

**IN THE  
MISSOURI SUPREME COURT**

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<b>STATE OF MISSOURI,</b>	)	
	)	
<b>Respondent,</b>	)	
	)	
<b>vs.</b>	)	<b>No. 90830</b>
	)	
<b>ERIC D. WINFREY,</b>	)	
	)	
<b>Appellant.</b>	)	

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**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**

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**SUBSTITUTE REPLY BRIEF**

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**CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	1
JURISDICTIONAL AND FACT STATEMENTS .....	4
ARGUMENT	
I. Batson Objection.....	5
II. Prison Informant – Limiting Cross-Examination .....	11
III. Justin Lewis’ Admission That He Shot The Victim .....	17
IV. Evidence of Other Crimes .....	22
CONCLUSION .....	29
CERTIFICATE OF COMPLIANCE AND SERVICE .....	30

**TABLE OF AUTHORITIES**

page

**CASES:**

*Batson v. Kentucky*, 476 U.S. 79 (1986) ..... 5, 6, 7, 8

*Chambers v. Mississippi*, 410 U.S. 284 (1973)..... 19, 21

*Holmes v. South Carolina*, 547 U.S. 319 (2006) ..... 17, 20, 21

*Miller-El v. Dretke*, 545 U.S. 231 (2005) ..... 5, 6, 7, 8, 9, 10

*Mitchell v. Kardesch*, 313 S.W.3d 667 (Mo. banc 2010) ..... 15

*Reasonover v. Washington*, 60 F.Supp.2d 937 (E.D. Mo. 1999)..... 14, 15

*Snyder v. Louisiana*, 552 U.S. 472 (2008)..... 5, 6, 7, 8, 9, 10

*State v. Boyd*, 143 S.W.3d 36 (Mo. App. W.D. 2004)..... 19

*State v. Burrage*, 258 S.W.3d 560 (Mo. App. S.D. 2008) ..... 8

*State v. Chambers*, 234 S.W.3d 501 (Mo. App. E.D. 2007)..... 19

*State v. Childs*, 257 S.W.3d 655 (Mo. App. W.D. 2008) ..... 19

*State v. Comte*, 141 S.W.3d 89 (Mo. App. S.D. 2004) ..... 19

*State v. Davis*, 211 S.W.3d 86 (Mo. banc 2006)..... 23

*State v. Garrett*, 226 S.W. 4 (Mo. 1920)..... 25

*State v. Gibson*, 636 S.W.2d 956 (Mo. banc 1982) ..... 19

*State v. Harlow*, 327 Mo. 231, 37 S.W.2d 419 (1931) ..... 15

*State v. Irby*, 423 S.W.2d 800 (Mo. 1968)..... 15

*State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006)..... 5, 6, 7, 8, 9

<i>State v. McFadden</i> , 216 S.W.3d 673 (Mo. banc 2007).....	5
<i>State v. Perkins</i> , 753 S.W.2d 567 (Mo. App. E.D. 1988) .....	27
<i>State v. Plummer</i> , 860 S.W.2d 340 (Mo. App. E.D. 1993).....	9
<i>State v. Roberts</i> , 948 S.W.2d 577 (Mo. banc 1997) .....	27
<i>State v. Shurn</i> , 866 S.W.2d 447 (Mo. banc 1993) .....	25
<i>State v. Twenter</i> , 818 S.W.2d 628 (Mo. banc 1991).....	26, 27
<i>State v. Williams</i> , 18 S.W.3d 461 (Mo. App. E.D. 2000) .....	23
<i>State v. Williams</i> , 24 S.W.3d 101 (Mo. App. W.D. 2000).....	9
<i>Stipp v. Tsutomi Karasawa</i> , 318 S.W.2d 172 (Mo. 1958).....	19
<i>Vollbaum v. State</i> , 833 S.W.2d 652 (Tx. App. 1992) .....	13

**CONSTITUTIONAL PROVISIONS:**

Mo. Const., Art. I, Sec. 2 .....	5
Mo. Const., Art. I, Sec. 10 .....	5, 17, 22
Mo. Const., Art. I, Sec. 17 .....	22
Mo. Const., Art. I, Sec. 18(a).....	5, 17, 22
U.S. Const., Amend. VI .....	5, 17, 21, 22
U.S. Const., Amend. XIV .....	5, 17, 21, 22

**STATUTES:**

Section 217.690.2 .....	12
-------------------------	----

**RULES:**

Rule 30.06(e)..... 8

**OTHER:**

“Procedures Governing the Granting of Paroles and Conditional Releases,”

available at: <http://doc.mo.gov/documents/prob/Blue%20Book.pdf>

..... 12

## **JURISDICTIONAL AND FACT STATEMENTS**

Appellant, Eric Winfrey, adopts the Jurisdictional Statement and the Statement of Facts in his original brief.

## **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 Mr. Winfrey and Ms. Birk’s rights to equal protection, and Mr. 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 Mr. 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 State’s 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.**

This Court’s review of Mr. Winfrey’s *Batson* claim is governed by United States Supreme Court precedent and this Court’s own decisions. Accordingly, Mr. Winfrey discussed *Snyder v. Louisiana*, 552 U.S. 472, 476-477 (2008), *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005), *State v. McFadden*, 191 S.W.3d 648, 651 (Mo. banc 2006), and *State v. McFadden*, 216 S.W.3d 673, 676 (Mo. banc 2007) in his opening brief. The State does not discuss any of these cases or attempt to distinguish them in any way (Resp. Br. 27-41). Had the State consulted these governing

principles, it would have discovered that Mr. Winfrey's *Batson* claim is preserved for review and merits relief.

### **What is Review for Clear Error?**

When this Court reviews for clear error, what should the Court review? The State suggests that the entire transcript of the voir dire is off-limits (Resp. Br. 28-29). Instead, this Court should only look at the parties' statements' during the *Batson* challenge (Resp. Br. at 29). The United States Supreme Court has rejected the State's argument. When "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. at 239. And, contrary to the State's suggestion that the reviewing court is limited to a review of the parties' arguments during the *Batson* hearing, the Supreme Court has ruled that a reviewing court must review the entire record before it. *Snyder*, 552 U.S. at 482, 483, n.2 (responding to dissent's criticism that similarly situated white jurors were not mentioned in the parties' argument before the trial court). Similarly, in *McFadden-I*, 191 S.W.3d at 651-657, this Court reviewed the entire record of voir dire in determining whether similarly situated white jurors were stricken.

Thus, when this Court reviews the prosecutor's stated reasons for striking Ms. Birk, it must review her voir dire responses to determine whether the prosecutor's reasons are supported by the record. A prosecutor's stated reason that "does not hold up" under a review of the record is evidence of pretext. *Snyder*, 552 U.S. at 485,

quoting *Miller-El*, 545 U.S. at 252. Here, the stated reason, that Birk had a sister currently in jail does not hold up. It is unsupported by the record (Tr. 91-92) and is evidence of pretext.

In reviewing a *Batson* claim, courts routinely determine whether similarly situated white jurors were stricken. *Snyder*, *Miller-El*, and *McFadden-I*. In all these cases, the United States Supreme Court and this Court reviewed the transcript of voir dire to determine the presence of similarly situated jurors. But, the State criticizes this practice, calling it “combing” the transcript or “post-ad hoc record mining” (Resp. Br. at 32, 33). Here, a fair review of the similarly situated white jurors identified by trial counsel shows that the State discriminated in striking Birk. Her sister had been convicted of a crime, but was not currently in jail (Tr. 91-92). A review of the three white jurors identified by defense counsel as similar show:

TRITSCH: son was convicted of a crime and had spent a couple of months in jail (Tr. 93-94);

PRICE: cousin convicted of murder and currently serving time (Tr. 98);

KRAUSZ: brother and mother were convicted, but transcript does not show whether they were currently in jail (Tr. 96).

Reviewing these three jurors’ voir dire responses is not a combing of the transcript in search of other jurors that might have been similar. The three jurors’ responses are not post-ad hoc record mining, since trial counsel presented them to the trial court as similarly situated jurors at the time of his *Batson* objection. (Tr. 232-234). He read

from his notes of the voir dire (Tr. 232, 233, 234). Mr. Winfrey has raised no new claims about these jurors on appeal, but simply referenced the record to support trial counsel's arguments made below, something he is required to do by this Court's rules of appellate procedure. *See* Rule 30.06(e).

In reviewing for clear error, the State suggests that this Court cannot consider whether the prosecutor questioned the prospective jurors on the area of his purported concern because trial counsel did not raise this below (Resp. Br. at 28-29). Again, this Court has ruled otherwise. *McFadden-I*, 191 S.W.3d at 653-654 (The State's failure to engage in meaningful voir dire on a subject it alleges it is concerned about is evidence suggesting that "the explanation is a sham and pretext for discrimination," *quoting Miller-El*, 125 S.Ct. at 2328).

*Snyder, Miller-El and McFadden-I* establish that Mr. Winfrey's *Batson* claim is properly preserved for review. Defense counsel objected to the strike of Birk and identified three similarly situated white jurors not stricken. The record supports defense counsel's case of purposeful discrimination and defeats the State's purported reason for his strike and his attempt to distinguish these jurors.

The State cites three<sup>1</sup> cases for its argument that Mr. Winfrey's claim is not preserved for review (Resp. Br. at 29). They do not support the State's argument and

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<sup>1</sup> Appellant discusses two of the three cases cited by the State. *State v. Burrage*, 258 S.W.3d 560 (Mo.App.S.D. 2008) did not address a *Batson* issue.

are distinguishable. But, to the extent that these lower court decisions can be read to conflict with *Snyder*, *Miller-El*, and *McFadden-I*, they should not be followed.

In *State v. Williams*, 24 S.W.3d 101 (Mo. App. W.D. 2000), counsel objected to the State's peremptory strike, the state offered several explanations for the strike, including that he did not want divorced people in a child homicide case, and then the trial court asked defense counsel if he had anything to add. *Id.* at 121. Counsel responded, "nothing to add, your Honor." *Id.* The divorce reason was unsupported by the record. *Id.* The Court of Appeals denied the claim, because Williams' counsel did nothing to show pretext and did not preserve the claim for review. *Id.* He proffered no evidence that the State's reason was pretextual. *Id.* By contrast, Winfrey's counsel disputed the prosecutor's reason, identifying three similarly situated white jurors who were not stricken.

In *State v. Plummer*, 860 S.W.2d 340 (Mo. App. E.D. 1993), defense counsel also failed to counter the State's explanation for its strikes, saying: "I again raise my objection to their being taken off the panel based on the reasons offered by the State." *Id.* at 345. Plummer's counsel gave no grounds for his objection and made no attempt to show that the state's reasons were pretextual. *Id.* The general statement was the equivalent of a failure to respond. *Id.* Winfrey's counsel, on the other hand, provided compelling evidence of pretext, three similarly situated non-African American jurors.

Acknowledging that "the prosecutor was incorrect" (Resp. Br. at 35) and his reason was "based upon a faulty premise . . ." (Resp. Br. at 35), the State now makes

the novel argument that this Court should not review the claim based on the record. Instead, the State asks this Court to find the prosecutor's stated reason was based on an "honest mistake" (Resp.Br. 30). The State goes so far as to assert that "the trial court was required to assume the prosecutor's statements were true" (Resp. Br. at 30). *Snyder* and *Miller-El* ruled just the opposite. A trial judge's findings must have record support. Otherwise, the State could always argue "mistake" on appeal, rendering the rights to equal protection and a jury free from discrimination illusory.

Here, the trial judge credited the prosecutor's reasons unsupported by the record. (Tr. 237). The court did not find he was "simply mistaken" and that he had a "mistaken recollection of the voir dire." This Court should review the trial judge's findings for clear error, not attribute the motive of an innocent mistake to the prosecutor for the first time on appeal. Since the prosecutor's reasons are unsupported by the record and similarly situated white jurors were not stricken, this Court 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 this evidence was relevant in determining Covington’s bias and motive to testify since 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. Further, Covington’s disciplinary violations for making false statements and lying to guards were relevant to impeach Covington on his character for truth and veracity. Winfrey was prejudiced because 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.**

The trial court limited Mr. Winfrey’s cross-examination of the State’s jailhouse informant, Kevin Covington. He had testified on direct examination that he was paroled on the merits of his case, not because the prosecutor had asked for this benefit in exchange for his cooperation (Tr. 1266). Whether this testimony was true necessarily required a look at his prison record and his conduct there. Covington had been disciplined for lying to guards or other correctional staff (Tr. 1317). He had 35 or 36 conduct violations since his incarceration in September of 1999 (Tr. 1317). The

violations included having contraband, lying to staff, and giving false information (Tr. 1317).

The State suggests that Covington's behavior in prison was not necessarily related to his parole (Resp. Br. at 49). Section 217.690.2, RSMo 2006, provides that parole should be granted only after a hearing and when it is in the best interest of society. The statute states, that "an offender shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen." *Id.* The Department of Corrections has enacted "Procedures Governing the Granting of Paroles and Conditional Releases."<sup>2</sup> The Procedures require consideration of past and present incarcerations and patterns of behaviors. *Id.* at 4. The parole hearing panel is specifically directed to review conduct violation history. *Id.* at 4, citing Rule 3.B (2). Thus, while the board is not directed to give particular weight to conduct violations, they are to be considered in deciding whether an inmate should be paroled.

The State also argues that evidence of 35 or 36 conduct violations was inadmissible without their "factual underpinnings" (Resp. Br. at 44). But, this claim is contrary to the State's concern that evidence of conduct violations would turn the trial into a "mini-trial" on Covington's bad behavior in prison (Resp. Br. at 46). Defense counsel sought a proper balance offering Covington's sworn deposition

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<sup>2</sup> The procedures can be found at:

<http://doc.mo.gov/documents/prob/Blue%20Book.pdf>

testimony that he had been disciplined for lying to guards and corrections staff, that he had received 35 or 36 conduct violations during this particular incarceration of September of 1999, and that the conduct violations were for contraband, lying to staff, and giving false information (Tr. 1317). This offer of proof shows that the number and types of conduct violations were relevant to whether Covington would be paroled absent the help of the prosecutor in Mr. Winfrey's case. But, the details were not so prejudicial as to turn the trial into a mini-trial on Covington's prison behavior.

The State argues that since the witness "volunteered" the information and the prosecutor did not elicit it, the State did not open the door (Resp. Br. 48). In support of this argument, the State cites to a Texas intermediary court, *Vollbaum v. State*, 833 S.W.2d 652 (Tx. App. 1992).<sup>3</sup>

Even if this Court were to rely on *Vollbaum*, it would find it readily distinguishable. There the defendant testified at trial. *Id.* at 658-59. On cross-examination, the defendant was non-responsive to the State's questioning him about physical evidence. *Id.* Based on the *defendant's* own unresponsive answer, the defendant then tried to argue that the State had opened the door to evidence about why he saw a family doctor. *Id.* The Court of Appeals ruled that the defendant's non-responsive answer did not open the door to this information. *Id.* at 659.

By contrast, here, the State's own witness volunteered that he was being paroled on the merits, thereby opening the door to questions about the actual merits of

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<sup>3</sup> Noteworthy is the State's failure to cite any Missouri authority for this proposition.

his being paroled. The State never explains how a defendant is any less prejudiced when the witness volunteers an untruthful statement than had the State elicited the testimony. The State never explains why a state witness should be allowed to volunteer false statements without correction.

The State also suggests that Covington's lies to correctional officers and his prior false statements had little value on the issue of his truthfulness (Resp. Br. at 46). Mr. Winfrey disagrees. That a snitch witness had repeatedly lied to law enforcement in an effort to benefit himself is directly relevant to whether he should be believed when testifying at trial. Snitch witnesses often testify that an accused gave them a detailed confession convincing a jury to convict. *See e.g. Reasonover v. Washington*, 60 F.Supp.2d 937, 943-944, 944-945 (E.D. Mo. 1999). In *Reasonover*, exculpatory tape recordings showed the snitch witnesses lied to the jury. *Id.* Such tapes are rarely available to establish the truth. Accordingly, defense counsel must be allowed to cross-examine the witness on his prior false statements to law enforcement and his disciplinary violations for lying to show his character for truth and veracity. As this Court stated:

The reason for allowing evidence of a witness's character for truth and veracity, while generally not allowing evidence of a bad general moral character, is that a witness's character for truth and veracity does not put the witness's *overall character* in issue, but rather only the witness's *credibility*-the ultimate issue.

*Mitchell v. Kardesch*, 313 S.W.3d 667, 677 (Mo. banc 2010), *citing State v. Harlow*, 327 Mo. 231, 37 S.W.2d 419, 421 (1931).

Here, Covington's credibility was the ultimate issue. The prosecutor wrote the parole board and told it that without Covington's testimony, the State would not have been able to indict Mr. Winfrey and his testimony was critical for obtaining a conviction (Ex. 232). But, now the State argues that his testimony was not necessary for conviction (Resp. Br. at 45-46). The prosecutor was correct. Without Covington, the State did not have a case. The State had no physical evidence or eyewitness placing Winfrey at the scene. At most, it established a financial motive for the robbery, opportunity and suspicion of guilt, which is insufficient to convict. *Cf. State v. Irby*, 423 S.W.2d 800, 803 (Mo. 1968) (citing numerous cases reversing convictions of persons at or near the scene of the crime under suspicious circumstances in which the accused had an opportunity to commit the offense).

The State alleges that Covington's testimony is reliable because Mr. Winfrey is the one who provided the information to him (Resp. Br. at 50, n. 11). That is what Covington alleged, but Mr. Winfrey disagrees. Snitches often obtain information from criminal discovery in a cell, from overhearing conversations, or from State investigators who feed them information. The two snitch witnesses in *Reasonover*, *supra*, provided detailed, convincing confessions, even though Reasonover was later found to be innocent. *Reasonover*, 60 F. Supp.2d at 943-94. That is why snitch testimony is a leading cause of wrongful convictions (App. Br. at 54, n. 9 and 10).

The trial court abused its discretion in limiting Mr. Winfrey's cross-examination of Covington. The jury should have been informed about his conduct violations, showing he was not paroled on the merits, but because of his cooperation with the State. As Covington put it:

“Now if you want a solid conviction then that's what you'll get, nothing less, but once again we live in a world of give and take. Lets talk soon . . . . .”

(Ex. 184, Covington's letter to Detective Harvey).

This Court should reverse and remand 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; and nothing justified the exclusion of relevant and probative evidence necessary to Winfrey's defense.**

When responding to the Mr. Winfrey's argument that the trial court erred in not allowing him to cross-examine Justin Lewis with his admission that he shot the victim, the State omits any reference to *Holmes v. South Carolina*, 547 U.S. 319 (2006) and ignores the trial court's blanket exclusion of this evidence because Lewis was not a party to the case (Tr. 1069) (Resp. Br. at 52-61). Both *Holmes* and the full record are necessary for a proper review of Mr. Winfrey's claim.

The State's argument fails to address the unfairness of an arbitrary evidentiary rule that excludes evidence of another's guilt (Resp. Br. at 52-61). Instead, it repeatedly criticizes defense counsel for failing to lay a foundation for Lewis' admission – citing counsel's failure to ask Lewis whether he shot the victim (Resp.

Br. at 52, 56, 58). The State also criticizes Mr. Winfrey's failure to call to testify Nick Reynolds, the person to whom Lewis confessed (Resp. Br. at 55).

The State ignores that Judge Rauch would not allow defense counsel to lay such a foundation. The State filed a motion in limine to exclude evidence that someone other than Winfrey committed the crime (L.F. 14, Tr.243-44). The trial court sustained the State's motion to exclude any evidence of another's guilt (L.F. 14, Tr. 243-44, 246). So, in an attempt to comply with the trial court's ruling, defense counsel did not ask Lewis about his admission to the crime, but approached the bench and, outside the jury's hearing, asked permission to question Lewis about his prior admission to Nick Reynolds that he had shot the victim (Tr. 1068). The court ruled it would not allow this questioning, because there was no independent evidence of Lewis' guilt and Lewis was not a party to the case (Tr. 1069). Given the court's blanket exclusion, defense counsel was hardly in a position to lay a foundation that the State advocates on appeal (Resp. Br. at 55, 56, and 58).

The State also criticizes Mr. Winfrey's offer of proof: "Did you tell Nick Reynolds that you shot the guy at Storage USA?" (Tr. 1068). According to the State, this question did not identify the evidence Mr. Winfrey was seeking to admit (Resp. Br. at 54). This argument borders on absurdity – counsel wanted to show that Lewis admitted to committing the crime. The pretrial hearing on the state's motion in limine and the trial record put both counsel and the trial court on notice of the intention to present evidence of a third person's guilt.

Rather than address the merits, the State focuses on hyper-technical arguments to deny Mr. Winfrey relief. According to the State, the “narrative” offer was inadequate (Resp. Br. at 53, *citing State v. Chambers*, 234 S.W.3d 501, 511 (Mo. App. E.D. 2007) and *State v. Childs*, 257 S.W.3d 655, 658 (Mo. App. W.D. 2008)). The State’s argument should be rejected.

The purpose of an offer of proof is to insure the trial court and opposing counsel understand what evidence is being offered and its relevance to the case. *Stipp v. Tsutomi Karasawa*, 318 S.W.2d 172, 175 (Mo. 1958). If an offer clearly states exactly what the proponent proposes to adduce, the appellate court should review the claim on the merits. *Stipp, supra* at 175. An adequate offer of proof should demonstrate relevance, be specific and definite. *State v. Gibson*, 636 S.W.2d 956, 958-59 (Mo. banc 1982).

The preferred method of making an offer of proof is to question the witness on the stand out of the jury’s hearing. *State v. Comte*, 141 S.W.3d 89, 93-94 (Mo. App. S.D. 2004). But, counsel’s narrative is permissible if it is definite, specific and not conclusory. *Id.* If the State does not object at trial to an inadequate offer of proof, it should not be heard to complain on appeal. *State v. Boyd*, 143 S.W.3d 36, 45-46 (Mo. App. W.D. 2004).

Here, the State made no objection to defense counsel’s offer of proof at trial, so it should not be heard to complain on appeal. Both the trial court and the prosecutor knew counsel proposed to cross-examine Lewis with the following question:

“Did you tell Nick Reynolds you shot the guy at Storage USA?”

(Tr. 1070). The State’s argument, made for the first time on appeal, that the offer of proof was insufficient should be rejected (Resp.Br. 53-54).<sup>4</sup> The specific question establishes what evidence counsel sought to admit.

The State suggests that the trial judge properly excluded Lewis’ “admission” because Lewis was not “a party, he’s a witness” (Tr. 1069). The Supreme Court rejected this suggestion in *Holmes, supra*. There, the petitioner sought to introduce proof that another man, Jimmy McCaw White, had committed the crime. *Id.* at 323. The evidence of White’s guilt was his admissions. He had either “acknowledged that petitioner was ‘innocent’ or had actually **admitted** to committing the crimes.” *Id.* (emphasis added). Justice Alito, writing for a unanimous court, ruled that a third party could “admit” to a crime and provide evidence of the third-party’s guilt. *Id.* Under the facts of *Holmes*, one need not be a party to the case for his “admission” of guilt to be admissible. Such arbitrary hearsay rules cannot trump a defendant’s constitutional right to have “a meaningful opportunity to present a complete defense.” *Holmes, supra* at 331.

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<sup>4</sup> Mr. Winfrey believes this claim is fully preserved for review. But, if this Court disagrees, he respectfully requests plain error review under Rule 29.12(b). The exclusion of another person’s guilt is harmful error resulting in a manifest injustice. The exclusion violates an accused’s constitutional rights, *Holmes v. South Carolina*, 547 U.S. 319 (2006), and can lead to wrongful convictions (App. Br. at 69, n. 12).

The State also suggests that Mr. Winfrey failed to demonstrate the alleged statement was sufficiently reliable under *Chambers v. Mississippi*, 410 U.S. 284 (1973) (Resp. Br. at 59, n. 15). The State again ignores that in *Holmes, supra*, the Supreme Court did not apply *Chambers*' three-part reliability test before reversing. The Supreme Court never reviewed the third-party admissions for reliability, because like here, the South Carolina trial judge made a blanket ruling that any evidence of a third party's guilt would be excluded. *Holmes, supra* at 323-324. The Supreme Court ruled that evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve'" violate the constitutional right to present a complete defense under the Due Process Clause of the Fourteenth Amendment or the Compulsory Process or Confrontation Clauses of the Sixth Amendment. *Id.* at 324 (citations omitted). The trial court arbitrarily excluded any evidence of another's guilt and any admission not made by a party to the case. Under *Holmes*, this Court should find error, reverse and remand for a new trial.

#### **IV. Evidence of Other Crimes and Bad Acts<sup>5</sup>**

**The trial court abused its discretion in overruling defense objections to testimony and exhibits that Mr. Winfrey:**

- stole rental furniture;**
- failed to pay for his utilities and fraudulently obtained services;**
- filed false police reports;**
- stole a car;**
- wrote bad checks; and**
- left his apartment with a razor blade and voluntarily checked himself into a psychiatric hospital;**

**because this denied Mr. 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 other crimes evidence, some which occurred after the charged offense, did not prove Winfrey's motive to commit the robbery.**

**Even if some of the evidence did have a tendency to prove a financial motive to commit the crime, the evidence was more prejudicial than probative because it was not specifically tied to the robbery at Storage USA, it was overused, and the State had other evidence of financial motive and did not need to present the other crimes evidence.**

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<sup>5</sup> Since the State responded to Points IV-IX in one point, Winfrey replies to the State's argument in Point IV in a single point.

The State suggests that trial courts have “wide latitude” to allow motive evidence even where it includes other crimes evidence (Resp. 64-65). The State ignores that this Court has ruled otherwise. Courts should subject its admission to rigid scrutiny. *State v. Davis*, 211 S.W.3d 86, 88 (Mo. banc 2006).

Even where the other crimes evidence is relevant, the probative value of evidence must not be outweighed by its tendency to create undue prejudice in the mind of the jury. *Id.* Here, the trial court did not properly weigh the probative value of all the other crimes against its prejudice and the State advocates such rule on appeal, “[i]f evidence of uncharged crimes is relevant for some purpose, the evidence should not be rejected merely because it incidentally shows the accused to be guilty of another crime.” (Resp. Br. at 64-65, *quoting State v. Williams*, 18 S.W.3d 461, 467 (Mo. App. E.D. 2000)). The State argues that since the other crimes evidence here had logical relevance to motive, it should be admissible, without further analysis for legal relevance – the probative value versus the prejudice (Resp. Br. at 65-67).<sup>6</sup>

The State did not make isolated references to Winfrey’s dire financial situation. It introduced the evidence through multiple witnesses and exhibits: gambling

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<sup>6</sup> The Court of Appeals’ per curiam opinion also cited *Williams, supra* and determined since the evidence established a motive to commit the crime, it was admissible (slip op. at 12). But, the State’s and the Court of Appeals’ cursory treatment is flawed, because the relevance for motive is only the beginning of the inquiry, the legal relevance must also be established.

(Tr.785-89,795-96, 1439, Exs. 54, 55, 55A , 68); payday loan debts and his negative checking balances (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 caused them (Ex.172, Tr.923, 925, 952-53). Detective Rimiller, Deputy Harvey, and Harris testified about the financial problems at length (Tr.923, 947-953, 1108-1114, 1416-1419, 1439).

Given the extensive evidence of Winfrey's bad financial state, why did the State need to show that Winfrey stole rental furniture after the offense, failed to pay his utility bills and fraudulently obtained services after the offense, filed false police reports, stole a car, wrote bad checks, and months before the charged offense had argued with his girlfriend, displayed a razor blade, and went to a psychiatric hospital? These crimes and bad acts were extremely prejudicial.

Contrary to the State's representations (Resp.Br. 69), the trial judge did not limit the other crimes evidence to those occurring immediately before the crime, despite her pretrial assurances that it would do so (Tr.271, 274). During the trial, when the State offered evidence of other crimes occurring months after the offense, the trial court overruled Winfrey's objections (Tr.1418-1419). Winfrey moved after the offense and took unpaid rental furniture with him. Stealing rental furniture after the charged offense had no relevance to the charged offense.

Similarly, Detective Harvey repeatedly testified Winfrey's "common practice" was to not pay his utility bills and then he would move (Tr.1417-18, 1418). This

evidence was not limited to what occurred before the crime. Despite her earlier pretrial ruling, the trial court again overruled Winfrey's objections to this other crimes evidence regarding his utilities (L.F.39,40, Tr.271-72,274,909-10,910-11,1393-94,1417-18).

The trial court also failed to limit the State's admission of Winfrey filing 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, not placing any time frame on these crimes (Tr. 907, 947). Rimiller highlighted details from the reports in his testimony (Tr. 947-949). Like the "common practice" of stealing utilities, Rimiller's reference to "several instances" of filing false reports over time established his propensity to steal, rather than his motive for the Storage USA robbery. The State fails to address the evidence of filing false police reports (Resp. Br. at 62-70).

The State relies on *State v. Shurn*, 866 S.W.2d 447, 457 (Mo. banc 1993) (Resp. Br. 45). *Shurn* does not support the admission of other crimes evidence. There, state witnesses established that the victim, Charles Taylor, was a potential witness in the trials of Shurn's brothers, Charles and Larry. *Shurn*, 866 S.W.2d at 457. This evidence was relevant to establish Shurn's motive for killing Taylor. *Id.* The victim's status as a witness was not other crimes evidence.

Similarly, in *State v. Garrett*, 226 S.W. 4, 7 (Mo. 1920), cited by the State (Resp. Br. at 65), the motive evidence was not evidence of other crimes. The

evidence showed the deceased kept considerable sums of money on her person and at her house, and defendant knew this. *Id.* The Court found this relevant motive evidence. *Id.* Additionally, the defendant's financial condition immediately before and after the homicide was relevant. *Id.* That a defendant is penniless before a crime, but then flush with money similar to what the victim had immediately thereafter, is relevant to show his motive to rob the victim. *Id.*

The State introduced similar evidence motive evidence in Winfrey's case. It established the amount of the money kept at Storage USA and Winfrey's knowledge of that money. Winfrey did not object to this legitimate evidence. He objected to the other crimes evidence.

The State also relies on *State v. Twenter*, 818 S.W.2d 628 (Mo. banc 1991) (Resp. Br. 65). The defendant had borrowed money from the victim and shortly before the crime was demanding repayment. *Id.* at 631. The State introduced evidence that Twenter's car was repossessed; she received a notice of intent to foreclose on her home; and only five days before the murder, she bought a new car with a check returned for insufficient funds. *Id.* All of this evidence was properly admitted to show her motive for the killing and stealing checks from the victim and his family. *Id.* Twenter raised no issue related to all this evidence regarding her financial condition. *Id.*

The issue raised in Twenter's appeal was whether the trial court abused its discretion in denying a mistrial when an audiotape of a witness was played for the

jury. *Id.* at 633. An officer asked: “Why should she-if she did it, why would she kill her own parents” and the witness responded: “Only thing I can think of is the money that she’s gotten.” *Id.* The trial judge listened to the tape recording three times in chambers and ruled it was not audible. *Id.* Further, this statement merely repeated what was already established through other evidence. *Id.* Under these circumstances, the trial court did not abuse its discretion in denying a mistrial. *Id.*

As in *Twenter*, the State presented much evidence of Winfrey’s financial problems without objection. Winfrey’s car was repossessed, he obtained loans to make ends meet, he gambled, he was in severe debt, and he fought with his girlfriend about finances. But, the trial court did not limit the State to this legitimate evidence, but also allowed other crimes to be admitted. This was the error.

Finally, the State argues that since the other crimes evidence came from Winfrey’s own admissions to police officers, they are admissible (Resp.Br. 63-64). A defendant’s admission overcomes a hearsay objection, but it does not address the other crimes error. Courts should excise evidence of other crimes from a defendant’s statement to police. *See, State v. Roberts*, 948 S.W.2d 577, 591 (Mo. banc 1997) (the trial court erred in failing to sustain defense motion to excise portions of the videotape statement to police that included inadmissible evidence of other crimes). *See, also, State v. Perkins*, 753 S.W.2d 567, 573-75 (Mo. App. E.D. 1988) (the trial court erred in admitting recorded conversation of the defendant and his brother that included references to other crimes).

This Court should review the evidence of other crimes and weigh its prejudice against its probative value. A review of the legitimate evidence of motive and the other crimes evidence shows the prejudice.

**Other Crimes:**

- ✓ Stole rental furniture
- ✓ Failed to pay for utilities and fraudulently obtained services
- ✓ Filed false police reports
- ✓ Stole a car
- ✓ Wrote bad checks
- ✓ Left apartment with razor blade and checked himself into a psychiatric hospital
- ✓ Prior Burglary and Car Break-In

**Bad Finances Properly Admitted:**

- ✓ Gambling
- ✓ Loans
- ✓ Bank accounts with negative balances
- ✓ Behind on car payments and car repossessed
- ✓ Behind on rent and being evicted from apartment
- ✓ Arguments with girlfriend about finances

Here, the State did not limit other crimes evidence to that strictly necessary to prove motive. The other crimes evidence was overused. Because the trial court failed to properly limit evidence of other crimes, this Court should reverse and remand for a new trial.

## **CONCLUSION**

For the reasons set forth in his original brief and his reply, 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, the signature block, and this certificate of compliance and service, the brief contains 6,162, which does not exceed the 7,750 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 September, 2010. According to that program, these disks are virus-free.

On the 9<sup>th</sup> day of September, 2010, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, 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

