No. SC90830

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

ERIC D. WINFREY,

Appellant.

Appeal from St. Charles County Circuit Court
Eleventh Judicial Circuit
The Honorable Lucy D. Rauch, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from convictions of first-degree murder, § 565.020, RSMo 2000, and first-degree robbery, § 569.020, RSMo 2000, obtained in the Circuit Court of St. Charles County, for which Appellant was sentenced to consecutive terms of life imprisonment without probation or parole and life imprisonment. After a decision by the Eastern District Court of Appeals, this Court granted transfer pursuant to Rule 83.04. Therefore, this Court has jurisdiction.

STATEMENT OF FACTS

Appellant, Eric Winfrey, was charged in St. Charles County with first-degree murder and first-degree robbery. (L.F. 45-52).[1] Beginning on July 21, 2008, Appellant was tried before a jury in St. Charles County. (L.F. 7-8; Tr. 1).

The evidence presented at trial, viewed in the light most favorable to the verdict, is as follows.

In 2004, Mary Slack was the property manager of Storage USA in St. Charles. (Tr. 476-477, 491, 750). Ms. Slack lived above the business with her husband, her sister (Corener Harris), and Appellant (her sister's boyfriend). (Tr. 368, 492, 749, 752, 1099-1100). Appellant occasionally mopped the office floor for Ms. Slack, but he was not employed by Storage USA. (Tr. 753, 1102-1103).

While living in the apartment, Appellant and Ms. Harris had full access to the grounds of Storage USA. (Tr. 492, 755-756). In February, 2004, Appellant and Ms. Harris moved to the Pralle Meadows Apartment Complex. (Tr. 753-754, 1101). Although Appellant was not employed by Storage USA, Ms. Slack advised the manager of Pralle Meadows, in accordance with Appellant's lease application, that Appellant was an employee. (Tr. 755, 1104-1105, 1167-1168). Appellant falsely indicated in his lease application that he was earning $1,800 per month from Storage

[1] The record on appeal consists of a pre-trial motions hearing transcript (M. Tr.), trial transcript (Tr.), a sentencing transcript (S.Tr.), and a legal file (L.F.).

USA. (Tr. 1105, 1167). Appellant also claimed income of $200 bi-weekly from Fazoli's. (Tr. 1167).

Appellant made these false representations because he and Ms. Harris were in a bad financial situation at the time. (Tr. 1109-1110). Appellant opened his savings account on January 21, 2004, with $5.00, and he opened his checking account the same day with $262.00. (Tr. 816). In February, 2004, Appellant began having negative balances. (Tr. 816). On June 3, 2004, the savings account had a positive balance of $6.50, and the checking account had a negative balance of $120.00. (Tr. 816-817). The couple had seven outstanding payday loans; two Quick Cash loans of $500 each; a AAA loan of over $3,000; delinquent payments on a car, rent, utilities, and rental furniture; two Fresh Start loans totaling approximately $2,450; and they had bounced several checks. (Tr. 776, 803, 817-823, 1110-1113). These money problems frequently caused arguments. (Tr. 1116).

While Ms. Slack managed Storage USA, the store operated two businesses: the storage units and a Budget Truck rental. (Tr. 475, 485, 627, 760). The two businesses had separate cash drawers. (Tr. 475, 485, 758, 761). Ms. Slack discussed both businesses in Appellant's presence, including the two cash registers. (Tr. 762, 766, 1106-1107).

In mid-April, 2004, Ms. Slack was terminated for stealing cash from both businesses. (Tr. 476-477, 759, 766). Ms. Slack and her husband moved in with

Appellant and Ms. Harris for about a month before moving to Milwaukee. (Tr. 759, 764).

In May, 2004, the victim, Chris Hanneken, began training to become a property manager at Storage USA. (Tr. 470, 509-510). After a couple of weeks of training, on June 2, 2004, the victim began his first solo shift. (Tr. 468, 483, 510). The store had a video-monitored security system, and the property manager was responsible for loading a new cassette into the system each morning. (Tr. 470-471, 481-482).

Several customers visited the storage facility on June 2nd. (Tr. 518-519, 522, 530, 533, 537). At 2:33 p.m., the victim called a friend, and they spoke for approximately nine minutes before the victim abruptly said, "got to go now," and hung up at 2:42 p.m. (Tr. 544-545). At 2:55 p.m., a delivery driver stopped at Storage USA. (Tr. 358, 1403). He looked around the property but could not find the manager. (Tr. 359). He noticed the golf cart in the garage, so he knew the manager was not out showing a unit. (Tr. 359). Eventually, he tried a door marked "employees only." (Tr. 362). He found the victim lying dead on the floor and called 911. (Tr. 363).

Approximately two minutes later, an officer arrived; he observed the victim lying on his back with a pool of blood around his head. (Tr. 366-367, 378, 383). Paramedics pronounced the victim deceased. (Tr. 369, 378).

Crime scene technicians took photographs and conducted a latent print examination of the building and grounds. (Tr. 370, 386). They lifted and submitted forty prints for identification. (Tr. 375, 387, 456, 499). Both security tapes for the day were missing from the security system's VCRs, and $395 cash was missing from the register. (Tr. 385, 455, 1259).

An autopsy revealed that the cause of death was a single gun-shot wound to the back of the victim's head. (Tr. 1253). The bullet was recovered, and it was determined to be a .38 or .357 caliber bullet. (Tr. 393, 1382).

Of the forty fingerprints submitted, eighteen were identifiable. (Tr. 499). Of those eighteen, one print from the exterior of a glass jar belonged to Ms. Harris; a second print on the jar belonged to Lajuana McFadden (a former employee); five prints, located on the video security system, belonged to John Taylor (an assistant manager of Storage USA); and four of the victim's prints were found on: the security system, by a clock, and on the backside of the "manager will return" sign. (Tr. 481, 502-504, 506).

The major case squad was activated. (Tr. 631, 633). Officers ran license checks on all vehicles in the area; canvassed the local businesses, interviewing employees and customers; obtained surveillance tapes from surrounding businesses; canvassed nearby apartments for witnesses; interviewed Storage USA customers; canvassed area dumpsters and sewers; interviewed the victim's friends and relatives;

viewed surveillance tapes from Storage USA from May 27 through June 1, 2004; searched 158 vacant storage lockers at Storage USA; and searched the victim's apartment. (Tr. 634, 642-644, 646-647, 649, 651-652, 656-659, 660-666, 670-672, 675-679, 684-687, 689-692, 694-697, 701-702, 706-708, 743, 746-747, 915-916). But none of those investigations produced anything of evidentiary value. (Tr. 634, 642-644, 646-647, 649, 651-652, 656-659, 660-666, 670-672, 675-679, 684-687, 689-692, 694-697, 701-702, 706-708, 743, 746-747, 915-916).

On June 3, 2004, Detective Rimiller, following a lead, interviewed Appellant. (Tr. 916). Appellant voluntarily accompanied officers to the police station. (Tr. 917).

During the interview, Appellant indicated that he had been living with Ms. Harris, and Mr. and Ms. Slack above Storage USA. (Tr. 918). Det. Rimiller advised Appellant that he was investigating a homicide that occurred at Storage USA on June 2nd, and he asked Appellant where he was that day. (Tr. 920). Appellant immediately responded that between 2:00 and 4:00 p.m., he was at Fazoli's, and he identified several people he had spoken with while there. (Tr. 920-921). Det. Rimiller had not informed Appellant of the timeframe of the murder, and never before had Det. Rimiller had a person start with his whereabouts during the timeframe of the crime, rather than the beginning of the day. (Tr. 920-922).

Det. Rimiller asked Appellant to start with the morning and go through his whereabouts for the whole day, both before and after the time he was supposedly at

Fazoli's. (Tr. 924).[2] Appellant said he woke up around 9:00 a.m., and that he and Ms. Harris argued about finances. (Tr. 924). He said that sometime between 9:00 and 10:00 a.m., he drove to Aerospace Community Bank to activate his ATM card. (Tr. 924). Appellant said that after leaving the bank, he returned to the apartment, where he and Ms. Harris again argued about finances, so Appellant left and drove to Phillips 66 where he had recently begun employment. (Tr. 925). He said he arrived somewhere around 1:00 p.m. and spoke with several employees. (Tr. 925). Appellant left, but later returned around 2:00 p.m. (Tr. 925-926). Appellant said that after he

[2] In his statement of facts, Appellant has included a timeline of his whereabouts on June 2, 2004. (App. Br. 15). While this timeline includes citations to the record, it is misleading insofar as it implies that Appellant was continuously at certain places during the stated times. Contrary to that implication, the evidence showed that Appellant was at certain places at some point *during* the stated time frame, not continuously throughout the time period. *See e.g.* Tr. 835 (witness saw Appellant at Fazoli's sometime between 3:00 and 5:00 p.m.), Tr. 843 (witness received a call from Appellant at Fazoli's sometime between 2:00 and 3:00 p.m.), Tr. 846 (witness recalled seeing Appellant at Phillips 66 sometime between 11:30 a.m. and noon), Tr. 853 (witness recalled seeing Appellant at Phillips 66 "around six, seven o'clock, something like that"), and Tr. 899-900 (witness worked the 3:00 to 11:00 p.m. shift at Fazoli's and testified that he saw Appellant there sometime after 3:00 p.m.).

left Phillips 66, he went back to his apartment complex where he ran into a friend. (Tr. 926-927). Appellant said that after smoking marijuana with his friend, he returned to his own apartment. (Tr. 927). Appellant said he watched some television and then woke Ms. Harris at 3:15 p.m. to get ready for work at Ameristar Casino. (Tr. 927). Appellant also said he left at 3:15 to go wash his car. (Tr. 928).

Appellant said that after washing his car, he went to Fazoli's where he spoke with several employees and called Sheldon Schaffer. (Tr. 928-929, 937). After leaving Fazoli's, Appellant drove back to his apartment to drive Ms. Harris to work, but he was late, and she had already left. (Tr. 929). Appellant said he took a nap and was awakened by a call from Ms. Harris's father advising him that a body had been found at Storage USA, and that the police were looking for Appellant to interview him. (Tr. 929, 931). Appellant later watched the 9:00 p.m. news, saw the report about the murder, and then he changed clothes and went to Ameristar Casino where he gambled until Ms. Harris's shift ended. (Tr. 930). Appellant lost approximately $100. (Tr. 930). Appellant admitted having a gambling problem, indicating that it had caused significant strain and financial problems. (Tr. 930-931). Appellant gambled until approximately 1:00 a.m., when he and Ms. Harris drove back to the apartment. (Tr. 931).

Appellant said he did not know the victim, and he denied any knowledge of or involvement in the crimes. (Tr. 932). Appellant agreed to make a written statement. (Tr. 933).

The officers continued questioning Appellant after his statement. (Tr. 939). When asked if he owned a gun, Appellant broke eye contact, paused before answering, took a deep breath, hesitated, and then said "no." (Tr. 939-940). Upon further questioning, Appellant admitted that he had recently tried to purchase a gun from several people, but he denied obtaining one. (Tr. 940-941). When asked why he wanted a gun, Appellant said he "needed one for protection." (Tr. 941). Appellant said he had tried to purchase a gun from Jim from Dobbs Auto Tire, Curtis and Julio from Labor Ready, and Justin – a person he smoked marijuana with. (Tr. 941, 944-945).

Appellant also volunteered that he had been fired from Dobbs for stealing a car and that he had filed a false police report claiming he had been robbed at gunpoint of $400. (Tr. 941, 943, 947). Appellant admitted making the false report so that Ms. Harris would not discover he lost the money gambling. (Tr. 948). Det. Rimiller then questioned Appellant about his finances, and Appellant initially indicated that he was $2,600 in debt. (Tr. 949-950). But further questioning revealed that Appellant's debt was closer to $8,500. (Tr. 951). Appellant disclosed that, about a month earlier, after arguing with Ms. Harris over finances, he left the apartment with some razor blades.

(Tr. 952). Ms. Harris contacted the police, and Appellant voluntarily went to a hospital to obtain counseling. (Tr. 952). Appellant said he was dealing with his financial stress by spending a lot of time alone. (Tr. 953).

Det. Rimiller requested and obtained Appellant's consent to search both his residence and vehicle. (Tr. 953). Appellant agreed to meet with the officers several days later, but he never showed up for the meeting. (Tr. 953).

A search of Appellant's vehicle produced a restaurant menu with a phone number and the name "Justin" written on it. (Tr. 461). Nothing of evidentiary value was obtained from Appellant's residence. (Tr. 695-696).

Det. Rimiller attempted to confirm the information Appellant had provided. (Tr. 955). Det. Rimiller went to Aerospace Community Bank, where he viewed a surveillance video showing Appellant at the bank on June 2, 2004, at 1:10 p.m. (Tr. 956). The video contradicted Appellant's oral statement that he went to the bank between 9:00 and 10:00 a.m., and his written statement that he was there between 10:00 a.m. and 1:00 p.m. (Tr. 956-957). Det. Rimiller also interviewed Jim Ikemeier from Dobbs, who confirmed that Appellant had attempted to purchase a weapon from him. (Tr. 957-958). Det. Rimiller also interviewed Justin Lewis, who confirmed that Appellant had attempted to purchase a hand gun a couple of weeks earlier and that Appellant had said "he needed to handle some business." (Tr. 965, 1034-1036). Det. Rimiller contacted Sheldon Schaffer and verified that Appellant had called him from

Fazoli's on June 2, 2004. (Tr. 970-971). Several Fazoli's employees indicated that they had not seen Appellant at all on June 2nd, and others said that, while he was there that day, it was not before 3:00 p.m. (Tr. 827-836, 900). A combination of surveillance video and employee statements placed Appellant at the Phillips 66 gas station on June 2nd between 11:30 and 11:45 a.m., around 4:00 p.m., and again between 6:00 and 7:00 p.m. (Tr. 844-865).

Also on June 3rd, police interviewed Ms. Harris. (Tr. 1117). Ms. Harris indicated that, on the morning of June 2nd, she woke up "pretty early," and Appellant was not home. (Tr. 1120). Ms. Harris walked her dog, and Appellant came back home. (Tr. 1121). Around 2:00 p.m., Appellant started to leave again. (Tr. 1123). When Ms. Harris asked why he was leaving so close to when she had to be at work, Appellant did not respond. (Tr. 1123). Ms. Harris did not see him again until he picked her up from work. (Tr. 1124). Ms. Harris denied that Appellant woke her up at 3:15, or anytime before that. (Tr. 1124).

On July 12, 2004, George Machino discovered his .38 Taurus revolver missing from his gun safe. (Tr. 1081, 1083, 1086, 1180, 1404). Mr. Machino started questioning his wife and his son, Daniel Cosgrove, who admitted taking the gun. (Tr. 1084, 1188, 1404). Justin Lewis, a friend of both Appellant and Daniel, had talked to Daniel about acquiring a gun on Friday, May 28, 2004 (5 days before the murder), so Daniel took a .38 Taurus and three bullets out of his father's gun cabinet and replaced

it with a laser gun. (Tr. 1177-1180, 1195). Daniel went to Shop 'n Save to meet up with Appellant and Justin. (Tr. 1039, 1179). Appellant was supposed to pay Daniel $150 to borrow the gun and return it later. (Tr. 1182). Daniel believed that Appellant planned to use the gun to scare someone who had robbed him. (Tr. 1182).

When they met up, Daniel gave the gun to Appellant, who looked it over and placed it underneath the seat. (Tr. 1041, 1404). Then Daniel, Appellant, and Justin drove back to Appellant's apartment complex. (Tr. 1042).

Appellant never returned the gun to Daniel. (Tr. 1189). Daniel told Mr. Machino that he had loaned the gun to one of Justin's friends, and he was supposed to get it back. (Tr. 1189). Mr. Machino told Daniel to take him to the person that borrowed the gun. (Tr. 1084, 1189). Because Daniel did not know which apartment was Appellant's, Mr. Machino contacted the Pralle Meadows apartment manager and asked where he could find Appellant. (Tr. 1085, 1169). The manager suggested he contact detective Michael Miller. (Tr. 1085, 1159, 1170). Mr. Machino set up a meeting with Det. Miller, bringing Daniel with him. (Tr. 1085-1087, 1160, 1189). Both Mr. Machino and Daniel gave written statements to Det. Miller. (Tr. 1086, 1160, 1189).

In early 2005, arrest warrants were issued for Appellant and Ms. Harris, who were then living in Milwaukee. (Tr. 1410). Ms. Harris was arrested and extradited to Missouri. (Tr. 1410). Det. Michael Harvey attempted to interview her in April, 2005,

but Ms. Harris indicated that she would not help even if she knew Appellant "did it." (Tr. 1411). Later that month, Det. Harvey had a meeting with Ms. Harris, her attorney, and the prosecutor. (Tr. 1411). Ms. Harris agreed to an interview. (Tr. 1411). She indicated that she was with Appellant on June 2, 2004, all day and that he could not have been involved in anything. (Tr. 1411). Det. Harvey presented her with a copy of her June 3rd statement, and Ms. Harris corrected herself, saying that she had not seen Appellant between 2:00 p.m. on June 2nd and 12:30 a.m. on June 3rd when Appellant picked her up from work. (Tr. 1411-1412).

Ms. Harris identified Justin and Daniel as young guys that Appellant socialized with. (Tr. 1412). She stated that Appellant told her he had obtained a gun from one of the boys, but had returned it. (Tr. 1412). While Ms. Harris repeatedly denied ever seeing Appellant with a gun, she approached Det. Harvey after a deposition and advised him that at the Pralle Meadows apartment sometime before the murder, Appellant displayed a revolver during an argument. (Tr. 1129-1131). Ms. Harris provided officers Appellant's address in Milwaukee. (Tr. 1412).

On May 18, 2005, Det. Harvey and Officer Juengst went to Milwaukee to arrest Appellant. (Tr. 1413). Appellant was taken into custody and interviewed again. (Tr. 1413).

Before the interview, Appellant was given his *Miranda* warnings, and Appellant indicated that he was willing to speak with the detectives. (Tr. 1414). They first

discussed Appellant's outstanding warrant for tampering with a motor vehicle, and Appellant admitted stealing a car from Dobbs on May 6, 2004. (Tr. 1415-1416). Appellant said he took the car to avoid the high cost of cab fare to and from work. (Tr. 1416). Appellant also indicated that he had some bad checks outstanding. (Tr. 1416).

Appellant told the officers that he knew they were there to discuss the Storage USA murder. (Tr. 1416). Appellant said he moved to Wisconsin just two weeks earlier and had been working for Ms. Slack and her husband. (Tr. 1417). Appellant indicated that he was unable to get utilities turned on in his own name because he had not paid the bills from his prior address, so he used a friend's name (with permission). (Tr. 1418). He said that it was a common practice for him to move from place to place, leaving unpaid bills behind. (Tr. 1418). Appellant also admitted renting some furniture, failing to make payments, and then taking that furniture to Milwaukee. (Tr. 1419). Appellant further discussed several outstanding payday loans that he was behind on payments for. (Tr. 1419). He also reiterated having outstanding bad checks. (Tr. 1419).

When Appellant discussed Ms. Harris, he began crying, stating that "if it had not been for him she wouldn't have been in trouble." (Tr. 1421). Appellant indicated that he was upset that he brought her into "all of this." (Tr. 1421). When questioned about his connection to Storage USA, Appellant acknowledged that Ms. Slack had

managed the property, and that he and Ms. Harris had lived upstairs during that time. (Tr. 1421). Appellant said he had performed odd jobs for Ms. Slack, and she had paid him out of the till. (Tr. 1422). Appellant indicated that he was familiar with the Storage USA operations. (Tr. 1422).

At one point, Det. Harvey asked Appellant how he became aware of the homicide investigation, and Appellant hesitated before responding that Ms. Harris's father had contacted him about a body being found at the storage facility. (Tr. 1423). Appellant confirmed that he had been interviewed on June 3, 2004, and he said that "he had made a confession." (Tr. 1424).

Det. Harvey presented Appellant with a copy of his June 3rd statement. (Tr. 1425). After Appellant had read it, Det. Harvey asked if Appellant wished to make any changes, and Appellant declined. (Tr. 1426-1427).

Upon discussing Appellant's efforts to obtain a gun, Appellant denied ever seeing or getting a gun from anyone. (Tr. 1431). Det. Harvey advised Appellant about Ms. Harris's statement that Appellant had obtained a gun, but later returned it. (Tr. 1440). Appellant then admitted receiving the gun, but claimed he returned it to Justin. (Tr. 1440). After being confronted with Justin's and Daniel's statements, Appellant admitted to meeting up with them at Shop 'n Save, but he claimed it was to buy marijuana. (Tr. 1442). Appellant said that Justin showed him a gun and that

Appellant handled it, but it was not a semi-automatic, and he did not like it, so he returned it to Justin. (Tr. 1443).

Det. Harvey also discussed Ms. Harris's statement about not seeing Appellant from 2:00 p.m. to 12:30 a.m., and Appellant agreed that they had fought and did not see each other during that time period. (Tr. 1432-1433). Appellant told Det. Harvey that he and Ms. Harris made an agreement when they left St. Charles that "whatever happened in St. Charles was going to stay in St. Charles." (Tr. 1433).

Det. Harvey asked Appellant about visiting Aerospace bank, and Appellant said he activated his ATM card between 9:00 a.m. and 10:00 a.m., and he denied being at the bank at any other time that day. (Tr. 1434).

Det. Harvey confronted Appellant with his earlier statement that he had woken Ms. Harris at 3:15 that day, and Appellant indicated that he knew the times were wrong, and that it was probably earlier between 2:00 and 3:00 p.m. (Tr. 1435). Det. Harvey pointed out that that was not possible since both Appellant and Ms. Harris agreed that they did not see each other after 2:00 p.m. that day. (Tr. 1436). Appellant agreed that the times could not be correct, and he said that he had left the apartment at 3:15 to wash and vacuum his car. (Tr. 1436). Det. Harvey again confronted Appellant with the fact that he could not have been home to leave at 3:15 based upon Ms. Harris's statement that she did not see him after 2:00 p.m. (Tr. 1436-1437). Appellant acknowledged that that time had to be incorrect as well. (Tr. 1437). He

then explained that he had been trying to buy some marijuana from a guy at Phillips 66 during that time. (Tr. 1437-1438).

Det. Harvey again discussed Appellant's financial situation, and Appellant said that he had been spending $100 per week on marijuana and that he had several payday loans out. (Tr. 1438). He again discussed the high cost of cab fare, as well as his and Ms. Harris's gambling habits. (Tr. 1438-1439).

Det. Harvey attempted to go over the timeline of Appellant's activities on June 2nd, and Appellant again began by discussing his location after 2:00 p.m., when he had gone to Phillips 66. (Tr. 1447). When discussing the bank visit, Det. Harvey confronted Appellant with the surveillance video that placed Appellant at the bank after 1:00 p.m., and Appellant admitted that his bank times were also wrong. (Tr. 1448).

After discussing the various times, Appellant advised Det. Harvey that his alibi from 2:00 p.m. on was not going to be good; Appellant specifically mentioned two o'clock p.m. until after the murder. (Tr. 1448). Appellant still had not been advised as to the timeframe of the murder. (Tr. 1448).

On June 22, 2006, Det. Harvey interviewed Appellant again. (Tr. 1458). This time, Appellant admitted wanting a gun for protection. (Tr. 1462). He admitted handling the gun from Daniel, but claimed that he returned it because it was not the kind of gun he liked. (Tr. 1465-1466).

Around July 31, 2006, Det. Harvey received a letter from Kevin Covington, an inmate at Farmington Correctional Center. (Tr. 1457, 1469). Mr. Covington said he had information about the Storage USA homicide. (Tr. 1469). In August, 2006, Det. Harvey interviewed Mr. Covington. (Tr. 1469). After Det. Harvey's June 22nd interview with Appellant, Appellant told Mr. Covington that he had been questioned about a murder that took place in St. Charles. (Tr. 1268). Appellant wondered why a federal prosecutor would be questioning him. (Tr. 1268). Appellant asked Mr. Covington if he knew anyone that could help. (Tr. 1271). Mr. Covington decided to seize the opportunity to gain information from Appellant to help himself obtain early parole by providing information to the police. (Tr. 1269). He told Appellant that his wife was a postal inspector and had friends in the St. Charles Police Department. (Tr. 1271). Mr. Covington advised Appellant that he could find out information for him, but he needed to know the truth about what happened in his case. (Tr. 1271).

Appellant told Mr. Covington that he woke up that morning and went to work. (Tr. 1274). From there, Appellant made a phone call and then went to the bank to activate his ATM card around 1:38 p.m. (Tr. 1274). Appellant said that he was familiar with the storage place because his girlfriend's aunt, Mary, was the property manager. (Tr. 1275). Appellant indicated that there were two safes at the facility. (Tr. 1275). Appellant admitted shooting the victim, and he said that he wiped down everything afterwards. (Tr. 1275-1276). Appellant said that the victim owed him

money. (Tr. 1276). Appellant also told Mr. Covington that he had obtained the gun from a friend named Justin. (Tr. 1276). He said that he disposed of the gun by throwing it into the river near the Chain of Rocks bridge. (Tr. 1276).

At one point, Mr. Covington introduced Appellant to his ex-brother-in-law, Roland Lee, who acted as a prison law clerk. (Tr. 1279, 1357). Appellant discussed the crimes with Mr. Lee and said there was a period of 30-40 minutes that he could not account for. (Tr. 1360-1361). Appellant also admitted handling a gun. (Tr. 1369).

Appellant presented no evidence at trial. (Tr. 1520). The jury found Appellant guilty as charged. (Tr. 1692). The court sentenced Appellant to consecutive terms of life imprisonment without parole and life imprisonment. (S.Tr. 15-16).

ARGUMENT

Point I

The trial court did not plainly err in overruling Appellant's *Batson* objection to the State's peremptory strike of venireperson Veronda Birk[3] because Appellant failed to carry his burden of proving purposeful discrimination in that the prosecutor proffered a race-neutral explanation for his strike of venireperson Birk, and Appellant failed to prove at trial that the prosecutor's proffered reason was pretextual.

Appellant argues that the trial court erred in overruling his *Batson* objection to the State's peremptory strike of venireperson Birk because, upon a review of the record, the State's proffered race-neutral reason was pretextual. But while the prosecutor's stated reason was based upon a mistaken recollection of the *voir dire*, a prosecutor's simple mistake does not equate with intentional discrimination. Because Appellant failed to prove that the prosecutor's strike was based on discriminatory intent, his claim should be denied.

A. Preservation and standard of review.

"A *Batson* challenge has three components: (1) the defendant must object that the state's peremptory challenge is based on an improper purpose, (2) the state has the

[3] The venireperson is referred to in the record as either Verronda Byrth or Veronda Birk. Because Appellant refers to her as Veronda Birk, Respondent will as well.

burden to prove a race-neutral reason for the strike, and (3) the defendant has the burden to prove the reason is pretextual." *State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009).

When the State sought to peremptorily strike Ms. Birk, Appellant lodged a *Batson* objection, identifying Ms. Birk as African-American. (Tr. 231). The prosecutor said he struck Ms. Birk because she "had a sister who was presently in jail." (Tr. 231). The prosecutor said "I think that I can't trust an individual whose relatives, people that are close to them, are in jail, and sit on a panel and not believe that they might – well, I shouldn't say get their own form of justice, but those are the reasons why I struck them and her in particular." (Tr. 232). Appellant then identified three allegedly similarly-situated non-African-American jurors: Tritsch, Price, and Krausz. (Tr. 232-234). The prosecutor distinguished them because their relatives were not currently in jail, whereas Ms. Birk's sister was. (Tr. 234-237). Defense counsel made no further argument nor identified any other facts supporting a claim of purposeful discrimination. The trial court credited the prosecutor's explanations and overruled Appellant's *Batson* objection. (Tr. 237).

On appeal, Appellant argues for the first time that the prosecutor's stated reasons for striking Ms. Birk and for not striking venirepersons Tritsch, Price, and Krausz were not supported by the record. (App. Br. 48-50). He also argues for the first time that the prosecutor did not question the panel about his purported area of

concern. (App. Br. 51). Thus, he reasons, the prosecutor's proffered explanation was merely pretext covering a discriminatory intent. (App. Br. 51-52). But Appellant never advised the trial court that the prosecutor's reasons were not supported by the record in *voir dire*, and he did not further challenge the prosecutor's explanation for the strike nor his distinction from the allegedly similarly-situated jurors.

"Where a defendant fails to lay a foundation for findings of pretext on the state's explanations in the trial court, the defendant may not challenge the state's explanations on appeal." *State v. Bass*, 81 S.W.3d 595, 611 (Mo. App. W.D. 2002). And if a defendant fails to sustain his burden of proof on the issue of pretext at trial, there is nothing for the appellate court to review. *State v. Plummer*, 860 S.W.2d 340, 346 (Mo. App. E.D. 1993). "A trial court will not be convicted of error regarding an issue not presented to it." *Burrage*, 258 S.W.3d at 563. "Reasons urged in a brief which were not advanced to the trial court are of no avail." *Id*.

This Court recently held, in *State v. Bateman*, SC90528 (August 3, 2010), that "the determination of pretext must be made based on the prosecutor's statement *at the time of the* ***Batson*** *challenge*; new reasons why a strike could have been made may not be offered on appeal." *Bateman*, slip op. at 3 (emphasis added; Court's emphasis removed). The obvious corollary of this rule is that the proponent of the strike likewise must present any and all evidence of pretext at the time of the *Batson* challenge and cannot later comb the record for new evidence to present in support of

the claimed pretext on appeal. Just as "[t]he . . . appellate courts cannot identify additional reasons why the prosecutor could have stricken the venireperson," *Id*. at 14, the appellate courts likewise cannot identify additional reasons, not advanced by the defendant at trial, for finding the prosecutor's explanations pretextual.

If appellate courts were permitted to evaluate the validity of new claims of pretext not presented to the trial court, it would not only cause the appellate court to become an advocate for the defendant, but also deprive the prosecutor of the opportunity to refute the allegations of pretext. This is especially true in the context of Appellant's claim. While some of the prosecutor's assertions justifying his strike were not supported by the record, it appears from the record that the prosecutor's mistake was an honest mistake, as no one identified any of the errors at trial. In evaluating the race neutrality of an attorney's explanation, the trial court is to assume that "the proffered reasons for the peremptory challenges are true." *Hernandez v. New York*, 500 U.S. 352, 359 (1991). If the prosecutor's errors had been obvious, Appellant easily could have told the trial court that the *voir dire* responses were not as the prosecutor indicated, which then would have given the prosecutor the opportunity to explain the discrepancy. But absent any indication to the contrary, the trial court was required to assume that the prosecutor's statements were true.

Because Appellant never presented the arguments he advances on appeal to the trial court, his claim is not preserved. Consequently, this Court may decline to review

his claim entirely. Rule 30.20; *State v. Shaw*, 14 S.W.3d 77, 84 (Mo. App. E.D. 1999) ("the failure to make a timely *Batson* objection is fatal to such a claim."); *State v. Taylor*, 944 S.W.2d 925, 934 (Mo. banc 1997). Because of the nature of plain error review – namely, that it exists to remedy outcome-determinative errors affecting substantial rights[4] – it is simply unwarranted in the *Batson* context. *Batson* was designed to "protect[] the equal protection rights of jurors and prohibit[] discriminating against jurors based upon race." *State v. Gray*, 887 S.W.2d 369, 385 (Mo. banc 1994). And "[a]t that stage of voir dire [when *Batson* objections are raised], the entire panel ha[s already] survived challenges for cause and demonstrated they could be fair and impartial." *State v. Pointer*, 215 S.W.3d 303, 307-308 (Mo. App. W.D. 2007). Thus, removal of any particular qualified juror in favor of another equally qualified juror cannot be said to have any outcome-determinative impact on a defendant's trial or his substantial rights. For these reasons, plain error review is not warranted in the *Batson* context. But, should this Court choose to review Appellant's claim, it can be for only plain error resulting in a manifest injustice.[5] Rule 30.20.

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[4] "Under Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative." *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006).

[5] Notably, Appellant fails to request plain error review of his claim. (App. Br. 39-43).

B. Appellant failed to prove that the prosecutor's proffered race-neutral reason for striking venireperson Birk was merely pretextual.

Appellant argues that the prosecutor's proffered race-neutral explanations for striking Ms. Birk – that her sister was in jail at the time of trial – and for not striking venirepersons Tritsch, Price, and Krausz – that their relatives were not currently in jail – was merely pretext. In making this argument, Appellant engages in post-hoc record-mining to show that the prosecutor's beliefs about the *voir dire* questions and answers were unsupported.

Appellant is correct that Ms. Birk never indicated that her sister was *currently* in jail. (Tr. 91). But "the fact that the state's race-neutral explanation of why it exercised its peremptory challenge to remove [a juror] was based on incorrect information does not, standing alone, require a finding that the strike violates the mandates of *Batson.*" *State v. Williams*, 159 S.W.3d 480, 484 (Mo. App. S.D. 2005). Rather, "[t]he issue in a *Batson* challenge . . . is not whether the reason given for a strike is true in fact, but whether the striking party believes it to be true, even if only a hunch, and the strike is not inherently racial on its face." *State v. Bass*, 81 S.W.3d 595, 611 (Mo. App. W.D. 2002) (citing *State v. Smith*, 944 S.W.2d 901, 912 (Mo. banc 1997)). "The second step of this process does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

There is nothing inherently racial about striking a potential juror believed to have an incarcerated relative. "The . . . incarceration of a venireperson's relative is a race-neutral reason for exercising a peremptory challenge." *State v. Williams*, 159 S.W.3d 480, 484 (Mo. App. S.D. 2005). And although the prosecutor was mistaken about Ms. Birk's *voir dire* responses,[6] the fact that he based his strike on a race-neutral reason he believed to be true defeated Appellant's *Batson* objection unless Appellant could prove pretext.

At trial, Appellant argued that there were similarly-situated non-African-American jurors that were not stricken. (Tr. 232). The prosecutor distinguished Appellant's proposed jurors by indicating that, while they each had relatives who had been convicted of crimes, none of those relatives were in jail or imprisoned at the time of trial like Ms. Birk's sister; consequently, they were not similarly situated to Ms. Birk. (Tr. 234, 237). Appellant did not challenge the prosecutor's proffered distinctions, and he offered nothing further in support of his claim of pretext.

But, after the opportunity to comb the transcript, Appellant points out – for the first time on appeal – that the prosecutor was mistaken about his distinction between Ms. Birk and the other jurors. (App. Br. 48-50). There are a couple of flaws in Appellant's argument. First, the prosecutor's explanation as to venireperson Tritsch

[6] It is understandable that mistakes could be made when selecting a jury from a 96-person venire panel. (Tr. 27).

was correct. Venireperson Tritsch indicated that her son had been convicted of driving while intoxicated and vehicular assault, and that he "*spent* a couple months in jail." (Tr. 93) (emphasis added). She also indicated that her son "*did* some jail time." (Tr. 93) (emphasis added). Her responses indicated that her son was not currently in jail, as the prosecutor believed Ms. Birk's sister to be. Thus, the prosecutor's distinction was supported by the record.

When confronted with venireperson Price, the prosecutor responded, "He's an alternate juror, Judge, so he didn't come in among my six strikes." (Tr. 233). The court and co-counsel corrected the prosecutor, noting that venireperson Price was actually the very last juror on the list. (Tr. 233). The prosecutor said that he "missed him because I struck, based on 66, that he was my last one." (Tr. 233). Even though the prosecutor indicated that he had unintentionally left venireperson Price on the panel, when discussing venireperson Price's circumstances, the prosecutor distinguished him from venireperson Birk by noting that, although venireperson Price's cousin was currently incarcerated, venireperson Price "didn't know anything about it." (Tr. 233-234). This explanation was supported by the record, as when questioned, venireperson Price responded, "I have a cousin who was convicted of murder, currently serving time. *I didn't know him*. It happened over 30 years ago." (Tr. 98) (emphasis added).

Even though the prosecutor was incorrect in his belief that venireperson Price's relative was not currently incarcerated, the prosecutor's underlying concern behind striking such individuals was absent in venireperson Price because venireperson Price did not know his relative (a cousin) that was currently incarcerated; thus, he was unlikely to seek his "own form of justice" for that relative, which was the prosecutor's main concern with Ms. Birk, who had a closer relative (a sister) in jail. Therefore, the prosecutor's distinction as to venireperson Price – though based upon a faulty premise – was sufficient to demonstrate a lack of discriminatory intent.

As to venireperson Krausz, the prosecutor distinguished him from Ms. Birk by noting that venireperson Krausz's convicted relatives were not currently incarcerated. (Tr. 234). And although Appellant did not point it out at trial, he now argues that venireperson Krausz never indicated whether his relatives were still incarcerated. (App. Br. 50; Tr. 96). But, again, "[t]he issue in a *Batson* challenge . . . is not whether the reason given . . . is true in fact, but whether the striking party believes it to be true[.]" *Bass*, 81 S.W.3d at 611. The prosecutor obviously believed that Mr. Krausz's relatives were not still incarcerated at the time of trial, which would have been a valid distinction from Ms. Birk's situation as the prosecutor believed it to be.[7]

[7] Appellant faults the Eastern District for examining the "facts the State believed to be true," arguing that the Court of Appeals simply "surmised the prosecutor's 'belief' from a cold record, where the trial judge made no such factual findings about the

While the existence of similarly-situated jurors is considered "crucial" to a showing of pretext, it is neither dispositive nor required. *State v. Miller*, 162 S.W.3d 7, 14 (Mo. App. E.D. 2005); *Bateman*, slip op. at 13. The trial court must also examine "the degree of logical relevance between the proffered explanation and the case to be tried in terms of the kind of crime charged, the nature of the evidence to be adduced and the potential punishment if the defendant is convicted." *Bateman*, slip op. at 15 (internal citations omitted). Also relevant are "[t]he prosecutor's 'patterns of practice,' *e.g.* questions and explanations and history of pretextual strikes," as well as "both the prosecutor's 'demeanor' while engaging with venirepersons, and the demeanor of excluded venirepersons." *Id.* (internal citations omitted). "Objective factors bearing on the state's motive to discriminate on the basis of race, such as

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prosecutor's belief, contrary to *Miller-El* and *Bateman*." (App. Br. 41 n.7). But Appellant would have this Court do exactly what he faults the Court of Appeals for doing – but in his favor – by asking this Court to find a discriminatory intent from a cold and silent record. But unlike the lack of findings as to the prosecutor's belief, the trial court made express findings about the prosecutor's motive, and they were contrary to Appellant's assertion of discriminatory intent. And those findings are entitled to deference by this Court. "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." *Hernandez*, 500 U.S. at 367.

conditions prevailing in the community and the race of the defendant, the victim, and the material witnesses, are also worthy of consideration." *Id*. at 16. The court may also consider the prosecutor's disproportionate number of strikes against other venirepersons and/or the number of venirepersons of the same race as the stricken panel member remaining after peremptory strikes in the case before the court. *Id*. at 16. Other valid considerations include: "the prosecutor's credibility based on his or her demeanor or statements during voir dire and the court's past experiences with that prosecutor." *State v. Pointer*, 215 S.W.3d 303, 306 (Mo. App. W.D. 2007). Further relevant factors at the third stage of a *Batson* challenge to prove pretext can include: the failure of the State to use all peremptory strikes to remove a certain class of individuals from the venire; whether the race of the victim and material witnesses is the same as the defendant; the percentage of the suspect class of individuals on the venire compared to the percentage of the suspect class on the petit jury; and the percentage of strikes used on the suspect class as compared to the total percentage of the suspect class on the venire. *State v. Robinson*, 811 S.W.2d 460, 463 (Mo. App. E.D. 1991).

Despite the availability of all of these potential means for demonstrating pretext, Appellant never presented the court with anything beyond the allegedly similarly-situated jurors to demonstrate a possible discriminatory intent on the part of the prosecutor. Appellant has not alleged, and the record does not reflect, the

presence of any of these additional factors. The record does not demonstrate the final racial composition of Appellant's venire panel or his petit jury,[8] nor does it indicate the race of other venirepersons peremptorily stricken by the prosecutor. Presumably, the prosecutor's other five peremptory strikes were not exercised against African-American jurors, or Appellant would have raised *Batson* challenges to those strikes as well. The fact that the State does not use all of its peremptory strikes to remove African-American jurors is a relevant consideration in determining the existence of pretext. *State v. Moorehead*, 811 S.W.2d 425, 429 (Mo. App. E.D. 1991). Furthermore, Appellant fails to identify any questions or comments evidencing any sort of discriminatory intent on the part of the prosecutor.

"In determining whether the defendant has proven purposeful discrimination, the trial court's chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case." *Shaw*, 14 S.W.3d at 82. "Any facts or circumstances that detract from or lend credence to the State's proffered explanations are relevant." *Id*. There are a variety of other factors that could have affected the trial court's determination in this case, but the existence of those factors is unknown because Appellant failed to identify any of them on the record at trial.

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[8] *State v. Harris*, 908 S.W.2d 912, 916 (Mo. App. E.D. 1995) and *State v. Harding*, 734 S.W.2d 871, 877 (Mo. App. E.D. 1987).

Similarly, in *Bateman*, the prosecutor responded to a *Batson* challenge with a reason that turned out to be factually inaccurate but still race-neutral. *Bateman*, slip op. at 17. Yet unlike Appellant, the defendant in *Bateman* actually advised the trial court that the prosecutor's race-neutral explanation for striking the juror was factually incorrect. *Id*. at 17. The defendant further sought to demonstrate pretext by identifying an allegedly similarly situated white juror, but he failed to identify any other potential factors relevant to the pretext inquiry. *Id*. at 18-19. After determining that the stricken venireperson and the allegedly similarly situated juror were not, in fact, similarly situated, this Court rejected the *Batson* challenge on appeal because the defendant failed to identify any other factors demonstrating pretext. *Id*. at 19-20. "[G]iving appropriate deference to the trial judge's ability to judge the credibility of the prosecutor's reasons," this Court held that "the trial court did not err in finding that the strike was race-neutral" even though the proffered reason for the strike was factually inaccurate. *Id*. at 20.

"In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez*, 500 U.S. at 365. "There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge." *Id*. "As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within

a trial judge's province." *Id.* "Because weighing the legitimacy of the State's explanation for a peremptory strike is, by nature, a subjective exercise, we place great reliance in the trial court's judgment." *Pointer*, 215 S.W.3d at 305.

After hearing the prosecutor's explanation for striking Ms. Birk and his distinctions between Ms. Birk and venirepersons Tritsch, Price, and Krausz, the court made the following ruling:

> With that reason the Court finds that that [sic] it is a race neutral reason and that the State hasn't improperly discriminated against Ms. Birk or hasn't infringed upon the defendant's rights by improperly striking Ms. Birk, an African American, for some improper reason other the race neutral reason that she has a sister presently in custody.

(Tr. 237). "Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations." *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003).

Appellant also argues, for the first time on appeal, that the prosecutor's proffered race-neutral reason was pretext because the prosecutor failed to question the panel about whether venirepersons had currently incarcerated relatives. (App. Br. 51-52). Although the prosecutor did not question every panel member about current versus past incarceration, he did pose questions along this line during *voir dire*. (Tr. 92, 93). Furthermore, the prosecutor did not need to question many of the panel

members individually on this issue because: (1) their answers voluntarily included the information, (2) the information was readily apparent from their responses (*e.g.* relative received probation or a fine, or the case was still pending), or (3) their responses indicated bias justifying strikes for cause. (Tr. 89, 94-99). Consequently, Appellant's belated assertion of pretext on this ground is insufficient.

In short, while the prosecutor's recall of *voir dire* was imperfect, there is nothing in the record evidencing a discriminatory intent. An imperfect memory is an invalid reason to tarnish a prosecutor's reputation by imputing a discriminatory intent where the record reflects nothing more than a mistaken recollection.

Because Appellant failed to prove that the prosecutor's proffered race-neutral reason for striking Ms. Birk was merely pretext, the trial court properly overruled his *Batson* challenge.

Point II

The trial court did not abuse its discretion in sustaining the State's objection to Appellant's proposed cross-examination question of Kevin Covington about whether Mr. Covington had received multiple conduct violations while incarcerated because Appellant failed to establish the admissibility of this evidence in that he never identified the factual underpinnings of Mr. Covington's conduct violations, nor how they were relevant to the credibility of his trial testimony.

Appellant argues that the trial court improperly precluded him from questioning Mr. Covington about a variety of conduct violations that he had received while incarcerated. Appellant claims that this question was proper impeachment in light of Mr. Covington's testimony that he was being paroled based on his merits, rather than on a letter written by the prosecutor on his behalf. But because this was improper impeachment evidence on a collateral issue and Appellant suffered no prejudice, his claim should be denied.

A. Standard of review.

"The trial court must be permitted broad discretion in deciding the permissible scope of cross-examination, and an appellate court will not reverse a criminal conviction unless it finds that the trial court abused its discretion." *State v. Oates*, 12 S.W.3d 307, 313 (Mo. banc 2000).

B. Because Appellant failed to identify the substance of Mr. Covington's conduct violations, he did not establish that the probative value of this evidence outweighed its prejudicial effect.

At trial, Kevin Covington testified on behalf of the State regarding admissions Appellant made about his involvement in the crimes while he was incarcerated with Mr. Covington. (Tr. 1260-1289). The State elicited evidence of Mr. Covington's criminal record, and then the State asked Mr. Covington if he was receiving any benefit for testifying at Appellant's trial. (Tr. 1260-1265). Mr. Covington indicated that "[o]ther than a letter of recommendation for parole, no." (Tr. 1265). After the prosecutor discussed the letter, he asked Mr. Covington, "And were you given any relief?" (Tr. 1265). Mr. Covington responded, "By my merits, not by the letter because the letter was not addressed." (Tr. 1266). The prosecutor then clarified with Mr. Covington that he had, in fact, been given an "out date" by the parole board for his release, so long as he "maintain[ed] proper conduct." (Tr. 1266).

On cross-examination, Appellant again went through Mr. Covington's criminal record and elicited an additional conviction involving Mr. Covington's assault on correctional staff. (Tr. 1289-1300). After questioning Mr. Covington about his conversations with Appellant in prison, Appellant revisited Mr. Covington's parole situation. (Tr. 1312). Appellant asked Mr. Covington, "Now, you stated that your

parole or – it's parole, it's not probation, your parole was due to your merits; correct?" (Tr. 1314).

At that point, the prosecutor asked to approach and advised the court that he believed Appellant was about to ask about Mr. Covington's "specific instances of misconduct . . . while he's in prison." (Tr. 1314). The prosecutor argued that such evidence would be improper impeachment.[9] (Tr. 1314). Appellant responded that he intended to challenge Mr. Covington's assertion that he was being paroled on his merits by showing his various prison conduct violations. (Tr. 1315). After the court indicated its intent to sustain the objection, Appellant made an offer of proof, which appeared to be from the transcript of Mr. Covington's deposition where Mr. Covington admitted having 35 or 36 conduct violations, including contraband, lying to staff, and giving false information. (Tr. 1316-1317). But the offer of proof did not establish the factual underpinnings of the conduct violations; the substance of neither the lies nor the false information were identified on the record.

Nevertheless, after hearing Appellant's offer of proof, the court asked the prosecutor how Mr. Covington's admission that he lied to prison authorities was not relevant. (Tr. 1317). The prosecutor responded that "that's like asking anybody if

[9] The prosecutor's objection was presumably based on this Court's holding in *State v. Wolfe*, 13 S.W.3d 248 (Mo. banc 2000), that was recently abrogated by *Mitchell v. Kardesch*, 313 S.W.3d 667 (Mo. banc 2010).

you ever lied in your life." (Tr. 1317). Appellant failed to further identify the relevance of the particular lies underlying Mr. Covington's conduct violations. The court subsequently determined that because the conduct violations did not involve sworn testimony that was a lie or Mr. Covington's reputation for truthfulness, Appellant's offer of proof would be refused. (Tr. 1318).

There are two potential impeachment uses for evidence of Mr. Covington's conduct violations. The first would be to refute his specific testimony that his parole was based upon his "merits." This was the use advocated by Appellant at trial. (Tr. 1315-1317). But the problem with this approach is that the existence of conduct violations while in prison does not necessarily preclude parole on the "merits." And Appellant certainly presented no evidence supporting this theory at trial.

The second potential use for evidence of Mr. Covington's conduct violations would be to attack Mr. Covington's overall credibility by showing that his character for truth and veracity is poor. Capitalizing on this Court's recent opinion in *Mitchell*, this is the approach Appellant advocates for the first time on appeal. But, under *Mitchell*, this kind of evidence is relevant only where credibility is a central issue in the case, and while Mr. Covington's credibility and testimony was certainly important to the State's case, the State had other evidence from which the jury could determine Appellant's guilt, and his convictions were not dependent upon Mr. Covington's

testimony. But in any event, Appellant failed to establish that the probative value of Mr. Covington's conduct violations outweighed their prejudicial effect.

"A 'Department of Corrections conduct violation,' . . . is an internal administrative punishment system that punishes inmates for behavior which violates Department of Corrections rules or warrants disciplinary action of some type." *Johnson v. State*, 125 S.W.3d 872, 875 n.3 (Mo. App. S.D. 2003). "It is not a criminal violation." *Id*. And while Appellant is correct that Mr. Covington's conduct violations for lying to staff or giving false information *might* have been relevant to impeach his character for truth and veracity, it is impossible to know if the probative value of Mr. Covington's specific violations outweighed the prejudicial effect of introducing them, as Appellant failed to identify the substance of those violations. As this Court stated in *Mitchell*, "the fact that a person has told a lie on an irrelevant issue that is remote in time or subject may make the [admission of] extrinsic evidence of little value in determining the witness's character for truth and veracity." *Mitchell*, 313 S.W.3d at 681-682. In that situation, as here, "the risk of prejudice and the distraction of a mini-trial would outweigh the benefit of allowing such evidence." *Id*. at 682. Mr. Covington's conduct violations could have involved lies as minimal as whether he made his bunk that day, or wrongly advised the guards that another inmate committed a conduct violation. But because Appellant failed to establish the

substance of Mr. Covington's dishonesty, the probative value of this evidence remains a mystery.

The fact that his conduct violations involved dishonesty to some degree, alone, is insufficient to establish that their probative value outweighed the prejudicial effect of their admission. *See State v. Wilson*, 256 S.W.3d 58, 61-62 (Mo. banc 2008) (finding that "The court did not abuse its discretion in excluding evidence of a prior *unrelated* lie by the victim" (emphasis added)); and *Mitchell*, 313 S.W.3d at 682 n.12 (approving of *Wilson*). This Court did *not* hold in *Mitchell* that every lie ever told by a witness becomes a proper subject for impeachment; it is only where credibility is a "central issue" that a witness's character for truth and veracity gains great probative value. *See Mitchell*, 313 S.W.3d at 674 (recognizing that "much of the trial turned on whether the jury believed [defendant] or [plaintiff]," and that "credibility was such a central issue"). As it was Appellant's burden to establish the admissibility of this evidence and he failed to identify the probative value of Mr. Covington's conduct violations, the court committed no error in refusing evidence that Mr. Covington had been dishonest about an unknown subject at some point in his past.

Appellant indirectly acknowledges that this evidence was inadmissible by arguing that the State opened the door to this evidence when Mr. Covington testified that he was being paroled on his "merits." (App. Br. 60). But Appellant is incorrect.

"The doctrine of opening the door allows a party to explore otherwise inadmissible evidence on cross-examination when the opposing party has made unfair prejudicial use of related evidence on direct examination." *Barnett v. State*, 103 S.W.3d 765, 773 n.5 (Mo. banc 2003).

The first flaw in Appellant's argument is that the State did not elicit Mr. Covington's testimony that he was being paroled on his merits; Mr. Covington volunteered this information, and it was non-responsive to the question asked. After discussing the letter of recommendation, the following occurred:

Q. And were you given any relief?

A. By my merits, not by the letter because the letter was not addressed.

(Tr. 1265-1266).

The State's question did not open the door for Appellant's proposed cross-examination about Mr. Covington's conduct violations because Mr. Covington's response about his "merits" was nonresponsive to the State's question. *See Vollbaum v. State*, 833 S.W.2d 652, 658 (Tex. App. 1992) ("Because Vollbaum's answer to the State's question about the physical evidence was nonresponsive, the State did not 'open the door.'"). Additionally, there is nothing in the record reflecting that the State "made unfair prejudicial use" of Mr. Covington's testimony on direct examination such that would allow Appellant to explore the area of the conduct violations on cross-examination. *Barnett*, 103 S.W.3d at 773 n.5.

Evidence of Mr. Covington's conduct violations was not only inadmissible but also collateral. Appellant argues that he should have been allowed to present this evidence to demonstrate Mr. Covington's motive to testify favorably for the State. (App. Br. 61, 63). But Appellant fails to demonstrate how evidence of Mr. Covington's various conduct violations would provide motive for him to testify falsely on the State's behalf, as his testimony would have no impact on the conduct violations he received in the past. This evidence would have done no more than to introduce the collateral issue of Mr. Covington's prison behavior into the trial, and "[i]t is not error to exclude offers to impeach on immaterial or collateral matters." *State v. Taylor*, 486 S.W.2d 239, 244 (Mo. 1972), abrogated on other grounds by *State v. March*, 216 S.W.3d 663, 665 (Mo. banc 2007).[10]

C. Appellant was not prejudiced by the court's limitation of his cross-examination.

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[10] As noted earlier, evidence of Mr. Covington's conduct violations – contrary to Appellant's implication – would not necessarily have impeached his testimony that he was paroled on his "merits," as Appellant showed no connection between the number or substance of a prisoner's conduct violations while in prison and the parole board's decision to grant a prisoner parole in any given case. It may very well be that a prisoner can have a multitude of conduct violations while in prison, yet still be paroled on his "merits."

Even if the court erred, Appellant suffered no prejudice. Appellant alleges prejudice because "the State relied on Covington's testimony to convict [Appellant]," and "[w]ithout Covington, the prosecution lacked enough evidence to indict, let alone convict, [Appellant]." (App. Br. 62). Appellant claims that "[b]ecause the trial court improperly limited his cross-examination, the jury could not properly assess Covington's credibility." (App. Br. 63).[11] But Appellant ignores the fact that the jury heard that the prosecutor wrote a letter of recommendation on Mr. Covington's behalf to the parole board and that Mr. Covington later received an "out date." (Tr. 1265-1266). It was this evidence, if anything, that provided a motive for Mr. Covington's testimony. Mr. Covington even admitted that the reason he communicated with Appellant in the first place was to use Appellant in hopes of getting an earlier parole date by providing information to law enforcement. (Tr. 1268-1269).

[11] Appellant also argues that "Covington's testimony was suspect," and then he discusses various aspects of Mr. Covington's testimony and how they did not square with the evidence. (App. Br. 62). Appellant's recitation, however, fails to mention that Mr. Covington's testimony was based upon information *provided to him by Appellant*. Thus, to the extent that Mr. Covington's testimony conflicted with the facts, it was because the information Appellant provided to Mr. Covington did not align with other evidence and facts presented at trial.

Additionally, the jury heard evidence of Mr. Covington's lengthy criminal history, including convictions for robbery, stealing, bad checks, battery, disorderly conduct, theft, and assault on corrections staff. (Tr. 1261-1263, 1299). Thus, the jury had more than enough information from which to judge Mr. Covington's credibility, and Appellant suffered no prejudice from his inability to introduce evidence of Mr. Covington's specific prison conduct violations occurring at an unknown time and involving unknown matters.

Point III

The trial court did not plainly err in limiting Appellant's cross-examination by not allowing him to ask Justin Lewis if he "t[old] Nick Reynolds that [he] shot the guy at Storage USA," because this question sought to elicit inadmissible evidence in that it called for hearsay for which Appellant failed to lay the foundation for the application of any exceptions to the hearsay rule.

Appellant claims that the trial court abused its discretion in not allowing him to question Mr. Lewis about his alleged prior confession to the murder. But because Appellant was trying to elicit simple hearsay, the trial court properly limited Appellant's cross-examination.

A. Appellant's offer of proof was insufficient, as it failed to both identify the evidence he wished to present and establish its admissibility.

During Appellant's cross-examination of Mr. Lewis, counsel approached the bench and indicated that he wished to ask Mr. Lewis the following question: "did you tell Nick Reynolds that you shot the guy at Storage USA?" (Tr. 1067-1068). The State objected, arguing that the statement was hearsay. (Tr. 1068). Appellant argued that it was an admission. (Tr. 1068). The court said the statement was hearsay and that the objection would be sustained. (Tr. 1069). Appellant requested to make an offer of proof. (Tr. 1069). Appellant then stated the following:

> The question that I want to ask Justin Lewis, did you tell Nick Reynolds you shot the guy at Storage USA. The question I offer, my offer of proof is that if he states yes that is an admission to the crime. It's relevant evidence that should be considered by this jury. This question seeks to elicit that admission directly from Justin Lewis. I have a good faith basis for asking the question based on discovery that was presented to me. By the statement I hope that is a sufficient offer of proof, but it is certainly the one I am offering.

(Tr. 1069-1070). The court ruled that the question sought to elicit hearsay. (Tr. 1070).

"To preserve the matter for appeal, the proponent of the evidence must attempt to present the excluded evidence at trial, and if an objection to the proposed evidence is raised and sustained, the proponent must then make an offer of proof." *State v. Chambers*, 234 S.W.3d 501, 511 (Mo. App. E.D. 2007). "An offer of proof must be sufficiently specific to apprise the trial court of the specifics of the proposed evidence and demonstrate its admissibility." *State v. Childs*, 257 S.W.3d 655, 658 (Mo. App. W.D. 2008). "An offer preferably is made in question and answer format." *Id*. "Although a specific narrative offer of proof summarizing the proposed testimony is acceptable in some situations, mere statements and conclusions are insufficient." *Id*. (internal citations omitted). "It is a risky proposition for counsel to rely on a narrative offer which may be found insufficient by a reviewing court." *Id*.

Where an offer of proof fails "to demonstrate specifically what the evidence would be, the purpose and object of the evidence, and each fact essential to establishing its admissibility," it is insufficient. *Id*. And "[w]hen an inadequate offer of proof is made, the alleged error is not preserved and the claim can only be reviewed for plain error." *Id*. at 659.[12]

Here, Appellant's offer of proof was insufficient because it failed to identify what the evidence was that he was seeking to admit. "In order for an appellate court to judge whether or not the evidence should have been admitted, the court must first know exactly what evidence was excluded." *State v. Shifkowski*, 57 S.W.3d 309, 315 (Mo. App. S.D. 2001).

Appellant never established what Mr. Lewis's answer to the question would have been. The question itself was not evidence. *See State v. Hardy*, 197 S.W.3d 250, 253 (Mo. App. S.D. 2006). Thus, for Appellant's offer of proof to be sufficient, he needed to advise the court of what evidence the question would actually elicit. Had Mr. Lewis been asked the question, he could have responded affirmatively or negatively – a fact Appellant recognized when he asserted in his offer of proof, "*if* he states yes that is an admission to the crime." (Tr. 1070) (emphasis added). But Mr. Lewis also could have denied making the statement. In that case, Appellant would have had to present the court with evidence that Mr. Lewis, in fact, made the

[12] Appellant fails to request plain error review of this claim. (App. Br. 66).

statement. *See State v. Garrison*, 276 S.W.3d 372, 379 (Mo. App. S.D. 2009) (witness's denial to prosecutor's question that he made a certain statement did not render the alleged prior statement evidence; "the State, if it still desired to impeach the witness, was required to present evidence showing the witness did, in fact, make the prior inconsistent statement."). Nick Reynolds did not testify in Appellant's trial, and Appellant never indicated his intent to call Mr. Reynolds as a witness should Mr. Lewis deny making the admission. Consequently, Appellant's offer of proof was insufficient because it failed to identify the evidence he wished to present. *State v. Bisher*, 255 S.W.3d 29, 37 (Mo. App. S.D. 2008) (finding claimed evidentiary error unpreserved where "[t]he record does not disclose what evidence would have been adduced had the trial court permitted the witness to answer the question.").

Because Appellant's offer of proof failed to sufficiently identify the evidence, this Court is forced to speculate on various theories of admissibility. If Mr. Lewis had admitted that he made the alleged out-of-court statement to Mr. Reynolds, that statement would still have been hearsay, as it was an "out-of-court statement . . . used to prove the truth of the matter asserted." *State v. Johnson*, 284 S.W.3d 561, 584 (Mo. banc 2009). Thus, under that circumstance, Appellant would have to show how Mr. Lewis's out-of-court statement was admissible under an exception to the hearsay rule. If, on the other hand, Mr. Lewis had denied making the out-of-court statement to Mr. Reynolds, then Appellant would have to show how the out-of-court statement was

admissible as a prior inconsistent statement. Again, the offer of proof did not reveal whether Mr. Lewis would admit or deny making the out-of-court statement, but in either event, the trial court did not plainly err.

1. Appellant failed to establish that the alleged statement would be admissible as a prior inconsistent statement.

In his brief, Appellant suggests that Mr. Lewis's alleged statement would have been admissible as a prior inconsistent statement if he denied making it in response to Appellant's proffered question. (App. Br. 68). But Appellant never presented this theory to the trial court, (L.F. 90; Tr. 1068-1070), and his suggestion is incorrect.

"Prior statements may be used to impeach the credibility of a witness only if the judge is satisfied that the prior statements are, in fact, inconsistent." *State v. Tolen*, 295 S.W.3d 883, 889 (Mo. App. E.D. 2009). "Absent the threshold showing of an inconsistency between the testimony and the statements contained within the proffered [evidence], use of the [evidence] to impeach is questionable." *Id*. at 890-891.

Here, Mr. Lewis's alleged statement to Mr. Reynolds was not inconsistent with any of his trial testimony. Mr. Lewis never testified that Appellant, or any other specific person, shot the victim. Nor did he ever testify that he did not shoot the victim. Thus, Mr. Lewis never presented any testimony with which his alleged statement to Mr. Reynolds would be inconsistent. Consequently, even *if* Appellant had presented evidence that Mr. Lewis actually made such a statement, it would not

have been admissible as a prior inconsistent statement because it did not conflict with Mr. Lewis's testimony.

At best, if Mr. Lewis had denied making the out-of-court statement to Mr. Reynolds, that denial would have laid the foundation for admission of evidence that he had, in fact, made the statement to Mr. Reynolds. Only then would there have been a prior inconsistent statement admissible for its substance. But Appellant never called Nick Reynolds to testify in his offer of proof; in fact, Appellant made no mention of Nick Reynolds apart from being the receiver of Mr. Lewis's alleged statement. In the absence of any evidence that Mr. Lewis made the statement, the trial court committed no error in excluding Appellant's proffered question for cross-examination that would have elicited nothing more than hearsay.

2. Appellant failed to establish that the alleged statement was admissible as a declaration against penal interest.

If Mr. Lewis had admitted making the statement, the question would be whether the out-of-court statement was admissible under any exception to the hearsay rule. At trial, Appellant argued that Mr. Lewis's alleged statement was admissible because it was "an admission." (Tr. 1068, 1070). The trial court interpreted Appellant's assertion to mean that Mr. Lewis's alleged statement was an admission by a party opponent, and the trial court rejected Appellant's argument because Mr. Lewis was "not a party, he's a witness." (Tr. 1069). Appellant now argues on appeal that Mr.

Lewis's statement was admissible as a declaration against penal interest. (App. Br. 66-68).[13]

"A declaration against a penal interest is not admissible as an exception to the hearsay rule, but may be admissible as a due process right of the defendant only if the declarant is shown to be unavailable as a witness, there are considerable assurances of the statement's reliability, and the statement, if true, would exonerate the defendant." *State v. Davidson*, 982 S.W.2d 238, 242 (Mo. banc 1998) (internal citation omitted). "All three prerequisites must be present for the statement to be admissible." *State v. Robinson*, 90 S.W.3d 547, 551 (Mo. App. S.D. 2002).

Appellant's offer of proof argued, at best, only that "the declaration, if true, would exonerate appellant."[14] Appellant's offer of proof failed to demonstrate the remaining prerequisites for the admissibility of Mr. Lewis's alleged statement as a declaration against penal interest. First, Mr. Lewis was not unavailable; he was

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[13] "A trial court will not be convicted of error regarding an issue not presented to it." *State v. Burrage*, 258 S.W.3d 560, 563 (Mo. App. S.D. 2008). "Reasons urged in a brief which were not advanced to the trial court are of no avail." *Id*.

[14] Even if the statement were true, it would not necessarily exonerate Appellant, as it did not preclude the possibility of Appellant's involvement with Mr. Lewis in the murder. *See e.g. Bisher*, 255 S.W.3d at 36 (alleged declaration against penal interest, while implicating others, did not preclude defendant's involvement as an accomplice).

present and testified at Appellant's trial. *See Davidson*, 982 S.W.2d at 242. Actual unavailability is usually required because when a witness is present and available to testify, that witness can be asked for facts without eliciting hearsay. If Appellant believed that Mr. Lewis actually shot the victim, he could have asked Mr. Lewis directly, "Did you shoot the victim?" Then, depending upon Mr. Lewis's answer, Appellant would have had either direct evidence of an alternate perpetrator, or he would have been able to lay the foundation for admission of Mr. Lewis's alleged prior inconsistent statement to Mr. Reynolds. But Appellant did not do this.

Second, Appellant failed to demonstrate that the alleged statement was sufficiently reliable. "The United States Supreme Court in *Chambers*[15] recognized three such indicia of reliability, as have Missouri courts, namely, (1) the statement must be self-incriminatory and undeniably against self-interest; (2) the statement must be made spontaneously to a close acquaintance shortly after the crime; and (3) the statement must be corroborated by other admissible evidence." *Robinson*, 90 S.W.3d at 553.

Again, Appellant's offer of proof was insufficient as it failed to reveal the nature of the relationship, if any, between Mr. Lewis and Mr. Reynolds, or when the alleged statement was made. The offer of proof further failed to identify any evidence corroborating the truth of Mr. Lewis's alleged statement. Appellant argues that "the

[15] *Chambers v. Mississippi*, 410 U.S. 284 (1973).

State had no physical evidence connecting [Appellant] to the crime." (App. Br. 68). But it is equally true that there was no physical evidence connecting Mr. Lewis. Mr. Lewis's only connection to the crimes was his role as an intermediary for Appellant to acquire a gun from Mr. Cosgrove. Consequently, Appellant failed to demonstrate that Mr. Lewis's alleged statement bore sufficient indicia of reliability.

Because Appellant's offer of proof was wholly insufficient in that it failed to both identify the evidence he wished to present and establish that evidence's admissibility, his claim is not preserved for review. "When an inadequate offer of proof is made, the alleged error is not preserved and the claim can only be reviewed for plain error." *Childs*, 257 S.W.3d at 659.

B. The trial court committed no error in preventing Appellant from seeking to elicit inadmissible evidence.

"Trial courts have substantial discretionary latitude in controlling cross-examination." *State v. Roper*, 136 S.W.3d 891, 900 (Mo. App. W.D. 2004). And where, as here, a party seeks to elicit inadmissible evidence through cross-examination, the trial court commits no error in precluding the party from doing so. *See City of Kansas City v. Habelitz*, 857 S.W.2d 299, 302 (Mo. App. W.D. 1993).

"A party is not allowed to inject suspicion, innuendo and insinuation under the guise of cross-examination." *State v. McCon*, 645 S.W.2d 67, 68 (Mo. App. W.D. 1982). "He must show as a foundation for his questions that he has some solidly

based belief that the questions will elicit answers, if truthful, which will support the defendant's thesis." *Id.*

Because the evidence Appellant sought to elicit would have been hearsay, and because it would not have been otherwise admissible as either a prior inconsistent statement or a declaration against penal interest, the trial court committed no error in restricting Appellant's cross-examination.

Point IV

The trial court did not abuse its discretion in admitting evidence that shortly before the crimes, Appellant: (1) stole a car; (2) stole rental furniture; (3) wrote bad checks; (4) fraudulently obtained utility services, failed to pay the bills, and then changed residences; (5) filed a false police report of robbery; and (6) left his apartment with a razor blade and checked himself into a psychiatric hospital following an argument with his girlfriend over finances, because this evidence was relevant and admissible in that it demonstrated Appellant's financial motive for committing the robbery, and the evidence came from Appellant's own admissions to police during interviews. (Responds to Appellant's Points IV – IX).

In Appellant's Points IV – IX, he argues that the trial court improperly admitted evidence of various prior bad acts. But because this evidence established Appellant's financial motive, it was both relevant and admissible.

A. Standard of review.

"The trial court's decision on the admission or exclusion of evidence is reviewed for abuse of discretion." *State v. Sittner*, 294 S.W.3d 90, 91 (Mo. App. E.D. 2009). "A trial court has abused its discretion when a ruling is clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id*.

"Moreover, an evidentiary ruling will not be overturned absent a showing of prejudice." *Id.*

B. Appellant's admissions of various bad acts were relevant and admissible to establish his financial motive.

At trial, the State elicited evidence that shortly before the crimes, Appellant: (1) stole a car while working at Dobbs Auto Tire, (Tr. 943, 1416); (2) failed to make payments on rental furniture and then, after the crimes, took that furniture with him to Milwaukee, (Tr. 1113, 1418-1419); (3) wrote several bad checks, (Tr. 821-823, 1416, 1419); (4) had a common practice of fraudulently obtaining utility services, failing to pay the bills, and then changing residences, (Tr. 1418); (5) filed a false police report alleging he had been robbed of $400 that he actually lost while gambling, (Tr. 947-949); and (6) left his apartment with a razor blade following an argument with his girlfriend over finances, and then checked himself into a psychiatric facility, (Tr. 952-953).

Appellant argues that all of this evidence constituted inadmissible evidence of other crimes and bad acts.[16] (App. Br. 43-62). But because this evidence came from Appellant's own admissions and was relevant to establish his financial motive for

[16] Appellant depicts evidence of the razor blade and psychiatric facility as "evidence of bad character," but otherwise treats this claim as one involving the improper admission of prior bad acts evidence. (App. Br. 87).

committing the robbery and murder, Appellant's claim is without merit and should be denied.

"A statement may be admitted as an admission of a party opponent if the statement is material to the issues in the case, the statement is relevant to the case, and the statement is offered by the opposing party." *State v. Simmons*, 233 S.W.3d 235, 237 (Mo. App. E.D. 2007). "[T]he admission of a criminal defendant is relevant and material if it tends to incriminate the defendant, to connect the defendant to a crime, or to manifest the defendant's consciousness of guilt." *Id*.

Additionally, "[e]vidence of other crimes is admissible if it is logically relevant, in that it has some legitimate tendency to establish directly the defendant's guilt of the charges for which he or she is on trial, and if the evidence is legally relevant, in that its probative value outweighs its prejudicial effect." *State v. Holleran*, 197 S.W.3d 603, 608-609 (Mo. App. E.D. 2006). "Evidence is logically relevant when it tends to establish, for example, motive, intent, the absence of mistake, a common scheme or plan, or the identity of the person charged with the commission of the crime." *Id*.

"The state is generally given wide latitude in the development of evidence of motive." *State v. Williams*, 18 S.W.3d 461, 467 (Mo. App. E.D. 2000). "Where the defendant claims innocence, evidence of motive, or absence of motive, is relevant." *State v. Shurn*, 866 S.W.2d 447, 457 (Mo. banc 1993). And "[i]f evidence of uncharged crimes is relevant for some purpose, the evidence should not be rejected

merely because it incidentally shows the accused to be guilty of another crime." *Williams*, 18 S.W.3d at 467.

Evidence that Appellant stole a car and rental furniture, passed bad checks, fraudulently obtained utility services and failed to pay bills, and filed a false police report to cover up a $400 gambling loss were all relevant because the evidence demonstrated Appellant's dire financial situation, as well as his desperation over that situation, which was relevant to establish why Appellant would be willing to both rob the Storage USA and kill the clerk to cover it up. *See State v. Mayes*, 63 S.W.3d 615, 633 (Mo. banc 2001) (evidence that defendant lost his job and argued with his wife was not character evidence and was relevant to prove the defendant "suffered from the pressure of financial and marital difficulties . . . and, so, was relevant to prove motive.");[17] *State v. Garrett*, 226 S.W. 4, 7 (Mo. 1920) (evidence bearing upon the financial condition of defendant both before and after the homicide competent to establish motive); *see also State v. Twenter*, 818 S.W.2d 628, 631 (Mo. 1991) (state introduced variety of evidence demonstrating that defendant was in "serious financial trouble at the time of the murders.").

[17] Appellant seeks to distinguish *Mayes* because the claim of error in that case was unpreserved. (App. Br. 76). But this distinction is irrelevant, as this Court did not reject the claim on prejudice grounds; rather, this Court found that the admission of this evidence was relevant and proper.

Likewise, evidence that Appellant left his apartment with razor blades following a fight with his girlfriend over finances and then checked himself into a psychiatric hospital was relevant to establish his desperation and severe emotional distress over their financial situation shortly before the murder and robbery, which, in turn, demonstrated his motive for committing the charged crimes. *Mayes*, 63 S.W.3d at 633 ("The fact that [Defendant's wife] and Defendant argued and that Defendant did not tell her about the loss of his job tended to demonstrate that he faced intense emotional stress and, so, was relevant to prove motive."); *State v. Hayes*, 15 S.W.3d 779, 785 (Mo. App. S.D. 2000) (evidence of defendant's suicide attempt after victim ended their relationship was relevant to establish his motive to later murder victim because it demonstrated his "extreme agitation" at the thought the relationship was over).[18]

[18] Appellant attempts to distinguish *Hayes* because it involved the same, known victim in both the suicide attempt and the charged murder. (App. Br. 89). But that was not the court's rationale in upholding the admission of the suicide evidence. The Southern District found no error in *Hayes* because evidence of the suicide attempt was relevant to establish the defendant's "extreme agitation" at the situation leading to the murder. *Hayes*, 15 S.W.3d at 785. Similarly, evidence of Appellant's suicidal thoughts was relevant to establish his desperation at his financial situation, which, under the State's

The Court of Appeals has frequently upheld the admission of other crimes or bad acts evidence contained within the defendant's own admissions when it tended to establish the defendant's motive for committing the charged crimes. *See State v. Thomas*, 272 S.W.3d 421, 427 (Mo. App. E.D. 2008) (defendant's use of racial epithets was highly relevant in showing defendant's clear motive to do harm); *State v. McDaniel*, 254 S.W.3d 144, 147 (Mo. App. E.D. 2008) (defendant's use of racial epithet towards victim during assault relevant to establish defendant's motive to commit assault); *State v. Petty*, 967 S.W.2d 127, 139-140 (Mo. App. E.D. 1998) (evidence of defendant's prior drug dealing and his admission made during a deal relevant to establish defendant's motive to shoot victim); and *State v. Mantia*, 748 S.W.2d 785, 789 (Mo. App. E.D. 1988) (evidence of defendant's crime in another state admissible to establish circumstances surrounding defendant's admission to charged crime).

Because the evidence Appellant complains of came from his own admissions and helped establish his desperation at his dire financial situation (thus providing evidence of his motive), the trial court committed no error in allowing the State to elicit this evidence.

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theory of motive, ultimately led to the robbery of Storage USA and murder of the victim.

Appellant relies on *State v. Davis*, 211 S.W.3d 86 (Mo. banc 2006), to argue that his particular trial court had the propensity to admit other crimes evidence without limitation. (App. Br. 73). But Appellant ignores the weighing the trial court engaged in, as well as the limitations it placed upon the admission of other crimes evidence in this case.

In *Davis*, the State was permitted to introduce evidence of a prior robbery committed in a similar manner to argue the defendant and his cohort's identity as the perpetrators of the charged robbery. *Id*. at 88-89. This Court found the admission of this evidence erroneous because it did not tend to prove the defendant's identity as the perpetrator of the charged robbery since the two robberies were neither identical nor sufficiently unusual and distinctive. *Id*. at 89. Rather than determine – as Appellant implies – that the trial court abused its discretion by admitting other crimes evidence without limitation, this Court simply determined that the evidence admitted failed to meet the requirements to fall within one of the exceptions to the admission of other crimes evidence. *Id*. And because half of the State's case involved evidence from the prior robbery, this Court found the admission of the evidence to be prejudicial. *Id*.

Here, contrary to Appellant's arguments, the trial court evaluated the State's purpose in offering the evidence and determined that it was relevant to establish Appellant's financial motive for committing the charged crimes. (Tr. 260-274). The court also refused to allow the State unfettered discretion in admitting other crimes

evidence; the court initially limited such evidence to the time period just before the crimes and refused to accept evidence of bad acts after the murder occurred.[19] (Tr. 274).

Appellant, relying on *Davis*, argues that "the other crimes evidence was extensive," and that "nothing connected it to the charged offense." (App. Br. 75-76). But Appellant's case is nothing like *Davis*. In *Davis*, none of the evidence related to the prior robbery was related to the charged robbery. Although the prosecutor attempted to argue the defendant's *modus operandi* to prove his identity in the charged crime, the prosecutor's effort to connect the two failed. Here, on the other hand, the State sufficiently connected Appellant's dire financial situation with his motive to commit murder. In order to demonstrate how financial problems could be severe enough to lead a person to commit murder, the State necessarily needed to

[19] Appellant correctly notes that he "took the furniture with him to Milwaukee *after* the charged offense[s]." (App. Br. 73, 75). Appellant also notes that there was evidence of his fraudulent method of obtaining utility services after the charged offenses. (App. Br. 75). While this evidence failed to comply with the trial court's initial temporal limitation, the evidence involved isolated references that came as part and parcel of Appellant's statement to police regarding his failure to pay for his rental furniture and inability to obtain utility services in his own name, which occurred *before* the charged offenses.

show the extent of those financial problems, which was why the trial court committed no error in allowing the State to explore all of the areas about which Appellant complains.

Point V

The trial court did not plainly err in admitting evidence of a prior break-in to the apartment above Storage USA or in admitting evidence that someone broke into Appellant's car while it was in the towing lot because this evidence was not evidence of other bad acts of Appellant in that the State made no effort to connect Appellant to these other crimes and Appellant suffered no prejudice from the admission of this evidence. (Responds to Appellant's Points X and XI).

Appellant argues that evidence of a prior break-in at Storage USA and his vehicle while it was on the tow lot were inadmissible evidence of other crimes. But because this evidence was not tied to Appellant in any way and did not prejudice Appellant, his claims are without merit.

A. Preservation and standard of review.

On appeal, Appellant argues that this evidence was inadmissible evidence of other crimes, but his objections at trial and his related claims of error in the motion for new trial argued simply that the evidence was irrelevant, and made no claim that it constituted improper evidence of other crimes.[20] (Tr. 637, 638, 962; L.F. 83, 92-93).

[20] Appellant filed a motion in limine to preclude introduction of the evidence of the prior burglary at Storage USA, but this motion argued only that the evidence was irrelevant, not that it constituted evidence of other bad acts. (L.F. 44).

"An issue is not properly preserved for appeal when the appellant fails to argue at trial the grounds asserted upon appeal." *State v. Lewis*, 243 S.W.3d 523, 524 (Mo. App. W.D. 2008). "An appellant cannot broaden or change allegations of error on appeal." *Id*. at 525. "The point raised on appeal must be based upon the same theory of the objection as made at the trial and as preserved in the motion for new trial." *Id*. An appellate court "will not convict the circuit court of an error it was given no opportunity to correct." *Id*.

While the exclusion of other crimes evidence is based upon a determination that the evidence lacks legal relevance, a simple relevance objection is not the same. An objection that evidence is irrelevant speaks only to a lack of logical relevance, which necessarily precludes legal relevance. Evidence of other crimes, however, can be logically relevant but lack legal relevance due to the highly prejudicial nature of the evidence. And because Appellant's objections and claims of error at trial were that this evidence was simply irrelevant, his claims now that they constituted inadmissible evidence of other crimes are not preserved for appellate review. Thus, this Court may decline to review the claims entirely; but, should this Court choose to review Appellant's claims, it can be for no more than plain error resulting in a manifest injustice. Rule 30.20.

B. The evidence did not constitute evidence of other crimes involving Appellant.

"As [a] general matter, evidence of uncharged crimes, wrongs, or acts is inadmissible to show an accused is predisposed to criminal conduct." *State v. Sheridan*, 188 S.W.3d 55, 65 (Mo. App. E.D. 2006). "Put another way, evidence of prior crimes is inadmissible for the purpose of eliciting an inference that the defendant also committed the crime for which he is charged." *Id*. "Counsel violates this rule when he offers evidence that shows the defendant committed, was accused of, was convicted of, or definitely was associated with the crime." *Id*. Where the evidence is not associated with the defendant, it does not constitute inadmissible evidence of other crimes. *See e.g. State v. Bolds*, 11 S.W.3d 633, 638-639 (Mo. App. E.D. 1999) ("the evidence adduced did not even connect defendant directly to the alleged crimes.").

1. Evidence of a prior burglary at Storage USA.

When the State elicited evidence of the prior burglary at Storage USA, it also elicited evidence that the burglary was unrelated to the murder and robbery for which Appellant was on trial:

> Q. Officer, did you respond to the location at Storage USA on April 26 of 2004?
>
> A. Yes, I did.
>
> Q. And what was the nature of that call?
>
> A. I got called there. The manager was closing up for the day, and he noticed that the upstairs apartment for the storage area had been broken into, and the

sliding glass had been broken into the apartment and then someone had gone down the steps and kicked a[n] entry door . . . to the lower commercial part of the business.

. . .

Q. It was damage prior to June 2nd of 2004?

A. Sometime over the weekend on the 26th, correct.

(Tr. 637-639).

Previously, the State offered testimony from an officer that had video-taped the crime scene. (Tr. 410). The video depicted damage to the back door leading to the upstairs apartment. (Tr. 414; State's Ex. 1). The officer testified that investigation revealed that the damage had occurred at an earlier date and had no connection with the homicide. (Tr. 414). He also indicated that the boarded-up patio door was due to a prior unrelated incident. (Tr. 414). Also previously admitted were still photos of both the back door and the apartment patio door taken on the day of the murder. (Tr. 373-374; State's Ex. 50, 53).[21]

[21] On appeal, Appellant argues error in the admission of State's Exhibits 50 and 53, but when these exhibits were offered by the State, Appellant indicated that he had no objection to their admission. (Tr. 376). Yet when the State discussed the exhibits in conjunction with exhibits 145 and 147, Appellant lodged an objection to all four

Appellant complains that the evidence was inadmissible because "[t]he State showed no connection to the charged offense or to [Appellant]." (App. Br. 94). Appellant is correct that this crime was not connected to him. But that is the very reason that this evidence did not constitute inadmissible evidence of other crimes – it did not show that "the defendant committed, was accused of, was convicted of, or definitely was associated with the crime." *Sheridan*, 188 S.W.3d at 65. The State offered the evidence "for the limited purpose to show that that damage, which the jury ha[d] already seen [in State's Exhibits 1, 50, and 53], was not or did not occur on June 2nd, 2004." (Tr. 635). This was relevant because by showing that the damage occurred apart from the charged crimes, the State established that the perpetrator of the charged crimes did not need to break in to gain access to the facility either because the charged crimes occurred during regular business hours when the facility was open to the public, or because the perpetrator was familiar with the workings of the facility, which supported the investigators' theory that the charged crimes were the result of an "inside job."

Appellant relies on *State v. Strickland*, 530 S.W.2d 736 (Mo. App. St. L. D. 1975). In *Strickland*, the State introduced evidence that, on the same day as the charged burglary, the residence next door to the victim residence had pry marks on the

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exhibits, even though exhibits 50 and 53 had already been admitted without objection. (Tr. 638).

door similar to those on the victim's residence. *Id*. at 736-737. The State presented no evidence actually connecting the defendant to the pry marks. *Id*. at 737. The court determined that this evidence was improperly admitted because there was nothing connecting it to the defendant, and it was totally irrelevant to the charged crime. *Id*.

Appellant also relies on *State v. Summers*, 362 S.W.2d 537 (Mo. 1962). In *Summers*, the State introduced evidence of other similar thefts committed in the same general neighborhood at about the same time as the offense charged. *Id*. at 542. This Court determined that this evidence was improperly admitted because it did not tend to prove the defendant's guilt of the charged crime. *Id*.

But both *Strickland* and *Summers* are distinguishable because the evidence here was relevant to the charged crimes insofar as the jury had viewed exhibits of the crime scene depicting damage that did not occur as part of the charged crimes. The State was entitled to explain this evidence to the jurors, rather than let them speculate as to what or who caused the damage and whether it was in any way connected to the charged crimes. *Cf. State v. McGee*, 284 S.W.3d 690, 701 (Mo. App. E.D. 2009) (evidence used to explain subsequent police conduct is admissible because it is "more likely to serve the ends of justice in that the jury is not called upon to speculate on the cause or reasons for the officers' subsequent activities."); and *State v. Shigemura*, 680 S.W.2d 256, 257 (Mo. App. E.D. 1984) (subsequent police conduct admissible to prevent jury speculation). Had the State not presented this evidence, the jurors could

have erroneously speculated that the damage was caused by Appellant, the police, or some other unidentified person contemporaneously with the murder. Thus, the trial court committed no error in allowing the State to introduce this evidence.

2. Evidence that the windows were broken on Appellant's car.

The State also elicited evidence that, when the police went to search one of Appellant's vehicles (a Toyota Camry)[22] on the tow lot, it had been broken into:

> Q. Did you find anything unusual that recently occurred with that Toyota Camry while on the lot?
>
> A. Yes.
>
> Q. And what was that?
>
> A. Yes, the lot had been broken into and [Appellant]'s vehicle, the Toyota Camry, had been the only vehicle on the lot that had been broken into. The windows had been busted out.

[22] Appellant had two vehicles when he was interviewed on June 3, 2004: a gold Nissan Altima and a maroon Toyota Camry. (Tr. 958-959). The Altima had been repossessed for lack of payment, and the Camry had been impounded for stolen license plates. (Tr. 958-959). Nothing of evidentiary value was found when the Camry was searched the day after the murder. (Tr. 664-665). But the restaurant menu with Justin Lewis's name and phone number were found in the Altima when it was searched four days later. (Tr. 461).

(Tr. 962).

Appellant again complains that there was no connection between himself and the evidence that his car had been broken into. (App. Br. 95). Again, Appellant is correct that nothing connected him to the break-in, but it is for this very reason that the evidence did not constitute inadmissible evidence of other crimes – it did not show that "the defendant committed, was accused of, was convicted of, or definitely was associated with the crime." *Sheridan*, 188 S.W.3d at 65.

Appellant again relies on *Strickland* and *Summers* to support his claim. But both *Strickland* and *Summers* introduced evidence implying – without connection – that the defendants were engaged in ongoing, repetitive crime sprees. At the very least, the irrelevant evidence in those cases involved the same crimes as those with which the defendants were charged, which could have prejudiced the defendants by implying that they committed crimes for which there was no connection.

Here, on the other hand, there was no implication that the vehicle break-in was part of some ongoing crime spree by Appellant. And while the relevance of this evidence appears questionable, to the extent that one could reasonably infer that Appellant was the person that caused the damage, such evidence would have been relevant to demonstrate Appellant's consciousness of guilt, as there was nothing of evidentiary value found in the car following the break-in. It is reasonable to infer that if Appellant broke into the car, he did so in order to remove any incriminating

evidence before the police searched the vehicle. *See State v. Williams*, 97 S.W.3d 462, 469 (Mo. banc 2003) (evidence of escape, even though constituting an uncharged crime, is admissible as bearing on defendant's consciousness of guilt as to pending charges).

But because there was no evidence as to when the Camry had been impounded, and, accordingly, no evidence as to whether Appellant had access to the Camry at the time of the charged crimes, there was no direct connection between this evidence and Appellant or the charged crimes. Consequently, it did not tend to prove or disprove any fact in the case and appears to have been irrelevant. That being said, the evidence's lack of relevance translates to an equal lack of prejudice.

"[T]he admission of irrelevant evidence is reversible only upon a showing of prejudice." *State v. Laughlin*, 900 S.W.2d 662, 667 (Mo. App. S.D. 1995). Because no evidence connected Appellant to the break-in, he suffered no prejudice from the admission of this evidence.

In *Laughlin*, the defendant argued that evidence showing that police found a car belonging to someone else and containing burglar's tools was irrelevant and prejudicial. *Id*. at 666-667. On appeal, the Southern District determined that, while the evidence was irrelevant, it was not prejudicial to the defendant because "[t]he State did not establish a connection between the car and Appellant." *Id*.

Similarly, the State never established a connection between Appellant and the break-in. Additionally, this was a single, isolated reference to the break-in by one witness of the sixty-nine that testified at Appellant's trial, and it was a single statement in a 1700-plus page transcript. (Tr. 3-13). Furthermore, the jury heard evidence that Appellant admitted to the murder. (Tr. 1276). Thus, Appellant cannot demonstrate prejudice, much less a manifest injustice, from the admission of this evidence.

Because none of the complained-of evidence constituted inadmissible evidence of other crimes committed by Appellant, and because he suffered no resulting prejudice, his claims 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 AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 17,695 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 30th day of August, 2010, to:

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APPENDIX