IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. 90830**
	)	
ERIC D. WINFREY,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
11TH JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE LUCY RAUCH, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Eric Winfrey appeals his conviction following a jury trial in the Circuit Court of St. Charles County, Missouri, for first degree murder, §565.020,[1] and first degree robbery, §569.020. On December 5, 2008, the Honorable Lucy D. Rauch sentenced Winfrey to consecutive terms of life without probation or parole and life (L.F. 95),[2] and notice of appeal was timely filed on December 5, 2008 (L.F.97). This appeal involves no issue reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, thus original jurisdiction lies in the Missouri Court of Appeals, Eastern District. Article V, Sect. 3, Mo. Const. (as amended 1982); §477.050. On March 2, 2010, the Court of Appeals issued a *per curiam* opinion. On June 29, 2010, this Court transferred this cause, pursuant to Rule 83.02.

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[1] All statutory citations are to RSMo 2000, unless otherwise stated.

[2] The Record on Appeal consists of a legal file (L.F.), transcript (Tr.), and Exhibits (Ex.).

STATEMENT OF FACTS

Jury Selection:

During jury selection, the State peremptorily struck Venireperson Verronda Birk,[3] an African-American, over defense objection (Tr. 231). The prosecutor said that he struck Ms. Birk because she had a sister who was "presently in jail" (Tr. 231). Venireperson Birk indicated that her sister had pled guilty to a drug offense (Tr. 91). The prosecutor then asked:

> MR. HOAG: All right. Same question I'm asking you, do you know enough about her case to have formed an opinion as to whether or not you think she was treated fairly or unfairly by the criminal justice system:
>
> VENIRE PANELIST BIRK: Yes.
>
> MR. HOAG: How do you think she was treated?
>
> VENIRE PANELIST BIRK: Fairly.
>
> MR. HOAG: So you would be able to put that experience aside and decide the case based on the evidence you hear; is that fair to say?
>
> VENIRE PANELIST BIRK: Yes.

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[3] The Court Reporter spells Ms. Birk's name both as "Birk" and "Byrth." Mr. Winfrey utilizes the first spelling throughout his brief.

MR. HOAG: Okay. Thank you. Row 4, anyone with that experience?

(Tr. 91-92).

Defense counsel countered that the State failed to strike similarly-situated white jurors including, No. 46-Vicky Tritsch, No. 24- Price, and No. 56-Krausz (Tr. 232-34). Vicky Tritsch's son was charged with assault in the second degree, DWI, and similarly responded that he was treated fairly (Tr. 232). Mr. Price, a white male, had a cousin who was convicted of murder (Tr. 233). Mr. Krausz had a brother with a domestic battery and his mother had an embezzlement charge (Tr. 234).

The prosecutor responded that these venirepersons were not similar, because their relatives were not "currently in jail" (Tr. 233-37).

The record of their voir dire responses shows Tritsch's son was charged with a DWI and vehicular assault (Tr.93). Tritsch's son had spent a couple of months in jail (Tr. 93-94). Tritsch believed her son had been treated fairly (Tr.93-94).

The cousin of Venireman Price, a white juror, had been convicted of murder and was "currently serving time" (Tr.98). Price said this would not affect his ability to listen to the evidence (Tr. 98).

Venireman Krausz, a white juror, had two relatives convicted of crimes: his brother had a domestic battery conviction and his mother had pled guilty to felony embezzlement (Tr. 96). The prosecutor asked if Krausz felt they were treated fairly, but elicited no information about jail time for either relative (Tr. 96).

The trial court found the prosecutor's reason race neutral and that the State had not improperly discriminated against Ms. Birk (Tr. 237).

Trial Evidence:

Time of Death: Between 2:42 p.m. and 3:09 p.m.

On June 2, 2004, Christopher Hanneken, an employee of Storage USA in St. Charles, Missouri, was shot at work and died from a gunshot wound to the back of his head (Tr. 377-79, 468-69, 1247, 1253, Ex.31). Patrick Larocco made a delivery to the business and found Hanneken's body in a back room marked "Employees Only"(Tr. 357-58, 362). He called 911 at 3:09 p.m. (Tr. 363, 366, Ex.58). Police interviewed Storage USA customers (Tr. 517-21, 522-28, 530-32, 533-35, 536-40). The last person to talk to Hanneken was his friend, Kurt Calkins (Tr. 541-544). Hanneken called Calkins at 2:33 p.m., they talked for nine minutes, and he ended the conversation, saying "got to go now" (Tr. 544-45, Tr. 1402-1403). The State obtained phone records to verify the calls (Tr. 546, Ex. 71).

Crime Scene Investigation:

Police photographed and videotaped the scene (Tr. 367-376, 385, 397, 411, Exs. 1, 8-9, 14-18, 24-32, 34-40). They found that the surveillance videotapes had been taken from the security system, which was behind the counter in open view (Tr. 384-85, 416, 451, 455, Exs. 35-37). Detective Harvey thought the crime scene

indicated an “inside job” where the robber knew the operations, what to take, and how to conceal the crime (Tr. 1401). $395.00 was taken during the robbery (Tr. 332, 1258-59).

Police took fingerprints and submitted them to the lab (Tr. 386-87, 415, 456, 497-98, 504, Exs. 211-219). The prints belonged to former or current employees and to Winfrey’s girlfriend, Corener Harris, whose sister had worked at Storage USA. Police found the victim’s prints on the security system and on two signs (Tr. 503, Exs.212-215). The prints of John Taylor, another manager, were on the security system (Tr. 502-33, Exs. 211, 216-219). Lajuana McFadden, a former employee, and Corener Harris had touched an exterior glass jar on the front counter (Tr. 502, Exs. 209, 210). None of the fingerprints from the scene matched Winfrey (Tr. 505).

Storage USA had two cash drawers, one for Budget Truck Rental, which operated form that location until May 3, 2004 and averaged $200-300.00 in the till per day and one drawer for Storage USA (Tr. 475-476, 485-486, 627, 758, 759, 762, 767, 768). Budget had previously operated from the Storage USA location, but that operation terminated on May 3, 2004 (Tr. 475-76, 627). Each day the Storage USA register started with $100 cash (Tr. 478, 762, 768). Storage USA employees made a daily deposit at 10:00 a.m. (Tr. 470, 477, 768). The security video system was in plain view (Tr. 757).

Prior Burglary:

The State introduced evidence of an earlier break-in at an apartment over Storage USA (Tr. 414, 637, Exs. 50, 53, 145, 147). The break-in occurred more than a month earlier on April 16, 2004 (Tr. 637).

Police Investigation:

Police investigated current and former employees of Storage USA, including Mary Harris Slack, a previous manager who had been fired in mid-April, 2004, for misappropriating funds (Tr. 476, 493, 651). Slack had taken money from both registers and repaid it later (Tr. 766, 1107). Slack had lived in the apartment which Storage USA maintained over the business, with her husband, Alex, her sister, Corener Harris, and Harris' boyfriend, Eric Winfrey until April 13, 2004 (Tr.491-92, 1099-1100). After being told to leave, Slack moved in with Winfrey and Harris, who had moved out in February, 2004 (Tr. 759, 1101). Winfrey had lived at the Storage USA apartment for a few months starting in the fall of 2003 (Tr. 750-52, 1099).

Both Winfrey and Harris had access to Storage USA while living there (Tr. 755, 1106). Winfrey mopped the floor for Slack a couple of times, but was not on the payroll (Tr. 753, 770-771, 1102-1103). Winfrey was inside the office occasionally, but he rarely came through the retail door where customers were (Tr. 758, 770). Instead, he used the residential entrance (Tr. 758, 770).

On June 3, 2004, police interviewed Harris and Winfrey (Tr. 914-917, 1404, 1411).[4] Winfrey told Detective Rimiller that he moved to St. Charles in September, 2003 (Tr. 918). Rimiller then asked Winfrey where he had been the previous day. Rimiller said that Winfrey responded with the afternoon time period, saying that, between 2:00 and 4:00 p.m., he went to Fazoli's Restaurant to pick up some shoes he had purchased as an employee (Tr. 920-921).

Then Winfrey went through his entire day. He said that he woke up at 9:00 a.m., argued with Harris, and then, between 9:00 and10:00 a.m., drove to Aerospace Community Bank to activate an ATM card (Tr. 924). He returned to his apartment and had another argument with Harris about their finances, a constant strain in their relationship (Tr. 923, 925, 951-53). Rimiller testified that Winfrey told him that months before the charged offense, Winfrey and Harris argued over finances, Winfrey left the apartment with a razor blade, and checked himself into a psychiatric hospital (Tr. 952-953).

During his statements to the police, Winfrey told detectives about many other crimes: stealing rental furniture after the crime (Tr. 1418-1419); fraudulently obtaining utility services (Tr. 1417-1418); filing false police reports to hide his

[4] The interviews were not audiotaped, videotaped or otherwise recorded (Tr. 977, 990).

gambling debts from Harris (Tr. 947, 948, 949); stealing a car (Tr. 943, 1391, 1415-1416); and writing bad checks (Tr. 811-825, 1112, 1416-1416, 1419, Ex. 180, 180A).[5]

Around 1:00 p.m., Winfrey went to Phillips 66 Gas Station and spoke to several employees (Tr. 925). He left, but returned around 2:00 p.m. (Tr. 925-26). While there, he saw Dan and Calvin and ran into Wendell, a neighbor (Tr. 926-27). Winfrey watched television and awakened Harris to get ready for work at 3:15 p.m. (Tr. 927-28). Rimiller said that Winfrey specified the time, 3:15 p.m., several times (Tr. 927-28). Then he left to get his car washed (Tr. 928).

Winfrey drove to Fazoli's where he talked to several employees (Tr. 928-29). While there, Winfrey called another employee (Tr. 929). Winfrey drove back to his apartment and took a nap (Tr. 929). At 6:00 p.m., Harris' father called Winfrey and, asking if he had watched the news, reported a body was found at Storage USA (Tr. 923, 929). Winfrey watched the 9:00 p.m. news and saw the story about the Storage USA shooting (Tr. 930). Winfrey drove to Ameristar Casino where Harris worked; he gambled, and lost approximately $100 (Tr. 930).

When Harris got off work, they drove home, and he told her about the Storage USA incident (Tr. 931). Harris' father called again, indicating police wanted to talk to Winfrey (Tr. 931-32). The State obtained Winfrey and Harris' phone records to verify the calls (Tr. 1571, Exs. 142-43).

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[5] This evidence is further detailed in the argument portion of the brief (Points IV-XI).

Winfrey denied owning a gun (Tr. 939-940). When Rimiller asked about the gun, Winfrey broke eye contact, paused, took a deep breath and hesitated (Tr. 939). Winfrey said he tried to purchase a gun from several people, including Jim Dobbs, a coworker at Dobbs Auto Tire, Curtis and Julio from Labor Ready, and his friend, Justin (Tr. 940, 943).

Winfrey gave police permission to search his apartment and his vehicle (Tr. 953-954, Ex.102). They searched the apartment and the car, but seized nothing (Tr. 664, 677, 695, 698). Nothing connected Winfrey to Storage USA on the date or time in question (Tr. 987).

Rimiller asked Winfrey to write a statement and he agreed (Tr. 932-933, Ex.104). The statement was read to the jury (Tr. 934-936, Ex. 103).

Police also questioned Harris on June 3, 2004 (Tr. 1133-34). When Harris awakened on June 2, 2004, Winfrey was not at home (Tr. 1120, 1121). They had argued so she did not think much about it (Tr. 1120-1121). Winfrey returned, and left again around 2:00 p.m., close to the time she had to go to work (Tr. 1123). Harris did not see Winfrey again until she got off work and he picked her up (Tr. 1123-1124). They discussed the Storage USA shooting (Tr. 1136-1137). Winfrey seemed normal, not nervous or aggressive (Tr. 1137). Harris told police she had never seen Winfrey with a gun (Tr. 1140).

Consistent with her initial statement to police, Harris testified before the grand jury and at her deposition that she never saw Winfrey with a gun (Tr.1141-42). At

trial, she changed her testimony, claiming that she had once seen Winfrey with a gun in their apartment (Tr. 1130-31). When she asked why he had it, he said, "I got to do what I got to do" (Tr. 1155). Harris's trial testimony was given in exchange for probation on felony charges of stealing, failing to return rental property, and attempting to commit a prohibited act on a gambling boat, and multiple misdemeanor counts of passing bad checks (Ex. 236).

Winfrey's Whereabouts:

Police investigated Winfrey's whereabouts on June 2, 2004 (Tr. 744). The State's evidence showed:

11:30- noon	Winfrey at Phillips 66	(Tr. 846)
1:02 p.m.	Winfrey at Aerospace Credit Union	(Tr. 804-807, Exs.75,1080)
1:49 p.m.	Winfrey at Aerospace Credit Union	(Tr. 745-46, Exs.75-77)
2:00-3:00 p.m.	Winfrey at Fazoli's-calls Schaffer	(Tr. 843)
3:00-5:00 p.m.	Winfrey at Fazoli's before dinner	(Tr. 835)
3:00-?	Winfrey gets soda at Fazoli's	(Tr. 897-900)
3:54-4:00 p.m.	Winfrey at Phillips 66	(Tr. 857-858, 864-865)
6:00-7:00 p.m.	Winfrey at Phillips 66	(Tr. 853)
11:10 p.m.	Winfrey at Ameristar Casino	(Tr. 653-54, 786-87)

Police verified Winfrey went to Aerospace Credit Union (Tr. 745-46, 804, Exs. 75-77, 1080); Phillips 66 (Tr. 846, 853, 857-858, 864-865); and Fazoli's (Tr. 835, 843, 897-900), but at times different from those in Winfrey's statement.

Winfrey went to Aerospace Credit Union at 1:02 p.m., where he pinned a debit card (Tr. 803-04, 805, 806-07, 815, Ex.75, 180). His behaviors were scattered (Tr. 805).

Winfrey went to the Phillips 66 Station multiple times, once in the morning, the afternoon and evening. Nora Shorman saw Winfrey there between 11:30 a.m. and noon (Tr. 846). Gracey saw Winfrey shortly after 3:54 p.m., just after he got off work (Tr. 857-88, 861-66). He estimated the time based on seeing himself on the surveillance tape purchasing a soda (Tr. 860-62, Exs. 105, 106). Franks recalled seeing Winfrey around 6:00-7:00 p.m. (Tr. 853). Video surveillance at the station was imprecise, because the tape's times did not record properly (Tr. 845). Employees estimated times based on shift changes (Tr. 845, 848).

Fazoli employees placed Winfrey there between 2:00 p.m. and 5:00 p.m. (Tr. 835, 843, 897-900). Docia Faulk who worked from 3:00 p.m. to closing, saw Winfrey sometime between 3:00-5:00 p.m., before the dinner rush (Tr. 833-835). Tyrone Owens believed he saw Winfrey sometime after 3:00 p.m., because he worked the 3:00 to 11:00 p.m. shift (Tr. 897-900). Owens usually got to work at 2:30 p.m. (Tr. 899).

While Winfrey was at Fazoli's, he called Sheldon Schaffer, a co-worker, asking for marijuana (Tr. 840-43). Schaffer recognized the Fazoli work number on his phone (Tr. 842, 843). The call occurred between 2:00-3:00 p.m. (Tr. 843). Police verified that, while at Fazoli's, Winfrey called Schaffer, but the State did not introduce phone records to verify the time of the call (Tr. 970-71).

Financial Problems:

At the time of the offense, Winfrey worked several jobs, including at Holiday Inn Select, Phillips 66, and Fazoli's (Tr.1101, 1135, 1422). He and Harris nonetheless had financial problems (Tr. 1108-1116). They obtained several loans (Tr. 1110-1111). They had accounts at Aerospace Credit Union Winfrey, where they opened a savings and checking account on January 21, 2004 (Tr. 802-803, 816). On June 1, 2004, Winfrey had a negative balance of $120 in checking and on June 2, 2004, he had $6.50 in savings (Tr. 816-17, 825). Renee Markert, an Aerospace employee, described several of their checks, including ones for insufficient funds (Tr. 821-823, Exs.180, 180A).

Winfrey and Harris obtained loans to pay off their negative balances (Tr. 803). Aerospace Credit Union never received payments due (Tr. 818). Winfrey and Harris tried desperately to get additional loans, but were not approved (Tr. 803, 808).

Winfrey and Harris also were behind on car payments (Tr. 1111-1112). On June 6, 2004, Winfrey's vehicle, a used 1996 Ultima, which he had bought on May 7,

2004, was repossessed (Tr. 672, 774-776, 958). The owner, Daniel Grosvenor, had called Winfrey several times about late payments (Tr. 776). On June 3rd, Winfrey had called Grosvenor, promising to make an $800 payment the next day, but never did (Tr. 776, 780, 783).

Winfrey and Harris lived at the Pralle Meadow Apartments from February, 2004 to the summer of 2004 (Tr. 1165-1164). When Winfrey applied, he listed his current employer as Storage USA and his supervisor as Mary Slack, who verified his employment by phone even though he did not work there (Tr. 755, 1166-1169, 1171-1172, Ex.108). On June 2, 2004, Winfrey was at least 45 days behind on rent and was being evicted (Tr. 1168-1169).

Winfrey gambled and spent money on marijuana (Tr. 1113-1114). Ameristar records showed that Winfrey gambled $650.00 in 2003 and $4,972.00 in 2004 (Tr. 789). Winfrey's gambled at Harrah's too - $6,720.00 in 2004 (Tr. 795-96, Ex.68). On June 2, 2004, at 11:13 p.m., Winfrey purchased $145.00 to gamble, lost $95.00, and cashed out for $50.00 at 11:25 p.m. (Tr. 654, 787-788, Ex. 54, 55, 55A).

Second Search of Car:

On June 7, police searched Winfrey's repossessed vehicle at Al's Towing Lot (Tr. 401, 409, 458-61, 780, 962, Exs. 56-57, 189-94). Winfrey's was the only car on the lot that had been broken into (Tr. 962). Police found a restaurant menu with the name-"Justin" and a phone number on it (Tr. 460-61). The trunk's bottom carpet was

missing and the carpet on the sides was pulled back (Tr. 401). Police tested for blood, but found none (Tr. 462-63).

Justin Lewis and the Gun:

Winfrey asked Jame Ikemeier, a former coworker from Dobbs Auto, if he could purchase a handgun (Tr. 900, 903, 957-958). Although Ikemeirer told Winfrey the procedures for getting a permit, residency requirements and background check, Winfrey never pursued it (Tr. 903-04).

On June 6, 2004, Justin Lewis told police that two weeks earlier, Winfrey had tried to purchase a gun from him (Tr. 965-67, 1032-1033, 1056-1057). Lewis said he could not get one for him (Tr. 1035).

On July 4, 2004, police re-interviewed Lewis, whose story changed (Tr. 1037, 1406). Lewis said he had arranged for a gun transfer from his friend, Danny Cosgrove, to Winfrey sometime before Schwagstock, a festival held on May 29, 2004 (Tr. 1038-1039, 1057-58, 1080). Lewis never saw the gun again (Tr.1042). Winfrey never paid for the gun (Tr. 1054-55).

Afterwards, Winfrey called Lewis seeking marijuana (Tr. 1051). Lewis told him he could get him some, but, when Winfrey arrived, he had none (Tr. 1051). Lewis said he asked Winfrey for the gun and told him that Cosgrove was supposed to get paid (Tr. 1051). Winfrey blew Lewis off and Lewis never heard from him again

(Tr. 1051-52). Phone records established that Winfrey called Lewis' roommate, James Hutton's, cell phone on two separate days in July (Tr. 1409, Ex. 178-179).

On July 28, 2004, Cosgrove and his father, George Machino, went to Lewis' apartment to recover the gun (Tr. 1044-1045). Machino wanted Lewis to go to the police station and report the stolen gun (Tr. 1045, 1055). Lewis gave police another statement about the gun (Tr. 1046).

In February, 2006, police arrested Lewis for attempted robbery (Tr. 1037-39, 1059-1061). Although Lewis initially denied ever handling a gun, ultimately he admitted he had (Tr. 1076).

Lewis' Admission to the Crime:

The trial court refused defense counsel's proffered cross-examination of Lewis that Lewis admitted that he had committed the crime (Tr. 1068-1070). Pretrial, the court sustained the State's motion in limine to exclude evidence that another had committed the crime (L.F. 14, Tr. 243-246). During trial, defense counsel asked the court to reconsider its ruling and to allow him to cross-examine Lewis about his admission that he shot the victim at Storage USA (Tr. 1068-1070). Outside the presence of the jury, counsel proffered the following question:

"Did you tell Nick Reynolds that you shot the guy at Storage USA?"

(Tr. 1068). The trial court sustained the State's hearsay objection, even though Lewis testified and was available for cross-examination (Tr.1069). The trial court believed

the admission was inadmissible because no evidence proved Lewis did the shooting and he was not a party to the case (Tr.1069).

Missing Gun:

Franklin Canour sold a .38 caliber Taurus revolver, a popular generic model, to George Machino in the 1990s (Tr. 991-993, 996, 1081, 1093). Machino's son, Danny Cosgrove, stole the gun (Tr. 1083-1085). Machino drove Cosgrove to Winfrey's apartment to recover it (Tr. 1084-1085, 1189). Winfrey was not there, so they spoke to the Apartment Manager, who referred them to the police (Tr. 1085, 1169, 1189). Machino reported the stolen gun to police (Tr. 1085-1087, 1160, 1189-1190, 1404, Ex. 23).

Cosgrove initially lied to police about the gun to protect his friend Justin Lewis (Tr. 1189-1192). Cosgrove later admitted giving the gun to Lewis in the car at his apartment complex (Tr. 1192, 1194). Cosgrove lent Lewis the gun for $150, but, based on Lewis' representations, Cosgrove believed it was for Winfrey (Tr. 1181-1183). Cosgrove placed the gun transaction on Friday, May 28, 2004, before Schwagstock (Tr. 1195).

After Cosgrove gave Lewis the gun, Lewis and Winfrey went into the apartment complex for 10 to 15 minutes (Tr. 1183-1184). They came back to the car and Winfrey asked for some weed (Tr. 1184). Cosgrove called Scotty Pomirko and Winfrey bought $20-40 worth of marijuana (Tr. 1184, 1204-06). Later that night,

Cosgrove asked Lewis when he would get the gun back (Tr. 1187). One or two weeks later, Lewis told Cosgrove he would get the gun back and to not talk about it anymore (Tr. 1187-1188).

Kyle Graham verified that he gave Cosgrove a ride to Shop 'N Save (Tr. 1199-1200, 1201). On the way there, Cosgrove showed Graham the gun (Tr. 1200). Cosgrove was meeting Justin Lewis and his friend (Tr. 1200-1202). Graham dropped Cosgrove off and left (Tr. 1201).

Ballistics Testing:

Detective Jackson, a firearms examiner, received a slug from the victim's body (Tr. 1376-1377, Ex. 96A). The bullet was fired from either a .38 special or a 357 Magnum and was a semi-wad cutter in cast lead (Tr. 1378-1379). The rifling had six lans and grooves with a right hand twist, a fairly common characteristic of many firearms (Tr. 1382). The bullet was too mutilated to make any determination about what gun fired it; Jackson could not match it to any weapon (Tr. 1383, 1387, 1390).

Machino provided police with .38 caliber bullets from his house and showed them where he had fired the gun at Mark Twain Lake (Tr. 1088-1090, 1160-1161, Ex.129). Jackson analyzed the bullets Machino provided (Tr. 1384). They were consistent with the design and construction of the fatal bullet, but were of a common type, not unique (Tr. 1387, 1389).

2005 Interrogation:

On May 18, 2005, police questioned Winfrey in Milwaukee (Tr. 1413-15, Ex.174). Winfrey had warrants for the offense of tampering with a motor vehicle, having stolen a car from Dobbs on May 6, 2004 (Tr. 1414-1416). Winfrey acknowledged his financial problems (Tr. 1417-19, 1438-1439). He told Detective Harvey that his only connection to Storage USA was Slack's employment there and when they lived upstairs (Tr. 1421). Winfrey found out about the homicide investigation when Harris' father called (Tr. 1423).

Winfrey acknowledged that Justin supplied him with marijuana, but stated Justin never gave him a gun (Tr. 1431, 1441-1443). Winfrey handled the gun, but never took it (Tr. 1442-1444). Winfrey knew that some of the times in his original statement were wrong (Tr. 1434-1437, 1447-1448).

Jailhouse Informant:

Kevin Covington was incarcerated with Winfrey at Farmington Correctional Center in 2006 (Tr. 1263, 1267, 1372-1375, Ex.195). Detective Harvey and a U.S. Attorney visited Winfrey and questioned him about the Storage USA shooting (Tr. 1268). Winfrey was concerned that a U.S. Attorney was involved (Tr. 1271). Covington claimed Winfrey admitted the crime to him (Tr. 1274-77). Covington said that Winfrey told him he woke up that morning, got dressed, and stopped by the USA Storage facility to speak to the manager, George (Tr. 1274). He was not there, but a

man who owed him money was (Tr. 1274). Covington claimed that Winfrey then went to his job, made a phone call, and at 1:38 p.m. went to a bank to activate an ATM card (Tr. 1274). Covington said that Winfrey's girlfriend's Aunt Mary was the property manager at Storage USA (Tr. 1275). Covington said Winfrey mentioned the two safes in the business and stated he wiped everything down after he left (Tr. 1275-1276). Covington asked Winfrey if he killed this man and Winfrey responded, "yeah" (Tr. 1276). Covington asserted the victim owed Winfrey money (Tr. 1276). Covington said that Winfrey got the gun from Justin and threw it in the Mississippi River, near the Chain of Rocks Bridge (Tr. 1276-1277).

In exchange for his testimony, the prosecutor sent a letter recommending Covington be paroled (Tr. 1265). Covington claimed he was getting parole on the merits of his case, not because of the letter (Tr. 1266).

On cross-examination, Winfrey tried to challenge Covington's assertion that he was being paroled based on the merits of his case (Tr. 1314-15). The State objected, saying the question called for bad character evidence and specific instances of misconduct (Tr. 1314-15). The court sustained the State's objection, forbidding counsel from asking about any conduct violations (Tr. 1315). Counsel made an offer of proof.

> Q. Mr. Covington, have you ever been disciplined for lying to guards or other correctional staff?
>
> A. Yes I have.

Q. What kind of conduct violations have you received while you have been incarcerated during this particular incarceration, September of 1999?

A. I have 35 or 36 conduct violations.

Q. Whatever [sic] they for?

A. Contraband.

Q. What else? Well, we know lying to staff would be one; right?

A. Would be one.

Q. Giving false information, what does that mean?

A. Lying.

(Tr. 1317). The state objected, asserting this was uncharged bad acts (Tr. 1318). The court ruled the conduct violations were irrelevant and sustained the objection (Tr. 1318). The court reasoned:

> And also this goes to character evidence which really - - I mean, we're not talking about sworn testimony that it was a lie, and we're not talking about reputation. So I'll sustain the objection and not allow you to go into this.

(Tr. 1318).

The jury convicted Winfrey of both counts and the trial court sentenced him to life without probation or parole and life (L.F. 95). This appeal follows.

POINTS RELIED ON

I. BATSON CHALLENGE

The trial court clearly erred in overruling Eric Winfrey's *Batson* objection to the State's peremptory strike of Venireperson Verronda Birk, an African American woman, because the strike violated Winfrey and Ms. Birk's rights to equal protection, and Winfrey's rights to due process, and a fair and impartial jury, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§ 2, 10, and 18(a), in that Winfrey challenged the State's strike, identified Birk as an African-American, and then established the State's purported reason—that Birk had a sister who was presently in jail —was pretextual. Pretext is demonstrated because the record does not support the purported reason; the State failed to strike similarly-situated white veniremembers, Tritsch, Price and Krausz; and the State failed to question veniremembers about its purported area of concern.

Snyder v. Louisiana, 552 U.S. 472 (2008);

Miller-El v. Dretke, 545 U.S. 231 (2005);

Batson v. Kentucky, 476 U.S. 79 (1986);

State v. McFadden, 191 S.W.3d 648 (Mo. banc 2006); and

"Illegal Racial Discrimination in Jury Selection: A Continuing Legacy," Equal Justice Initiative, (August 2010), available at: http://eji.org/eji/files/06.25.10%20Race%20and%20Jury%20Report%202nd%20Ed%20Final.pdf.

II. Jailhouse Informant – Court Improperly Limited Cross-Examination

The trial court abused its discretion in sustaining the state's objection to defense counsel's cross-examination of jailhouse informant, Kevin Covington, about whether he had received disciplinary violations for lying to staff, giving false information, and possessing contraband, because limiting his cross-examination violated Winfrey's rights to due process, to present a defense, to confrontation and to a fair trial, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10 and 18(a), in that Covington's disciplinary violations for making false statements and lying to guards were relevant to impeach Covington on his character for truth and veracity. Further, the State opened the door to evidence of disciplinary violations when Covington testified on direct that he was being paroled on the merits of his case and not because of the prosecutor's letter to the parole board recommending his parole.

Winfrey was prejudiced because he was unable to show Covington was not credible, lied when he said he was being paroled on the merits, he was actually receiving a benefit for his testimony against Winfrey, and Covington had every incentive to manufacture evidence favorable to the State to help himself. The State's case relied on Covington's testimony that Winfrey confessed to him, making Covington's credibility decisive in determining Winfrey's guilt or innocence.

Mitchell v. Kardesch, ___ S.W.3d ____, 2010 WL 2523791 (Mo. banc 2010);

Davis v. Alaska, 415 U.S. 308 (1974);

State v.Ofield, 635 S.W.2d 73 (Mo. App. W.D. 1982);

State v. Bolds, 11 S.W.3d 633 (Mo. App. E.D. 1999); and

"How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row: A Center on Wrongful Convictions Survey," Winter 2004-2005, available at:

http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf

See, Arnold H. Loewy, "Systemic Changes that Could Reduce the Conviction of the Innocent," 18 Crim. L.F. (2007), available at:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927223##

III. Justin Lewis' Admission That He Shot the Victim

The trial court abused its discretion in sustaining the State's hearsay objection and refusing Winfrey's proffered cross-examination of Justin Lewis, "did you tell Nick Reynolds that you shot the guy at Storage USA," because excluding this evidence denied Winfrey his rights to due process, to compulsory process, to present a defense, to confrontation, and to a fair trial, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10 and 18(a), in that Lewis' prior admission that he shot the victim was direct evidence of Lewis' guilt; Lewis testified for the State and was available to both parties to examine; nothing justified the exclusion of relevant and probative evidence necessary to Winfrey's defense; and the prior inconsistent statement was admissible as substantive evidence of Lewis' guilt.

Holmes v. South Carolina, 547 U.S. 319 (2006);

Chambers v. Mississippi, 410 U.S. 284 (1973);

Washington v. Texas, 388 U.S. 14 (1967);

Crane v. Kentucky, 476 U.S. 683 (1986); and

John H. Blume, Sheri L. Johnson, and Emily C. Paavola, "Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense," 44 Am. Crim. L. Rev. 1069 (Summer 2007).

IV. Evidence of Other Crimes – Stealing Rental Furniture[6]

The trial court abused its discretion in overruling defense objections to testimony that Winfrey stole rental furniture because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that stealing the rental furniture was prejudicial evidence of another crime, occurring after the charged offense, and did not prove Winfrey's motive to commit the robbery, since the State adduced no evidence to tie the stealing to the robbery of USA Storage. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

State v. Davis, 211 S.W.3d 86 (Mo. banc 2006);

State v. Allen, 274 S.W.3d 514 (Mo. App. W.D. 2008);

State v. Mayes, 63 S.W.3d 615 (Mo. banc 2002); and

State v. Sims, 952 S.W.2d 286 (Mo. App. W.D. 1997).

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[6] Winfrey raises separate points on the admission of numerous prior crimes and bad acts in an attempt to comply with this Court's briefing rules prohibiting multifarious points. *See, e.g.*,*Christeson v. State*, 131 S.W.3d 796, 799, n. 5 (Mo. banc 2004) (multiple claims of error in one point on appeal should be segregated into separate points).

V. Evidence of Other Crimes – Failure to Pay Utility Bills and Fraudulently Obtaining Services

The trial court erred in abused its discretion in overruling defense objections to testimony that Winfrey failed to pay his utility bills and had a common practice of fraudulently obtaining services, running up bills and then moving because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo.Const., Art. I, §§10, 17 and 18(a), in that this testimony about fraudulent activity and stealing was evidence of other crimes, the evidence was prejudicial and did not prove Winfrey's motive to commit the robbery, since the State adduced no evidence to tie the fraud and theft to the robbery of USA Storage. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

State v. Davis, 211 S.W.3d 86 (Mo. banc 2006).

VI. Evidence of Other Crimes – False Police Reports

The trial court abused its discretion in overruling defense objections to testimony that Winfrey filed false police reports alleging he was robbed, because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that filing false reports was prejudicial evidence of other crimes, and did not prove Winfrey's motive to commit the robbery, since the State adduced no evidence to tie the false reports to the robbery of USA Storage. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

State v. Davis, 211 S.W.3d 86 (Mo. banc 2006).

VII. Evidence of Other Crimes – Stolen Car

The trial court abused its discretion in overruling defense objections to repeated testimony that Winfrey stole a car when he worked at Dobb's Tire and Auto because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that stealing a car was prejudicial evidence of another crime, and did not prove Winfrey's motive to commit the robbery, since the State adduced no evidence to tie the stolen car to the robbery. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

State v. Davis, 211 S.W.3d 86 (Mo. banc 2006).

VIII. Evidence of Other Crimes – Writing Bad Checks

The trial court abused its discretion in overruling defense objections to testimony and Exhibits 180 and 180A that Winfrey wrote bad checks because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that writing checks with insufficient funds to cover them was prejudicial evidence of other crimes, and did not prove Winfrey's motive to commit the robbery, since the State adduced no evidence to tie the checks to the robbery of USA Storage. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

State v. Davis, 211 S.W.3d 86 (Mo. banc 2006).

IX. Evidence of Bad Character – Razor Blade and Psychiatric Hospital

The trial court abused its discretion in overruling defense objections to testimony that three months before the charged offense, Winfrey left his apartment with a razor blade and voluntarily checked himself into a psychiatric hospital, because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const. Art. I, §§10, 17 and 18(a), in that this testimony about the razor blade and hospital was prejudicial evidence of bad character and did not prove Winfrey's motive to commit the robbery, since the State adduced no evidence to tie the psychiatric evidence occurring months before the charged offense to the actual robbery of USA Storage. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

State v. Davis, 211 S.W.3d 86 (Mo. banc 2006);

State v. Hayes, 15 S.W.3d 779 (Mo. App. S.D. 2000).

X. Evidence of Other Crimes: Prior Burglary at Storage USA

The trial court abused its discretion in overruling defense objections to testimony and admitting Exhibits 50, 53, 145, and 147 showing that several weeks before the charged offense, someone broke into the apartment above Storage USA, because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that this evidence suggested Winfrey committed this prior crime, but no evidence tied him to the offense. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

State v. Davis, 211 S.W.3d 86 (Mo. banc 2006);

State v. Strickland, 530 S.W.2d 736 (Mo. App. St.L.D. 1975); and

State v. Summers, 362 S.W.2d 537 (Mo. 1962).

XI. Evidence of Other Crimes: Winfrey's Car Broken Into at Towing Lot

The trial court abused its discretion in overruling defense objections to testimony that someone broke into Winfrey's car while it was on the towing lot and it was the only car broken into, because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that this evidence suggested Winfrey committed this crime to tamper with evidence, but nothing tied him to the offense. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

State v. Davis, 211 S.W.3d 86 (Mo. banc 2006);

State v. Strickland, 530 S.W.2d 736 (Mo. App. St.L.D. 1975); and

State v. Summers, 362 S.W.2d 537 (Mo.1962).

ARGUMENT

I. BATSON CHALLENGE

The trial court clearly erred in overruling Eric Winfrey's *Batson* objection to the State's peremptory strike of Venireperson Verronda Birk, an African American woman, because the strike violated Winfrey and Ms. Birk's rights to equal protection, and Winfrey's rights to due process, and a fair and impartial jury, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§2, 10, and 18(a), in that Winfrey challenged the State's strike, identified Birk as an African-American, and then established the State's purported reason—that Birk had a sister who was presently in jail —was pretextual. Pretext is demonstrated because the record does not support the purported reason; the State failed to strike similarly-situated white veniremembers, Tritsch, Price and Krausz; and the State failed to question veniremembers about its purported area of concern.

The State peremptorily struck Verronda Birk, an African American, supposedly because her sister had pled guilty to a drug offense and was currently serving jail time. The prosecutor's explanation was a pretext for discrimination. Birk's sister was convicted of a drug offense, but nothing in the record supports the assertion that her sister was serving jail time. Similarly-situated white jurors with relatives serving jail time were not stricken. Tellingly, the prosecutor did not question all venirepersons, including Ms. Birk, about whether their relatives were serving jail time, his purported area of concern. The prosecutor's reason for striking Ms. Birk

does not withstand scrutiny. Therefore, the trial court's ruling allowing the strike should be reversed.

Constitutional Provisions and Standard of Review

When the State utilizes a peremptory strike to remove a juror based on race, it violates the Equal Protection Clause. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Bateman*, ___ S.W.3d ____, SC 90528, slip op. at 12 (Mo. banc Aug. 3, 2010). A *Batson* challenge is made in three steps. *Id*. at 12-13, *discussing State v. Parker*, 836 S.W.2d 930, 939 (Mo.banc1992). First, the defendant must challenge one or more specific veniremembers the State is striking and identify the cognizable racial group to which they belong. *Id.* at 934, 939. Second, the State must provide a race-neutral reason, one more than an unsubstantiated denial of discriminatory purpose. *Id.* Third, the defendant must show the State's explanation is pretextual and the true reason for its strike is racially motivated. *Id.*; *Snyder v. Louisiana*, 552 U.S. 472, 476-477 (2008).

The Supreme Court has "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be a *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478, *citing Miller-El v. Dretke*, 545 U.S. 231, 239 (2005). Accordingly, this Court must review the record to determine whether a prosecutor's explanation is pretextual and not simply assess the parties' arguments made at trial. *Snyder*, 552 U.S. at 482, 483, n.2.

"The question presented at the third stage of a *Batson* inquiry is 'whether the defendant has shown purposeful discrimination.'" *Snyder*, 552 U.S. at 484-485, *quoting Miller-El*, 545 U.S. at 277. A prosecutor's stated reason that "does not hold up" is evidence of pretext. *Snyder*, 552 U.S. at 485; *quoting Miller-El*, 545 U.S. at 252. When a prosecutor is called out on the pretextual nature of his reasons, his new explanations, not raised initially, "reek of afterthought." *Miller-El*, 545 U.S. at 246.

In determining whether a prosecutor has purposefully discriminated, 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." *Id.*; *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003); *Parker*, 826 S.W.2d at 939. At the third step, the trial court must consider whether "(1) the explanation is race-neutral, (2) related to the case to be tried, (3) clear and reasonably specific, and (4) legitimate." *State v. Edwards*, 116 S.W.3d 511, 527 (Mo. banc 2003).

"The most telling and common means of showing pretext is by showing that similarly-situated venirepersons are treated differently." *Bateman*, *supra* at 13, *citing State v. McFadden*, 191 S.W.3d 648, 651 (Mo. banc 2006) ("*McFadden I*"). Purposeful discrimination is established when similarly-situated white jurors were not stricken. *McFadden I*, at 651; *State v. Hopkins*, 140 S.W.3d 143, 148-149 (Mo. App. E.D. 2004). The similarly-situated juror need not be identical. *Bateman*, *supra* at 13-14. Otherwise, *Batson* would be inoperable. *Id., citing Miller-El*, 545 U.S. at 247, n.6; *State v. McFadden*, 216 S.W.3d 673, 676 (Mo. banc 2007).

"The issue of pretext must be determined by the prosecutor's stated reasons for the strike at the time of the *Batson* inquiry." *Bateman*, *supra* at 14. Trial and appellate courts cannot provide additional reasons[7] why the prosecutor could have struck the juror. *Id.*; *see also Miller-El*, 545 U.S. at 245, n. 4.

Another factor that shows pretext is the prosecutor's failure to question jurors about the area of his purported concern. *Miller-El v. Dretke*, 545 U.S. at 244-245 (prosecutor could have asked further questions to clarify concerns about whether juror could vote for death were that really area of concern). "The State's failure to engage in any meaningful voir dire examination on a subject the state alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for

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[7] The Court of Appeals' per curiam opinion looked beyond the reasons cited by the prosecutor and reviewed the "***facts the State believed to be true***" (Slip op. at 18, emphasis added). According to the Court of Appeals, "[t]he State ***believed*** that Venireprson Birk's sister remained in jail, and there is nothing in the record to suggest the State knowingly misstated the record. The State also ***believed*** that Venireperson Krausz's relatives were not currently in jail, Venireperson Tritsch's son was no longer in jail, and that Venireperson Price did not actually know his relative that was in jail. Based on the ***facts the State believed were true***, these jurors are not similarly situated." (Slip op. at 18, emphasis added). The Court of Appeals surmised the prosecutor's "belief" from a cold record, where the trial judge made no such factual findings about the prosecutor's belief, contrary to *Miller-El* and *Bateman*, *supra*.

discrimination." *Id*. at 246, *quoting Ex parte Travis*, 776 So.2d 874, 881 (Ala. 2000). *See also*, *McFadden* , 191 S.W.3d at 653-54 (prosecutor failed to question jurors on whether they could recognize sound of gunshot); and *Hopkins*, 140 S.W.3d at 150-151 (prosecutor did not question on employment and whether it involved adding things up). *Id*. at 151.

After reviewing the entire record, the trial court's findings on a *Batson* challenge must be set aside if they are clearly erroneous. *Snyder*, 552 U.S. at 477; *McFadden*, 191 S.W.3d at 651. A reviewing court must ask whether "on the entire evidence," it is "left with the definite and firm conviction that a mistake has been made. *Snyder*, 552 U.S. at 487. "Deference does not by definition preclude relief." *Miller-El*, 545 U.S. at 240, *quoting Miller-El v. Cockrell*, 537 U.S. at 340. In the absence of meaningful appellate review,[8] discrimination will continue. *See*, "Illegal Racial Discrimination in Jury Selection: A Continuing Legacy," Equal Justice Initiative, p. 19-27 (August 2010), available at: http://eji.org/eji/files/06.25.10%20Race%20and%20Jury%20Report%202nd%20Ed%20Final.pdf (A study of ten southern states in the deep south showed that appellate courts have not reviewed claims of racial bias consistently and some Mississippi and

[8] Mississippi has upheld excluding a black juror for having dyed red hair. *Id*. at 18, n. 85, *citing Jackson v. State*, 5 So.3d 1144, 1149-1150 (Miss. App. 2008). Fortunately, this Court has rejected the red hair reason. *State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007).

Arkansas courts acknowledged that racial discrimination in jury selection remains widespread since *Batson*).

Strike and Batson Objection

The trial court clearly erred in overruling Mr. Winfrey's *Batson* objection and allowing the State's strike of No. 26, Verronda Birk. Defense counsel objected to the strike and the trial court recognized that Ms. Birk was African-American (Tr. 231). The prosecutor responded that he struck Ms. Birk because she had a sister who was "presently in jail" (Tr. 231). "She was charged with a narcotics violation and indicated she pled guilty and was in jail." (Tr. 231). The State claimed it struck other jurors whose sons were in jail, including Jurors No. 37, 49 and 58 (Tr. 231). The State elaborated:

> 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).

The defense countered that the State failed to strike similarly-situated white jurors including, No. 46-Vicky Tritsch, No. 24- Price, and No. 56-Krausz (Tr. 232-34). Defense counsel proffered:

> Your Honor, my review of my notes is that there are similarly situated jurors who are not African-American. I have as a note Vicky Tritsch

who is Juror Number 46. I believe her son was charged with assault in the second degree, DWI, similarly responded that they were treated fair.

(Tr. 232). Counsel continued:

I'm just going through my notes again just to be thorough. Mr. Price, I believe, is also similarly situated. I believe he was a white male had a cousin who was convicted of murder some 20 years ago.

(Tr. 233). Initially, the prosecutor responded that Mr. Price was an alternate juror and did not come in among his six strikes, but both the assistant prosecutor, Ms. Whitlow, defense counsel and the court corrected him and noted that he was within the group of initial jurors that could have been struck (Tr. 233). The trial court then injected another reason the prosecutor could have used to strike him:

THE COURT: And wasn't it in another state?

(Tr. 233). The assistant prosecutor agreed (Tr. 233).

Defense counsel proffered a third similarly-situated juror, saying:

Your Honor, I think there are - - I also noticed Mr. Krausz, I believe, had a brother with a domestic battery and mother had an embezzlement charge.

(Tr. 234). Counsel asked the court to disallow the strikes given the examples he had provided and stated he was "arguing pursuant to Batson v. Kentucky." (Tr. 234).

The prosecutor responded that these venirepersons were not similar, because their relatives were not "currently in jail" (Tr. 233-37). The prosecutor stated:

MR. HOAG: But they are distinguished by the fact that they are not In jail, just as Ms. Tritsch, her son did some time in jail but *they are not presently serving time*. My distinguishing is that you take a look at Juror Number 27 and Juror Number 26, is he had two sons that are in jail, and she has a sister who is *presently in jail*. That's my distinguishing characteristic. Just as I can't remember which juror it was, okay, who I think -- well, whatever. Okay. That's –

(Tr. 234-235) (emphasis added).

The trial court clarified that the State struck Cagle because he had two sons currently in jail (Tr. 235). As for Tritsch:

THE COURT: Tritsch, but he's not currently in jail.

MR. HOAG: Right. He did time, she specifically said he did time, some jail time is what she said.

THE COURT: That was it.

MR. HOAG: Okay. He's not in jail at the present time.

(Tr. 236). The prosecutor then provided another distinction:

MR. HOAG: And I also might point out with Tritsch that that was a DWI, okay, I think it was an automobile accident, okay.

THE COURT: Vehicular assault is what she said.

MR. TUCCI: Assault second, DWI's.

MR. HOAG: As opposed to a drug charge which is what Juror Number 26's daughter or sister is doing time on. Okay.

MR. TUCCI: All I would say to that is the experts would say alcohol is a drug.

MR. HOAG: That's a good answer.

(Tr. 236). Given this exchange, the prosecutor apparently agreed this afterthought did not support any differing treatment.

The court then asked for clarification on Krausz and the parties responded:

MR. TUCCI: My note reflect [sic] brother had a domestic battery, then I had a semicolon, mother had embezzlement.

THE COURT: Okay. And Mr. Hoag, what did you --

MR. HOAG: Not in jail. It's the same distinction, Judge.

(Tr. 236-237).

The court then made the finding:

THE COURT: You're saying that you struck Ms. Byrth because her sister is presently in jail?

MR. HOAG: Yeah.

THE COURT: With that reason the Court finds that that it is a race neutral reason and that the State hasn't improperly discriminated against Ms. Byrth or hasn't infringed upon the defendant's rights by improperly striking Ms. Byrth, an African American, for some improper

reason other the race neutral reason that she has a sister presently in custody. But I think she had two sisters; didn't she, involved in drugs?

MS. WHITLOW: I thought it was one sister.

MR. TUCCI: I believe it's one, Judge.

THE COURT: I'm sorry, one, I have sister. So that Batson challenge will be denied.

(Tr. 237). The court's ruling is unsupported by the record and must be reversed.

Record Does Not Support Strike

The prosecutor asked venirepersons whether they, friends or relatives had ever been charged with or convicted of a crime (Tr. 89). Venireperson Birk indicated that her sister was charged with a drug offense (Tr. 91). Birk said her sister had pled guilty (Tr. 91). The prosecutor then asked:

MR. HOAG: All right. Same question I'm asking you, do you know enough about her case to have formed an opinion as to whether or not you think she was treated fairly or unfairly by the criminal justice system:

VENIRE PANELIST BIRK: Yes.

MR. HOAG: How do you think she was treated?

VENIRE PANELIST BIRK: Fairly.

MR. HOAG: So you would be able to put that experience aside and decide the case based on the evidence you hear; is that fair to say?

VENIRE PANELIST BIRK: Yes.

MR. HOAG: Okay. Thank you. Row 4, anyone with that experience?

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(Tr. 91-92). Noticeably absent from the record is any mention that Birk's sister was doing jail time. The prosecutor's stated reason that Birk's sister was serving jail time "does not hold up" and is evidence of pretext. *Snyder*, 552 U.S. at 485; *quoting Miller-El*, 545 U.S. at 252.

Similarly-Situated White Jurors

By contrast, the record supports defense counsel's evidence that three similarly-situated white jurors were not stricken by the prosecutor (Tr. 231-34). A review of the record shows how similar these jurors were to Ms. Birk. Tritsch's son was charged with a DWI and vehicular assault (Tr.93). The prosecutor asked about what occurred and elicited that Tritsch's son had spent a couple of months in jail (Tr. 93-94). Tritsch believed her son had been treated fairly ((Tr.93-94).

The cousin of Venireman Price, a white juror, had been convicted of murder and was "currently serving time," the prosecutor's stated concern (Tr.98). Like Birk, Price said this would not affect his ability to listen to the evidence (Tr. 98).

Venireman Krausz, a white juror, had two relatives convicted of serious crimes: his brother had a domestic battery conviction and his mother had pled guilty

to felony embezzlement (Tr. 96). The prosecutor asked if Krausz felt they were treated fairly, but elicited no information about jail time for either relative (Tr. 96).

When confronted with these similar jurors, the prosecutor claimed that the key distinction between Tritsch and Birk was whether they were "currently" serving jail time (Tr. 234-35). According to the State, Birk's sister was, but Tritsch's son was not. *Id.* The record refutes the assertion that Birk's sister was serving time in jail, because the State never asked her (Tr. 90-92). Accordingly, Birk and Tritsch are in fact similar and cannot be distinguished on that basis.

The record also does not support the prosecutor's failure to strike Price. When confronted with Price's response that his cousin was "currently" incarcerated, the prosecutor responded that Mr. Price was an alternate juror and did not fall within his six strikes, but, the assistant prosecutor, defense counsel and the court corrected him and noted that he was within the group of initial jurors that could have been struck (Tr. 233). The prosecutor never provided any distinction between Price and Birk. And, there is record evidence that Price's relative was currently serving time in prison, the prosecutor's supposed concern. No such evidence exists as to Birk's sister.

The trial court then injected another reason the prosecutor could have used to strike Mr. Price – that it occurred in another state -- (Tr. 233). The trial court clearly erred in providing additional reasons. "The issue of pretext must be determined by the prosecutor's stated reasons for the strike at the time of the *Batson* inquiry."

Bateman, supra at 14. The trial court should not provide additional reasons why the prosecutor could have stricken the juror. Rather, the court must fairly evaluate the prosecutor's stated reason. *Id.*; *see also Miller-El*, 545 U.S. at 245, n. 4.

The prosecutor also proffered a distinction between Birk and Krausz that lacked record support. Even though Krausz' brother and mother were convicted of crimes, the prosecutor said Krausz was different: "Not in jail. It's the same distinction, Judge." (Tr. 237). But the record shows that the State never asked Krausz whether those relatives were currently serving jail time (Tr. 96).

The record establishes that the prosecutor did not strike similarly-situated white jurors whose relatives were convicted of crimes. The proffered distinction of current jail time does not withstand scrutiny. The record does not establish whether Birk's and Krausz's relatives were in jail since the State never asked them. Further, although Price's cousin was currently in jail, that did not matter to the State. Price was white.

Courts have repeatedly found pretext when the State failed to strike similarly-situated venirepersons. *Miller-El*, 545 U.S. at 241 (side-by-side comparisons of some black jurors stricken and white panelists allowed to serve showed pretext in explanation regarding support for death penalty); *Snyder*, 552 U.S. at 484 (strike based on hardship pretextual where similarly-situated white juror not stricken); *McFadden I*, 191 S.W.3d at 652, 654, 654-655 (reasons based on hardship, familiarity with area of crime, views of scientific evidence were pretextual when comparing

similarly-situated white jurors); *State v. Marlowe*, 89 S.W.3d 464, 469-70 (Mo. banc 2002) (although State justified its strike on ground that black juror was soon to be in class action lawsuit, State failed to strike white jurors also in class action lawsuits); *Hopkins*, 140 S.W.3d at 143 (*Batson* challenge sustained as to three jurors based on employment, marital status, and relationship with persons in criminal justice system, because State failed to strike similarly-situated white jurors).

Given that similarly-situated white jurors were not struck, this Court should find the proffered reason for striking Ms. Birk a pretext for discrimination. This Court should reverse.

Failure to Question Jurors on Area of Purported Concern

The State claimed it was concerned about jurors whose relatives were currently serving time in jail (Tr. 234). The record shows otherwise. When questioning jurors about whether their relatives had been convicted of crimes, the prosecutor rarely asked about jail time. He never asked Ms. Birk whether her sister was serving jail time, currently or in the past (Tr. 90-92). He did not ask Beckham whether his nephew served jail time (Tr. 92). He also failed to ask Lay, Massen, Lore, Krausz, and Taylor about jail time (Tr. 94-96). He did not ask Rhodes about jail time, although Rhodes' cousin "was charged with taking crystal meth across state lines." (Tr. 97). Sometimes, venirepersons mentioned jail time, but the prosecutor did not follow-up to determine whether it was current. (*See, e.g.* Venireperson Neese's response about "some jail time" (Tr. 97)).

If the prosecutor were sincerely concerned about whether veniremembers' relatives were currently serving time in jail, surely he would have questioned them on this subject. Failing to voir dire on a characteristic or factor cited as support for the strike demonstrates pretext. *Miller-El*, 545 U.S. at 244-246; *McFadden* , 191 S.W.3d at 653-54 and *Hopkins*, 140 S.W.3d at 150-151.

Given the entire record, this Court must find the trial court clearly erred in finding the State's strike of Ms. Birk non-discriminatory. It should reverse and remand for a new trial.

II. Jailhouse Informant – Court Improperly Limited Cross-Examination

The trial court abused its discretion in sustaining the state's objection to defense counsel's cross-examination of jailhouse informant, Kevin Covington, about whether he had received disciplinary violations for lying to staff, giving false information, and possessing contraband, because limiting his cross-examination violated Winfrey's rights to due process, to present a defense, to confrontation and to a fair trial, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10 and 18(a), in that Covington's disciplinary violations for making false statements and lying to guards were relevant to impeach Covington on his character for truth and veracity. Further, the State opened the door to evidence of disciplinary violations when Covington testified on direct that he was being paroled on the merits of his case and not because of the prosecutor's letter to the parole board recommending his parole.

Winfrey was prejudiced because he was unable to show Covington was not credible, lied when he said he was being paroled on the merits, he was actually receiving a benefit for his testimony against Winfrey, and Covington had every incentive to manufacture evidence favorable to the State to help himself. The State's case relied on Covington's testimony that Winfrey confessed to him, making Covington's credibility decisive in determining Winfrey's guilt or innocence.

Jailhouse informants have every incentive to manufacture confessions to obtain favorable treatment. Jurors should be cautious about their testimony. Snitch testimony is a leading cause of wrongful convictions.[9] At the very least, an accused should have the right to fully cross-examine[10] the snitch witness to show his character for truth and veracity and his incentive to provide favorable testimony so he can help

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[9] See, "How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row: A Center on Wrongful Convictions Survey," Winter 2004-2005, available at: http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf

[10] See, Arnold H. Loewy, "Systemic Changes that Could Reduce the Conviction of the Innocent," 18 Crim. L.F. (2007), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927223## Professor Loewy believes jurors should receive cautionary instructions on the unreliability of jailhouse confessions. *Id*. at 9. Jailhouse snitches' testimony results in innocent people being convicted. *Id.*, n. 18 and 19. Particularly troubling is an informants' admissions that "using only a telephone, he could gather enough information to convincingly fabricate the confession of a murder defendant whom he had never met." *Id.* n. 18, *quoting* Evan Haglund, "Impeaching The Underworld Informant," 63 S. CAL. L. REV. 1405, 1416 (1990).

himself. The trial court improperly limited Winfrey's cross-examination, not allowing questions about Covington's disciplinary violations for making false statements and lying to guards, impeachment that went to Covington's lack of truth and veracity. Covington maintained he was paroled on the merits, not because of his testimony for the State. Winfrey should have been able to set the record straight and show that, given his 35 or 36 disciplinary violations, his testimony, not his prison conduct, secured his release.

Covington's Testimony

Covington was incarcerated with Winfrey at Farmington Correctional Center in 2006 (Tr. 1263, 1267). Detective Harvey and a prosecutor visited Winfrey there and questioned him about the Storage USA shooting (Tr. 1268). Winfrey was concerned about the questioning and that a United States Attorney was involved (Tr. 1271).

Covington seized the opportunity to help himself (Tr. 1269). Covington lied to Winfrey, saying that his wife was a postal inspector and had friends in the St. Charles County Police Department (Tr. 1271, 1273). Covington claimed Winfrey admitted the crime to him (Tr. 1274-77). In exchange for Covington's testimony, the prosecutor sent a letter recommending he be paroled (Tr. 1265). Covington downplayed the benefit, saying that he was getting paroled based on the merits of his case, not because of the letter (Tr. 1266).

On cross-examination, Winfrey tried to challenge Covington's assertion that he was being paroled based on the merits of his case (Tr. 1314-15). The State objected, saying the question called for bad character evidence and specific instances of misconduct (Tr. 1314-15). The court sustained the State's objection, forbidding counsel from asking about any conduct violations (Tr. 1315). Counsel argued Winfrey was entitled to rebut Covington's testimony that he was being paroled based on the merits (Tr. 1316) and made an offer of proof.

Q. Mr. Covington, have you ever been disciplined for lying to guards or other correctional staff?

A. Yes I have.

Q. What kind of conduct violations have you received while you have been incarcerated during this particular incarceration, September of 1999?

A. I have 35 or 36 conduct violations.

Q. Whatever [sic] they for?

A. Contraband.

Q. What else? Well, we know *lying to staff* would be one; right?

A. Would be one.

Q. *Giving false information*, what does that mean?

A. *Lying*.

(Tr. 1317) (emphasis added). The state objected, asserting this was uncharged bad acts (Tr. 1318). The court ruled the conduct violations were irrelevant and sustained the objection (Tr. 1318). The court reasoned:

> And also this goes to character evidence which really - - I mean, we're not talking about sworn testimony that it was a lie, and we're not talking about reputation. So I'll sustain the objection and not allow you to go into this.

(Tr. 1318).

The trial court erred. Winfrey was entitled to impeach Covington on his character for truth and veracity. Moreover, the State had opened the door to this testimony. It had elicited that Covington was paroled on the merits of his prison conduct, not his testimony against Winfrey that gained him favor with the State and parole board, and proved his bias and motive to lie.

Constitutional Provisions and Standard of Review

The trial court has broad discretion in deciding the permissible scope of cross-examination. *State v. Isa*, 850 S.W.2d 876, 896 (Mo. banc 1993). The standard of review is an abuse of discretion. *Id*. But, that discretion is not unlimited.

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 688 (1986). Due process requires that a defendant be permitted to offer testimony of witnesses in his defense. *Washington v. Texas*, 388 U.S. 14 (1967). The Sixth Amendment

guarantees an accused the right to confront witnesses against him. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The Sixth Amendment is applicable to the States. *Pointer v. Texas*, 380 U.S. 400 (1965).

A witness' bias and motive to lie is always admissible and relevant. *State v. Ofield*, 635 S.W.2d 73, 75 (Mo. App. W.D. 1982). "The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

This Court recently reaffirmed the right to cross-examine a witness and use extrinsic evidence to show the witness's character for truth and veracity. *Mitchell v. Kardesch*, ___ S.W.3d ___, 2010 WL 2513791, 1 (Mo. banc 2010). "It has long been the rule in Missouri that on cross-examination a witness may be asked any questions which tend to test his accuracy, veracity or credibility ...." *Id., quoting, Sandy Ford Ranch, Inc. v. Dill*, 449 S.W.2d 1, 6 (Mo. 1970). "Impeachment provides a tool to test a witness's perception, credibility, and truthfulness, which is essential because a jury is free to believe any, all, or none of a witness's testimony." *Mitchell*, *supra* at 7 (citations omitted).

Here, as in *Mitchell*, counsel sought to cross-examine the witness about his character for truth and veracity. Specifically, counsel proposed questioning Covington about having lied to staff and given them false information (Tr.1317). The trial court precluded the inquiry because it attacked Covington's character (Tr. 1318).

But, as Missouri has long held, such cross-examination is a proper form of impeachment.

The trial court also improperly limited defense counsel's cross-examination to general reputation evidence. Such a limitation is appropriate when "a witness is called to impeach the character of a different witness in the case for truth and veracity," but not when a party is impeaching the witness who is testifying. *Mitchell, supra* at 9. The trial court improperly limited Winfrey's cross-examination of Covington about having lied and made false statements to guards, evidence that directly called into question his character for truth and veracity. He admitted numerous conduct violations for his false statements and lying in his sworn deposition. Counsel was entitled to cross-examine Covington about specific instances of his bad character for truthfulness.[11]

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[11] In the Court of Appeals, the State relied on *State v. Wolfe*, 13 S.W.3d 248, 258 (Mo. banc 2000) to uphold the trial court's limits on cross-examination (State's Brief at 37, 38, 40). But, as this Court held in *Mitchell*, "to the extent that *Wolfe* and cases following it hold that a witness may not be impeached by asking him or her about specific instances of conduct relevant to his or her character for truth and veracity, it no longer should be followed." *Mitchell* , supra at 10.

State Opened the Door to Prison Conduct

When a party injects an issue into a case, the opposing party "may offer, otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue." *State v. Bolds*, 11 S.W.3d 633, 639 (Mo. App. E.D. 1999). "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." *United States v. Durham*, 868 F.2d 1010, 1012 (8th Cir.1989). This Court recognizes this "curative admissibility doctrine." *State v. Middleton*, 998 S.W.2d 520, 528 (Mo. banc 1999); and *State v. Armentrout*, 8 S.W.3d 99, 111 (Mo. banc 1999).

In *State v. Couch*, 256 S.W.3d 64, 72 (Mo. banc 2008), the defendant asked the State's expert witness whether the complaining witnesses fit the description of children who make false allegations. This questioning "opened the door" to the expert's testimony why he believed they did not. *Id*. at 72. "[W]here the defendant has injected an issue into the case, the State may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue that defendant injects." *Id*.

In *State v. Bolds*, the defendant's former girlfriend testified that she had lived with the defendant in an apartment from which the police seized evidence. 11 S.W.3d at 637-38. On cross, the defense elicited that the apartment's lease was in the girlfriend's name but she left because she was scared. *Id.* at 638. Because the

defense "opened the door," the State could elicit that the victim was scared because the defendant had hit her and was violent. *Id*. at 639.

In *State v. East*, 976 S.W.2d 507, 511 (Mo. App. W.D. 1998), counsel elicited on cross-examination that the arresting officer found no weapons on the defendant. This questioning created the false impression that the defendant was unarmed when arrested. *Id*. It "opened the door" for the State to present "curative evidence" on re-direct that the officer found an unrelated knife in the defendant's easy reach.

Similarly, here, the State opened the door to counsel's proposed cross-examination about Covington's conduct violations. Covington minimized his motive to testify so that he would get parole. He said he was paroled because of the merits of his case, not because of the prosecutor's recommendation. Counsel should have been able to set the record straight. Covington had multiple conduct violations for lying to guards, having contraband, and providing false information to the corrections staff. Covington had every incentive to testify against Winfrey so that he could secure a release, a release otherwise unlikely, given his prison record.

Covington lived in a world of "give and take" (Ex. 184). He wanted to give the State what they needed to convict Winfrey and he would take their help in securing his release from prison. Contrary to the trial court's ruling, Covington's bias and motive to lie were relevant. *Ofield, supra.* Winfrey was entitled to expose Covington's motivation for testifying against him through his constitutionally-protected right of cross-examination. *Davis*, 415 U.S. at 316.

Winfrey was prejudiced because the State relied on Covington's testimony to convict him. The State had no physical evidence against him. His fingerprints were not at the scene (Tr. 505). No fiber or hair evidence connected him to the crime. No one saw him at the scene at or near the time of the crime. No ballistic evidence established his guilt (Tr. 1387-90). Without Covington, the prosecution lacked enough evidence to indict, let alone convict, Winfrey (Ex. 232).

Covington's testimony was suspect. Covington claimed that the victim owed Winfrey money (Tr. 1274). This suggestion was contrary to all the evidence showing that Winfrey was broke and had no money to lend. Covington said that Winfrey had gone to the bank to activate an ATM card at approximately 1:38 p.m. providing him an alibi (Tr. 1275), but that time did not match the evidence (Tr. 745-46, 804, 806-07, 812, Exs. 75, 1080). Covington also said that Winfrey was familiar with Storage USA because his girlfriend's aunt was the property manager (Tr. 1275). That alleged fact was wrong too. Harris' sister, not her aunt, was the manager (Tr. 491-92, 1099-1100). Covington claimed that Winfrey said two safes were inside the business when he robbed Storage USA (Tr.1275). But this allegation ignored that Budget had closed its operations, and the real robber could only have gotten money from one safe, not two (Tr. 475-76, 627). Covington said that Winfrey had wiped down everything after the crime and left (Tr. 1275-76). Again, Covington's account conflicts with the physical evidence showing others' fingerprints at the crime scene, an unlikely find had someone wiped down everything (Tr. 497-98, 502-05, Exs. 209-215).

The jury should have had the opportunity to fully consider Covington's bad character for truthfulness in weighing his testimony. He had lied numerous times to prison guards. He had received disciplinary violations for making false statements. The jury should have been informed that he did not have a good record of truthfulness. The specific instances of lying went directly to his credibility. His prison record showed his true motive for testifying for the State. He wanted to be paroled and, given his bad prison record of 35 or 36 conduct violations, he needed the prosecutor's recommendation. Because the trial court improperly limited his cross-examination, the jury could not properly assess Covington's credibility. This Court should reverse for a new trial.

III. Justin Lewis' Admission That He Shot the Victim

The trial court abused its discretion in sustaining the State's hearsay objection and refusing Winfrey's proffered cross-examination of Justin Lewis, "did you tell Nick Reynolds that you shot the guy at Storage USA," because excluding this evidence denied Winfrey his rights to due process, to compulsory process, to present a defense, to confrontation, and to a fair trial, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10 and 18(a), in that Lewis' prior admission that he shot the victim was direct evidence of Lewis' guilt; Lewis testified for the State and was available to both parties to examine; nothing justified the exclusion of relevant and probative evidence necessary to Winfrey's defense; and the prior inconsistent statement was admissible as substantive evidence of Lewis' guilt.

The State filed a motion in limine to exclude evidence that someone other than Winfrey committed the crime (L.F. 14, Tr.243-44). Counsel said he would introduce evidence of a third party's guilt only if he had direct evidence (Tr. 245). The trial court sustained the State's motion to exclude this evidence of another's guilt (Tr. 246).

Justin Lewis testified at trial (Tr. 1028-1052). When the police first interviewed him, Lewis stated that although Winfrey asked him for a weapon, Lewis could not get one for him (Tr. 1035, 1056-57). On February 6, 2006, police arrested Lewis for an attempted robbery in St. Charles County separate from the robbery at

Storage USA (Tr. 1059-1060). Lewis worried that the judge would "hammer him" (Tr. 1060-61).

Three days after Lewis' arrest, police interviewed him again about the Storage USA robbery and his story changed (Tr. 1059-1061). Now, he claimed that he got a gun from Danny Cosgrove and gave it to Winfrey (Tr. 1036-1041). Lewis claimed Winfrey never paid for the gun and Lewis never saw the gun again (Tr. 1041-42). Lewis said a couple of weeks thereafter, he asked Winfrey to return the gun, but Winfrey blew him off (Tr. 1051-52).

Lewis initially denied ever handling the gun (Tr. 1061, 1074). But, when Detective Harvey pressed him to get his story straight, he acknowledged handling the gun while in Winfrey's car (Tr. 1062, 1076).

Defense counsel asked to cross-examine Lewis about his admission that he shot the victim at Storage USA (Tr. 1068-1070). Outside the presence of the jury, counsel proffered the following question:

"***Did you tell Nick Reynolds that you shot the guy at Storage USA***?" (Tr. 1068) (emphasis added). The trial court sustained the State's hearsay objection, even though Lewis testified and was available for cross-examination (Tr.1069). The trial court believed the admission was inadmissible because no evidence proved Lewis did the shooting and he was not a party to the case (Tr.1069).

This ruling unfairly limited Winfrey's cross-examination. A new trial should result.

Constitutional Provisions and Standard of Review

The trial court has discretion to decide the permissible scope of cross-examination. *State v. Isa*, 850 S.W.2d 876, 896 (Mo. banc 1993). The standard of review is an abuse of discretion. *Id*.

In *Holmes v. South Carolina*, 547 U.S. 319 (2006), excluding evidence of a third person's guilt denied the defendant of a fair trial. The defense sought to admit proof that another man, Jimmy McCaw White, had attacked the victim. *Id*. at 323. Witnesses would testify that White had admitted committing the crimes and had said Holmes was innocent. *Id.* The trial court improperly excluded this evidence and the State Supreme Court improperly upheld the exclusion, based on the strength of the State's forensic evidence. *Id*. at 323-324.

While State courts have broad latitude under the Constitution to establish rules excluding evidence from criminal trials, that latitude is not unlimited. *Id*. at 324. The Due Process Clause of the Fourteenth Amendment and the Compulsory Process or Confrontation Clause of the Sixth Amendment guarantees criminal defendants a "meaningful opportunity to present a complete defense." *Id*. at 324, *quoting Crane v. Kentucky*, 476 U.S. 683, 690 (1986) and *California v. Trombetta*, 467 U.S. 479, 485 (1984). Courts should not uphold arbitrary evidentiary rules that infringe upon a weighty interest of the accused. *Holmes*, 547 U.S. at 324-325.

Two such arbitrary rules are Texas' statute that precluded a co-defendant from testifying for the defendant unless the codefendant was acquitted; *Washington v.*

Texas, 388 U.S. 14, 22-23 (1967); and Mississippi's voucher rule, which prohibited Chambers from impeaching a witness who had repudiated his earlier confession with his prior admission. *Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973). Excluding the "out-of-court statements, coupled with the State's refusal to permit the defendant to cross-examine McDonald, denied [Chambers] a trial in accord with the traditional and fundamental standards of due process." *Holmes*, 547 U.S. at 325-326, *quoting Chambers*, 410 U.S. at 302.

Reasonable state rules regulating the admission of evidence showing someone else committed the crime are permissible. *Holmes*, 547 U.S. at 327. Such evidence may be excluded if the evidence is "speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." *Id*. See, *State v. Butler*, 951 S.W.2d 600, 609 (Mo. banc 1997) (another's motive and opportunity to commit the crime provided a "direct connection" to the crime and was admissible). But, blanket exclusions of another's admission that he committed the crime are not reasonable, since that is direct evidence of another's guilt. *Holmes; Chambers, supra*.

Here, the trial court arbitrarily excluded Lewis' admission. The court sustained the State's hearsay objection and excluded the evidence because it found that no evidence showed Lewis committed the crime, and he was not a party to the case (Tr.1069-1070). Contrary to the trial court's finding, Lewis' admission that he shot the victim was direct evidence of his guilt. It is precisely the type of evidence discussed in *Holmes* and *Chambers, supra*. The State called Lewis to testify, so he

was available for the parties to question. That Lewis was not a party to the case did not justify the trial court's limiting Winfrey's cross-examination of him. White was not a party in *Holmes*, but his admissions were relevant and admissible at Holmes' trial. McDonald was not a party in *Chambers*, but his admission was admissible there. Finally, if Lewis denied making the admission, his prior inconsistent statement could be considered as substantive evidence of Lewis' guilt under §491.074.

Winfrey was prejudiced. He cooperated with police, provided statements and allowed searches of his home and car. He consistently maintained his innocence. Unlike *Holmes*, where the forensic evidence against Holmes was strong, here, the State had no physical evidence connecting Winfrey to the crime. Without its jailhouse informant, the State here did not even have a submissible case. At most, the State had a potential motive - Winfrey's financial straits - and opportunity – Winfrey's familiarity with Storage USA and its operations. Many people had the same opportunity and the State never explains why someone familiar with the operations would rob the business after the money was deposited at the bank instead of before.

Even the State's own time line makes it nearly impossible for Winfrey to have committed the crime. The victim was killed sometime between 2:42 p.m. and 3:09 p.m. (Tr. 363, 366, 544-545, 546, 1402-1403, Exs. 58 and 71). Videotaped evidence and the State's own witnesses established that he was elsewhere near this time.

11:30- noon	Winfrey at Phillips 66	(Tr. 846)
1:02 p.m.	Winfrey at Aerospace Credit Union	(Tr. 804-807, Exs.75,1080)
1:49 p.m.	Winfrey at Aerospace Credit Union	(Tr. 745-46, Exs.75-77)
2:00-3:00 p.m.	Winfrey at Fazoli's-calls Schaffer	(Tr. 843)
3:00-5:00 p.m.	Winfrey at Fazoli's before dinner	(Tr. 835)
3:00-?	Winfrey gets soda at Fazoli's	(Tr. 897-900)
3:54-4:00 p.m.	Winfrey at Phillips 66	(Tr. 857-858, 864-865)
6:00-7:00 p.m.	Winfrey at Phillips 66	(Tr. 853)
11:10 p.m.	Winfrey at Ameristar Casino	(Tr. 653-54, 786-87)

The State never explains how Winfrey could be at Fazoli's and the crime scene at the same time. And, the State never introduced phone records showing the precise time of the phone call Winfrey made to Schaffer from inside the Fazoli's Restaurant. Schaffer distinctly remembered the caller-identification showing the Fazoli's phone number and it left a lasting impression because he was upset that other coworkers would know about his involvement in drugs.

Winfrey's right to present a complete defense included showing the jury who actually committed the crime.[12] The State presented a one-sided story that Justin

[12] See, Loewy, *supra*. In addition to snitch testimony, courts' exclusion of exculpatory evidence that another committed the crime is a cause of wrongful convictions of the innocent. Loewy, at 10-12, *supra*.

Lewis gave Winfrey a gun shortly before the shooting. Winfrey should have been able to present evidence that Lewis was lying and that he kept the gun and used it to shoot the victim. His admission that he shot the victim directly implicated him and explained why he needed to place the gun in Winfrey's hands. The jury should have heard both sides, not just the State's version.[13]

The trial court abused its discretion in excluding evidence of Lewis' guilt. A new trial should result.

[13] An accused's right to present a complete defense must include the right to present this exculpatory evidence. *See*, John H. Blume, Sheri L. Johnson, and Emily C. Paavola, "Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense," 44 Am. Crim. L. Rev. 1069 (Summer 2007).

IV. Evidence of Other Crimes – Stealing Rental Furniture

The trial court abused its discretion in overruling defense objections to testimony that Winfrey stole rental furniture because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that stealing the rental furniture was prejudicial evidence of another crime, occurring after the charged offense, and did not prove Winfrey's motive to commit the robbery, since the State adduced no evidence to tie the stealing to the robbery of USA Storage. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

The State exercised little or no restraint in introducing other crimes evidence against Winfrey. Detective Harvey testified that Winfrey obtained loans for rental furniture and did not pay for the furniture, but took it with him to Milwaukee (Tr. 1418-19). The trial court overruled defense objections to this evidence (Tr. 1419). Stealing rental furniture was irrelevant to the charged offense, since it occurred after the charged offense.

Standard of Review

The Due Process Clause of the Fourteenth Amendment requires that criminal prosecutions comport with prevailing notions of fundamental fairness. *California v. Trombetta*, 467 U.S. 479, 485 (1984). The admission of other crimes evidence that is "not properly related to the cause on trial violates the defendant's right to be tried for

the offense with which he is charged by the information." *State v. Dunn*, 309 S.W.2d 643, 645 (Mo. banc 1958); *See*, §§10, 17, 18(a), Mo. Const. Other crimes evidence is improper because a conviction must be based only on a crime with which the defendant is charged. *State v. Cole*, 887 S.W.2d 712, 714 (Mo. App. E.D. 1994); *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998). Because of the dangerous tendency and misleading probative force of evidence of other crimes, courts should subject its admission to rigid scrutiny. *State v. Davis*, 211 S.W.3d 86, 88 (Mo. banc 2006); *State v. Primers*, 971 S.W.2d 922, 929 (Mo. App. W.D. 1998). If erroneously admitted, evidence of other crimes is presumed prejudicial. *State v. Randolph*, 698 S.W.2d 535, 541 (Mo. App. E.D. 1985).

Evidence of other crimes is generally inadmissible. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). Other crimes evidence may be allowed in limited circumstances, if it tends to establish motive, intent, identity of the person charged, common scheme or plan, or absence of mistake or accident. *State v. Engleman*, 653 S.W.2d 198, 199 (Mo. 1983). Even if the trial court finds evidence relevant, it must exclude that evidence if its prejudicial effect outweighs other considerations that make evidence useful to prove an issue in the case. *State v. Diercks*, 674 S.W.2d 72 (Mo. App. W.D. 1984). Evidence that tends to unnecessarily divert the jury's attention from the question before it should be excluded. *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984). The probative value of evidence must not be outweighed by its tendency to create undue prejudice in the jurors' minds. *Id*. Prejudice can

outweigh the probative value, even if the other crimes evidence is relevant to prove motive. *State v. Alexander*, 875 S.W.2d 924 (Mo. App. S.D. 1994).

In *Davis*, 211 S.W.3d at 89-90, less than two years before Winfrey's trial, this Court reversed Judge Rauch's admission of extensive evidence of other crimes evidence. This Court commented on the extensive evidence relating to an uncharged robbery. *Id*. at 87, n. 2. While trial courts have sound discretion to balance the effect and value of the other crimes evidence, its admission must be subjected to "rigid scrutiny." *Id*. at 88. Prejudice is possible when the evidence amounts to an "attack on a defendant's character" or "when the evidence is used to show the defendant is a bad or evil man' to support the inference he committed the charged offense. *Id*. Prejudice may occur, if there is a possibility that the "bad guy evidence" even if probative, is overused. *Id.*

The State had no justification for admitting testimony that Winfrey stole the rental furniture (Tr. 1418-19). Winfrey took the furniture with him to Milwaukee *after* the charged offense. A theft occurring *after* the charged offense was irrelevant and evidence about it should have been excluded. *State v. Allen*, 274 S.W.3d 514, 522 (Mo. App. W.D. 2008). The State must connect the prior crimes to the charged offense. *Id*.

In *Allen*, the court ruled that "the State is not entitled to automatically assume that whenever the defendant is charged with the crime of stealing, evidence of other crimes bearing on motive is automatically admissible." *Id.* The record must

explicitly include some explanation of motive connecting the prior crimes to the charged offense. *Id.* at 522-23. Thus, Allen's possession of drugs and drug paraphernalia was not admissible to prove motive. *Id*. at 523. Nothing linked the drug evidence with the charged offense of robbery. *Id*. The State had the burden of showing the two crimes were connected. *Id*.

The State made no effort to show that Winfrey's alleged crimes long after the charged offense had any connection to the charged offense. The Court of Appeals admitted that introducing evidence of other crimes after the charged offense was error, noting "[t]he State did elicit testimony over objection that Defendant took rented but unpaid for furniture with him to Milwaukee after the shooting and that his common practice was to move to avoid utility fees." (Slip op. at 13). The Court found the reference to moving rental furniture was not relevant to his motive for committing the crime (Slip op. at 14). But, the Court found that "[i]n this case, a single reference to Defendant taking the furniture with him to Milwaukee was not sufficient to deprive Defendant a fair trial." (Slip op. at 14). According to the Court of Appeals, "[t]he State presented overwhelming[14] evidence including a confession such that reversal is not mandated." (Slip op. at 14).

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[14] A snitch's claim that someone confessed is not "overwhelming" evidence of guilt. Rather, it is unreliable and a leading cause of the convictions of innocent people. *See*, n. 9 and n. 10, *supra*.

The State did not make a single reference to one crime occurring after the shooting. Instead, Detective Harvey testified that Winfrey had "actually rented some furniture and that he didn't pay the loans on that. And they had taken the furniture up to Milwaukee with them." (Tr. 1418-19). Harvey also testified that Winfrey could not get utilities in his own name, so he fraudulently used others' names to get the utilities (Tr. 1417-18). Again, Harvey did not limit his testimony to events occurring shortly before the crime, but testified about the Milwaukee incident and noted it was Winfrey's "common practice" to defraud the utility companies (Tr. 1418).

The State did not limit its discussion about Winfrey stealing a car before the crime (Tr. 943). Instead, Detective Harvey testified about the warrants for the charge of tampering with the motor vehicle occurring after the charged offense (Tr. 1415-16).

Similarly, Detective Rimiller testified about "several instances" of filing false police reports without tying those reports to the time period immediately before the crime (Tr. 947). This is hardly the "single reference" to one crime occurring after the shooting (Slip op. at 14).

Like *Davis*, the other crimes evidence was extensive. Numerous witnesses testified, not only about the rental furniture, but Winfrey's stealing and fraudulently obtaining utilities after the charged offense (Pt. V), filing false police reports (Pt. VI), stealing a car (Pt. VII), and writing bad checks (Pt. VIII). The State introduced evidence of another robbery at the Storage USA apartment, even though it could not relate it to Winfrey or the charged offense (Pt. X). It implied he tampered with

evidence, breaking into his car when it was on the tow lot, even though no evidence established his involvement (Pt. XI). Judge Rauch did not heed this Court's warning to limit evidence to that which is strictly necessary. Instead, she allowed extensive other crimes evidence even though nothing connected it to the charged offense.

The State argued the stealing showed Winfrey's financial picture and motive, citing *State v. Mayes*, 63 S.W.3d 615 (Mo. banc 2002); and *State v. Sims*, 952 S.W.2d 286 (Mo. App. W.D. 1997) (Tr. 255-56, 267). The State's reliance on *Mayes* and *Sims* was misplaced. In both, because the error was unpreserved, review was for plain error. *Mayes*, 63 S.W.3d at 633; *Sims*, 952 S.W.2d at 291-92. In *Mayes*, the defendant's financial pressures and marital difficulties were admissible to show his intense emotional stress and his motive for killing his wife and stepdaughter. *Id*. at 633. Both victims were supposed to testify for Mayes in a trial the following day. *Id*. at 621, 633. The financial conflict and marital difficulties were intertwined with Mayes' motive for killing his wife when she told him she would not testify. *Id*.

In *Sims*, the Court found no plain error in admitting testimony that Sims had previously used drugs and pawned his girlfriend's possessions, including her vcr, camera, and lawn mower. *Id*. The girlfriend testified about Sims' drug use and their financial troubles at the time of the charged robbery. *Id*. at 292. He had overdrawn checks on her account without her permission. *Id*. Fed up with his stealing, she called the police and told them about the robbery. *Id*. Under these circumstances, the Court found that the evidence of drug use had a legitimate tendency to establish Sims'

guilt on the robbery and explained the circumstances for the girlfriend's statement to the police. *Id*. The trial court did not plainly err in admitting the evidence, since the prior crimes were connected and related to the charged offense. *Id*.

By contrast, here, no evidence showed that that stealing rental furniture in the year after the charged offense had any connection with the charged offense. It was unnecessary to prove motive because the State elicited other evidence of Winfrey's financial problems, including his gambling (Tr. 785-89, 795-96, 1439, Exs. 54, 55, 55A, 68). The State introduced evidence of Winfrey's payday loan debts and his negative checking balances through multiple witnesses (Tr. 802-25, 950-51, 1110-1111, 1394-95, 1419, 1438). Winfrey and Harris both told the police about their financial problems and the stress it created (Ex.172, Tr.923, 925, 952-53). Detective Rimiller, Deputy Harvey and Harris testified at length about their financial problems (Tr. 923, 947-953, 1108-1114, 1416-1419, 1439). The State had no need to use prior crimes to show Winfrey's dire financial picture and provide a motive for the robbery.

The trial court erred in admitting the other crime evidence. This Court should reverse and remand for a new trial.

V. Evidence of Other Crimes – Failure to Pay Utility Bills and Fraudulently Obtaining Services

The trial court abused its discretion in overruling defense objections to testimony that Winfrey failed to pay his utility bills and had a common practice of fraudulently obtaining services, running up bills and then moving because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that this testimony about fraudulent activity and stealing was evidence of other crimes, the evidence was prejudicial and did not prove Winfrey's motive to commit the robbery, since the State adduced no evidence to tie the fraud and theft to the robbery of USA Storage. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

The State's true purpose in admitting other crimes evidence – to show Winfrey was a bad person with a propensity to steal– was revealed when it introduced evidence of his fraud and theft of utility services. The State repeatedly elicited that Winfrey's "common practice" was to fraudulently obtain services, not to pay his bills, and then move, leaving his bills unpaid (Tr.1417-18).

Winfrey objected to the other crimes evidence regarding his utilities (L.F. 39, 40, Tr. 271-72, 274, 909-10, 910-11, 1393-94, 1417-18). Winfrey could not get utilities in his own name, so he used a friend's name to obtain services (Tr. 1417-18).

Harvey said Winfrey's "common practice" was to not pay his utility bills and then move (Tr. 1417-18). Harvey repeated that this was Winfrey's "common practice" (Tr. 1418). The trial court erred in overruling Winfrey's objection to this evidence of other crimes.

Winfrey was entitled to be tried solely for the charged offense. *Dunn* and *Cole*, *supra*. Instead, he had to defend against a host of other crimes which portrayed him as a thief and cheat. The State repeatedly referenced Winfrey's "common practice" to steal. The State's evidence was classic propensity evidence. Like *Davis*, *supra*, it was used to show Winfrey as a "bad or evil man" to support the further inference he committed the charged offense. As discussed in Point IV, this Court should subject the trial court's admission of other crimes to rigid scrutiny and presume prejudice. *Bernard*, 849 S.W.2d at 13; *Davis*, 211 S.W.3d at 88; and *Randolph*, 698 S.W.2d at 541. *See*, Sixth and Fourteenth Amendments, U.S. Const.; and §§10, 17, 18(a), Mo. Const. That review will demonstrate that reversal is warranted.

VI. Evidence of Other Crimes – False Police Reports

The trial court abused its discretion in overruling defense objections to testimony that Winfrey filed false police reports alleging he was robbed, because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that filing false reports was prejudicial evidence of other crimes, and did not prove Winfrey's motive to commit the robbery, since the State adduced no evidence to tie the false reports to the robbery of USA Storage. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

Winfrey moved to exclude evidence that Winfrey had filed a false police report (L.F. 31, Tr. 258-60). The State argued that Winfrey had lost hundreds of dollars gambling and did not want his girlfriend to find out (Tr. 258-59). Winfrey filed the false report to hide his debts and gambling losses (Tr. 258-260). The court overruled defense counsel's objection and ruled this evidence was admissible (Tr. 260).

The State did not limit its evidence about false police reports to incidents occurring just before the Storage USA robbery. Instead, Detective Rimiller testified over objection that Winfrey admitted "several instances" of filing false reports (Tr. 907, 947). Winfrey claimed to the St. Charles Sheriff's Department that he was robbed of $400.00 at gunpoint (Tr. 947). Winfrey admitted that the report was false; that he lost the money gambling and he did not want his girlfriend to find out (Tr.

948). Rimiller repeatedly testified about Winfrey's ATM withdrawals and other false reports (Tr. 948-949). Then, Rimiller discussed one of the actual reports and its details, like the amount of the reported theft (Tr. 949). As it had with all the other crimes evidence, the State argued it in closing (Tr. 1598-99).

As with Points IV-V, this Court should subject the trial court's admission of other crimes to rigid scrutiny and presume prejudice. *Bernard*, 849 S.W.2d at 13; *Davis*, 211 S.W.3d at 88; and *Randolph*, 698 S.W.2d at 541. *See*, Sixth and Fourteenth Amendments, U.S. Const.; and §§10, 17, 18(a), Mo. Const.

Like the "common practice" of stealing utilities, Rimiller's reference to "several instances" of filing false reports over a period of time shows the evidence was admitted to show Winfrey's propensity to steal, not his motive for the Storage USA robbery. The State portrayed Winfrey as a thief who repeatedly stole and lied to cover his tracks. The jury likely found him guilty, not because any evidence connected him to the Storage USA crimes, but because of all the other crimes evidence. *Davis, supra*. The trial court put virtually no limits on the other crimes evidence, requiring no connection to the charged offense. *Allen, supra*.

This Court should reverse and remand for a new trial.

VII. Evidence of Other Crimes – Stolen Car

The trial court abused its discretion in overruling defense objections to repeated testimony that Winfrey stole a car when he worked at Dobb's Tire and Auto because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that stealing a car was prejudicial evidence of another crime, and did not prove Winfrey's motive to commit the charged robbery, since the State adduced no evidence to tie the stolen car to the robbery. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

Defense counsel moved to exclude evidence that Winfrey stole a car in St. Peters (L.F. 36, Tr. 266-69). Winfrey and his girlfriend paid cab fees to get to work, so they needed a car for transportation (Tr. 267). The trial court ruled that stealing a car showed Winfrey's desperation (Tr. 289-269).

At trial, counsel renewed his objection to this evidence (Tr. 942-43). The court ruled that the stealing was not "mere propensity" evidence, but provided a context in which the crime occurred (Tr. 943). The court found it admissible to show Winfrey's financial condition and motive for the crime (Tr. 943).

Detective Rimiller testified that Winfrey was fired from Dodds Auto and Tire for stealing a car (Tr. 943). Detective Harvey discussed the stealing too (Tr. 1391, 1415). When Harvey questioned Winfrey on May 18, 2005, nearly a year after the

offense, they discussed his arrest warrants, including one for tampering with a motor vehicle (Tr. 1415). Winfrey admitted stealing a car from Dobbs on May 6, 2004 (Tr. 1415-16). Winfrey needed the car to drive to work; he could not afford cab fare (Tr. 1416). The State emphasized this evidence in its closing argument (Tr.1617).

As with Points IV-VI, this Court should subject the trial court's admission of other crimes to rigid scrutiny and presume prejudice. *Bernard*, 849 S.W.2d at 13; *Davis*, 211 S.W.3d at 88; and *Randolph*, 698 S.W.2d at 541. *See*, Sixth and Fourteenth Amendments, U.S. Const.; and §§10, 17, 18(a), Mo. Const.

Judge Rauch, again erred in admitting the evidence that Winfrey stole a car at a former employer's business. Far from applying the rigid scrutiny standard mandated for presenting such evidence, Judge Rauch admitted the evidence based on the prosecutor's argument that any evidence about Winfrey's finances was admissible to show his motive (Tr. 255-56).

No evidence showed that stealing a car had any connection with the charged offense. At the time of the offense, Winfrey had bought another used car (Tr. 672, 774-776, 958). The State introduced extensive evidence about the problems he had paying for the car and its eventual repossession. Winfrey and Harris were behind on the car payments (Tr. 1111-1112). On June 6, 2004, the vehicle was repossessed (Tr. 672, 774-776, 958). The owner, Daniel Grosvenor, had called Winfrey several times about late payments (Tr. 776). On June 3rd, Winfrey had called Grosvenor, promising to make an $800 payment the next day, but never did (Tr. 776, 780, 783).

Given all this evidence, uncontested by the defense, the State had no need to introduce the stolen car evidence. The prior stealing had little probative value but was highly prejudicial.

The trial court erred in allowing the admission of other crimes evidence over objection. This Court should reverse and remand for a new trial.

VIII. Evidence of Other Crimes – Writing Bad Checks

The trial court abused its discretion in overruling defense objections to testimony and Exhibits 180 and 180A, that Winfrey wrote bad checks because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that writing checks with insufficient funds to cover them was prejudicial evidence of other crimes, and did not prove Winfrey's motive to commit the robbery, since the State adduced no evidence to tie the checks to the robbery of USA Storage. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

Multiple witnesses testified about Winfrey writing checks with insufficient funds to cover them (Tr. 811-25, 1112, 1416, 1419, Ex.180). Renee Markert from Aerospace Credit Union detailed the checks and highlighted those returned for insufficient funds (Tr. 811, 823). Markert identified all the checks that were returned, the amount of the checks and to whom they were written (Tr. 821-823). Harris discussed the bad checks (Tr. 1112). Detective Harvey emphasized the bad checks, not once, but twice, during his testimony (Tr. 1416, 1419). The court admitted financial records showing the checks returned for insufficient funds (Exs.180, 180A). Defense counsel repeatedly objected to this other crimes evidence, both before trial and before the improper testimony (L.F. 41, Tr.820-21, 824, 911, 1112, 1393-94).

The State emphasized the other crimes in its opening and closing arguments (Tr. 345, 1601).

As with Points IV-VII, this Court should subject the trial court's admission of other crimes to rigid scrutiny and presume prejudice. *Bernard*, 849 S.W.2d at 13; *Davis*, 211 S.W.3d at 88; and *Randolph*, 698 S.W.2d at 541. *See*, Sixth and Fourteenth Amendments, U.S. Const.; and §§10, 17, 18(a), Mo. Const.

The State failed to tie the bad checks evidence to the Storage USA robbery. The records covered events occurring after the charged offenses (Ex. 180). The State argued that any evidence showing Winfrey's bad finances could be admitted to prove his motive to commit the Storage USA robbery (Tr. 255). The trial court allowed the repeated references to the bad checks evidence, over defense objection. The court failed to admit only that evidence necessary to establish motive. The court placed no limits on this evidence, allowing the State to present it through three separate witnesses and through documentary exhibits.

This bad check evidence should have been excluded since it was not tied to the charged offense and thus was not logically relevant. *Allen*, *supra*. The trial court did not weigh whether the repeated references outweighed its probative value. Instead, the trial court allowed excessive evidence of the stealing evidence. *Cf. Davis*, 211 S.W.3d at 88. Even if it had some minimal probative value, that probative value was outweighed by the prejudice it engendered. *Id.*

This Court should reverse and remand for a new trial.

IX. Evidence of Bad Character – Razor Blade and Psychiatric Hospital

The trial court abused its discretion in overruling defense objections to testimony that three months before the charged offense, Winfrey left his apartment with a razor blade and voluntarily checked himself into a psychiatric hospital, because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that this testimony about the razor blade and hospital was prejudicial evidence of bad character and did not prove Winfrey's motive to commit the robbery, since the State adduced no evidence to tie the psychiatric evidence occurring months before the charged offense to the actual robbery of USA Storage. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

Winfrey moved to exclude any reference to an incident occurring in March, 2004, during which Winfrey argued with his girlfriend, left their apartment with a razor blade, and voluntarily checked himself into a hospital for psychiatric counseling (L.F. 34-35, Tr. 261-65). The trial court overruled defense motions to exclude this evidence (Tr. 263, 265). At trial, counsel renewed his objection before Detective Rimiller testified (Tr. 908, 951). The court allowed Rimiller to describe Winfrey's argument with his girlfriend, how he left with a razor blade and checked himself into

St. Joseph's Hospital (Tr. 952-953). Hospital personnel indicated that Winfrey needed counseling (Tr. 952).

As with Points IV-VII, this Court should subject the trial court's admission of other bad acts to rigid scrutiny and presume prejudice. *Bernard*, 849 S.W.2d at 13; *Davis*, 211 S.W.3d at 88; and *Randolph*, 698 S.W.2d at 541. *See*, Sixth and Fourteenth Amendments, U.S. Const.; and §§10, 17, 18(a), Mo. Const.

Here, the State argued Winfrey's potential suicide threat and admission to a psychiatric hospital showed Winfrey's desperation and that it was therefore relevant to prove motive (Tr. 262). The State cited *State v. Hayes*, 15 S.W.3d 779 (Mo. App. S.D. 2000) in support of its argument (Tr.262). *Hayes* does not support the admission of this evidence.

In *Hayes*, the defendant was convicted of second degree murder for killing his girlfriend, Stacy. *Id*. at 781. Their relationship was important to the State's case. *Id.* at 782-83. Hayes was possessive of Stacy. *Id*. at 782. They argued about Stacy's desire to end the relationship. *Id*. During one argument, Hayes flew through the front window and tried to grab Stacy. *Id*. Hayes threatened to kill himself. *Id.* A witness called the police and took Stacy and her children to a friend's house. *Id*.

Police found Hayes upstairs with cut wrists. *Id*. Hayes, angry and uncooperative, said his girlfriend had broken up with him, and he no longer wanted to live. *Id*. Stacy and Hayes reconciled for a brief period, but within a month, Stacy decided to break off the relationship. *Id.* at 782-83. Hayes became angry when he

learned Stacy intended to leave him. *Id*. at 783. Stacy disappeared. *Id*. Hayes admitted killing her. *Id*.

On appeal, the defense argued it was plain error to admit Hayes' suicide attempt because its prejudicial value outweighed its probative value. *Id*. at 784-85. The court rejected the argument, finding the prior bad acts relevant to show Hayes' motive to kill Stacy. *Id*. at 785. It showed his obsession with Stacy, which led to her homicide. *Id*. Its probative value outweighed any prejudice it engendered and Hayes could show no manifest injustice in admitting this evidence. *Id*.

By contrast, that Winfrey argued with his girlfriend, left his apartment with a razor blade and was admitted to a hospital was not related to the charged robbery and shooting of a complete stranger at Storage USA. Unlike *Hayes*, the charged offenses did not both involve Winfrey's girlfriend. The two incidents occurred three months apart. Nothing linked Winfrey's earlier suicide threat to the charged offense, as in *Hayes*. Any relevance the evidence might have had was far outweighed by the prejudice it engendered. The claim is preserved for review. The trial court erred in admitting this evidence. This Court should grant a new trial.

X. Evidence of Other Crimes: Prior Burglary at Storage USA

The trial court abused its discretion in overruling defense objections to testimony and admitting Exhibits 50, 53, 145, and 147 showing that several weeks before the charged offense, someone broke into the apartment above Storage USA, because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that this evidence suggested Winfrey committed this prior crime, but no evidence tied him to the offense. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

Prior to trial, Winfrey moved to exclude evidence of a prior burglary at the apartment above Storage USA (L.F. 44, Tr. 284-87). The State claimed it was not seeking to connect Winfrey to the prior burglary, but adduced the evidence to show that damage to the door had not been repaired at the time of the charged offense (Tr. 284). The court ruled that the State could present the evidence to show the damage occurred prior to the incident, but the witnesses should not call the prior incident a "burglary" (Tr. 286-87).

Officer O'Neal, a crime scene investigator, testified about his investigation of the charged robbery and murder (Tr.382-414). O'Neal indicated that the damage to the downstairs door leading to the apartment was unconnected to the homicide (Tr. 414). The patio door upstairs had been boarded over (Tr. 414).

Had the State left the evidence there, Winfrey would have had no problem. Instead, the State called Officer Daniel Geenly, who testified over objection, that, on April 26, 2004, he went to the upstairs apartment at Storage USA to investigate a break-in (Tr. 637). The intruder had broken a sliding glass door to the apartment and had gone downstairs and kicked an entry door (Tr. 637). Photographs showing the damage from the prior break in were introduced, over Winfrey's objections (Tr. 637-38, Exs. 50, 53, 145, 147).

Exhibit 145 showed the broken patio door and shattered glass.

Exhibit 147 showed the broken lock:

Exhibit 50 showed another view of the door with the broken lock. Exhibit 53 showed the boarded patio door, repaired after the April break-in.[15] Officer Geenly testified that he did not know if the April incident was related to or tied to Winfrey (Tr. 640). He knew of no connection between the April incident and the June incident (Tr. 640).

The trial court erred in admitting evidence of the unrelated break-in. As with Points IV-IX, this Court should subject the trial court's admission of other bad acts to rigid scrutiny and presume prejudice. *Bernard*, 849 S.W.2d at 13; *Davis*, 211 S.W.3d

[15] Copies of all these exhibits are included in the appendix.

at 88; and *Randolph*, 698 S.W.2d at 541. *See*, Sixth and Fourteenth Amendments, U.S. Const.; and §§ 10, 17, 18(a), Mo. Const.

The Court of Appeals reversed under similar facts in *State v. Strickland*, 530 S.W.2d 736 (Mo. App. St.L.D. 1975). There, Strickland was charged with burglary and stealing from the victim's townhouse apartment. *Id*. A next-door neighbor heard banging sounds from her window and saw Strickland walking away from the residence with items. *Id*. Strickland handed the items to another man and told him to bring the car around. *Id*. The neighbor called the police. *Id*. The police found Strickland in an alley behind the apartments and found the victim's property in a parked car. *Id*. at 737. The neighbor identified Strickland at the scene. *Id*.

Despite this strong evidence of guilt, the State presented evidence that the victim's next door neighbor's house was also burglarized. *Id*. The door had grooves on it and had been jimmied. *Id*. A tire iron, found near the alley behind the buildings, fit into the marks on the neighbor's door and those marks were similar to marks on the victim's door. *Id*. But, nothing linked the defendant to the tire tool – no one saw him with it and his fingerprints were not on it. *Id*.

The Court ruled that evidence of separate and distinct crimes from those charged are generally inadmissible. *Id*. Since the State could not connect the defendant with the other crime, it should have been excluded. *Id*. And, while the evidence against Strickland was strong, the Court found prejudice. *Id*. Injection of another crime has a "dangerous tendency and misleading probative force causing the

defendant to suffer unfair disadvantage at his trial." *Id*. *quoting, State v. Lee*, 486 S.W.2d 412, 425 (Mo. 1972).

Similarly, in *State v. Summers*, 362 S.W.2d 537 (Mo.1962), this Court held that evidence of other thefts of gasoline in the same general neighborhood at about same time of charged offense was inadmissible and prejudicial. Much like here, the State called a police officer to testify about the investigation into the thefts. *Id*. at 541-42. This Court reversed the conviction ruling that the evidence of the other crimes in the same general neighborhood at the same time was inadmissible. *Id*. at 542. The other crimes evidence was prejudicial. *Id*.

Here, too, evidence of the prior break-in of the upstairs apartment at Storage USA and the photos of the damaged patio door and lock were not relevant to proving any issue relating to the charged offense. The State could not connect the prior break-in to Winfrey (Tr. 640-41). No evidence connected it to the robbery of Storage USA two months later (Tr. 640-41). Like *Strickland*, where the attempted robbery next door was inadmissible, the attempted burglary in the upstairs apartment was inadmissible. The State showed no connection to the charged offense or to Winfrey. But, like *Strickland* and *Summers*, the other crimes evidence was highly prejudicial, especially since the State showed photographs of the prior offense – shattered glass and a broken lock.

This Court should reverse and remand for a new trial.

XI. Evidence of Other Crimes: Winfrey's Car Broken Into at Towing Lot

The trial court abused its discretion in overruling defense objections to testimony that someone broke into Winfrey's car while it was on the towing lot and it was the only car broken into, because this denied Winfrey due process, a fair trial, and his right to be tried only for the charged offense, U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, §§10, 17 and 18(a), in that this evidence suggested Winfrey committed this crime to tamper with evidence, but nothing tied him to the offense. Since this evidence was more prejudicial than probative and was not legally relevant, the trial court erred in not excluding it.

Detective Rimiller testified that Don Grosvenor of Five Star Auto repossessed Winfrey's car because he was behind in his payments (Tr. 958). The car was towed (Tr. 958). Rimiller located the automobile at Al's Towing (Tr. 962). Rimiller testified, over defense objection, that someone had broken into the lot and broke the windows on Winfrey's car (Tr. 962). Winfrey's car was the only car broken into on the lot (Tr. 962).

Like the break-in of the upstairs apartment (Point IX), nothing tied what happened on the towing lot to Winfrey. Yet, the State introduced this other crimes evidence to suggest that Winfrey had tampered with the evidence. The trial court erred in admitting this evidence.

As discussed fully in Points IV-X, this Court should subject the trial court's admission of other bad acts to rigid scrutiny and presume prejudice. *Bernard*, 849

S.W.2d at 13; *Davis*, 211 S.W.3d at 88; and *Randolph*, 698 S.W.2d at 541. *See*, Sixth and Fourteenth Amendments, U.S. Const.; and §§10, 17, 18(a), Mo. Const.

Like *Strickland* and *Summers, supra*, the Court should not admit evidence of crimes unless they are relevant to some question at issue. Here, no evidence showed that Winfrey broke into his car while it was on the towing lot. Winfrey had consented to officers searching the car days earlier and the State adduced testimony about the items they found. Nothing in the car linked Winfrey to the Storage USA robbery. Since it lacked evidence showing Winfrey's guilt, the State turned to other crimes evidence to prejudice Winfrey.

This Court should reverse and remand for a new trial.

CONCLUSION

Mr. Winfrey's case has all too common errors that lead to the wrongful conviction of innocent people: racial bias, snitch testimony and exclusion of evidence that someone else committed the crime. The trial court's errors denied Mr. Winfrey a fair trial. As a result, for all the reasons set forth in Points I-XI, Mr. Winfrey respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Melinda K. Pendergraph, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, table of contents, table of authorities, the signature block, this certificate of compliance and service, and the appendix, the brief contains 19,537 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan, updated in August, 2010. According to that program, these disks are virus-free.

On the 9th day of August, 2010, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were hand-delivered to the Office of the Attorney General, Criminal Appeals Division, 221 W. High Street, Jefferson City, MO 65102.

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Melinda K. Pendergraph

APPENDIX

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