Case No. SC94658

IN THE SUPREME COURT OF MISSOURI

CHADWICK LELAND WALTER

Appellant,

v.

STATE OF MISSOURI

Respondent.

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

RESPONDENT'S SUBSTITUTE BRIEF

Respectfully submitted,

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Statement of Facts

The State is satisfied with the accuracy, but not the completeness, of Appellant Chadwick Walter's statement of facts. *See* Rule 84.04(f). Accordingly, it adds the following.

This is a methamphetamine production case. The State charged Walter with violating section 195.211, attempted manufacture of a controlled substance. (LF 52). The State also charged Walter with violating section 195.130, maintaining a public nuisance—a residence used for the purpose of producing methamphetamine. (LF 53).

On August 4, 2011, at roughly 3:48 p.m., Walter and his girlfriend, Kathy Martinson (Tr. 86:16-18; 374:1-4), drove to Marshall Missouri in Walter's 1982 blue Chevrolet Truck. (Tr. 374:10-16). There, they bought Lithium batteries at a Wal-Mart store. (Tr. 288:2-16; 297:1-9 (photographs of Walter at Wal-Mart on August 4, 2011, admitted) 314:3-11 (Walter identified in Wal-Mart photographs); 375:22-24)). Also on that day, Walter purchased pseudoephedrine pills from a Red Cross pharmacy. (Tr. 374:25; 375:1-6). Martinson bought pseudoephedrine pills from the Red Cross pharmacy, separately from Walter's purchase. (Tr. 375:11-14). Eight minutes after that, Walter and Martinson purchased

pseudoephedrine pills from Wal-Mart. (Tr. 291:18; 376:2-5). Martinson then went to a different Red Cross to buy more pseudoephedrine pills. (Tr. 376:7-11). Martinson then came back to Wal-Mart to purchase Coleman Camp Fuel. (Tr. 293:16).

Lithium batteries, pseudoephedrine pills (or ephedrine pills), and Coleman Fuel, are all components used in the production of methamphetamine. (Tr. 162:2-25; 163:1-6) (Lithium batteries) (Tr. 161:15-24; 163:22-23) (ephedrine/ pseudoephedrine); (Tr. 166:1-25) (Coleman Fuel).

That evening, methamphetamine was manufactured at Walter's residence, and the items purchased earlier that day were used in the production. (Tr. 73:18-19; 74:24-25: 75:1, 14-15; 366:16-19; 368:5-14). Specifically, the pseudoephedrine pills that Walter himself purchased were used in the production of methamphetamine. (Tr. 380:12-16).

According to Martinson, Walter knew about the methamphetamine production. (Tr. 386:1-13). She told her probation officer that she and Walter purchased the pseudoephedrine pills for the purpose of producing methamphetamine. (Tr. 386:8-13).[1]

[1] Although Martinson testified differently at trial, the standard of review mandates that (1) her contrary trial testimony be disregarded; and

At 6:45 p.m., Shane Nicholson, an acquaintance of Walter's, was pulled over for a traffic violation. (Tr. 98:15-24). Trooper Christopher Sullivan took Nicholson to the Saline County Sherriff's office. (Tr. 99:20-23). While there, Nicholson received a text message. (Tr. 102:1-5). Trooper Sullivan viewed the text message. (Tr. 102:3-6). The text message contained identifying information at the top of the cell-phone, which read "Chad." (Tr. 102:6-13). Nicholson's cell-phone rang at 8:10 p.m. (Tr. 103:18-24). Nicholson put the cell-phone "on speaker," so that Trooper Sullivan could listen to the conversation. (Tr. 104:6-10). Trooper Sullivan recognized the voice of the caller to be Walter's. (Tr. 104:11-25; 105:1-4). Trooper Sullivan could identify Walter's voice because he had had other dealings with Walter. (*Id.*; Tr. 143:4-6). Nicholson asked "if it was fire," and Walter replied "yeah." (Tr. 111:14-18). Among methamphetamine users, the term "fire" means "good" or "excellent" methamphetamine. (Tr. 231:17-24).

Walter's residence was located at 24808 155th Road. (Tr. 222:25; 223:1-9). In the early morning hours of August 5, 2011, Trooper Sulli-

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(2) her statements to the probation officer be believed. *State v. Mitchell*, 442 S.W.3d 923, 931 (Mo. App. S.D. 2014).

van applied for and obtained a search warrant for that residence. (Tr. 79:21-23) (LF 19, 27).

The application for the search warrant stated, among other things, that (1) Walter and Martinson were known to be users of methamphetamine; (2) Sullivan had obtained information from an informant that Walter was cooking methamphetamine that night because he was "off parole"; (3) Sullivan verified that Walter's parole officer had spoken with Walter that same day and had told him that he would be off parole in two weeks; (4) the informant had received a call from an individual who said he was "at Chad's getting ready to get high"; (5) Walter sent a text message to the informant, asking if he was coming over; (6) Walter called the informant, who asked "if it was 'fire,'" to which Walter responded "yeah"; (7) the informant stated that Walter had previously cooked methamphetamine on July 21, 2011; (8) Trooper Sullivan, through consulting a database, determined that Walter and Martinson had purchased ephedrine and pseudoephedrine six separate times between July 20, 2011, and August 4, 2011; (9) Walter had prior felony drug convictions in Saline County and was currently on bond in Clay County for possession with intent to distribute; and (10) three previous

warrants had issued for Walter's residence, and all three had resulted in the seizure of methamphetamine and/or paraphernalia of methamphetamine production, including burnt components of a methamphetamine laboratory in the exterior wood furnace. (LF 23-24).

The search warrant issued and described the area to be search as follows:

> A residential structure with a street address of 24808 155th Road in Saline County, Missouri, located on the south side of 155th Road, and described as a gray single-story wood frame home, with vinyl siding and wooden deck located on the south side of the residence. The residence has a basement and a detached two car garage. In addition, there is an outdoor wood-burning furnace on the exterior of the residence.

(LF 26). The items to be searched for were methamphetamine and any articles used in the sale, distribution, or manufacture of methamphetamine. (*Id.*).

At 1:25 a.m., Trooper Sullivan and nine other officers served the search warrant. (Tr. 81:16-18). When the police entered Walter's residence, he was in the basement. (Tr. 87:16-17). Located in the basement

was a Wal-Mart card with white powder residue on it. (Tr. 94:1-5). A razor blade and a baggie with white powder residue inside lay in close proximity to the card. (*Id.*). Trooper Sullivan also found a syringe and a plastic baggie filled with a white powdery substance. (Tr. 113:14-16). The syringe was found in the pocket of a pair of blue jean shorts. (Tr. 183:23-25; 184:1-5). The shorts did not belong to Martinson, the only other resident of the address. (Tr. 369:25; 370:1-12).

Deputy Richard Miller was one of the police officers who served the warrant. (Tr. 171:25; 172:1). He collected and cataloged items found at the residence that are typically used to created methamphetamine. (Tr. 172:7-8).

In Walter's basement, Deputy Miller found the following items: salt (Tr. 180:25); Lithium batteries (Tr. 181:3-5); two quarts of Acetone (Tr. 181:13); starting fluid, which contains ether (Tr. 182:9); an unmarked container containing Liquid Fire, which contains acid (Tr. 184:12-14). Each of these items is used in the production of methamphetamine. (Tr. 168:17-25) (salt); (Tr. 162:1-3) (Lithium batteries); (Tr. 166:1-3) (Acetone); (Tr 182:14-16) (ether); (Tr. 184:25; 185:1-2) (Liquid Fire).

Deputy Miller also found a propane torch in the basement, which is

used in the consumption of methamphetamine, (Tr. 182:23-25; 183:1-4), and a metal spoon with powdery residue. (Tr. 186:8-14). Trooper Sullivan found a baggie containing a white powdery substance in a bourbon container near the bar area of the basement. (Tr. 113:17-24). Deputy Miller noticed a strong chemical odor emanating from a jug in the basement. (Tr. 183:7-8).

In the area in and around the wood burning stove, Deputy Miller found burnt Lithium batteries, burnt packaging for ephedra or pseudoephedrine pills, a burnt acetone container, a burnt Coleman Fuel Container, and burnt syringes. (Tr. 189:12-19; 191:6-9; 192:23-25).

Walter owned a dark-colored Chevrolet truck and a dark blue 1982 Chevrolet truck. (Tr. 112:16-25; 113:1-3). The police found the blue truck inside the Walter residence's garage. (Tr. 113:1-6; 194:14-21).

Deputy Miller searched the garage. (Tr. 195:24-25; 196:1-2). There was a strong chemical smell in the garage. (*Id.*). Deputy Miller located the source of the smell as coming from the engine compartment of Walter's truck. (Tr. 196:3-7). Inside that compartment, Deputy Miller discovered items used in the manufacture of methamphetamine. (Tr. 196:10-13). Specifically, Deputy Miller found Coleman Fuel containers

(Tr. 196:16-18), and a large red mixing bowl (Tr. 197:4-7), containing a cloth with white powdery substance on it. (Tr. 198:2-8). Deputy Miller also found ephedrine that had gone through the process of adding the Lithium batteries and anhydrous ammonia. (Tr. 198:25; 199:1-4).

The materials in the blue truck contained chemicals undergoing the process of manufacturing methamphetamine. (Tr. 222:22-24).

What the police found was an active methamphetamine lab. (*Id.*).

The red bowl contained samples of methamphetamine. (Tr. 263:24-25; 264:1-6). Anhydrous ammonia would have had to have been present to produce the methamphetamine found in the bowl. (Tr. 233:2-3). The total weight of the substances sampled from the red bowl was 58.82 grams. (*Id.*).

When confronted with the contents of the red mixing bowl, Walter said "this is fucking bullshit, someone set me up, you set me up." (Tr. 140:6-10).

After the search was executed, Trooper Sullivan was responsible for completing the return of inventory (Tr. 14:16-19).

He conducted the inventory in Walter's presence. (Tr. 16:9-13).

Corporal Darrin Lilleman participated in the execution of the search warrant for Walter's residence. (Tr. 312:11-14). In cross-examining Corporal Lilleman, Defense Counsel attempted to show that the officers violated the terms of the warrant by removing Walter from the premises. (Tr. 316-324). Corporal Lilleman responded that Walter was removed due to concerns for officer safety. (Tr. 318:12-13; 320:22-24).

At trial, the mugshot of Walter was admitted into evidence as Exhibit 151. (Tr. 418:4-25; 419; 420:1-18; 467:1-8). Walter objected as to foundation. (419:12-18). The objection was overruled. (420:13-18). Walter has not appealed the propriety of that ruling.

During the opening portion of the State's closing argument, the prosecutor summarized the evidence and concluded as follows: "So, based upon that evidence, I would ask you to find, on both Counts, I and II, the Defendant is guilty." (Tr. 443:5-7). As the prosecutor said the word "guilty," he displayed the portion of Exhibit 151 that was the mugshot of Walter. (Tr. 467:3-19). After the photograph was presented to the jury, the prosecutor digitally added the letters G-U-I-L-T-Y in red. (*Id.*; Tr. 490:6-12). The defense did not object at that time.

The jury deliberated for two hours and twenty-three minutes. (463:10, 23). The defense did not object to the closing argument during that time. After the verdict was rendered, the Court discharged the jury with no objection from the defense. (Tr. 464:2-7). At that point, the defense brought the mugshot and the digital letters that had been written on it to the Court's attention. (464:23, *et seq*.). At a post-trial hearing, the trial court heard argument on the point and overruled the defense's motion for a new trial. (Tr. 491:8-12).

Argument

This is a methamphetamine production case. The issue is whether a prosecutor may (1) state that "based upon [the] evidence, I would ask you to find … the Defendant is guilty"; (2) *then* display a mugshot of the defendant that was in evidence; and (3) *then* write on the photograph "Guilty." He can. A prosecutor cannot imply outside knowledge of the defendant's guilt, but that did not happen here. Under the circumstances of this case—where the prosecutor preceded his statement of the defendant's guilt by summarizing the overwhelming evidence—the prosecutor could say, "The defendant is guilty." He could also write that on a document in evidence. The mugshot was in evidence, so writing a proper argument on it did not constitute prosecutorial misconduct.

Regardless, Walter cannot survive plain error review. Walter, though having knowledge of the alleged error, gambled on the verdict, and only then, when the result was known to be adverse, did he bring the matter to the Court's attention. And if Walter's gamble does not preclude him from relief, the overwhelming nature of the evidence does.

Because there was no error—and certainly no manifest injustice—the trial court's judgment should be affirmed.

I. Under plain error review, it was not manifestly unjust for a prosecutor, in his closing, to digitally write on a photograph of the defendant the word "GUILTY," when the prosecutor would be justified in making that same statement and when the evidence against the defendant was overwhelming. (Responds to Point I).

Under Missouri law, the prosecutor was entitled to state that, *based on the evidence*, Walter is guilty. So too was he entitled to write the word "guilty" on a mugshot of Walter that was in evidence, given that he had preceded the act by summarizing the overwhelming evidence of Walter's guilt.

In any event, the trial court's decision not to order a new trial survives plain error review because (1) Walter gambled on an alleged error in closing argument, which is never proper; and (2) the evidence against Walter was overwhelming, thus vitiating any claim that the closing argument had a decisive effect on the jury's determination.

a. Standard of Review

Requests for relief from improper argument must be timely made to preserve them for appellate review. *State v. Hicks*, 803 S.W.2d 143, 147 (Mo. App. S.D. 1991). Here, Defense Counsel did not object to the alleged error when it occurred; rather, he waited until after the verdict was returned. (Tr. 463:23, *et seq*).

> "Plain error review is used sparingly and is limited to those cases where there is a clear demonstration of manifest injustice or miscarriage of justice. Claims of plain error are reviewed under a two-prong standard. In the first prong, we determine whether there is, indeed, plain error, which is error that is evident, obvious, and clear. If so, then we look to the second prong of the analysis, which considers whether a manifest injustice or miscarriage of justice has, indeed, occurred as a result of the error. A criminal defendant seeking plain error review bears the burden of showing that plain error occurred and that it resulted in a manifest injustice or miscarriage of justice. The outcome of plain error review depends heavily on the specific facts and circumstances of each

case."

State v. Celis-Garcia, 420 S.W.3d 723, 726-27 (Mo. App. W.D. 2014) (*quoting State v. Ray*, 407 S.W.3d 162, 170 (Mo. App. E.D. 2013)).

"[T]o reverse a conviction on plain error for improper argument, an appellant must show manifest prejudice affecting substantial rights. In other words, the appellant must establish that the … prosecutor's comments had *a decisive effect* on the jury's determination such that the verdict would have been different" absent the comments. *State v. Albanese*, 9 S.W.3d 39, 55 (Mo. App. W.D. 1999) (emphasis added) (citations omitted).

b. The prosecutor could write the word "GUILTY" on a mugshot *after* he had summarized the overwhelming evidence of the defendant's guilt.

In Missouri, "statements by a prosecuting attorney in argument indicating his opinion that the accused is guilty, where it is apparent that such opinion is based on the evidence in the case, are permissible." *State v. Moore*, 428 S.W.2d 563, 565 (Mo. 1968). In order to be improper, the statement of the defendant's guilt must "imply knowledge of facts not in evidence." *Id.* "[P]rosecutors and defense attorneys are allowed

substantial latitude in closing argument, including suggesting reasonable inferences to be drawn from the evidence. As such, a prosecutor may express a belief as to the defendant's guilt if that opinion appears to be fairly based on the evidence." *Albanese*, 9 S.W.3d at 56.

Here, the prosecutor's written statement survives that standard. The prosecutor ended the opening portion of his closing by stating that "based on that evidence," which he had previously been summarizing, "I would ask you to find … the defendant is guilty." (Tr. 443:5-7). Simultaneously with that statement, the prosecutor displayed a mugshot of Walter. (Tr. 467:15-19). Then, *and not before*, the prosecutor digitally wrote the word "GUILTY" across the mugshot. (Tr. 490:6-12).

Under these circumstances— *after* summarizing the overwhelming evidence showing Walter's guilt—the prosecutor was entitled to say "Walter is guilty." He was also entitled to show the jury a mugshot that was in evidence. *State v. Powell*, 793 S.W.2d 505, 509 (Mo. App. E.D. 1990). It follows that the prosecutor was entitled to couple his proper argument—that Walter was guilty—with a photograph that was in evidence.[2]

[2] Here, Walter's mugshot was admitted into evidence over a founda-

There is no authority for the proposition that a prosecutor cannot superimpose once piece of *proper* evidence or argument onto another. For example, in *State v. Strong*, 142 S.W.3d 702, 720-21 (Mo. 2004), the prosecutor, in closing, used a slide show that superimposed images of the defendant's mugshot over photographs of the victims' bodies. He also superimposed the defendant's mugshot over the murder weapon. *Id.* This Court affirmed, noting that "[n]early all of the photographs contained in the slide show were previously admitted" into evidence. *Id.* at 721.[3]

In arguing the contrary, Walter relies heavily on Washington law, but even if this Court would look to those cases as opposed to its own, the prosecutor's argument should be upheld. *See In re Olsen*, No. 44984-

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tion objection. (Tr. 418:4-25; 419; 420:1-18). The trial court's ruling on that objection has not been appealed. It would not matter if it had been appealed, because "'[m]ugshots' are in themselves neutral and do not constitute evidence of prior crimes and offenses." *State v. Hamell*, 561 S.W.2d 357, 361 (Mo. App. 1977).

[3] The photographs that were displayed but that were not in evidence were innocuous.

6-II, 183 Wash. App. 1046, *4 (October 7, 2014) (unpublished) (affirming a closing argument that used a mugshot of the defendant with the caption "guilty" because the mugshot was displayed *after* the prosecutor had properly summarized the evidence of the defendant's guilt).

In re Glasmann is distinguishable because *the argument itself*—that the defendant was "GUILTY, GUILTY, GUILTY"— was improper under the facts of that case. 286 P.3d 673, 680 (2012). There, the prosecutor had superimposed captions onto photographs that (1) expressed the prosecutor's personal opinions; (2) contained improper statements of the law; and (3) appeared throughout the closing argument, as opposed to being submitted only at the culmination of the evidence argued. *Id.* at 679-80. In *this* manner, "[a] prosecutor could never shout in closing argument that '[Defendant] is guilty, guilty, guilty,'" and therefore prosecutorial misconduct occurred. *Id.* at 680.

But, even in Washington, the prosecutor *can* argue that, based on the evidence cumulatively presented, the jury should find the defendant guilty, and the prosecutor *can* reinforce that point with a mugshot with the word "guilty" superimposed. *In re Olsen*, 183 Wash. App. 1046 at *4.

The *Olsen* court—in affirming a case that is on all fours with this

one—distinguished *Glasmann* on this basis. In *Glasmann*, the *Olsen* court explained, "the prosecutor's conduct was improper because the prosecutor used his 'position of power and prestige' to influence the jury and expressed in the captions a personal opinion regarding the defendant's guilt." 183 Wash. App. 1046 at *5. By contrast, in *Olsen*, "the prosecutor linked the image of Olsen's photo with a *progressive presentation of admitted evidence* that *ultimately* led to the word 'guilty' superimposed over Olsen's photo. Thus, the prosecutor presented an argument rather than a personal expression of guilt." *Id.* (emphasis added). *See also State v. Spence*, 2014 WL 2089506, at *5 (Del. Super. May 15, 2014) (distinguishing *Glasmann*, because, in *Glasmann* "the prosecutions slideshow presentation contained *multiple* assertions of the defendant's guilt, improperly modified exhibits, and statements that jurors could only acquit the defendant if the jury believed the defendant's trial testimony.") (emphasis added).

Thus, it was the constant barrage of photographs with improper captions—and not, an ultimate, and solitary presentation of the defendant's mugshot captioned with the word "guilty"—that rendered the *Glasmann* closing argument improper under Washington law. *Olsen*,

183 Wash. App. 1046 at *5.

Nor does the most recent Washington case, *State v. Walker*, 341 P.3d 976 (Wash. 2015), hold differently. There, the prosecution, *throughout* its closing, used over 100 slides that contained the statement that the defendant was guilty. Further, the closing argument

> included *multiple* exhibits that were altered with inflammatory captions and superimposed text; it suggested to the jury that [the defendant] should be convicted because he is a callous and greedy person who spent the robbery proceeds on video games and lobster; it plainly juxtaposed photographs of the victim with photographs of [the defendant] and his family, some altered with racially inflammatory text; and it *repeatedly* and emphatically expressed a personal opinion on [the defendant's] guilt.

Id. at 985 (emphasis added). Even worse, in *Walker*, "some of the State's PowerPoint slides implicitly encouraged a verdict specifically based on racial prejudice." *Id.* at 985 n.4. Nothing like the closing at issue in *Walker* occurred here.

Indeed, *Walker* hurts Walter's case, because it notes that "the word

'guilty,' when presented as a written word in a visual aid, [does not] always constitutes an improper expression of the prosecutor's opinion on guilt." *Id.* at 986 n.6. Thus, the Washington cases are consistent with Missouri law in that "statements by a prosecuting attorney in argument indicating his opinion that the accused is guilty, *where it is apparent that such opinion is based on the evidence in the case*, are permissible." *Moore*, 428 S.W.2d at 565 (emphasis added); *Cf. Olsen*, 183 Wash. App. 1046 at *5 (affirming when "the prosecutor linked the image of Olsen's photo with a progressive presentation of admitted evidence").

Neither mugshots, nor the word "guilty," nor combining the two is improper: rather, the touchstone is whether the prosecutor, at the time he writes the word "guilty" on a mugshot, could properly make that argument. *Olsen*, 183 Wash. App. 1046 at *5. If the prosecutor's statement "appears to be fairly based on the evidence," *Albanese*, 9 S.W.3d at 56, then it is proper. This case meets that standard, given that the prosecutor first summarized the substantial evidence against Walter, then displayed the mugshot, then wrote the word "GUILTY" on the mugshot, while stating "I would ask you to find … the defendant is guilty."

Under these circumstances, the first prong of plain error review—finding an error to be "evident, obvious, and clear"—cannot be met. *Celis-Garcia*, 420 S.W.3d at 726-27.

c. Even if error occurred, the Court should affirm because (1) Walter gambled on the verdict; and (2) evidence of his guilt was overwhelming, thus vitiating any claim that the mugshot had a decisive effect.

1. Walter is in no position to claim "manifest injustice" given that he gambled on the verdict.

A party cannot fail to request relief, gamble on the verdict, and then, if the result is adverse, request relief for the first time. *Hicks*, 803 S.W.2d at 147; *State v. Cooper*, 673 S.W.2d 848, 850 (Mo. App. S.D. 1984). Thus, assertions of plain error regarding closing arguments are generally denied without explanation. *State v. Cobb*, 875 S.W.2d 533, 537 (Mo. 1994); *State v. Rodgers*, 899 S.W.2d 909, 912 (Mo. App. S.D. 1995).

> Appellate review on assertions of plain error as to closing argument mandates reversal only if the error results in mani-

> fest injustice. Relief is *rarely granted on such claims* because, in the absence of objection and request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. Because trial strategy looms as an important consideration in any trial, assertions of plain error concerning matters contained in closing argument are *generally denied without explication*.

State v. Lane, 415 S.W.3d 740, 756 (Mo. App. S.D. 2013) (emphasis added) (quotation marks and citations omitted).

Here, Defense Counsel did not object to the alleged error in closing argument until after the jury's verdict was read. The jury deliberated for over two hours (Tr. 463:10-23), and the error could have been brought to the Court's attention at that time. Because the failure to cite the error until after the jury returned an adverse result constituted a strategic decision, Walter cannot survive plain error review. *See Hicks*, 803 S.W.2d at 147.

2. There was no prejudice because the evidence of Walter's guilt was overwhelming, thus vitiating any claim that the mugshot had a decisive effect.

Walter cannot survive plain error review because the alleged misconduct did not have a decisive effect on the verdict. "The appellant must establish that the … prosecutor's comments had a decisive effect on the jury's determination such that the verdict would have been different" absent the comments. *Albanese*, 9 S.W.3d at 55. And the burden lies on Walter to prove that decisive effect. *State v. Deck*, 303 S.W.3d 527, 541 (Mo. 2010) ("The burden to prove decisive effect is on the appellant.").

A. It remains Walter's burden to prove that the alleged error had a decisive effect.

Walter erroneously suggests that manifest injustice can be found *in the absence* of a finding that the alleged error had a decisive effect. (Substitute Brief at 34). That is not the law. *State v. McFadden*, 369 S.W.3d 727, 747 (Mo. 2012) ("Reversal is required for improper argument only if such argument had a decisive effect on the jury's determination. The burden to demonstrate a decisive effect is on the defend-

ant."); *State v. Tisius*, 362 S.W.3d 398, 409 (Mo. 2012) (same); *State v. Anderson*, 306 S.W.3d 529 (Mo. 2010) (same). Walter cites *State v. Hammonds*, 651 S.W.2d 537, 539 (Mo. App. E.D. 1983), for the proposition that a closing argument can be *so bad* that no "decisive effect" analysis need be done.[4] But neither *Hammonds* nor any other Missouri case stands for that proposition.

"An argument has a decisive effect when it is reasonably probable that, absent the argument, the verdict would have been different." *State v. Baumruk*, 280 S.W.3d 600, 618 (Mo. 2009).

In *Hammonds*, although the Court of Appeals did not explicitly engage in a "decisive effect" analysis, the standard for a "decisive effect" was met. 651 S.W.2d 538-39. In that case, the premise of the accused's defense was that he was with his uncle at the time of the crime. *Id.* at 538. However, the Court excluded the uncle's testimony due to late disclosure of an alibi witness. *Id.* The prosecutor had the uncle stand up in

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[4] Even if the Court accepted this erroneous legal proposition, the factual premise upon which the argument is made (that the prosecutor's argument was egregious and therefore deserving of *suis generis* treatment) fails for the reasons stated in section I.b. of this brief.

the courtroom and then argued to the jury that he did not testify, not because he was excluded, but because he did not want perjure himself. *Id.* at 538-39. Under those circumstances—improperly impugning the very basis of the defendant's case—it was "reasonably probable that, absent the argument, the verdict would have been different." *Baumruk*, 280 S.W.3d at 618.

By contrast, here, it is not reasonably probable that, had the prosecutor not displayed the mugshot, the verdict would have been different. The evidence against Walter was simply too strong. And, unlike the argument in *Hammonds*, the argument here did not speak to Walter's theory of the case—that the girlfriend acted without his knowledge. Thus, it remains Walter's burden to prove that the alleged misconduct had a decisive effect. He cannot meet that burden, so much so that he has not even tried.

B. By not arguing the point, Walter has waived any claim that the alleged error had a decisive effect.

Walter has not even attempted to meet his burden to prove that the alleged error had a decisive effect.

His briefs to the Court of Appeals contained no such argument, and therefore it is waived. *Essex Contracting, Inc. v. Jefferson Cnty.*, 277 S.W.3d 647, 656 (Mo. 2009) ("This argument appeared nowhere in the brief to the court of appeals, and that portion of the substitute brief will not be considered by this Court."); *Matter of Hasty*, 446 S.W.3d 336, 339 (Mo. App. E.D. 2014) ("Missouri courts may hold a party has abandoned an issue where the party fails to address the issue of prejudice in his or her brief.").

Nor does Walter attempt to prove "decisive effect" in his Substitute Brief. Rather, he argues that (1) the evidence was not overwhelming; and (2) he should not have to prove "decisive effect" because the alleged error was so bad. (Substitute Brief at 33-37).

But he is wrong on both counts. At trial, the evidence *was* overwhelming, and, as explained above, he *does* have to prove "decisive effect."

C. Evidence of Walter's guilt was overwhelming.

"An argument has a decisive effect when it is reasonably probable that, absent the argument, the verdict would have been different."

Baumruk, 280 S.W.3d at 618. "Generally, where there is overwhelming evidence of defendant's guilt, errors concerning the prosecutor's closing argument are not viewed as having a decisive effect on jury deliberations." *State v. Durbin*, 835 S.W.2d 323, 326 (Mo. App. E.D. 1992).

Here, evidence of Walter's guilt was overwhelming. On the day in question, Walter and his girlfriend bought elements required to produce methamphetamine. (Tr. 288:2-16; 297:1-9; 314:3-11; 375:22-24; 374:25; 375:1-6; 375:11-14; 291:18; 376:2-5; 376:7-11; 293:16). They did so under suspicious circumstances, buying them piecemeal and at different locations. *Id*.

The girlfriend testified that, in purchasing these items, she had the intent to manufacture methamphetamine. (Tr. 365:11-14). She told her parole officer that Walter knew what was going on and that he too purchased the items for the purpose of manufacturing methamphetamine. (Tr. 386:1-13; 386:8-13). The items, including pills that Walter bought independently of his girlfriend, were in fact used to produce methamphetamine. (Tr. 365:5-14; 380:12-16).

Walter called a third party and told him that "it was fire," meaning excellent methamphetamine. (Tr. 111:14-18). The police found numer-

ous items of methamphetamine manufacturing paraphernalia in Walter's own residence. They found all items necessary to produce methamphetamine. (Tr. 234:2-4). Walter had "commenced the manufacturing process," *see State v. Mickle*, 164 S.W.3d 33, 53 (Mo. App. W.D. 2005), in that an "active meth lab" (Tr. 222:24), was located in his truck, and the lab in fact produced methamphetamine. (Tr. 73:18-19; 74:24-25: 75:1, 14-15; 366:16-19; 368:5-14).

Incriminating evidence pervaded Walter's residence. Walter was found in the basement, where several of the paraphernalia items were located. (Tr. 87:16-17). Noticeable chemical smells emanated from both the basement (Tr. 183:7-8), where Walter was found, and in the garage, where his truck was parked. (Tr. 195:24-25; 196:1-2). A syringe was found in a pair of blue jean shorts, (Tr. 183:23-25; 184:1-5), which did not belong to the girlfriend, who was the only other resident. (Tr. 369:25; 370:1-12). Several items had been burned in the furnace (Tr. 189:12-19; 191:6-9; 192:23-25), indicating a knowledge of their incriminating nature.

When confronted with the methamphetamine in the red mixing bowl, Walter said "someone set me up" (Tr. 140:6-10), indicating that he rec-

ognized the contents of the bowl to be methamphetamine.

Given the incriminating evidence surrounding Walter and his activities that night, the evidence was overwhelming that Walter possessed the methamphetamine manufacturing paraphernalia and the active methamphetamine lab that the police found at his residence. *See Mickle*, 164 S.W.3d at 46; *cf. State v. Arles*, 998 S.W.2d 136, 139-40 (Mo. App. S.D. 1999) (holding the evidence to be insufficient to support intent to manufacture when there was no incriminating evidence, apart from the possession of otherwise lawful items). Indeed, absent finding a suspect actually engaged in manufacturing methamphetamine, it is difficult to imagine a stronger case.

Walter argues that the evidence was less than overwhelming (Substitute Brief at 33-34), but to lend any credence to that argument, one would have to believe that

- Walter and his girlfriend made, in one trip but at three different locations, six separate purchases of items necessary to produce methamphetamine, without the former suspecting anything;
- the girlfriend produced the methamphetamine—omitting a strong odor—in Walter's house, where he was located, without his

knowledge;

- when Walter called a friend to tell him about "fire," he was not referring to methamphetamine; and
- the girlfriend lied to her probation officer about Walter's conduct.

To state the argument is to reveal its weakness, and Walter only half-heartedly states it. (Substitute Brief at 33-34). Instead, he spends the majority of the "prejudice" portion of his brief arguing that the Court should find manifest injustice *without* considering the strength of the evidence against him. (Substitute Brief at 34-37) ("regardless of the State's evidence …"). But, as illustrated above, a finding of "decisive effect" *is* necessary, and the absence of such an effect precludes relief.

II. The State put on sufficient evidence to prove that Walter took a substantial step toward producing methamphetamine with the intent to produce it. (Responds to Point II).

The State must prove intent to manufacture, which does not necessarily require pre-existing knowledge of *how* to manufacture. Even if such were required, the burden would be met here, given the existence of "an active meth lab," which in fact produced methamphetamine, in Walter's residence.

a. Standard of Review

"The standard of review for sufficiency of the evidence claims is whether the evidence is sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt." *State v. Johnson*, 354 S.W.3d 627, 635 (Mo. 2011).

> "[A]ll of the evidence is to be considered in the light most favorable to the prosecution. Thus, evidence that supports a finding of guilt is taken as true and all logical inferences that support a finding of guilt and that may reasonably be drawn from the evidence are indulged. Conversely, the evi-

dence and any inferences to be drawn therefrom that do not support a finding of guilt are ignored."

Mickle, 164 S.W.3d at 41 (*quoting State v. Johnson*, 62 S.W.3d 61, 69 (Mo. App. W.D. 2001)) (internal quotation marks omitted).

b. Statutory violations at issue

The State charged Walter with violating section 195.211, attempted manufacture of a controlled substance, and section 195.130, maintaining a public nuisance.

"[I]t is unlawful for any person to distribute, deliver, manufacture, produce or attempt to distribute, deliver, manufacture or produce a controlled substance or to possess with intent to distribute, deliver, manufacture, or produce a controlled substance." § 195.211.1.[5]

> 1. Any room, building, structure or inhabitable structure ….which is used for the illegal use, keeping or selling of controlled substances is a "public nuisance". No person shall keep or maintain such a public nuisance.
>
> ….

[5] Statutory citations are to RSMo 2000, as updated through the 2010 cumulative supplement.

4. It is unlawful for a person to keep or maintain such a public nuisance.

§ 195.130.

c. There was substantial evidence that Walter purposefully took a substantial step toward manufacturing methamphetamine.

Walter argues that there was insufficient evidence of his intent to manufacture methamphetamine. (Substitute Brief at 41-52). The argument has no merit because there was overwhelming evidence that Walter purposefully took a substantial step toward manufacturing methamphetamine in his residence.

"To convict the appellant of the offense of an attempt to manufacture methamphetamine … the State had the burden of proving that he, with the purpose of manufacturing methamphetamine, did any act that was a substantial step toward the commission of that offense." *Mickle*, 164 S.W.3d at 42. The State must prove that, in taking the substantial step, the defendant had the intent to manufacture methamphetamine, but the State is not required to prove that the defendant had "*knowledge of how to manufacture methamphetamine*." *Id.* at 49 (emphasis in origi-

nal).[6]

Here, on the day in question, Walter and his girlfriend bought elements required to produce methamphetamine. (Tr. 288:2-16; 297:1-9; 314:3-11; 375:22-24; 374:25; 375:1-6; 375:11-14; 291:18; 376:2-5; 376:7-11; 293:16). They did so under suspicious circumstances, buying them piecemeal and at different locations. *Id*. The girlfriend testified that, in purchasing these items, she had the intent to manufacture methamphetamine. (Tr. 365:11-14). She told her parole officer that Walter knew what was going on and that he too purchased the items for the purpose of manufacturing methamphetamine. (Tr. 386:1-13; 386:8-13). The items, including pills that Walter bought independently of his girlfriend, were in fact used to produce methamphetamine. (Tr. 365:5-14; 380:12-16). Walter called a third party and told him that "it was fire," meaning excellent methamphetamine. (Tr. 111:14-18). When confronted with the methamphetamine in the red mixing bowl, Walter said "some-

[6] In his Substitute Brief, Walter acknowledges that, in order to meet the "intent" element," the State need not prove that he knew how to manufacture methamphetamine. (Substitute Brief at 50).

one set me up" (Tr. 140:6-10), indicating that he recognized the contents of the bowl to be methamphetamine.

Given such facts, a reasonable jury could convict Walter of the "intent" element of the charges, which is the only element he challenges on appeal. The inquiry can end there. However, even if it were necessary to prove that Walter constructively possessed the methamphetamine manufacturing paraphernalia, and the active methamphetamine lab, that the police found at his residence, it is easy to show that he did.

"Possession must be established by showing: (1) conscious and intentional possession of the substance, either actual or constructive; and (2) an awareness or knowledge of the presence and nature of the substance. … Both possession and knowledge may be proven by circumstantial evidence." *State v. Villanueva*, 147 S.W.3d 126, 129 (Mo. App. W.D. 2004).

> [C]onstructive possession of the drugs or the drug components and apparatus will satisfy [the State's] burden if other facts exist which buttress the inference of the defendant's requisite mental state. Constructive possession requires, at a minimum, evidence that the defendant had access to and control over the premises where the materials were found.

> Exclusive possession of the premises containing the materials raises an inference of possession and control. When the accused shares control over the premises … further evidence is needed to connect him to the manufacturing process. The mere fact that a defendant is present on the premises where the manufacturing process is occurring does not by itself make a submissible case. Moreover, proximity to the contraband alone fails to prove ownership. There must be some incriminating evidence implying that the defendant knew of the presence of the manufacturing process, and that the materials or the manufacturing process were under his control.

State v. Withrow, 8 S.W.3d 75, 80 (Mo. 1999) (citations omitted).

In deciding whether the defendant constructively possessed the items used to produce methamphetamine, the Court looks to the totality of the circumstances. *Mickle*, 164 S.W.3d at 44. One relevant factor is whether *all* of the items necessary to produce methamphetamine, except anhydrous ammonia, are present, and whether the methamphetamine manufacturing process had already begun. *Id*. at 44-45.

Here, the police found numerous items of methamphetamine manu-

facturing paraphernalia in Walter's own residence. They found all items necessary to produce methamphetamine. (Tr. 234:2-4). Walter had "commenced the manufacturing process," *Mickle*, 164 S.W.3d at 53, in that an "active meth lab" (Tr. 222:24), was located in his truck, and the lab in fact produced methamphetamine. (Tr. 73:18-19; 74:24-25: 75:1, 14-15; 366:16-19; 368:5-14).

Incriminating evidence pervaded Walter's residence. Walter was found in the basement, where several of the paraphernalia items were located. (Tr. 87:16-17). Noticeable chemical smells emanated from both the basement (Tr. 183:7-8), where Walter was found, and in the garage, where his truck was parked. (Tr. 195:24-25; 196:1-2). A syringe was found in a pair of blue jean shorts, (Tr. 183:23-25; 184:1-5), which did not belong to Martinson. (Tr. 369:25; 370:1-12). Several items had been burned in the furnace (Tr. 189:12-19; 191:6-9; 192:23-25), indicating a knowledge of their incriminating nature.

Again, Walter himself purchased some of the items used to produce the methamphetamine. (Tr. 288:2-16; 297:1-9; 314:3-11; 375:22-24; 374:25; 375:1-6; 375:11-14; 291:18; 376:2-5; 376:7-11; 293:16). He told a third party that "it was fire." (Tr. 111:14-18). His girlfriend told her

probation officer that Walter knew what was going on and that he bought the pills and other items that day with the intent to manufacture methamphetamine. (Tr. 365:11-14; 386:1-13; 386:8-13). Walter recognized the contents of the red bowl to be incriminating. (Tr. 140:6-10).

Given the incriminating evidence surrounding Walter and his activities that night, Walter constructively possessed the methamphetamine manufacturing paraphernalia and the active methamphetamine lab that the police found at his residence. *Mickle*, 164 S.W.3d; *cf. Arles*, 998 S.W.2d at 139-40 (holding the evidence to be insufficient to support intent to manufacture when there was no incriminating evidence, apart from the possession of otherwise lawful items). Under similar circumstances, the Court of Appeals held as follows:

> Given the evidence of the additional incriminating factors and disregarding all evidence and inferences to the contrary, we find that there was sufficient evidence from which a reasonable jury could conclude that the appellant had constructive possession of all the meth-related items seized … which are commonly used to manufacture methamphetamine, and [that he] was aware of the presence and nature of their use.

> Hence, the evidence was sufficient for the jury to conclude that the appellant had committed a substantial step toward the commission of the underlying offense of manufacturing methamphetamine.

Mickle, 164 S.W.3d at 46 (citation omitted).

Accordingly, the State met its burden in showing that Walter purposefully took substantial steps toward manufacturing methamphetamine. *See id.*; *see also State v. Zimmerman*, 169 S.W.3d 194, 198 (Mo. App. S.D. 2005) ("Defendant possessed items within his house, primarily in the kitchen area, that are commonly used to manufacture or produce methamphetamine. … [T]he presence of all the items was corroborative that their purpose was to manufacture or produce methamphetamine."). Indeed, absent finding a suspect actually engaged in manufacturing methamphetamine, it is difficult to imagine a stronger case.

Walter cites *State v. Deadmon*, 118 S.W.3d 625, 628 (Mo. App. S.D. 2003); *State v. Lubbers*, 81 S.W.3d 156, 161 (Mo. App. E.D. 2002); and *State v. Morrow*, 996 S.W.2d 679, 683 (Mo. App. W.D. 1999); for the proposition that, although it is not required that the State prove knowledge of how to produce methamphetamine, the lack of such

knowledge should factor heavily in the Court's analysis.

However, even if knowledge of how to produce methamphetamine were an important factor, *but cf. Mickle*, 164 S.W.3d at 48 (criticizing cases that so suggest), that point cuts against Walter because the State *did* adduce substantial evidence that Walter knew how to produce methamphetamine. As discussed above, Walter was found in the constructive possession of "an active meth lab," which is a fact missing from *Deadmon*, *Lubbers*, and *Morrow*. If constructive possession of an active meth lab is not sufficient to establish knowledge of how to manufacture methamphetamine, then it is difficult to imagine how this "factor" would be proved, absent evidence of prior bad acts.

As discussed above, there was ample evidence to establish Walter's knowledge of and participation in the crime, and therefore the fact that there was an active meth lab in Walter's constructive possession satisfies *Deadmon*, *Lubbers*, and *Morrow*.

III. The inventory was done in Walter's presence, which was all that the warrant required. Even if the warrant required more, Walter has shown no prejudice. (Responds to Point III).

Walter argues that evidence from the search should be suppressed because the police did not perform the entirety of the search in his presence, which, he claims, the warrant required. The argument fails because the warrant required only that an inventory be done in resident's presence, if possible. That was done. Even if the warrant required that the search be done in Walter's presence (and it did not require that), there is no constitutional right to have a search warrant executed in the defendant's presence, and Walter cannot show and does not argue that prejudice occurred.

a. Standard of Review

At a hearing on a motion to suppress, the state bears both the burden of producing evidence and the risk of nonpersuasion to show by a preponderance of the evidence that the motion to suppress should be overruled. When reviewing the trial court's overruling of a motion to suppress, [the appel-

> late] Court considers the evidence presented at both the suppression hearing and at trial to determine whether sufficient evidence exists in the record to support the trial court's ruling. The Court defers to the trial court's determination of credibility and factual findings, inquiring only whether the decision is supported by substantial evidence, and it will be reversed only if clearly erroneous. By contrast, legal determinations of reasonable suspicion and probable cause are reviewed de novo.

State v. Grayson, 336 S.W.3d 138, 142 (Mo. 2011) (citations and quotation marks omitted).

b. In relevant part, the warrant required only that the inventory be done in Walter's presence, which was done.

The warrant directed the police to inventory the items seized in Walter's presence. It stated that

> these are to command you to search the said premises above described within 10 days after the issuance of this Warrant, by day or night, and take with you, if need be, the power of

> your county, and if the above described items or any part thereof be found on said premises by you, that you seize the same and take the same into your possession, making a complete and accurate inventory of the items so taken by you in the presence of the person from whose possession the same is taken, if that be possible, and giving to such person a receipt for such property, together with a copy of this Search Warrant.

(LF 27). The trial court noted that "I think it just means that they have to do the inventory in the presence of the person." (Tr. 328:22-24).

The trial court was correct. "[I]n the presence of the person" modifies "making a complete inventory," which means that the inventory, not the search and seizure, must be done in the presence of the person. If the warrant language had intended "in the presence of the person" to modify "to search" or "that you seize," it would have placed the modifier in the clauses where those terms appear. That reading of the warrant is buttressed by Form 39A, from which the language derives. The model affidavit that accompanies that model warrant language has the officer swear that he did "this inventory in the presence of the person," not

that he did the search or seizure in the person's presence. Mo. Sup. Ct. R. Form 39A.

Thus, this point is moot because the officer did, in fact, inventory the items seized in Walter's presence. (Tr. 14:16-19; 16:9-13).

c. Even if Walter's novel reading of the warrant language were correct, he has shown no prejudice.

Walter has cited no authority for the proposition that the Constitution requires that a search and seizure be done in the presence of the accused. Regardless, there is no prejudice from Walter being removed from the residence, as would be required to suppress evidence on that basis.

"[T]he Fourth Amendment [does not] require[] that the owner of the premises searched be present at the time of the inventory." *United States v. Daniel*, 667 F.2d 783, 785 (9th Cir. 1982). "Where executing officers fail to abide by the dictates of Rule 41 [the federal rule requiring an inventory to be made in person, if possible], suppression is only required if a defendant can demonstrate prejudice." *United States v. Nichols*, 344 F.3d 793, 799 (8th Cir. 2003) (internal citation omitted);

United States v. Adams, 401 F.3d 886, 893 (8th Cir. 2005) ("Parker fails to suggest, much less prove, any prejudice resulting from the alleged failure to list the items on a property return."); *see also* 2 W. LaFave, Search and Seizure, § 4.12 p. 186 (1978) ("The prevailing view [is that such] provisions are deemed to be ministerial only, so that 'absent a showing of prejudice' failure to comply with them does not void an otherwise valid search.").

Here, Walter has not even attempted to show that his being removed from the premises caused prejudice. The point should be denied.

IV. The trial court did not abuse its discretion in admitting the statement of a party opponent, when that admission, to be given proper context, requires that the question asked to the party also be admitted. (Responds to Point IV).

The statements of a party opponent are admissible and are not hearsay. If the question asked before the statement was made must be admitted to provide context to the statement, then the question is part of the party statement and is not hearsay.

a. Standard of Review

The standard of review is abuse of discretion. "The trial court is vested with substantial discretion in ruling on admissibility of evidence." *State v. Dampier*, 862 S.W.2d 366, 374 (Mo. App. W.D. 1993). The trial court's ruling will be "disturbed only when the decision is clearly against the logic of the circumstances.'" *State v. Schnelle*, 398 S.W.3d 37, 42 (Mo. App. W.D. 2013) (quotation marks omitted).

b. The statement "yeah" came from a party opponent and therefore was not hearsay.

Walter, the party opponent, made the statement "yeah," so the hearsay rule does not apply.

"Admissions by a party opponent are admissible … because such admissions are not considered hearsay." *State v. Reagan*, 654 S.W.2d 636, 640 (Mo. App. E.D. 1983).

Here, Trooper Sullivan overheard a cell phone conversation between Shane Nicholson and Walter. (Tr. 104). He testified that he heard the voice on the other end say "yeah," (Tr. 111:14-18), and he identified the speaker as Walter, which he was able to do through previous and subsequent interactions with him. (Tr. 104-05). That was sufficient to identify Walter, a party opponent, as the speaker of the statement "yeah." *See State v. Moiser*, 738 S.W.2d 549, 555 (Mo. App. W.D. 1987) ("The test is whether, at any time, the officers had heard defendant's voice from which they could compare the voice heard on the tape and through the body microphone."). The statement was therefore not hearsay. *See id.*

c. Nicholson's question—is it fire?—was not hearsay because (1) it was not a statement of fact submitted for its truth; (2) it was necessary to give context to Walter's reply; and (3) to the extent it was a statement, Walter, a party opponent, adopted it.

Nicholson's question was admissible for at least three reasons. "A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value." *State v. Morgan*, 289 S.W.3d 802, 805 (Mo. App. S.D. 2009).

First, Nicholson's question—is it fire?—was not an assertion of fact submitted for the truth of the matter. Indeed, a question does not assert a fact at all. *State v. Williams*, 118 S.W.3d 308, 311 n.3 (Mo. App. S.D. 2003). Rather, it is *the confirmation* of the question—and not the question itself—that asserts a fact. The confirmation of that question (and, thus, the statement of fact) came from a party opponent, and therefore it was not hearsay. *Reagan*, 654 S.W.2d at 640. The question was also admissible because it was not submitted for the truth of the matter "as-

serted": i.e., the State had no interest in proving that the methamphetamine was "fire."

Second, the statement was admissible as an explanation of Walter's own statement. "Testimony of what another said offered in explanation of conduct rather than as proof of the facts in the other's statement is not inadmissible hearsay." *Morgan*, 289 S.W.3d at 805. Here, Walter said "yeah," which makes sense only in light of Nicholson's question, and therefore the question was proper to give context. *See Moiser*, 738 S.W.2d at 556 ("The statements of [a third party were] … admissible as being necessary to obtain the full significance and meaning of defendant's declarations.").

Third, Nicholson's question—to the extent it was a statement—was adopted by Walter and was thus admissible. "[O]ne may expressly or implicitly adopt the statement of another as his own and such can constitute an admission of a party opponent." *Gordon v. Oidtman*, 692 S.W.2d 349, 355 (Mo. App. W.D. 1985). A third party's "questioned statement … is admissible as a statement adopted by [the party] as his own. 'One may expressly adopt another's statement as his own. *That is an explicit admission like any other …*'" *State v. Laws*, 668 S.W.2d 234,

239 (Mo. App. E.D. 1984) (emphasis added) (quoting McCormick on Evidence § 269 (2d Ed.1972)). In *Laws*, the defendant "agreed to [a third party's] suggestion to rob and kill old people, thereby rendering [the third party's] statement admissible as an adoptive admission." *Id.*

Here, Walter adopted Nicholson's statement (that "it was fire") and explicitly agreed with it. *See Laws*, 668 S.W.2d at 239. Just as in *Laws*, the party opponent "agreed to [a third party's] suggestion … thereby rendering [the third party's] statement admissible as an adoptive admission." *Id.* Thus, the trial court did not abuse its discretion in admitting Nicholson's question.

Conclusion

For the reasons stated above, the court should affirm the trial court's judgment.

Respectfully submitted,

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Certificate of Compliance and Service

I hereby certify:

That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 9,678 words, excluding the cover, certificate of service, signature block, appendix and certification as determined by 2010 Microsoft Word; and

That a copy of the foregoing Respondent's brief was sent electronically via the Missouri E-Filing system to: Gregory Doty, and Damien De Loyola, Office of the Public Defender, 920 Main St. Suite 500, Kansas City, MO 64105 on this 18th day of May, 2015.

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