

No. SC92003

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**In the  
Supreme Court of Missouri**

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**JERMANE CLARK,**

**Appellant.**

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**Appeal from St. Louis City Circuit Court  
Twenty-Second Judicial Circuit, Division Eleven  
The Honorable Bryan L. Hettenbach, Judge**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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## STATEMENT OF FACTS

This appeal arises from Appellant's convictions for murder in the first degree and an associated count of armed criminal action in the Circuit Court of St. Louis City. Appellant was charged as a prior and persistent offender with murder in the first degree, robbery in the first degree, and two counts of armed criminal action. (L.F. 9-10). Appellant was convicted of murder in the first degree and the associated count of armed criminal action following a jury trial held April 19-21, 2010. (L.F. 2-4, Tr. 5-395).

Appellant does not contest the sufficiency of the evidence to sustain his convictions. Viewed in the light most favorable to the verdicts, the evidence at trial showed the following:

On December 28, 2008, Appellant and Glenn Shelby were hanging out with Maurice "ReRe" Payne in the area of Clarence and Lee in St. Louis City. (Tr. 227-228, 230, 278). Both Shelby and Payne had known Appellant for years, (Tr. 227-228, 275), while Shelby and Payne had only known each other for a matter of months. (Tr. 228, 248, 275). Morris Thompson came down the street, approached the three men, and asked them if they had any crack. (Tr. 230-231, 278-279). After Shelby told Thompson no, Appellant suggested that they "gank" him, *i.e.*, sell him some fake crack, and Shelby said he didn't

care. (Tr. 231-232, 296). Shelby gave Appellant his gun and went into his house to use the bathroom. (Tr. 232-234, 242).

Thompson gave Appellant or Payne \$30 for what he believed were three rocks of crack cocaine, but Thompson became suspicious whether the crack was good or not. (Tr. 237, 278-281). As Payne turned to leave, Appellant turned the gun on Thompson to rob him. (Tr. 280-283, 296-297). Appellant told Thompson that he would shoot him if he didn't give him any money. (Tr. 283). Thompson tried to run away, but Appellant shot him in the chest. (Tr. 283).

Payne was present and witnessed the shooting. (Tr. 283). Shelby, who was walking his sisters to a store, heard one gunshot but kept on going to the store. (Tr. 234-235). After Appellant shot Thompson, he searched him for any valuables. (Tr. 284, 296-297, 326, 334). Shortly thereafter, Appellant encountered Shelby in a nearby alley and told him that he tried to sell Thompson fake crack but that he wasn't falling for it, so Appellant tried to rob Thompson and then shot him. (Tr. 236-237). Appellant gave Shelby the gun back, and they both left the scene. (Tr. 237, 297). Shelby hid the gun behind a dumpster in an alley. (Tr. 237).

St. Louis City Detective Jimmy Hyatt was dispatched to the area to investigate an apparent homicide. (Tr. 207-208). Upon arrival, he discovered

Morris Thompson facedown behind a vacant residence. (Tr. 201, 208, 225-226). After it was determined that Thompson was dead, (Tr. 201), Detective Hyatt found a bullet in the victim's clothing. (Tr. 208-209). Thompson had died from a gunshot wound to his chest. (Tr. 310).

Detectives Patrick Haug and Heather Sabin were directed to canvas the neighborhood of the crime scene in hopes of locating any witnesses and/or additional evidence. (Tr. 216-217, 316-317). They were unable to locate anyone who said that they had seen what had happened. (Tr. 218, 317). Two days later, Officer Damon Willis received information regarding a suspicious person, later identified as Glenn Shelby, who was "showing off a gun" on the same block of Lee where the victim had been found. (Tr. 203, 205). As soon as Officer Willis and other police arrived at the scene, Shelby took off running, but the police were able to catch him. (Tr. 203-204, 238-239). As soon as the police took Shelby into custody, he showed them where the gun was, which they seized. (Tr. 204, 239). Ballistics testing matched the gun to the killing of Morris Thompson. (Tr. 336, 347-348).

Both Shelby and Payne told police what had happened regarding the shooting and both testified for the State at Appellant's trial. (Tr. 243, 286, 318-319, 323-324). After receiving the information that Appellant had been the shooter, police were able to arrest Appellant. (Tr. 320-322, 324-326).

Appellant did not testify or present any evidence at trial. (Tr. 357-360, 365-367). The jury found Appellant guilty of murder in the first degree and the associated count of armed criminal action, and not guilty of robbery in the first degree and the associated count of armed criminal action. (L.F. 40-43, Tr. 395). Having found Appellant to be a prior and persistent offender, (Tr. 341-343), the court sentenced Appellant to two concurrent sentences of life imprisonment. (Tr. 401-402, L.F. 48-51).

The court of appeals, Eastern District, affirmed Appellant's convictions and sentences in an unpublished *per curiam* order on July 12, 2011. *State v. Clark*, 2011 WL 2893072 (Mo. App. E.D. 2011). This Court ordered this cause transferred on October 4, 2011.

## ARGUMENT

**The trial court did not abuse its discretion in limiting Appellant’s cross-examination of Maurice “ReRe” Payne regarding whether Payne hoped that his testimony might be helpful in his pending criminal case because Payne’s criminal case had essentially been disposed of by the time of Appellant’s trial without any deal by the State, as Payne had been placed in a diversionary program (drug court), which if successfully completed, would preclude any sentencing whatsoever, so any hope Payne had of currying favor with the State was not relevant to establishing whether he might be biased in favor of the State. Additionally, any error in limiting Payne’s cross-examination was harmless because Appellant was able to effectively cross-examine Payne regarding potential bias, Payne’s testimony was cumulative to the testimony of Glenn Shelby, and the evidence of Appellant’s guilt was substantial.**

### **A. Background.**

Appellant filed a motion for disclosure of deals with State’s witnesses. (L.F. 11-13, Tr. 265). During a conference away from the jury, the State represented that “no deals, no promises or inducements” had been made to either Glenn Shelby or Maurice “ReRe” Payne. (Tr. 265). Appellant’s counsel

stated that this satisfied his written motion. (Tr. 265). Appellant's counsel next stated that he had spoken with Payne, who had expressed a hope and belief that he would gain a benefit or a positive outcome regarding his pending sentence for second-degree burglary and theft. (Tr. 266-267). Payne entered guilty pleas to these charges on March 24, 2010 and had not yet been sentenced, as he had been placed in drug court pursuant to his attorney's request. (Tr. 266). The State had not agreed to his placement in drug court. (Tr. 270-272). Appellant's counsel wished to cross-examine him regarding that hope and belief. (Tr. 267-268). The State argued that it was irrelevant what Payne's hopes were, and that there was no basis for portraying Payne as dishonest simply because he hoped for or believed in a favorable outcome at his sentencing. (Tr. 269).

During an offer of proof, Payne testified that he had not yet been sentenced but that he had been placed in drug court, and that if he failed to complete the requirements, he would be subject to the full range of punishment. (Tr. 273). Payne testified that he hoped that his testimony was going to help him in some way if he failed drug court. (Tr. 273). Payne testified that his hopes would not influence his testimony in any way, and that nothing had been promised him. (Tr. 273).

The court sustained the State's objection to Appellant's proposed cross-examination of Payne regarding his hopes or belief in sentencing. (Tr. 274).

Payne testified at trial that two weeks prior, he had pleaded guilty to second-degree burglary and stealing, but that he had not been sentenced yet. (Tr. 277). During closing argument, Appellant's counsel referred to Payne having just entered a guilty plea and how Payne had "gotten in over his head" and how he "needed somebody to take the fall." (Tr. 378).

### **B. Standard of review.**

Absent a clear abuse of discretion, an appellate court will not interfere with a trial court's ruling on the admission or exclusion of evidence. *State v. Nicklasson*, 967 S.W.2d 596, 619 (Mo. banc 1998). An abuse of discretion will be found when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Mathews*, 33 S.W.3d 658, 660 (Mo. App. S.D. 2000). If reasonable people can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Id.*

The trial court has broad discretion over the extent of cross-examination, especially in criminal cases. *State v. Gardner*, 8 S.W.3d 66, 72 (Mo. banc 1999). An abuse of discretion will be found only if the trial court ruling clearly offends the logic of the circumstances or appears arbitrary and unreasonable. *State v. Strughold*, 973 S.W.2d 876, 887 (Mo. App. E.D. 1998).

If reasonable people can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Id.*

### **C. Cross-examination and bias.**

An accused in a criminal prosecution has the right to confront the witnesses against him. U.S. Const. Amend. VI; Mo. Const. Art. I § 18(a). By virtue of the Fourteenth Amendment, the federal right is secured in state prosecutions. *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). This right includes the opportunity to cross-examine the witness to expose any motivation, including potential bias or prejudice, which may influence his testimony. *Davis v. Alaska*, 415 U.S. 308, 315–317 (1974); *State v. Leisure*, 796 S.W.2d 875, 880 (Mo. banc 1990).

Under Missouri law, “the interest or bias of a witness and his relation to or feeling towards a party are never irrelevant matters.” *State v. Edwards*, 637 S.W.2d 27, 29 (Mo. banc 1982). But the authority of a party, and in particular a criminal defendant, to show the existence and extent of a witness’s bias, prejudice, or hostility is subject to the sound discretion of the trial court. *Edwards*, 637 S.W.2d at 30.

The right of cross examination is not unlimited. *State v. Hicklin*, 969 S.W.2d 303, 307 (Mo. App. W.D. 1998). “Generally, the Confrontation Clause guarantees an opportunity for effective cross examination, not cross-

examination that is effective in whatever way, and to whatever extent the defense might wish." *Id.* "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 677.

As a general rule, a witness may not be impeached with a mere arrest, investigation, or criminal charge not yet resulting in a conviction. *State v. Sanders*, 360 S.W.2d 722, 725 (Mo. 1962). This rule exists because such evidence is generally considered inadmissible character evidence, lacking the necessary relevance to proving the case at hand, as well as not being a reliable gauge of the witness's credibility. *State v. Phillips*, 941 S.W.2d 599, 601 (Mo. App. E.D. 1997). Like any rule, however, this principle has its exceptions, which are threefold: (1) where the inquiry would demonstrate a specific interest of the witness; (2) where the inquiry would demonstrate a witness's motivation to testify favorably for the State; or (3) where the inquiry would demonstrate that the witness testified with an expectation of leniency from the State. *State v. Lockhart*, 507 S.W.2d 395, 396 (Mo. 1974).

#### **D. Evidence related to potential bias by Payne.**

In the present case, Appellant contends that the trial court erred in limiting his cross-examination of State's witness Maurice Payne.

Specifically, Appellant claims that he should have been able to demonstrate Payne's alleged bias by questioning him as to whether he had a hope for leniency in his pending criminal case and thus a motive to testify favorably towards the State. (App. Subs. Br. 22, 24).

Appellant presented the jury with the idea that both of the State's witnesses, Maurice Payne and Glenn Shelby, were potentially biased because they might be seeking to curry favor with the State by testifying against Appellant. During the direct examination of Payne, the jury heard that two weeks prior, he had pleaded guilty to second-degree burglary and stealing, but that he had not yet been sentenced. (Tr. 277). During Appellant's cross-examination of Payne, Payne conceded that in the past, he and Appellant had problems with each other. (Tr. 293-294). Payne admitted that Appellant had given him the gun used in the murder, but that he gave it back to Appellant. (Tr. 294-295). Payne also admitted that it was his plan to "gank" Morris Thompson (*i.e.*, sell him fake crack), but that he had not wanted to shoot him. (Tr. 295-296).

During closing argument, Appellant's counsel made the most of this testimony when he referred to the problems between Payne and Appellant. (Tr. 376). He argued that Payne had just entered a guilty plea and that Shelby was on probation, and that "he" was "gonna do anything to save his butt, because it's his butt that needs saving." (Tr. 378). He further argued that both Payne and Shelby had "gotten in over their heads," and that they knew they were in trouble and "needed somebody to take the fall." (Tr. 379).

Moreover, the jury was specifically instructed that "In determining the believability of a witness and the weight to be given to testimony of the witness, you may take into consideration . . . any interest, bias, or prejudice the witness may have." (Instruction No. 1, L.F. 14). The jury was also instructed that they may consider Payne's guilty pleas "for the sole purpose of deciding the believability of the witness and the weight to be given his testimony and for no other purpose." (Instruction No. 12, L.F. 25).

What the jury did not hear (from the offer of proof) was that 1) no deals, promises, or inducements had been made to Payne by the State; 2) if Payne failed to complete the requirements of drug court, he would be subject to the full range of punishment; 3) Payne hoped that his testimony was going to help him in some way *if* he failed drug court; and 4) Payne's hope that his testimony might have a positive effect on his sentence would not influence his

testimony in any way. (Tr. 265, 273-274). Nor did the jury hear that the State had not agreed to his placement in drug court. (Tr. 270-272).

Although Payne had not actually been sentenced at the time he testified at Appellant's trial, he had been referred to post-plea drug court. (Tr. 266, 268). Payne would not be facing imprisonment after drug court if he were successful and complied with all of the requirements of drug court. (Tr. 268, 270). It was solely up to Payne whether he would successfully complete the requirements of drug court and thus avoid sentencing. (Tr. 268). Payne's "hope" that his testimony might help him could only be realized if he failed drug court and faced a sentence. (Tr. 273). As the prosecutor pointed out, this would be similar to a witness who thinks he might be arrested in the future and so his testimony was a type of insurance policy that might lead to being favorably viewed by the State. (Tr. 268-269).

This case is similar to *State v. Gilbert*, 121 S.W.3d 341, 345 (Mo. App. S.D. 2003), where the Court of Appeals, Southern District, held that because the charges against the State's witness had been disposed of prior to the defendant's trial, there was nothing indicating that the disposition of those charges was affected in any way by, or had any connection with, the actions of the State's witness in recording his conversation with the defendant or in testifying at trial. *Id.* Thus, there was no indication that the State's witness benefited in the disposition of the charges against him because of the tape

recording, or because of any anticipated testimony in this case, nor was there any reason for him to fear harsher treatment by the State if he did not testify to the State's satisfaction. *Id.* This is precisely the situation in the present case, where Appellant's only concern about the disposition of his sentence was his successful completion of the requirements of Drug Court, which in no way was dependent on the State. Any hope that Payne had that his testimony might be viewed favorably by the State to the extent it would benefit him was not rooted in reality and thus not logically nor legally relevant.

In *State v. Johnson*, 700 S.W.2d 815 (Mo. banc 1985) (cited by Appellant at App. Subs. Br. 33-34), this Court held that the critical question to be asked in determining whether a defendant was able to sufficiently demonstrate bias in a witness is "whether the jury was otherwise in possession of sufficient information concerning formative events to make a 'discriminating appraisal' of [witness's] motives and bias." *Johnson*, 700 S.W.2d at 818. This Court went on to state:

There are sound reasons for having a rule which gives a trial court the discretionary authority to limit the scope of cross-examination directed toward impeachment. As the helmsman of the trial process, a trial judge should be able to keep the process from becoming weighted down with the accumulation of cumulative evidence and free of undue

harassment of witnesses. It should be within the power of the trial court to limit or exclude the use of impeachment evidence whose prejudicial effect far out-distances its value to the jury as an aid for determining credibility. As Professor McCormick has noted, a trial judge “has the responsibility for seeing that the sideshow does not take over the circus.” McCormick On Evidence, § 41 (3rd ed. 1984).

*Johnson*, 700 S.W.2d at 818. Here, like the jury in *Johnson*, the jury in the present case was able to make a “discriminating appraisal” of Payne’s motives and bias on the basis of his testimony, the arguments by counsel, and the instructions they were given.

In *State v. Joiner*, 823 S.W.2d 50 (Mo. App. E.D. 1991), the witness at issue gave testimony that could potentially have led the jury to believe the witness expected favorable treatment, particularly when taken in conjunction with the prosecutor's statement that “no deal has yet been made.” *Joiner*, 823 S.W.2d at 53. The *Joiner* court noted that the trial court had completely precluded any cross-examination designed to expose all potential bias of the witness, who was the sole eyewitness who provided the State’s only proof of guilt. *Joiner*, 823 S.W.2d at 53-54. Here, the trial court permitted cross-examination regarding other potential bias resulting from Payne’s past bad feelings towards Appellant, (Tr. 293-294), as opposed to completely precluding any cross-examination that might expose a potential bias by

Payne. The trial court merely exercised its discretion in disallowing the challenged line of questioning to the extent it did (inasmuch as Appellant was able to establish that Payne had recently pleaded guilty and had yet to be sentenced).

In *State v. Butler*, 984 S.W.2d 860 (Mo. App. W.D. 1998), the defendant complained that the trial court precluded him from cross-examining a State's witness regarding her pending charge for sale of a controlled substance. *Id* at 865. The defendant argued "that the state gave [the witness] favorable treatment in her pending drug case by ensuring that the circuit court released her from jail on a recognizance bond [and] that the state's favorable treatment demonstrated [the witness'] bias and credibility as a witness." *Id*. The *Butler* court disagreed and affirmed the ruling, noting that the witness "testified that she did not discuss her pending charge with the prosecuting attorney in Butler's case and that the prosecutor did not offer to help her in her pending drug case," and that the witness "also said that she had no expectation of any favorable treatment." *Id*.

In *State v. Francis*, 997 S.W.2d 74 (Mo. App. W.D. 1999), the defendant complained that "the trial court erred in not allowing defense counsel to cross-examine the victim . . . about an alleged police search of [his] residence and [his] subsequent arrest." *Francis*, 997 S.W.2d at 78. The defendant argued that the inquiry was relevant because any benefit to the victim, such

as a favorable plea offer, would be probative of the victim's credibility and motive to testify. *Id.* The *Francis* court concluded that the defendant's assertions were unsupported by the record because the defendant failed to present any evidence that the victim was receiving favorable treatment, and because "the prosecutor assured the court and defense counsel that they did not have any agreements with [the victim]." *Id.* at 79. Again, there were assurances here from the State that Payne had been offered no deals, promises, or inducements in exchange for his testimony.

In *State v. Franklin*, 16 S.W.3d 692 (Mo. App. E.D. 2000), the defendant complained that the trial court precluded him from cross examining a State's witness regarding a pending criminal charge. *Id.* at 698. The *Franklin* court noted that the "trial court's statements reflect and defendant does not argue on appeal that there was any deal by the State for [the witness'] rebuttal testimony," but that the defendant argued "that the jury could have found that [the witness] had perceptions of the prosecution's power over her pending charges and this gave her a motive to lie." *Id.* The *Franklin* court rejected the defendant's argument as "speculative and therefore insufficient to show an abuse of discretion." *Id.*

Here, the trial court did not abuse its discretion by limiting (but not foreclosing) Appellant's cross-examination of State's witness Maurice Payne. Payne's criminal case had essentially been disposed of by the time of

Appellant's trial without any deal by the State. Since Payne had been placed in Drug Court, the State could do nothing to affect his participation in the drug court program. Any hope Payne had of currying favor with the State was not relevant to establishing whether he might be biased in favor of the State.

This is very similar to the situation faced in *Franklin*, where the defendant argued that the jury could have found that the witness had a motive to lie due to her perception of the prosecution's power over her pending charges. Just as the Eastern District rejected this argument as speculative and insufficient to show an abuse of discretion, *Franklin*, 16 S.W.3d at 698, this Court should also reject Appellant's claim that the trial court abused its discretion in not allowing Appellant to cross-examine Payne about any belief he might have had that his testimony would benefit him at sentencing. Given that the State could do nothing to affect Payne's participation in the drug court program, any such belief or hope by Payne was too speculative and attenuated to be relevant in showing potential bias.

**E. Appellant did not suffer prejudice due to the limits placed on his cross-examination of Payne.**

Appellant could not have been prejudiced by the trial court's decision not to allow Payne to testify that if he failed to complete the requirements of

drug court, he would be subject to the full range of punishment, and that he hoped that his testimony was going to help him in some way if he failed drug court.

Error in omitting evidence will be declared harmless only if harmless beyond a reasonable doubt; that is, the error is presumed prejudicial unless it is not prejudicial beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Miller*, 650 S.W.2d 619, 621–623 (Mo. banc 1983). Where the right to cross examine has been affected by error, that error can be held harmless. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). The factors to consider include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and the overall strength of the prosecution's case. *Id.*

Regarding the extent of cross-examination permitted, Appellant presented the jury with the idea that both of the State's witnesses, Maurice Payne and Glenn Shelby, were potentially biased because they might be seeking to curry favor with the State by testifying against Appellant. During the direct examination of Payne, the jury heard that two weeks prior, he had pleaded guilty to second-degree burglary and stealing, but that he had not yet been sentenced. (Tr. 277). During Appellant's cross-examination of Payne,

Payne conceded that in the past, he and Appellant had problems with each other. (Tr. 293-294).

Moreover, what the court did not allow the jury to hear from Payne would not have been entirely helpful in Appellant's attempt to demonstrate potential bias by Payne. Testimony that there were no deals, promises, or inducements made to Payne by the State, or that any hope that Payne may have held would not influence his testimony in any way did not demonstrate any potential bias by Payne. Absent the excluded testimony, the jury would have been free to speculate that Payne's unresolved criminal case might color his testimony at trial. Thus, the jury knew that Payne had pleaded guilty to second-degree burglary and stealing, and that he had not yet been sentenced. It would have been easy for the jury to infer that Payne was hoping that his testimony would be helpful to the State and that might have a positive effect (from his point of view) on his sentence.

Payne's testimony was cumulative to the testimony of Glenn Shelby, who testified that he and Appellant decided to sell Thompson some fake crack. (Tr. 231-232). Shelby testified that he gave Appellant his gun, (Tr. 232-233, 242), and that he heard one gunshot. (Tr. 235). Shelby testified that Appellant told him that he tried to sell Thompson fake crack but that he wasn't falling for it, so Appellant tried to rob Thompson and then shot him. (Tr. 237). Regarding the overall strength of the prosecution's case, there was

substantial evidence of Appellant's guilt, including ballistics testing of the bullet in the victim's clothing which matched the recovered gun. (Tr. 208-209, 336, 347-348). Additionally, there was an absence of evidence that contradicted the testimony of Payne and Shelby. Any error by the trial court in limiting Appellant's cross-examination of Payne was thus rendered harmless, and this point should be denied.

## CONCLUSION

The trial court did not commit reversible error in this case. Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,777 words, excluding the cover and certification, as determined by Microsoft Word 2007 software; and

2. That a true and correct copy of the attached brief, was sent through the eFiling system on this 19<sup>th</sup> day of December, 2011, to:

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