based on his eyes [Tr. 435-37]. Mr. Vails made a written statement identifying Mr. Davis as the shorter robber based on his voice [Tr. 500-01]. Defense counsel for Mr. Davis filed motions to suppress the in-court identifications, which the trial court denied in an order providing that the State would "not be permitted to adduce [the voice-identification] evidence in its case-

in-chief without approaching the bench to show why said evidence would be permitted” [L.F. 20-21, 33, 45-46, 55].

In addition, the State filed a pre-trial motion to admit evidence of uncharged crimes related to the robbery of McDonald’s Bar in Hazelwood, Missouri [L.F. 30-32]. Defense counsel filed a memo in opposition to the state’s motion, and later filed a motion to suppress and a motion in limine to exclude such evidence, including Ms. Dussold’s photo identification of Mr. Davis and the surveillance videotape from Citgo [L.F. 30-32, 38-44, 60-65, 84]. The court granted the state’s motion to allow evidence of uncharged crimes and denied defense counsel’s motions [PTr-II 3, 57-60; PTr.-III 31; L.F. 53, 65]. The court also denied defense counsel’s pre-trial motion to sever Mr. Davis’ and Mr. Bainter’s trials [PTr.-I 56-61; L.F. 24-25, 33].

A jury trial of the charges against Mr. Davis and Mr. Bainter was held March 7-13, 2005 before the Honorable Lucy D. Rauch, judge of Division III, St. Charles County Circuit Court. Judge Rauch administered the oath to the venire panel, but not to the petit jury [Tr. 26, 28, 316]. At no point during the trial was the petit jury sworn [Tr. 316 *et seq.*]

Despite its ruling on the pre-trial motion to suppress, the court permitted Ms. Wilman and Mr. Vails to make in-court identifications of Mr. Davis during the state’s redirect examination of them, because Mr. Bainter’s counsel had asked them on cross-examination about the statements they made to police after Mr. Davis’ court appearance [Tr. 424-30, 436, 497-501].

In addition, over defense counsel's objections, the jury heard detailed testimony from witnesses of the robbery of McDonald's Bar in Hazelwood, Missouri [Tr. 745-818]. Defense counsel later filed a renewed motion to suppress "any and all evidence of uncharged crimes in Hazelwood, MO" based on a recent appellate decision, but the court denied the motion [L.F. 36; Tr. 924-29].

The jury found Mr. Davis guilty of the charged offenses [L.F. 124-41; Tr. 1196-1201]. On May 13, 2005, the court sentenced Mr. Davis as a prior and persistent felony offender to consecutive terms of imprisonment in the Missouri Department of Corrections of life (Counts 1 and 17), fifty years (Counts 2, 4, 6, 8, 10, 12, 14, and 16), fifteen years (Counts 3, 5, 7, 9, 11, 13, and 15), and seven years (Count 18), for a total of two life terms plus 512 years [L.F. 151-57; STr. 34-35].

Mr. Davis appealed his convictions to the Missouri Court of Appeals, Eastern District, which on June 6, 2006, issued its opinion transferring his case to this Court. *State v. Davis*, --- S.W.3d ---, 2006 WL 1527127 (Mo.App. E.D. 2006). The appellate court found that "[b]ecause the record proper does not affirmatively show that the jury was sworn to try this case during the progress of trial and before they had begun to deliberate upon their verdict, the trial court plainly erred." *Id.* at * 4. It transferred the cause to this Court due to "the general interest and importance of the issue involved in this case and for the purpose of reexamining existing law." *Id.*

To avoid unnecessary repetition, additional facts may be set forth in the Argument portion of this brief.

POINTS RELIED ON

I. The trial court plainly erred in failing to administer the oath to the jury after it was selected, because the failure to have the jury sworn violated the requirements of § 546.070, 27.01, and 27.02, and Mr. Davis' rights to due process of law and a fair trial before a fair and impartial jury under the U.S. Constitution, Amends. V, VI, and XIV, and Mo. Const., Art. I, §§ 10, 18(a), and 22(a), in that at no point after the jury was impaneled did the trial court administer the oath to the jurors, and therefore the jury's verdicts are a nullity and should be given no force or effect. Mr. Davis has suffered a manifest injustice from the trial court's oversight. A new trial before a properly impaneled and sworn jury is required.

State v. Frazier, 339 Mo. 966, 98 S.W.2d 707 (Mo. 1936);

State v. McKinney, 221 Mo. 467, 120 S.W. 608 (1909);

State v. Mitchell, 199 Mo. 105, 97 S.W.561 (1906);

City of Smithville v. Summers, 690 S.W.2d 850 (Mo.App. W.D. 1985);

§ 546.070, RSMo;

Rules 27.01, 27.02, 29.11, and 30.20;

Bench Book for Missouri Trial Judges, Vol. V, Ch. 3, § 3.9(5) (1998);

Mo. Const., Art. I, §§ 10, 18(a), and 22(a); and

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

II. The trial court erred and abused its discretion in granting the State's motion to admit evidence of uncharged crimes and in admitting such evidence over defense counsel's objections because that ruling violated Mr. Davis' right to be tried only on the charged offense, due process of law, and a fair trial under the U.S. Constitution, Amends. V, VI, and XIV, and Article I, §§ 10, 17, and 18(a) of the Missouri Constitution, in that the evidence of the robbery of McDonald's Bar in Hazelwood, Missouri was more prejudicial than probative and therefore should have been excluded. Contrary to the State's claim, the evidence of the robbery in Hazelwood was not necessary for the State to prove the identity of the robbers. Furthermore, this uncharged crimes evidence was not a limited occurrence, but encompassed the entire testimony of four witnesses, and was brought up repeatedly throughout the trial. The improper admission of this other crimes evidence encouraged the jury to convict Mr. Davis on the basis of the other, uncharged conduct, and because he was an incorrigible criminal and a danger to the community. Reversal for a new trial at which all such evidence is excluded is required.

State v. Bernard, 849 S.W.2d 10 (Mo.banc 1993);

State v. Reese, 364 Mo. 1221, 274 S.W.2d 304 (Mo.banc 1955);

State v. Sladek, 835 S.W.2d 308 (Mo.banc 1992);

State v. Kitson, 817 S.W.2d 594 (Mo.App. E.D. 1991);

Rules 29.11 and 30.20;

Mo. Const., Art. I, §§ 10, 16, 17, and 18(a); and

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

III. The motion court erred and abused its discretion in overruling Mr. Davis' motion for judgment of acquittal or a new trial and in imposing sentence and judgment upon Mr. Davis for each of the seven counts of felonious restraint (Counts 3, 5, 7, 9, 11, 13, and 15) and accompanying seven counts of armed criminal action (Counts 4, 6, 8, 10, 12, 14, and 16) because the findings of guilt and imposition of sentences on those charge violated Mr. Davis' right to due process of law under the U.S. Constitution, Amendments V and XIV, and Missouri Constitution, Article I, § 10, in that the evidence was insufficient as a matter of law to support any finding that by ordering the seven individuals to stand in the meat cooler, Mr. Davis "interfered substantially with their liberty" or exposed them to a "substantial risk of serious physical injury" because the meat cooler did not lock from the inside and the individuals were able to escape by simply opening the door. Because those two elements of the crime of felonious restraint could not be proven beyond a reasonable doubt, Mr. Davis' convictions on each of the felonious restraint counts, and the accompanying armed criminal action charges, must be vacated.

State v. Abel, 939 S.W.2d 539 (Mo.App. E.D. 1997);

State v. Bledsoe, 920 S.W.2d 538 (Mo.App. E.D. 1996);

State v. Cobbins, 21 S.W.3d 876 (Mo.App. E.D. 2000);

State v. Smith, 902 S.W.2d 313 (Mo.App. E.D. 1995);

Rule 29.11;

§§ 565.002, 565.120, 565.130, and 571.015, RSMo;

Mo. Const., Art. I, § 10; and

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

IV. The trial court erred and abused its discretion in denying Mr. Davis' motion to sever his case from that of his co-defendant, Mr. Bainter, because the court's error violated Mr. Davis' rights to due process of law and a fair trial under the U.S. Constitution, Amends. V, VI and XIV, and Mo. Const., Art. I, §§ 10, 17, and 18(a) in that the trial of the two co-defendants together foreclosed Mr. Davis' opportunity to create a separate defense and resulted in the admission of evidence prejudicial to Mr. Davis' case, including evidence of uncharged crimes.

State v. Kidd, 990 S.W.2d 175 (Mo.App. W.D. 1999);

State v. Hufford, 119 S.W.2d 654 (Mo.App. S.D. 2003);

Rules 24.06, 29.11, and 30.20;

§ 545.880, RSMo;

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

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

V. The trial court erred and abused its discretion in finding Mr. Davis to be a persistent felony offender and in sentencing Mr. Davis to an extended term of imprisonment on Counts 3, 5, 7, 9, 11, 13, 15, 17, and 18, because that finding and the imposition of extended terms of imprisonment violated §§ 558.016 and 558.021 and Mr. Davis’ right to due process of law under the U.S. Constitution, Amends. V and XIV, and Mo. Const., Art. I § 10, in that the prior offenses pled and proven by the State were committed on the same date and therefore were not committed at “different times.” Resentencing is required.

State v. Sanchez, 186 S.W.3d 260 (Mo.banc 2006);

Hardnett v. State, 564 S.W.2d 852 (Mo.banc 1978);

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

State v. Johnson, 150 S.W.3d 132 (Mo.App. E.D. 2004);

Rule 30.20;

§§ 558.011, 558.016, and 558.021, RSMo;

Mo. Const., Art. I, § 10; and

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

ARGUMENT

I. The trial court plainly erred in failing to administer the oath to the jury after it was selected, because the failure to have the jury sworn violated the requirements of § 546.070, 27.01, and 27.02, and Mr. Davis' rights to due process of law and a fair trial before a fair and impartial jury under the U.S. Constitution, Amends. V, VI, and XIV, and Mo. Const., Art. I, §§ 10, 18(a), and 22(a), in that at no point after the jury was impaneled did the trial court administer the oath to the jurors, and therefore the jury's verdicts are a nullity and should be given no force or effect. Mr. Davis has suffered a manifest injustice from the trial court's oversight. A new trial before a properly impaneled and sworn jury is required.

Facts and Preservation of Error

The venire panel was sworn when it was initially brought into the courtroom, prior to the beginning of voir dire [Tr. 26, 28]. All members of the venire panel indicated at that time that they could follow the court's reasonable doubt instruction [Tr. 30-31]. After the for-cause and peremptory strikes were made, the jury was selected, brought into the courtroom, and excused for lunch [Tr. 305-310]. Following the lunch recess, the court attended to some matters with the attorneys, then announced, "And we're ready to proceed to bring the jury up to place them under oath and read the preliminary instructions and opening statements" [Tr. 312]. The jury was brought into the courtroom, and the court instructed the jurors on how the

case would proceed (MAI-CR3d 300.06, entitled “After the Jury is Sworn”), then read Instructions No. 1 and No. 2, based on MAI-CR3d 302.01 and 302.02, to the jury [Tr. 312-16; L.F. 101-02]. The court then asked the State to proceed with its opening statement, without ever administering the oath to the jury impaneled [Tr. 316]. None of the parties objected [Tr. 316]. The error was not corrected at any point at trial, and thus the jury was permitted to deliberate on the charges and render verdicts without ever being sworn [Tr. 1187-1202].

Mr. Davis did, however, include this claim in his motion for a new trial [L.F. 143]. In denying Mr. Davis’ motion, the court acknowledged its “apparent failure to administer the usual oath to the jury after empanelling the jury, despite announcing its intention to do so on the record” but determined that Mr. Davis had waived the claim by failing to make a timely objection [L.F. 150]. The trial court’s order indicates that the court’s error in failing to swear the jury after it was impaneled was “brought to the attention of counsel after the Court reviewed the Court’s trial notes and the court reporter reviewed her official notes” [L.F. 150].

Because no timely objection was made, this claim of error is not properly preserved. *State v. Marshall*, 571 S.W.2d 768, 772 (Mo.App. St.L.D. 1978). But because this error respects the sufficiency of the verdict and sentence, preservation of error is not required for this Court to review Mr. Davis’ claim. *State v. Greer*, 879 S.W.2d 683, 684 (Mo.App. W.D. 1994); Rule 30.20. Mr. Davis requests review for

plain error here, as the trial court's failure to swear the jury created a manifest injustice or miscarriage of justice requiring relief on appeal. Rule 30.20.

Standard of Review

The appellate court is permitted "to consider allegations of error respecting the sufficiency of the information or indictment, verdict, judgment and sentence although they were not raised in the trial court or preserved for review." *State v. Harlston*, 565 S.W.2d 773, 777 (Mo.App. St.L.D. 1978); Rule 30.20. Reversal is required if "the action of the trial court created manifest injustice or a miscarriage of justice." *State v. Robinson*, 864 SW.2d 347, 351 (Mo.App. W.D. 1993). In determining whether to review for plain error, the appellate court must "look to determine whether on the face of the appellant's claim substantial grounds exist for believing that the trial court committed error that is evident, obvious, and clear, affecting a substantial right of the defendant, which resulted in manifest injustice or a miscarriage of justice." *State v. Beck*, 167 S.W.3d 767, 772 (Mo.App. W.D. 2005).

Argument

The court's failure to swear the jury in this matter was a fundamental error resulting in a manifest injustice. The jury oath is of tremendous import to the defendant's right to a jury trial. It is a safeguard of the defendant's right to be tried by an impartial jury, not a meaningless act. Administration of the oath to the jury impresses upon the jurors the solemnity of the task they are to undertake. As noted in *State v. Jackson*, 155 S.W.3d 849, 854 (Mo.App. W.D. 2005),

It hardly needs mention that there is a historical sanctity in the jury process that constitutes one of the most fundamental rights provided by our state and federal constitutions. Much law has developed both to protect this right, to ensure its fairness and operation, and to protect the jury's vitally independent role in the determination of guilt and innocence. A jury has a solemn, never trivial, duty in determining whether a defendant will be deprived of that most fundamental right, liberty.

The oath to the petit jury plays a fundamental role in ensuring the “fairness and operation” of the defendant’s exercise of his right to a jury trial. Significantly, two prior Missouri Supreme Court cases have held that a verdict by an unsworn jury is a nullity, requiring reversal without a showing of prejudice. *See State v. Mitchell*, 199 Mo. 105, 97 S.W.561 (1906) and *State v. McKinney*, 221 Mo. 467, 120 S.W. 608 (1909). In both *Mitchell* and *McKinney*, this Court reversed the defendants’ convictions and remanded for a new trial because the trial record failed to show that the jury was sworn “to try the cause and a true verdict render according to the law and the evidence.” *Mitchell* at 562.

Prejudice from a court’s failure to swear the jury would be difficult to quantify. The jury may make subtle inferences of guilt from the trial court’s conduct of the trial, such as the trial court’s failure to employ certain procedural safeguards to the

defendant's right to a fair trial. As noted in *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623 (1955), “[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.” “It is never proper nor constitutionally permissible to mislead a criminal jury about the nature of its duty and obligation.” *Jackson*, 155 S.W.3d at 854. Even the “obvious guilt” of a criminal defendant would not justify a court’s failure to abide by the prescriptions of the Sixth Amendment. *Crawford v. Washington*, 541 U.S. 36, 62, 124 S.Ct. 1354 (2004).

Thus, where an error such as this is apparent from the record, prejudice is presumed and need not be demonstrated. *Mitchell* at 562 (concluding “that the record proper in a criminal appeal must show that the jury was sworn to try the cause,” but the record before it “fail[ed] to do so,” requiring that the judgment be reversed and the cause remanded for a new trial). Notably, in *Mitchell*, it was the prosecuting attorney who, after the trial, discovered that the jury had not been sworn and brought it to the defendant’s attention, much as the court brought the error to defense counsel’s attention in the present case. 97 S.W. at 562. One can presume from *Mitchell*, therefore, that defense counsel did not object to the failure to swear the jury at trial, and the claim was thus “unpreserved.”

Courts in this state have found the use of plain error review justified in other situations bearing upon the defendant’s right to trial by an impartial jury. For

example, in *State v. Hamilton*, 8 S.W.3d 132, 134 (Mo.App. S.D. 1999), the Southern District reversed a defendant's conviction, despite his failure to object, when he was tried without a jury. Because there was no record of the defendant's waiver of his right to a jury trial, the only remedy for the error was a new trial. *Id.* Likewise, the same result was reached in *State v. Rulo*, 976 S.W.2d 650 (Mo.App. S.D. 1998) (no record of waiver of jury trial required reversal). In *Rulo*, the court noted that “[d]enying Appellant’s claim of error in the instant case would be the equivalent of totally ignoring Rule 27.01(b).”

In the State’s response to Mr. Davis’ new trial motion claiming error in the trial court’s failure to swear the jury, the State focused on § 546.070, which does not use mandatory language in establishing that the jury be sworn before the commencement of trial [L.F. 147]. § 546.070 merely states, “The jury being impaneled and sworn, the trial may proceed in the following order:” then notes that the State is to proceed with its case first and the other elements of a jury trial. § 546.070 assumes that the jury in every criminal trial will be sworn.

The failure to swear the jury, however, also violates Rules 27.01 and 27.02. Specifically, Rule 27.01(a) provides that “[a]ll issues of fact in any criminal case shall be tried by a jury to be selected, summoned and returned in the manner prescribed by law, unless trial by jury be waived” And Rule 27.02, which expands upon § 546.070’s instructions regarding the order of trial, provides that “[a] qualified jury shall

be selected as provided by law and *shall be sworn well and truly to try the case.*” Rule 27.02(d) (emphasis added).

As noted in *State v. Frazier*, “it is imperative that the jury be sworn to try the cause and that the record show it.” 339 Mo. 966, 980, 98 S.W.2d 707, 715 (Mo. 1936) (citing *Mitchell*). “The jury does not exist until the veniremen selected therefor are sworn to service in that capacity.” *State v. Shaw*, 636 S.W.2d 667, 671 (Mo.banc 1982). But a party can waive irregularities in the swearing of the jury as long as there has been “substantial compliance” with the statutes contemplating that the jury be sworn to try the cause. *Frazier* at 980. Because the record showed that the jury in *Frazier* had been “sworn during the progress of the trial and before they had begun to deliberate upon their verdict,” the court determined that reversal was not required. *Id.* at 982.

Here, the jury was never sworn and so there was no compliance with the requirements of § 546.070 or Rules 27.01 and 27.02. Thus, the holdings in *Mitchell* and *McKinney*, where there was no record the jury was sworn, are directly on point. The doctrine of *stare decisis* alone should mandate reversal in this case. *See, e.g., State v. Johnson*, 830 S.W.2d 36, 37 (Mo.App. W.D. 1992) (declining state’s request to transfer cause to Missouri Supreme Court for reevaluation of prior precedent). This is not a situation, as in *Frazier*, regarding an untimely administration of the oath. While there was substantial compliance with the statute in *Frazier*, the same cannot be said in the instant case.

Nor is this a situation in which defense counsel noticed the error but failed to bring it to the court's attention, thereby waiving the error. By comparison, in *State v. Arellano*, 125 N.M. 709, 710, 965 P.2d 293, 294 (N.M. 1998), there was evidence that the defense attorney "was aware, during the trial, that the jury had not been sworn," but "did not call this omission to the court's attention until after the jury rendered its verdict and was finally discharged" as a "tactical move." The New Mexico Supreme Court concluded that, despite other New Mexico case law holding that the verdict of an unsworn jury is a nullity, the conviction in the defendant's case "was not a nullity" and was harmless error "because Defendant perpetuated the error." 125 N.M. at 296, 965 P.2d at 712. Defense counsel's tactical decision not to object to the trial court's failure to swear the jury, therefore, acted as a waiver. *Id.* In contrast, the record here demonstrates that it was the court that brought the error to defense counsel's attention [L.F. 150].

The trial court suggested in its order denying Mr. Davis's new trial motion that the oath administered to the venire panel was sufficient and its failure to administer the oath to the impaneled jury was a mere "irregularity" [L.F. 150]. But the wording of the oath to the venire panel and oath to the impaneled jury are not the same. *City of Smithville v. Summers*, 690 S.W.2d 850, 855, n.3 (Mo.App. W.D. 1985). As set forth in *Summers*,

The oath to qualify a panel recites [Bench Book for Missouri Trial Judges, § 14.22 (1974)]:

You, and each of you, do solemnly swear that you will well and truly answer such questions that may be propounded to you by and under the direction of the court, touching your qualifications to serve as jurors, so help you God.

The oath to the jury recites [§ 14.26, supra]:

You, and each of you, do solemnly swear [declare and affirm] that you will well and truly try the issues joined to you in this cause and a true verdict of your findings render according to the law and the evidence, so help you God.

Id. (underscored emphasis added). *See also Bench Book for Missouri Trial Judges*, Vol. V, Ch. 3, § 3.9(5) (1998). In the first, the venire members swear or affirm that they will answer the questions posed to them during voir dire truthfully. In the second, the jury members swear that they will enter a verdict based upon its findings according to the law and evidence. *Id.*

Cases from other jurisdictions in which an oath to the venire panel was held sufficient where the jury was never sworn are distinguishable from the instant case, as the differences between the oaths administered to the venire panel and the petit jury in Missouri are significant compared to the distinction between the two oaths in other jurisdictions. For example, in *Ex Parte Deramus*, 721 So.2d 242, 244 (Al. 1998), the

appellate court found that the trial court's error in administering the oath to the venire panel but not to the impaneled jury was harmless; but under Alabama law, both the venire panel and the impaneled jury are sworn to "well and truly try all issues" and to render true verdicts according to the law and evidence. *Deramus*, 721 So.2d at 243, nn.2-3.

A similar result was reached in the federal case of *United States v. Martin*, 740 F.2d 1352, 1358 (6th Cir. 1984) where no objection was made to the trial court's method of swearing the jury panel "en masse on the first day of their terms, rather than following voir dire for each particular case." While the federal court noted that "[s]wearing the jury immediately prior to trial serves to emphasize the importance and the seriousness of the juror's task, and ensures that each juror is indeed sworn before he or she hears any evidence," it determined the trial court's error was harmless. *Id.* This was because "[e]ach juror swore before trial to try all criminal cases well and truly according to the laws of the United States," and that was "the crucial consideration." *Id.*

The difference between the two oaths is not a mere matter of semantics. Specifically, courts have held that "jeopardy attaches--for purposes of the Double Jeopardy Clause--when the jury is empaneled and sworn." *City of Smithville v. Summers*, 690 S.W.2d at 854 (finding that failure to instruct jury under then MAI-CR2d 1.02 did not make reversal on appeal a certainty, so that jeopardy attached to trial court's *sua sponte* declaration of mistrial after jury was impaneled and sworn, barring retrial);

Durham v. State, 538 S.W.2d 881, 883 (Mo.App. St.L.D. 1976) (mistrial during voir dire did not bar retrial because no jury was sworn). The fact that the administration of an oath to a venire panel does not result in jeopardy to the defendant demonstrates that there is significance to the oaths beyond their words. *See, e.g., Durham*, 538 S.W.2d at 883.

The court's error in failing to swear the jury constituted a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," thereby requiring reversal. *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 1264-65 (1991). It was not a "trial error" which "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 308, 111 S.Ct. at 1264-65. Such an "obvious procedural error" requires reversal on appeal. *See Illinois v. Somerville*, 410 U.S. 458, 464, 93 S.Ct. 1066, 1070 (1973). As in *Mitchell*, a showing of prejudice should not be required. Because the jury was never sworn once it was impaneled, jeopardy has not attached to Mr. Davis's convictions and sentences, the jury's verdicts are a nullity, and this Court must reverse.

II. The trial court erred and abused its discretion in granting the State's motion to admit evidence of uncharged crimes and in admitting such evidence over defense counsel's objections because that ruling violated Mr. Davis' rights to be tried only on the charged offense, due process of law, and a fair trial under the U.S. Constitution, Amends. V, VI, and XIV, and Article I, §§ 10, 17, and 18(a) of the Missouri Constitution, in that the evidence of the robbery of McDonald's Bar in Hazelwood, Missouri was more prejudicial than probative and therefore should have been excluded. Contrary to the State's claim, the evidence of the robbery in Hazelwood was not necessary for the State to prove the identity of the robbers. Furthermore, this uncharged crimes evidence was not a limited occurrence, but encompassed the entire testimony of four witnesses, and was brought up repeatedly throughout the trial. The improper admission of this other crimes evidence encouraged the jury to convict Mr. Davis on the basis of the other, uncharged conduct, and because he was an incorrigible criminal and a danger to the community. Reversal for a new trial at which all such evidence is excluded is required.

Preservation of Error

This claim is preserved for appellate review. Before trial, the State filed a motion to admit evidence of uncharged crimes related to the robbery of McDonald's Bar in Hazelwood, Missouri [L.F. 30-32]. Defense counsel filed a memo in opposition to the state's motion, and later filed a motion to suppress and a motion in

limine to exclude such evidence, including Ms. Dussold's photo identification of Mr. Davis and the surveillance videotape from Citgo [L.F. 30-32, 38-44, 60-65, 84]. The court granted the state's motion to allow evidence of uncharged crimes, and later denied defense counsel's motion in limine [PTr-II 3, 57-60; PTr.-III 31; L.F. 53, 65]. Then, at trial, defense counsel objected or had a continuing objection every time evidence regarding the Hazelwood, Missouri robbery was introduced [*see* Tr. 324-25, 618, 646. 649-50, 727, 756-59, 776, 814, 827, 893-94, 906, 908-12, 912-22, 924-29, 942-45, 946-63, 965-73, 975-80, 1148]. Finally, defense counsel included the claim of error in Mr. Davis' new trial motion [L.F. 143-44]. Because defense counsel filed pre-trial motions, objected consistently at trial, and included the claim in the new trial motion, the issue is preserved for this Court's review. *See State v. Mahoney*, 70 S.W.3d 601, 605 (Mo.App. S.D. 2002); Rule 29.11(d). Should this Court find this claim is not preserved, plain error review is requested. Rule 30.20.

Although Mr. Davis asserts that reversal for a new trial on Point I is mandated, he respectfully requests that this Court review this and his remaining points because of the likelihood that such errors will recur.

Standard of Review

A criminal defendant has a right to be tried only for the crimes with which he is charged. *State v. Mahoney*, 70 S.W.3d at 605; Mo. Const., Art. I, § 17. Therefore, as a general rule, "evidence of prior misconduct is inadmissible for the purpose of

showing the propensity of the defendant to commit such crimes.” *State v. Bernard*, 849 S.W.2d 10, 13 (Mo.banc 1993).

But there are exceptions to the rule which permit such evidence to be admitted if it is both logically and legally relevant. *Bernard* at 13. To be logically relevant, the evidence must have “some legitimate tendency to establish directly the accused’s guilt of the charges for which he is on trial.” *Bernard* at 13. To be legally relevant, the probative value of the offered evidence must outweigh its prejudicial effect, *id.*, and the dangers of confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence. *State v. Sladek*, 835 S.W.2d 308, 314 (Mo.banc 1992) (Thomas, J., concurring).

There is a possibility of prejudice “whenever the evidence amounts to an attack on the defendant’s character,” or “when the evidence is used to show the defendant is a bad or evil man to support the further inference that he therefore committed the crime with which he is charged.” *State v. Kitson*, 817 S.W.2d 594, 597-98 (Mo.App. E.D. 1991) (quoting Imwinkelried, *Uncharged Misconduct Evidence*, § 2:14 at 38 (1984)). Prejudice also may result if there is a possibility that the “bad-guy evidence,” even if probative, will be overused. *Sladek* at 314 (Thomas, J., concurring). “The balancing of the effect and value of evidence rests within the sound discretion of the trial court.” *Bernard* at 13. *See also Mahoney*, 70 S.W.3d at 605.

Argument

Evidence of other, uncharged misconduct is considered logically relevant if it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the person charged with commission of the crime on trial. *Bernard* at 13. Because of the probability of jurors assuming based on a defendant's prior misconduct that he committed the crime for which he is on trial, courts should require that the admission of other misconduct under one of these exceptions be subjected to rigid scrutiny. *Sladek* at 311.

Here, motive, intent, and mistake or accident are not issues. Whoever robbed Frontier IGA clearly wanted to deprive the owner of the store's money, did so purposefully, and was not operating under a mistaken impression of a claim of right to the stolen property. Therefore, the only exceptions possibly applicable in this case are common scheme or plan and identity. The common scheme or plan exception would appear not to apply as there was no evidence that Mr. Davis and Mr. Bainter contemplated robbing the IGA prior to robbing McDonald's Bar. *See Sladek*, 835 S.W.2d at 315 (Thomas, J. concurring) (distinguishing common scheme or plan cases from identity cases). And, for the reasons set forth below, the identity exception should not apply either.

Uncharged Crime Not Distinct Enough to Be Probative of Identity of IGA Robbers

Here, the State claimed evidence of Mr. Davis' alleged participation in the McDonald's Bar robbery was necessary to prove he was one of the persons who robbed the IGA. If the identity of the wrongdoer is at issue, the State may be permitted under the identity exception to show the defendant is the person who committed the charged crimes by showing he committed other uncharged crimes that are sufficiently similar to the charged crime in time, place, and method. *Bernard* at 17. "[I]t is not enough to show that a person on trial committed one or more other crimes of the same general nature as the crime for which he is on trial." *Sladek*, at 312. As the Missouri Supreme Court noted in *Bernard*,

For the prior conduct to fall within the identity exception, there must be more than mere similarity between the crime charged and the uncharged crime. The charged and uncharged crimes must be nearly "identical" and their methodology "so unusual and distinctive" that they resemble a "signature" of defendant's involvement in both crimes.

Bernard at 17. In other words, for uncharged misconduct to be admitted under the identity exception, the uncharged misconduct must be so unusual and distinctive as to be a signature of the defendant's *modus operandi*. *Id.* Judge Thomas provided an

excellent description of the requirements of the identity exception in his concurring opinion in *Sladek*, stating:

The identification exception requires a unique and highly similar modus operandi for the series of crimes. *The strength of the inference that identifies the defendant depends upon two things: first, the extent to which the defendant's crimes are distinctive from crimes committed by others; and second, the extent to which the defendant's prior crimes and the crime charged are similar.* It would not be good enough to simply show that this defendant, now charged with a robbery, committed a robbery last month and also one the month before; or that a defendant charged with forging a check had a history of forging checks. Courts often say that modus operandi must be sufficiently unique and sufficiently associated with the defendant that it becomes like his signature.

Sladek, 835 S.W.2d at 316 (emphasis added).

In *Bernard*, the Court found that evidence that the defendant charged with sexual abuse and attempted forcible sodomy had many years earlier asked other young men to run naked in front of his car was admissible because the acts were “so unusual and distinctive as to ‘earmark’ it as the conduct of the accused.” *Bernard* at 19. But the Court excluded evidence that appellant possessed and showed nude photographs

to members of the youth group he led, despite that such conduct was nearly identical to the charged conduct, because it was not so unusual and distinctive as to be a signature of the defendant's modus operandi. *Id.*

Here, the evidence regarding the McDonald's Bar robbery in Hazelwood should have been excluded because the similarities between the McDonald's Bar and Frontier IGA robberies were not so unusual and distinctive as to be a signature of the robber's modus operandi. In fact, the manner in which the robberies were committed was altogether common. That the men who robbed both establishments both wore ski masks covering their faces, dark gloves, and carried guns can hardly be described as "unique" [L.F. 31]. Nor does the fact that the name "Ed" was uttered during both robberies designate a signature crime [L.F. 31]. Therefore, it was error for the trial court to admit evidence of the Hazelwood robbery under the identity exception. *See Sladek* at 317 (Thomas, J., concurring) (stating that "[t]he modus operandi of the crime should be unusual and detailed; not just a run-of-the-mill crime, such as . . . robbery or burglary").

The State argued such evidence was admissible under the identity exception because Ms. Dussold had identified Mr. Davis and Mr. Bainter as the individuals who were at the Citgo hours before the robbery wearing clothing matching the description of the people who robbed the bar, and the descriptions of the people who robbed Frontier IGA were similar to the descriptions of the McDonald's Bar robbers [L.F. 30-32]. Thus, in allowing evidence of uncharged crimes to be admitted against Mr.

Davis, the trial court first permitted the State to introduce evidence that Ms. Dussold identified Mr. Davis and Mr. Bainter as customers who were at the Citgo gas station near the McDonald's Bar four hours prior to its robbery [Tr. 727]. The police determined that the clothing worn by Mr. Davis and Mr. Bainter at the Citgo station matched the description of the clothing worn by the individuals who robbed McDonald's Bar [Tr. 648-49, 667-74]. While Ms. Dussold's identification of Mr. Davis may be admissible in a prosecution of the McDonald's Bar robbery, her identification and all testimony regarding the description of the McDonald's Bar robbers bore no probative value in the prosecution of Mr. Davis for the unrelated robbery of the Frontier IGA in St. Charles, Missouri [Tr. 645-818]. That it showed he had a propensity to rob small businesses was not legally relevant and therefore should have been excluded. *See Sladek* at 312 (evidence of propensity does not supply the requisite nexus between other crimes and the one for which the defendant was on trial).

Furthermore, the evidence presented at trial did not support the State's claims that the robbers of McDonald's Bar and Frontier IGA were dressed the same, the physical description of the suspects matched, and the circumstances of the robberies were the same [L.F. 31]. Eyewitness descriptions of the suspects in each incident differed in significant ways. Although there are some similarities between descriptions of the individuals involved in each incident, such as height, weight, and race, these are so general that they do not rise to the level required to allow evidence of uncharged

misconduct to be admitted into evidence at trial [*compare* Tr. 747-49 (Diane Barry) and Tr. 809-10 (Sean Marlowe) *with* Tr. 343-44 (Brian Moore), Tr. 400 (Sean Moore), 420-21 (Rachel Wilman), 461-63 (Terry Pointer), Tr. 472 (Renee Hudson), and Tr. 479-84 (James Vails)]. And the differences in the description of the robbers of both places are significant. In particular, the clothing items said to have been worn by the smaller robber at the IGA, including the Marlboro denim jacket and black military boots, were unique, and neither robber of McDonald's Bar was described as wearing those or similar items [Tr. 406-07, 480-82, 747-48, 809-10].

Other Identity Evidence Admitted So Uncharged Crimes Evidence Not Strictly Necessary

Even if the general similarities in the descriptions of the robbers of both establishments were probative to identifying the men who robbed the IGA, application of the identity exception to Mr. Davis' case was inappropriate. “[I]t is only where the identity of the accused is not definitely connected with the offense on trial that other offenses may be introduced to connect and identify him with the case on trial.” *State v. Reese*, 364 Mo. 1221, 1227, 274 S.W.2d 304, 307 (Mo.banc 1955) (quoting 20 Am.Jur., Evidence, § 312). If the state can establish the identity of the accused by other evidence, identity is no longer an issue, and it is improper for the trial court to admit evidence of other uncharged crimes on that theory. *Reese*, 274 S.W.2d at 307 (quoting 20 Am.Jur., Evidence, § 312).

Here, the witnesses to the IGA robbery were able to identify numerous items found in the codefendants' possession when they were arrested. For example,

witnesses to the IGA robbery were able to identify the weapons seized, Mr. Davis' black military-style boots, his denim Marlboro jacket, and his stained bluish gray sweatpants [*see* Tr. 404-07 (Kenneth Condor identifies guns and Mr. Davis' boots); 480-84 (James Vails identifies Mr. Davis' jean jacket, sweat pants, boots, and gun); 1140-42 (State argues these facts in closing, stating that there is "no doubt" Mr. Bainter and Mr. Davis are the individuals who robbed the IGA)]. Cash seized from Mr. Davis' personal belongings was bundled in the same fashion as the IGA manager bundled the store's cash, and rolls of quarters in white paper with orange writing like those used at IGA were found in the truck Mr. Davis was driving immediately prior to his arrest [Tr. 347, 363 (Brian Moore describes how quarters wrapped and cash bundled at IGA); Tr. 898-99, 921, 945, 963 (Tiffany Fischer describes identically packaged coins and bundled bills found in Mr. Davis' possessions or truck following his arrest); Tr. 1143 (State argues in closing that cash and coins found in Mr. Davis' possessions and truck was bundled or wrapped were the same as that taken from the IGA)].

In addition, the witnesses' descriptions of the IGA robbers' height and weight were similar to the actual height and weight of Mr. Davis and Mr. Bainter [Tr. 343-45, 461-62, 1034-36]. Lastly, Mr. Davis was identified by Ms. Wilman and Mr. Vails (over defense counsel's objections) based on their memories of the smaller robber's eyes and voice [Tr. 429-30, 463, 500-03, 1143].

Therefore, evidence of the robbery of McDonald's Bar in Hazelwood was of little probative value on the issue of identity. Furthermore, the admission of such evidence greatly prejudiced Mr. Davis' defense, as the jury was led to believe that Mr. Davis committed two robberies, not one, suggesting that he was an incorrigible criminal likely to re-offend if not convicted on the present charges.

Excessive Evidence of Uncharged Crimes Admitted

Finally, even if evidence of the McDonald's Bar robbery was properly admissible as probative of the identity of the men who robbed the IGA, the evidence offered by the State on this matter far exceeded what was arguably relevant, to include the admission into evidence of the supposed loot from McDonald's Bar, such as money with staple holes in it; a description of which direction the robbers ran after robbing the bar; information that Mr. Davis lived near the bar that was robbed; and information that in his fanny pack Mr. Bainter had handwritten notes giving directions to Missouri Bottom Road, on which the bar was located [Tr. 745, 766, 776-77, 812, 903-04, 943-45]. *See Reese*, 274 S.W.2d at 307 (finding that even if proof of defendant's possession of the gun used in robbery committed same evening as charged murder was relevant to identity, it "did not necessitate the inclusion of the further showing with respect to the details of the subsequent crime in which it was used by defendant"). Here, the entire testimony of four witnesses, Brian Hudson, Samantha Dussold, Diane Barry, and Sean Marlowe, pertained exclusively to the McDonald's Bar robbery and Ms. Dussold's identification of Mr. Davis and Mr.

Bainter as customers at the nearby Citgo hours before the robbery [Tr. 645-818]. So it is also in that sense that the evidence was not legally relevant, in that the exhaustive presentation of such testimony undoubtedly created confusion of the issues, caused undue delay, was a waste of time, and resulted in the needless presentation of cumulative evidence. *See, e.g., Sladek*, 835 S.W. at 314 (Thomas, J., concurring). Simply put, the costs of admitting that evidence far exceeded the benefit to the State; therefore, it should have been excluded. *See id.*

Prejudice to Mr. Davis

Because the trial court allowed this evidence to be used against Mr. Davis, Mr. Davis essentially was forced to defend himself against two different crimes, one of which was not even within the charging jurisdiction [L.F. 144; Tr. 1148-51]. This was a catastrophic violation of Mr. Davis' due process rights under the Constitution. Mr. Davis was not able to answer an information or indictment, and the facts of that crime had not been tested through a preliminary hearing or presentation to a grand jury [L.F. 144]. Mo. Const., Art. I, §§ 16 and 17. The danger that the jury would find Mr. Davis guilty on the basis of the uncharged robbery rather than proof beyond a reasonable doubt of the charged crime cannot be underestimated. *See Sladek*, 835 S.W.2d at 314 (Thomas, J., concurring).

In addition, the trial court's decision to permit uncharged crime evidence into the case at bar prevented Mr. Davis from presenting a defense apart from Mr. Bainter, thus shutting out possible conflict defenses [L.F. 144]. The State's evidence linking

Mr. Davis to the IGA robbery was arguably greater than that for Mr. Bainter,⁶ and it is probable that had the defendants been tried separately, evidence of the McDonalds' Bar robbery would not have been offered at Mr. Davis' trial. Because the State may have needed such evidence to prove Mr. Bainter's participation in the IGA robbery, Mr. Davis was forced to assume the additional burden of defending himself against two robberies, not one. And although the fact that a murder occurred at McDonald's Bar was not disclosed to the jury (except for the bartender Diane Barry's references to David Peoples, the individual was killed), the looming threat of being charged with a homicide in the Hazelwood case completely foreclosed Mr. Davis from testifying in his own defense [L.F. 144; Tr. 746, 749]. Because Mr. Davis was prejudiced by the admission of the uncharged crimes evidence, this Court should reverse his convictions and remand for a new trial.

Conclusion

For the foregoing reasons, the Court's nearly unrestricted admission of evidence regarding the McDonald's Bar robbery was improper and deprived Mr. Davis of his rights to be tried only on the charged offense, due process of law, and a

⁶ For example, the denim Marlboro jacket and black military boots allegedly worn by Mr. Davis at the IGA robbery were found in the truck when he was arrested, but the connection between the other garments found and what Mr. Bainter supposedly wore was not as clear, as the garments were not as distinct.

fair trial under the U.S. Constitution, Amends. V, VI, and XIV, and Article I, §§ 10, 17, and 18(a) of the Missouri Constitution. The evidence of the robbery of McDonald's Bar in Hazelwood, Missouri was more prejudicial to Mr. Davis than it was probative of his guilt for the charged crime. Reversal for a new trial at which all such evidence is excluded is required.

III. The motion court erred and abused its discretion in overruling Mr. Davis' motion for judgment of acquittal or a new trial and in imposing sentence and judgment upon Mr. Davis for each of the seven counts of felonious restraint (Counts 3, 5, 7, 9, 11, 13, and 15) and accompanying seven counts of armed criminal action (Counts 4, 6, 8, 10, 12, 14, and 16) because the findings of guilt and imposition of sentences on those charge violated Mr. Davis' right to due process of law under the U.S. Constitution, Amendments V and XIV, and Missouri Constitution, Article I, § 10, in that the evidence was insufficient as a matter of law to support any finding that by ordering the seven individuals to stand in the meat cooler, Mr. Davis "interfered substantially with their liberty" or exposed them to a "substantial risk of serious physical injury" because the meat cooler did not lock from the inside and the individuals were able to escape by simply opening the door. Because those two elements of the crime of felonious restraint could not be proven beyond a reasonable doubt, Mr. Davis' convictions on each of the felonious restraint counts, and the accompanying armed criminal action charges, must be vacated.

Preservation of Error

At the close of the state's case, trial counsel made a motion for judgment of acquittal, arguing "[a]ccepting as true all the evidence, whether circumstantial or direct, together with all favorable inferences drawn therefrom, the evidence is insufficient as a matter of law to support a finding of guilt" [Tr. 1020-21; L.F. 97-98].

At the close of all evidence, trial counsel renewed the motion for judgment of acquittal [Tr. 1041-42; L.F. 99-100]. After trial, trial counsel filed a motion for “judgment of acquittal on all counts” or a new trial [L.F. 145]. The court denied each of these motions [Tr. 1020-21, 1041-42; L.F. 150].

This specific allegation regarding the sufficiency of the evidence for the felonious restraint charges was not included in the new trial motion [L.F. 143-45]. But a claim of error regarding the sufficiency of the evidence to sustain a conviction need not be included in a new trial motion to preserve the issue for appellate review. Rule 29.11(d)(3).

Standard of Review

Review of claims challenging the sufficiency of the evidence is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Clay*, 975 S.W.2d 121, 139 (Mo.banc 1998). The reviewing court views the evidence in a light most favorable to the verdict, considering all favorable inferences and disregarding all evidence and inferences contrary to the verdict. *Id.* This Court must consider whether, on this evidence, a reasonable juror could find each of the elements of the crime beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 411 (Mo.banc 1993).

Argument

The trial court erred when it denied Mr. Davis’ motion for judgment of acquittal at the close of all the evidence and submitted the case to the jury because the

state's evidence was insufficient to prove that Mr. Davis committed the crimes of felonious restraint (Counts 3, 5, 7, 9, 11, 13, and 15) in that the evidence was insufficient as a matter of law to support any finding that by ordering the seven individuals to stand in the meat cooler, Mr. Davis "interfered substantially with their liberty" or exposed them to a "substantial risk of serious physical injury" because the meat cooler did not lock from the inside and the individuals were able to escape by simply opening the door. Because those two elements of the crime of felonious restraint were not proven beyond a reasonable doubt, Mr. Davis' convictions on those counts must be vacated. The trial court's ruling and imposition of sentence and judgment on those charges violated Mr. Davis' right to due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, § 10 of the Missouri Constitution.

To support a conviction, the state must prove beyond a reasonable doubt that the defendant committed each element of the offense charged. *In re Winslip*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970); *State v. Johnson*, 741 S.W.2d 70, 73 (Mo.App. S.D. 1987). A jury given a proper "reasonable doubt" instruction "may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury." *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 2788 (1979). For the reviewing court, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. at 320, 99 S.Ct. at 2789. See also *State v. Guenther*, 744 S.W.2d 564, 565 (Mo.App. W.D. 1988).

Here, the State charged Mr. Davis with seven counts of felonious restraint, and seven accompanying counts of armed criminal action, for ordering the seven individuals in the Frontier IGA at the time of the robbery (Bryan Moore, Sean Moore, James Vails, Rachel Wilman, Renee Hudson, Terry Pointer, and Kenneth Condor) to stand inside the meat cooler [L.F. 72-82].

The evidence at trial related to these counts was that after the robbers had put all the money into their bag, they ordered everyone to go into a 10' x 15' meat cooler in the rear of the store [Tr. 341, 349, 395, 464, 473, 484-87]. The meat cooler was a refrigerated room kept at a temperature in the “low thirties” [Tr. 341]. “[T]echnically” the room is “not a freezer” [Tr. 366]. There were two “heavy duty” doors into the meat cooler, one that was accessible through the meat prep room, and a separate back entrance [Tr. 341, 356].

The robbers told everyone that if they followed them into the meat cooler no one would be hurt [Tr. 349]. Everyone complied with the robbers’ request and went into the cooler [Tr. 349, 395, 407, 421, 464].

No one testified that the robbers had guns pointed at them when they told everyone to go inside the meat cooler. Only one of the seven individuals, James Vails, said that the robbers used any physical force in commanding everyone to go to the

meat cooler, and he merely said that the shorter robber “grabbed” him by the arm, “and basically stopped everybody and told my boss to tell everybody to to [sic] go to the meat cooler” [Tr. 485]. Mr. Vails testified that the robber held his arm for “approximately a minute, two minutes” [Tr. 486].

Mr. Vails testified that it was the big, heavy-set robber who opened the door and told everyone to “get inside the cooler” [Tr. 487]. Mr. Vails said that the smaller robber “basically just told us to go inside and not come out” [Tr. 487]. Mr. Pointer said that they “were all led back to the cooler and told to remain there” [Tr. 464]. But the store owner, Brian Moore, said that after being led to the meat cooler, the robbers “closed the door behind them. They said stay here. No specific time was given or anything, and we were roughly in there for, I would say, two or three minutes” [Tr. 349]. Mr. Moore, who knew that they were not locked inside, “just figured” he “would give [the robbers] enough time to leave” [Tr. 349].

Likewise, when asked whether she knew she could get out of the meat cooler, Ms. Hudson replied, “Yeah, I did” but that she “panicked at the time” [Tr. 473]. Ms. Wilman also testified that she “cried” because she was “nervous,” but was not asked whether she knew she would be able to get out [Tr. 421]. After two or three minutes had passed, Mr. Moore opened the meat cooler door, walked into the store to make sure that the robbers were gone, and called the police [Tr. 349]. Although one of the customers, Kenneth Condor, testified that he did not know at first if they would be able to get out of the meat cooler, there was no evidence that Mr. Moore had to use a

key, combination lock, or anything other than the door handle to exit the meat cooler [Tr. 349, 407]. Presumably anyone who tried the door handle would have been able to leave.

Under § 565.120.1, RSMo, “[a] person commits the crime of felonious restraint if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty and exposes him to a substantial risk of serious physical injury.” Here, the evidence showed that the robbers “knowingly restrained” the people in the store “unlawfully and without consent.” But it did not show that the restraint “interfere[d] substantially with [their] liberty” or exposed them “to a substantial risk of serious physical injury.” Serious physical injury is defined in § 565.002(6) as any “physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.” “A protracted loss or impairment of the function of any part of the body entails an injury short of permanent but more than a short duration.” *State v. Cobbins*, 21 S.W.3d 876, 879 (Mo.App. E.D. 2000). It is the restraint itself that must expose the victim “to a substantial risk of serious physical injury,” a matter to be determined “from all the circumstances.” *State v. Smith*, 902 S.W.2d 313, 315 (Mo.App. E.D. 1995).

While the information and verdict directing instructions did not specify how Mr. Davis or Mr. Bainter allegedly restrained the people in the IGA, the prosecutor told the jury during closing argument:

Counts 3, 5, 7, 9, 11, 13 and 15, those seven counts are felonious restraint counts. There is a count for every victim that was put into the meat cooler, Brian Moore, Sean Moore, James Vails, he goes by J.R., Rachel Willman, Renee Hudson, Terry Pointer, and Kenneth Condor. And again, the defendants restrained every one of those victims without their consent and put them into the meat cooler.

[Tr. 1144]. The prosecutor also argued that “anytime guns are involved there is a substantial risk of serious physical injury” [Tr. 1145]. The restraint charges, therefore, were directed at the act of making the seven individuals go into the meat cooler.

There is only one Missouri case discussing what would constitute a substantial interference with one’s liberty. *State v. Abel*, 939 S.W.2d 539 (Mo.App. E.D. 1997). In deciding *Abel*, the appellate court relied on cases from Indiana, Washington, and Arkansas holding that it is the nature of the restraint, and not its duration, that determines whether the interference with one’s liberty is substantial. *Id.* at 540-41. For an interference with one’s liberty to be substantial in Washington required a real or material interference, and not just a petty annoyance or minor inconvenience. *Id.* at 541 (citing *State v. Robinson*, 20 Wash.App. 882, 582 P.2d 580, 581 (1978)). The court concluded that defendant’s actions of getting into the passenger seat of the victim’s car while she talked on the phone, holding a knife in one hand and gripping her arm with his other hand so tightly it bruised her, then struggling with her briefly before she

escaped, created a substantial interference with the victim's liberty, despite the short duration of the event. *Id.* This Court has not addressed this issue.

Here, it cannot be said that there was any substantial interference with the robbery victims' liberty, as the meat cooler was not locked and everyone was able to exit without any physical struggle or special effort [Tr. 349, 473]. Therefore an essential element of the felonious restraint charges, substantial interference with liberty, was not met. *See* § 565.120.

Nor was the State able to prove the essential element of exposing the victim to a "substantial risk of serious physical injury" required for a felonious restraint conviction. *See* § 565.120.1. Other cases decided by the appellate courts of this state are instructive.

For example, the Eastern District overturned a defendant's conviction for felonious restraint where the State alleged that the defendant had grabbed the 13-year old victim by the wrist, lead her out of her sister's yard, directed her to a house across the street, and lead her into the garage, where he first forced a pipe, and then his penis, into the victim's mouth. *Smith*, 902 S.W.2d at 316. Reversal of the defendant's conviction was required because, as the court determined, none "of these actions created a substantial risk of death, nor were they capable of causing serious physical disfigurement or protracted impairment of any part" of the victim's body. *Id.* The court rejected the State's contention that the defendant exposed the victim to a substantial risk of serious physical injury by sodomizing her as there was no evidence

the defendant had a physical disease or committed any acts that could cause damage to her uterus or vagina. *Id.*

Later, the court of appeals overturned a felonious restraint conviction against a defendant who offered a 55-year-old woman with cerebral palsy a ride, then locked the door, drove in an opposite direction from where the woman was headed, refused to let the woman out of the car when she asked, stole her money, and broke her glasses before letting her go. *State v. Cobbins*, 21 S.W.3d 876, 878 (Mo.App. E.D. 2000). The court found that those actions did not subject the woman to serious physical injury, but remanded for entry of judgment and sentencing on the lesser included offense of false imprisonment. *Id.* at 879-80. *See* § 565.130.

If the defendants' actions in *Smith* and *Cobbins* did not create a substantial risk of serious physical injury, then clearly Mr. Davis' alleged actions in the present case, including grabbing Mr. Vails by the arm and ordering everyone to form a line and to go into the meat cooler, did not do so either. The State presented no evidence that staying in a refrigerated room for any amount of time would subject anyone to a substantial risk of death, physical impairment, or disfigurement. That employees would have reason to be in the meat cooler for indeterminate periods of time taking inventory, restocking, and cleaning suggests that limited exposure to the refrigerated environment would not create a substantial risk of serious physical injury [Tr. 341-42]. If there was a risk of such harm, it would not be "within the common experience of jurors." *Cf. State v. Brokus*, 858 S.W.2d 298 (Mo.App. E.D. 1993) (jurors could infer

that forcibly dragging person through car window creates risk of physical impairment of one's limbs). Regardless, no one was in the meat cooler for more than a few minutes [Tr. 349]. Furthermore, though the robbers pointed a gun at Mr. Moore when they initiated the robbery and as they walked him towards the front of the store, there was no evidence that the robbers pointed guns at anyone while ordering everyone to go into the meat cooler [Tr. 342-49, 390-96, 404-07, 419-21, 461-64, 469-73, 479-87]. *Cf. State v. Carroll*, 755 S.W.2d 322, 323-24 (Mo.App. E.D. 1988) (ordering victims of hair salon robbery to stay in restroom, under the "threat of injury from a weapon," until he escaped supported defendant's felonious restraint conviction).

Because there was insufficient evidence to support the felonious restraint convictions, this Court must also reverse the convictions for armed criminal action in Counts 4, 6, 8, 10, 12, 14, and 16. "Armed criminal action is the commission of any felony by, with, or through the use, assistance or aid of a dangerous instrument or deadly weapon." *State v. Hyman*, 37 S.W.3d 384, 391 (Mo.App. W.D. 2001). Thus, by definition, "[a] conviction of armed criminal action requires the commission of an underlying felony." *State v. Bledsoe*, 920 S.W.2d 538, 541 (Mo.App. E.D. 1996); § 571.015. Should this Court determine, as in *Cobbins*, 21 S.W.3d at 878, that only the elements of the class A misdemeanor of false imprisonment have been met, the related armed criminal action charges still must be dismissed.

Conclusion

For the foregoing reasons, the court's entry of judgment and sentence on the felonious restraint and armed criminal action charges has violated Mr. Davis' right to due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, § 10 of the Missouri Constitution. Accordingly, this Court must reverse Mr. Davis' conviction on Counts 3-16, and, because no lesser included offense instruction was offered, discharge him. *See Smith*, 902 S.W.2d at 316 (discharging defendant's felonious restraint conviction because evidence was insufficient to sustain conviction).

IV. The trial court erred and abused its discretion in denying Mr. Davis' motion to sever his case from that of his co-defendant, Mr. Bainter, because the court's error violated Mr. Davis' rights to due process of law and a fair trial under the U.S. Constitution, Amends. V, VI and XIV, and Mo. Const., Art. I, §§ 10, 17, and 18(a) in that the trial of the two co-defendants together foreclosed Mr. Davis' opportunity to create a separate defense and resulted in the admission of evidence prejudicial to Mr. Davis' case, including evidence of uncharged crimes.

Preservation of Error

Prior to trial, defense counsel filed a motion to sever the trial of Mr. Davis and Mr. Bainter, but that motion was denied [PTr.-I 56-61; L.F. 24-25, 33]. Defense counsel also raised this claim of error in Mr. Davis' new trial motion [L.F. 144]. Therefore, this claim is preserved for appellate review. Rule 29.11(d). Should this Court find that Mr. Davis' claim is not preserved, plain error review is requested. Rule 30.20.

Standard of Review

“The trial court has discretion over whether to sever a joint trial and its ruling will be disturbed on appeal only if there has been an abuse of discretion resulting in clear prejudice to the defendant.” *State v. Kidd*, 990 S.W.2d 175, 182 (Mo.App. W.D. 1999). If a “less drastic course” is available, severance may not be required. *Id.*

Argument

The joint trial of two defendants serves the trial court's interest in judicial economy. *See State v. Hufford*, 119 S.W.3d 654, 658 (Mo.App. S.D. 2003) (regarding severing counts). Despite the benefit to the trial court, defendants should not be tried together if it will unduly prejudice the defendant. Rule 24.06(b).

Rule 24.06(b) controls the severance of trials for co-defendants. It provides:

(b) A defendant shall be ordered to be tried separately only if the defendant files a written motion requesting a separate trial and the court finds a probability of prejudice exists or:

(1) The defendant is subject to assessment of punishment by the jury and the defendant shows a probability of prejudice would result from this fact if he is not tried separately; or

(2) There is, or may reasonably be expected to be, material and substantial evidence not admissible against the defendant that would be admissible against other defendants if a separate trial is not ordered; or

(3) There is an out-of-court statement that is not admissible against the defendant that would be admissible against other defendants if a separate trial is not ordered unless the court finds the out-of-court statement can be limited by eliminating any reference to the defendant; or

(4) A separate trial is necessary to a fair determination of whether the defendant is guilty.

Under § 545.880, defendants can be tried together even if charged in separate indictments or informations, as was done here [L.F. 72-82].

Here, a separate trial for the defendants was necessary to a fair determination of whether Mr. Davis was guilty because of the probability of prejudice to him if tried jointly with Mr. Bainter. Rule 24.06(b)(4). The prejudice to Mr. Davis from being tried jointly with Mr. Bainter manifested itself at his trial in at least two ways, preventing Mr. Davis from creating a separate defense to the charges from Mr. Bainter. The probability of these two events and the resulting prejudice should have been apparent to the trial court at the time it ruled upon Mr. Davis' motion to sever. Rule 24.06(b). The court abused its discretion in denying Mr. Davis' motion.

First, Mr. Davis was prejudiced from being tried together with Mr. Bainter when robbery victims Rachel Wilman and James Vails were permitted to make in-court identifications of Mr. Davis in response to questions posed by Mr. Bainter's attorney during cross-examination. Prior to trial, the prosecutors asked Rachel Wilman and James Vails to come to a court setting Mr. Davis was to attend to see if they recognized him from the robbery [Tr. 501]. Ms. Wilman made a written statement identifying Mr. Davis as the shorter robber based on his eyes [Tr. 435-37]. Mr. Vails made a written statement identifying Mr. Davis as the shorter robber based on his voice [Tr. 500-01]. Defense counsel for Mr. Davis filed motions to suppress

the in-court identifications, which the trial court denied in an order providing that the State would “not be permitted to adduce [the voice-identification] evidence in its case-in-chief without approaching the bench to show why said evidence would be permitted” [L.F. 20-21, 33, 45-46, 55]. But at trial, after Mr. Bainter’s defense counsel asked Ms. Wilman and Mr. Vails about their statements to police following Mr. Davis’ court appearance, Ms. Wilman and Mr. Vails were both permitted during the state’s redirect examination to make in-court identifications of Mr. Davis [Tr. 424-30, 436, 497-501].

Mr. Davis’ attorney had withdrawn her objection to Ms. Wilman’s identification of Mr. Davis’ eyes on the understanding that only her statement, which did not pertain to any voice identification, would be admitted [Tr. 426]. But during re-direct examination, the State was permitted, over Mr. Davis’ objection, to have Ms. Wilman identify Mr. Davis in court [Tr. 436]. Likewise, the State was permitted to have Mr. Vails identify Mr. Davis in court during the State’s re-direct examination [Tr. 500-01].⁷ Had Mr. Bainter and Mr. Davis been tried separately, pursuant to the trial court’s pre-trial ruling, this highly prejudicial identification evidence would not have been admitted against Mr. Davis [L.F. 55].

⁷ Mr. Davis’ attorney objected to Mr. Vails’ in-court identification of Mr. Davis following her re-cross-examination, on the apparent basis that it was based on a prior, suggestive identification [Tr. 503].

Second, Mr. Davis also was prejudiced by the joint trial when Mr. Bainter's defense counsel admitted that Mr. Bainter resisted arrest [Tr. 1165]. There is a substantial likelihood that the jury would have accepted this statement of Mr. Bainter's complicity in the charged crime as an admission by both parties. Had the defendants been tried separately, this would not have happened.

Conclusion

Therefore, the trial court erred and abused its discretion in overruling Mr. Davis' motion to sever the defendants and in trying he and Mr. Bainter together, because the joint trial of the co-defendants violated Mr. Davis' rights to due process of law and a fair trial under the U.S. Constitution, Amendments V, VI and XIV, and Mo. Const., Art. I, §§ 10 and 18(a). This Court must reverse Mr. Davis' convictions and remand for a new trial.

V. The trial court erred and abused its discretion in finding Mr. Davis to be a persistent felony offender and in sentencing Mr. Davis to an extended term of imprisonment on Counts 3, 5, 7, 9, 11, 13, 15, 17, and 18, because that finding and the imposition of extended terms of imprisonment violated §§ 558.016 and 558.021 and Mr. Davis' right to due process of law under the U.S. Constitution, Amends. V and XIV, and Mo. Const., Art. I § 10, in that the prior offenses pled and proven by the State were committed on the same date and therefore were not committed at "different times." Resentencing is required.

Preservation of Error

Mr. Davis' attorney objected when the Court found Mr. Davis to be a persistent felony offender under § 558.016, and included the claim in Mr. Davis' new trial motion [Tr. 23-25; L.F. 145]. But she did not object when the Court sentenced Mr. Davis as a prior and persistent felony offender to extended terms of imprisonment on Counts 3, 5, 7, 9, 11, 13, 15, 17, and 18, the felonious restraint, burglary, and resisting arrest charges [STr. 34-35]. Therefore, the claim is not preserved for appellate review and plain error review is requested. Rule 30.20.

Standard of Review

The appellate court determines whether plain errors, those which are evident, obvious, and clear, exist based on the facts and circumstances of each case. *State v. Johnson*, 150 S.W.3d 132, 136 (Mo.App. E.D. 2004). If the defendant's claim of plain error does not establish on its face substantial grounds for the reviewing court to

believe a manifest injustice or a miscarriage of justice occurred, the court will decline to review for plain error. *Id.* “Plain error review is appropriate where it appears a defendant has been improperly sentenced as a prior or persistent offender.” *Id.*

Argument

As set forth in *State v. Johnson*, 160 S.W.3d 839, 841-42 (Mo.App. S.D. 2005),

The trial court shall find a defendant to be a prior and persistent offender if: 1) the State pleads in the indictment or information, original or amended, or in the information in lieu of indictment, all essential facts warranting a finding that the defendant is a prior and persistent offender; 2) the State introduces sufficient evidence to warrant a finding that the defendant is a prior and persistent offender; and 3) the trial court finds beyond a reasonable doubt that the defendant is a prior and persistent offender.

See also § 558.021. Under § 558.016.2, “[a] ‘persistent offender’ is one who has pleaded guilty to or has been found guilty of two or more felonies committed *at different times*” (emphasis added).

The prior felony offenses alleged by the State in its Third Amended Information were for pleas of guilty to two counts of assault in the second degree which were committed on January 24, 1988, and to which Mr. Davis pleaded guilty in St. Louis County on March 13, 1989 [L.F. 79]. One count was alleged to have taken

place at 11:00 p.m., and the other at 11:45 p.m. [L.F. 79]. The cause number for those charges was not specified in the indictment, but it was revealed to be Cause No. 575422 at the time the State offered its Exhibit 118 to prove the offenses [L.F. 79; Tr. 25]. The court found Mr. Davis to be a prior and persistent felony offender beyond a reasonable doubt and sentenced Mr. Davis to extended terms of imprisonment of 15 years on Counts 3, 5, 7, 9, 11, 13, and 15, the class C felonious restraint charges; life on Count 17, the class B burglary in the first degree charge; and 7 years on Count 18, the class D resisting arrest charge. [Tr. 25; STr. 34-35; L.F. 151-57].

But the trial court's finding that Mr. Davis was a persistent felony offender violated the plain language of § 558.016, which requires that the offenses occur at "different times." Because the offenses happened on the same day, January 24, 1988, it cannot be assumed that they occurred at different times. That they were committed 45 minutes apart is inconsequential absent a further showing by the State that the charged offenses were not part of a single episode.

This Court's recent decision in *State v. Sanchez*, 186 S.W.3d 260 (Mo.banc 2006) is instructive. In that case, the State, "[i]n support of its assertion that Sanchez was a prior and persistent offender, . . . offered evidence that Sanchez pleaded guilty to two firearm felonies occurring on the same date at roughly the same time." *Id.* at 263. Sanchez' prior two convictions were for exhibiting a shotgun in an angry or threatening manner and carrying a concealed weapon. *Id.* Sanchez had gone into a

restaurant carrying a shotgun. *Id.* He left, the police were called, and when the police stopped Sanchez, they found a gun concealed in his waistband. *Id.*

This Court agreed with Sanchez' argument "that these two felonies arose out of a single incident and cannot be the basis for finding him to be a persistent offender." *Id.* In reaching that conclusion, the court noted that "[a]lthough the statutes do not define the phrase 'committed at different times,' . . . felonies are not committed at different times if they are committed as a part of a continuous course of conduct in a single episode." *Id.* at 263-64. The court noted that there was no evidence as to "what time interval occurred between when the restaurant was entered and the truck was stopped," so the court could not conclude that the two incidents were not part of a single episode. *Id.* at 264. This Court did not indicate what interval would be required for the two incidents to be considered to have occurred "at different times" as required by § 558.016.3, RSMo. Yet, such a determination would seem to require an examination of the circumstances of each case, rather than some arbitrary determination of what interval would cause two offenses committed on the same day to be found to have occurred at different times.

The only evidence offered by the State in Mr. Davis' case regarding his prior convictions was that he pleaded guilty to two counts of assault in the second degree committed 45 minutes apart on January 24, 1998 [L.F. 79; Tr. 25]. *Cf. Gillichan*, 865 S.W.2d at 755 (incidents of receiving stolen property occurring *five hours* apart were found to have occurred at different times). No facts regarding the nature of the two

charges were offered [Tr. 25]. Without more, this Court cannot conclude that the two assaults committed just 45 minutes apart were *not* part of a continuous course of conduct in a single episode. Because the State failed to prove beyond a reasonable doubt that Mr. Davis' two prior felony convictions occurred "at different times," the trial court's enhancement of his sentences on Counts 3, 5, 7, 9, 11, 13, 15, 17, and 18 as a persistent felony offender was improper.

Mr. Davis was prejudiced by the trial court's finding that he was a persistent felony offender because he received extended terms of imprisonment on the felonious restraint, burglary, and resisting arrest charges. *See Matthews v. State*, 123 S.W.3d 307, 310 (Mo.App. E.D. 2003). Imposition of an extended term of imprisonment violates the defendant's right to due process; prejudice inheres in the imposition of an extended term of imprisonment. *See Scharnhorst v. State*, 775 S.W.2d 241, 244-45 (Mo.App. W.D. 1989). If the sentence a court imposed exceeds the statutory range of punishment for the charged crime, the defendant is entitled to resentencing within the limits prescribed by law. *Hardnett v. State*, 564 S.W.2d 852, 856 (Mo.banc 1978); *Olds v. State*, 891 S.W.2d 486, 492-493 (Mo.App. E.D. 1994).

Conclusion

Because the trial court plainly erred in finding Mr. Davis to be a persistent felony offender and in sentencing him to an extended term of imprisonment on Counts 3, 5, 7, 9, 11, 13, 15, 17, and 18, this Court must reverse for resentencing.

CONCLUSION

WHEREFORE, based on his argument in Points I, II, and IV of his brief, Appellant Robert Davis requests that this Court reverse his convictions and remand for a new trial. Based on his argument in Point III, Mr. Davis requests that this Court reverse his convictions on Counts 3-16 and discharge him. Based on his argument in Point V, Mr. Davis requests that this Court remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this 31st day of July, 2006, two true and correct copies of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the office of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65109.

In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Garamond 14 point font. The word-processing software identified that this brief contains 16,172 words, excluding the cover page, signature block, and certificates of service and of compliance. The enclosed diskette has been scanned for viruses with McAfee VirusScan Enterprise 7.1.0 software, which was updated July, 2006, and found virus-free.

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