No. SC90853

In the

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ANTHONY BROWN,

Appellant.

Appeal from the City of St. Louis Circuit Court

Twenty-Second Judicial Circuit

The Honorable Thomas J. Frawley, Judge of Division 22

APPELLANT'S SUBSTITUTE BRIEF, STATEMENT, AND ARGUMENT

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JURISDICTIONAL STATEMENT

In St. Louis City Cause Number 0722-CR05734, the State charged Appellant Anthony Brown with Count 1 of murder in the first degree in violation of § 565.020, and Count 2 of armed criminal action in violation of § 571.015. [1] The State tried Mr. Brown on the charges from February 23, 2009 through February 24, 2009. On February 24, 2009, a jury convicted Mr. Brown of the lesser-included offense of murder in the second degree under § 565.021, and armed criminal action.

On March 16, 2009, the trial court sentenced Mr. Brown to consecutive terms of imprisonment in the Missouri Department of Corrections of thirty years (Count 1) and three years (Count 2). On March 25, 2009, Mr. Brown timely filed his notice of appeal.

The Missouri Court of Appeals, Eastern District issued its *per curiam* order and memorandum, affirming Mr. Brown's convictions in *State v. Brown,* ___ S.W.3d ___, 2010 WL 933339 (Mo. App. E.D. March 16, 2010). On May 25, 2010, this Court sustained Mr. Brown's application for transfer, and transferred this

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[1] All statutory references are to RSMo 2000 unless otherwise indicated. Appellant Anthony Brown will cite to the record on appeal as follows: Legal File, "(L.F)"; and Transcript, "(Tr.)."

case to this Court. Consequently, this Court has jurisdiction over Mr. Brown's appeal. Mo. Const., Art. V, § 10 (as amended 1982); Rule 83.04.

STATEMENT OF FACTS

On the afternoon of June 9, 2007, Anthony Terrell Brown was at the home of his grandmother, Evelyn Dukes, for a children's birthday party when Robert Anderson arrived with his girlfriend, Raquel Vanhook (Tr. 123). While Mr. Anderson was pulling up, Ms. Vanhook got into an argument with Mr. Brown's girlfriend, Kenyonna; the argument was some "he said/she said" discussion (Tr. 123-124, 132). Mr. Brown intervened to try to break up the argument, but Mr. Anderson walked up (Tr. 125, 133).

Mr. Anderson a.k.a. "Porky" and Mr. Brown, also known as "Slim," had grown up together in the same neighborhood and had been friends their entire lives (Tr. 122, 141, 161, 170). Mr. Anderson had recently been in a drive-by shooting, and had been shot in his groin (Tr. 151-152). He carried a gun sometimes and that day, he had on sweatpants with pockets (Tr. 130-131, 151-152, 158-159). Mr. Anderson and Mr. Brown angrily exchanged words and soon everyone was arguing (Tr. 125). Ms. Dukes told Mr. Anderson and Ms. Vanhook to go home (Tr. 167-168).

Douglas Vaughn, a guest at the party who was observing the argument from a distance, saw Mr. Brown leave the argument and go to the gangway (Tr.

126, 132). When Mr. Brown returned, he jumped over the gate enclosing the gangway with a .38 revolver that had been painted white (Tr. 126, 138).

Mr. Brown kept the revolver, which he had named, "Casper," on the side of his grandmother's house (Tr. 174, 176-178, 180-181). The guys in the neighborhood had "talked about [the revolver] like it was a joke," and had discussed taking the revolver away from Mr. Brown (Tr. 173, 175-177). There was talk that Mr. Brown might shoot up his grandmother's house (Tr. 178, 183-184).

Mr. Brown approached Mr. Anderson with the revolver and held it down by his leg (Tr. 127, 146). Mr. Anderson resumed arguing with Mr. Brown (Tr. 127, 145). When Mr. Brown asked Mr. Anderson what he was going to do, Mr. Anderson told Mr. Brown that he was not afraid of a gun, or "burner" (Tr. 146). He said, "I don't care [,] shoot me," and Mr. Brown fired at Mr. Anderson multiple times (Tr. 127, 137-138). Mr. Brown's brother, sister, and cousin ran over to restrain Mr. Brown and stop him from firing (Tr. 149).

Mr. Anderson fell to the ground and people gathered around Mr. Anderson to see if he was okay (Tr. 128). Ms. Vanhook removed Mr. Anderson's shoes because she knew from tending to Mr. Anderson's prior gunshot wound that taking off his shoes would comfort him (Tr. 138-139, 151-153). Then, Ms. Vanhook put ice on him (Tr. 138, 139, 153).

While everyone else was gathered around Mr. Anderson, Mr. Vaughn took off (Tr. 128, 139). He had a warrant out for his arrest and a prior misdemeanor conviction for possession of marijuana (Tr. 129).

Mr. Anderson had gunshot wounds to his back, chest, stomach, right leg, and left shoulder (Tr. 130, 194). He died from his chest wound (Tr. 195), and Mr. Brown turned himself in to police three days later on June 12, 2007 (Tr. 120-121, 288).

For Mr. Anderson's shooting death, the State charged Mr. Brown with Count 1 of murder in the first degree and Count 2 of armed criminal action (L.F. 10-11). The State tried Mr. Brown on the charges from February 23, 2009 to February 24, 2009 (L.F. 5). At trial, Ms. Vanhook and Mr. Vaughn testified against Mr. Brown (Tr. 121-187). Family members, who attended the birthday party at Ms. Dukes' house, and Mr. Brown testified in Mr. Brown's defense (Tr. 206-291).

Mr. Brown testified that before June 9, 2007, he and Mr. Anderson were friends who did everything together (Tr. 273). They carried guns and messed around with narcotics (Tr. 274). But when Mr. Brown refused to assist Mr. Anderson in retaliating against the individuals whom Mr. Anderson believed shot him in the groin, Mr. Brown's relationship with Mr. Anderson changed (Tr. 273-274).

Mr. Anderson wanted Mr. Brown to shoot somebody for him, and Mr. Brown wouldn't, much to Mr. Anderson's disappointment (Tr. 275-276). Once, while Mr. Anderson and Mr. Brown were walking from the home of Mr. Brown's grandmother, Mr. Anderson turned and drew his gun on Mr. Brown (Tr. 276). He asked Mr. Brown why he had not retaliated and told Mr. Brown that "he should have f**ked [him] up" (Tr. 275-277). Mr. Anderson did not "f**k up" Mr. Brown or shoot him (Tr. 276-277). Mr. Brown had his gun on him (Tr. 277).

Mr. Brown saw Mr. Anderson in the neighborhood after that (Tr. 277). But he and Mr. Anderson did not speak to each other or spend time together, and when they did happen to chance upon one another, they argued (Tr. 277).

Mr. Brown testified that on June 9, 2007, their girlfriends got into an argument (Tr. 278-279). When Mr. Brown asked Mr. Anderson to get Ms. Vanhook and take her around the corner, Mr. Anderson got angry (Tr. 279). Mr. Anderson began cussing at Mr. Brown and fidgeting with the gun in his pocket (Tr. 279-280). Mr. Anderson let Mr. Brown know that he would hurt him over his girl, Ms. Vanhook (Tr. 279).

Mr. Brown's grandmother, Ms. Dukes, walked outside and told Mr. Brown to go over into the yard (Tr. 280). Mr. Brown did as he was told, but Mr. Anderson followed him into the yard with Ms. Vanhook (Tr. 280). Mr. Anderson argued with Mr. Brown again, and put his hand in his pocket to move his gun

around (Tr. 281). He told Mr. Brown that Mr. Brown knew that he wanted to "f**k him up[,] for real" (Tr. 281). Mr. Brown turned and began to walk away, but drew his revolver and returned to the argument, positioning the revolver behind his back (Tr. 281).

This time, when Mr. Anderson stated he wanted to "f**k" Mr. Brown up, Mr. Brown told him to "do what you feel" (Tr. 282). As Mr. Anderson began to draw his gun from his pocket, Mr. Brown fired his revolver until Mr. Anderson fell to the ground (Tr. 282-284, 286). Afterwards, Mr. Brown ran away and gave the revolver to his friend (Tr. 284, 287).

Mr. Brown stated he shot Mr. Anderson because he felt Mr. Anderson was going to shoot and kill him (Tr. 284). He told the jury that he did what he did because he believed his life was in danger (Tr. 289-290).

Mr. Brown's mother, Marilyn Brown, testified that Mr. Brown had told her the same thing (Tr. 217). When she saw Mr. Brown the day after the shooting, he told her that it wasn't his intention to kill Mr. Anderson, but that he had been afraid for his life and had to defend himself (Tr. 217). Ms. Brown said Mr. Brown told her it was self-defense (Tr. 217), and Ms. Brown recalled that Mr. Anderson had had his hand underneath his shirt during his argument with Mr. Brown (Tr. 209-210, 220).

Mr. Brown's grandmother, Evelyn Dukes, testified that she had seen Mr. Anderson's gun (Tr. 221). She told the jury that she was there when Mr. Brown told Mr. Anderson to get Ms. Vanhook and go (Tr. 224). Mr. Anderson responded, "N***er, I will do something to you about my woman," and raised his hands up as if to indicate his readiness for a fight (Tr. 224, 232). As he did so, Ms. Dukes saw the gun in Mr. Anderson's pocket and got between the two men (Tr. 225, 231-232). Ms. Dukes knew Mr. Anderson was "kind of dangerous" (Tr. 226). She testified that she told Mr. Anderson to leave (Tr. 225).

Mr. Brown's aunt, Mertell Brown, who was on Ms. Dukes' porch before the shooting, also testified that she had seen Mr. Anderson's gun (Tr. 243, 252-253). She said that when it appeared that Mr. Anderson was reaching for his gun, Mr. Brown did not give Mr. Anderson the chance to shoot him, and instead, shot him (Tr. 244, 251, 253-254). She said the hand in which Mr. Anderson was holding his gun went straight up in the air when Mr. Brown shot him (Tr. 258-259). Mr. Brown fell to the ground and the gun fell from his hand (Tr. 245-246).

Mertell and another of Mr. Brown's aunts, Roberta Davis, testified that afterwards, they saw Ms. Vanhook pull off Mr. Anderson's shoes, and search his shoes and pockets (Tr. 245, 264). They did not know what, if anything, Ms. Vanhook found (Tr. 245, 264). Mertell and Ms. Dukes also testified that Ms.

Vanhook or a boy with long braids picked up Mr. Anderson's gun and the boy ran around the corner with it (Tr. 228, 245-246, 257, 269).

After hearing the evidence, the jury retired to deliberate at 2:18 p.m. on February 24, 2009 (Tr. 316). At 5:04 p.m. that day, the jury returned with its verdicts finding Mr. Brown guilty of murder in the second degree and armed criminal action (Tr. 318-319; L.F. 5, 57-58). On March 16, 2009, the Honorable Thomas J. Frawley sentenced Mr. Brown to consecutive terms of imprisonment in the Missouri Department of Corrections of thirty years (Count 1), and three years (Count 2) (Tr. 345; L.F. 72-75).

POINT – I.

The trial court clearly erred and abused its discretion in overruling defense counsel's objections to the State using an unrelated pistol during closing argument as demonstrative evidence because the use of the pistol was far more prejudicial than it was probative. The pistol was outside the evidence, was not shown to witnesses during trial for identification purposes, and was not the gun used in the shooting, a gun found in either the defendant's or victim's possession, or a gun found or seen at or near the crime scene. Despite the lack of any evidence about the size, caliber, type, brand, or model of pistol victim Anderson had on the day of the shooting, the prosecutor used a .38 caliber revolver to demonstrate that it was

impossible for Mr. Anderson to have carried and drawn a gun in the manner that Mr. Brown's self-defense witnesses had described. The decisive effect of the prosecutor's improper demonstration of the unrelated pistol in closing is evidenced by the jury's question asking for the .38 caliber revolver in jury deliberations. Because the evidence of Mr. Brown's guilt was not overwhelming, there is a reasonable probability that, but for the prosecutor's improper argument, the jury's verdict would have been different. The trial court's error denied Mr. Brown's rights to due process of law and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Brown's convictions and remand for a new trial.

State v. Black, 50 S.W.3d 778 (Mo. banc 2001);

State v. Wynne, 182 S.W.2d 294 (Mo. 1944);

State v. Hall, 748 S.W.2d 713 (Mo. App. E.D. 1988);

State v. Grant, 810 S.W.2d 591 (Mo. App. S.D. 1991);

Mo. Const., Art. I, §§ 10 and 18(a);

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

Rules 29.11 and 30.20.

POINT – II.

The trial court clearly erred in denying defense counsel's request for a peremptory strike of Juror No. 1, Ms. Hoxworth, because the State did not show that the defense's strike was motivated by purposeful discrimination against the juror based on gender, ethnic origin, or race. After the State made its *Batson* challenge, defense counsel explained that he struck Juror Hoxworth because she was "a white-collar worker who said nothing and she's single." Defense counsel's explanation was reasonably specific, race-neutral, gender-neutral, and legitimate, and the under the totality of the circumstances, counsel's explanation was not a pretext for discrimination. The trial court's ruling denied Mr. Brown's rights to due process of law, to equal protection of the law, to a fair and impartial jury, and to a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 2, 10, 18(a), 22(a) and 22(b) of the Missouri Constitution. This Court must reverse Mr. Brown's convictions and remand for a new trial.

Georgia v. McCollum, 505 U.S. 42 (1992);

State v. Barnett, 980 S.W.2d 297 (Mo. banc 1998);

State v. Williams, 97 S.W.3d 462 (Mo. banc 2003);

State v. Whitfield, 947 S.W.2d 537 (Mo. App. E.D. 1997);

Mo. Const., Art. I, §§ 2, 10, 18(a), 22(a);

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

Rules 29.11 and 30.20.

ARGUMENT – I.

The trial court clearly erred and abused its discretion in overruling defense counsel's objections to the State using an unrelated pistol during closing argument as demonstrative evidence because the use of the pistol was far more prejudicial than it was probative. The pistol was outside the evidence, was not shown to witnesses during trial for identification purposes, and was not the gun used in the shooting, a gun found in either the defendant's or victim's possession, or a gun found or seen at or near the crime scene. Despite the lack of any evidence about the size, caliber, type, brand, or model of pistol victim Anderson had on the day of the shooting, the prosecutor used a .38 caliber revolver to demonstrate that it was impossible for Mr. Anderson to have carried and drawn a gun in the manner that Mr. Brown's self-defense witnesses had described. The decisive effect of the prosecutor's improper demonstration of the unrelated pistol in closing is evidenced by the jury's question asking for the .38 caliber revolver in jury deliberations. Because the evidence of Mr. Brown's guilt was not overwhelming, there is a reasonable probability that, but for the prosecutor's improper argument, the jury's verdict would have been different. The trial court's error denied Mr. Brown's rights to due process of law and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth

Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Brown's convictions and remand for a new trial.

Facts and Preservation of the Error

Before closing argument, the prosecutor advised defense counsel and the trial court that he wished to use a .38 caliber revolver in closing argument for demonstrative purposes (Tr. 292). The prosecutor wished to demonstrate to the jury what he believed occurred and the unlikelihood that the shooting had occurred in the manner that the defense witnesses testified it had (Tr. 293). The prosecutor noted that defense witnesses testified they saw the handle of the gun protruding from the pocket of Mr. Anderson's sweatpants, and that they saw Mr. Anderson reach across to get the gun (Tr. 295).

Defense counsel objected to the prosecutor's use of the .38 caliber revolver during closing argument (Tr. 292). Defense counsel stated the .38 caliber revolver was irrelevant because "[n]obody [had] testified that the decedent [, Mr. Anderson,] had a .38 caliber revolver" (Tr. 293, 295). Moreover, defense counsel noted that the .38 caliber revolver was "not introduced into evidence and was not shown to the jury or utilized during the course of the trial in any way, shape or form" (Tr. 292). Defense counsel argued that as a consequence, it was improper for the prosecutor to utilize the gun during closing argument (Tr. 293). Defense

counsel further argued that "any relevance whatsoever" that the gun had was clearly "outweighed by [the] prejudicial value of the State pulling out a .38 caliber revolver and showing it to the jury" (Tr. 294). The State responded, "Everything I'm doing is prejudicial hopefully" (Tr. 296).

The trial court noted the .38 caliber revolver that shot Mr. Anderson was not available for trial because Mr. Brown had not turned it over to police and had given it away (Tr. 293-294). Then, the trial court granted the prosecutor leave to display the revolver to the jury in closing argument, and to demonstrate to the jury the relative credibility of the State's and defense's stories (Tr. 294, 296). Afterwards, the trial court allowed the defense a continuing objection to the prosecutor's demonstration, so there was no need for defense counsel to make an objection each time the prosecutor used the revolver in closing argument (Tr. 297).

In closing argument, the prosecutor argued:

> These are the pants that were being worn that day by Mr. Brown -- by Mr. Anderson. The pockets -- this is the front, by the way. The tag is in the back. Notice how the pockets are cut, toward the back. Now, if Mr. Anderson in fact had a weapon, as it was described by the defendant and by Mertel Brown -- this weapon, by the way, is unloaded and

> it has a clip across here so the trigger doesn't pull -- they say that they saw the weapon in his left pocket and the grip was hanging out. They described it as a white pearl grip. The description of the defendant and his witnesses were [sic] that what happened was that Mr. Anderson went for the gun like this (indicating) to get it out of his pocket. And that's when Mr. Brown says he took the gun from behind his back and shot him repeatedly, four times.

(Tr. 301).

After closing argument, during jury deliberations, jurors asked to see Mr. Anderson's pants, State's Exhibit #5, and the trial court obliged them (L.F. 55; Tr. 192, 316). Fifteen minutes later, jurors asked, "Can the sheriff please bring in the gun used as a sample? We would like [to] see the gun and return [it] to the sheriff" (Tr. 316). The trial court responded, "The gun was not received in evidence. I'm only able to give you what was received in evidence. You are to be guided by your recollection of the evidence" (Tr. 317).

After Mr. Brown's conviction, defense counsel timely filed a new trial motion in which he assigned error to the trial court's ruling (L.F. 60). Defense counsel asserted, "The trial court erred in overruling defense counsel's objections to the State using an unrelated pistol during closing argument as demonstrative

evidence because the use of the object was far more prejudicial than it was probative" (L.F. 60).

Because defense counsel made a continuing objection to the prosecutor's use of the revolver during closing argument and included an assignment of error in Mr. Brown's timely filed new trial motion, this error is preserved for appellate review. Rule 29.11(d). Should this Court find otherwise, Mr. Brown respectfully requests review for plain error under Rule 30.20.

Standard of Review

The trial court has broad discretion to permit or prohibit arguments in closing, and the trial court's rulings are only reversed if the trial court abuses its discretion and prejudices the defendant. *State v. Ferguson*, 20 S.W.3d 485, 498 (Mo. banc 2000). Where the improper argument had a decisive effect on the jury's determination, the conviction is reversed. *State v. Roberts*, 838 S.W.2d 126, 131-132 (Mo. App. E.D. 1992). Generally, such a "decisive effect" exists when there is a reasonable probability that, in absence of the remarks, the verdict would have been different. *Id*. at 132.

Argument

In this case, the trial court erred and abused its discretion in overruling defense counsel's objections to the State using an unrelated pistol during closing argument as demonstrative evidence because the use of the pistol was far more

prejudicial than it was probative. Both Missouri and Federal courts have consistently condemned the deliberate introduction of prejudicial extraneous matter into trial proceedings by the prosecution. *Newlon v. Armontrout*, 885 F.2d 1328, 1336 (8th Cir. 1989). Although prosecutors are given wide latitude during closing argument, as representatives of the government, they have a duty to ensure that the defendant gets a fair trial. *State v. Hubbard*, 659 S.W.2d 551, 558 (Mo. App. W.D. 1983). There must be no conduct by argument, or otherwise, the effect of which is to inflame the prejudices or excite the passions of the jury against the defendant. *State v. Long*, 684 S.W.2d 361, 365 (Mo. App. E.D. 1984) (citing *State v. Tiedt*, 206 S.W.2d 524, 526-527 (Mo. banc 1947)). The prosecutor may prosecute with vigor and strike blows, but he is not at liberty to strike foul ones. *Long*, 684 S.W.2d at 365.

Where the prosecutor displays or mentions lethal weapons in closing argument that are not related to the offense for which the defendant is on trial, the appellate courts are quick to find that prejudicial, reversible error occurred. *State v. Charles*, 572 S.W.2d 193, 198 (Mo. App. K.C.D. 1978). The display, mention, or admission into evidence of weapons that are not connected with the defendant or the offense for which the defendant is on trial results in unfair prejudice. *State v. Wynne*, 182 S.W.2d 294, 300 (Mo. 1944).

First, there is a natural tendency to infer from the mere

> production of any material object, and without further evidence, the truth of all that is predicated of it. Secondly, the sight of deadly weapons or of cruel injuries tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence.

Id. (citing 4 Wigmore, Evidence, Sec. 1157, p. 254).

As a result, courts have consistently found reversible error in the display or admission of unrelated guns as demonstrative evidence at trial and this is borne out by the following cases: *id.* at 299-300 (reversing because the prosecutor used the .25 caliber pistol in his pocket for demonstration purposes on cross-examination); *State v. Holbert*, 416 S.W.2d 129, 133 (Mo. 1967) (reversing due to the admission of revolvers other than the ones for which the defendant was on trial); *State v. Merritt*, 460 S.W.2d 591, 593-595 (Mo. 1970); *Charles*, 572 S.W.2d at 196-199 (reversing for the mention and admission of an unrelated .38 caliber revolver and cartridge); *State v. Davis*, 530 S.W.2d 709, 712-713 (Mo. App. St.L.D. 1975) (reversing for admission of unrelated sawed-off shotgun); *State v. Fristoe*, 620 S.W.2d 421, 426-427 (Mo. App. W.D. 1981) (reversing for display of an unrelated .22 caliber long-barreled revolver); *State v. Moore*, 645 S.W.2d 109, 110 (Mo. App. W.D. 1982) (reversing for admission of a handgun unrelated to the robbery for which the defendant was on trial); and, *State v. Perry*, 689 S.W.2d

123, 125-126 (Mo. App. W.D. 1985) (reversing for admission at trial of unrelated shotgun).

This Court should also find reversible error in Mr. Brown's case because the trial court permitted the display of an unrelated gun that was outside the evidence, was not shown to witnesses during trial for identification purposes, and was not the gun used in the shooting, a gun found in either the defendant's or victim's possession, or a gun found or seen at or near the crime scene. Though a .38 caliber revolver was the type of weapon that *defendant Brown* admitted he had used in the shooting (Tr. 285), the .38 caliber revolver used in closing argument was not shown to Mr. Brown or any other witness at trial for identification as being the same as, or similar to, any gun used in the charged shooting, any gun found in either the defendant's or victim's possession, or any gun found or seen at or near the crime scene (*see* Tr. 100-291). In fact, the .38 caliber revolver used in the prosecutor's closing argument was "not introduced into evidence and was not shown to the jury or utilized during the course of the trial in any way, shape or form" (Tr. 292). The trial court should properly refuse to permit counsel to use an object outside the evidence to dramatize his closing argument. *See State v. Black*, 50 S.W.3d 778, 787 (Mo. banc 2001).

Yet, the trial court in Mr. Brown's case permitted the prosecutor to display an inherently prejudicial object outside the evidence, a lethal firearm, and to

inaccurately portray the firearm, a .38 caliber revolver, as the type of firearm that defense witnesses claimed *victim Anderson* possessed on the day of the shooting (Tr. 292-298, 301). The .38 caliber revolver was not the type of firearm that witnesses testified Mr. Anderson had. At trial, no witness testified that Mr. Anderson was armed with a .38 caliber revolver on the day of the shooting, that the .38 caliber revolver was Mr. Anderson's gun, or that Mr. Anderson carried a gun similar to the .38 caliber revolver shown on the day of the shooting or any other day (*see* Tr. 206-291).

Rather, witnesses testified that they knew Mr. Anderson carried a gun (Tr. 210), and vaguely described the gun that Mr. Anderson had the day of the shooting as "a shiny looking" or "chrome" gun with a white looking, light, or pearl handle, which protruded from Mr. Anderson's left pants' pocket, left side, or waistband (Tr. 231-232, 251-252, 257, 279). This testimony did not connect Mr. Anderson to the .38 caliber revolver used in closing argument by the prosecutor. It also certainly did not support the prosecutor's portrayal of the unrelated .38 caliber revolver, which no witness had identified and no court had admitted, as the weapon that Mr. Anderson had in his pocket the day of the shooting. Consequently, the trial court erred and abused its discretion in overruling defense counsel's objections to the State using the revolver during closing argument as demonstrative evidence.

The trial court's error warrants reversal because the error prejudiced Mr. Brown by influencing the jury's verdict. The prosecutor's improper argument related to the central, disputed issues at trial: whether Mr. Anderson drew or attempted to draw a gun before Mr. Brown shot him; and consequently, whether Mr. Brown acted in lawful self-defense by shooting Mr. Anderson (*see* L.F. 49-50 – self-defense instruction; L.F. 42-43 – verdict directors).

The prosecutor's demonstration was also an unfair comment on the evidence. Despite the lack of any evidence about the size, caliber, type, brand, or model of gun Mr. Anderson had on the day of the shooting, the prosecutor used a .38 caliber revolver of unknown size, brand, and model to demonstrate that it was impossible for Mr. Anderson to have carried and drawn a gun in the manner that Mr. Brown's self-defense witnesses had described. As the prosecutor went for the unrelated .38 caliber revolver in his pocket and displayed it to the jury, he argued, "Is this reasonable, folks? Do you really believe that?" (Tr. 302).

But the .38 caliber revolver with which the prosecutor demonstrated might have been larger, heavier, and more cumbersome to carry in a pants' pocket or waistband than the gun that defense witnesses claimed to have observed. There was no evidence tending to show that .38 caliber revolver so much as resembled the "shiny looking" or "chrome" gun with a white looking, light, or pearl handle

that defense witnesses testified protruded from Mr. Anderson's left pants' pocket, left side, or waistband (Tr. 231-232, 251-252, 257, 279).

And, since the prosecutor's demonstration was made in closing argument, rather than during the case, the defense did not have the opportunity to elicit any testimony from defense witnesses about whether the .38 caliber revolver and the prosecutor's demonstration were fair representations of what they had seen on the day of the shooting. That the defense was not presented a fair opportunity to rebut the conclusions that jurors no doubt drew from the prosecutor's contrived use of the .38 caliber revolver in closing argument could only have prejudiced Mr. Brown.

What's more, considering the jury's request to view the .38 caliber revolver during jury deliberations, the prejudice to Mr. Brown is unmistakable (Tr. 316). "Improperly admitted evidence should not be declared harmless unless it can be said harmless without question, and the record demonstrates that the jury disregarded or was not influenced by the improper evidence." *State v. Grant*, 810 S.W.2d 591, 592 (Mo. App. S.D. 1991).

Here, the decisive effect of the prosecutor's improper argument on the jury is evidenced by the jury's question at 3:15 p.m. asking for Mr. Anderson's sweatpants, and the jury's question at 3:30 p.m. asking for the .38 caliber revolver during jury deliberations (Tr. 316-318). The jury would not have asked

for the .38 caliber revolver used in closing argument had it not intended to consider the prosecutor's improper argument and demonstration in deliberating Mr. Brown's guilt. Also, in light of the substantial evidence supporting Mr. Brown's defense of self-defense – the testimony of five defense witnesses, including the defendant – the fact that the jury returned with guilty verdicts indicates that the jury considered the prosecutor's improper argument in rendering its guilty verdicts.

There is a reasonable probability that, but for the prosecutor's improper argument, the jury's verdict would have been different because the State's evidence against Mr. Brown was not overwhelming. Mr. Brown's case was close and depended entirely on whether the jury believed Mr. Brown's five defense witnesses or the two chief State's witnesses whose credibility and reliability were undoubtedly questionable: victim Anderson's grieving girlfriend, Raquel Vanhook, who defense witnesses claimed removed Mr. Anderson's gun from the scene after the shooting or had it removed (Tr. 141-187. 228, 245-246, 257, 269); and, Douglas Vaughn, a bystander at the party, who admittedly observed the argument from ten feet away and heard only select portions of what Mr. Anderson and Mr. Brown said (Tr. 125, 136).

Under the circumstances, there is a reasonable probability that, absent the prosecutor's improper, highly prejudicial demonstration of what he claimed the

defense witnesses said Mr. Anderson did with his gun, the jury would have discounted the testimony of the State's witnesses and would have found Mr. Brown acted in lawful self-defense. Substantial evidence of self-defense came in at trial through prosecution and defense witnesses, including Mr. Brown, showing the following: (1) victim Anderson carried a gun and was "kind of dangerous" (Tr. 210, 226, 274); (2) Mr. Anderson had a grudge against Mr. Brown because Mr. Brown had not assisted in retaliating against those who had previously shot Mr. Anderson (Tr. 273-274, 275-277); (3) Mr. Anderson threatened Mr. Brown prior to, and on the day of, the shooting (Tr. 224, 232, 275-277, 279-280); (4) Mr. Brown retreated from Mr. Anderson immediately before the shooting (Tr. 280-281); (5) Mr. Anderson and Mr. Brown were face-to-face when the shooting occurred (Tr. 147, 250, 253, 283); (6) it appeared Mr. Anderson was going to shoot Mr. Brown (Tr. 244, 251, 253-254, 258-259); (7) Mr. Anderson had a gun in his waistband, on his left side, or in his left pants' pocket (Tr. 211, 220, 225, 231-233, 243-244, 250, 252-253, 265); (8) the first shot entered Mr. Anderson's chest/stomach area (Tr. 147, 194, 197-198); (9) Mr. Brown turned himself into police three days after the shooting (Tr. 120-121, 288), and (10) Mr. Brown's defense of self-defense came to light well before trial when he told his mother the day after the shooting that he had been afraid for his life and had to defend himself (Tr. 217).

Because there was substantial evidence of self-defense and the evidence of Mr. Brown's guilt was not overwhelming, this Court must reverse Mr. Brown's convictions and remand for a new trial. In *Grant*, the Southern District reversed and remanded because the prosecutor used a gun that had neither been identified nor admitted into evidence to demonstrate how a gun was pointed at the victim and how the proximity of the gun to the victim's head had permitted the victim to see in the gun chamber. 810 S.W.2d at 592. Though no evidence established the gun as the same as, or similar to, the gun used in the robbery, and no evidence connected the gun to the robbery offense, the prosecutor handed the gun to the victim and had him point it at the prosecutor's head. *Id*. The prosecutor's demonstration of an unconnected gun, over defense objection, constituted prejudicial, and consequently, reversible error. *Id*.

Similarly, in *State v. Hall*, 748 S.W.2d 713, 715-716 (Mo. App. E.D. 1988), the Eastern District found reversible error where the trial court permitted the prosecutor to draw a gun from his waistband during closing argument to demonstrate the unreliability of the defense witnesses' testimony. The defendant, who was on trial for unlawful use of a weapon, presented two female defense witnesses who testified that the defendant had not removed a gun from his clothing and thrown it, but that another unidentified male had thrown an object. *Id*. at 714.

Later, after the defense's closing argument, the prosecutor sought to demonstrate for the jury on rebuttal how defense witnesses might have been so distracted or inattentive that they simply failed to see the defendant remove the gun from his clothing as prosecution witnesses had described. *Id*. at 714-715. Over defense objection, the prosecutor drew a gun from his waistband while simultaneously arguing the following:

> {Prosecutor}: Now as Ms. Moss stood here in front of you, I sat there in her closing argument, I sat right there approximately the same distance as the two girls were from Kenny Hall, were you paying attention to her or were you paying attention to me? Where is the gun? It's right here. You didn't see me put it there because you weren't paying attention to me, you were paying attention to her.
>
> . . .
>
> Just like the girls weren't looking at Kenny Hall to see what he was doing, they were looking at the guy doing like this. (indicating)

Id.

The Eastern District held the prosecutor's demonstration was "an unfair device." *Id*. at 715. The demonstration related to the central issue in the case: whether the defendant or another person had the gun. *Id*. The demonstration was not a comment on evidence: the conditions in the courtroom under which the jury viewed the prosecutor were entirely different than those under which the defense witnesses made their observations; and, the demonstration did not illustrate the acts of the defendant or the degree of attention of any witness at trial. *Id*. In addition, because the evidence of the defendant's guilt was not overwhelming, it was impossible to conclude the improper argument had not misled jurors. *Id*. at 716. For these reasons, the Eastern District concluded a new trial was required. *Id*.

The error of Mr. Brown's trial court similarly requires a new trial, for some of the very same reasons. The prosecutor's demonstration related to the central issue at trial. Also, for the reasons previously stated, the demonstration was not a comment on the evidence, but constituted unsworn testimony by the prosecutor. Prosecutors are entitled to argue the evidence and reasonable inferences from the evidence, *State v. Crump*, 986 S.W.2d 180, 188 (Mo. App. E.D. 1999), but "[a]ssertions of fact not proven amount to unsworn testimony by the prosecutor." *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995). In closing argument, the prosecutor may not give unsworn, untested testimony bearing on

a crucial issue in the defendant's case. *See State v. Brown*, 231 S.W.3d 268, 272 (Mo. App. W.D. 2007) (reversing because the prosecutor argued in closing that she would never risk her career by suborning perjury, and thereby rebutted the defendant's defense of self-defense and defense of another).

Through his demonstration with the .38 caliber revolver in closing, the prosecutor gave unsworn, untested testimony rebutting Mr. Brown's defense of self-defense in a close case in which the evidence of Mr. Brown's guilt was not overwhelming. As a consequence, this Court must reverse Mr. Brown's convictions and remand for a new trial. The trial court erred and denied Mr. Brown's rights to due process of law and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

ARGUMENT – II.

The trial court clearly erred in denying defense counsel's request for a peremptory strike of Juror No. 1, Ms. Hoxworth, because the State did not show that the defense's strike was motivated by purposeful discrimination against the juror based on gender, ethnic origin, or race. After the State made its *Batson* challenge, defense counsel explained that he struck Juror Hoxworth because she was "a white-collar worker who said nothing and she's single." Defense counsel's explanation was reasonably specific, race-neutral, gender-neutral, and legitimate, and the under the totality of the circumstances, counsel's explanation was not a pretext for discrimination. The trial court's ruling denied Mr. Brown's rights to due process of law, to equal protection of the law, to a fair and impartial jury, and to a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 2, 10, 18(a), 22(a) and 22(b) of the Missouri Constitution. This Court must reverse Mr. Brown's convictions and remand for a new trial.

Facts

At trial, the defense used its peremptory challenges to remove Juror No. 1, Ms. Hoxworth, Juror No. 3, Ms. Deno, Juror No. 9, Dr. Allen, and Juror No. 14, Ms. Horton (Tr. 83-86). Ms. Hoxworth, Ms. Deno, and Ms. Horton were White or

Caucasian women (Tr. 84-85). Ms. Hoxworth was a single, white-collar worker who indicated on voir dire that she would be able to listen to what Mr. Brown said on the witness stand, despite Mr. Brown's prior drug conviction (Tr. 69-70, 85).

Ms. Deno, who was also single, had disclosed on voir dire that two of her friends were policemen, and that one of the two, Officer Kirk, had worked in the south St. Louis area (Tr. 45-46, 85). She stated that she knew Officer Kirk through another of her cop friends, but that she would not give Officer Kirk more or less credibility than anyone else if he testified at trial (Tr. 45-46). She told defense counsel that she could be fair and impartial, and qualified her answer by stating, "I don't feel – I don't have a relationship in regards to where I would feel – that I don't feel that just by knowing him" (Tr. 46). She later told defense counsel that she could hold the State to the burden of proving beyond a reasonable doubt that Mr. Brown did not act in self-defense (Tr. 72).

Dr. Robert Allen disclosed on defense voir dire that he had served on the jury for a rape case seven years ago (Tr. 30-31). He had not been the foreperson of the jury, but he had found the experience of serving frustrating (Tr. 30-31, 86).

Ms. Horton also disclosed on voir dire that she had been on a criminal jury before but had not served as the jury's foreperson (Tr. 33). She additionally disclosed that her brother had been a St. Louis City police officer for fifteen years,

had worked in the First District, and had just been promoted to detective (Tr. 53-54). She stated that she sees her brother once a month but does not discuss his work with him (Tr. 53-54). She indicated that she would not give a police officer more or less credibility based on her relationship with her brother, and acknowledged that some police officers lie and some tell the truth (Tr. 54). When asked if she would be able to judge the case based on the evidence, she said, "Yes" (Tr. 54).

Defense counsel attempted to remove Juror Deno for cause, but the trial court denied his motion to strike her (Tr. 77-78). At the conclusion of voir dire, defense counsel used his peremptory strikes to strike Jurors Deno, Horton, Allen, and Hoxworth, and the State challenged the strikes of the three White, female jurors because they are members of a protected class of jurors (Tr. 83-84, 86).

Initially, defense counsel explained that he had struck Juror Hoxworth because she had not said anything during voir dire (Tr. 84-85). When the prosecutor informed defense counsel that he had asked Juror Hoxworth a question and she had answered it, defense counsel, replied: "Yeah, that was it. She's the only one who – she doesn't know cops or anything and she's a white-collar worker" (Tr. 84).

Defense counsel later added that Juror Hoxworth is "a white-collar worker who said nothing and she's single" (Tr. 85). Based on those factors, defense

counsel stated that he concluded Juror Hoxworth was "holding in who knows what and it scare[d] [him]" (Tr. 85).

The trial court permitted all of the defense's peremptory strikes, except that of Juror Hoxworth (Tr. 84-87). In making its ruling, the trial court noted Juror Hoxworth was not the only juror who said nothing (Tr. 84). The court noted Mr. Moorehead had said nothing during voir dire, and stated that it had a problem with defense counsel's explanation for striking Juror Hoxworth (Tr. 84). The trial court said:

> Mr. Moorehead said nothing. Ms. Scott, I think, and Mr. Wallace said something. But there are some things that were in response to questions directed by you to them specifically, as was Mr. Jones. So, yes, they said something, but because you – and when I use the word "picked on" I didn't mean that because you picked them, that's not a critical word. You said to them, what about you, Mr. Jones, what do you think about this, what do you think about this, Mr. Wallace. So Ms. Hoxworth did answer questions.

(Tr. 85).

The trial court further stated it had a problem with defense counsel striking Juror Hoxworth:

> You've got four strikes, all of whom are White, two who – three of whom are White women. When you put it all together, it doesn't strike me that – that that's not a legitimate *Batson* challenge to Ms. Hoxworth.

(Tr. 85).

Ms. Hoxworth, identified as Juror No. 1, served on the jury that convicted Mr. Brown (*see* Tr. 87-88: transcript of jury list).

Preservation of the Error

This error is properly preserved for appellate review because defense counsel alleged error in the trial court's ruling in a timely filed motion for new trial (L.F. 59). Rule 29.11(d). *State v. Shaw*, 14 S.W.3d 77, 83 (Mo. App. E.D. 1999). If this Court finds otherwise, however, Mr. Brown requests plain error review under Rule 30.20.

Standard of Review and Applicable Law

The criminal defendant's right to peremptory challenges is a legislative grace, founded on statute, and not a federal constitutional right. *State v. Martin*, 291 S.W.3d 269, 281 (Mo. App. S.D. 2009) (citing *State v. Gill*, 167 S.W.3d 184, 194 (Mo. banc 2005)); *Rivera v. Illinois*, 129 S.Ct. 1446, 1453 (2009); *United*

States v. Martinez-Salazar, 528 U.S. 304, 311 (2000). Section 494.480.2(2) of the Missouri Revised Statutes provides the defendant with six peremptory challenges in cases punishable by imprisonment in the penitentiary. In exercising the defendant's peremptory challenges, defense counsel may rely on "perceptions of attitudes based upon demeanor, gender, ethnic background, employment, marital status, age, economic status, social position, religion, and many other fundamental background facts." *State v. Blunk,* 860 S.W.2d 819, 821 (Mo. App. E.D. 1993) (citing *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. banc 1987)).

"Under the Equal Protection Clause, [however,] a party may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin or race." *State v. Hampton*, 163 S.W.3d 903, 904 (Mo. banc 2005) (quoting *State v. Marlowe*, 89 S.W.3d 464, 468 (Mo. banc 2002)). In *Batson v. Kentucky*, 476 U.S. 79, 86, 95-98 (1986), the United States Supreme Court held the Equal Protection Clause prohibited a prosecutor from discriminatorily striking potential jurors on the basis of their race. In *Georgia v. McCollum*, 505 U.S. 42, 59 (1992), the United States Supreme Court held the *Batson* prohibition extended to criminal defendants who discriminatorily struck potential jurors on the basis of their race, and in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994), the United States Supreme Court extended the *Batson*

prohibition to either party's discriminatory use of peremptory strikes to remove jurors based on gender bias.

These prohibitions apply with equal force to prosecutors and defendants in criminal trials in the State of Missouri. *See State v. Hayden*, 878 S.W.2d 883, 885 (Mo. App. E.D. 1994); *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992). Article I, section 2 of the Missouri Constitution provides that "all persons . . . are entitled to equal rights and opportunity under the law." *City of Pleasant Valley v. Baker*, 991 S.W.2d 725, 729 (Mo. App. W.D. 1999); Mo., Const., Art. I, § 2.

In Missouri, a *Batson* challenge to the improper removal of a juror on the basis of race or gender proceeds in three steps. *State v. Broom*, 281 S.W.3d 353, 355 (Mo. App. E.D. 2009) (discussing steps); *see also State v. Smith*, 5 S.W.3d 595, 596-597 (Mo. App. E.D. 1999) (same). First, the opponent must raise a *Batson* challenge with respect to one or more specific jurors struck and identify the cognizable group to which the excluded jurors belong. *Id.*; *see also State v. Miller,* 162 S.W.3d 7, 14 (Mo. App. E.D. 2005). Second, the proponent of the strike must offer a reasonably specific and clear race-neutral or gender-neutral reason for the strikes. *Id*. And, third, assuming the proponent can articulate an acceptable reason for the strikes, the opponent must show that the proponent's proffered reasons for the strikes were merely pretextual and that the strikes were discriminatory. *Id*.

This Court will give the trial court's determination on a *Batson* challenge great deference, and will not reverse it unless it is clearly erroneous. *Miller,* 162 S.W.3d at 13-14. The trial court's ruling is clearly erroneous if this Court is left with the definite and firm conviction that a mistake was made. *State v. McFadden*, 216 S.W.3d 673, 675 (Mo. banc 2007).

Argument

The trial court clearly erred in denying defense counsel's request for a peremptory strike of Juror No. 1, Ms. Hoxworth, because the State did not show that the defense's strike was motivated by purposeful discrimination against the juror based on gender, ethnic origin, or race. Though the defense peremptorily struck four White jurors, three of whom were female, the defense articulated a reasonably specific, race-neutral, and gender-neutral reason for the strike of Juror Hoxworth. The defense explained that Juror Hoxworth was "a white-collar worker who said nothing and she's single" (Tr. 85). He further expressed his concern that she was withholding information (Tr. 85).

That a juror seems "uncommunicative," or "never cracked a smile," is an accepted race-neutral and gender-neutral reason for a strike. *See Smulls v. State*, 71 S.W.3d 138, 159 (Mo. banc 2002) (Wolff, J., concurring); *see also State v. Nicklasson*, 967 S.W.2d 596, 614 (Mo. banc 1998) (stating "failure to participate actively in voir dire is gender-neutral on its face").

A quiet demeanor could indicate that a juror is not an independent thinker. *State v. Brow*n, 752 S.W.2d 382, 385 (Mo. App. E.D. 1988). And, particularized silence during the voir dire of one party versus the other may indicate a juror's bias for one party over the other. *See*, *e.g*. *State v. Moore*, 88 S.W.3d 31, 34 (Mo. App. E.D. 2002) (contrasting juror's behavior on voir dire by defense with that on State's voir dire).

What's more, strikes based on a juror's marital status or employment choices are likewise constitutionally permissible because marital status and employment are race-neutral and gender-neutral reasons. *See*, *e.g.*, *State v. Whitfield*, 947 S.W.2d 537, 529 (Mo. App. E.D. 1997) (finding strike of juror based on marital status and unemployment constitutionally permissible). In *State v. Barnett*, 980 S.W.2d 297, 302 (Mo. banc 1998), the defendant raised a gender-*Batson* motion based on the State's peremptory strike of a female juror. The prosecutor explained that she struck the juror because she was concerned about not having "weak" people on the jury, and the juror was "very young" and "single." *Id*. The trial court upheld the State's strike of the female juror, and so did this Court on appeal. *Id*. This Court noted that "[a]ge and marital status are race-neutral, gender-neutral factors." *Id*.

Similarly, in upholding the prosecution's strikes of jurors, this Court has held that "[e]mployment is a valid race-neutral basis for striking a prospective

juror," and "is sufficiently gender-neutral" to support the denial of a *Batson* challenge. *State v. Williams*, 97 S.W.3d 462, 472 (Mo. banc 2003); *State v. Brown*, 998 S.W.2d 531, 545 (Mo. banc 1999). Examples of valid and constitutionally permissible employment reasons for strikes of prospective jurors include:

(1) minimal work experience – *see*, *e.g.*, *State v. Jones*, 747 S.W.2d 229, 232 (Mo. App. E.D. 1988) (upholding strike based on stated belief that young jurors with less life and work experience may be less sympathetic to an elderly victim than older, more mature jurors); *see also State v. Blewett*, 853 S.W.2d 455, 461 (Mo. App. W.D. 1993);

(2) unstable employment history – *see*, *e.g.*, *Whitfield*, 947 S.W.2d at 538-539 (upholding strike based on stated belief that people without a steady job feel they don't have anything at stake in the criminal causes tried in court);

(3) unemployment – *State v. Bennett*, 907 S.W.2d 374, 377 (Mo. App. E.D. 1995) (stating unemployment is a sufficiently neutral reason for striking a juror); and,

(4) type of employment, including, but not limited to . . .

(a) social work – *see*, *e.g.*, *State v. Johnson*, 207 S.W.3d 24, 36 (Mo. banc 2006) (permitting strike of juror who worked in youth services for fear juror would try to save the defendant);

(b) religious vocation – *see*, *e.g*., *State v. Strong*, 142 S.W.3d 702, 713 (Mo. banc 2004) (permitting strike of juror who trained individuals for religious vocation);

(c) medical field – *see*, *e.g*., *State v. Roberts*, 948 S.W.2d 577, 602 (Mo. banc 1997) (permitting strike of juror employed in medical field);

(d) pharmaceutical work – *see*, *e.g*., *State v. Jackson*, 872 S.W.2d 123, 126 (Mo. App. E.D. 1994) (permitting strike of juror who worked with records and drugs in a pharmacy);

(e) postal work – *see*, *e.g*., *State v. Hudson*, 822 S.W.2d 477, 481 (Mo. App. E.D. 1991) (permitting strike of postal worker based on the belief that a liberal attitude is instilled in postal workers); *see also State v. Smulls*, 935 S.W.2d 9, 18 (Mo. banc 1996) (permitting strike of mail sorter); *see also State v. Edwards,* 116 S.W.3d 511, 526-528 (Mo. banc 2003);

(f) defense-related – *see*, *e.g.*, *Smulls*, 935 S.W.2d at 18 (permitting strike of juror who worked in a defense law firm); and

(g) correctional field – *see*, *e.g*., *State v. Hall*, 785 S.W.2d 652, 656 (Mo. App. E.D. 1990) (permitting strike of black female juror who worked at the city jail).

In this case, defense counsel's strike of Juror Hoxworth based on the fact that she was single, quiet on voir dire, and a white-collar worker was valid and constitutionally permissible, and the State did not show otherwise. The State had the ultimate burden of proving that purposeful discrimination motivated defense counsel's strike, or that defense counsel's proffered explanation for striking Juror Hoxworth was merely pretextual. *Miller*, 162 S.W.3d at 14; *Purkett v. Elem*, 514 U.S. 765, 769 (1995).

In determining pretext, the trial court should consider the totality of the facts and circumstances surrounding the case. *Marlowe*, 89 S.W.3d at 469-470. The trial court should consider "whether the explanation is (1) race-neutral [or gender-neutral], (2) related to the case to be tried, (3) clear and reasonably specific, and (4) legitimate." *McFadden*, 216 S.W.3d at 676. The trial court should also consider the existence of similarly-situated jurors whom the party did not strike, the degree of logical relevance between the proffered explanation and the case for which the defendant is on trial, the attorney's credibility based on his demeanor or statements during voir dire and the trial court's prior experience with the attorney, and the demeanor of the juror who was the subject of the strike. *Marlowe*, 89 S.W.3d at 469-470; *see also State v. Davis*, 894 S.W.2d 703, 706-707 (Mo. App. W.D. 1995).

Here, under the totality of the circumstances, counsel's explanation was not a pretext for discrimination, and purposeful discrimination did not motivate defense's counsel's strike of Juror Hoxworth. As previously stated, defense counsel's explanation for striking Juror Hoxworth was clear, race-neutral, and gender-neutral.

It was also reasonably specific and legitimate. Although defense counsel did not attempt to relate his explanation for striking the single, quiet, white-collar worker to the case for which Mr. Brown was on trial, it was reasonable for defense counsel to assume that a single, quiet, white-collar worker, i.e., a salaried professional or educated worker, might have difficulty identifying with a defendant who would testify at trial that he had a prior drug possession conviction, and "mess[ed] around" with street drugs when he wasn't working (*see* Tr. 274-275). It was reasonable to assume that such a person, who was primarily engaged in intellectual work, and not manual labor, might have difficulty understanding why a person such as Mr. Brown would carry a gun for protection on a regular basis, and for what reason, other than killing, Mr. Brown would have carried a gun on the day of the charged incident (Tr. 287).

These assumptions applied with even greater force to Juror Hoxworth who said so little on voir dire that defense counsel believed she was holding back and would be unsympathetic toward Mr. Brown (Tr. 85). Defense counsel had a

"hunch" that because Juror Hoxworth was a single, white-collar worker who had been quiet during voir dire, she was "holding in who knows what and it scare[d] [him]" (Tr. 85).

Counsel was allowed to rely on his "hunch" or his own "horse sense" that Juror Hoxworth might not be a defense-favorable, or fair and impartial, juror. Parties are free to use "horse sense" and "play hunches" in exercising peremptory strikes, and even if the party's perception of the juror is merely based on a race-neutral and gender-neutral "hunch," the party may permissibly strike the juror. *Miller*, 162 S.W.3d at 14; *State v. Morrow*, 968 S.W.2d 100, 114 (Mo. banc 1998). Counsel is "not prohibited from using information outside the record as a basis for the peremptory strike," *State v. Deck*, 994 S.W.2d 527, 538 (Mo. banc 1999), and counsel's common sense, observations, and past experiences may form a legitimate basis for exercising a peremptory strike. *State v. Weaver*, 912 S.W.2d 499, 509-510 (Mo. banc 1995). "A legitimate reason is not one that makes sense but one that does not deny equal protection." *Id*. at 509.

Trial counsel's reason for striking Juror Hoxworth was legitimate, and its legitimacy is not undermined after consideration of the remaining factors. Although the presence of similarly-situated jurors is crucially probative of pretext, it is not dispositive of the State's *Batson* challenge to the defense's peremptory strike of Juror Hoxworth. *Broom*, 281 S.W.3d at 355. The State did

not identify any similarly-situated jurors (Tr. 84-87), and at least one of the jurors that the trial court identified was not similarly situated. Juror Moorehead gave no response on voir dire, whereas Juror Hoxworth did (Tr. 69-70; *see also* Tr. 6-74).

Moreover, the record shows that Juror Hoxworth was quiet on voir dire, as defense counsel indicated, and that defense counsel's peremptory strikes of the remaining three jurors were justified by similarly legitimate, reasonably specific, race-neutral and gender-neutral reasons that were related to Mr. Brown's case (Tr. 6-74, 85-86). The court noted that Juror Deno was possibly biased toward police officers, and defense counsel stated that he believed she possibly knew one of the witnesses (Tr. 85-86). Defense counsel further explained that Dr. Allen indicated he was frustrated with court procedures and that when Juror Horton, who had a cop for a brother, answered his question about credibility with an "uh-huh," it made him uncomfortable (Tr. 86-87).

Consequently, under the totality of the circumstances, the trial court clearly erred in denying defense counsel's request for a peremptory strike of Juror No. 1, Ms. Hoxworth, because the defense's strike was not motivated by purposeful discrimination. The trial court's ruling denied Mr. Brown's rights to due process of law, to equal protection of the law, to a fair and impartial jury, and to a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States

Constitution, and Article I, §§ 2, 10, 18(a), 22(a) and 22(b) of the Missouri Constitution.

This Court must reverse Mr. Brown's convictions and remand for a new trial. Mr. Brown acknowledges that in *Rivera*, the United States Supreme Court held that the trial court's erroneous denial of a defendant's peremptory challenge is not a "structural error" requiring automatic reversal under federal law. 129 S.Ct. at 1453. But the United States Supreme Court expressly left states "free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*." *Id*. at 1456. Consequently, even after the United States Supreme Court's opinion in *Rivera*, law holding that the erroneous denial of a peremptory challenge is reversible error *per se* remains unchanged in some states. *See*, *e.g*., *State v. Campbell*, 772 N.W.2d 858, 862 (Minn. Ct. App. 2009); *People v. Novotny*, ___P.3d ___, 2010 WL 961657, at*3-4 (Colo. Ct. App. March 18, 2010).

Mr. Brown respectfully asks this Court to find (1) that Missouri law holds that the erroneous denial of a defendant's peremptory challenge to a particular juror is reversible error when the challenged juror serves on the defendant's jury, and (2) that for all of the reasons previously stated, the trial court's denial of Mr. Brown's peremptory challenge to Juror Hoxworth was clearly erroneous. *See*, *e.g*., *McFadden*, 216 S.W.3d at 677-678 (reversing and remanding for a new

trial, without a further finding of prejudice, because prosecutor's reason for strike of African American juror – "crazy-looking red hair" – was pretextual); § 494.480.4. Because Juror Hoxworth served on Mr. Brown's jury, reversal is mandated (*see* Tr. 87).

CONCLUSION

WHEREFORE, based on the arguments in his brief, Appellant Anthony Brown respectfully requests this Court to reverse Mr. Brown's convictions, and remand for a new trial.

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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 Thursday, June 17, 2010, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, I hereby certify that this brief includes the information required by Rules 55.03 and 84.06, and that it complies with the word limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Californian FB 14 point font, and contains 10997 words. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee VirusScan Enterprise 7.1.0 software and found virus-free.

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