

No. SC88409

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

WILLIAM T. WARD,

Appellant.

Appeal from St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable David Vincent, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant appeals a St. Louis County Circuit Court judgment convicting him on one count of Possession of a Controlled Substance with Intent to Distribute. Appellant was sentenced to six years in the Missouri Department of Corrections. After issuing an opinion indicating that it would affirm Appellant's conviction, the Missouri Court of Appeals, Eastern District, ordered this appeal transferred to this Court on the grounds of general interest and importance. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Rule 83.02.

STATEMENT OF FACTS

Appellant, William Ward, was charged as a prior offender with one count of Possession of a Controlled Substance with Intent to Distribute, § 195.211 RSMo 2000. (L.F. 14-5). Appellant's case went to trial before a jury on November 14, 2005, with the Honorable David Lee Vincent presiding. (Tr. 5). Viewed in the light most favorable to the verdict, the evidence at trial showed the following:

Around 1:00 p.m. on August 6, 2003, a St. Louis County Police officer patrolling Interstate 44 near Eureka, stopped a vehicle with a "02" sticker on the license plate. (Tr. 74-76). Suspecting that the out-of-state license tags were expired, the officer initiated a traffic stop. (Tr. 76).

Appellant was driving the vehicle, which carried two other passengers. (Tr. 76). The officer asked Appellant for his driver's license, and Appellant, whose hands were shaking "excessively," complied. (Tr. 77). While standing next to the driver's side window, the officer noticed a "very strong odor of raw marijuana emitting from the vehicle." (Tr. 77).

The officer then requested assistance from the department's canine unit. (Tr. 84, 122). After the dog "alerted to the vehicle for the presence of narcotics," the officer proceeded to open a luggage carrier on top of the vehicle and found a duffel bag containing a significant amount what appeared to be marijuana. (Tr. 85-6, 123-24). Later tests confirmed that the substance was marijuana; the total weight of the marijuana seized from Appellant's vehicle was 73.8 pounds. (Tr. 130).

One of the other passengers in the car, Anthony McMullin, testified against Appellant. (Tr. 130-1). McMullin said that he, Appellant, and another man had picked up

approximately \$30,000 worth of marijuana in Arizona and that they had been on the way back to New Jersey when they were stopped. (Tr. 133-4).

Appellant represented himself *pro se* with the assistance of standby counsel. (Tr. 5). Appellant was found guilty of possession of a controlled substance with intent to deliver. (Tr. 277; L.F. 52). The jury recommended a six-year term of imprisonment. (Tr. 291; L.F. 46). The trial court sentenced Appellant to six years imprisonment in accordance with the jury's verdict. (Tr. 317; L.F. 53).

ARGUMENT

I. (Defendant's refusal to swear or affirm)

The trial court did not clearly err in refusing to permit Appellant to testify because Appellant refused to make a statement or declaration, in any form, expressing that he understood the solemn duty of a witness to tell the truth, and that any testimony would be subject to the pains and penalties of perjury.

Appellant claims that the trial court “erred in denying defendant the right to testify as a witness in his own defense” (App. Br. 21). This claim is without merit inasmuch as Appellant refused to swear, affirm, or make some other solemn declaration that he would tell the truth, as required under § 491.380(2), RSMo 2000.

Furthermore, Appellant's Point Relied On, (App. Br. 19), is not in compliance with Rule 84.04, because Appellant failed to “state concisely the legal reasons for the appellant's claim of reversible error” and “explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.” Rule 84.04(d)(1). “Points relied on are critical and must be stated as specified in Rule 84.04(d).” *Storey v. State*, 175 S.W.3d 116, 126 (Mo. banc 2005). “A point relied on which does not state ‘wherein and why’ the trial court erred does not comply with Rule 84.04(d) and preserves nothing for appellate review.” *Id.*

A. Relevant Facts

Prior to the conclusion of the defense case in chief, Appellant discussed with the court whether he would be permitted to testify on his own behalf without swearing or affirming to tell the truth. Appellant declared that swearing or taking an oath would be “unacceptable to

me for any reason,” (Tr. 250-1). Appellant told the court that he would refuse to swear or affirm in any form whatsoever:

The Court: Okay. Mr. Ward, what you’re saying is that you do not want to take the oath so help you God or affirm under the pains and penalty of perjury before testifying; is that what you’re saying?

Appellant: I’m saying I’m a nonbeliever. I don’t believe in oaths, affirming to oath or anything else.

The Court: Do you have scruples? I think you have a conscience, a scruple against taking an oath or swearing in any form; is that correct?

Appellant: That’s correct.

The Court: Can you at least affirm to this statement under Section 492.030: You do solemnly declare and affirm, under the pains and penalty of perjury, that you will promise to tell the truth in this case?

Appellant: No, that means the same thing to me.

The Court: Is there any form that you can at least affirm or make some kind of indication --

Appellant: No, your Honor.

The Court: So there is no oath or no swearing of any form that you will permit before you testify; is that correct?

Appellant: That’s correct.

The Court: You’re not permitted to testify in this case, Mr. Ward, unless you do take some kind of oath or affirmance; do you understand that?

Appellant: Am I entitled to a closing statement?

The Court: Yes, sir. . . .

(Tr. 251-52).

B. The trial court did not err in refusing to allow Appellant to testify

Section 491.380(2), RSMo 2000, provides that all witnesses in Missouri courts must be sworn before testifying:

Every person offered as a witness, before any testimony shall be given by him, shall be duly sworn, or affirmed, that the evidence he shall give relating to the matter in issue between _____, plaintiff, and _____, defendant, shall be the truth, the whole truth, and nothing but the truth.

Section 491.380(2), RSMo 2000.

Recognizing that the customs and practices of some witnesses might conflict with the requirement of an “oath” or “swearing,” the Missouri legislature broadened the scope of acceptable witness affirmations in §§ 492.030, .040, .050, and .060.

In § 492.030, the legislature provided for a specific alternative to the traditional oath: Every person who shall declare that he has conscientious scruples against taking an oath or swearing in any form shall be permitted to make his solemn declaration or affirmation in the following form: “You do solemnly declare and affirm”, etc., concluding with the words “under the pains and penalties of perjury”.

Section 492.030, RSMo 2000.

Recognizing that perhaps even this very general affirmation would be unacceptable to some witnesses, the Missouri legislature further established that other methods of “oath-

taking” particular to the witness’s culture would be permitted, so long as that method is binding on the conscience of the witness:

Whenever the court or officer by whom any person is about to be sworn shall be satisfied that such person has any peculiar mode of swearing connected with or in addition to the usual form of administering oaths, which is to him of more solemn and binding obligation, the court or officer shall adopt that mode which shall appear to be most binding on the conscience of the person to be sworn.

Section 492.040, RSMo 2000.

Every person, believing in any other than the Christian religion, shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies.

Section 492.050, RSMo 2000.

Finally, in § 492.060, the legislature established that these alternative methods of “oath-taking” would be considered equal to the traditional method of swearing on a Bible.

Section 492.060, RSMo 2000.

This series of statutes illustrates the efforts made by the Missouri legislature in fashioning a system of oath-taking which minimizes the potential for conflict between § 491.380(2)’s requirement that witnesses be sworn in, and the particular belief system which might be held by a given witness.

The question before this Court is, essentially, whether to give practical effect to Missouri’s statutory requirement that a witness swear or affirm to tell the truth before testifying. Appellant asserts that the trial court unlawfully prevented him from testifying on his own behalf. (App. Br. 21). The record reflects, however, that the trial court carefully

followed the Missouri statutory provisions pertaining to the “swearing in” of a witness, and only refused to permit Appellant to testify once it became clear that no form of oath or affirmance would be acceptable to Appellant.

In his brief, Appellant attempts to portray the trial court as having callously disregarded his desire to testify.¹ The record illustrates, however, that the trial court made every attempt to reconcile Appellant’s unspecified belief system with the § 491.380(2) requirement that he be sworn before testifying.

Initially, the trial court questioned Appellant regarding the traditional oath format contained in § 491.380(2). (Tr. 251). Appellant responded, without further explanation, that he was a “non-believer” and did not “believe in oaths, affirming to oath, or anything else.” (Tr. 251). Accordingly, the trial court proceeded to offer Appellant the statutory alternative under § 492.030, where Appellant would “solemnly declare and affirm, under the pains and penalty of perjury, that [he would] promise to tell the truth.” (Tr. 252). Appellant declared that this alternative was unacceptable to him as well. (Tr. 252).

¹ Additionally, Appellant appears to call into question the trial court’s refusal given that Appellant was permitted to testify during a pre-trial hearing to determine his competency. (Tr. 15-16). The fact that Appellant was permitted to testify at this pretrial hearing is irrelevant to the question at hand. The oath-taking requirement of § 491.380(2) applies only to testimony given “relating to the matter in issue” between the plaintiff and the defendant, and was thus inapplicable to testimony given during a hearing to determine competency.

At this point, the trial court was in a somewhat difficult position. On the one hand, the trial court certainly understood the right of a defendant to testify in his own defense; on the other hand, the trial court was plainly aware of the statutory requirement that witnesses be sworn before testifying. Appellant never explained why he refused to swear to any oath or make any affirmation.² Up to this point, Appellant had told the trial court that the only statement he would make would be “I’ll tell the truth.” (Tr. 13, 249).

The trial court was undoubtedly aware that the oath-taking requirement would be satisfied under Missouri law if Appellant would simply make some statement indicating that his duty to tell the truth was a “solemn and binding obligation . . . most binding on [Appellant’s] conscience,” and that such a statement could be made “in whatever form.” *See* §§ 492.040 and 492.060. Lacking any suggestion from Appellant regarding the basis of his objection, the trial court asked Appellant, “Is there any form that you can at least affirm or make some kind of indication—”. (Tr. 252). Appellant at this point interrupted the court’s inquiry, emphasizing that there was no such form. (Tr. 252). Recognizing the importance of this issue, the trial court attempted to confirm its understanding of Appellant’s particular

² Appellant’s standby counsel told the trial court that even he was “not a hundred percent sure what his basis is of why he won’t take an oath.” (Tr. 250). Appellant’s standby counsel suggested that “I know he doesn’t want to take it under God, so help me God, but I think there is a way to do it without using the word God.” (Tr. 250).

belief system: “So there is no oath or no swearing of any form that you will permit before you testify; is that correct?” (Tr. 252). Appellant confirmed that this was the case. (Tr. 252).³

While Appellant objected to making an affirmation on what appear to be religious grounds, the alternative offered to Appellant was specifically non-religious. (Tr. 252). The only common trait shared by the traditional oath and the statutorily established affirmation would be a recognition on the part of the affiant that he or she would be bound in some way by the offered statement. From the totality of Appellant’s statements, it appears that the very binding nature of the statements, rather than any religious issue, provided the basis for Appellant’s objection.⁴ Appellant’s apparent desire to not be bound by his own statements undermines the sincerity of Appellant’s statement that he “would tell the truth,” given that there would be no reason to believe that Appellant would feel constrained to, in fact, tell the truth.

Missouri courts have emphasized that the particular form of the statement or declaration is secondary to the consideration of whether the statement indicates an

³ Additionally, while the jury was deliberating on the issue of Appellant’s guilt, the trial court once again attempted to clarify its understanding of Appellant’s position on oath-taking by asking, “And you could not do any oaths or any affirmations or anything that we already talked about like promises to speak the truth, you could not do that at all?” (Tr. 274-75). Appellant replied, “no.” (Tr. 275).

⁴ This is borne out by the fact that after Appellant refused to swear or affirm in any form, he asked the trial court whether he would be permitted to make a closing argument. (Tr. 252).

understanding of the solemn duty on the part of the witness to tell the truth. *State v. Bowlin*, 850 S.W.2d 116, 117 (Mo. App. S.D. 1993) (“No special litany is required in administering an oath. The important feature, regardless of the form of oath, is its quickening of the conscience of the witness and the liability it creates for the penalty of perjury.”); *See Kovacs v. Kovacs*, 869 S.W.2d 789, 792 (Mo. App. W.D. 1994); *see also State v. McClain*, 541 S.W.2d 351, 356 (Mo. App. S.D. 1976). While these cases may require a trial court to broadly interpret whatever declaration a witness might be willing to make, it nevertheless remains clear that a declaration of some kind must be made.

Admittedly, trial courts should be reluctant to refuse a defendant the opportunity to testify in his own defense. As the United States Supreme Court has noted, “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v. Mississippi*, 410 U.S. 284, 302 (1972). The Supreme Court further explained, however, that this right is not unlimited, and that “[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Id.* While Appellant was undoubtedly entitled to present the testimony of witnesses on his behalf—including his own testimony—he remained bound by the procedural requirement of § 491.380(2).

The record illustrates that the trial court in this case was faced with an uncooperative defendant who expressed an unwillingness to take a traditional oath, while at the same time interrupting the trial court’s inquiries. (Tr. 252). Appellant made no effort to assist the trial court in understanding the basis for this refusal, explaining his alleged belief system, or in

fashioning an alternative declaration. Appellant emphasizes in his brief that a witness's declaration may take any form. (App. Br. 32). But Appellant repeatedly said that there was **no form** of declaration which he would deem acceptable. The trial court therefore acted appropriately in refusing to permit Appellant to testify, as any other action would have effectively eviscerated the requirement of § 491.380(2) that a witness make a declaration in some form prior to testifying.

In his brief, Appellant cites primarily to two Missouri cases: *State v. Spulak*, 720 S.W.2d 396 (Mo. App. S.D. 1986) and *State v. Bowlin*, 850 S.W.2d 116 (Mo. App. S.D. 1993). Given the particular facts of the present case, however, neither of these cases support Appellant's position. In *Spulak* and *Bowlin*, the witnesses at issue indicated that they would be willing to declare that their testimony was being made "subject to the penalty of perjury." *State v Spulak*, 720 S.W.2d at 397; *State v. Bowlin*, 850 S.W.2d at 117. In the present case, however, Appellant indicated no similar willingness, maintaining that no declaration of any kind would be acceptable to him, aside from the bare statement that "I'll tell the truth." (Tr. 13, 249-52).

Furthermore, the *Bowlin* court outlined exactly what course of action by the trial court would have been appropriate in that case:

The court should have determined whether the form of oath/commitment suggested by defendant, or perhaps some other alternative form, would create a solemn and binding obligation on the conscience of defendant and his witness to speak the truth under the penalty of perjury as required by § 492.040. If so, they should have been permitted to testify.

State v. Bowlin, 850 S.W.2d at 118.

Unlike *Bowlin* or *Spulak*, however, the trial court in this case was clearly reluctant in denying Appellant's request to testify, doing so only after determining that Appellant refused to make any statement which would satisfy the requirements of § 491.380(2). The trial court here attempted to fashion some sort of affirmation or declaration acceptable to Appellant, just as the opinion in *Bowlin* had instructed. But no form was satisfactory to Appellant. Consequently, the trial court in this case reasonably concluded from Appellant's responses that no such statement was possible.

Appellant asserts that "[i]t was incumbent upon the court . . . to fashion a declaration that would allow the appellant to testify" (App. Br. 32). Appellant, however, cites no authority for the proposition that the trial court was required to do more than conduct an inquiry of Appellant, as suggested in *Bowlin*. Appellant's proposed requirement would be unduly burdensome on the trial court, as it would essentially require the trial court to play a guessing game with a potentially uncooperative defendant in the hope of stumbling upon some combination of words which would comport with the defendant's particular belief system. The impracticality of such a requirement is clearly illustrated in this case, where the defendant not only consistently refused to give the trial court an indication of what language might be acceptable, but, in fact, repeatedly told the trial court that no such language existed.

Appellant also refers to cases from other jurisdictions, including *U.S. v. Looper*, 419 F2d 1405 (4th Cir. 1969), *Gordon v. Idaho*, 778 F2d 1397 (9th Cir. 1985), and *U.S. v. Ward*, 989 F2d 1015 (9th Cir. 1992). In each of these cases, however, the trial court's ruling was reversed because the court refused to deviate from rigid requirements that specific language

be used in the oath or affirmation. The *Looper* court noted that the district court judge merely needed “to make inquiry as to what form of oath or affirmation would not offend defendant’s religious beliefs but would give rise to a duty to speak the truth.” *U.S. v. Looper*, 419 F2d at 1407. Similarly, the *Gordon* court held that, “[b]y failing to explore less restrictive means of assuring truthful deposition testimony, the district court abused its discretion.” *Gordon v. Idaho*, 778 F2d at 1401. In this case, however, the trial court displayed no such rigidity, and repeatedly asked Appellant if there was any language which would be acceptable to him. (Tr. 252).

A case more similar to the facts in Appellant’s case is *U.S. v. Fowler*, 605 F.2d 181, 185 (5th Cir. 1979). In *Fowler*, the defendant complained that the court erred in refusing to allow him to testify after he refused either to swear or affirm that he would tell the truth:

At one point in their extended colloquy on the point, the judge offered to accept the simple statement, “I state that I will tell the truth in my testimony.” Fowler was willing to do no more than laud himself in such remarks as, “I am a truthful man,” and “I would not tell a lie to stay out of jail.” Rule 603, Federal Rules of Evidence, is clear and simple: “Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation” No witness has the right to testify but on penalty of perjury and subject to cross-examination.

Id. at 185.

The *Fowler* court not only disagreed with the defendant’s contention, but described the claim as “frivolous.” *Id.* In Missouri, § 491.380(2) is no less clear than its federal counterpart. Just as in *Fowler*, the trial court here offered a reasonable alternative—as

provided by statute—and Appellant steadfastly refused to make any attempt to comply with the procedural requirements for his testimony.

The trial court here recognized the gravity of the situation and was appropriately hesitant in ruling that Appellant would not be permitted to testify. Nevertheless, once Appellant refused to take either the traditional oath or the statutory alternative, and further refused to assist the court in finding some acceptable statement which would satisfy § 491.380(2), the court was unable to allow Appellant to testify. To the extent that Appellant suggests that the trial court had a duty to engage in a guessing game with Appellant in a potentially fruitless search for acceptable language, such an assertion is unsupported by any authority. The trial court did not err, and Appellant is entitled to no relief on this point.

C. Any trial court error was harmless

Even if this Court concludes that the trial court should have made further attempts to divine what language would be acceptable to Appellant, any such error was harmless.

The United State Supreme Court has noted that “certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial.” *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991). Among the claims specifically mentioned as not being subject to harmless-error analysis are issues involving the denial of trial counsel or a biased judge. *Id.* at 290. This Court in *State v. Storey*, 986 S.W.2d 462 (Mo. banc 1999), discussed the *Fulminante* holding:

The Court distinguished between “trial error,” which is subject to harmless-error review, and “structural defects,” which are not. Trial error occurs “during the

presentation of the case to the jury, and . . . may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” A structural defect, on the other hand, affects “the framework within which the trial proceeds, rather than being simply an error in the trial process itself.”

Id at 464. (Internal citations omitted)

This case involves an alleged “trial error,” as opposed to a “structural defect,” because under the circumstances of this case the absence of Appellant’s testimony can “be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” *Id*.

This Court is readily capable of ascertaining from the record the likelihood that Appellant’s testimony would have had any effect on the jury’s verdict. Review of Appellant’s closing argument reveals that the trial court was exceedingly generous in allowing Appellant to essentially testify before the jury to facts which had never been introduced during the trial. (Tr. 262-69). Even given this opportunity, Appellant’s closing argument consisted of little more than allegations that he was being framed by the United States government, that he had been in Arizona for the purpose of “going to the fire on the mountain,” and that the president of the United States “stole the election” and was a member of a secret society.⁵ (Tr. 264-65, 268). In fact, it is entirely likely that Appellant reaped more

⁵ Appellant never made a record demonstrating what he would have said if he had been allowed to take the witness stand.

benefit from the trial court's ruling against him on the issue of his testimony because he was able to argue at length to the jury that the court was not allowing him to testify; an argument which could only have supported his otherwise far-fetched assertion of a conspiracy against him. (Tr. 263).

Appellant was arrested following the discovery of nearly 75 pounds of highly pungent⁶ marijuana inside a luggage container on top of the SUV Appellant was driving. (76, 85-86, 130). One of the other passengers in the car testified that he, Appellant, and another man had picked up approximately \$30,000 of marijuana in Arizona and that they had been on their way back to New Jersey when they were stopped. (Tr. 133-4). Given the highly incriminating evidence presented against Appellant, nothing Appellant might have testified to would have had any influence on the verdict, and any alleged error on the part of the trial court was harmless.

⁶ When the officer approached the vehicle he could detect a "very strong odor of raw marijuana emitting from the vehicle." (Tr. 77).

II. (Evidence of other crimes)

The trial court did not clearly err in failing to declare a mistrial following each of two instances where a police officer referred to Appellant’s prior arrest for possessing cocaine at a North Carolina airport. Appellant suffered no prejudice from these remarks because the trial court instructed the jury to disregard them and because the evidence against Appellant was overwhelming.

Appellant claims that the trial court erred in failing to declare a mistrial after an officer volunteered two statements pertaining to Appellant’s prior arrests. (App. Br. 34). This claim is without merit inasmuch as the statements were volunteered and not emphasized, the trial court promptly instructed the jury to disregard them, and the evidence against Appellant was overwhelming.

Furthermore, Appellant’s Point Relied On, (App. Br. 20), is not in compliance with Missouri Supreme Court Rule 84.04, because Appellant failed to “state concisely the legal reasons for the appellant’s claim of reversible error” and “explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.” Rule 84.04(d)(1). “Points relied on are critical and must be stated as specified in Rule 84.04(d).” *Storey v. State*, 175 S.W.3d at 126. “A point relied on which does not state ‘wherein and why’ the trial court erred does not comply with Rule 84.04(d) and preserves nothing for appellate review.” *Id.*

A. Standard of Review

“Mistrial is a drastic remedy to be used only in the most extraordinary circumstances when there is a grievous error which cannot otherwise be remedied.” *State v. Sanders*, 903

S.W.2d 234, 238 (Mo. App. E.D. 1995); *State v. Johnson*, 968 S.W.2d 123, 134 (Mo. banc 1998). The review of the trial court's denial of a motion for mistrial is for abuse of discretion. *State v. Costa*, 11 S.W.3d 670, 677 (Mo. App. W.D. 1999). A trial court will be found to have abused its discretion when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *State v. Brown*, 939 S.W.2d 882, 883-84 (Mo. banc 1997).

B. Relevant Facts

During the State's direct examination of the arresting officer, the prosecuting attorney asked about the officer's discussion with Appellant regarding the smell of marijuana present in the vehicle. (Tr. 79). The officer responded that he had done a background check on Appellant and had discovered an arrest for possession of cocaine in North Carolina. (Tr. 79). Appellant objected to this testimony, and the trial court immediately sustained the objection. (Tr. 79). The trial court then instructed the jury to disregard the officer's remark. (Tr. 79). Appellant requested a mistrial, and the trial court denied this request. (Tr. 80).

During Appellant's cross-examination of the officer, he asked about the events that occurred during the traffic stop. (Tr. 98). During the officer's somewhat lengthy response, he again mentioned the background check and Appellant's prior arrest. (Tr. 98-99). Once again, the trial court instructed the jury to disregard that testimony, remarking that "[i]t has no relevance." (Tr. 99). Appellant again asked for a mistrial, but this request was also denied. (Tr. 100).

C. Appellant suffered no prejudice

In *State v. Goff*, 129 S.W.3d 857 (Mo. banc 2004), this Court outlined the factors examined in “determining the prejudicial effect of an unsolicited reference to other crimes:”

- (1) whether the statement was voluntary and unresponsive;
- (2) whether the statement was singular and isolated, or emphasized by the prosecution;
- (3) whether the statement was vague and indefinite, or made specific references to a crime committed by the accused;
- (4) if the court promptly sustained defense counsel’s objection to the statement and admonished the jury to disregard the statement; and
- (5) if the comment played a decisive role in the determination of guilt in view of other evidence presented and the strength of the prosecution’s case.

Id at 866. When applied to the facts of this case, these factors show that Appellant suffered no prejudice.

First, neither of the statements was deliberately elicited by the prosecution. Rather, the officer volunteered that Appellant had a prior arrest in a non-responsive answer to a prosecution question about his discussion with Appellant during the vehicle stop. (Tr. 79). The officer mentioned the prior arrest a second time during his cross-examination by Appellant when Appellant asked him to go over the events of the traffic stop. (Tr. 98).

Second, the statements were brief and isolated, and were not being offered as part of any larger discussion of Appellant’s criminal background. Furthermore, at no time did the prosecution use, or even mention, the prior arrests in presenting or arguing the State’s case.

Third, the trial court immediately sustained Appellant’s objection and instructed the jury to disregard the officer’s remark. (Tr. 79, 99). Inadmissible evidence presented to a jury is generally not prejudicial when the trial court instructs the jury to disregard that evidence because “[i]t is normally presumed that the jury follows the instructions given it by the trial judge.” *Kuehne v. State*, 107 S.W.3d 285, 298 (Mo. App. W.D. 2003).

Fourth, and finally, given all the evidence arrayed against Appellant, it would be unreasonable to conclude that these two minor remarks had any significant or decisive role in the jury’s determination that Appellant was guilty. Appellant was arrested following the discovery of nearly 75 pounds of highly pungent⁷ marijuana inside a luggage container on top of the SUV Appellant was driving. (76, 85-86, 130). Furthermore, one of the other passengers in the car testified that he, Appellant, and another man had picked up approximately \$30,000 of marijuana in Arizona and that they had been on their way back to New Jersey when they were stopped. (Tr. 133-4). Given the highly incriminating evidence presented against Appellant, there is simply no reason to believe that the jury’s verdict was affected in any way by two relatively insignificant comments that the jury was instructed to disregard.

Applying the five factors from *Goff* illustrates that Appellant suffered no prejudice as the result of the officer’s remarks. The trial court immediately instructed the jury to

⁷ When the officer approached the vehicle he could detect a “very strong odor of raw marijuana emitting from the vehicle.” (Tr. 77).

disregard each of the two comments, and did not abuse its discretion in either instance by refusing to declare a mistrial.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,686 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of May, 2007, to:

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APPENDIX

Sentence and Judgment A1