

No. SC90853

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ANTHONY BROWN,

Appellant.

Appeal from City of St. Louis Circuit Court
Twenty-second Judicial Circuit
The Honorable Thomas J. Frawley, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Anthony Brown, was convicted on March 16, 2009, in the Circuit Court of the City of St. Louis, Missouri, after trial by jury. L.F. 2A, 4-5, 72-75.¹

Appellant had been found guilty by the jury of murder in the second degree and armed criminal action. L.F. 2A, 5, 57-58, Tr. 318-20.

Appellant was sentenced to consecutive terms of thirty years for murder in the second degree and three years for armed criminal action. L.F. 72-75, Tr. 344-46.

After an opinion by the Missouri Court of Appeals, Eastern District, this Court granted Appellant's Application for Transfer. Missouri Constitution, Article V, Section 10; Rule 83.04.

¹ References to the record shall be abbreviated as follows in this brief: "L.F." for references to the Legal File, "Tr." for references to the Trial Transcript, and "Mem." for references to the memorandum issued on this case by the Missouri Court of Appeals, Eastern District. The unlabeled docket sheet between page 2 and page 3 of the Legal file will be referred to as page 2A.

STATEMENT OF FACTS

On the afternoon of June 9, 2007, Appellant was at the home of Evelyn Dukes, his grandmother, for a birthday party. Tr. 121-22. Douglas Vaughn was also at this party. Tr. 122. Robert Anderson and his girlfriend, Raquel Vanhook, were also at this party. Tr. 122-23, 141-42. The birthday party was for one of Ms. Dukes's great grandchildren and for Ms. Vanhook's son. Tr. 166-67, 222. At some point during that afternoon, Ms. Vanhook got into an argument with Appellant and Appellant's girlfriend who was also at the party. Tr. 123-24, 132-35, 142-43. Shortly thereafter, Appellant had an argument with Mr. Anderson. Tr. 124-25. At approximately the same time, Ms. Vanhook was arguing with Appellant's girlfriend. Tr. 143-45.

After this argument, Mr. Vaughn saw Appellant walking toward a gangway by the house. Tr. 125-26. When Appellant returned, he had a .38 revolver which had been painted white. Tr. 126, 173. Appellant approached Mr. Anderson and resumed the argument. Tr. 126-27, 145. At some point during the argument, Mr. Anderson said something to the effect that he didn't care if Appellant shot him. Tr. 127, 146. At that point, Appellant shot Mr. Anderson several times. Tr. 127, 146. At least one of the shots was fired after Mr. Anderson was already down on the ground. Tr. 163-64. Mr. Vaughn did not see Mr. Anderson with a gun or pointing a gun at anybody at any time on that day. Tr. 127. Ms. Vanhook also did not see Mr. Anderson with a gun or hear him threaten Appellant. Tr. 149-50.

Some relatives of Appellant tackled Appellant to stop him from firing any more shots. Tr. 148-49. Ms. Vanhook attempted to tend to Mr. Anderson. Tr. 152-53. Ms.

Vanhook removed Mr. Anderson's shoes in an effort to make Mr. Anderson more comfortable. Tr. 152-53. She did not take any drugs out of those shoes or take a gun off of Mr. Anderson. Tr. 153.

Officer Eric Larson was assigned to the crime lab as a firearms and tool-mark examiner. Tr. 187. In the course of his duties, he examined three spent slugs connected with this case. Tr. 188. All three bullets were fired from the same .38 caliber gun. Tr. 188-89. Typically, a .38 caliber gun will be a revolver, not a semi-automatic. Tr. 189. A fourth bullet was recovered from Mr. Anderson which was from a different gun, but the medical examiner believed it was from an old wound. Tr. 191.

Dr. Phillip Birch performed an autopsy on Mr. Anderson. Tr. 193. Dr. Birch found four gunshot wounds – one that entered in the back and exited the chest, one that entered the front of the abdomen, one that entered in the right thigh, and one that entered at the left shoulder. Tr. 193-94. Three spent bullets were recovered. Tr. 194-95. The gunshot wound to the back went through both lungs and the heart. Tr. 195-96. Mr. Anderson died as a result of these gunshot wounds, specifically the one that entered in his back. Tr. 195-96.

On June 13, 2007, a complaint was filed alleging that Appellant committed the offenses of murder in the first degree and armed criminal action. L.F. 1, 7-9. Subsequently, an indictment was filed formally charging Appellant with the same offenses and alleging that Appellant was a persistent offender. L.F. 2, 3, 10-11.

During jury selection, Appellant attempted to use a peremptory challenge on Ms. Hoxworth, a white female. Tr. 83-84. The State objected to this challenge, and several

other challenges to white women, as a violation of *Batson*. Tr. 83-84. The supposedly race-neutral reason given by Appellant's counsel was that Ms. Hoxworth did not answer any questions. Tr. 84. The State challenged this reason by stating that Ms. Hoxworth answered a question. Tr. 84. Appellant's counsel responded that the only question that Ms. Hoxworth answered was the one that she was asked. Tr. 84. Appellant's counsel then attempted to add the reasons that Ms. Hoxworth did not know any law enforcement officers and was a white collar worker. Tr. 84. The State began to challenge these reasons by noting other similarly situated jurors when the trial court began to deal with the first reason – noting several other jurors (Mr. Moorehead, Ms. Scott, Mr. Jones, and Mr. Wallace)² that either said nothing or only said something when they were specifically asked a question. Tr. 84-85. Appellant's counsel then noted again that Ms. Hoxworth was a white-collar worker who was single. Tr. 85. Given that Appellant had struck four venirepersons, all of whom were white, and three of whom were women, the trial court sustained the *Batson* objection and disallowed the strike. Tr. 85.

² Mr. William Jones did answer a general question regarding prior jury service, as well as individual questions on self-defense. Tr. 34, 71-72. The only question that Ms. Christine Jones answered was when she was individually asked about her views on self-defense. Tr. 71 Ms. Hoxworth, Mr. Wallace, and Ms. Scott only answered a question when they were individually asked about the impact of Appellant's prior convictions on their ability to consider his testimony. Tr. 69-70.

During a recess after the State had concluded its evidence, the State introduced evidence regarding Appellant's prior offense and the trial court found that Appellant was a prior offender. Tr. 202-04. Appellant then presented his witnesses.

Marilyn Brown, Appellant's mother, testified that Mr. Anderson arrived after Ms. Vanhorn and Appellant's girlfriend had gotten into an argument. Tr. 208. Marilyn then saw Appellant arguing with Mr. Anderson and Mr. Anderson had his hand under his shirt, apparently as if he was holding something, but Marilyn did not see anything in Mr. Anderson's hand. Tr. 210-11.

Ms. Dukes testified that, when the noise from the argument was getting loud, she came outside to separate Appellant, his girlfriend, Mr. Anderson, and Ms. Vanhook. Tr. 224. During this encounter, Mr. Anderson had his hands up as if he was wanting to fight. Tr. 225. Ms. Dukes claimed that she saw what looked like a gun in Mr. Anderson's pocket. Tr. 225. Ms. Dukes thought that the gun had a white handle. Tr. 231. After separating Mr. Anderson and Appellant, Ms. Dukes went inside. Tr. 226. After hearing the shots, Ms. Dukes came back outside and saw a woman taking off Mr. Anderson's shoes and shaking something out of his shoes. Tr. 228. Ms. Dukes also saw a young man that she didn't know pick up what Ms. Dukes believed to be a gun and run around the corner with it. Tr. 228.

Mertel Brown, Ms. Dukes's sister-in-law, claimed that she saw a gun in Mr. Anderson's left pocket while he was arguing with Appellant. Tr. 243-44. According to Mertel, Appellant was holding a gun on Mr. Anderson when Mr. Anderson started to reach as if he was going for his gun at which point Appellant shot him. Tr. 244. Mertel

also claimed to have seen someone, possibly Ms. Vanhook, search Mr. Anderson's shoes and give the gun to somebody else at the scene. Tr. 244-45. Mertel claimed that the gun held by Mr. Anderson was a shiny gun with a white handle. Tr. 251.

Roberta Davis, Appellant's aunt, claimed to have seen a lady searching through Mr. Anderson's shoes after he was shot, along with a young man. Tr. 264. Ms. Davis claimed that the young man took something out of Mr. Anderson's pocket and then left. Tr. 264-65.

Appellant testified in his own behalf. Appellant claimed that both he and Mr. Anderson regularly carried guns on their persons. Tr. 274. Appellant stated that several weeks before he killed Mr. Anderson that there was an incident in which he was walking with Mr. Anderson and Mr. Anderson pulled a gun on Appellant, asking Appellant why he didn't do anything to help Mr. Anderson retaliate against the people who had previously shot Mr. Anderson. Tr. 276.

Appellant testified that on June 9, 2007, his girlfriend and Ms. Vanhook had an argument. Tr. 278. At the time that the argument started, Appellant was near Mr. Anderson. Tr. 278-79. Appellant admitted that he had a gun, and he claimed that he saw the pearl handle of a gun in Mr. Anderson's pocket. Tr. 279. According to Appellant, after his girlfriend and Ms. Vanhook had been arguing for some time, Appellant suggested to Mr. Anderson that Mr. Anderson should get Ms. Vanhook and take her around the corner. Tr. 279. Appellant claimed that this made Mr. Anderson mad and that he and Mr. Anderson had an argument. Tr. 279. When Ms. Dukes came out, Appellant then started walking across the street but saw Mr. Anderson and Ms. Vanhook coming up

behind him. Tr. 280. Appellant and Mr. Anderson then started to argue again. Tr. 280-81. Appellant claimed that he saw Mr. Anderson getting his hands into his pockets as if playing with the gun; so Appellant pulled his own gun out and kept his hands behind his back. Tr. 281. Appellant alleged that, after some more words, Mr. Anderson reached to his left side as if to pull out his gun. Tr. 282. At that point, Appellant shot Mr. Anderson. Tr. 282. Appellant admitted that Mr. Anderson never got his gun out of his pocket. Tr. 282-83.

According to Appellant, Mr. Anderson kept the gun in his left pocket. Tr. 285-86. As such, Mr. Anderson would have been reaching across his body to pull the gun out when Appellant shot him. Tr. 286.

Appellant admitted that he got rid of his gun after shooting Mr. Anderson. Tr. 287. Appellant also admitted that he did not stick around after the shooting to explain his side of events to the police but instead went and stayed with a relative. Tr. 288. According to Appellant, he never told the police or any relative that he was acting in self-defense when he shot Mr. Anderson. Tr. 288-90.

The jury was instructed on murder in the first degree, the lesser-included offense of murder in the second degree, and alternative versions of armed criminal action (one based on murder in the first degree and the other based on murder in the second degree). L.F. 42-45. The jury was also instructed on self-defense, and the instructions on murder in the first degree and murder in the second degree referenced that instruction. L.F. 42-43, 49-50. They were also instructed that closing arguments were not evidence, and that they were to base their verdicts on the evidence and the instructions. L.F. 52.

During closing argument, the State used a .38 revolver (a gun similar to the one that Appellant admitted to using) for demonstrative purposes. Tr. 301. Prior to closing argument, the State explained that it intended to use the gun to demonstrate that it could not have fit in Mr. Anderson's pocket in the way described by the witnesses. Tr. 292-95. Appellant's counsel objected to the proposed use, and the trial court granted a continuing objection so that counsel would not have to object in front of the jury. Tr. 297-98.

During deliberations, the jury asked to see the .38 revolver which had been used as a demonstrative exhibit. L.F. 54, Tr. 316-17. The trial court responded that it could not send the revolver back as it was not in evidence. L.F. 54, Tr. 316-17. About ninety minutes later, the jury returned with a verdict finding Appellant guilty of the lesser-included offense of murder in the second degree and the associated count of armed criminal action. L.F. 57-58, Tr. 318-19.

In his motion for new trial, in relevant part, Appellant challenged the trial court's ruling on the State's *Batson* challenge and the trial court's allowing the State to use a demonstrative exhibit in closing. L.F. 59-61. The trial court denied the motion for new trial and proceeded to sentence Appellant to consecutive terms of thirty years for murder in the second degree and three years for armed criminal action. L.F. 72-75, Tr. 344-45.

Appellant filed his notice of appeal to the Missouri Court of Appeals, Eastern District. L.F. 77-86.

ARGUMENT

Point I (Demonstrative Exhibit)

The trial court did not abuse its discretion in allowing the State to use a gun as a demonstrative exhibit during closing to demonstrate that Appellant's claim that the victim was armed was not credible because the use of such an exhibit was not unduly prejudicial against Appellant in that the gun was presented to the jury in such a way as to make it clear that it was not Appellant's gun.

Review of a trial court's ruling on the permissible scope of closing argument is for abuse of discretion. *State v. Williams*, 97 S.W.3d 462, 474 (Mo. banc 2003). The trial court abuses its discretion when the ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to indicate a lack of careful consideration. *State v. Fassero*, 256 S.W.3d 109, 115 (Mo. banc 2008). Furthermore, to be reversible error, the argument must have had a decisive impact on the case. *Williams*, 97 S.W.3d at 475.

Contrary to Appellant's suggestions, it is not improper to allow a weapon to be used as a demonstrative exhibit merely because it is not the same exact weapon as was used in the case.³ *State v. Silvey*, 894 S.W.2d 662, 667 (Mo. banc 1995). Instead the

³ A similar conclusion was reached in *State v. Freeman*, 269 S.W.3d 422, 427 (Mo. banc 2008), in which certain liquor bottles similar to the ones that the defendant had been carrying when he left a bar were used as demonstrative exhibits to show that those liquor bottles had a unique shape resembling marks found on the victim.

question is whether the weapon is sufficiently connected to the case to aid the jury in understanding the issues in the case. *Id.* at 668.

In the present case, the evidence was undisputed that Appellant had used a .38 revolver. Tr. 126, 173, 188-89, 285. Appellant did not claim that the .38 revolver used by the prosecutor in closing argument was not fairly representative of that gun. Tr. 292-97. However, there was no specific evidence describing the gun that Appellant and his family alleged that Mr. Anderson carried. Under Appellant's theory of this case, the inability of Appellant and his family to accurately describe a probably fictitious gun precludes the State from using any type of gun to demonstrate the impossibility of the testimony of Appellant and his family. Respondent would argue that, in the absence of a good description of the gun, a generic gun can be used for demonstrative purposes.

A trial court can permit demonstrations in closing argument. *See, e.g., State v. Brown*, 246 S.W.3d 519, 531-32 (Mo. App. S.D. 2008); *State v. Henke*, 901 S.W.2d 921, 923-24 (Mo. App. W.D. 1995). Even in cases like *State v. Black*, 50 S.W.3d 778, 787 (Mo. banc 2001), which held that it was proper to exclude certain demonstrations, the analysis was on whether the demonstrations aided the jury.

Appellant has cited to multiple cases in which the use of weapons was found to be erroneous. Appellant's Brief at 24-25. In some of the cases cited by Appellant, the weapon was expressly connected to the defendant, and was evidence of other crimes. *See, e.g., State v. Holbert*, 416 S.W.2d 129, 132-33 (Mo. 1967); *State v. Perry*, 689 S.W.2d 123, 125-26 (Mo. App. W.D. 1985); *State v. Charles*, 572 S.W.2d 193, 197-98 (Mo. App. K.C.D. 1978). In other cases cited by Appellant, the way that the weapon was

used suggested that the weapon displayed to the jury was, in fact, the weapon used in the crime despite the lack of evidence supporting that inference. *State v. Merritt*, 460 S.W.2d 591, 593-95 (Mo. 1970); *State v. Moore*, 649 S.W.2d 109, 110 (Mo. App. W.D. 1982); *State v. Fristoe*, 620 S.W.2d 421, 426-27 (Mo. App. W.D. 1981); *State v. Davis*, 530 S.W.2d 709 (Mo. App. St. L. D. 1975). In this case, the weapon being displayed was displayed in a circumstance that would have suggested that it was the weapon of the victim, or more precisely that the victim had no weapon. As the Eastern District noted in its memorandum on this case, the argument made clear that the gun being used in the demonstration was not Appellant's gun. Mem. at 5, Tr. 301. As such, these cases involving a weapon of the defendant are not relevant to the present issue.

To the extent that these cases suggest that it is the use of a weapon in closing argument which makes this type of demonstration impermissible (and that use of weapons should be limited to weapons actually admitted into evidence), these cases rely on old language from *State v. Wynne*, 182 S.W.2d 294, 300 (Mo. 1944), that the "sight of deadly weapons . . . tends to overwhelm reason." Such language disparages the intelligence and common sense of jurors. Even if such language ever should have been followed, it is difficult to credibly make that same argument today.

Unlike in the 1940s, the average juror today is inundated with depictions of crimes and violence whether on the nightly news or during prime time in which many of the top shows seem to specialize in showing the most gruesome crimes possible or at the movie

theaters or at the video store or in playing video games.⁴ One effect of such repeated exposure is to desensitize viewers to violence.⁵ While many jurors may have never held

⁴ A study conducted between 1994 and 1997 indicated that two-thirds of television shows contained some violence with an average of six acts of violence per hour. See Kaiser Family Foundation, Key Facts: TV Violence (Spring 2003) at www.kff.org/entmedia/upload/Key-Facts-TV-Violence.pdf. Appendix at A-1-A-4. A study conducted in 2003 found that 40% of children aged 10-14 had seen R-rated movies characterized by extreme violence including such films as *Blade*, *Bride of Chucky*, *Scream 3*, and *Hannibal*. Keilah Worth et al., *Exposure of U.S. Adolescents to Extremely Violent Movies*, 122 *Pediatrics* 306 (2008) (<http://pediatrics.aappublications.org/cgi/content/full/122/2/306>). Appendix at A-5-A-11.

⁵ A recent study, building on multiple previous studies, suggests that exposure to violence in the media can result in people not only being desensitized to violence but also that a result of this desensitization can be a decreased likelihood of rendering emergency assistance to the victims of violence. Brad J. Bushman & Craig A. Anderson, *Comfortably Numb: Desensitizing Effects of Violent Media on Helping Others*, 20 *Psychological Science* 273 (2009), Appendix at A-12-16; see also Bruce D. Bartholomew, Brad J. Bushman, & Marc A. Sestir, *Chronic Violent Video Game Exposure and Desensitization to Violence: Behavior and Event-Related Brain Potential Data*, 42 *J. Experimental Social Psychology* 532, 532-33 (2006) (summarizing prior

a weapon, in this day and age, the mere display of a weapon in a courtroom is not likely to produce the type of reaction suggested in *Wynne*. Jurors are fully capable of evaluating a weapon in the same manner as they would evaluate any other item produced in the courtroom, and the mere display of a weapon is not likely to cause jurors to lose their ability to use reason in evaluating the case.

To the extent that Missouri case law can be read as applying a different standard to the use of a weapon as part of a demonstrative argument than to other types of items used in demonstrative arguments based on the theory that jurors are less capable of evaluating weapons in a demonstrative argument, that case law should be reconsidered and the use of weapons in a demonstrative argument should be evaluated in a similar manner to other demonstrative arguments.

In analyzing other demonstrative arguments, courts have generally looked at whether or not the demonstration was a legitimate inference from the evidence in the case. For example, in *State v. Henke*, 901 S.W.2d 921 (Mo. App. W.D. 1995), the Western District found that an objection would have been meritless when the prosecutor used a shotgun in closing argument to demonstrate how defendant pointed his gun at the victim in a case in which there had been testimony describing how the gun had been pointed at the victim. *Id.* On the other hand, when the demonstration is not based on the evidence, but instead is intended to create evidence, it is deemed to be improper. *See*,

studies on desensitizing effect of repeated exposure to violence in the media), Appendix at A-17-A-24.

e.g., *State v. Hall*, 748 S.W.2d 713, 714-16 (Mo. App. E.D. 1988). In *Hall*, some of the witnesses did not see the defendant dispose of a gun. *Id.* at 715-16. During the rebuttal portion of closing argument, the prosecutor in *Hall* hid the gun during the defense counsel's argument and tried to create an analogy between how the jurors were distracted and did not see the prosecutor hiding the gun and how the witnesses might have been distracted. *Id.* The Eastern District found that this demonstration which was not related to or an inference from the testimony at trial was an attempt to establish "proof" and thus was impermissible. *Id.*

Other states use a similar rule in dealing with demonstrations and visual aids during closing. In *State v. Reid*, 164 S.W.3d 286 (Tenn. 2005), the Supreme Court of Tennessee did not find any error in permitting the prosecutor to use a chart summarizing a comparison of fibers in which the prosecutor had written the word match, finding that it was a legitimate inference from the evidence, even though the witness had used the term "consistent" instead of match. *Id.* at 345-46. In *State v. Ancona*, 270 Conn. 568, 854 A.2d 718 (Conn. 2004), while finding problems with other parts of the closing argument, the Connecticut Supreme Court found that the use of blue sunglasses as a prop during closing was not improper. 270 Conn. at 597-99, 854 A.2d at 737-38. In reaching this conclusion, the Connecticut Supreme Court cited to cases from Georgia, Illinois, Massachusetts, and Pennsylvania which also allowed use of items not in evidence as

visual aids during closing argument.⁶ *Id.* In *Perry v. State*, 274 Ga. 236, 552 S.E.2d 798 (Ga. 2001), the Supreme Court of Georgia upheld a closing argument in which one prosecutor had an assistant sit in the posture of the victim to demonstrate how the victim

⁶ In the case from Georgia, *Laney v. State*, 271 Ga. 194, 515 S.E.2d 610 (Ga. 1999), the Georgia Supreme Court upheld the prosecutor's use of a five-pound bag of sugar, which was not in evidence, to demonstrate the amount of pressure which had to be used to pull the trigger on a gun. 271 Ga. at 197-98, 515 S.E.2d at 613. In the case from Massachusetts, *Commonwealth v. Nol*, 39 Mass. App. Ct. 901, 652 N.E.2d 898 (Mass. App. 1995), the Appeals Court of Massachusetts upheld the prosecutor's use of a handkerchief in a robbery case to demonstrate how much of the defendant's face would still be visible despite the defendant wearing a mask that covered the lower part of his face where the prosecutor made it clear that his handkerchief was not the mask used by the defendant. *Id.* In the case from Pennsylvania, *Commonwealth v. Twilley*, 417 Pa. Super. 511, 612 A.2d 1056 (Pa. Super. 1992), the Superior Court of Pennsylvania permitted the prosecutor to use a baseball bat and a beer bottle in a paper bag – neither of which had been introduced into evidence -- in closing argument in a case in which the victim had been assaulted with a baseball bat by multiple individuals and witnesses claimed that the defendant had been holding a baseball bat but the defendant claimed that he had merely been holding a bag containing a bottle of beer (and thus implicitly had not been involved in actually striking the victim). 417 Pa. Super. at 518-19, 612 A.2d. 1060.

was killed finding it to be based on reasonable inferences from the evidence. 274 Ga. at 238, 552 S.E.2d at 800-01.

Based on the evidence in this case, an issue for the jury was whether or not Appellant and his witnesses were credible in describing the acts of Mr. Anderson in connection with the gun that they alleged that Mr. Anderson possessed. Ms. Dukes alleged that she saw a gun in Mr. Anderson's pocket. Tr. 225. Mertel Brown also said that she saw a gun in Mr. Anderson's pocket and that she saw Mr. Anderson reaching for it while Appellant was already holding his gun in his hand. Tr. 243-44. Finally, Appellant claimed that he knew that Mr. Anderson had a gun in his pocket and saw Mr. Anderson reaching to pull the gun out. Tr. 281-82, 285-86. As was the circumstance in *Henke*, the testimony of these witnesses supported the demonstration that the prosecuting attorney intended to do. Whether or not the acts described by Appellant and his family were possible or reasonable had the potential to be a key consideration for the jury. The record indicates that the State merely demonstrated how, based on the testimony of Appellant, Ms. Dukes and Mertel Brown, the gun would have been located in the pocket and how difficult it would be to extract the gun. Tr. 292-295, 301.

The trial court in this case listened to the arguments of both sides as to whether the demonstration should be allowed. Tr. 292-97. While Appellant claimed that it was unduly prejudicial, Appellant did not elaborate on this claim. Tr. 296. Primarily, Appellant's argument was based on the fact that the gun which the State would be using had not been introduced into evidence. Tr. 293-95.

Taking into account the arguments made at the trial level, to the Court of Appeals, and to this Court, this argument can be split into two parts. The first part is the physical demonstration of the actions that Appellant and his witnesses alleged that Mr. Anderson took. Appellant has at no level complained that the physical component of the demonstration was not based on the testimony at trial.

The complaint instead is limited to the choice of the prop used by the State during this physical demonstration and the fact that the gun used as a prop might have more closely resembled Appellant's gun than the gun supposedly possessed by Mr. Anderson. Tr. 292-97, Appellant's Brief at 26-28. While Appellant complains about the gun used as a prop, the only detail that was preserved for the record was the caliber of the gun.⁷ Tr. 292-97. However, the caliber does not automatically translate into relative sizes of guns. There are apparently some relatively small in size .38 caliber guns. See Mouseguns.com, Comparison of Pocket Semi-Automatic Handguns Overall Length of Less than Six Inches -- .32 ACP or larger (www.mouseguns.com/PocketAutoComparison.pdf), Appendix at A-25-A-26; smallestguns.com, Smallest Guns (www.smallestguns.com),

⁷ A significant portion of Appellant's arguments are based on the fact that the caliber of the gun used as a prop matched the caliber of Appellant's gun. Appellant's Brief at 26-27. To avoid these arguments, it might have been better to use a different caliber gun. However, the use of a different caliber of gun would have merely led to a different set of arguments – e.g. why was a .25 caliber or .40 caliber gun used when there was no evidence that there was a gun of that caliber.

Appendix at A-27-A-29. For the purposes of the accuracy of the demonstration, it would not necessarily be the caliber that would matter but the dimensions as it would be the bulk of the gun that would make it harder or easier to pull the gun out of the pocket. If the gun used during the demonstration were on the small end of the scale, any mistake about the size of the gun would make the demonstration more favorable to Appellant, and there would be no prejudice from any inaccuracy. However, Appellant did not choose to make a record on this issue at trial. Tr. 292-97.

Based on the actual arguments made at trial, the ruling of the trial court showed that it carefully considered whether or not the proposed demonstration had a valid purpose that would aid the making of a proper argument to the jury. Tr. 295-96. Given the circumstances of this case in which the inability to more closely match the gun used as a prop to the gun allegedly used by Mr. Anderson was due primarily to the fact that Appellant and his witnesses were unable to describe the gun, this ruling reflects a careful consideration of the circumstances of the case. As such, the trial court did not abuse its discretion.

In considering whether or not the trial court abused its discretion and the degree to which there was prejudice if discretion was abused, this Court should remain cognizant of the fact that the allegedly improper argument occurred during the opening phase of the State's closing argument. Tr. 301. To the extent that Appellant believed that the demonstration involved questionable inferences from the evidence, he had the opportunity to respond and to argue to the jury why the State's demonstration was not a reasonable inference from the evidence.

Furthermore, Appellant alleges that the prejudice is demonstrated by the fact that the jury asked about the gun during deliberations. Appellant's Brief at 29. This argument ignores the fact that the trial court's response was that the gun was not in evidence and that the jury should be guided by its recollection of the evidence. L.F. 54. This response effectively re-emphasized what the jury was told in the original instructions – that the closing arguments were not evidence. L.F. 52. A jury is presumed to follow the instructions given by the court. *State v. Avery*, 275 S.W.3d 231, 234 (Mo. banc 2009); *State v. Forrest*, 183 S.W.3d 218, 230 (Mo. banc 2006); *State v. Davidson*, 242 S.W.3d 409, 416 (Mo. App. E.D. 2007).

In this case, there was no dispute that Appellant shot Mr. Anderson. The only dispute was about whether Appellant acted in self-defense. The evidence, however, demonstrated that Appellant killed Mr. Anderson with a shot to Mr. Anderson's back. Tr. 193-96. Furthermore, Appellant's testimony was that the first shot hit Mr. Anderson in the leg after which Mr. Anderson spun around. Tr. 283-84. Appellant acknowledged continuing to shoot after Mr. Anderson was no longer facing him. Tr. 284. While the testimony presented on behalf of Appellant might have been legally sufficient to warrant an instruction on self-defense, in light of the physical evidence and Appellant's own testimony, it was clear that the fatal shot was fired at a time when Mr. Anderson was not in a position to threaten Appellant.

In addition, some of Appellant's claims as to credibility actually demonstrate that the evidence was not credible. For example, Appellant claims that he was credible because he surrendered to the police **three days** after the shooting. Appellant's Brief at

31. With all due respect, Appellant's actions in fleeing the scene and hiding from the police for three days more closely resembles a demonstration of consciousness of guilt by someone who killed another person without justification than the actions of an innocent man who only acted in self-defense. *See, e.g., State v. Gilbert*, 103 S.W.3d 743, 749-50 (Mo. banc 2003) (flight from scene indicates consciousness of guilt). While Appellant claims to this Court that he told his mother the day after the shooting that he was acting in self-defense (and his mother testified to that effect), during his trial testimony, Appellant denied ever telling anybody that he was acting in self-defense. Appellant's Brief at 31 (citing to Tr. 217), Tr. 288-90. Furthermore, when Appellant's mother testified before the grand jury about the conversation that she had with Appellant the day after the shooting, she never mentioned Appellant claiming that he was acting in self-defense. Tr. 218-19.

Taking all of the evidence together, even if the State had been precluded from the use of a gun in closing argument to demonstrate that the victim could not have been armed in the way described by Appellant's evidence, there is no reasonable likelihood that the jury would have concluded that Appellant acted in self-defense.

Point I should be denied.

Point II (Reverse Batson)

The trial court did not clearly err in sustaining the State's objection to the peremptory strike of a juror on the grounds that the strike was motivated by racial and gender bias because the trial court did not clearly err in finding that the reasons given by Appellant for the strike were pretextual in that Appellant failed to strike other similarly situated non-Caucasian jurors and all of Appellant's strikes were used against Caucasian jurors.

In reviewing the decision of a trial court sustaining the State's objection to a racially-motivated peremptory strike by a defendant, this Court gives great deference to the trial court and only reverses upon a showing of clear error. *State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009).

A *Batson* challenge requires the party making the challenge to identify the racial and gender group to which the struck juror belongs.⁸ *State v. Brown*, 998 S.W.2d 531, 541 (Mo. banc 1999). Upon the challenge being made, the party who made the strike is then required to come forward with race-neutral reasons. *Id.* The party challenging the strike is then required to demonstrate that the reasons are pretextual. *Id.*

In determining whether a strike is pretextual, the trial court considers whether there are similarly-situated venirepersons who were not struck, the relation of the reasons given to the case at hand, the demeanor of the attorney making the strike, and the

⁸ The same rules apply in civil cases as in criminal cases. *Kesler-Ferguson v. Hy-Vee, Inc.*, 271 S.W.3d 556, 558-59 (Mo. banc 2008).

demeanor of the struck venireperson. *State v. Parker*, 836 S.W.2d 930, 939-40 (Mo. banc 1992). The other strikes used by a party can be a factor in determining the credibility of that party as to the asserted reasons for a strike. *See State v. Hopkins*, 140 S.W.3d 143, 157 (Mo. App. E.D. 2004).

In arguing this case, Appellant notes that the reasons given by trial counsel can be valid race-neutral reasons. Appellant's Brief at 42-45. However, the fact that those reasons are not per se discriminatory does not preclude a trial court from determining that they are not the real reasons in a given case.

Appellant's initial explanation was that Ms. Hoxworth was "the only one who said nothing." Tr. 84. This explanation was quickly proven to be false in that Ms. Hoxworth did answer a question that was asked to her. Tr. 69-70. Only after being challenged did Appellant acknowledge that she had answered a question, but noted that "that was it." Tr. 84. Appellant then added the facts that Ms. Hoxworth was single and a white-collar worker. Tr. 84. As the United States Supreme Court noted in *Miller-El v. Dretke*, 545 U.S. 231, 246, 125 S. Ct. 2317, 2328 (2004), when a party is caught with an invalid reason on its first attempt to explain a strike, attempts to come up with other reasons do not need to be accepted and can properly be viewed as afterthoughts attempting to defend an improper strike.

The trial court correctly noted that, in terms of being silent and only answering questions that were put to her, Ms. Hoxworth was similar to several other jurors. Tr. 84-85. While the trial court may have misidentified some of the other silent jurors, it did correctly identify Mr. Wallace and Ms. Scott as jurors who only answered questions

when they were asked. Tr. 69-70, 84-85. Appellant makes no argument that, as far as being silent, these two jurors were not similarly situated.

Appellant's main argument is that being a white-collar worker and single are race-neutral factors⁹ and must be accepted by the trial court as being non-pretextual.

Appellant's Brief at 43-45. As the Missouri Court of Appeals, Eastern District noted in *State v. Morton*, 238 S.W.3d 732, 735 (Mo. App. E.D. 2007), strikes justified based on employment should be examined very closely to determine if there is a relationship between that employment and the facts of the case at hand. Furthermore, in considering a claim that employment was a motivating factor, the trial court can consider whether the party using employment as a basis for a strike attempted to inquire about the impact of that employment during voir dire. *Id.*; see also *Miller-El*, 545 U.S. at 246, 125 S. Ct. at 2338 (failure to engage in meaningful voir dire on a subject is "evidence suggesting that the explanation is a sham and a pretext for discrimination"); *Kesler-Ferguson*, 271 S.W.3d at 559 n. 2. There is nothing in the record that indicates how these reasons are related to the case at hand or why those factors "bothered" Appellant's counsel beyond

⁹ Appellant has requested the jury records – which would apparently include the jury questionnaires -- be certified to this Court. For the purposes of this argument, Respondent is assuming that the questionnaires will not show a single male working a white-collar job served on the jury. If the questionnaires do show such a person served on the jury, that would be another indication that marital status and employment were a pretext.

the claim of a hunch. Tr. 84-85. Likewise, Appellant did not attempt to voir dire Ms. Hoxworth or any venireperson about those issues. Tr. 28-74.

Furthermore, the claim related to Ms. Hoxworth being single does not stand-up to closer analysis. At the time of trial, there was no explanation of why being single was relevant. Tr. 84-85. Likewise, there is little argument as to why being single was relevant in Appellant's Brief to this Court, other than noting that marital status can be race and gender neutral Appellant's Brief at 42-43. While there are circumstances in which marital status may be relevant and the "real" reason for removing a juror, there will also be circumstances in which marital status is being used to hide gender-discrimination. The failure of Appellant's trial counsel to ask any questions regarding the impact of marital status supports the trial court's conclusions that marital status was being used to hide gender-discrimination.

For employment status, Appellant claims that employment is relevant because a white-collar worker is unlikely to understand the circumstances of someone engaged in manual labor and using drugs and why such a person might carry a gun for protection. Appellant's Brief at 46-47. This argument, which was not made at the trial level, includes a lot of assumptions. In particular, it assumes that only working-class people use drugs and carry weapons. It also assumes that a person who currently has a white-collar job came from a background in which she was not exposed to people who do manual labor or use drugs or carry weapons.

Even granting that these class-based assumptions are technically race-neutral and gender-neutral, however, does not mean that they are the real reason for the strikes.

During voir dire, Appellant's initial questions dealt with prior jury service. Tr. 29-43. Appellant then moved to the issue of whether any members of the venire knew each other. Tr. 43-44. Appellant's third topic dealt with involvement with law enforcement. Tr. 44-68. Appellant's fourth topic was the impact of Appellant's prior record on his credibility and the burden of proof. Tr. 68-71. From that topic, Appellant's trial counsel then asked about self-defense and the burden of proof. Tr. 71-74. Appellant never asked whether any of the venire knew anybody who had used drugs. Appellant never asked whether any of the venire knew anybody who owned guns or had a concealed carry permit. In light of the absence of questions about those issues, a claim first made to this Court that employment status was a proxy for those issues should not be given much weight.

Ultimately, this case comes down to the issue of the credibility of Appellant's trial counsel. Appellant does not contest that all of his strikes were of Caucasians with three of the four strikes being women. In light of this circumstance, the trial court concluded that it just did not seem that trial counsel was giving real reasons for striking Ms. Hoxworth. Tr. 85. As the Missouri Court of Appeals, Eastern District, noted in *State v. Miller*, 162 S.W.3d 7, 15 (Mo. App. E.D. 2005), claims of pretext require the trial court to consider the behavior and demeanor of the venirepersons and the attorneys to judge the credibility of the reasons given for a strike; *see also Kesler-Ferguson*, 271 S.W.3d at 559 n. 1. The trial court is free to reject claims by a defense attorney as to his reasons for a strike including the suggestion that he is playing a hunch, and, on review, this Court

defers to the trial court's assessment of the legitimacy of the explanation. *Miller*, 162 S.W.3d at 15.

As this Court noted in *Kesler-Ferguson*, 271 S.W.3d 556 (Mo. banc 2008), there is a distinction between a case in which the trial court denies a *Batson* challenge and a case in which the trial court grants a *Batson* challenge. *Id.* at 560. A trial court is free to accept a reason which might be silly or superstitious, but it is not required to accept those reasons. *Id.*

In short, Appellant's argument is essentially that the trial court had to accept his explanations of the reasons for the strike even though there is nothing in the record that demonstrates that being single or a white-collared worker was a legitimate concern in this case, and the record refuted his other reasons, and he used all of his strikes to eliminate white jurors. The trial court is no more required to accept the reasons of a defendant without scrutiny than it is allowed to accept the reasons of the State without scrutiny. This Court should appropriately defer to the judgment of the trial court that Appellant's strike of Ms. Hoxworth was, in fact, for an improper reason.

Furthermore, even if the objection to the peremptory challenge was wrongfully sustained, there is no prejudice. As the United States Supreme Court has recently reaffirmed, the right to peremptory challenges is a statutory right, and the erroneous denial of a peremptory challenge does not prevent a defendant from having a constitutionally fair trial. *Rivera v. Illinois*, 129 S. Ct. 1446 (2008). In *Rivera*, the Illinois Supreme Court had determined that the trial court erred in finding that one of the defendant's peremptory challenges was discriminatory, but further found that, based on

the evidence in the case, that any reasonable jury would have returned a verdict of guilty and, as such, that the error was harmless error. *Id.* at 1452. In affirming, the United States Supreme Court rejected the claim of the defendant in that case (and the implicit claim of Appellant in this case) that the denial of a peremptory strike is structural error rendering the judgment automatically reversible without a showing of prejudice. *Id.* at 1455.

Like in other states, in Missouri, the right to peremptory challenges is statutory, not constitutional. *State v. Hall*, 955 S.W.2d 198, 204 (Mo. banc 1997). In this case, there was no evidence that Ms. Hoxworth was anything other than a fair and impartial juror and no basis to conclude that, if Ms. Hoxworth did not serve on the jury, the result would have been different. Indeed, if Ms. Hoxworth had been removed, she would simply have been replaced by a different qualified juror.

As noted in Point I, Appellant admitted to shooting Mr. Anderson, and the claim of self-defense was incredible in light of the fact that Mr. Anderson was killed by a shot to the back. As was the case in *Rivera*, any error in denying Appellant's peremptory challenge to Ms. Hoxworth was harmless.

Appellant cites to other states which have opted to allow a claim of error based on the erroneous granting of a *Batson* challenge. Appellant's Brief at 49. While states are free to grant such additional protection if they deem fit, Appellant's argument ignores Missouri cases which indicate a much more restricted view on the issue of peremptory challenges. In the context of claims that trial counsel was ineffective in failing to strike a particular juror, both the Southern District and the Western District of the Missouri Court

of Appeals have found that the failure to peremptorily strike a particular qualified juror does not demonstrate prejudice for the purposes of *Strickland* prejudice. *Hightower v. State*, 43 S.W.3d 472, 477 (Mo. App. S.D. 2001); *Ham v. State*, 7 S.W.3d 433, 439-41 (Mo. App. W.D. 1999). While recognizing that *Strickland* prejudice is not quite the same standard that governs on direct review, the reasoning in these opinions is substantially similar to the reasoning of the United States Supreme Court in *Rivera*. As such, there is no substantial reason in Missouri law for this Court to come to a different conclusion than *Rivera*.

Point II should be denied.

CONCLUSION

The judgment of the trial court 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 7,753 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 1st day of June, 2010, to:

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APPENDIX

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