Appeal No. SC91849

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,
Respondent,

vs.

INES LETICA,
Appellant.

Appeal from the Circuit Court of the City of St. Louis
Case No. 0722-CR10502
The Honorable Thomas J. Frawley, Presiding

APPELLANT'S SUBSTITUTE BRIEF

STEVEN V. STENGER
Missouri Bar No. #45842
Klar, Izsak & Stenger, L.L.C.
1505 S. Big Bend Blvd.
St. Louis, MO 63117
Phone: (314) 863-1117
Fax: (314) 863-1118
ATTORNEY FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is a criminal matter in which Appellant Ines Letica appeals the judgment and sentence of the Circuit Court of St. Louis City, Missouri. The case was tried to a jury on June 14 – June 16, 2010. On June 16, 2010, the jury returned a verdict of guilty on Counts I and II. Appellant timely filed motions for Judgment of Acquittal and for New Trial on July 12, 2010.

Appellant was sentenced on August 16, 2010. Thereafter, Appellant timely filed a Notice of Appeal on August 23, 2010.

The Missouri Court of Appeals, Eastern District, issued an opinion on June 21, 2011 transferring the case to the Missouri Supreme Court pursuant to Rule 83.02. Jurisdiction lies in the Supreme Court of Missouri. MO. CONST. art. V, § 10; Mo. Sup. Ct. R. 83.02.

STATEMENT OF FACTS

Appellant Ines Letica was indicted in St. Louis City Circuit Court on one count of first-degree assault in violation of MO. REV. STAT. § 565.050 (2000) and one count of armed criminal action in violation of MO. REV. STAT. § 571.015 (2000) for the December 7, 2007 attack of Mr. Edmond Ibrahemi. (LF 20-21). The Honorable Michael Mullen ordered a jury trial for the week of February 23, 2009. (LF 14). During the State's voir dire examination, the assistant circuit attorney ("ACA") instructed the jury that its role was to decide guilt or innocence and commented on the obligations of defense counsel to provide a list of witnesses he intended to call. In response to a venireperson's question regarding witness testimony, the ACA stated: "I expect that Mr. Adler [counsel for defendant] will probably talk to you about his burden." (Feb. 2009 Trial Tr. 80). Defense counsel objected to the statement prompting the ACA to rephrase her response. *Id.* at 80. The trial judge neither ruled on the matter nor instructed the jury to disregard the statements. *Id.* at 66. In addition, the ACA posed the following questions to the venire panel:

- "Would any of you want to hear from every single person that's involved, every single person you hear in order to decide guilt or innocence?" *Id*. at 26.
- "I'm saying I don't have DNA, I don't have fingerprints. I've got my victim. Are you going to require me to have DNA, to have fingerprints, to have a gun in order to convict somebody of a crime?" *Id*. at 50.
- "Is there anybody here that would require me to prove every single detail [of a

hypothetical DWI case] that surrounds the crime, so you would want to know if it were tequila versus Natural Light or vodka versus Boones." *Id*. at 91.

- "A police report is just a summary of what happens. And in this case you're not in any case you're not going to get the police reports. They're not going to come into evidence. Does anybody here feel that they cannot convict somebody unless they had the police reports from the incident and were able to read from them?" *Id*. at 67.

In response to the above questions, eighteen jurors answered in the affirmative. *Id*. at 26, 30, 32, 34, 35, 37-38, 38-39, 46, 47, 52-53, 56, 59, 63, 64, 70-71, 80, 83, 84. Before the State concluded its examination of the forty-eight-person panel and before defense counsel was able to begin his investigation, Judge Mullen announced that the court could not select twelve prospective jurors and declared a mistrial. *Id*. at 120. A second jury trial commenced on March 22, 2010 lasting three days. (LF 7-8). After hearing evidence from the State and the defense, the jury retired and deliberated and on March 25, 2010 informed the court that it was deadlocked. (LF 7). Thereinafter, the court declared a second mistrial. (LF 7).

Appellant thereafter filed a motion to dismiss based on the State's improper voir dire examination during the February 2009 mistrial. (LF 97-98). Appellant's motion was denied (June 2010 Trial Tr. 22-23). The matter was next docketed and tried to jury on June 14, 2010 to June 16, 2010 with Judge Thomas Frawley presiding. (LF 3-5). During the State's voir dire examination, the ACA asked jurors to consider a situation where

"someone comes up to you, somebody puts a gun in your face, somebody robs you." (June 2010 Trial Tr. 76). Subsequently, the ACA asked if jurors would need more evidence to convict beyond that of Mr. Ibrahemi's testimony. *Id*.

During voir dire, the following exchange took place:

[ACA]: While I'm in the first row Miss Wiese, is that how you say your name?

VENIREPERSON WIESE: It's Wiese.

THE COURT: Would you stand for me please, ma'am? Thank you.

[ACA]: It says here you work for Express Scripts; is that correct?

VENIREPERSON WIESE: Yes.

[ACA]: And how long have you been doing that?

VENIREPERSON WIESE: Two years.

[ACA]: Okay. Anything that you've heard so far that you believe that you could not be fair and impartial and follow the law?

VENIREPERSON WIESE: No.

[ACA]: Okay. Thank you.

Id. at 151-152.

The ACA used peremptory challenges to strike five African-American females from the panel for which defense counsel raised *Batson* objections. *Id*. at 176-177. After the ACA explained her reasoning for striking the five African-American females, the trial judge addressed defense counsel stating: "Okay. I think the burden flips to you, [defense counsel], to show somebody is similarly situated, does it not?" *Id*. at 179.

After defense counsel offered a similarly situated venireperson, the trial judge stated further:

> No, but it's a peremptory challenge, which I understand it can be based solely on instinct unless the instinct is racially or gender pretextual. The question then is whether there is someone similarly situated where you can confirm for me that it's a pretextual basis.

Id. at 179-180. The trial judge denied all five of Appellant's *Batson* challenges. *Id.*

Defense counsel used peremptory challenges to strike four Caucasian females, including Venireperson Wiese, from the panel. *Id*. at 181-182. Defense counsel also used peremptory challenges to strike a Caucasian male and an African-American female. *Id*. The State raised a reverse-*Batson* objection to striking the four venirepersons, including Wiese. *Id*. at 182. Defense counsel responded: "Miss Wiese I thought was young, she wore glasses, she's correct. She didn't really have much interaction with anyone. But I didn't get a good vibe, it was basically because she was young." *Id*. at 183.

The following exchange then took place:

> THE COURT: …. I think just young doesn't get it. And I have no notes that she said anything.
>
> [ACA]: And age is a protected class.
>
> THE COURT: She works for Express Scripts, yes. I think she asked how long have you been there, she said three years maybe.
>
> [DEFENSE COUNSEL]: Three or four years.

THE COURT: And that was it. So I'm going to sustain your objection to Miss Wiese.

Id. at 184 -185. Wiese was seated on the jury that found Appellant guilty. *Id*. at 186.

A brief summary of evidence at trial follows:

At around 7 p.m. on December 7, 2007, Appellant and Edmond Ibrahemi were at Skala Bar located at 5051 Gravois Avenue in St. Louis, Missouri. *Id*. at 214-16. According to Mr. Ibrahemi, he and the Appellant had a history of previous altercations. *Id*. at 219. Mr. Ibrahemi testified that Appellant approached him in the bar bathroom and asked him to go outside. *Id*. at 217 – 218, 221. Once outside, Mr. Ibrahemi stated that Appellant inquired about a possible insult made by Mr. Ibrahemi. *Id*. at 224. Soon thereafter, Mr. Ibrahemi alleges Appellant stabbed him in the neck. *Id*. at 225. Mr. Ibrahemi testified that Appellant stabbed him multiple times in his neck, arm, knee, stomach, hips and chest. *Id*. at 225, 229-31. At trial, both Mr. Ibrahemi and the State's medical expert, Dr. Jane Turner, testified about Mr. Ibrahemi's injuries and the resulting treatment he received. *Id*. at 228-41, 292-309. Dr. Turner stated that Mr. Ibrahemi's injuries ranged from deep wounds to superficial cuts and were consistent with those of someone stabbed by another in an effort to release a chokehold. *Id*. at 328, 309-10. Additionally, the State's medical expert stated that upon review of Mr. Ibrahemi's medical record, he was alert and oriented in the emergency room. *Id*. at 312.

The State offered five photographs, exhibits 17, 18, 19, 20, 21, into evidence. *Id*. at 338-39. The photographs were of Mr. Ibrahemi's injuries after he received medical

treatment including but not limited to a surgical operation. *Id*. at 28. Defense counsel objected to the admission of the photographs. *Id*. at 339. The trial judge sustained Appellant's objections as to exhibits 17 and 19 and overruled as to exhibits 18, 20, and 21. *Id*. at 340.

At trial, Mr. Ibrahemi testified that Appellant pulled a knife from his jacket. *Id*. at 221. However, when questioned by the police, Mr. Ibrahemi stated Appellant only wore jeans and a sweater. *Id*. at 272. Officer Frank Williams, a detective for the St. Louis Metropolitan Police Department, testified that at the time of his initial report to the police, Mr. Ibrahemi described Appellant as wearing a sweater without any mention of a jacket with pockets. *Id*. at 364, 376. Appellant also testified that he wore a sweater with no jacket or pockets. *Id*. at 408.

During the defense's case in chief, Appellant testified that Mr. Ibrahemi approached him in the bathroom of the Skala Bar and accused Appellant of getting him kicked out of a different bar on a previous occasion. *Id*. at 405-06. Appellant and Mr. Ibrahemi then went outside to make peace before Mr. Ibrahemi pushed Appellant down a set of stairs outside of the bar. *Id*. at 407. According to Appellant, the two wrestled with one another before Mr. Ibrahemi grabbed Appellant's throat and said, "This [is] your last night." *Id*. at 416. Mr. Ibrahemi then wielded a knife, which Appellant seized and used to defend himself from Mr. Ibrahemi's attacks. *Id*. at 419-20. Appellant testified that the fighting continued until he was able to escape. *Id*. at 421-26. Appellant testified to being bruised on his face, neck and body. *Id*. at 434.

Dr. Neal Patel, a board certified emergency room physician, testified that medical records from the night of alleged incident showed that Mr. Ibrahemi had a blood-alcohol content of .10. *Id*. at 471-473. Dr. Patel stated that the wounds on Mr. Ibrahemi's neck were superficial, not serious, and did not penetrate the thyroid cartilage. *Id*. at 481. Regarding the wounds to Mr. Ibrahemi's abdomen, Dr. Patel stated that the injuries were serious but did not cause damage. *Id*. Finally, Dr. Patel testified that the cut to Mr. Ibrahemi's triceps caused most of his bleeding, but that bleeding was controlled by the time Mr. Ibrahemi arrived at the hospital. *Id*. at 482-483.

Through the duration of the trial, the ACA referred to Mr. Ibrahemi as having been "stabbed." *Id*. at 197, 204, 521, 525. In closing arguments, the ACA argued that the alleged crime could not have been committed amidst sudden passion. *Id*. at 520-30. In doing so, she stated: "This isn't sudden passion, ladies and gentlemen, these pictures aren't reasonable. Those injuries are not reasonable. This is not what a reasonable person would do." *Id*. at 526.

Prior to sentencing, on August 16, 2010, Appellant filed a motion for judgment of acquittal notwithstanding the verdict of the jury or, in the alternative, motion for new trial. *Id*. at 534-535. At sentencing proceedings, Appellant stated that he was innocent. *Id*. at 540. The trial judge addressed Appellant in response stating: "You have just sealed the deal for me … I remember this vividly, you're sitting on that witness stand there's a question asked and I start to rule on it, and you look at me, and if looks could kill I would be dead." *Id*. The trial judge sentenced Appellant to two prison terms of fifteen years to

be run concurrently. (LF. 123-126). At the sentencing proceedings, the trial judge stated: "I remember 15 stab wounds, is what I remember, I'm going to give you one year for each stab wound." *Id*. at 541. Upon the trial court entering judgment of conviction, Appellant timely filed a notice of appeal on August 23, 2010. (LF 128).

On June 21, 2011, the Missouri Court of Appeals, Eastern District, issued an opinion transferring the case to the Missouri Supreme Court pursuant to Rule 83.02. *State v. Letica*, ED95498, 2011 WL 2453493 (Mo. Ct. App. E.D. June 21, 2011). The Court of Appeals opined that they "would reverse and remand for a new trial," based upon Appellant's second point (Point I herein), and thus, addressed only that issue. *Id.* However, believing the instant case raises issues of sufficient general interest and importance, the Court of Appeals transferred the instant case to this Court pursuant to Rule 83.02. *Id.*

POINTS RELIED ON

Point I

The trial court erred in sustaining the State's reverse-*Batson* challenge as to Venireperson Wiese because the State failed to carry its burden of proving Appellant struck Wiese for unconstitutionally discriminatory reasons, in violation of Appellant's due process right guaranteed by the Fourteenth Amendment of the Untied States Constitution and Article I, Section Ten of the Missouri Constitution and his right to a fair trial before an impartial jury guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section Eighteen of the Missouri Constitution, entitling him to a new trial.

State v. Johnson, 207 S.W.3d 24 (Mo. banc 2006);

State v. Letica, ED95498, 2011 WL 2453493 (Mo. Ct. App. E.D. June 21, 2011);

State v. Smith, 944 S.W.2d 901 (Mo. 1997);

U.S. CONST., amend. XIV; and

MO. CONST., art. I, §10.

Point II

The trial court erred in failing to grant Appellant's motion to dismiss and failing to grant Appellant's motion for acquittal notwithstanding the verdict because further prosecution beyond the February 2009 mistrial violated Appellant's right to due process guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section Ten of the Missouri Constitution, and

Appellant's right to a fair trial before an impartial jury guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section Eighteen of the Missouri Constitution in that the assistant circuit attorney's voir dire examination during the February 2009 trial and general conduct prior to and throughout the June 2010 trial was improper.

State v. Burnfin, 771 S.W.2d 908 (Mo. Ct. App. W.D. 1989);

State v. Williams, 646 S.W.2d 107 (Mo. banc 1983);

MO. CONST., art. I, §10;

MO. CONST., art. I, §18(a); and

MO. REV. STAT. § 547.070 (2000).

Point III

The trial court erred in admitting State's exhibits 18, 20 and 21 because the admission of photographs of Mr. Ibrahemi's alleged injuries after exploratory surgery and other medical procedures violates Appellant's right to due process guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section Ten of the Missouri Constitution in that said photographs were highly inflammatory and prejudicial and lacked probative value as to the material facts at issue in the case.

State v. Day, 866 S.W.2d 491 (Mo. Ct. App. S.D. 1993);

State v. Isa, 850 S.W.2d 876 (Mo. banc 1993);

State v. Weems, 840 S.W.2d 222 (Mo. banc 1992);

U.S. CONST., amend. XIV; and

MO. CONST., art. I, §10.

Point IV

The trial court erred in refusing to grant Appellant's motion for judgment of acquittal notwithstanding the verdict of the jury or in the alternative, motion for a new trial because the court's ruling violated Appellant's right to due process guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section Ten of the Missouri Constitution, and Appellant's right to a fair trial before an impartial jury guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section Eighteen of the Missouri Constitution, in that there was insufficient evidence to prove beyond a reasonable doubt that Appellant attempted to kill or knowingly caused or attempted to cause serious physical injury to Edmond Ibrahemi and knowingly did so using assistance or aid of a dangerous instrument.

State v. Dixon, 70 S.W.3d 540, (Mo. Ct. App. W.D. 2002);

State v. Presberry, 128 S.W.3d 80, (Mo. Ct. App. E.D. 2003);

MO. CONST., art. I, §10;

MO. CONST., art. I, §18(a); and

MO. REV. STAT. § 565.050 (2000).

Point V

The trial court erred in sentencing Appellant to two concurrent fifteen year terms of incarceration because the sentence violates Appellant's right to due process guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section Ten of the Missouri Constitution in that the court's rationale for sentencing Appellant to one year for each stab wound amounts to an abuse of discretion.

State v. Collins, 290 S.W.3d 736 (Mo. Ct. App. E.D. 2009);

State v. Palmer, 193 S.W.3d 854 (Mo. Ct. App. S.D. 2006);

U.S. CONST., amend. XIV; and

MO. CONST., art. I, § 10.

ARGUMENT

Point I

The trial court erred in sustaining the State's reverse-*Batson* challenge as to Venireperson Wiese because the State failed to carry its burden of proving Appellant struck Wiese for unconstitutionally discriminatory reasons, in violation of Appellant's due process right guaranteed by the Fourteenth Amendment of the Untied States Constitution and Article I, Section Ten of the Missouri Constitution and his right to a fair trial before an impartial jury guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section Eighteen of the Missouri Constitution, entitling him to a new trial.

A. Standard of Review

The trial court's determination of a *Batson* challenge is given great deference on appeal and will not be set aside unless it is clearly erroneous. *State v. Miller*, 162 S.W.3d 7, 13 (Mo. Ct. App. E.D. 2005). A finding is clearly erroneous when the appellate court is left with the definite and firm conviction from the evidence as a whole that a mistake has been made. *Id*. at 14.

B. The trial court erred in sustaining the State's reverse-*Batson* challenge as to Venireperson Wiese because the State failed to carry its burden of proving Appellant struck Wiese for unconstitutionally discriminatory reasons.

In *Batson v. Kentucky*, the United States Supreme Court held a criminal defendant's equal protection rights are violated when the State exercises peremptory

strikes to remove potential jurors from the venire solely because of their race or on the assumption their race will disable them from impartially considering the State's case. *Batson v. Kentucky*, 476 U.S. 79, 94-102 (1986). In *J.E.B. v. Alabama ex rel. T.B.*, the United States Supreme Court extended the *Batson* doctrine to prohibit the State's use of peremptory challenges to remove potential jurors solely on the basis of gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145-146 (1994). Thus, it is a violation of the Equal Protection Clause for a party to exercise a peremptory strike to remove a potential juror solely on the basis of the juror's race, ethnic origin, or gender. *State v. Chambers*, 234 S.W.3d 501, 515 (Mo. Ct. App. E.D. 2007). Reverse-*Batson* challenges are challenges the State makes in response to a defendant's purposeful discrimination on the grounds of race in the exercise of peremptory strikes. *Id.*

There is a three-step procedure for *Batson* or reverse-*Batso*n challenges. *Id.* For a reverse-*Batson* challenge, the State must first raise a *Batson* challenge with regard to one or more specific venirepersons struck by the defendant and identify the cognizable racial group to which the venireperson or persons belong. *Id.* Second, the trial court will require the defendant to come forward with a reasonably specific and clear race-neutral or gender-neutral explanation for the strike. *Id.* Third, assuming the defendant is able to articulate an acceptable explanation, the State will need to show that the defendant's proffered reason for the strike was merely pretextual and that the strike was motivated by race or gender. *Id.* This procedure is consistent with the key principle that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the

opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

In the instant case, the State exercised a reverse-*Batson* challenge with regard to Appellant's strike of Venireperson Wiese. (June 2010 Trial Tr. 182). Defense counsel offered a reasonably specific and clear race-neutral explanation for the strike stating: "Miss Wiese, I thought was young, she wore glasses, she's correct. She didn't really have much interaction with anyone. But I didn't get a good vibe, it was basically because she was young." (June 2010 Trial Tr. 183).

Missouri law is settled that age is a valid race-neutral explanation for purposes of a *Batson* inquiry. *State v. Barnett*, 980 S.W.2d 297, 302 (Mo. 1998) (holding that age and marital status are race-neutral, gender-neutral factors that the State may properly consider when making a peremptory strike where prosecutor's explanation focused on the venireperson being "very young" and "single"); *State v. Robinson*, 844 S.W.2d 85, 86 (Mo. Ct. App. E.D. 1992) (holding age, occupation, education, and demeanor are but a few of the additional factors which may serve as proper motivation for the exercise of a peremptory strike); *State v. Readman*, 261 S.W.3d 697, 700 (Mo. Ct. App. W.D. 2008) (holding that the prosecutor's explanation based on age was a valid, gender-neutral basis for a peremptory strike that the court deemed credible); *State v. Winters*, 949 S.W.2d 264, 267, 269 (Mo. Ct. App. S.D. 1997) (holding that a prospective juror's age was a legitimate race-neutral explanation for the State's exercise of a peremptory challenge when the prosecutor stated as his explanation: "I took off the younger people of the panel by age.").

In addition to Venireperson Wiese's youth, defense counsel offered that he did not get a "good vibe" from her as a race-neutral and gender neutral reason for striking her from the jury panel. (June 2010 Trial Tr. 183). In *State v. Smith,* this Court held that the State's proffered race neutral explanation consisting of "hunches," or "horse sense" can survive *Batson* if the hunch is based on a racially-neutral factor. *State v. Smith,* 944 S.W.2d 901, 912 (Mo. 1997). In *Smith*, the defendant raised a *Batson* challenge relating to the State's preemptory strike of a twenty-one year old venireperson. *Id*. The State's race-neutral explanation consisted entirely of "the State's belief that younger jurors are less likely statistically to vote in favor of the death penalty." *Id*. This Court held that "age is a racially-neutral factor, and therefore, a proper factor on which to base a 'hunch.'" *Id.*

Analysis of the trial court's *Baston* ruling in the instant case is similar to the Court's treatment of the issue in *Smith*. Although, contrary to the trial court's ruling, defense counsel's explanation was not based exclusively on Venireperson Wiese's age. While stating that age was "basically the reason" defense counsel offered additional reasons in his explanation for striking Wiese including counsel's observation that Wiese "didn't have much interaction with anyone" and the fact that he "didn't get a good vibe." (June 2010 Trial Tr. 183). Like the State's preemptory strike in *Smith,* counsel's hunch or "vibe" regarding Venireperson Wiese was coupled with his concern about her age. Accordingly, counsel's explanation satisfied the first and second prongs of the trial court's *Batson* inquiry.

Once defense counsel provides a race-neutral and gender-neutral explanation, the

burden shifts back to the State to persuade the trial court that the explanation given was merely pretext for intentional discrimination. *State v. Letica*, ED95498, 2011 WL 2453493 (Mo. Ct. App. E.D. June 21, 2011). In the instant case, the State did not present an argument as to pretext. *See generally* June 2010 Trial Tr. 182-185. Instead, the trial court found defense counsel's explanation for the strike unsatisfactory stating, "I just think young doesn't get it. And I have no notes that she said anything." (June 2010 Trial Tr. 184). The ACA agreed with the trial court asserting "age is a protected class." (June 2010 Trial Tr. 185). However, as noted above, age is a race-neutral, gender-neutral factor that may be considered when exercising peremptory strikes. *See supra* pp. 16-17. In addition, the trial court made no comment regarding defense counsel's explanation that he did not get a good vibe from Wiese, which is also a legitimate race-neutral and gender-neutral explanation. *See* June 2010, Trial Tr. 182-184. Therefore, the State was required to make a record that would support a finding of pretext. The trial court prematurely ruled on the reverse-*Batson* challenge without requiring the State to come forward with a pretext argument. The trial court and the State made no attempt to satisfy the requirement of the third step of a *Batson* challenge, and thus, the State failed to meet its burden to show defense counsel's explanation for striking Wiese was pretextual.[1]

[1] It should also be noted that after the State gave race-neutral and gender-neutral explanations to four of its peremptory strikes to address defense counsel's *Batson* challenges, the trial court specifically noted that the burden shifted back to defense counsel to show pretext. (June 2010 Trial Tr. 179). Thus, in dealing with defense

Although a reviewing court will afford great deference to the trial judge's determination of a *Batson* challenge, the trial court's ruling on the State's reverse-*Batson* challenge was clearly erroneous. The trial court ruled prematurely on the challenge and the State failed to meet its burden of showing that racial or gender discrimination was the motivating factor for Appellant's peremptory challenge of Venireperson Wiese.

C. The trial court's error in precluding defense counsel from exercising a peremptory strike against Venireperson Wiese was in violation of Appellant's due process right guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section Ten of the Missouri Constitution and his right to a fair trial before an impartial jury guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section Eighteen of the Missouri Constitution and entitles Appellant to a new trial.

Appellant is entitled to a new trial because the trial court's erroneous denial of Appellant's peremptory strike where the juror in question subsequently sat in judgment against Appellant constitutes structural error. "Structural defects" are errors that "'defy analysis by 'harmless-error' standards'" because they "'affec[t] the framework within which the trial proceeds, [and are not] simply [errors] in the trial process itself.'" *State v. Johnson*, 207 S.W.3d 24, 38 (Mo. banc 2006), quoting *Arizona v. Fulminante*, 499 U.S.

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counsel's *Batson* challenges to the State's use of peremptory strikes, the trial court followed the three-step process of *Batson* but ignored the process in dealing with the State's *Batson* challenges to Appellant's use of peremptory strikes.

279, 310 (1991).

Defendants have a right to an impartial jury. U.S. CONST. amend. VI; U.S. CONST. amend. XIV; MO. CONST. art. I, § 18; MO. CONST. art. I, § 10. To that end, Missouri Revised Statute Section 494.480 permits each party to exercise an unlimited number of for cause challenges where a prospective juror "has formed or expressed an opinion concerning the matter or any material fact in controversy in any case that may influence the judgment of such person." MO. REV. STAT. § 494.470 (2000). Our Legislature has also provided litigants in criminal actions the right to exercise, based upon the degree of crime charged, a limited number of peremptory challenges. MO. REV. STAT. § 494.480 (2000). Peremptory challenges are "one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894). Long recognized as "a means to achieve the end of an impartial jury," peremptory challenges afford each side an opportunity to generalize about the potential biases of prospective jurors and strike those who, regardless of the evidence, seemingly will be unfavorable to their position at trial. *Holland v. Illinois*, 493 U.S. 474, 487 (1990), citing *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). Peremptory challenges "eliminate extremes of partiality on both sides" and are a mainstay in a litigant's strategic arsenal, protected by Missouri Revised Statute Section 494.480. *People v. Hecker*, 942 N.E.2d 248, 272 (N.Y. 2010), *cert. denied sub nom.*, *Black v. New York*, 131 S. Ct. 2117 (2011), citing *Batson*, 476 U.S. at 91, 98.

The United States Supreme Court has authorized automatic reversal of a conviction where a peremptory challenge was denied or impaired. *Rivera v. Illinois*, 129

S. Ct. 1446, 1456 (2009). In *Rivera*, the Supreme Court held that "states are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error per se," or that "the error could rank as harmless error under state law." The Court makes it clear that states are permitted to apply an automatic reversal rule. *Hecker*, 942 N.E.2d at 272 (N.Y. 2010).

The automatic reversal rule for the impairment of the peremptory challenge has had a long history and tradition under the common law as such an error undermines "the basic structural integrity of the criminal tribunal itself ... and is not amenable to harmless-error review," *State v. Reiners*, 644 N.W.2d 118, 127 (Minn. Ct. App. 2002) (internal quotations omitted). *See also* Roger J. Traynor, *The Riddle of the Harmless Error*, 64-66 (1970) (a defendant challenging the denial of the right to peremptory challenges could not possibly show prejudice, and the appellant "should not be called upon to do the impossible at the appellate stage"). The Supreme Court of Vermont has held that a party is not required to show actual prejudice because:

> If [this Court] were to accept the actual prejudice rule, the trial court's errors would become unreviewable because the focus of the appellate inquiry would not be on the court's error, but on the qualifications of the juror subject to the lost peremptory challenge. The whole purpose of peremptory challenges is to allow each party an opportunity to dismiss a fixed number of jurors without cause or explanation. The faulty denial of that opportunity creates prejudice that should need no elucidation.

Westcom v. Meunier, 674 A.2d 1267, 1269 (Vt. 1996) (internal quotations omitted).

The majority of federal courts addressing the issue have held that the denial or impairment of the statutory right to exercise peremptory challenges under the federal rules is structural error, including the Eighth Circuit. *See, e.g., Tankleff v. Senkowski,* 135 F.3d 235, 248 (2d Cir. 1998); *United States v. Ruuska*, 883 F.2d 262, 268 (3d Cir. 1989); *United States v. Ricks*, 802 F.2d 731, 734 (4th Cir. 1986); *United States v. Broussard*, 987 F.2d 215, 221 (5th Cir. 1993); *United States v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998); *Ford v. Norris*, 67 F.3d 162, 170 (8th Cir. 1995).

Numerous state courts have also held that the impairment of the right to a peremptory challenge is structural error. *See Busby v. State*, 894 So.2d 88, 97 (Fla. 2004); *State v. Iuli*, 65 P.3d 143, 151 (Haw. 2003); *Shane v. Com.*, 243 S.W.3d 336, 343 (Ky. 2007); *State v. McLean*, 815 A.2d 799, 802 (Me. 2002); *Whitney v. State*, 857 A.2d 625, 632 (Md. Ct. Spec. App. 2004); *Com. v. Hampton*, 928 N.E.2d 917, 927 (Mass. 2010); *Pellegrino v. AMPCO Sys. Parking*, 785 N.W.2d 45, 56 (Mich. 2010); *State v. Campbell*, 772 N.W.2d 858, 862 (Minn. Ct. App. 2009); *State v. Lamere*, 112 P.3d 1005, 1013 (Mont. 2005); *State v. Lowe*, 677 N.W.2d 178, 189 (Neb. 2004); *Diomampo v. State*, 185 P.3d 1031, 1037 (Nev. 2008); *People v. Hecker*, 942 N.E.2d 248, 272 (N.Y. 2010); *City of Dickinson v. Lindstrom*, 575 N.W.2d 440, 444 (N.D. 1998); *State v. Russell*, 2010 - Ohio- 4765, at ¶ 24 (Ohio Ct. App. 2010); *State v. Vreen*, 26 P.3d 236, 240 (Wash. 2001).

This Court's decision in *State v. Johnson* addresses the present issue.[2] *State v.*

[2] The Missouri Legislature has also indicated an intent to adopt an automatic reversal

Johnson, 207 S.W.3d 24, 39 n.9 (Mo. banc 2006). In *Johnson*, the defendant made *Batson* challenges as to two of the State's peremptory strikes. *Id.* at 36. The State provided race-neutral and gender-neutral reasons for the strikes, and the trial court overruled the defendant's challenges. *Id*. Immediately after, the defense made its arguments as to pretext. *Id.* On appeal, the defendant argued the trial court's premature ruling on his *Batson* challenge constituted structural error requiring reversal. *Id.* at 38. This Court found the trial court's premature ruling did not prevent it from considering the defendant's arguments as to pretext. *Id*. This Court noted that "[w]hile the three-step process required by *Batson* was not followed in order, no step of the process was omitted," and the defendant was not prejudiced by the trial court's failure to follow the steps in a precise order. *Id*. at 39. In making its ruling, this Court observed the defendant was not arguing that the trial court had applied an improper standard in deciding the issue or that he was "prevented from exercising his peremptory challenges." *Id.* A footnote followed this sentence where this Court stated, the "[d]enial or impairment of the right to

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standard through its 1993 amendment of Missouri Revised Statute Section 494.480.4 by inserting the relevant language: "The qualifications of a juror on the panel from which peremptory challenges by the defense are made shall not constitute a ground for the granting of a motion for *new trial* or the reversal of a conviction or sentence *unless such juror served upon the jury at the defendant's trial and participated in the verdict rendered against the defendant*." MO. REV. STAT. § 494.480 (2000) (emphasis added).

peremptory challenges has been considered a structural defect that is not reviewed for prejudice," citing, *inter alia*, *Moran v. Clark*, 443 F.3d 646, 660-661 (8th Cir. 2006) and *United States v. Broussard*, 987 F.2d 215, 221 (5th Cir. 1993), abrogated on other grounds by *J.E.B.*, 114 S.Ct. at 1428. *Id.* at 51 n.9. This Court indicates in its footnote that had the defendant in *Johnson* raised the issue, this Court would have considered it to be a structural error and would have required reversal.

The Eighth Circuit also concluded that an error involving improper juror exclusion infects the entire trial process itself and is, therefore, a structural error not subject to a harmless error analysis. The court stated:

> A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The voir dire phase of the trial represents the jurors' first introduction to the substantive factual and legal issues in a case. The influence of the voir dire process may persist through the whole course of the trial proceedings.

Ford v. Norris, 67 F.3d 162, 171 (8th Cir. 1995).

As a recognized valuable right, the ability to exercise peremptory challenges foster the defendant's peace of mind and the public's view of fairness. *Shane v. Com.*, 243 S.W.3d 336, 339 (Ky. 2007). It is fundamentally inconsistent for the Court to give with

one hand and take away with the other, a position that does not invite public trust in the integrity of the judicial system. *Id.* To shortchange a defendant by denying the use of a peremptory challenge is to effectively give the State more peremptory challenges than the defendant. *Id.*

Appellant was tried by a jury that was obtained by forcing him to forgo a peremptory strike he was entitled to make. (June 2010 Trial Tr. 184). At trial, Appellant was entitled to remove jurors that made him uncomfortable in any way except in violation of *Batson*; this is a right given to him by law and rule. MO. REV. STAT. § 494.470 (2000); *Batson*, 476 U.S. at 91, 98. Depriving Appellant of that right so taints the equity of the proceedings that no jury selected from that venire could result in a fair trial. *Shane*, 243 S.W.3d at 340. No jury so obtained can be presumed to be a fair one; a trial cannot be called fair and the jury impartial if the method of arriving at the qualified jury is not. *Id*. An error affecting the fundamental right to an unbiased proceeding goes to the integrity of the entire trial process. *Id.* To prevent defendants from using their delegated peremptory strikes is to make a mockery of the very rules and procedures created by this Court, and indeed does allow a trial court to commit error that is not subject to correction because all the jurors who sat were qualified. *Id.*

In any case in which a defendant's right to have jurors selected in the manner prescribed by statute is impaired, as it was in the instant case, it would be virtually impossible for the defendant to demonstrate prejudice. *State v. McLean,* 815 A.2d 799, 804-05 (Me. 2002). The trial court's failure to allow Appellant to exercise a peremptory

challenge pursuant to Missouri Revised Statute Section 494.480, an error that affected the composition of the jury actually called upon to deliberate the case, requires vacation of Appellant's conviction.

Thus, considering the importance of the right, the patent inequity in its denial, and Missouri precedent, the trial court's erroneous denial of Appellant's peremptory challenge is structural error under the facts presented in the instant case requiring automatic reversal without consideration of prejudice.

D. Alternatively, if this Court rejects application of the established automatic reversal standard and instead adopts a harmless error approach in reviewing the trial court's error in precluding defense counsel from exercising a peremptory strike against Venireperson Wiese, an error-based approach should be implemented.

The Supreme Court has used two conflicting versions of harmless error review, a "guilt-based" approach and an "error-based" approach. *Peremptory Challenges – Harmless Error Doctrine*, 123 Harv. L. Rev. 212, 221 (2009). Under guilt-based review, Appellant would have to prove that a hypothetical jury would not have convicted him had Venireperson Wiese not sat on the jury during the trial. *Id.* Under error-based review, the State would have the burden of proving that the error of permitting Venireperson Wiese to qualify as a juror did not substantially influence the actual jury. *Id.*, citing *Kotteakos v. United States*, 328 U.S. 750, 760 (1946). For the reasons set forth below, if this Court adopts harmless error review in this context, it should implement an error-based

approach.

There are problematic consequences of following the guilt-based harmless error standard. It "erodes … individual rights and liberties" by allowing the felt need to convict the factually guilty to trump defendants' rights, it vitiates the jury trial right, and it eliminates the deterrent effect of remedying rights violations. Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1194 (1995) (stating desire to punish the guilty will frequently prevail over the need to honor individual rights); Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 108 n. 195 (2008) ("To hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee"); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 Wis. L. Rev. 35, 61-62 (2005) ("Harmless error doctrine erodes the deterrent effect of exclusion – violations can be excused based on a discretionary, flexible, and broad examination of all of the evidence before the jury, taking account of any general perception of the guilt of the defendant"). The guilt-based test also focuses on the error's impact on a hypothetical, rational jury rather than its impact on the actually empanelled jury or on the jury that would have been empanelled absent the error. *People v. Rivera*, N.E.2d 876, 888 (Ill. 2007). In cases not involving jury errors, this kind of review could easily lead to

reversal.[3] 123 Harv. L. Rev. at 218. For example, in some ineffective assistance of counsel cases, competent counsel would have introduced evidence that incompetent counsel did not. *Id*. Clearly, that evidence could have led a hypothetical rational jury to a different conclusion. *Id.* But in the instant case, the problem lies not with what material reaches the jury but with the jury itself. *Id.* When jurors removable only through peremptories are at issue, there is little an appellate court could point to as evidence that another rational jury could have come to a different conclusion.[4] An appellate finding of harmfulness would thus involve holding that, although the juror was presumed to be rational and received all of the evidence concerning guilt, something about the juror not

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[3] "Ease," of course, being a relative term. Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 Nw. U. L. Rev. 1053, 1071 (2005) (Stating courts held errors harmless under guilt-based review 93% of the time as opposed to 47% under the error-based approach).

[4] "Although a litigant may suspect that a potential juror harbors an unarticulated bias or hostility, that litigant would be unable to demonstrate that bias or hostility to an appellate court reviewing for harmless error." *United States v. Annigoni*, 96 F.3d 1132, 1144-45 (9th Cir. 1996), *overruled by United States v. Lindsey*, 634 F.3d 541, 544 (9th Cir. 2011). "[The denial of a peremptory challenge] is not amenable to normal harmless error analysis, as we can never figure out what would have happened if one member of the jury had been struck and replaced by some other, unknown, person." *Id.* at 1150 (Kozinski, J., dissenting).

rising to the level of a for-cause challenge – her place of employment, her avoidance of eye contact with the defendant's attorney, or other such "reasons" for peremptory challenges – creates such sufficient doubts about what another rational jury could have found that the prosecution must go through the time and expense of another trial. *Id.* Such holdings will likely be extremely rare. *Id.* Thus, guilt-based harmless error review functionally allows courts to eliminate remedies. *Id.*

Ubi jus, ibi remedium ("where there is a right, there is a remedy") is a deep-seated principle of Anglo-American law. The Missouri Constitution's Bill of Rights, article I, section fourteen, provides: "That … certain remedy [be] afforded for every injury to person, property, or character." MO. CONST., art. I, sec. 14. This constitutional right "applies against all impediments to fair judicial process, be they legislative or judicial in origin." David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1203 (1992). Where a barrier is erected in seeking a remedy for a recognized injury, the question is whether it is arbitrary or unreasonable. *Kilmer v. Mun*, 17 S.W.3d 545, 550 (Mo. banc 2000).

Here, guilt-based harmless error review of a denial of a peremptory challenge erects an arbitrary, unreasonable barrier which violates article I, section fourteen of the Missouri Constitution. As previously discussed Appellant had the right to remove jurors that made him uncomfortable in any way except in violation of *Batson*. However, Appellant was denied that right. Guilt-based harmless error review would effectively deny Appellant a reasonable remedy. All errors committed against Appellant would be

forgiven, and his conviction affirmed, because there is an inherent inability to prove that a hypothetical jury would not have convicted Appellant had the trial court dismissed Venireperson Wiese. As previously discussed, such a showing in the context of an erroneously denied peremptory challenge is a legal impossibility. It would be unreasonable to grant the right to peremptory challenges, but deny a remedy for the denial or impairment of that right. A defendant who has an injury recognized by law has a constitutional right to a "certain remedy." Thus, if this Court adopts a harmless error standard of review for erroneously denied or impaired peremptory challenges, it should implement an error-based standard. Under this standard, in the instant case, clearly the State has not and cannot prove that Venireperson Wiese's inclusion on the empanelled jury did not substantially influence the actual jury, as she was present throughout the trial and participated in rendering Appellant's verdict.

Point II

The trial court erred in failing to grant Appellant's motion to dismiss and failing to grant Appellant's motion for acquittal notwithstanding the verdict because further prosecution beyond the February 2009 mistrial violated the Appellant's right to due process guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section Ten of the Missouri Constitution, and the Apellant's right to a fair trial before an impartial jury guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section Eighteen of the Missouri Constitution in that the assistant circuit attorney's voir dire examination

during the February 2009 trial and general conduct prior to and throughout the June 2010 trial was improper.

A. Standard of Review

This Court reviews a ruling on prosecutorial misconduct for abuse of discretion. *State v. Brown*, 246 S.W.3d 519, 532 (Mo. Ct. App. S.D. 2008).

B. The assistant circuit attorney's voir dire examination at the February 2009 trial and general conduct prior to and throughout the June 2010 trial amounted to prosecutorial misconduct requiring reversal of the Appellant's conviction.

A trial court's ruling of a previous mistrial remains ripe for review notwithstanding subsequent new trials as Missouri law limits the right of appeal in criminal cases to final judgments. MO. REV. STAT. § 547.070 (2000). In a criminal case, a judgment becomes final for purposes of appeal when the judgment and sentence are entered. *State v. Welch*, 865 S.W.2d 434, 435 (Mo. Ct. App. E.D. 1993). Until judgment and sentence in regard to Appellant were entered on August 16, 2010, the issue of prosecutorial misconduct in the previous February 2009 mistrial was unripe for appellate review. (LF 123).

A prosecutor in a criminal case represents the people and it is his duty to be impartial and to refrain from conduct that causes him to be a heated partisan who appeals to prejudice and seeks a conviction at all costs. *State v. Wintjen*, 500 S.W.2d 39, 43-44 (Mo. Ct. App. S.D. 1973). His obligation is not simply to obtain a conviction but to see that justice is done and that the accused gets a fair trial. *State v. Hicks*, 535 S.W.2d 308,

311 (Mo. Ct. App. S.D. 1976).

In *State v. Williams*, counsel for the defendant objected to the prosecutor's remarks, thus preserving the error for review. *State v. Williams*, 646 S.W.2d 107, 109 (Mo. banc 1983). "Although further curative action was not requested by defense counsel, the absence of request did not preclude the trial court from taking additional curative action." *Id*. at 110. "The curative action taken by the trial court was not sufficient to cure the error created by the prosecutor." *Id.* In particular, the trial court failed to sustain defense counsel's objections, "thus giving the prosecutor's argument the imprimatur of the trial court and compounding the error." *Id.*

Courts have recognized that a criminal defendant is entitled to a reversal of his conviction because the cumulative effect of multiple errors injected sufficient prejudice into the case to warrant a new trial. *State v. Burnfin*, 771 S.W.2d 908, 912-913 (Mo. Ct. App. W.D. 1989); *State v. Whitman*, 788 S.W.2d 328, 336 (Mo. Ct. App. E.D. 1990).

The court in *Burnfin* held that in some instances, the making of improper statements injects poison and prejudice into the case which may not be neutralized, therefore, making it appropriate to grant relief. *Burnfin*, 771 S.W.2d at 912. The effect of the multiple errors in the prosecutor's argument was cumulative and egregiously prejudicial. *Id*. at 913. The court granted a new trial because of the prejudice arising from multiple instances of prosecutorial misconduct. *Id.*

In the present case, the State's misconduct precedes the events of the June 2010 trial. Before a jury verdict was reached, the cause sustained two mistrials. (LF 7, 41) At

the February 2009 mistrial, the ACA intentionally disqualified the jury panel. During her investigation of forty-eight potential jurors, the ACA instructed the jury that their role was to decide guilt or innocence. (Feb. 2009 Trial Tr. 26, 28, 28, 102). The State's examination of the venire panel consisted of questions based on unfounded legal standards for juror competency designed to introduce doubt in each venireperson's subjective belief as to their fitness to serve on the jury. This resulted in trial court finding twenty-seven venirepersons dismissible for cause. *Id.* at 120. The State's voir dire questions related to testimonial evidence from witnesses to the alleged assault, the lack of certain physical evidence, inadmissibility of police reports and the facts for which the State is and is not required to prove. *Id.* at 26, 50, 91, 67). The ACA's voir dire examination included the following questions:

"Would any of you want to hear from every single person that's involved, every single person you hear in order to decide guilt or innocence?" *Id.* at 26.

"I'm saying I don't have DNA, I don't have fingerprints. I've got my victim. Are you going to require me to have DNA, to have fingerprints, to have a gun in order to convict somebody of a crime?" *Id.* at 50.

"Is there anybody here that would require me to prove every single detail [of a hypothetical DWI case] that surrounds the crime, so you would want to know if it were tequila versus Natural Light or vodka versus Boones." *Id.* at 91.

"A police report is just a summary of what happens. And in this case you're not in any case you're not going to get the police reports. They're not going to come into

evidence. Does anybody here feel that they cannot convict somebody unless they had the police reports from the incident and were able to read from them?" *Id.* at 67.

Notwithstanding the mischaracterization of the standard for a criminal conviction, the premise of the State's general inquiry is fundamentally misleading. Asking a venireperson what type of evidence he or she would *want* to decide a case is qualitatively different from a question related to the venireperson's ability to be fair and impartial given the forms of evidence the prosecution realistically intends to introduce. In effect, the ACA was asking if the evidence she intended to introduce would meet each venireperson's subjective burden of production. It is therefore unsurprising, given the form of the questions, that eighteen venirepersons stated that they would be unable to fairly or impartially decide the case not because of bias or a partial disposition to either party but because the State would not be introducing evidence they would find most convincing. *Id.* at 26, 30, 32, 34, 35, 37-38, 38-39, 46, 47, 52-53, 56, 59, 63, 64, 70-71, 80, 83, 84. As a result, the trial court tallied twenty-seven potential strikes for cause and ordered a mistrial without giving defense counsel an opportunity to conduct his own voir dire examination and rehabilitate the panel. *Id.* at 120.

Also during the State's voir dire examination during the February 2009 mistrial, the ACA erroneously shifted the burden of proof to the Appellant. In response to a vernireperson's question regarding witness testimony, the ACA stated: "I expect that Mr. Adler [counsel for defendant] will probably talk to you about his burden." *Id.* at 80. Defense counsel objected to the statement prompting the ACA to rephrase her response.

Id. The trial judge neither ruled on the matter nor instructed the jury to disregard the statements.

The right of the accused to a fair and impartial trial in the Sixth Amendment of the United States Constitution and Article 1, Section 18 of the Missouri Constitution establishes "as a fixed and definite principle of criminal law, no burden [rests] upon the defendant to prove his innocence, and a jury argument permitted over proper objection to that effect would be reversible error." *State v. Purvis*, 525 S.W.2d 590, 593 (Mo. Ct. App. S.D. 1975). The ACA's statement placed an unconstitutional burden of proof on the Appellant. The trial court's failure to either sua sponte rule a mistrial or instruct the venire panel to disregard the ACA's statement effectively put the imprimatur of the court on the assistant circuit attorney's improper conduct. Such a failure constitutes violation of the Appellant's right to a fair trial.

Even under plain error analysis, a violation of the Appellant's Sixth Amendment rights "can never be treated as harmless error." *State v. Callahan*, 641 S.W.2d 186, 192 (Mo. Ct. App. W.D. 1982). Accordingly, "when federal Constitutional rights basic to the integrity of the fact-finding process of implicating the due process right to a fair and impartial trial are involved, the plain error rule will be invoked" and "may even be undertaken sua sponte." *Id.* at 193. The court in *Callahan* held that the prosecutor's comment on the burden of proof during voir dire combined with other instances of improper conduct which in and of themselves would not constitute reversible error required reversal of the Appellant's conviction. The court's rationale in *Callahan* stands

in the present case. The ACA's improper burden shifting during voir dire combined with her erroneous voir dire questions and generally improper conduct prior to and throughout the June 2010 trial, as outlined below, require reversal of Appellant's conviction.

At the June 2010 trial the ACA conducted a voir dire investigation similar to the investigation that led to the February 2009 mistrial. The ACA presented to the jury panel a hypothetical situation where the jurors were to imagine themselves as a victim to a crime. (June 2010 Trial Tr. 76). The ACA then asked if the jurors would need more evidence to convict beyond that of Mr. Ibrahemi's testimony. *Id.* The assistant circuit attorney's voir dire examinations resulted in the erroneous disqualification of potential jurors. Intentionally disqualifying jurors is prosecutorial misconduct amounting to substantial prejudice against the Appellant and impedes the Appellant's constitutional right to due process.

In addition, the ACA overstepped her province by repeatedly arguing inaccurate claims regarding Mr. Ibrahemi's injuries. The ACA characterized the totality of Mr. Ibrahemi's injuries as stabbings. *Id.* at 197, 204, 521, 525. Such a characterization is contrary to the testimony adduced at trial. Testimony from the State's own medical expert made clear that while Mr. Ibrahemi's skin may have been penetrated fifteen times, the wounds ranged from deep wounds to superficial cuts. *Id.* at 328. Any characterization of Mr. Ibrahemi's injuries by the ACA is erroneous when contrary to evidence from a medical expert. The ACA's hyperbolic depiction of Mr. Ibrahemi's injuries was highly prejudicial and amounted to prosecutorial misconduct severe enough to substantially

sway the judgment of the jurors.

The ACA's false characterization of the facts is compounded by her false characterization of the law. In the State's closing argument, the ACA misstated the law as to the applicability of the assault in the second-degree instruction. The ACA argued that the jury should convict the Appellant of first-degree assault rather than second-degree assault. *Id.* at 526. In doing so, she claimed that the alleged crime was not committed amidst the Appellant's sudden passion, "because this is not what a reasonable person would do." *Id.* A finding of sudden passion, consistent with the trial court's instructions, charges a jury to consider whether or not the Appellant's act was caused by or arose out of provocation by Mr. Ibrahemi. (App. A5). Sudden passion does not consider the reasonableness of the actor. On the contrary, sudden passion asks whether or not the Appellant's actions arouse out of adequate cause sufficient to substantially impair an ordinary person's capacity for self-control. (App. A5). The ACA's false characterization of the applicable law in her closing argument constitutes erroneous prosecutorial conduct resulting in substantial prejudice against Appellant. The cumulative effect of the assistant circuit attorney's voir dire examination during the February 2009 trial and erroneous conduct prior to and throughout the June 2010 trial resulted in egregious prejudice requiring reversal of the Appellant's conviction.

Point III

The trial court erred in admitting State's exhibits 18, 20 and 21 because the admission of photographs of Mr. Ibrahemi's alleged injuries after exploratory

surgery and other medical procedures violates Appellant's right to due process guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section Ten of the Missouri Constitution, in that said photographs were highly inflammatory and prejudicial and lacked probative value as to the material facts at issue in the case.

A. Standard of Review

The standard of review for the admission of evidence is abuse of discretion. *State v. Freeman*, 269 S.W.3d 422, 426 (Mo. banc 2008). This standard gives the trial court broad leeway in admitting evidence, and an exercise of this discretion will not be disturbed unless it "is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Id.*

B. The probative value of State's exhibits 18, 20 and 21 did not outweigh their prejudicial effect.

Photographs that tend to corroborate testimony of witnesses, to assist the jury in understanding the facts and the testimony of witnesses, or to prove an element in the case are admissible. *State v. Isa*, 850 S.W.2d 876, 890-91 (Mo. banc 1993). The test to be applied is whether the prejudicial effect outweighs the probative value. *State v. Weems*, 840 S.W.2d 222, 229 (Mo. banc 1992). Photographs should not be admitted when their sole purpose is to arouse the emotions of the jury and to prejudice the accused. *State v. Day*, 866 S.W.2d 491, 495 (Mo. Ct. App. S.D. 1993). Missouri law generally favors admissibility of photographs.

At trial, the State offered a series of photographs of Mr. Ibrahemi's injuries. The photographs were taken after Mr. Ibrahemi received medical treatment including but not limited to a surgical procedure. (June 2010 Trial Tr. 28). Appellant objected to admission of the photographs and the court sustained the objection to the admission of all of the photographs except State's exhibits 18. 20 and 21. *Id.* In addition to offering photographs of Mr. Ibrahemi's injuries, the State also called Dr. Jane Turner to testify to her understanding of Mr. Ibrahemi's injuries according to her interpretation of his medical records. *Id.* at 284-309. Mr. Ibrahemi also testified to his own injuries. *Id.* at 214-83.

Notwithstanding Missouri's low threshold for admissibility, application of the standard outlined in *Weems* makes clear that the trial judge erred in admitting exhibits 18, 20, and 21. The State's proffered photographs were incapable of showing the nature of Mr. Ibrahemi's wounds. The photographs were taken after Mr. Ibrahemi was treated for his injuries. *Id.* at 28. The exhibits are probative insofar as they show the nature of the medical treatment Mr. Ibrahemi received but void of probative value as it relates to the actual injury allegedly inflicted by Appellant.

Additionally, the photographs were offered for purposes of proving that Mr. Ibrahemi incurred serious physical injury. At no point during trial was there any dispute as to the serious nature of the injuries sustained by Mr. Ibrahemi. The contested issues at trial dealt almost exclusively with the issue of whether or not Appellant was acting in self-defense.

In *State v. Wintjen*, a distinguishable case, the Missouri Court of Appeals upheld a

trial court's admission of photographs taken of a victim's injuries after a surgical procedure. *State v. Wintjen*, 522 S.W.2d 628, 629 (Mo. Ct. App. S.D. 1975). The charge alleged required the State to prove that the defendant committed assault with intent to kill with malice aforethought. *Id.* Unlike the present case, the serious nature of the victim's injuries was an issue of material fact. In *Wintjen*, the State's case-if-chief was based on a theory that the victim had been stabbed with either a ballpoint pen or a metal wire. *Id.* The Court of Appeals held that the photographs were admissible because "showing the nature of the wounds would influence whether the jury believed the State's theory." *Id*. The court in *Wintjen* allowed the photographs to be shown to the jury because of their ability to prove the material fact of whether or not the victim's wounds were serious enough to satisfy an essential element of the crime charged. The court's decision was sound given that the weapons allegedly used to inflict the injuries (a ballpoint pen and wire) are not inherently dangerous instruments

The Court's reasoning in *Wintjen* fails in the present case because neither the fact that Mr. Ibrahemi was injured nor the serious nature of those injuries was ever in contention. Appellant testified at trial to using a knife against Mr. Ibrahemi. (June 2010 Trial Tr. 419-420). Also distinct from *Wintjen*, the injury alleged in the present case was not the result of Appellant's use of an otherwise innocuous instrument. In *Wintjen* the photographs were used to establish a chain of inferences leading to the conclusion that the ballpoint pen was used to inflict serious physical injury. No such inference is required when the alleged weapon is a knife. Considering together Mr. Ibrahemi's testimony of his

injuries and the testimony of Dr. Jane Turner relating to Mr. Ibrahemi's medical records, the photographs served only to inflame the passions of the jury and therefore should not have been admitted. *Id.* at 225, 229-31, 228-41, 292-309.

Point IV

The trial court erred in refusing to grant Appellant's motion for judgment of acquittal notwithstanding the verdict of the jury or in the alternative, motion for a new trial because the court's ruling violated Appellant's right to due process guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section Ten of the Missouri Constitution, and Appellant's right to a fair trial before an impartial jury guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section Eighteen of the Missouri Constitution, in that there was insufficient evidence to prove beyond a reasonable doubt that Appellant, Ines Letica, attempted to kill or knowingly caused or attempted to cause serious physical injury to Edmond Ibrahemi and knowingly did so using assistance or aid of a dangerous instrument.

A. Standard of Review

"Appellate review of a challenge to the sufficiency of the evidence supporting a criminal conviction is limited to a determination of whether sufficient evidence was presented at trial from which a reasonable juror might have found the defendant guilty of the essential elements of the crime beyond a reasonable doubt." *State v. Gibbs*, 306 S.W.3d 178, 181 (Mo. Ct. App. E.D. 2010) (internal citations omitted). In applying this

standard of review, the Court "accepts as true all of the evidence favorable to the State, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary." *Id.*

B. The State failed to meet its burden of proof requisite for a conviction of assault in the first degree.

In considering whether the evidence is sufficient to support the jury's verdict, the court must look to the elements of the crime and consider each in turn to determine whether a reasonable juror could find each of the elements beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993), citing *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). Under the *Dulany* standard, the court is required to take the evidence in the light most favorable to the State and grant the State all reasonable inferences from the evidence, disregarding all contrary inferences. *Dulany*, 781 S.W.2d at 55. While reasonable inferences may be drawn from direct and circumstantial evidence, "the inferences must be logical, reasonable and drawn from established fact." *State v. Presberry*, 128 S.W.3d 80, 90 (Mo. Ct. App. E.D. 2003), quoting *State v. West*, 21 S.W.3d 59, 62-63 (Mo. Ct. App. W.D. 2000). "In considering the sufficiency of the evidence, there must be sufficient evidence of each element of the offense." *State v. Dixon*, 70 S.W.3d 540, 544 (Mo. Ct. App. W.D. 2002).

The State failed to meet its burden of proving beyond a reasonable doubt that Appellant attempted to kill or knowingly caused or attempted to cause serious physical injury to Edmond Ibrahemi. Testimony elicited at trial was inconclusive as to which party

was the initial aggressor. The State failed to sufficiently prove that Edmond Ibrahemi's injuries were the result of Appellant's attempt to kill or cause serious physical injury.

The State's case-in-chief was based on a theory that Appellant was the initial aggressor of the alleged assault. At trial, both Mr. Ibrahemi and Appellant testified to previous altercations between the two of them. (June 2010 Trial Tr. 291, 405-406). The evidence of who initiated the altercation is inconclusive on its face and illogical when considered in conjunction with the alleged injuries sustained by Mr. Ibrahemi. *Id.* at 225, 419-20. Even when taking the evidence in the light most favorable to the State, the injuries sustained by Mr. Ibrahemi cannot logically corroborate a theory of Appellant having acted as the initial aggressor. The alleged lacerations sustained by Mr. Ibrahemi were random in location, depth and severity. *Id.* at 225, 229-31, 281, 288, 325. One cannot rationally infer from the haphazard nature of the alleged injuries that Appellant acted with requisite intent required for conviction of assault in the first degree.

The only rational inference that can be drawn from the nature of Mr. Ibrahemi's injures is that which was offered by the State's own expert Dr. Jane. Turner. At trial, Dr. Turner confirmed her previous testimony that Mr. Ibrahemi's wounds could have been delivered while Mr. Ibrahemi was choking Appellant. *Id.* at 309-10. Dr. Turner's testimony supports statements made by Appellant at trial that his alleged use of force was delivered after Mr. Ibrahemi's initial choking attack outside of Skala bar. *Id.* at 416, 419-20. Consistent with testimony relating to prior altercations between Mr. Ibrahemi and Appellant, any finding that Appellant was acting as the initial aggressor is irrational,

illogical and contrary to the weight of the evidence.

Point V

The trial court erred in sentencing Appellant to two concurrent fifteen year terms of incarceration because the sentence violates Appellant's right to due process guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section Ten of the Missouri Constitution, in that the court's rationale for sentencing Appellant to one year for each stab wound amounts to an abuse of discretion.

A. Standard of Review

"A court's sentencing decision is reviewed for abuse of discretion" *Collins*, 290 S.W.3d at 746. "An abuse of discretion occurs when the trial court's action is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration." *State v. Palmer*, 193 S.W.3d 854, 857-58 (Mo. Ct. App. S.D. 2006).

B. The trial court's sentence of fifteen years incarceration lacked careful consideration amounting to an abuse of discretion.

The trial judge's rationale for sentencing Appellant to two concurrent fifteen-year terms of incarceration constitutes an abuse of discretion. At sentencing proceedings, Appellant attested to his innocence maintaining that his actions were in justifiable self-defense. The trial judge addressed Appellant in response stating: "You have just sealed the deal for me…I remember this vividly, you're sitting on that witness stand there's a

question asked and I start to rule on it, and you look at me, and if looks could kill I would be dead." (June 2010 Trial Tr. 540). Without argument from defense counsel, the trial judge sentenced Appellant to a prison term amounting to "one year for each stab wound." *Id.* at 541. The court's rationale for Appellant's sentence is void of the careful consideration required by the court in *Palmer.* As mentioned, the trial judge stated at sentencing: "I remember 15 stab wounds, is what I remember, I'm going to give you one year for each stab wound." *Id.* The trial judge abused his discretion in basing Appellant's sentence on an arbitrary legal standard. Instead of carefully considering the appropriate sentence, the trial judge appears to have relied strictly on a highly contested fact litigated by both the State and Appellant, which the jury was not required to base its verdict on.

Appellant is fully aware of the deference a reviewing court grants to a trial court's sentencing decision. While a fifteen-year term is within the confines of Missouri statute, the trial judge's tit-for-tat rationale demonstrates the trial judge's lack of careful consideration in deciding Appellant's sentence.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Appellant Ines Letica respectfully requests that this Court reverse his conviction and sentence and remand for a new trial.

Respectfully Submitted,

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STEVEN V. STENGER, #45842
Klar, Izsak & Stenger, L.L.C.
1505 S. Big Bend Blvd.
St. Louis, MO 63117
Phone: (314) 863-1117
Fax: (314) 863-1118
ATTORNEY FOR APPELLANT

Substantial assistance provided by:

Brendan A. Smith
3L Student
Saint Louis University School of Law

James J. Lang
3L Student
University of Missouri School of Law

CERTIFICATE OF COMPLIANCE AND SERVICE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 15th day of July, 2011, two true and correct copies of the foregoing brief and a CD-ROM disk containing the foregoing brief were mailed postage prepaid to Mr. Timothy Blackwell of the Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Times New Roman 13-point font. The word-processing software identified that this brief contains 11,068 words. Also, the enclosed CD-ROM disk has been scanned for viruses and found to be virus-free.

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STEVEN V. STENGER, #45842
Klar, Izsak & Stenger, L.L.C.
1505 S. Big Bend Blvd.
St. Louis, MO 63117
Phone: (314) 863-1117
Fax: (314) 863-1118

ATTORNEY FOR APPELLANT

APPENDIX