

IN THE  
SUPREME COURT OF MISSOURI

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STATE OF MISSOURI,	)	
Respondent,	)	
	)	
vs.	)	Case No. SC91760
	)	
MELVIN STOVER, JR.,	)	
Appellant.	)	

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF CLAY COUNTY  
SEVENTH JUDICIAL CIRCUIT  
THE HONORABLE LARRY D. HARMAN, JUDGE

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APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts and incorporates herein by reference the Jurisdictional Statement contained in his Appellant's Substitute Brief.

STATEMENT OF FACTS

Appellant adopts and incorporates herein by reference his original statement of facts as set forth in his Appellant's Substitute Brief and adds the following in reply to the state's brief:

Contrary to the Respondent's assertion, this traffic stop occurred in Lafayette County, not Livingston County (St.'s Brief p. 54; L. F. 1-5, 13-14; Tr. 7).

Although the state seems to imply that Appellant consented to the search when it states that Appellant said that "he did not have a problem with the troopers 'going through that vehicle' because he did not have anything in it", Appellant made this comment after the troopers had already initiated the search and it was not directed to the troopers who were conducting the search (St.'s Brief p. 13; St.'s ex. 33 at 11:45-46).

As to the watch mentioned at page 14 of the state's brief, there was no evidence as to who put the watch inside the trunk or when the watch was put inside the trunk in relationship to when the suitcase was put in the trunk (Tr. 360-364, 473, 488, 585-586). Corporal Hagerty testified that Appellant said the watch was in the passenger compartment (Tr. 585).

POINT RELIED ON

I.

**The trial court erred in denying Appellant's Motions for Judgment of Acquittal and entering judgment and sentence against Appellant for trafficking drugs in the first degree, because by doing so the court violated Appellant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 10 of the Missouri Constitution, in that the state failed to prove the elements of trafficking drugs in the first degree, by not producing sufficient evidence to convince a reasonable trier of fact that Appellant knowingly possessed the contraband.**

*State v. Gonzalez*, 235 S.W.3d 20 (Mo. App., S.D. 2007)

*State v. Johnson*, 81 S.W.3d 212 (Mo. App., S.D. 2002)

*State v. Mercado*, 887 S.W.2d 688 (Mo. App., S.D. 1994)

*State v. Bacon*, 156 S.W. 3d 372 (Mo. App., W.D. 2005)

POINT RELIED ON

II.

**The trial court clearly erred in failing to sustain Appellant's Motion to Suppress Evidence and Statements and in allowing into evidence at trial the evidence obtained as a result of the traffic stop, because the prolonged detention of Appellant without reasonable suspicion of criminal activity and beyond the time reasonably required to complete a traffic ticket was unlawful and violated Appellant's rights as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 15 and 19 of the Missouri Constitution.**

*United States v. Jones*, 269 F.3d 919 (8<sup>th</sup> Cir. 2001)

*United States v. Beck*, 140 F.3d 1129 (8<sup>th</sup> Cir. 1998)

*State v. Stevens*, 845 S.W.2d 124 (Mo. App., E.D. 1993)

*State v. Riddle*, 843 S.W.2d 385, 387 (Mo. App., E.D. 1992)

POINT RELIED ON

III.

**The trial court clearly erred in failing to sustain Appellant's Motion to Suppress and in allowing into evidence at trial the statements Appellant made during the traffic stop prior to being *Mirandized* because the admission of these custodial statements deprived Appellant of his right to be free from self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 18 (a) and 19 of the Missouri Constitution in that Appellant was not free to leave and *Miranda* warnings were required prior to Corporal Hagerty questioning Appellant while he was being detained.**

*Taylor v. State*, 234 S.W.3d 532 (Mo. App., W.D. 2007)

*U. S. v. \$404, 905.00 in U. S. Currency*, 182 F.3d 643 (8<sup>th</sup> Cir. 1999)

*State v. Weddle*, 18 S.W.3d 389 (Mo. App., E.D. 2000)

POINT RELIED ON

IV.

**The trial court erred in allowing evidence and argument regarding Appellant's refusal to waive his Fourth Amendment right to consent to a search of the vehicle because such evidence and argument deprived Appellant of his rights to due process and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that such evidence and argument induced the jury to infer that Appellant was guilty based on his invocation of his constitutional right against unreasonable searches and seizures.**

*State v. West*, 21 S.W.3d 59 (Mo. App., W.D. 2000)

*State v. Olson*, 854 S.W.2d 14 (Mo. App., W.D.1993)

*United Fire & Casualty Co. v. Historic Preservation Trust*, 265 F.3d 722  
(8<sup>th</sup> Cir. 2001)

POINT RELIED ON

V.

**The trial court abused its discretion in overruling Appellant's hearsay objection and allowing the testimony of Corporal Hagerty regarding the commendation he received in this case for making the largest PCP seizure in the history of the United States until 2003 because by doing so the court deprived Appellant of his rights to cross-examination of the witnesses against him and to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18 (a) of the Missouri Constitution in that the evidence was inadmissible hearsay, irrelevant and calculated to inflame the passions of the jury against Appellant.**

*State v. Robinson*, 111 S.W.3d 510 (Mo. App., S.D. 2003)

POINT RELIED ON

VI.

**The trial court erred in overruling Appellant's objection to the verdict-directing instruction, instruction No. 6, because the verdict director did not require the jury to find that Appellant knew of the substance's content and character or that he was aware of its presence and nature which prejudiced Appellant and denied him his rights to a fair trial and due process of law as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.**

*State v. Richards*, 300 S.W.3d 279 (Mo. App., W.D. 2009)

*State v. Farris*, 125 S.W.3d 382 (Mo. App., W.D. 2004)

*State v. Cooper*, 215 S.W.3d 123 (Mo. banc 2007)

*State v. Burns*, 457 S.W.2d 721(Mo. 1970)

ARGUMENT

I.

**The trial court erred in denying Appellant’s Motions for Judgment of Acquittal and entering judgment and sentence against Appellant for trafficking drugs in the first degree, because by doing so the court violated Appellant’s right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 10 of the Missouri Constitution, in that the state failed to prove the elements of trafficking drugs in the first degree, by not producing sufficient evidence to convince a reasonable trier of fact that Appellant knowingly possessed the contraband.**

The evidence was insufficient to convict Appellant. *State v. Woods*, 284 S.W.3d 630 (Mo. App., W.D. 2009), upon which the state relies in its Argument I, is readily distinguishable from the instant case (St.’s Brief p. 19-20). In *Woods*, the “drugs were not hidden or concealed; they were in plain view” in the trunk of the vehicle. *Id.* at 640. Woods and his companion had “exited the interstate after a threatened drug checkpoint and began going the opposite direction.” *Id.* They also attempted to flee from the officer by speeding, driving erratically, and by walking quickly away from the officer and failing to respond when told to halt. *Id.* The officer in *Woods* found two cell phones and a large bundle of cash on Woods’ person. *Id.* Additionally, the bailiff at trial testified that Woods made incriminating admissions to her pointing to his guilt. *Id.* at 640.

In Appellant's case, however, the prohibited substance was not in plain view; it was in a closed, opaque suitcase in the trunk, and it did not emit any odor until after the trooper opened the suitcase (Tr. 466, 599; St.'s ex. 33). Unlike the driver in *Woods*, Appellant did not exhibit suspicious driving behavior by exiting at a threatened drug check point nor did he try to evade the trooper by speeding or driving erratically (St.'s ex. 33). The traffic stop in the instant case was for the minor infraction of allegedly following too closely (Tr. 411).

Once stopped, Appellant did not try to walk away from the trooper or fail to respond to commands as Woods did when he was stopped; Appellant was cooperative (St.'s ex. 33). Here, there was no evidence of drug trafficking found on Appellant's person, such as multiple cell phones or a large amount of cash as there was in *Woods* (Tr. 590). No items of evidence were seized from Appellant's person (Tr. 590). Corporal Hagerty did not smell anything on his person to suggest that he had been near illegal drugs (Tr. 590). Most significantly, unlike the defendant in *Woods*, Appellant did not make any admissions of guilt (Tr. 613-51; St.'s Ex. 33). Mr. Stover consistently denied his guilt (L. F. 2, 21).

Although the state attempts to connect Appellant with the aborted cash withdrawal receipts found in an interior compartment of the rental car (St.'s Brief p. 26, 28; Tr. 525-527; St.'s ex. 31), those receipts (which were admitted over objection that they were not disclosed to the defense until September 3, 2008, five days before trial) (L. F. 48-49; Tr. 507-510, 527), do not bear Appellant's name,

his signature nor the same credit card number as was used for the car rental (St.'s ex. 23). In fact, those receipts could have been left behind by a prior rental car customer. The fact that some nameless receipts were found tucked away in an interior compartment of the rental car contributes nothing to support Appellant's conviction of the charged offense.

The state makes much ado about Appellant asking for a cigarette (St.'s Brief p. 23, 78). However, Appellant never said that he had his own cigarettes; he asked if he could smoke one of the trooper's cigarettes (St.'s ex. 33 at 11:20).

Further, the state exaggerates Appellant's use of hand gestures (St.'s Brief p. 23). In actuality, just part of one of Appellant's hands can be seen at only one place in the video (St.'s ex. 33 at 11:21).

The state also argues that because Appellant's "passenger had previous drug-related arrests" (St.'s Brief 23, 28), it thereby indicates that the Appellant is guilty. This is nothing more than a blatant "guilt-by-association" argument, which has been consistently rejected by the courts. *See State v. Beck*, 785 S.W.2d 714, 719 (Mo. App., E.D. 1990) (*Beck II*) (conviction reversed due to "prejudicial transgression of defendant's fundamental right . . . not to be found guilty by association") (emphasis added); *Harris v. Blackburn*, 646 F.2d 904, 906 (5<sup>th</sup> Cir. 1981) (mere association with the person who does control the drug or the property where it is located is insufficient to support a finding of possession); *State v. Brown*, 741 S.W.2d 53, 57 (Mo. App., W.D. 1987) (traveling with another person

suspected in criminal activity does not establish probable cause.) In fact, Appellant himself had no criminal history whatsoever (Tr. 570).

Other cases in which convictions have been reversed despite a large seizure of drugs include *State v. Gonzalez*, 235 S.W.3d 20, 26 (Mo. App., S.D. 2007) (40 pounds of marijuana seized from the vehicle that defendant was driving); *State v. Johnson*, 81 S.W.3d 212 (Mo. App., S.D. 2002) (\$40,000 worth of marijuana found in vehicle that defendant rented) and *State v. Mercado*, 887 S.W.2d 688 (Mo. App., S.D. 1994) (200 pounds of marijuana found in van in which defendant was passenger). *See also, State v. Bacon*, 156 S.W. 3d 372, 381 (Mo. App., W.D. 2005) (state failed to establish defendant's possession of jars containing large amount of marijuana despite joint control of premises and his presence when jars were located in closed box in his garage, and not in plain view).

“The proof required was of a conscious possession . . . .” *State v. Bowyer*, 693 S.W.2d 845, 848 (Mo. App., W.D. 1985). The state failed to prove conscious possession. Therefore, the Appellant's conviction should be reversed.

ARGUMENT

II.

**The trial court clearly erred in failing to sustain Appellant's Motion to Suppress Evidence and Statements and in allowing into evidence at trial the evidence obtained as a result of the traffic stop, because the prolonged detention of Appellant without reasonable suspicion of criminal activity and beyond the time reasonably required to complete a traffic ticket was unlawful and violated Appellant's rights as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 15 and 19 of the Missouri Constitution.**

The extended detention was unreasonable. Contrary to the state's argument, very little, if any, significance should be attached to Appellant tapping his brakes and slowing prior to being stopped (St.'s Brief 52). After all, Corporal Hagerty was in an unmarked vehicle, so it is highly unlikely that Appellant knew he was being followed by law enforcement (Tr. 549-50). Further, Corporal Hagerty actually admitted on cross-examination that slowing a vehicle in order to increase the following distance is the correct response for a driver to make when he or she is following too closely (Tr. 563).

In *United States v. Jones*, 269 F.3d 919 (8<sup>th</sup> Cir. 2001), the Court considered and rejected many of the factors that the state relies on in this case as supposedly supporting reasonable suspicion. In *Jones*, the prosecution argued that the officer had reasonable suspicion because the defendant "slowed while being

passed, his camper wheels crossed traffic lines, he gave an inconsistent answer regarding his prior arrest record, and he acted nervously upon being . . . questioned. . . .” *Id.* at 927. The Court noted, however, that “[t]here is generally ‘nothing suspicious about a driver . . . slowing down when he realizes a vehicle is approaching him from the rear.’ This is ‘a normal reaction if the driver wishes to let the tailing vehicle pass.’” *Id.* (Citation omitted). The Court stated that it attached “little suspicion of criminal activity” to the driver slowing and swerving while the officer trailed him because “‘when the officer’s actions are such that any driver, whether innocent or guilty, would be preoccupied with his presence, then any inference that might be drawn from the driver’s behavior is destroyed.’” *Id.* (Citation omitted). “California license plates might suggest that the driver was unfamiliar with Missouri roads . . . and was merely exercising sound judgment in proceeding cautiously.” *Id.* at 927-28. The Court concluded that the slow and cautious driving had *nil* or *de minimis* value in its reasonable suspicion calculus. *Id.* at 928.

The court in *Jones* further stated that “[b]ecause the government repeatedly relies on nervousness as a basis for reasonable suspicion, ‘it must be treated with caution.’” *Id.* at 929 (citation omitted). Because the officer had never met Jones and was “unfamiliar with his usual demeanor,” his “evaluation of Jones’s behavior lacks any foundation.” *Id.* Noting that “‘it is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation,’” the court held that the facts did

“not generate a suspicion sufficient to warrant Jones’s detention.” *Id.* (quoting *United States v. Beck*, 140 F.3d 1129, 1137 (8<sup>th</sup> Cir. 1998)).

As Appellant noted in his original Appellant’s Substitute Brief, there is nothing inherently suspicious in the use of a rental vehicle to travel. *United States v. Beck*, 140 F.3d 1129, 1137 (8<sup>th</sup> Cir. 1998). Out-of-state plates are also equally consistent with innocent behavior, and that factor is not probative of reasonable suspicion. *Id.* The court in *Beck* noted that “millions of law-abiding Americans reside in California and travel,” which means the “source state” factor must be considered in that context. *Id.* at 1137-1138. Because “[i]nnumerable other Americans travel to that state or through there for pleasure or lawful business”, this factor must be relegated to a “relatively insignificant role.” *Id.* at 1137-1138.

In the instant case, the state points to a number of wholly innocent factors which do not, even when combined, add up to reasonable suspicion (St.’s Brief 52-54).

Similar factors were rejected as grounds for reasonable suspicion of criminal activity in *State v. Stevens*, 845 S.W.2d 124 (Mo. App., E.D. 1993). In *Stevens*, the state argued that the following factors, which the trooper learned prior to issuance of a warning, justified further detention for investigation of possible criminal activity: 1) the defendant was very nervous and did not relax when being told he was only getting a warning; 2) the defendant’s stated salary was not adequate to support the costly mobile home he was driving; 3) the defendant was

taking a longer than necessary cross-country route from California to Indianapolis; and 4) although the defendant claimed to have known his passenger for eight years, he did not know his last name. *Id.* at 129.

However, the court rejected the state's argument in *Stevens*, and found that those observations made prior to the issuance of the warning did not, "when taken together, create a suspicion that defendant was engaged in criminal activity." *Id. Accord, State v. Riddle*, 843 S.W.2d 385, 387 (Mo. App., E.D. 1992) (factors of cooler on floor board, highlighted map routes, very little clothing visible, taking cross-country trip while unemployed and being lone occupant of rental vehicle that was rented to another person did not provide reasonable suspicion of criminal activity even when considered together).

Contrary to the state's assertion that Appellant "obstructed" Corporal Hagerty's efforts (St.'s Brief p. 42, 54), the recording shows that Appellant was simply upset—a natural reaction to the extended detention and the relentless questioning outside the scope of a legitimate traffic investigation (St.'s ex. 33). Hagerty also conceded that Appellant did not prevent him from writing a ticket (Tr. 568). Appellant did not obstruct Corporal Hagerty; he simply declined to waive his right to be free from an unreasonable search (St.'s ex. 33).

The state also attributes Corporal Hagerty's delay to "discrepancies in Defendant's driver's license information" (St.'s Brief 58). However, the state provides no citation to the record for this assertion, and a review of the video reveals no discrepancy in Appellant's driver's license information (St.'s Brief 58;

St.'s ex. 33). In fact, at one point in the video, Corporal Hagerty even tells Appellant that there is nothing wrong with his driver's license (St.'s ex. 33 at 11:15).

It is more likely that Corporal Hagerty's decision to detain and interrogate the Appellant was based on the fact that Appellant drove a vehicle with California license plates and the fact that he and his passenger were black. Corporal Hagerty unreasonably detained Appellant without reasonable suspicion of criminal activity. Therefore, the evidence obtained thereby should have been suppressed.

## ARGUMENT

### III.

**The trial court clearly erred in failing to sustain Appellant's Motion to Suppress and in allowing into evidence at trial the statements Appellant made during the traffic stop prior to being *Mirandized* because the admission of these custodial statements deprived Appellant of his right to be free from self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 18(a) and 19 of the Missouri Constitution in that Appellant was not free to leave and *Miranda* warnings were required prior to Corporal Hagerty questioning Appellant while he was being detained.**

In *Taylor v. State*, 234 S.W.3d 532, 538 (Mo. App., W.D. 2007), the Missouri Court of Appeals, Western District stated that “[a] traffic stop is not investigative; it is a form of arrest, based upon probable cause that a penal law has been violated.” (Quoting *United States v. \$404, 905.00 in U. S. Currency*, 182 F.3d 643, 648 (8<sup>th</sup> Cir. 1999)) (emphasis added). Indeed, Corporal B. S. Hagerty clearly admitted that Appellant was not free to leave (Tr. 85, 92, 100). No reasonable person in Appellant's shoes would have felt free to leave under these circumstances. *State v. Weddle*, 18 S.W.3d 389 (Mo. App., E.D. 2000). Therefore, *Miranda* warnings were required prior to the interrogation of the

Appellant, which was clearly intended to elicit incriminating responses, and which the prosecution in fact did use to try to incriminate the Appellant.

ARGUMENT

IV.

**The trial court erred in allowing evidence and argument regarding Appellant's refusal to waive his Fourth Amendment right to consent to a search of the vehicle because such evidence and argument deprived Appellant of his rights to due process and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that such evidence and argument induced the jury to infer that Appellant was guilty based on his invocation of his constitutional right against unreasonable searches and seizures.**

The Motion to Suppress was framed in terms that comprehensively encompassed the refusal-to-consent evidence (L. F. 24-25). Appellant also raised the issue prior to trial at an early opportunity and asked that this portion of the recording be excluded (Tr. 130-31). He made timely, specific objections to the introduction of the refusal evidence during testimony and the use of it in the state's closing argument (Tr. 434-36, 493, 788-89). The issue was also included in the Motion for New Trial (L. F. 110-12). Appellant indeed preserved this issue for appeal. *See State v. Olson*, 854 S.W.2d 14, 15 (Mo. App., W.D.1993) (rejecting state's claim that issue on appeal was not preserved when defendant objected before tape of child victim was played and asked to redact offending portions,

renewed his objection when tape was played and included the erroneous admission thereof in motion for new trial).

Defense counsel declined the no-adverse-inference instruction (L. F. 85) because it would simply emphasize and draw even more attention to the refusal to consent to the search, making the jury even more likely to draw an inference of guilt therefrom (Tr. 858). The proffered instruction was not a sufficient remedy for a very serious violation of Appellant's rights.

Even in the context of civil cases, "[e]vidence that an insured refused to take a polygraph is generally inadmissible because it has little probative value and may be highly prejudicial to an insured." *United Fire & Casualty Co. v. Historic Preservation Trust*, 265 F.3d 722, 728 (8<sup>th</sup> Cir. 2001) (citation omitted).

Similarly, there is no doubt in the case at hand that the prosecution exploited the fact of Appellant's refusal to consent to the search (Tr. 434-436, 493-496, 741, 788-789, 792), contrary to the admonition that "refusal to give consent to search cannot be used to infer wrongful activity." *State v. West*, 21 S.W.3d 59, 66 (Mo. App., W.D. 2000). Here, the prejudicial effect of the repeated use of the evidence was the intended inference that Appellant must have known he had something to hide or he would have allowed the search.

The evidence of Appellant's refusal to give consent to search was obviously improperly used to imply guilt, and it therefore, improperly prejudiced the jury against the Appellant. Since the other evidence of guilt was certainly not overwhelming (Point I herein), the error here is clear and quite likely a major

factor in the jury's verdict. A constitutional right becomes rather meaningless if its exercise can be used as evidence of guilt.

ARGUMENT

V.

**The trial court abused its discretion in overruling Appellant's hearsay objection and allowing the testimony of Corporal Hagerty regarding the commendation he received in this case for making the largest PCP seizure in the history of the United States until 2003 because by doing so the court deprived Appellant of his rights to cross-examination of the witnesses against him and to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18 (a) of the Missouri Constitution in that the evidence was inadmissible hearsay, irrelevant and calculated to inflame the passions of the jury against Appellant.**

Evidence of Corporal B. S. Hagerty's DEA commendation in this case for allegedly making the largest PCP seizure in the nation's history was indeed hearsay unless Corporal Hagerty was involved in and had personal knowledge of every PCP bust in the nation until 2003, which, of course, he did not. *See State v. Robinson*, 111 S.W.3d 510 (Mo. App., S.D. 2003) (conviction reversed due to admission of inadmissible hearsay). The state had already elicited testimony from Corporal Hagerty that this was not an amount consistent with personal use (Tr. 546). The inquiry should have stopped there, but the prosecutor persisted with questions about the commendation (Tr. 546-47). Appellant never even raised an

issue at trial about whether it was for personal use. There was no legitimate need for this testimony.

The overwhelming harm of this evidence was further repeatedly exploited during the state's closing argument (Tr. 793-97) in an effort to inflame the passions of the jury:

[The prosecutor]: Corporal Hagerty did his job in taking out of a vehicle in Lafayette County, Missouri the largest PCP amount then in the country. (Tr. 793-794) (emphasis added).

[The prosecutor]: And now in closing argument I'm reminding you of what you already know, that the evidence beyond any reasonable doubt, any reasonable doubt, proves that this Defendant was aiding, abetting, and assisting Oris Butler in trafficking the largest amount of PCP across the country.

(Tr. 795-796) (emphasis added).

[The prosecutor]: He's trying to keep his involvement down because there's the largest amount of PCP in the country in the trunk of the car he rented.

(Tr. 796-797) (emphasis added).

Each of these statements in fact exaggerated and embellished the improper hearsay testimony, which was that this was the largest amount then seized.

Almost certainly it was far from being the largest amount that existed "in the country". This hearsay was definitely used for the truth of the matter asserted.

Because this evidence should have been excluded, this Court must assume that the jury considered it as it reached its verdict, especially in light of the prosecutor's closing arguments. *Id.* at 514. The only purpose that this irrelevant hearsay evidence served was to prejudice the jury against Appellant.

## ARGUMENT

### VI.

**The trial court erred in overruling Appellant’s objection to the verdict-directing instruction, instruction No. 6, because the verdict director did not require the jury to find that Appellant knew of the substance’s content and character or that he was aware of its presence and nature which prejudiced Appellant and denied him his rights to a fair trial and due process of law as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18 (a) of the Missouri Constitution.**

Awareness of the content and character or presence and nature of the substance is essential to the legal definition of “possession.” *State v. Ingram*, 249 S.W.3d 892, 895 (Mo. App., W.D. 2008). They are inextricably woven together. Thus, the objection to this instruction at trial because the definition of possession would mislead the jury and the inclusion of the issue in the Motion for New Trial sufficiently preserved the issue for appellate review (L. F. 119-121; Tr. 737-738). “If the giving of [an] instruction is error, it will be held harmless only when the court can declare its belief that it was harmless beyond a reasonable doubt.” *State v. Richards*, 300 S.W.3d 279, 281 (Mo. App., W.D. 2009) (citation omitted).

In *Richards*, the appellate court held that failure to include the legal definition of the word “deprive” in the verdict director for attempted stealing was reversible error. *Id.* at 286. “[T]he jury was permitted to ascribe a meaning to the

word ‘deprive’ that relieved the State of the burden to prove all essential elements of the offense of attempted stealing, including whether Richards acted with the requisite mental state.” *Id.* at 285.

Likewise, in Appellant’s case, by omission of the phrase, “knowing of the substance’s content and character,” the state was relieved of the burden to prove all essential elements of trafficking, particularly the requisite mental state (Appendix A3-A4). Conscious possession “was not only an essential element of the crime charged, but it was a *contested* essential element.” *Id.* at 15 (quoting *State v. Farris*, 125 S.W.3d 382, 393 (Mo. App., W.D. 2004)) (failure to define possession in instruction for attempt to manufacture methamphetamine was plain error) (emphasis in *Farris*).

In the event this Court finds that this issue is not adequately preserved, Appellant requests plain error review. Rule 30.20, V.A.M.R. “A verdict directing instruction that omits an essential element rises to the level of plain error if the evidence establishing the omitted element was seriously disputed.” *State v. Cooper*, 215 S.W.3d 123, 126 (Mo. banc 2007) (citation omitted).

In *Cooper*, this Court reversed the defendant’s conviction under plain error review because the verdict director for first-degree burglary omitted the word “unlawfully”. *Id.* at 126-27. “Whether Cooper entered [the victim’s] house ‘unlawfully’ was indeed in serious dispute during trial.” *Id.* at 126. Thus, the omission of the essential element resulted in manifest injustice. *Id.* at 127.

Likewise, whether Appellant knew of the substance's content and character was in serious dispute during this trial. Yet, the jury was allowed to convict without deliberating on and determining the most contested element of the crime-- conscious possession-- which is what the omitted phrase was meant to define. *See Id.* at 126. Under instruction No. 6, the jury had no choice but to convict Appellant simply because the PCP was in the car (Appendix A3-A4). *State v. Burns*, 457 S.W.2d 721, 725-26 (Mo. 1970). Thus, the jury was so misdirected that a manifest injustice resulted.

CONCLUSION

WHEREFORE, for the reasons stated in Arguments I and II, Appellant prays this Court reverse his conviction and discharge him. For the reasons stated in Arguments III through VI, Appellant prays this Court reverse his conviction and grant him a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

The undersigned counsel hereby certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 5,373 words, excluding the cover, signature block, certification, and appendix, as determined by Microsoft Word software; and that a true and complete copy of this brief was served via the Missouri e-filing system on November 7, 2011 to:

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