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 REPLY BRIEF

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When tested by materiality, relevancy, and similarity of the circumstances, the prosecutor's demonstration in closing argument of an unidentified .38 caliber revolver, having no connection to victim Anderson or Appellant Brown, was not logically relevant and was more prejudicial than probative, in that (1) no witness, for either the prosecution or the defense, testified that the .38 caliber revolver was similar to any gun carried by victim Anderson on the day of the shooting, and (2) the facts in evidence did not show sufficient similarity between the circumstances of the case and the demonstration with the .38 caliber revolver. The improper use of the .38 caliber revolver to demonstrate the impossibility that Mr. Anderson carried and drew a gun in the manner that Mr. Brown's self-defense witnesses had described prejudiced Mr. Brown and resulted in reversible error. 10

State v. Wynne, 182 S.W.2d 294 (Mo. 1944); 10

State v. Anderson, 76 S.W.3d 275 (Mo. banc 2002); 10

State v. Hall, 748 S.W.2d 713 (Mo. App. E.D. 1988); & 11

State v. Silvey, 894 S.W.2d 662 (Mo. banc 1995). 11

REPLY ARGUMENT – I. 12

When tested by materiality, relevancy, and similarity of the circumstances, the prosecutor's demonstration in closing argument of an unidentified .38 caliber revolver, having no connection to victim Anderson or Appellant Brown, was not logically relevant and was more prejudicial than probative, in that (1) no witness, for either the prosecution or the defense, testified that the .38 caliber revolver was similar to any gun carried by victim Anderson on the day of the shooting, and (2) the facts in evidence did not show sufficient similarity between the circumstances of the case and the demonstration with the .38 caliber revolver. The improper use of the .38 caliber revolver to demonstrate the impossibility that Mr. Anderson carried and drew a gun in the manner that Mr. Brown's self-defense witnesses had described prejudiced Mr. Brown and resulted in reversible error..... 12

In its brief, Respondent stated that Appellant Brown suggests that it is improper to allow a weapon to be used as a demonstrative exhibit merely because it is not the same exact weapon as was used in the case (Resp. Br. 13). Respondent further argued, "Under Appellant's theory of this case, the inability of Appellant and his family to accurately describe a probably fictitious gun precludes the State from using any type of gun to demonstrate the impossibility of the testimony of Appellant and his family" (Resp. Br. 14). Respondent misstated Appellant's argument and Appellant's theory.[12] Appellant Brown acknowledges that identifications of weapons need not be unequivocal, clear, certain, or proof-positive, but rather that weapons are admissible if there is a prima facie showing of sufficient identity and connection with the crime.

State v. Miller, 208 S.W.3d 284, 288 (Mo. App. W.D. 2006); *State v. Young*, 701 S.W.2d 490, 496 (Mo. App. E.D. 1985). Appellant Brown further acknowledges that "there is no absolute rule that demonstrative evidence of a weapon unconnected to the defendant or offense charged is inadmissible." *State v. Silvey*, 894 S.W.2d 662, 667 (Mo. banc 1995). 13

Appellant notes, however, that "Missouri courts have not approved admission of a weapon not identified as that used to commit an offense without a painstaking show of relevancy." *State v. Reyes*, 740 S.W.2d 257, 261 (Mo. App. W.D. 1987); *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002). Logical relevancy and legal relevancy are prerequisites to the evidence's admissibility. *Anderson*, 76 S.W.3d at 276. Evidence is logically relevant if it has some legitimate tendency to establish the defendant's guilt of the charges for which he is on trial. *State v. Sladek*, 835 S.W.2d 308, 311 (Mo. banc 1992). Evidence is legally relevant if its probative value outweighs its prejudicial effect. *State v. Cole*, 887 S.W.2d 712, 714 (Mo. App. E.D. 1994)..... 13

In evaluating the relevancy and admissibility of a demonstration with a weapon that is unconnected to the defendant or the offense, courts look to (1) whether there is evidence proving that the weapon used in the demonstration was similar to a weapon used, and (2) whether there is sufficient proof of similarity of the circumstances. *See Silvey*, 894 S.W.2d at 667 (discussing *State v. Wynne*, 182 S.W.2d 294 (Mo. 1944), *State v. Perry*, 689 S.W.2d 123 (Mo. App. W.D. 1985), and *State v. Grant*, 810 S.W.2d 591 (Mo. App. S.D. 1991))..... 14

If neither (1) nor (2) are shown, then the display is not logically relevant, is more prejudicial than probative, and constitutes reversible error upon a showing it prejudiced the defendant. For example, in *Wynne*, this Court reversed the defendant's conviction after the trial court admitted a pistol unconnected with the defendant for the purpose of demonstrating how far a pistol stuck out of another individual's pocket. 182 S.W.2d at 298-300. There, no one had testified at trial that the pistol used in the demonstration was the same as, or similar to, any gun that the individual carried. *Id*. at 299. There was little to no evidence about the type or size of gun the individual carried, and there was no evidence about the size of the individual's pocket. *Id*. As a consequence, this Court held that when tested by materiality, relevancy, and similarity of circumstances, the pistol and its demonstration were inadmissible. *Id*. at 300. . 14 Similarly, in this case, for all the reasons stated in Appellant's brief, when tested by materiality, relevancy, and similarity of the circumstances, the prosecutor's demonstration in closing with the unconnected .38 caliber revolver was not logically relevant, was more prejudicial than probative, and constitutes reversible error: (1) no witness, *for either the prosecution or the defense*, testified that the .38 caliber revolver was similar to any gun carried by victim Anderson on the day of the shooting, and (2) the facts in evidence did not show sufficient similarity between the circumstances of the case and the demonstration with the .38 caliber revolver (*see* App. Br. 23-34). 15 What's more, the improper use of the .38 caliber revolver to demonstrate the impossibility that Mr. Anderson carried and drew a gun in the manner that Mr. Brown's

self-defense witnesses had described prejudiced Mr. Brown and resulted in reversible error. The demonstration had a decisive effect on the jury's verdict, as the evidence against Appellant Brown was not overwhelming, and Appellant Brown presented evidence from which jurors could have acquitted him on the basis of self-defense (*see* App. Br. 29-30). 15

Given the circumstances, the prosecutor's demonstration with the .38 caliber revolver constituted the very type of evidence creation that Respondent acknowledged occurred in *State v. Hall*, 748 S.W.2d 713 (Mo. App. E.D. 1988), a case upon which Appellant Brown relied in his substitute brief (*see* Resp. Br. 17-18; App. Br. 31-33). One could not have legitimately inferred from the evidence that victim Anderson was carrying a .38 caliber revolver on his person at the time of the shooting because there was no evidence establishing the .38 caliber revolver was the same as, or similar to, the gun that defense witnesses said Mr. Anderson was carrying at the time of the shooting. 15

In this way, Appellant Brown's case is distinguishable from that of *State v. Henke*, 901 S.W.2d 921 (Mo. App. W.D. 1995), cited by Respondent (Resp. Br. 14, 17). Respondent noted that in *Henke*, the Western District found that there would have been no merit to a defense objection to the prosecutor's use of a shotgun in closing argument to demonstrate how Henke pointed his gun at the victim. 901 S.W.2d at 924..... 16

Yet, in *Henke*, there was evidence at trial supporting the prosecutor's use of the type of gun used in the demonstration, as well as evidence supporting the prosecutor's demonstration. *Id*. There was testimony that Henke had used a shotgun in committing

the assault for which he was on trial, as well as testimony about how Henke pointed or held the shotgun to the victim's chest and pulled the trigger. *Id*. 16

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State v. Young, 701 S.W.2d 490 (Mo. App. E.D. 1985) 8

JURISDICTIONAL STATEMENT

Appellant Anthony Brown adopts the jurisdictional statement set out in Appellant's Substitute Brief, Statement and Argument, filed on June 17, 2010, in this Court in SC90853.

STATEMENT OF FACTS

Appellant Anthony Brown adopts the statement of facts set out in Appellant's Substitute Brief, Statement and Argument, filed on June 17, 2010, in this Court in SC90853. Appellant Anthony Brown will cite to the record on appeal as follows: Legal File, "(L.F)"; Transcript, "(Tr.)"; Appellant's Brief, "(App. Br.)"; and, Respondent's Brief, "(Resp. Br.)."

REPLY POINT – I.[1]

When tested by materiality, relevancy, and similarity of the circumstances, the prosecutor's demonstration in closing argument of an unidentified .38 caliber revolver, having no connection to victim Anderson or Appellant Brown, was not logically relevant and was more prejudicial than probative, in that (1) no witness, for either the prosecution or the defense, testified that the .38 caliber revolver was similar to any gun carried by victim Anderson on the day of the shooting, and (2) the facts in evidence did not show sufficient similarity between the circumstances of the case and the demonstration with the .38 caliber revolver. The improper use of the .38 caliber revolver to demonstrate the impossibility that Mr. Anderson carried and drew a gun in the manner that Mr. Brown's self-defense witnesses had described prejudiced Mr. Brown and resulted in reversible error.

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

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[1] Appellant Brown does not waive the allegation of trial court error presented in Point II of his previously filed substitute brief, but specifically replies to Respondent's Argument addressing Point I.

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

State v. Silvey, 894 S.W.2d 662 (Mo. banc 1995).

REPLY ARGUMENT – I.

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Appellant notes, however, that "Missouri courts have not approved admission of a weapon not identified as that used to commit an offense without a painstaking show of relevancy." *State v. Reyes*, 740 S.W.2d 257, 261 (Mo. App. W.D. 1987); *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002). Logical relevancy and legal relevancy are prerequisites to the evidence's admissibility. *Anderson*, 76 S.W.3d at 276. Evidence is logically relevant if it has some legitimate tendency to establish the defendant's guilt of the charges for which he is on trial. *State v. Sladek*, 835 S.W.2d 308, 311 (Mo. banc 1992). Evidence is legally relevant if its probative value outweighs its prejudicial effect. *State v. Cole*, 887 S.W.2d 712, 714 (Mo. App. E.D. 1994).

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If neither (1) nor (2) are shown, then the display is not logically relevant, is more prejudicial than probative, and constitutes reversible error upon a showing it prejudiced the defendant. For example, in *Wynne*, this Court reversed the defendant's conviction after the trial court admitted a pistol unconnected with the defendant for the purpose of demonstrating how far a pistol stuck out of another individual's pocket. 182 S.W.2d at 298-300. There, no one had testified at trial that the pistol used in the demonstration was the same as, or similar to, any gun that the individual carried. *Id*. at 299. There was little to no evidence about the type or size of gun the individual carried, and there was no evidence about the size of the individual's pocket. *Id*. As a consequence, this Court held that when tested by materiality, relevancy, and similarity of circumstances, the pistol and its demonstration were inadmissible. *Id*. at 300.

Similarly, in this case, for all the reasons stated in Appellant's brief, when tested by materiality, relevancy, and similarity of the circumstances, the prosecutor's demonstration in closing with the unconnected .38 caliber revolver was not logically relevant, was more prejudicial than probative, and constitutes reversible error: (1) no witness, *for either the prosecution or the defense*, testified that the .38 caliber revolver was similar to any gun carried by victim Anderson on the day of the shooting, and (2) the facts in evidence did not show sufficient similarity between the circumstances of the case and the demonstration with the .38 caliber revolver (*see* App. Br. 23-34).

What's more, the improper use of the .38 caliber revolver to demonstrate the impossibility that Mr. Anderson carried and drew a gun in the manner that Mr. Brown's self-defense witnesses had described prejudiced Mr. Brown and resulted in reversible error. The demonstration had a decisive effect on the jury's verdict, as the evidence against Appellant Brown was not overwhelming, and Appellant Brown presented evidence from which jurors could have acquitted him on the basis of self-defense (*see* App. Br. 29-30).

Given the circumstances, the prosecutor's demonstration with the .38 caliber revolver constituted the very type of evidence creation that Respondent acknowledged occurred in *State v. Hall*, 748 S.W.2d 713 (Mo. App. E.D. 1988), a case upon which Appellant Brown relied in his substitute brief

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Yet, in *Henke*, there was evidence at trial supporting the prosecutor's use of the type of gun used in the demonstration, as well as evidence supporting the prosecutor's demonstration. *Id*. There was testimony that Henke had used a shotgun in committing the assault for which he was on trial, as well as testimony about how Henke pointed or held the shotgun to the victim's chest and pulled the trigger. *Id*.

In contrast, in this case, there was no evidence at trial supporting the prosecutor's use of the type of gun used in the demonstration – a .38 caliber

revolver. Consequently, the evidence did not support the prosecutor's use of the .38 caliber revolver to demonstrate the impossibility that Mr. Anderson carried and drew a gun in the manner that Mr. Brown's self-defense witnesses had described.

Though Appellant Brown argued that this demonstration no doubt prejudiced him at trial, Respondent theorized that "the mere display of a weapon in a courtroom is not likely to produce the type of reaction suggested in *Wynne*" due to the desensitizing effect of jurors' repeated exposure to violence in the media (Resp. Br. 17). Respondent's argument overlooked that the prejudice to Appellant Brown is not something that exists only in theory, but is palpable. Whether or not Respondent's theory about the desensitization of jurors to the sight of weapons proves to be generally true, Appellant Brown suffered specific prejudice.

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 asked for the sweatpants and the .38 caliber revolver because jurors wanted to examine them in evaluating Appellant Brown's claim of self-defense and his testimony that Mr. Anderson was the first to draw his weapon. Had the trial court provided both the

.38 caliber revolver and the sweatpants to the jury, jurors would likely have reenacted the prosecutor's demonstration. They would have attempted to confirm for themselves that it would have been impossible for Mr. Anderson to have carried and drawn a gun in the manner that Mr. Brown's self-defense witnesses had described.

The trial court, however, did not provide jurors with the .38 caliber revolver and jurors were left with the memory of the prosecutor's improper demonstration upon which to render their verdict (Tr. 317). For all of the foregoing reasons, this Court must reverse and remand for a new trial.

CONCLUSION

WHEREFORE, based on the arguments in Appellant's Substitute Statement, Brief, and Argument, filed on June 17, 2010, and on the arguments in this Substitute Reply Brief, Appellant Anthony Brown requests that the Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Rule 84.06, I hereby certify that on Wednesday, July 21, 2010, a true and correct copy of the foregoing reply brief and a floppy disk containing the foregoing brief were mailed postage prepaid to Assistant Attorney General Terrence M. Messonnier, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, and uses Californian FB 14 point font. The word-processing software identified that this brief contains 2,264 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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