SC94658

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

CHADWICK LELAND WALTER,

Appellant.

Appeal from Clay County Circuit Court
Seventh Judicial Circuit
The Honorable Larry D. Harman, Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant Chadwick Leland Walter appeals his convictions in *State v. Walter*, 12CY-CR00040, following a jury trial in the Clay County Circuit Court in which he was found guilty of one count each of the class B felony of attempted manufacture of methamphetamine and of the class C felony of maintaining a public nuisance, Sections 195.211 and 195.130, RSMo,[1] respectively (Tr. 463; LF 126; App'x A2-3).[2] On July 11, 2013, the Honorable Larry D. Harman sentenced Mr. Walter as a prior and persistent drug offender to concurrent terms of fifteen years' imprisonment for attempted manufacture of methamphetamine and eight years' imprisonment for maintaining a public nuisance (Tr. 475, 511; LF 15-18; App'x A1). Mr. Walter timely filed his notice of appeal (LF 128-29).

The Court of Appeals, Western District, issued an order affirming Mr. Walter's convictions and sentences. This Court ordered transfer on February 24, 2015, after Mr. Walter's application. Mo. Const., Art. V, § 9; Rule 83.04. Accordingly, jurisdiction lies with this Court.

[1] All statutory references are to RSMo 2000, as amended.

[2] The Record on Appeal consists of a Legal File ("LF"), Supplemental Legal File ("LF"); Trial Transcript ("Trial Tr."), and Appendix ("App'x").

STATEMENT OF FACTS

On August 4, 2011, Missouri State Highway Patrol Trooper Christopher J. Sullivan applied for a search warrant for Mr. Walter's residence, located at 24808 155th Road in Saline County, Missouri (Tr. 8-9; LF 20-25). Just after midnight on August 5, 2011, a search warrant was issued by the Circuit Court of Saline County (LF 26-27; Tr.8-9). In the last paragraph of the search warrant, the court ordered:

> NOW THEREFORE, 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; Tr. 19-20) (emphasis added).

Shortly after the warrant was issued, Trooper Sullivan and nine other law enforcement officers executed the search warrant at Mr. Walter's home by forcibly entering the property after kicking down the front door (Tr. 9, 11, 17). Mr. Walter and his co-defendant, Kathy Martinson, were in the home when the search warrant was executed (Tr. 12-13). Despite the court's order that the officers seize and inventory the property "in the presence of the person from whose possession the same is taken, if that

be possible," Ms. Martinson and Mr. Walter were immediately arrested and transported to the Saline County Sheriff's Department before the search was conducted (LF 27; Tr. 12-13, 21).

Before trial, Mr. Walter sought to quash the search warrant and suppress the evidence found during the search, arguing, *inter alia*, that the officers deliberately disregarded the express terms of the search warrant (LF 39-40, 48-49). At the suppression hearing, Trooper Sullivan testified that the search warrant was the first he served himself, although he had been with other officers during the service of other search warrants (Tr. 22). Trooper Sullivan claimed that he arrested Mr. Walter and Ms. Martinson for "possession and paraphernalia" before the search was conducted after he saw a Wal-Mart card and a razor blade with residue on the bar in the basement (Tr. 13). Trooper Sullivan claimed he also saw a corner-cut baggie with white powder residue on the bar table (Tr. 13).

Trooper Sullivan testified that he read the search warrant before it was executed (Tr. 19). Trooper Sullivan admitted that Mr. Walter and Ms. Martinson were transported to the Saline County Sheriff's Department before the search was conducted despite the court's order requiring the officers to seize and inventory the items found during the search in the presence of the person from whose possession the items were taken, "if that be possible" (LF 26-27; Tr. 19-21). Trooper Sullivan also claimed that Mr. Walter and Ms. Martinson were taken away from the house due to "officer safety" (Tr. 21-23). He testified that there is always a possibility of danger if the homeowner remains on the scene during the search warrant (Tr. 22). Trooper Sullivan was responsible for

completing the Return and Inventory for the search warrant, which he presented to Mr. Walter while Mr. Walter was in custody (Tr. 14-16). The trial court denied Mr. Walter's motions to quash the search warrant and suppress evidence (LF 12, 51; Tr. 61). Defense counsel renewed the suppression motions at trial and was granted a continuing objection as to the suppression issues he raised previously (Tr. 61, 78-79, 173).

The following evidence was presented at trial. Trooper Sullivan testified that the information leading to the issuance of the search warrant was provided by Steven Shane Nicholson (Tr. 98). Mr. Nicholson was taken into custody following a traffic violation that occurred at approximately 6:45p.m. on the evening of August 4, 2011 (Tr. 98-99). Mr. Nicholson was stopped about eight miles north of Mr. Walter's residence (Tr. 99). Trooper Sullivan interviewed Mr. Nicholson at the Saline County Sheriff's Department, at which time Trooper Sullivan saw Mr. Nicholson receive a text message that contained the name "Chad" on top of it "like a contact" (Tr. 99-100, 102). Trooper Sullivan did not recall the time of the alleged text message and did not see a phone number associated with the message (Tr. 102).

Trooper Sullivan also heard Mr. Nicholson's phone ring at approximately 8:10 p.m., after which he instructed Mr. Nicholson to place the cell phone on speaker phone so that he could listen to the call (Tr. 103-04). Trooper Sullivan claimed that he could recognize the voice on the other end of Mr. Nicholson's phone call as Mr. Walter because he had spoken to Mr. Walter during a prior traffic stop (Tr. 134). Trooper Sullivan stated that he once stopped Mr. Walter while Mr. Walter was driving a motorcycle, but Trooper Sullivan could not remember how long ago the stop occurred (Tr. 141-43). Over defense

counsel's hearsay objection, Trooper Sullivan testified that Mr. Nicholson asked the caller "if it was fire," to which Mr. Walter said, "yeah" (Tr. 105-112).

On August 5, 2011, at 1:25 a.m., the search warrant was executed at Mr. Walter's residence, which Trooper Sullivan described as a single story house with a finished basement, detached two car garage, and an outside wood burning fireplace (Tr. 80-81). When officers forcibly entered the home, Ms. Martinson was seen running towards the kitchen (Tr. 86). Mr. Walter was in the basement, either sitting on or standing by a couch in the family room (Tr. 87). When provided the search warrant, Mr. Walter told police that they would not find anything (Tr. 93).

When asked why Mr. Walter was not allowed to remain at the scene during the search and inventory, Trooper Sullivan testified that it was the written policy of the Missouri State Highway Patrol that when someone is arrested, they are transported to "the facility that can hold them" (Tr. 123-26). Trooper Sullivan seized a syringe from inside the pocket of a pair of jean shorts and a small clear plastic baggie containing a white powdery substance from inside a bourbon container found in the bar area (Tr. 113, 183-84, 186-87). The jean shorts were too large for either Ms. Martinson or Ms. Walter to wear (Tr. 369-70).

Saline County Deputy Sheriff Richard Miller testified as to the "Nazi method" for making methamphetamine, which typically requires ephedrine, lithium strips, anhydrous ammonia, Coleman fuel or acetone, muriatic or sulfuric acid, and salt (Tr. 157-68). Deputy Miller participated in the execution of the search warrant and was responsible for collecting and cataloging the items seized at the home (Tr. 172). Deputy Miller seized

the following items: a pair of pliers from a desk in the upstairs living room (Tr. 175); a container of Morton salt, an empty clear package that once contained lithium batteries, three quart containers of acetone, and a can of starting fluid from the woodworking room in the basement (Tr. 28-29, 180-82, 184); two glass jars, a metal spoon, a plastic container, a quart container of Liquid Fire drain cleaner, a propane torch, and two quart-size containers with unknown chemicals from the middle storage room in the basement (Tr. 28, 182-86); two one-gallon containers for Coleman fuel in the garage (Tr. 30, 196); and a one gallon container for Coleman fuel, one quart container for acetone, two syringes, blister packs that at one time contained pills or tablets containing pseudoephedrine, and parts of lithium batteries, all partially burnt in the outside wood burning stove (Tr. 31-32, 189, 191-92). There was residue on the spoon, plastic containers, and glass containers found in the storage room (Tr. 186).

The garage had a strong chemical smell (Tr. 196). Parked inside the garage was a blue 1982 Chevrolet Truck registered to Mr. Walter and his "separated wife, Erin Walter" (Tr. 194). Inside the engine compartment of the truck was a large red mixing bowl containing a cloth with a white powdery substance on it (Tr. 196-98). According to Deputy Miller, the substance in the red bowl was methamphetamine that was not ready for use (Tr. 231, 236).

All of the seized items, with the exception of the alleged methamphetamine, were items that can be purchased legally, and even next to each other, the items would appear to be innocent to the untrained eye (Tr. 132-33). The parties stipulated, amongst other things, that the chemists from the Missouri State Highway Patrol Laboratory would

testify that the samples from the red bowl contained methamphetamine (LF 54-55; Tr. 263-65). When Trooper Sullivan confronted Mr. Walter about the red mixing bowl, Mr. Walter said, "This is fuckin' bullshit, someone set me up, you set me up" (Tr. 140).

Deputy Miller testified that "fire" means "good" or "excellent" amongst methamphetamine users and that a local meth user had "a tattoo on his arm of a syringe injecting fire into his veins" (Tr. 231-32). Deputy Miller agreed that either anhydrous ammonia or red phosphorus was necessary to make methamphetamine and neither ingredient was found on Mr. Walter's property (Tr. 232-33). Deputy Miller did not smell the odor of anhydrous ammonia on the property (Tr. 247). Deputy Miller acknowledged that syringes are consistent with the use of insulin to treat diabetes and that the syringes were not examined for methamphetamine residue (Tr. 237-38). He also admitted that acetone is a solvent sometimes used for stripping or refinishing furniture and that the acetone was found in the woodworking area of Mr. Walter's basement (Tr. 239-40). Deputy Miller had known Mr. Walter for over ten years and had never known him to ride a motorcycle (Tr. 253-54).

Deputy Miller took a battery package seized from the basement and a log of pseudoephedrine purchases from a law enforcement database to Wal-Mart in Marshall, Missouri, where he contacted the store's asset protection manager, Leah Homfeld (Tr. 212-17, 266-69). Ms. Homfeld accessed video and documentary evidence of purchases that either Mr. Walter or Ms. Martinson made on the afternoon of August 4, 2011, including purchases for lithium batteries, Coleman fuel, mouthwash, and feminine hygiene products (Tr. 276). Mr. Walter signed for a purchase of "Nasal Decon" and paid

cash for it on the afternoon of August 4, 2011 (Tr. 290-92). An additional purchase of lithium batteries occurred on the evening of July 26, 2011 (Tr. 294-95). Ms. Martinson purchased the batteries in each instance, although on one instance Mr. Walter was with her (Tr. 303). Certified sales records from the Wal-Mart and Red Cross Pharmacy in Marshall were introduced into evidence (Tr. 220).

Missouri State Highway Patrol Corporal Darrin Lilleman participated in executing the search warrant (Tr. 310-12). Corporal Lilleman knew Mr. Walter for about ten years and did not recall him owning a motorcycle (Tr. 316). He claimed Mr. Walter could not remain at the scene due to officer safety but admitted that Mr. Walter was not a threat to the officers and did not have any weapons (Tr. 318). Corporal Lilleman testified that there was an officer safety concern due to a prior search warrant that was served at Mr. Walter's residence on January 4, 2011, when officers searched for bullet holes, shell casings, and spent bullets and multiple people were found in the residence (Tr. 337-38). Mr. Walter was not a suspect in relation to that search warrant (Tr. 337). There was also testimony presented as to whether Mr. Walter ever threatened Corporal Lilleman (Tr. 319, 336, 339).

The trial court denied Mr. Walter's Motion for Judgment of Acquittal at the Close of the State's Case (LF 56-57; Tr. 340-42). Jeff Smith, Kathy Martinson, and Cheryl Walter testified in rebuttal for the defense (Tr. 353, 363, 396). Mr. Smith met Mr. Walter through working construction and through Mr. Walter's mechanic shop, and Mr. Walter previously worked on Mr. Smith's vehicles (Tr. 353-54). Mr. Smith testified that his

cousin was Josh Gilpin, who Mr. Smith knew was acquainted to Mr. Walter (Tr. 354-55). Mr. Gilpin is diabetic and uses insulin with a syringe (Tr. 355-56).

Mr. Smith stopped by Mr. Walter's residence on August 4, 2011, to check on his truck, but Mr. Walter was not home (Tr. 356-57). Instead, Shawn Bishop was there, and Mr. Smith spoke with Mr. Bishop in the driveway (Tr. 357, 361-62). Mr. Smith saw Shane Nicholson's silver Buick automobile at Mr. Walter's residence (Tr. 357-58). As far as Mr. Smith knew, Mr. Walter never owned a motorcycle (Tr. 362).

Ms. Martinson testified that she had known Mr. Walter for about six years, was his girlfriend in August of 2011, and had been living in his home (Tr. 363, 374). Ms. Martinson pled guilty to a criminal charge arising from the events of August 4, 2011, and was on probation for those charges at the time of trial (Tr. 372, 381, 383). Ms. Martinson also had a prior conviction for stealing (Tr. 372, 381). According to Ms. Martinson, she and Mr. Walter made trips to Wal-Mart and Red Cross Pharmacies in Marshall on August 4, 2011, where she purchased pills containing pseudoephedrine (Tr. 366). Mr. Walter made a purchase of pseudoephedrine at a Red Cross Pharmacy, after which Ms. Martinson went into the pharmacy and purchased more pseudoephedrine pills (Tr. 374-75). Ms. Martinson then went to another Red Cross Pharmacy and purchased additional pseudoephedrine pills (Tr. 376).

Ms. Martinson testified that she made the purchases with the intent to make methamphetamine, but she did not tell Mr. Walter of her intent (Tr. 366-67). Although Mr. Walter also purchased pseudoephedrine pills, Ms. Martinson believed he did so because he was sick that day (Tr. 367, 375). Ms. Martinson explained that Mr. Walter

has an ongoing sinus condition or chronic sinus infection that sometimes requires the use of ephedrine pills (Tr. 367-68, 375). Although she purchased lithium batteries to make methamphetamine, she also purchased the batteries for other purposes, such as for her camera and children's toys (Tr. 368, 375, 385). According to Ms. Martinson, Shawn Bishop had been a visitor at Mr. Walter's residence on or before August 4, 2011, and he left behind a pair of jean shorts (Tr. 369). She also stated that Josh Gilpin left syringes related to his diabetes at Mr. Walter's home (Tr. 372). Ms. Martinson also had syringes she intended to use with the methamphetamine, and she burned her syringes in the outdoor furnace (Tr. 373).

Ms. Martinson testified that following her purchase of the pseudoephedrine pills, she attempted to make methamphetamine at Mr. Walter's residence after Mr. Walter left his house at 5:00 p.m. to go to his "shop" (Tr. 368, 371-77). Three other people assisted Ms. Martinson in making the methamphetamine (Tr. 368-69). Shane Nicholson, Lisa Smith, and Josh Gilpin arrived at Mr. Walter's residence around 6:30 or 7:00 p.m. that evening, left for a period of time, and returned after Mr. Walter came home from his shop and had gone to bed (Tr. 377-78). Mr. Nicholson stripped the lithium batteries (Tr. 380). Ms. Martinson remembered that Mr. Nicholson, Ms. Smith, and Mr. Gilpin left the residence early in the morning at about 5:00 or 6:00 a.m. (Tr. 378-79). After the State indicated to Ms. Martinson that Mr. Nicholson was in custody from 6:45 p.m. until approximately 10:00 p.m., Ms. Martinson replied that Mr. Nicholson was at the residence but that she might not be correct about the time because she was high (Tr. 381). Ms.

Martinson later told her probation officer that Mr. Walter did not manufacture methamphetamine as far as she was aware (Tr. 386).

Cheryl Walter, Mr. Walter's adoptive mother, testified that Mr. Walter had a construction business (Tr. 396-97, 404). She explained that Mr. Walter has had chronic sinus problems since he was twelve to fourteen years old, was continually on medication for his sinus problems, and routinely purchased sinus medication (Tr. 397-98). Ms. Walter lived within a quarter mile of Mr. Walter's home (Tr. 399). At approximately 6:15 p.m. on August 4, 2011, she saw a silver Buick driven by Shane Nicholson driving very fast out of Mr. Walter's driveway (Tr. 400-02). There was another person in the vehicle (Tr. 402). Around 7:30 or 7:45 p.m., Ms. Walter was taking her now deceased husband to dinner and saw that Mr. Nicholson was pulled over by the police near Marshall Hospital and was being arrested (Tr. 401-03).

In rebuttal, the State called Brian Woods, Chief Deputy of the Jail Division at the Saline County Sheriff's Department (Tr. 413). Mr. Woods was responsible for booking Mr. Nicholson at approximately 7:00 p.m. on August 4, 2011 (Tr. 414-15). Mr. Woods' shift ended at 10:00 p.m. that night (Tr. 415). Mr. Woods indicated that he brought the booking records for Mr. Nicholson and Mr. Walter with him to court (Tr. 416-17). Defense counsel objected on the grounds that the booking records had not been disclosed to the defense and lacked proper foundation (Tr. 417, 419-20). The trial court overruled the objection, and Mr. Woods testified that according to the booking record, Mr. Nicholson was released from the Saline County Jail at 4:02 a.m. on August 5, 2011 (Tr. 421). Mr. Woods also testified over defense counsel's Fifth Amendment objection that

according to the medical questionnaire from the Saline County Jail taken when Mr. Walter was booked, Mr. Walter responded, "No" when asked whether he had a fever, allergies, hay fever, a runny nose, or other medical conditions (Tr. 421-24). The booking records were received into evidence over defense counsel's previous objections (Tr. 420).

In surrebutal, Ms. Martinson testified again for the defense, where she stated that Mr. Nicholson was at Mr. Walter's residence for "a couple of hours" from shortly before 5:00 pm. until roughly 7:00 p.m. on August 4, 2011 (Tr. 427). She encountered Mr. Nicholson again later that night (Tr. 427). Ms. Martinson was under the influence of methamphetamine that night and it was possible that she was mistaken about the timing of the events (Tr. 427-28). The trial court overruled Mr. Walter's Motion for Judgment of Acquittal at the Close of All Evidence (LF 58-59; Tr. 429).

During closing argument, the State referenced Trooper Sullivan's testimony as to Mr. Nicholson's statements while on the alleged phone call with Mr. Walter and made the following argument:

> The defendant knew what was going on. He knew what he had in his garage. He knew that it was fire. They were making what's known in the methamphetamine community as good, good methamphetamine, good, good stuff. He knew what was going on at his house

(Tr. 459).

During its argument, the State used a visual presentation with slides, similar to a "Power Point" presentation (LF 61-100). The final image in the State's slideshow was an enlarged color photo of Mr. Walter's mugshot with Mr. Walter wearing a bright orange

jumpsuit and the word "GUILTY" superimposed in large red letters (LF 100; Tr. 465-69; App'x A4). The mugshot was displayed to the jury at the end of the State's closing argument when the State asked the jury to find the defendant guilty (Tr. 467). Thereafter, the jury found Mr. Walter guilty on both counts (LF 8; Tr. 463).

Following the verdict, defense counsel raised an objection to the State's improper and prejudicial presentation of Mr. Walter's altered mugshot to the jury (Tr. 464-65). Defense counsel stated that he did not object because he did not see the image at the time (Tr. 465-66). The trial court also did not see the picture (Tr. 465). The State explained that the mug shot without the superimposed "GUILTY" text was included within State's Exhibit 151, the booking records admitted through Mr. Wood's testimony (Tr. 467). The picture had not been previously published to the jury or displayed to the court (Tr. 467, 469). Defense counsel asked for a copy of the picture, and the trial court deferred to ruling on the issue until defense counsel filed a motion for new trial (Tr. 469-70).

At the hearing on Mr. Walter's motion for new trial, defense counsel explained that he did not see the picture because he was watching the prosecutor address the jury while the screen displaying the image was on the other side of the room facing the jury (Tr. 487-89). Also at the hearing, the State argued that the purpose of admitting Mr. Nicholson's question during the phone call as to whether "it was fire" was to "elucidate one of the main facts in issue, that the defendant knew that there was a manufacturing operation going on at his residence" (Tr. 486). The trial court denied Mr. Walter's motion for new trial (LF 8, 101-125; Tr. 491).

The trial court sentenced Mr. Walter as a prior and persistent drug offender to concurrent terms of fifteen years' imprisonment for attempted manufacture of methamphetamine and eight years' imprisonment for maintaining a public nuisance (Tr. 475, 511; LF 15-18). This appeal follows.

POINTS ON APPEAL

POINT I: Prosecutorial Misconduct During Closing Argument

The trial court plainly erred in overruling Mr. Walter's motion for new trial claim of prosecutorial misconduct, in violation of Mr. Walter's rights to due process and to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because the deliberate presentation of altered evidence during closing argument by the State for the purpose of inflaming the jury results in a manifest injustice that impugns the presumption of innocence and denies a defendant a fair trial, in that during closing argument, the State displayed to the jury an enlarged color photo of Mr. Walter's mug shot depicting Mr. Walter wearing an orange prison uniform with the word "GUILTY" superimposed over the photo in large red letters.

U.S. Const., Amends. V & XIV

Mo. Const. Art. I, §§ 10 & 18(a)

Deck v. Missouri, 544 U.S. 622 (2005)

State v. Banks, 215 S.W.3d 118 (Mo. banc 2007)

State v. Walker, 341 P.3d 976 (Wash. 2015)

In re Glasmann, 286 P.3d 673 (Wash. 2012)

POINT II: Insufficient Evidence of Intent to Manufacture Methamphetamine

The trial court erred in overruling Mr. Walter's motions for acquittal and entering a judgment of conviction on Count I, attempted manufacture of methamphetamine under Section 195.211, and Count II, maintaining a public nuisance under Section 195.130, in violation of Mr. Wright's rights to due process and a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because the State's evidence was insufficient to support a finding of guilt on both counts, in that the State failed to present sufficient evidence to convince a reasonable trier of fact that Mr. Walter knew how to manufacture methamphetamine, had the intent to do so, or participated in an attempt to manufacture methamphetamine.

U.S. Const., Amends. V & XIV

Mo. Const. Art. I, §§ 10 & 18(a)

Section 195.211, RSMo

Section 195.130, RSMo

State v. Lubbers, 81 S.W.3d 156 (Mo. App. E.D. 2002)

State v. Deadmon, 118 S.W.3d 625 (Mo. App. S.D. 2003)

State v. Morrow, 996 S.W.2d 679 (Mo. App. W.D. 1999)

POINT III: Illegal Execution of Search Warrant

The trial court clearly erred and abused its discretion in denying Mr. Walter's Motion to Quash the Search Warrant and Suppress Evidence and in overruling Mr. Walter's objections at trial to the admission of the evidence seized pursuant to the search warrant, in violation of Mr. Walter's rights to due process, a fair trial, and to be free from unreasonable searches and seizures, as guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 15, and 18(a), of the Missouri Constitution, and Section 542.296, RSMo, because suppression is required when officers illegally execute a search warrant by exceeding the limitations of authority imposed on them by the court, in that the officers executing the search warrant refused to allow Mr. Walter to be present during the search and inventory despite the explicit requirement in the warrant that they do so if possible.

U.S. Const., Amends. IV, V, VI, & XIV

Mo. Const. Art. I, §§ 10, 15, & 18(a)

Section 542.296, RSMo

State v. Ricketts, 981 S.W.2d 657 (Mo. App. W.D. 1998)

State v. Varvil, 686 S.W.2d 507 (Mo. App. E.D. 1985).

POINT IV: Inadmissible Hearsay

The trial court erred and abused its discretion in overruling Mr. Walter's objection to Trooper Sullivan's testimony regarding the statements Shane Nicholson made during a phone call he allegedly received from Mr. Walter, in violation of Mr. Walter's rights to due process, a fair trial, and to confront adverse witnesses, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, because testimony from an officer concerning statements from a third party who is not declared unavailable and whose statements are not offered solely to explain subsequent police conduct is inadmissible and prejudicial hearsay, in that Mr. Nicholson was not declared unavailable and his hearsay statements were admitted for the truth of the matter asserted, were not admitted solely to explain Trooper Sullivan's subsequent police conduct, were argued for the truth of the matter asserted by the State during closing argument.

U.S. Const., Amends VI & XIV

Mo. Const. Art. I, § 18(a)

State v. Reed, 282 S.W.3d 835 (Mo. banc 2009)

State v. Francis, -S.W.3d --, 2014 WL 1686538 (Mo. App. E.D. 2014)

State v. Douglas, 131 S.W.3d 818 (Mo. App. W.D. 2004)

ARGUMENT ON APPEAL

POINT I: Prosecutorial Misconduct During Closing Argument

The trial court plainly erred in overruling Mr. Walter's motion for new trial claim of prosecutorial misconduct, in violation of Mr. Walter's rights to due process and to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because the deliberate presentation of altered evidence during closing argument by the State for the purpose of inflaming the jury results in a manifest injustice that impugns the presumption of innocence and denies a defendant a fair trial, in that during closing argument, the State displayed to the jury an enlarged color photo of Mr. Walter's mug shot depicting Mr. Walter wearing an orange prison uniform with the word "GUILTY" superimposed over the photo in large red letters.

Standard of Review

Defense counsel did not object to the State's inflammatory closing argument until after the verdict (Tr. 464-65). Accordingly, Mr. Walter's claim against the State's highly improper and prejudicial closing argument presentation may only be reviewed for plain error. *See State v. Elam*, 89 S.W.3d 517, 523 (Mo. App. W.D. 2002); *State v. Baller*, 949 S.W.2d 269, 272 (Mo. App. E.D. 1997); *State v. Lingle*, 140 S.W.3d 178, 190 (Mo. App. S.D. 2004); Rule 30.20.[3]

[3] All citations are to Missouri Supreme Court Rules unless otherwise noted.

Plain error review involves a two-step process: (1) this Court determines whether "the claimed error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted[;]" and (2) this Court, at its discretion, "consider[s] whether or not a miscarriage of justice or manifest injustice will occur if the error is left uncorrected." *State v. Mullins*, 140 S.W.3d 64, 68 (Mo. App. W.D. 2004) (internal citations and quotation marks omitted).

Discussion

"The State has wide latitude in closing arguments, but closing arguments must not go beyond the evidence presented; courts should exclude 'statements that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury.'" *State v. Deck*, 303 S.W.3d 527, 543 (Mo. banc 2010) (quoting *State v. Rush*, 949 S.W.2d 251, 256 (Mo. App. S.D. 1997)). Prosecutors are prohibited from making arguments designed to inflame the passions of the jury. *State v. Smith*, 32 S.W.3d 532, 548 (Mo. banc 2000) ("there must be no conduct by argument, or otherwise, the effect of which is to inflame the prejudices or excite the passions of the jury." (internal quotation omitted)); *see also State v. Ozier*, 961 S.W.2d 95, 98 (Mo. App. E.D. 1998) ("A prosecutor should refrain from making irrelevant statements that only inflame a jury."). A prosecutor's improper argument during closing denies a defendant a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. *State v. Burnfin*, 771 S.W.2d 908, 910 (Mo. App. W.D. 1989).

During closing argument, the State used a visual presentation with slides, similar to a "PowerPoint" presentation (LF 61-100). At the culmination of the State's argument, the State displayed to the jury an enlarged color photo of Mr. Walter's mugshot with Mr. Walter wearing a bright orange jumpsuit and the word "GUILTY" superimposed across the photo in large red letters (LF 100; Tr. 465-69; App'x A4). The mugshot was enlarged on a screen facing the jury as the prosecutor gave his argument (Tr. 487-89). Although a small version of the mugshot without the superimposed "GUILTY" was included within the booking records admitted through Mr. Wood's testimony, the mugshot was never published to the jury or displayed to the court before closing (Tr. 467, 469). Instead, the State's presentation of the booking records as trial was limited to the date and times in which Mr. Nicholson was booked and released and Mr. Walter's responses to a medical questionnaire (Tr. 421-24).

The State's use of the altered mugshot during closing argument was highly improper. The mugshot added nothing to the State's argument but, instead, was only used to inflame the jury and portray Mr. Walter in a negative light. A criminal defendant is presumed to be innocent until proven guilty. *Deck v. Missouri*, 544 U.S. 622, 630 (2005) (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Accordingly, criminal justice must be administrated in a manner that prevents any suggestion to the jury "that the justice system itself sees a 'need to separate a defendant from the community at large.'" *Id*. (quoting *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986)). In *Deck*, the United States Supreme Court held that the Constitution forbids the use of visible shackles during trial absent an essential state interest specific to the defendant, because such a practice

"undermines the presumption of innocence and the related fairness of the fact finding process." *Id.*

Accordingly, Missouri courts have long held that a defendant should not be presented to the jury in prison clothing, because such clothing "'disparages the presumption of innocence and impairs a fair trial.'" *State v. Harris*, 868 S.W.2d 203, 208 (Mo. App. W.D. 1994) (quoting *State v. Green*, 674 S.W.2d 615, 622 (Mo. App. E.D. 1984)). Other state courts have explained that the "obvious purpose" of preventing the jury from viewing the defendant in shackles or prison garb "is to insure that the jury will not construe the defendant's pretrial incarceration as a suggestion that he is dangerous or insinuate that the defendant is incarcerated on other charges." *Bowe v. State*, 514 A.2d 408, 410 (Del. 1986). Simply, "[t]he fact of pretrial incarceration is entirely irrelevant to the issue of guilt and evidence to that effect may not, in the first instance, be presented by the State." *Id.*

As the foregoing cases establish, the mere presentation Mr. Walter's enlarged color mugshot with Mr. Walter wearing an orange prison uniform was improper and prejudicial. However, the State went another highly improper and prejudicial step further and altered the mugshot by superimposing "GUILTY" across the entire photo in bright red letters (LF 100; App'x 4). In doing so, the prosecutor went far beyond expressing his personal opinion of Mr. Walter's guilt with the altered mugshot, although that in and of itself is improper. *See State v. Clark*, 412 S.W.2d 493, 497 (Mo. banc 1967) ("Of course, it is not proper for a prosecuting attorney to express his personal opinion, especially one inferentially based on something not before the jury, of the defendant's guilt . . . .").

Rather, the State branded Mr. Walter as "GUILTY" as if that determination had already been made.

By altering the mugshot, Mr. Walter's guilt was dramatically presented to the jury as a fact, not just the State's argued position. Before the jury's verdict, Mr. Walter was supposed to be remain shielded by the presumption of innocence, yet the State's actions stripped Mr. Walter of that presumption by presenting the jury with inflammatory imagery of a guilty Mr. Walter before the jury was excused to deliberate Mr. Walter's guilt. Consequently, the prosecutor "place[d] the government's thumb on the scales" of justice. *See Bates v. Bell*, 402 F.3d 635, 648 (6th Cir. 2005) (reversing for new sentencing hearing after the prosecutor injected his personal opinion into the State's argument).

Although the presentation of altered evidence in a digital presentation during closing argument presents a novel issue for this Court, the Washington Supreme Court decided the impropriety of very similar actions by their prosecutors just this year. *See State v. Walker*, 341 P.3d 976 (Wash. 2015). During closing argument in *Walker*, the prosecutor utilized a PowerPoint presentation with a series of slides suggesting Walker's guilt, including a slide depicting Walker's booking photo with the superimposed words "GUILTY BEYOND A REASONABLE DOUBT" written in bright red letters. *Id.* at 981. Defense counsel did not object. *Id*. at 983.

In finding that the prosecutor's actions amounted to "serious misconduct," the *Walker* Court explained, "Closing argument provides an opportunity to draw the jury's attention to the evidence presented, but it does not give a prosecutor the right to present

altered versions of admitted evidence to support the State's theory of the case, to present derogatory depictions of the defendant, or to express personal opinions on the defendant's guilt." *Id*. at 985 (citing *In re Glasmann*, 286 P.3d 673 (Wash. 2012)). The court found that the prosecutor clearly violated his duty as a quasi-judicial officer to "subdue courtroom zeal, not to add to it, in order to ensure the defendant receives a fair trial." *Id*. at 984 (internal quotation omitted). Moreover, the *Walker* Court found that although there was not a timely objection to the inflammatory PowerPoint presentation, the prosecutor's misconduct "was so flagrant, pervasive, and prejudicial that it could not have been overcome with a timely objection and an instruction to the jury to disregard the improper slides." *Id.*

The *Walker* Court's holding echoed that court's prior holding in *Glasmann*, where, like here, the prosecutor presented Glasmann's booking photo with "GUILTY" superimposed over his face in red letters. *Glasmann*, 286 P.3d at 705-06. In reversing, the *Glasmann* Court explained that "[h]ighly prejudicial images may sway a jury in ways that words cannot." *Id*. at 707. "'[V]isual arguments manipulate audiences by harnessing rapid unconscious or emotional reasoning processes and by exploiting the fact that we do not generally question the rapid conclusions we reach based on visually presented information.'" *Id.* at 708-09 (quoting Lucille A. Jewel, *Through a Glass Darkly: Using Brain and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. CAL. INTERDISC. L.J. 237, 289 (2010)). Because "one of the last things the jury saw before it began its deliberations was the representative of the State of Washington

impermissibly flashing the word 'GUILTY' across an image of Glasmann's face three times" the jury was predisposed "to return a harsh verdict." *Id*. at 709.

The Western District Court of Appeals appreciated the impropriety of the State's use of Mr. Walter's altered mugshot during closing argument. *State v. Walter*, --S.W.3d--, 2014 WL 4976913 at *16-*17 (Mo. App. W.D. 2014) ("there is no question that the prosecutor's use of the altered mug shot was improper"). As the court explained, "[t]he display of the photograph alone raises serious concerns and the addition of the large red letters across the photo reading 'GUILTY' increases the concerns exponentially." *Id*. at *17. According to the court, there was "no rational justification for the prosecutor's use of the mug shot during closing argument." *Id*. The State's conduct was "egregious," "unwarranted," and violated the prosecution's duty as a quasi-judicial officer "to serve justice, not merely win the case." *Id*. (quoting *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995)). Nevertheless, the Western District found that the State's conduct did not rise to the level of plain error due to the "overwhelming evidence" of Mr. Walter's guilt. *Id*. at *18.

Contrary to the prejudice analysis performed by the Western District, this Court has specifically refused to limit such analysis to a mere determination as to whether there was overwhelming evidence of guilt. *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000) (describing the "overwhelming evidence" test as too "narrow"). Instead, the correct test is whether the court's error was "outcome-determinative." *Id*. As this Court explained, the ultimate question is whether the error "had an effect on the jury's deliberations to the point that it contributed to the result reached. Even if reasonable

minds may differ with respect to whether there is overwhelming evidence of guilt in this case, that is not the only consideration." *Id.* at 151. Therefore, in finding prejudice relating to improperly admitted evidence, the *Barriner* Court did not limit itself to determining whether the evidence of guilt was overwhelming; rather, the Court considered a range of relevant factors, including whether the prosecutor's actions in eliciting the evidence were deliberate. *Id*. at 151-52. Furthermore, although in addressing the sufficiency of the evidence this Court views the evidence in the light most favorable to the State, it does not do so when evaluating the potential prejudice of . . . trial error." *State v. Banks*, 215 S.W.3d 118, 122 (Mo. banc 2007) (internal citations omitted).

Therefore, the strength of the state's case is merely one factor, albeit an important one, "in the determination of whether the error committed by the trial court resulted in a manifest injustice or a miscarriage of justice." *State v. Hammonds*, 651 S.W.2d 537, 539 (Mo. App. E.D. 1983) (citing *State v. Watson*, 588 S.W.2d 20 (Mo. App. E.D. 1979)). "On occasion, prosecutorial misconduct can result in manifest injustice, even though the state has a strong case." *Id*. (citing *State v. Williams*, 646 S.W.2d 107 (Mo. banc 1983)).

Initially, the evidence of Mr. Walter's guilt was not overwhelming. Although the items seized by police were found in Mr. Walter's residence, Ms. Martinson, who was living with Mr. Walter at the time, testified that she bought the items to manufacture methamphetamine and that the methamphetamine was manufactured outside of Mr. Walter's presence and without his knowledge (Tr. 366-69, 371-77). Ms. Martinson, who also pled guilty to charges resulting from the police search, made nearly all of the

purchases at the Red Cross Pharmacies and Wal-Mart (Tr. 366, 372,374-76, 381, 383). Although Mr. Walter purchased a product containing ephedrine on one occasion, evidence was presented that he purchased the pills due to a chronic sinus condition (Tr. 367-68, 375, 397-88). Furthermore, as set forth in Point II, the State did not present any evidence that Mr. Walter knew how to manufacture methamphetamine.

Moreover, regardless of the State's evidence, this Court should find that the prosecutorial misconduct in this case resulted in manifest injustice due to the deliberate nature of the prosecutor's actions in displaying Mr. Walter's altered mugshot. In *Hammonds*, the prosecutor successfully excluded defendant's uncle as a witness due to a late disclosure to the State. *Hammonds*, 651 S.W.2d at 539. Yet, the prosecutor "misrepresented the facts and informed the jury that the witness did not testify because he did not want to perjure himself and the jury should consider that in determining the 'believability and credibility' of the witnesses." *Id*. In finding that the argument resulted in manifest injustice that affected Hammond's substantial rights, the court highlighted that the comment was deliberate and "cannot be excused." *Id*.

The Washington Supreme Court's reversals in *Walker* and *Glasmann* were similarly justified by the deliberate nature of the State's actions regardless of the lack of preservation and the nature of the evidence against the defendants. *See Walker*, 341 P.3d at 984-85 ("Our analysis of 'prejudicial impact' does not rely on a review of sufficiency of the evidence"); *Glasmann*, 286 P.3d at 712. Instead, "'[t]he focus must be on the misconduct and its impact, not on the evidence that was properly admitted.'" *Walker*, 341 P.3d at 986 (citing *Glasmann*, 286 P.3d at 711). For instance, even though

Glasmann conceded three of the four crimes charged, the Glasmann court held that the State's deliberate conduct required reversal because "[t]he impact of such powerful but unquantifiable material on the jury is exceedingly difficult to assess but substantially likely to have affected the *entirety* of the jury deliberations and its verdicts." *Id*. at 712 (emphasis in original).

As is well established by these and many other cases, a prosecutor is "'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Ferguson v. Dormire*, 413 S.W.3d 40, 57 (Mo. App. W.D. 2013) (quoting *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 127 (Mo. banc 2010)). "'[T]he function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.'" *Douglas v. Workman*, 560 F.3d 1156, 1194 (10th Cir. 2009) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting)). Accordingly, a prosecutor "'may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.'" *United States v. Sigillito*, 759 F.3d 913, 932 (8th Cir. 2014) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *see also Banks*, 215 S.W.3d at 121.

The comment to Missouri Supreme Court Rule 4-3.8 provides:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

In addressing deliberate prosecutorial misconduct during closing argument, this Court has specifically warned against the mistaken belief that "zealous advocacy" demands that lawyers base their arguments on "prejudice, fear, envy, and bias, regardless of whether those emotions have anything to do with the facts and law of the case." *Banks*, 215 S.W.3d at 122. This Court bemoaned that "[r]hetoric is too often substituted for logic and reason" and that when such behavior is tolerated, "the ultimate victim is our system of justice itself." *Id*. Instead, in order to maintain "public trust and confidence" in our judicial system, it is fundamental "that individuals and corporations are tried (civilly or criminally) for their acts and not for simply who they are (or are alleged to be)." *Id.*

Instead of heeding this Court's explicit warnings, the prosecutor took Mr. Walter's color mugshot with Mr. Walter wearing an orange prison uniform, enlarged it, superimposed the phrase "GUILTY" across the photo in large red letters as if it had been stamped on the photo, and displayed the altered mugshot to the jury during closing argument (LF 100). In reversing in *Glasmann*, the Washington Supreme Court resolutely held, "we give substance to our message that prejudicial prosecutorial tactics will not be permitted, and our warnings that prosecutors must avoid improper, prejudicial means of obtaining convictions will not be empty words." *Glasmann*, 286 P.3d at 712-13 (internal

quotation omitted). The present case similarly offers this Court the opportunity to give effect to its explicit warning in *Banks* by reversing Mr. Walter's convictions and sentences due to the State's highly improper and prejudicial actions during closing argument. The manifest injustice resulting from the State's actions, and indeed the integrity of our judicial system, demand it.

POINT II: Insufficient Evidence of Intent to Manufacture Methamphetamine

The trial court erred in overruling Mr. Walter's motions for acquittal and entering a judgment of conviction on Count I, attempted manufacture of methamphetamine under Section 195.211, and Count II, maintaining a public nuisance under Section 195.130, in violation of Mr. Wright's rights to due process and a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because the State's evidence was insufficient to support a finding of guilt on both counts, in that the State failed to present sufficient evidence to convince a reasonable trier of fact that Mr. Walter knew how to manufacture methamphetamine, had the intent to do so, or participated in an attempt to manufacture methamphetamine.

Standard of Review

Mr. Walter filed a Motion for Acquittal at the Close of the State's evidence, a Motion for Acquittal at the Close of All Evidence, and included a claim that the evidence was insufficient in Defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict, Or in the Alternative, for a New Trial (LF 56-59, 101-27; Tr. 341, 429, 475-81). Accordingly, this claim alleging insufficient evidence is preserved on appeal. *See State v. Willis*, 97 S.W.3d 548, 556 (Mo. App. W.D. 2003); *State v. McGee*, 284 S.W.3d 690, 704 (Mo. App. E.D. 2009). Alternatively, a claim challenging the sufficiency of the evidence to sustain a conviction is always preserved. Rules 27.07, 29.11.

In reviewing a claim that the evidence was insufficient, this Court's "role is limited to determining whether sufficient evidence exists from which a reasonable trier of fact might have found the defendant guilty beyond a reasonable doubt." *State v. Warren*, 304 S.W.3d 796, 799-800 (Mo. App. W.D. 2010). The evidence and all reasonable inferences are viewed in the light most favorable to the verdict and all contrary evidence and inferences are disregarded. *Id.* at 800. Deference also is given to the fact-finder's "decision as to the credibility and weight of the witnesses' testimony," recognizing that the fact finder "'may believe all, some, or none of the testimony of a witness.'" *Id.* (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002)). This Court, however, "'may not supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences.'" *State v. Loyd*, 326 S.W.3d 908, 916 (Mo. App. W.D. 2010) (quoting *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001)) (alteration in original).

Discussion

A conviction based on insufficient evidence violates a defendant's rights to due process and a fair trial, under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a), of the Missouri Constitution. *State v. Redifer*, 215 S.W.3d 725, 730 (Mo. App. W.D. 2006).

Mr. Walter was charged and convicted of attempted manufacture of a controlled substance under Section 195.211 and of maintaining a public nuisance under Section 195.130 (LF 52-53). Under Section 195.211.1, "it is unlawful for any person to distribute, deliver, manufacture, or produce or attempt to distribute, deliver manufacture,

or produce a controlled substance." Under Section 195.130.1, "Any room, building, structure, or inhabitable structure as defined in section 569.010 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."

The jury was instructed as to Count I as follows:

> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about August 5, 2011, in the County of Saline, State of Missouri, the defendant or Kathy L. Martinson possessed Coleman fuel containers, a large red mixing bowl containing a mixture of an orange tinted powdery material, a wooden mixing spoon and a chemical, covered with a white cloth containing a powdery material, and other items, and
>
> Second, that such conduct was a substantial step toward the commission of the offense of manufacturing or producing methamphetamine, a controlled substance, and
>
> Third, that defendant or Kathy L. Martinson engaged in such conduct with the purpose of committing such offense of manufacture or production of methamphetamine, a controlled substance, and
>
> Fourth, that defendant knew or was aware that the substance he or Kathy L. Martinson attempted to manufacture or produce was methamphetamine, a controlled substance,

then you are instructed that the offense of attempted manufacture or production of a controlled substance has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Fifth, that with the purpose of promoting or furthering the commission of that manufacture or production of a controlled substance, the defendant acted together with or aided Kathy L. Martinson in committing the offense,

then you will find the defendant guilty under Count I of attempted manufacture or production of a controlled substance.

(Supp. LF 6-7).

As defense counsel argued in closing, because Ms. Martinson admitted to procuring the items and manufacturing methamphetamine without Mr. Walter's knowledge, the only dispute in the case was whether Mr. Walter acted with the intent to aid Ms. Martinson in manufacturing methamphetamine (Tr. 446-48). The State failed to present sufficient evidence to allow a reasonable trier of fact to find that Mr. Walter knew how to manufacture methamphetamine, had the intent to do so, or participated in an attempt to manufacture methamphetamine. Accordingly, there was insufficient evidence to support Mr. Walter's conviction for attempted manufacture of methamphetamine.

Because nothing incriminating was seized from Mr. Walter's person and because he made no incriminating statements, this case was based on "constructive possession" (Tr. 14-15, 21, 26-32, 94-114, 172-208). "A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who,

although not in actual possession, has the power and intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it." *State v. Ingram*, 249 S.W.3d 892, 895 (Mo. App. W.D. 2005) (quoting Section 195.010(32)).

This Court has held that, where actual possession is not present, mere "constructive possession of the drugs or the drug components and apparatus" is not sufficient to support a conviction for attempted manufacturing of a controlled substance unless "other facts exist which buttress the inference of the defendant's requisite mental state." *State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999) (citing *State v. Condict*, 952 S.W.2d 784, 786 (Mo. App. S.D. 1997)). Instead, "[w]hen the accused shares control over the premises, as here, further evidence is needed to connect him to the manufacturing process." *Id.* (citing *State v. Purlee*, 839 S.W.2d 584, 588 (Mo. banc 1992)). "There mere fact that a defendant is present on the premises where the manufacturing process is occurring does not by itself make a submissible case" and "proximity to the contraband alone fails to prove ownership." *Id.* (internal citation omitted). Thus, "[t]here 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." *Id.* (citing *Purlee*, 839 S.W.2d at 588).

In the present case, two people lived at the residence, and the other occupant, Ms. Martinson, testified that she was the one who attempted to manufacture methamphetamine and that Mr. Walter was not aware of her intentions (Tr. 363, 367-68,

374, 386). At least three other individuals also had recent access to the residence, including Shane Nicholson, Josh Gilpin, and Lisa Smith (Tr. 357, 368-69, 379-81, 402). There was no evidence that Mr. Walter was on the premises while Ms. Martinson attempted to manufacture methamphetamine; instead, Ms. Martinson testified that Mr. Walter was up the road at his shop (Tr. 371). According to Ms. Martinson, Shane Nicholson was the individual who helped her in her attempt to manufacture methamphetamine (Tr. 368-69, 379-80). Although Mr. Walter made one purchase of ephedrine pills, it was established that Mr. Walter had a history of chronic sinus problems that provided a legitimate health-related reason to purchase ephedrine (Tr. 367-68, 397-98, 407, 409-10).

It was undisputed that all of the items found on Mr. Walter's property with the exception of the substance seized from the red bowl in the detached garage had perfectly lawful household purposes and would appear innocent to the untrained eye (Tr. 132-33, 249). For example, the acetone that was seized was a solvent commonly used to strip furniture, and it was found in the woodworking room of Mr. Walter's home (Tr. 116-17, 185, 239-40). Significantly, neither anhydrous ammonia nor red phosphorus were found during the search, one of which is necessary for the manufacture of methamphetamine (Tr. 232-33). Anhydrous ammonia is a fertilizer that must be stored under pressure because it otherwise evaporates quickly due its low boiling point (Tr. 164). Police neither found a container that could hold anhydrous ammonia for any substantial amount of time nor detected any odor of anhydrous about the property (Tr. 247). Therefore, even assuming, *arguendo*, that the common household items were intended for illegal use,

police did not find all the necessary ingredients for the manufacture of methamphetamine.

Consequently, this case presents facts closely analogous to those in *State v. Lubbers*, 81 S.W.3d 156, 163 (Mo. App. E.D. 2002), where the Eastern District found insufficient evidence to support Lubbers' conviction for possession of chemicals with intent to create a controlled substance. Lubbers was stopped by police while driving her boyfriend's truck. *Id*. at 158. When police searched the truck, they found several items used in methamphetamine manufacturing, including plastic wrap, coffee filters, plastic tubing, several jars containing "a two-layer liquid" and residue, lithium batteries, a college chemistry book, several cans of starter fluid, rubber gloves, salt, and several sheets of paper, one of which listed "common chemicals and items used in the production of methamphetamine." *Id.* Samples taken from the various jars tested positive for methamphetamine while other contained ephedrine. *Id*. at 159. Officers described the contents of the truck "as a methamphetamine lab with products in the final stages of production." *Id*. at 161.

Also inside the truck was a purse containing a pill bottle with 56 ephedrine hydrochloride tablets, a note with dollar amounts and names written on it, and a woman's compact, which had residue on the mirror that tested positive for methamphetamine. *Id.* Lubbers' boyfriend testified that before he let Lubbers borrow his truck, he told her it "contained a methamphetamine lab and that she would face dire consequences if caught with it." *Id*. He also testified that Lubbers used some of the methamphetamine he produced. *Id*.

Although the *Lubbers* Court found that the evidence was sufficient to indicate that Lubbers "maintained constructive possession of the contents in the cab of the truck," the State nevertheless failed to present sufficient evidence that Lubbers intended to manufacture methamphetamine with those items. *Id*. at 161-62. Specifically, the *Lubbers* Court found that there was no evidence "as to whether Defendant knew how to manufacture methamphetamine or that she had ever participated in the manufacture of methamphetamine." *Id*. at 161. The State also did not present evidence that Lubbers "purchased or handled any of the items constituting the lab found in the truck." *Id*. The court reiterated, "Even disregarding what Boyfriend said to disclaim Defendant's knowledge of the methamphetamine manufacturing process, nothing in his testimony on the state's behalf indicated that Defendant knew how to or intended to manufacture methamphetamine." *Id*. at 162. Accordingly, the court affirmed Lubbers' conviction for possession of a controlled substance but reversed her conviction for possession of chemicals with intent to create a controlled substance. *Id*. at 163.

The *Lubbers* Court relied on the Western District's decision in *State v. Morrow*, 996 S.W.2d 679 (Mo. App. W.D. 1999), as support. In *Morrow*, the Western District reversed Morrow's convictions for possession of ephedrine with the intent to manufacture methamphetamine and attempt to manufacture methamphetamine despite Morrow being stopped in a vehicle in which police found the following items: one gallon of toluene, a bottle of Liquid Fire, four bottles of pseudoephedrine, one bottle of ephedrine, and an air tank. *Morrow*, 996 S.W.2d at 681, 683-84. In reversing, the *Morrow* Court found persuasive that "[t]he State did not present any evidence that Mr.

Morrow planned to use the supplies he possessed to manufacture methamphetamine or that he knew how to manufacture the substance." *Id*. at 683.

The Southern District has since cited *Lubbers* favorably when reversing a defendant's conviction for possession of a chemical with the intent to create a controlled substance. *See State v. Deadmon*, 118 S.W.3d 625, 628 (Mo. App. S.D. 2003). Deadmon was riding in a truck when police pulled over the vehicle and arrested the driver for driving with a license that had been either suspended or revoked. *Id*. at 626. An inventory search of the vehicle revealed a forty-pound propane tank of anhydrous ammonia in the trunk compartment. *Id*. at 627. In reversing for insufficient evidence that Deadmon possessed the anhydrous ammonia with the intent to create methamphetamine, the court emphasized the language in *Lubbers* that "'nothing . . . indicated that Defendant knew how to or intended to manufacture methamphetamine.'" *Id*. at 628 (quoting *Lubbers*, 81 S.W.3d at 162).

Here, the State similarly failed to present evidence that Mr. Walter knew how or intended to manufacture methamphetamine. In fact, the facts in the present case are far less incriminating than the facts in *Lubbers*. As opposed to being found in a vehicle as in *Lubbers*, all of the items seized in this case, except for the contents of the red bowl in the detached garage, had common household purposes that would appear innocent to the untrained eye (Tr. 132-33, 249). Accordingly, Mr. Walter's presence in a home where the items were found – a home that he shared with the individual who admitted to manufacturing the methamphetamine – is far weaker evidence of his intent to use the items to manufacture methamphetamine than if the items were all found within a vehicle

Mr. Walter was driving. In contrast to Lubbers' boyfriend, who testified that he specifically told her that the items in the vehicle were being used to manufacture methamphetamine, *Lubbers*, 81 S.W.3d at 161, Ms. Martinson specifically testified that she did not tell Mr. Walter of her intent to make methamphetamine. Furthermore, whereas there was evidence that Lubbers had been getting high off methamphetamine shortly before borrowing the truck, *id*., there was no evidence that Mr. Walter appeared to be under the influence of methamphetamine (Tr. 8-261, 314-51). Even the booking records presented by the State did not show any indication that Mr. Walter appeared to be under the influence (Tr. 417-23).

Although evidence was presented that Mr. Walter made a purchase for ephedrine pills and was in Ms. Martinson's presence while she made several purchases of pseudoephedrine pills and lithium batteries, that fact is not enough to prove Mr. Walter's intent to manufacture methamphetamine. In *State v. Arles*, 998 S.W.2d 136, 138 n. 3, 138-40 (Mo. App. S.D. 1999), Arles and his girlfriend purchased, among other things, *twelve* boxes of pills containing ephedrine, lamp oil, solvent, coffee filters, air line tubing, propane, Coleman fuel, and alcohol. Arles himself purchased several of the items, including six boxes of Suphedrine. *Id*. at 138 n. 3. In finding insufficient evidence, the *Arles* Court held:

> All of the items that defendant purchased and had in his possession at the time of arrest were items legally acquired. Even if some or all of them could be used to manufacture methamphetamine, unless the evidence was sufficient to permit a reasonable juror to find the defendant intended to

> manufacture methamphetamine, he could not be found guilty of [possession of pseudoephedrine with the intent to manufacture methamphetamine].

Id. at 139.

Similarly, in *State v. Agee*, 37 S.W.3d 834, 836 (Mo. App. S.D. 2001), officers observed an object being thrown from the passenger side window of a car, which turned out to be several blister packs of pseudoephedrine containing a total of 168 tablets not in cardboard packaging. A search of the vehicle revealed, among other things, a propane tank from a barbecue grill in the trunk. *Id*. at 836. In finding the evidence insufficient to establish Agee's intent to manufacture methamphetamine, the court quoted the Western District's decision in *State v. Tackett*, 12 S.W.3d 332, 334 (Mo. App. W.D. 2000), as follows: "'[T]he State is essentially contending that people who possess antihistamines in the quantities purchased here, without visible signs of allergies, must be intending to manufacture methamphetamine. We reject this contention . . . .'". Accordingly, the mere purchase of cold or sinus medication in suspicious circumstances does not sufficiently prove intent to manufacture methamphetamine.

Instead of following the above cases from all three Courts of Appeals, the Western District denied Mr. Walter's sufficiency claim after relying heavily on *State v. Mickle*, 164 S.W.3d 33 (Mo. App. W.D. 2005). *Walter*, 2014 WL 4976913 at *3-*5. *Mickle* again involved a case where a defendant was pulled over while riding in a vehicle. *Mickle*, 164 S.W.3d at 40. Contained entirely in the vehicle were the following items:

> [T]roopers found. . . a plastic Wal–Mart bag containing drain cleaner, four cans of starting fluid, and a jar of white powdery liquid, which later tested

> positive for pseudoephedrine. They also found a large cooler containing 83.94 grams of powdered pseudoephedrine, a spatula, a beer can, and a black leather bag containing 17.89 grams of powdered pseudoephedrine, scales, small plastic baggies, mason lids, silicone gel, another spatula, rubber gloves, paper plates, coffee filters, vice grips, wire cutters, a can opener, a spoon, alcohol cleansing pads, a clear glass vial, a thermos, and lithium cores that had been stripped from batteries. In addition, they found an ice cream bucket containing a bottle of salt, a length of tubing with a two liter bottle attached, and black tape. Among these items, they also found a plastic Wal–Mart bag containing the appellant's clothes. In the hatchback of the vehicle, they found a rifle case containing a pump-action sawed-off shotgun. Where Trooper Bearden initially saw the appellant reach with his hand, they found a syringe with a bent needle, containing a small amount of cloudy liquid.

Id. Defense counsel presented testimony that the all of the items belongs to the driver and that Mickle was unaware of their presence in the vehicle. *Id*. at 40-41.

In affirming Mickle's convictions for attempted manufacture of methamphetamine, possession of ephedrine with intent to manufacture methamphetamine, and possession of drug paraphernalia with intent to use to manufacture methamphetamine, the *Mickle* Court was critical of *Lubbers*. *Id*. at 49-50. The Western District explained that its references in *Morrow* concerning a lack of evidence as to a defendant's knowledge of how to manufacture methamphetamine does

not stand "for the proposition that such evidence is required in every case in order to find an intent to manufacture methamphetamine. *Id*. at 52. The court explained that although knowledge of how to manufacture methamphetamine is not a "proof element" of the drug offenses, it is instead "relevant in determining whether [a defendant] actually intended to act." *Id*. at 49-50.

Crucial to the *Mickle* Court's finding of sufficient evidence was the fact that the items in the vehicle were "in plain view and within [Mickle's] reach." *Id*. at 46. The vehicle in which Mickle was riding smelled of chemicals, his clothes were in a plastic Wal-Mart shopping bag identical to those containing the meth-related items, Mickle had been traveling in the vehicle for three days, the pump-action sawed-off shotgun was in a case within plain view, and Mickle was an admitted methamphetamine user. *Id*. at 45, 53-54. In finding the facts sufficient to affirm Mickle's conviction, the court explained, "Our review of the cases would indicate that there is no set formula as to what evidence is required to properly infer an intent to manufacture methamphetamine." *Id*. at 53.

Admittedly, knowledge of how to manufacture methamphetamine is not an element of attempted manufacture of methamphetamine under Section 195.211. However, all of the foregoing cases, including *Mickle*, expressly hold that knowledge of how to manufacture methamphetamine is at least a relevant factor regularly considered by appellate courts when determining whether there was sufficient evidence to establish a defendant's intent to manufacture methamphetamine. The disagreement between the cases concerns the significance of the factor. As set forth above, the *Lubbers*, *Deadmon*, and *Morrow* Courts placed far more significance on the factor than did the *Mickle* Court.

Knowledge of how to manufacture methamphetamine is particularly relevant in cases such as Mr. Walter's, where items were located in a shared residence where the other occupant admitted to manufacturing the methamphetamine without the defendant's knowledge. In *Mickle*, knowledge of how to manufacture methamphetamine was not necessary due to the strength of the State's case. However, as opposed to *Mickle*, the items seized by police in the present case were assembled by police from various places on the property, including from a detached garage, as opposed to all of the items being in plain view in a vehicle (Tr. 28--32 175, 180-86, 189, 191-92, 196-98). The items were found in a home, which as established above, is far less inculpatory that having all of the items in a vehicle within easy reach. There were no weapons found on the property, and there was no admission that Mr. Walter was a methamphetamine user, as in *Mickle* and *Lubbers* (Tr. 318). Because Mr. Walter's case was weaker than *Mickle* and even arguably weaker than *Lubbers*, knowledge of how to manufacture methamphetamine was a significant factor indicating Mr. Walter's intent to manufacture methamphetamine, which the State failed to prove.

In accordance with the foregoing decisions, this Court should find that the totality of the facts in this case, together with the fact that the State failed to establish that Mr. Walter had knowledge of how to manufacture methamphetamine, are insufficient to establish that Mr. Walter had the necessary intent to manufacture methamphetamine. Therefore, Count I must be reversed and Mr. Walter discharged.

Additionally, Mr. Walter's conviction on Count II, for keeping or maintaining a public nuisance under Section 195.130, was based entirely upon the Mr. Walter's

conviction on Count I. To find Mr. Walter guilty on Count II, the jury had to find that Mr. Walter "maintained a public nuisance at 24808 155th Road by keeping methamphetamine and its precursors on the premises" and that he "acted knowingly" in doing so (Supp. LF 8). The State failed to present sufficient evidence that Mr. Walter knew that the items on his property were being used for an illegal purpose or that he knowingly kept a controlled substance. Therefore, for the reasons set forth above regarding Count I, the conviction for Count II should likewise be reversed and Mr. Walter discharged.

POINT III: Illegal Execution of Search Warrant

The trial court clearly erred and abused its discretion in denying Mr. Walter's Motion to Quash the Search Warrant and Suppress Evidence and in overruling Mr. Walter's objections at trial to the admission of the evidence seized pursuant to the search warrant, in violation of Mr. Walter's rights to due process, a fair trial, and to be free from unreasonable searches and seizures, as guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 15, and 18(a), of the Missouri Constitution, and Section 542.296, RSMo, because suppression is required when officers illegally execute a search warrant by exceeding the limitations of authority imposed on them by the court, in that the officers executing the search warrant refused to allow Mr. Walter to be present during the search and inventory despite the explicit requirement in the warrant that they do so if possible.

Standard of Review

Mr. Walter filed a Motion to Suppress Evidence and a First Amended Motion to Quash Search Warrant and Suppress Evidence, both of which asserted his claim that the search warrant was illegally executed and both of which were litigated in a suppression hearing (LF 38-50; Tr. 7-35). After the trial court denied Mr. Walter's motions, Mr. Walter was granted a continuing objection regarding the issues raised in the motions at trial. Accordingly, Mr. Walter's claim that the warrant was illegally executed is preserved for appeal. *State v. Baker*, 103 S.W.3d 711, 716-17 (Mo. banc 2003).

At a suppression hearing, "[t]he burden of going forward with the evidence and the risk of nonpersuasion shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled." Section 542.296.6, RSMo; *State v. Franklin*, 841 S.W.2d 639, 644 (Mo. banc 1992). On appeal, the appellate court's review is limited to determining whether the trial court's decision to deny the motion to suppress was supported by substantial evidence. *State v. Edwards*, 116 S.W.3d 511, 530 (Mo. banc 2003). "In reviewing the trial court's ruling on the matter, this Court considers the record made at the suppression hearing as well as the evidence introduced at trial." *State v. Deck*, 994 S.W.2d 527, 534 (Mo. banc 1999). On appeal, the trial court's ruling must be reversed if the decision is clearly erroneous, leaving the court with a definite and firm impression that a mistake has been made. *State v. Williams*, 97 S.W.3d 462, 469 (Mo. banc 2003).

Discussion

"The Fourth Amendment to the Constitution, which affords the same guarantees against unreasonable search and seizures as article I, section 15 of the Missouri Constitution, protects '[t]he right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.'" *Baker*, 103 S.W.3d at 717-18 (quoting U.S. Const., Amend. IV). Pursuant to Section 542.296.5(4), a motion to suppress can be based on a claim that "the warrant was illegally executed by the officer." Accordingly, the erroneous admission of evidence seized pursuant to an illegally executed search warrant violates a defendant's rights to due process, a fair trial, and to be free from unreasonable searches and seizures under the Fourth, Sixth, and Fourteenth

Amendments to the United States Constitution and Article I, Sections 10, 15, and 18(a), of the Missouri Constitution. *See State v. Hagan*, 113 S.W.3d 260, 263 (Mo. App. W.D. 2003); *Baker, 103 S.W.3d at 717-18*; *see also Barriner*, 34 S.W.3d at 144.

In the present case, officers illegally executed the search warrant by deliberately disregarding the mandate in the warrant that the officers conduct the search and inventory in the presence of Mr. Walter, "if that be possible" (LF 27). In the last paragraph of the search warrant, the court ordered:

> NOW THEREFORE, 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; Tr. 19-20) (emphasis added).

Shortly after the warrant was issued, Trooper Sullivan and nine other law enforcement officers executed the search warrant at Mr. Walter's home by forcibly entering the property after kicking down the front door (Tr. 9, 11, 17). Mr. Walter and Ms. Martinson were in the home when the search warrant was executed (Tr. 12-13). Despite the court's order that the officers seize and inventory the property in Mr.

Walter's presence, Ms. Martinson and Mr. Walter were immediately arrested and transported to the Saline County Sheriff's Department before the search was conducted (Tr. 12-13, 21).

At the suppression hearing, Trooper Sullivan testified that the search warrant was the first he served himself, although he had been with other officers during the service of other search warrants (Tr. 22). Trooper Sullivan claimed that he arrested Mr. Walter and Ms. Martinson for "possession and paraphernalia" before the search was conducted when he saw a Wal-Mart card and a razor blade with residue in the basement (Tr. 13). Trooper Sullivan simultaneously claimed that Mr. Walter and Ms. Martinson were taken away from the house due to "officer safety" (Tr. 21-23). Trooper Sullivan was responsible for completing the Return and Inventory for the search warrant, which he presented to Mr. Walter while he was in custody (Tr. 14-16).

Corporal Lilleman, who participated in executing the search warrant, claimed Mr. Walter could not remain at the scene due to officer safety (Tr. 310-12). Corporal Lilleman testified that there was an officer safety concern due to a prior search warrant that was served at Mr. Walter's residence (Tr. 337-38). The trial court denied Mr. Walter's motions to quash the search warrant and suppress evidence (LF 12, 51; Tr. 61).

Illegal execution of a search warrant is frequently based on a claim that officers disregarded the knock and announce requirement before attempting forcible entry. *See State v. Ricketts*, 981 S.W.2d 657, 660-62 (Mo. App. W.D. 1998). The United States Supreme Court has held that the right against unreasonable searches and seizures "includes the right to be notified by law enforcement officials of their purpose and

authority prior to enter a dwelling." *Baker*, 103 S.W.3d at 718 (citing *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995)). In such cases, officers must have a "'reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.'" *Id.* (quoting *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997)). If this standard is not met, the evidence was seized as a result of an illegally executed warrant and must be suppressed. *Ricketts*, 981 S.W.2d at 660-62. The United States Supreme Court justified the "knock and announce" rule based on the common-law principle that "the officer cometh not as a mere trespasser, but claiming to act under a proper authority . . . ." and therefore, he must announce that authority. *Wilson*, 514 U.S. at 932, 934 (quoting *Case of Richard Curtis*, 168 Eng. Rep. 67, 68 (Crown 1757)).

Officers executing a search warrant must also limit the scope of the search to that which the warrant grants them authority to search. *State v. Varvil*, 686 S.W.2d 507, 509 (Mo. App. E.D. 1985). "'It is well accepted that the authority to search granted by any warrant is limited to the specific places described in it, and does not extend to additional or different places.'" *Id.* (quoting *United States v. Heldt*, 668 F.2d 1238, 1262 (D.C. Cir. 1981)). In such cases, evidence seized outside of the authority granted in the warrant must be suppressed. *Id*. at 513.

Suppressing evidence as a result of an officer's failure to announce his authority or otherwise limit his search to the language of the warrant provide closely analogous justifications for suppressing the evidence in the present case, where the police similarly

failed to comply with an express limitation placed on their authority by the court. Despite the court's explicit order that police seize any evidence and inventory it in Mr. Walter's presence, Mr. Walter was not allowed to remain on the premises (Tr. 21, 123, 255, 316). Although the officers attempted to offer various excuses for ignoring the order, there was nothing which made it impossible for Mr. Walter to remain at the scene of the search. For instance, Trooper Sullivan offered "officer safety" as an excuse for Mr. Walter's removal from the premises, but Trooper Sullivan did not state specifically how officer safety was threatened during the execution of this specific warrant and readily admitted that there is always a possibility of danger if the homeowner remains on the scene during the search warrant (Tr. 22). Therefore, under Trooper Sullivan's view, police could never follow the court's order to seize and inventory the items in a defendant's presence.

Trooper Sullivan simultaneously offered Mr. Walter's arrest as the justification for immediately removing Mr. Walter from the residence (Tr. 13). Trooper Sullivan testified that he was following the Missouri State Highway Patrol's policy that arrested individuals be transported to "the facility than can hold them" (Tr. 126). In so testifying, Trooper Sullivan essentially asserted that the Missouri State Highway Patrol's procedures regarding arrests trump the express language in a warrant (Tr. 125-26).

Similarly, while Corporal Lilleman also cited "officer safety" as the reason for removing Mr. Walter from the residence, Corporal Lilleman admitted that Mr. Walter was not a threat to the officers and did not have any weapons (Tr. 318). Although Corporal Lilleman explained that a prior search warrant was executed at the residence,

Mr. Walter was not a suspect in relation to that particular search warrant (Tr. 337-38). Corporal Lilleman's testimony was also extremely contradictory (Tr. 319). At first, Corporal Lilleman testified to the jury that Mr. Walter had made threats to him, yet on voir dire when the jury was not present, he peculiarly testified that he did not tell the jury that Mr. Walter had threatened him (Tr. 336). Moments later back in front of the jury, Corporal Lilleman implied that Mr. Walter made threats in a recorded conversation while being held at the Saline County Jail (Tr. 339). Consequently, the officer safety concerns testified to by Trooper Sullivan and Corporal Lilleman were unreasonable and lacked substantial evidence.

Moreover, regardless of what safety concerns existed prior to entering the residence, those concerns were removed entirely by the time Mr. Walter was safely detained in his home and no weapons were found. Most importantly, none of the officers testified as to why an officer safety issue persisted at the point Mr. Walter was arrested and in handcuffs. Furthermore, although Mr. Walter was arrested at the scene, it does not follow that his arrest would make it impossible for him to remain at the scene, regardless of the policies of the Missouri State Highway Patrol. Even the Western District acknowledged as such, when stating, "Exactly why the officers believed their safety was in danger when Walter was arrested and in handcuffs while there were ten armed officers present at the scene to maintain custody of Walter and also conduct the search of the premises is unclear from the record." *Walter*, 2014 WL 4976913 at *11 n. 6. This Court should find that the officers' explanations for Mr. Walter's immediate removal from the

premises were unreasonable under the totality of the circumstances and lacked substantial evidence.

Instead, the officers' failure to complete the search in Mr. Walter's presence as ordered is "a classic example of indirect criminal contempt: conduct outside of the presence of the contemned court in violation of the dignity of the court and in derogation of its decrees." *See Ryan v. Moreland*, 653 S.W.2d 244, 247 (Mo. App. E.D. 1983) (citing *Mechanic v. Gruensfelder*, 461 S.W.2d 298, 304-05 (Mo. App. E.D. 1970)). Such disregard for a court order by law enforcement cannot be condoned by this Court. "Men must turn square corners when they deal with the Government," *Rock Island A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920), but "[t]he [State], like the defendant, should be required to turn square corners." *United States v. Johnson*, 652 F.3d 918, 922 n. 2 (8th Cir. 2011) (quoting *United States v. Recio*, 537 U.S. 270, 279 (2003) (Stevens, J., concurring in part and dissenting in part)). As the United States Supreme Court has recognized:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration

> of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (overruled in part by *Katz v. United States*, 389 U.S. 347 (1967)).

Therefore, this Court should find that the totality of the circumstances were such that it was at least possible for Mr. Walter to remain at the scene while the officers seized and inventoried the items and that the officers' illegally executed the search warrant by deliberately disregarding the court's order to allow Mr. Walter to remain at the scene "if possible." Officers who disregard an express limitation on the their authority during the execution of the search warrant should be afforded the same result as officers who unreasonably fail to announce that authority or search beyond the scope of the warrant. As set forth above, in those situations courts are obliged to suppress all of the evidence seized as a result of the illegally executed warrant. *See Ricketts*, 981 S.W.2d at 660-62; *Varvil*, 686 S.W.2d at 509.

Because the trial court clearly erred and abused its discretion in failing to grant Mr. Walter's motion to suppress on the basis that the warrant was illegally executed, this Court should reverse Mr. Walter's convictions and order the evidence suppressed.

POINT IV: Inadmissible Hearsay

The trial court erred and abused its discretion in overruling Mr. Walter's objection to Trooper Sullivan's testimony regarding the statements Shane Nicholson made during a phone call he allegedly received from Mr. Walter, in violation of Mr. Walter's rights to due process, a fair trial, and to confront adverse witnesses, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, because testimony from an officer concerning statements from a third party who is not declared unavailable and whose statements are not offered solely to explain subsequent police conduct is inadmissible and prejudicial hearsay, in that Mr. Nicholson was not declared unavailable and his hearsay statements were admitted for the truth of the matter asserted, were not admitted solely to explain Trooper Sullivan's subsequent police conduct, were argued for the truth of the matter asserted by the State during closing argument.

Standard of Review

Mr. Walter objected to Trooper Sullivan's hearsay testimony at trial and raised a claim in his motion for new trial that the trial court erred in overruling his objection (Tr. 105-112; LF 118-19). Accordingly, this claim is preserved on appeal. *State v. Reed*, 282 S.W.3d 835, 837-38 (Mo. banc 2009).

"The admission of evidence is reviewed for abuse of discretion and disturbed only when the decision is 'clearly against the logic of the circumstances.'" *State v. Taylor*, 298 S.W.3d 482, 491 (Mo. banc 2009) (quoting *Reed*, 282 S.W.3d at 837 (Mo. banc

2009)). Although substantial deference is afforded to trial court decisions on issues of fact, "when the issue is primarily legal, no deference is warranted and appellate courts engage in de novo review." *Id*. (citing *State v. March*, 216 S.W.3d 663, 664 (Mo. banc 2007) and *Jones v. Fife*, 207 S.W.3d 614, 616 (Mo. banc 2006)). Reversal is required where an evidentiary error was prejudicial. *Id*. (citing *State v. Wolfe*, 13 S.W.3d 248, 260 (Mo. banc 2000)). Prejudice is established when "'there is a reasonable probability that the trial court's error affected the outcome of the trial.'" *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006).

Discussion

"Hearsay is any out-of-court statement that is offered into evidence to prove the truth of the matter asserted." *Reed*, 282 S.W.3d at 837 (citing *State v. Kemp*, 212 S.W.3d 135, 146 (Mo. banc 2007)). "Once counsel objects on the basis of hearsay, the proponent has the burden to demonstrate that the statement fits into a recognized exception to the hearsay rule." *Id*. (citing *Gough v. General Box Co.*, 302 S.W.2d 884, 887 (Mo. 1957)).

The Sixth Amendment of the United States Constitution guarantees a criminal defendant "'the right to confront the witnesses against him or her and to have the opportunity for effective cross examination of any witnesses who appear and testify against him or her.'" *State v. Mozee*, 112 S.W.3d 102, 107 (Mo. App. W.D. 2003) (footnoted omitted) (quoting *State v. Glaese*, 956 S.W.2d 926, 930 (Mo. App. S.D. 1997)). "As a result, '[t]he admission of a hearsay statement against a criminal defendant violates his or her Sixth Amendment right to confront adverse witnesses unless the statement falls within a firmly rooted exception to the hearsay rule or it contains

particularized guarantees of trustworthiness.'" *Id.* at 108 (quoting *State v. Shaw*, 14 S.W.3d 77, 81 (Mo. App. E.D. 1999)). Moreover, the erroneous admission of prejudicial evidence violates a defendant's rights to due process and a fair trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution. *State v. Francis*, -S.W.3d --, 2014 WL 1686538 (Mo. App. E.D. 2014); *Barriner*, 34 S.W.3d at 144.

At trial, Trooper Sullivan testified that during his interview with Shane Nicholson, Trooper Sullivan heard Mr. Nicholson's phone ring, after which he instructed Mr. Nicholson to place the cell phone on speaker phone so that he could listen to the call (Tr. 104). Trooper Sullivan claimed that he could recognize the voice on the other end of Mr. Nicholson's phone call as Mr. Walter because he had spoken to Mr. Walter during a prior traffic stop (Tr. 104-05, 134). The State asked what Mr. Walter said during the phone conversation, and Trooper Sullivan started to testify as to what Mr. Nicholson said on his end, to which defense counsel objected and argued that Mr. Nicholson's statements were hearsay (Tr. 105). The trial court immediately sustained the objection (Tr. 105).

However, the State asked the court to reconsider its ruling and argued that Mr. Nicholson's statements were necessary to "to explain the defendant's statement or to provide context" (Tr. 105-06). Defense counsel argued that the State should call Mr. Nicholson as a witness if they want to bring out what Mr. Nicholson said on the phone call (Tr. 106). The trial court then reversed its ruling, stating that Mr. Nicholson's statements could be admitted "as part of res gestae" (Tr. 109). The court also hypothesized that "perhaps it's being used also to demonstrate what this witness did, not

that the statement of Mr. Nicholson necessarily was the truth of the matter, but to explain what happened" (Tr. 109). After defense counsel renewed his objection, Trooper Sullivan testified that Mr. Nicholson asked Mr. Walter "if it was fire," to which Mr. Walter said, "yeah" (Tr. 111-12).

Trooper Sullivan's testimony concerning Mr. Nicholson's statements was inadmissible hearsay and should have been excluded. "'Generally, acts, statements, occurrences and the circumstances forming part of the main transaction may be shown in evidence under the *res gestae* rule where they *precede the offense immediately or by a short interval of time* and tend, as background information, to elucidate a main fact in issue.'" *State v. Williams*, 366 S.W.3d 609, 625 (Mo. App. W.D. 2012) (quoting *State v. Davis*, 226 S.W.3d 167, 170 (Mo. App. W.D. 2007) (emphasis added)). Although statements or acts and conduct of third persons are admissible as *res gestae*, the third party's hearsay statements must "immediately precede or [be] contemporaneous" with the offense. *State v. Moiser*, 738 S.W.2d 549, 556 (Mo. App. E.D. 1987). "'While often referred to as the exception relating to excited utterances, [res gestae] is, in addition, employed to explain declarations giving meaning to an operative transaction such as a sale.'" *Id*. at 555-56 (quoting MCCORMICK, EVIDENCE 586 (1954)).

Moreover, the declarant must be declared "unavailable" at trial. *See id*. at 555-56. For instance, in *Moiser*, a police officer was allowed to testify as to the confidential informant's statements to the defendant during a drug sale in order to provide context to the defendant's declarations. *Id*. at 553, 555-56. The Eastern District found the testimony properly admitted because the confidential informants statements immediately

preceded or were contemporaneous with the sale and because the informant was unavailable. *Id*. at 555-56.

Here, the alleged telephone conversation was neither immediately preceding nor contemporaneous with the offenses for which Mr. Walter was charged. As defense counsel attempted to explain to the trial court, the conversation occurred over the phone and was "not at the scene of the crime at all" (Tr. 110). Specifically, Trooper Sullivan testified that the phone call occurred at the Saline County Sheriff's Department at approximately 8:10 p.m. (Tr. 103-04). The search warrant was not executed at Mr. Walter's residence until the following morning at 1:25 a.m. (Tr. 80-81). Because the conversation did not occur anywhere near the location of the offense and did not occur during or immediately prior to the offense, the statements cannot qualify as admissible under the res gestae exception.

Furthermore, the State did not argue that Mr. Nicholson was unavailable to testify (Tr. 105-11). Therefore, even if his hearsay statements were otherwise admissible, Mr. Nicholson should have been called to testify as to the contents of the conversation and thereby be subjected to cross-examination. "Such [c]onfrontation and right to cross examine have been held to be among the fundamental guarantees of life and liberty and the essential and indispensable safeguards to a fair trial and due process of law." *State v. Jackson*, 495 S.W.2d 80, 84 (Mo. App. K.C. 1973) (citing *Kirby v. United States*, 174 U.S. 47 (1899)). Accordingly, by allowing Trooper Sullivan to testify to Mr. Nicholson's statements without Mr. Nicholson offering his own account of the conversation or being

declared unavailable, the court denied Mr. Walter his fundamental right to cross-examine Mr. Nicholson on the critical issue of what was said on the phone call.

Although the trial court also surmised that the hearsay testimony might be admissible as subsequent police conduct (Tr. 109), that was clearly not the purpose for which the State sought to admit the statements. "[A]n out-of-court statement offered not for the truth of the matter asserted, but to explain subsequent police conduct, is not hearsay and is, therefore, admissible assuming it is relevant." *Douglas*, 131 S.W.3d at 824 (citing *State v. Bell*, 62 S.W.3d 84, 89 (Mo. App. W.D. 2004)). "However, when such out-of-court statements go beyond what is necessary to explain subsequent police conduct, they are hearsay, unless they qualify as non-hearsay on another basis." *Id.* (internal citations omitted).

The State made no attempt to argue that Trooper Sullivan's testimony was admissible as explaining subsequent police conduct, but instead relied solely on a res gestae argument (Tr. 105-07). Immediately following the line of questioning concerning Mr. Nicholson's statement during the phone call, the State proceeded to ask Trooper Sullivan about the kind of vehicle Mr. Walter drove (Tr. 112). The State then asked Trooper Sullivan about the items he was responsible for seizing pursuant to the search warrant (Tr. 112-13). After discussing those items and their chain of custody, the State ended its direct (Tr. 113-18). As such, after eliciting the hearsay testimony, the State did not follow up with Trooper Sullivan as to how Mr. Nicholson's statements were relevant to explain his subsequent conduct (Tr. 112-13).

Instead, the State used Mr. Nicholson's hearsay statements for the truth of the matter asserted and not solely to explain Trooper Sullivan's subsequent conduct. The State later had Deputy Miller testify that "fire" means "good" or "excellent" amongst methamphetamine users and that a local meth user had "a tattoo on his arm of a syringe injecting fire into his veins" (Tr. 231-32). The State argued these facts in closing as follows:

> The Defendant wasn't down at the shop that particular night. As you heard Trooper Sullivan tell you, he overheard a conversation between Mr. Nicholson and Mr. Walter where Mr. Nicholson asked the Defendant whether it was fire. And you heard Deputy Miller explain what that term meant in the methamphetamine community.
>
> He gave you an example of a subject that he knew that had a tattoo of a needle that said, FIRE, going into his arm, into a vein.
>
> The defendant knew what was going on. He knew what he had in his garage. He knew that it was fire. They were making what's known in the methamphetamine community as good, good methamphetamine, good, good stuff. He knew what was going on at his house.

(Tr. 458-59).

In *Douglas*, one of the arresting officers in a driving while intoxicated case testified, "we received a call for service, that there was a dispatch for a party slumped over the wheel of a dark colored . . . ." *Douglas*, 131 S.W.3d at 822. The prosecutor asked, "you received a call from dispatch?", to which the officer responded, "A call for

service from dispatch that a party was behind the wheel of a dark-colored SUV at the intersection of 59th and Prospect." *Id*. Even though the State neither referenced the hearsay statements in closing argument nor argued that the hearsay statements supported its case – unlike the State in the present case – the Western District still found that the admission of the hearsay statements required reversal. *Id*. at 822, 826.

Similarly, in *Francis*, 2014 WL 1686538 at *7-*14, the Eastern District reversed Francis' conviction for possession of pseudoephedrine with intent to manufacture methamphetamine due to the court's error in admitting inadmissible hearsay in the form of text messages. Instead of focusing on the text messages Francis sent, the State focused on the incriminating nature of the text messages that were being sent by the third party. *Id*. at *13-*14. In reversing, the court explained, "The intent of such action is clear; the State was not seeking to introduce evidence of Appellant's alleged admissions, but instead was seeking to admit the hearsay statements of unidentified third parties." *Id*. at *14.

The same reasoning applies to the present case. By eliciting testimony as to what "fire" means and repeating Deputy Miller's testimony concerning the unknown methamphetamine user with a tattoo of fire going into his veins, the State's use of Mr. Nicholson's hearsay statements went far beyond explaining Trooper Sullivan's subsequent conduct or the immediate circumstances of the crime. Rather, the State used Mr. Nicholson's testimony to attempt to establish the truth of the matter asserted: that Mr. Walter was in possession of or was attempting to manufacture methamphetamine. In fact, the State admitted at the new trial motion hearing that the purpose of eliciting Mr.

Nicholson's question during the phone call was to "elucidate one of the main facts in issue, that the defendant knew that there was a manufacturing operation going on at his residence" (Tr. 486). The State did so without calling Mr. Nicholson as a witness, which would have subjected him to cross-examination concerning the conversation. Accordingly, Trooper Sullivan's testimony was inadmissible hearsay.

Trooper Sullivan's inadmissible hearsay testimony was highly prejudicial. Although in addressing the sufficiency of the evidence this Court views the evidence in the light most favorable to the State, it does not do so when evaluating the potential prejudice of . . . trial error." *Banks*, 215 S.W.3d at 122. Generally, the threshold for finding prejudice is proportional to the strength of the case against the defendant – in close cases, slight errors can be prejudicial, while in cases with overwhelming evidence of guilt, fundamental errors are required to show prejudice. *See State v. Delaney*, 973 S.W.2d 152, 156 (Mo. App. W.D. 1998); *State v. Starke*, 811 S.W.2d 799, 801 (Mo. App. W.D. 1991); *State v. Blakey*, 203 S.W.3d 806, 816 (Mo. App. S.D. 2006). However, "the mere fact that there is overwhelming evidence of guilt is not the test; the test is whether there is a reasonable probability the jury relied on the improperly admitted evidence in convicting the defendant and that it would have reached a different result but for its admission." *Douglas*, 131 S.W.3d at 825 (discussing *Barriner*, 34 S.W.3d at 150).

Here, Trooper Sullivan's inadmissible hearsay testimony was outcome-determinative in that it went towards the primary dispute in the case: whether Mr. Walter participated in or had knowledge that methamphetamine was being manufactured at his residence. *See Reed*, 282 S.W.3d at 838 (finding prejudice resulting from police officer's

inadmissible hearsay testimony because "no other direct testimony showed that Reed was attempting to manufacture methamphetamine."). Ms. Martinson testified that she bought the items to manufacture methamphetamine and that the methamphetamine was manufactured outside of Mr. Walter's presence and without his knowledge (Tr. 366-69, 371-77). Through Trooper Sullivan's testimony, the State was allowed to present Mr. Nicholson's hearsay statements and use those statements in closing to contradict Ms. Martinson's testimony and suggest that Mr. Walter knew that methamphetamine was being manufactured on his property (Tr. 458-59).

Moreover, as set forth above, this evidence was admitted without Mr. Nicholson being subjected to cross-examination. As this Court has explained, "The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination." *State v. Kirkland*, 471 S.W.2d 191, 193 (Mo. banc 1971). In establishing prejudice, the *Douglas* Court explained, "[T]he prejudice here was not ultimately caused by the inaccuracy of the officer's reporting what was stated to the dispatcher by the caller, but the fact that the caller was not subject at trial to cross-examination by the appellant." *Douglas*, 131 S.W.3d at 826 n. 3. Here, Mr. Walter was not afforded this fundamental right. Because Trooper Sullivan's testimony was outcome-determinative and denied Mr. Walter the right to cross-examine Mr. Nicholson as to his statements, the admission of Trooper Sullivan's inadmissible hearsay testimony was highly prejudicial.

For the reasons set forth above, the trial court erred and abused its discretion in admitting Trooper Sullivan's inadmissible and prejudicial hearsay testimony. As a result, this Court must vacate and set aside the judgment and sentences in the underlying criminal action and remand this case for a new trial.

CONCLUSION

WHEREFORE, Mr. Walter respectfully requests this Court reverse the judgment of the trial court and vacate and set aside the judgment and sentences in the underlying criminal action, *State v. Walter*, 12CY-CR00040, and either discharge Mr. Walter pursuant to the argument presented in Point II or remand for a new trial pursuant to the arguments presented in Points I, III, and IV.

Respectfully submitted,

/s/ Greg Doty

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Greg Doty, hereby certify as follows:

The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Office Word 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **17,882** words, which does not exceed the 31,000 words allowed for an appellant's brief under Rule 84.04.

A true and correct copy of the attached *Appellant's Substitute Brief* was sent through the e-filing system on April 6, 2015, to: Benjamin P. Cox, Assistant Attorney General, Office of the Attorney General, at benjamin.cox@ago.mo.gov.

/s/ Greg Doty
Greg Doty