No. SC91849

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

INES LETICA,

Appellant.

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

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

TIMOTHY A. BLACKWELL
Assistant Attorney General
Missouri Bar No. 35443

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
tim.blackwell@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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JURISDICTIONAL STATEMENT

Appellant, Ines Letica, appeals from a judgment of the Circuit Court of the City of St. Louis convicting him of the class A felony of assault in the first degree and the unclassified felony of armed criminal action (L.F. 109-10). On June 21, 2011, the Missouri Court of Appeals, Eastern District, issued an opinion and transferred the cause to this Court pursuant to Supreme Court Rule 83.02. Therefore, this Court has jurisdiction over the cause. Mo. Const. art. V, § 10 (as amended 1982).

STATEMENT OF FACTS

Appellant, Ines Letica, was charged by indictment in the Circuit Court of the City of St. Louis with the class A felony of assault in the first degree and the unclassified felony of armed criminal action (L.F. 20-21).

Jury selection began on February 25, 2009, the Honorable Michael K. Mullen presiding, but the trial court declared a mistrial because there was an insufficient number of jurors to make up a panel (February 2009 Tr. 121).

The cause then went to trial before a jury on March 22-25, 2010, the Honorable Michael K. Mullen presiding, but the trial court granted Appellant's motion for a mistrial because one juror could not agree with the others in reaching a verdict (March 2010 Tr. 556-58).

The cause again went to trial before a jury in the Circuit Court of the City of St. Louis on June 14-17, 2010, the Honorable Thomas Frawley presiding, and Appellant was convicted of the charges (L.F. 3-4). Viewed in the light most favorable to the jury's verdict, the following evidence was adduced at the trial on June 14-17, 2010.

On the evening of December 7, 2007, Edmond Ibrahemi went to Skala, a bar in St. Louis, to meet a friend for a celebration (Tr. 214-16).[1] Ibrahemi is originally from Serbia (Tr. 214). Ibrahemi and Appellant knew each other, and had frequently "hung out" at the same places (Tr. 218-19). Ibrahemi and Appellant had previously engaged in a verbal altercation at Skala, when it was operated under another name, and at another bar (Tr. 218-

[1] Transcript references are to the transcript of the June 2010 trial, unless otherwise noted.

19). On a previous occasion, Appellant had engaged in a fight with someone else, Ibrahemi grabbed him to separate him from the fight, and Appellant started cursing him (Tr. 258). A security guard separated them (Tr. 258-59). A friend and the security guard walked Ibrahemi to his car (Tr. 260-61).

During the incident at Skala on December 7, 2007, Appellant approached Ibrahemi in the bathroom and stated that he wanted to talk outside (Tr. 217-18, 220-21). Ibrahemi went out a back door with Appellant, and was unaware that Appellant was carrying a knife (Tr. 222-23). Ibrahemi had told Appellant's cousin that he wanted Appellant to leave him alone, and that he did not want to fight with Appellant (Tr. 254). Appellant asked Ibrahemi over and over if Ibrahemi considered him a child, which was derogatory in Ibrahemi's culture, and Ibrahemi stated that Appellant was a child because he was acting the same way he had before (Tr. 224). Appellant then pulled a knife and cut Ibrahemi's throat and neck (Tr. 224-25; State's Ex. 5). Appellant was blocking the back door, and Ibrahemi went down the steps, trying to get away from him (Tr. 225, 228). Ibrahemi turned around, and Appellant then cut him under the chin (Tr. 228-30; State's Ex. 14). Appellant also cut Ibrahemi in the arm, chest and abdomen (Tr. 230-31). Ibrahemi fell down, and Appellant stabbed him in the knee (Tr. 233; State's Ex. 7). Ibrahemi stated that he was dying, and asked Appellant to leave him alone (Tr. 233). Appellant ran away, and as Ibrahemi attempted to go back inside, Appellant swung at him again and stabbed his hip (Tr. 237-38). Ibrahemi sustained three stab wounds in the abdomen, a wound in the abdomen/hip, two chest wounds, and three wounds in the left arm (Tr. 289-91, 293-96, 298; State's Exhibits 5, 7, 14, 16, 18, 20-22). Ibrahemi went back inside and collapsed (Tr. 238).

Ibrahemi was transported to the hospital for medical treatment (Tr. 373). He was in the hospital for five days (Tr. 302). Ibrahemi's injuries would have been life-threatening if he had not received medical intervention (Tr. 296, 299). The cut across the front of his neck went down to the Adam's apple and caused injury and swelling to the vocal cord (Tr. 289-90). Ibrahemi underwent exploratory surgery on his abdomen, which left an additional incision in his abdomen (Tr. 292-94; State's Ex. 18). A chest tube had to be inserted, causing an additional incision in Ibrahemi's chest (Tr. 295; State's Ex. 16). Ibrahemi thus sustained fifteen cuts in total, two of which were from surgical intervention (Tr. 289-96, 298; State's Exhibits 5, 7, 14, 16, 18, 20-22).[2] Because Ibrahemi had to be placed on a respirator, he was in a medically induced coma for three to four days (Tr. 302-03).

Appellant testified at trial and claimed self-defense, stating that Ibrahemi was the initial aggressor (Tr. 411-25).

Appellant filed a motion for judgment of acquittal at the close of the State's case, and the trial court denied the motion (L.F. 4). Appellant also moved for a judgment of acquittal at the close of all the evidence, and the trial court denied the motion (Tr. 494).

The jury found Appellant guilty of assault in the first degree and armed criminal action (L.F. 109-10). Appellant filed a motion for judgment of acquittal or for new trial, and the trial court denied the motion (L.F. 114-22; Tr. 535-36). The trial court sentenced

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[2] Three cuts in the neck/throat, one in the knee, two in the chest, three in the abdomen, one in the abdomen/hip, and three in the left arm, plus two more from surgical intervention (Tr. 289-96, 298; State's Exhibits 5, 7, 14, 16, 18, 20-22).

Appellant to fifteen years in the custody of the Missouri Department of Corrections on each count, with the sentences to run concurrently (Tr. 541-42; L.F. 123-26).

This appeal followed.

ARGUMENT

I. (reverse-*Batson*)

The trial court did not clearly err in sustaining the State's reverse-*Batson* challenge as to venireperson Jessica Wiese, and even if Appellant was erroneously denied a peremptory challenge, Appellant was not prejudiced; i.e., the error was harmless, as Appellant's guilt was determined by a panel of qualified jurors, and evidence of Appellant's guilt was overwhelming; further, as Appellant failed to raise any constitutional issue under Mo. Const. art. I, § 14 at trial regarding his right to a remedy, that issue cannot be raised before this Court.

"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]." *State v. Chambers*, 234 S.W.3d 501, 507 n. 1 (Mo. App. E.D. 2007); *see also State v. Brown*, 966 S.W.2d 332, 336 (Mo. App. W.D. 1998) ("*Batson* objections may be made by the state regarding the defendant's racially-motivated use of peremptory strikes to remove white venirepersons from the jury panel").

Appellant asserts that the trial court erred in sustaining the State's reverse-*Batson* challenge to venireperson Jessica Wiese. Great deference must be given to the trial court's determination as to pretext. *Chambers*, 234 S.W.3d at 514-15. However, even if this Court determines that the trial court clearly erred in denying a peremptory strike to Appellant, the United States Supreme Court's decision in *Rivera v. Illinois*, 129 S.Ct. 1446, 1453-54 (2009), gives states the option to determine that such error was harmless error under state law. Here the trial court made every effort to assure that the venire members were not

discriminated against on the basis of race. As venireperson Wiese was not biased in any way, any hint of racial discrimination in the jury selection process was removed, and Appellant's guilt was adjudicated by a full panel of qualified jurors, any error in sustaining the State's reverse-*Batson* challenge was harmless error.

A. Additional facts.

During voir dire in the June 2010 trial, the following exchange occurred:

MS. CARMODY: . . . 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.

MS. CARMODY: It says here you work for Express Scripts; is that correct?

VENIREPERSON WIESE: Yes.

MS. CARMODY: And how long have you been doing that?

VENIREPERSON WIESE: Two years.

MS. CARMODY: 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.

(Tr. 151-52).

Defense counsel used peremptory challenges to strike four Caucasian females, including venireperson Wiese from the panel, and the Assistant Circuit Attorney raised a reverse-Batson objection to striking Wiese (Tr. 181-82). Defense counsel also struck a Caucasian male and an African-American female (Tr. 181-82). The Assistant Circuit

Attorney stated that venireperson Wiese "didn't say anything," and noted that a number of the venirepersons struck through defense counsel's peremptory challenges were white people (Tr. 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.

(Tr. 183).

The trial court stated that "the only one I have any problem at all with is Miss Wiese[,]" and the Assistant Circuit Attorney stated that there were other people who were similarly situated (Tr. 184). The trial court then stated:

> THE COURT: . . . I think Miss Wiese, however, Mr. Adler, I think just young doesn't get it. And I have no notes that she said anything.
>
> MS. CARMODY: And age is a protected class.
>
> THE COURT: She works for Express Scripts, you did ask her that. That's the only contact, as I recall, that either of you had with her.
>
> MR. ADLER: There was one question that Ryann asked her, that's the best I can remember.
>
> THE COURT: It was you work for Express Scripts, yes. I think she asked how long have you been there, she said three years maybe.
>
> MR. ADLER: Three or four years.
>
> THE COURT: And that was it. So I'm going to sustain your objection to Miss Wiese.

(Tr. 184-85).

B. Preservation and the standard of review.

Appellant raised the reverse-*Batson* issue in his motion for new trial, and thus preserved this issue for appellate review (L.F. 118).

On a reverse-*Batson* challenge, the appellate court gives the trial court's determination great deference and will not set it aside unless the Court finds clear error. *Chambers*, 234 S.W.3d at 514-15. When reviewing for clear error, the Court evaluates the entire evidence to determine if it is left with a definite and firm conviction that a mistake has been made. *Id*.

However, if this Court determines that the trial court clearly erred in denying a peremptory strike to Appellant, the United States Supreme Court's decision in *Rivera*, 129 S.Ct. at 1456, gives states the option to determine that such error was harmless error under state law. Therefore, any error in sustaining the State's reverse-*Batson* challenge should be viewed as harmless error, as discussed in more detail in section I.D of this brief.

C. The trial court did not clearly err in sustaining the State's reverse-*Batson* challenge as to venireperson Wiese.

In *Batson v. Kentucky*, 106 S.Ct. 1712, 1716-25 (1986), the United States Supreme Court held that the State may not use peremptory challenges to remove venirepersons on the basis of their race. In *Georgia v. McCollum*, 112 S.Ct. 2348, 2353-54 (1992), the Supreme Court of the United States held that the *Batson* prohibition extended to criminal defendants who discriminatorily struck potential jurors on the basis of their race. In *McCollum*, 112 S.Ct at 2351, the defendants were white and the victims were African-American, and before jury selection began, the prosecution moved to prohibit the defendants from exercising

peremptory challenges in a racially discriminatory manner. *Id*. The State expected to show that the victims' race was a factor in the alleged assault. *Id*. The State contended that counsel for the defendants had indicated a clear intention to use peremptory strikes in a racially discriminatory manner, arguing that the circumstances of their case gave them the right to exclude African-Americans from participating as jurors in the trial. *Id*. The State sought an order providing that, if it succeeded in making a prima facie case of racial discrimination by the defendants, the defendants would be required to articulate a racially neutral explanation for peremptory challenges. *Id*. at 2351-52. The trial court denied the State's motion, holding that neither state nor federal law prohibited criminal defendants from exercising peremptory challenges in a racially discriminatory manner. *Id*. at 2352. The issue was certified for immediate appeal, and the Georgia Supreme Court affirmed. *Id*.

The United States Supreme Court reversed, holding that *Batson* was designed to protect individual defendants from discrimination in the selection of jurors, and further, denying a person participation in jury service on account of race unconstitutionally discriminates against the excluded juror. *Id*. at 2353. In addition, the Court noted that the harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community, as selection procedures that purposefully exclude African-Americans from juries undermine the public confidence. *Id*. at 2353-54.

In *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419, 1430 (1994), the Court extended the *Batson* prohibition to either party's discriminatory use of peremptory strikes to remove jurors based on gender bias.

In *Chambers*, 234 S.W.3d at 507 n. 1, the Missouri Court of Appeals, Eastern District followed a three-step procedure for reverse-*Batson* challenges, which mirrors the three-step procedure established by this Court for *Batson* challenges. *Chambers*, 234 S.W.3d at 514-15. First, the State must raise a reverse-*Batson* challenge with regard to one or more specific venirepersons struck by the defense and identify the cognizable racial group to which the venireperson or persons belong. *Id*. Second, the trial court will require the defense to come forward with a reasonably specific and clear race-neutral explanation for the strike. *Id*. Third, assuming the defense is able to articulate an acceptable explanation, the State will need to show that the defense's proffered reason for the strike was merely pretextual and that the strike was racially motivated. *Id*. Age is a race-neutral, gender-neutral factor that may properly be considered when making peremptory strikes. *State v. Readman*, 261 S.W.3d 697, 700 (Mo. App. W.D. 2008). Although references to demeanor should be heavily scrutinized, hunches based on demeanor and manner may be a sufficient basis for using a peremptory strike. *State v. Nylon*, 311 S.W.3d 869, 883 (Mo. App. E.D. 2010). Counsel remain free to "use horse sense" and "play hunches" in exercising peremptory challenges so long as the factors they rely on are race-neutral and gender-neutral. *State v. Shaw*, 14 S.W.3d 77, 83 (Mo. App. E.D. 1999).

"The trial court's determination of whether a peremptory strike was exercised on racially neutral grounds is entitled to great deference on appeal." *Brown*, 966 S.W.2d at 336. In this case, the State satisfied the first step of *Batson* by challenging Appellant's peremptory strike of a Caucasian (Tr. 181-82). Appellant then satisfied the second step of the *Batson*

procedure by stating that his reason for striking Wiese was due to her age, her not saying anything, and defense counsel having a bad vibe about her (Tr. 183).

In determining pretext, one factor to be considered is the existence of similarly-situated venirepersons who were not struck. *Chambers*, 234 S.W.3d at 515. This is a crucial factor in determining pretext. Post-hoc justifications are irrelevant at this stage, as the focus is on the plausibility of the contemporaneous explanation. *Id*. Another factor in determining pretext is the degree of logical relevance between the proffered explanation and the case to be tried. *Id*. Yet another factor to be considered is the attorney's demeanor or statements made during voir dire, as well as the court's past experiences with the attorney. *Id*. In addition, the trial court may consider the demeanor of the excluded venirepersons. *Id*.

Here the record does not show whether there were persons who were not struck who were similarly situated to Wiese in age, but a number of Caucasian venirepersons were also struck (Tr. 181-82). The Assistant Circuit Attorney stated that there were other people who were similarly situated and defense counsel did not dispute her statement (Tr. 184).

Defense counsel stated that his reason for striking Wiese was that she was young, she didn't say anything, and defense counsel had a bad vibe about her (Tr. 183). There is no logical relevance between this case and the proffered explanation that Wiese was young. Here, there was no evidence that the victim was especially young or that there was any special factor about the case such that an older person's life experiences would be of benefit to one party or the other.

Appellant argues that the trial court ruled prematurely on the State's reverse-*Batson* challenge. However, in *State v. Johnson*, 207 S.W.3d 24, 39 n. 10 (Mo. banc 2006), this

Court held that "[c]ounsel should not be allowed to create reversible error simply by ignoring a judge's failure to consider a particular *Batson* step."

In *Kesler-Ferguson v. Hy-vee, Inc.*, 271 S.W.3d 556 (Mo. banc 2008), this Court noted that "the United States Supreme Court and this Court have both recognized that a trial court is free to disbelieve an alleged race-neutral explanation as mere pretext for discrimination."[3] The trial court's determination is entitled to great deference on appeal, and may not be set aside unless this Court finds clear error. *Chambers*, 234 S.W.3d at 514-15. In reviewing for clear error, this Court evaluates the entire evidence to determine if it is left with a definite and firm conviction that a mistake has been made. *Id*. "A trial court's findings as to a *Batson* challenge are entitled to great deference because its decision depends largely on the evaluation of intangibles such as credibility and demeanor." *State v. Bass*, 81 S.W.3d 595, 611 (Mo. App. W.D. 2002) (quoting *State v. Jackson*, 969 S.W.2d 773, 775 (Mo. App. W.D. 1998). "The decisive question to be determined by a trial court facing a *Batson* challenge is whether the . . . race-neutral explanation for a peremptory challenge

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[3] That case involved a transfer from the Missouri Court of Appeals, Western District, where the Western District had held that the circuit court improperly sustained a *Batson* challenge, and the Western District found that, in order to establish reversible error, Hy-vee had to show that the venireperson was not qualified to serve as a juror and should have been removed for cause. 2008 WL 490626. On transfer to this Court, this Court did not reach the issue of prejudice because it held that the trial court's ruling was supported by the record in sustaining the *Batson* challenge. 271 S.W.3d at 560-61.

should be believed." *Id*. "There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge." *Id*. "The evaluation of [counsel's] state of mind based on his or her demeanor and credibility lies particularly within the province of the trial judge." *Id*.

In *Brown*, 966 S.W.2d at 336, involving a reverse-*Batson* challenge, the trial court did not accept defense counsel's explanation for the strike, and the Western District held that the trial court was entitled to conclude that the explanation was pretextual for removing the Caucasian venireman. *Id*. On appeal, the Court held that the trial court's ruling was not clearly erroneous. *Id*. Similarly, in the present case, the trial court, by sustaining the State's reverse-*Batson* challenge, obviously disbelieved Appellant's alleged race-neutral explanation as mere pretext for discrimination. Deference must be given to the trial court's determination. *Chambers*, 234 S.W.3d at 514-15; *see also State v. Lopez*, 898 S.W.2d 563, 569 (Mo. App. W.D. 1995) (though a prospective juror's prior military service might conceivably constitute a race-neutral reason for the use of a peremptory strike, appellate court could not say that the trial court was "clearly erroneous" in refusing to allow defendant to use a peremptory challenge to strike venireperson); *State v. West*, 866 S.W.2d 150 (Mo. App. E.D. 1993) (trial court did not err in denying defendant his exercise of a peremptory strike against a white venireperson); *State v. Holloway*, 877 S.W.2d 692 (Mo. App. E.D. 1994) (trial court was not clearly erroneous in disallowing strikes of white venirepersons). Giving due deference to the trial court's determination, this Court should hold that the trial court did not clearly err in sustaining the State's reverse-*Batson* challenge.

D. Even if the trial court erroneously sustained the State's reverse-*Batson* challenge, the denial of a peremptory challenge should be subject to harmless error analysis, as *Rivera* allows states to make that determination. As venireperson Wiese was not biased, and Appellant had a full panel of qualified jurors, any error in denying his peremptory strike was harmless error.

1. The United States Supreme Court's decision in *Rivera*.

Even if this Court concludes that the trial court erroneously denied Appellant's peremptory challenge, the error should be considered harmless error. In *Rivera*, 129 S.Ct. at 1453-54, the United States Supreme Court held that, because there is no freestanding constitutional right to peremptory challenges, and peremptory challenges are within a State's province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution. There the Court affirmed the judgment of the Illinois Supreme Court finding the erroneous denial of a defendant's peremptory challenge did not qualify as structural error requiring automatic reversal, and instead applying a harmless error analysis. *Id*. at 1452-53. The Court relied on its earlier decision in *Ross v. Oklahoma*, 108 S.Ct. 2273, 2279-80 (1988), where the defendant had used a peremptory challenge to rectify the trial court's erroneous denial of a for-cause challenge, and the Court had noted that the trial court's error may have resulted in a jury panel different from that which would otherwise have decided Ross's cases, but because no member of the jury as finally composed was removable for cause, the Court found no violation of Ross's Sixth Amendment right to an impartial jury or his Fourteenth Amendment to Due Process. The Court also relied on its earlier decision in *United States v.*

Martinez-Salazar, 120 S.Ct. 774, 778 (2000), where the defendant in a federal criminal case used a peremptory challenge pursuant to Federal Rule of Criminal Procedure 24(b) because the trial court erroneously denied a for-cause challenge. There the Court held that the defendant's rights under the federal rule were not impaired, and the defendant, having been tried "by a jury on which no biased juror sat," and having "received precisely what federal law provided," could not "tenably assert any violation of his . . . right to due process." 120 S.Ct. at 776, 782.

The *Rivera* Court held that Rivera's efforts to distinguish *Ross* and *Martinez-Salazar* were unavailing, as Rivera's jury, like the juries in those cases, was impartial for Sixth Amendment purposes. 129 S.Ct. at 1454. In addition, the Court found that it was "not constitutionally significant that the seating of Gomez over Rivera's peremptory challenge was at odds with state law." *Id*. at 1455. The Court held that:

> [a]s in *Ross* and *Martinez-Salazar*, there is no suggestion here that the trial judge repeatedly or deliberately misapplied the law or acted in an arbitrary or irrational manner. Rather, the trial judge's conduct reflected a good-faith, if arguably overzealous, effort to enforce the antidiscrimination requirements of our *Batson*-related precedents. To hold that a one-time, good-faith misapplication of *Batson* violates due process would likely discourage trial courts and prosecutors from policing a criminal defendant's discriminatory use of peremptory challenges. The Fourteenth Amendment does not compel such a tradeoff.

Id. (citations omitted).

The Court also rejected Rivera's argument that, even without a constitutional violation, the deprivation of a state-provided peremptory challenge required reversal as a matter of federal law. *Id*. The Court noted that, in *Martinez-Salazar*, it had disavowed its earlier dicta in *Swain v. Alabama*, 85 S.Ct. 824 (1965), that the denial or impairment of the right to exercise peremptory challenges was reversible error without a showing of prejudice. *Rivera*, 129 S.Ct. at 1455. The Court stated that, "[a]s our recent decisions make clear, we typically designate an error as 'structural,' therefore requiring automatic reversal, only when the error necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. The mistaken denial of a state-provided peremptory challenge does not, at least in the circumstances we confront here, constitute an error of that character." *Id*. (citations omitted).

The *Rivera* Court concluded that "[a]bsent a federal constitutional violation, . . 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 "they may conclude, as the Supreme Court of Illinois implicitly did here, that the improper seating of a competent and unbiased juror does not convert the jury into an ultra vires tribunal; therefore the error could rank as harmless error under state law." *Id*. at 1456.

Appellant argues that the trial court erroneously denied his peremptory strike of venireperson Wiese and that the error is structural error. Appellant's Brief at p. 19. Missouri courts have held that the deprivation of the right to a fair and impartial jury constitutes structural error. *Everage v. State*, 229 S.W.3d 99, 102 (Mo. App. W.D. 2007); *see also State v. Baumruk*, 85 S.W.3d 644, 651 (Mo. banc 2002) ("the impartiality of the

adjudicator goes to the very integrity of the legal system," and "harmless-error analysis cannot apply") (*quoting Gray v. Mississippi*, 107 S.Ct. 2045 (1987)). However, the *Rivera* Court plainly stated that, "[a]s our recent decisions make clear, we typically designate an error as 'structural,' therefore requiring automatic reversal, only when the error necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. The mistaken denial of a state-provided peremptory challenge does not, at least in the circumstances we confront here, constitute an error of that character." 129 S.Ct. at 1455 (citations omitted). Therefore, assuming *arguendo* that the trial court erroneously denied the peremptory strike, the erroneous denial of a peremptory challenge is not structural error.

2. Decisions of other jurisdictions after *Rivera*.

Appellant asserts that courts from other states and a majority of the federal courts have held that the impairment of the right to a peremptory challenge is structural error. However, once again, in its 2009 decision in *Rivera*, 129 S.Ct. at 1455, the United States Supreme Court plainly held that the denial of the right to a peremptory challenge is not structural error. Although this case is the first in Missouri to address the impact of *Rivera*, other jurisdictions have examined the effect of *Rivera*, with mixed results.

In *State v. Mootz*, 2011 WL 1814496 (Iowa App. 2011), the Court adhered to its pre-*Rivera* precedent holding that a defendant must demonstrate prejudice resulting from the

denial of a peremptory challenge.[4] The Court held that because no rational jury could have acquitted the defendant of the offense, he suffered no prejudice from the court's wrongful refusal to strike the juror in question.

In *Robinson v. State*, 2011 WL 1546453 (Okla. Crim. App. 2011), the Court re-examined its earlier ruling that the erroneous denial of a peremptory challenge was not subject to harmless error review. There the Court noted that the trial court, acting in good faith, had mistakenly counted the number of peremptory challenges remaining, and both parties had joined in that good faith mistake. *Id*. The Court found that there was no indication that any sitting juror was biased, and because the defendant received a fair trial before an impartial and properly instructed jury, the trial court's failure to afford the defendant the full complement of statutorily-required peremptory challenges was harmless beyond a reasonable doubt. *Id*.

In *United States v. Lindsey*, 634 F.3d 541, 548-51 (9th Cir. 2011), the Court followed the lead of the United States Supreme Court in *Rivera* and thus abrogated its earlier ruling that the erroneous denial of a peremptory challenge mandated automatic reversal of a conviction. In *Lindsey*, *id*. at 549, the district court had simply miscounted and had given the defendant one less peremptory challenge than what he was entitled to, which the Court found was essentially the same situation as *Rivera*, where the defendant was allowed the full

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[4] Respondent recognizes that the opinion in the cited case was not final as of the date of filing this brief. However, given the fact that *Rivera* is a relatively recent decision, Respondent cites the case in order to bring the developing case law to the Court's attention.

number of challenges but was not allowed to use one challenge against the person he chose. In *Lindsey*, 634 F.3d at 550-51, the Court went on to review for plain error because the defendant had failed to object at trial to the denial of his peremptory challenge. The Court concluded that there was no plain error, as the defendant had provided no evidence that his substantial rights were affected, he advanced no serious argument of prejudicial error, and the alleged error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 551.

In a number of post-*Rivera* cases, the Georgia Court of Appeals has not specifically addressed the impact of *Rivera*, but has held that the trial court did not err in sustaining the State's *McCollum* challenge and in reseating the affected juror. *Brown v. State*, 706 S.E.2d 170, 175-76 (Ga. App. 2011); *Thomas v. State*, 682 S.E.2d 325, 327 (Ga. App. 2009); *Reid v. State*, 681 S.E.2d 671, 676-77 (Ga. App. 2009). Thus, in those cases, the Georgia Court had no need to address the effect of an erroneous deprivation of a peremptory challenge.

In *State v. Campbell*, 772 N.W.2d 858, 862 (Minn. App. 2009), decided post-*Rivera*, the Minnesota Court of Appeals, without explanation, found no reason to depart from the Minnesota Supreme Court's earlier holding in *State v. Reiners*, 664 N.W.2d 826, 835 (Minn. 2003), that automatic reversal is required when a defendant is denied a peremptory challenge. In *Reiners*, 664 N.W.2d at 835, the Court held that erroneous denial of a peremptory challenge did not lend itself to harmless error analysis because it would be "difficult, if not impossible, to compare an error made during voir dire to all of the evidence presented at trial and gauge its particular impact on the verdict." The Court stated that "[t]his difficulty stems from the reviewing court's inability to follow the challenged juror into jury

deliberation to determine his or her effect, if any, on the resulting verdict." *Id*. The Court also noted that its holding was in accord with that of nearly all of the federal courts of appeal, *id*., but that observation, of course, was based on federal cases decided before *Rivera*.

In *Commonwealth v. Hampton*, 928 N.E.2d 917, 927 (Mass. 2010), the Court recognized *Rivera* but stated that it would continue to adhere to its view that the erroneous denial of a peremptory challenge requires automatic reversal without a showing of prejudice. However, in that case the defendant raised a claim for the first time during oral argument that the trial court had created structural error by denying him access to criminal offender record information regarding jurors. *Id*. The Court held that the criminal record information was not an indispensable or necessary means to the selection of an impartial jury, thus the denial of the defendant's request for the records was not structural error. *Id*. The Court affirmed the conviction, holding that the defendant was tried by an impartial jury. *Id*. at 930-31.

In *Pellegrino v. AMPCO System Parking*, 486 Mich. 330, 350-351, 785 N.W.2d 45, 57 (Mich. 2010), cited by Appellant, the Court distinguished *Rivera* and found it inapplicable, as in *Rivera* the trial court merely erred in good faith by finding a *Batson* error, but in *Pellegrino* the trial court deliberately refused to follow the three-step process required under *Batson* because it thought that process required the court to "indulge" in "race baiting," and the trial court, despite never finding a *Batson* error in the first place, "nonetheless arbitrarily proceeded as if it had." *Pellegrino* is inapposite.

State v. Russell, 2010 WL3835645 (Ohio App. 2010), also cited by Appellant, was not selected for publication in the official reporter and does not discuss *Rivera.* In *Russell*, the

trial court had preempted a *Batson* inquiry by counsel and the appellate court remanded for a determination whether there was a *Batson* violation. The case is inapposite.

In *People v. Hecker*, 942 N.E.2d 248, 272 (N.Y. App. 2010), the Court found no reason to depart from its pre-*Rivera* precedent requiring automatic reversal, noting that peremptory challenges are a mainstay in a litigant's strategic arsenal. The Court stated that the unjustified denial of a peremptory was a statutory violation and required reversal without regard to harmless error. *Id*.

3. Missouri precedents.

As *Rivera* recognized, 129 S.Ct. at 1456, states are free to determine the effect of the denial of a peremptory challenge under state law. Missouri case law already sheds some light on this issue.

a. Peremptory challenges.

In *Johnson*, 207 S.W.3d at 36, the defendant made *Batson* challenges as to two of the State's peremptory strikes. 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 defendant made his 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. The Court found the trial court's premature ruling did not prevent it from considering the defendant's arguments as to pretext. *Id*. The 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, the 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 the court stated, the "[d]enial or impairment of the right to peremptory challenges has been considered a structural defect that is not reviewed for prejudice[.]" *Id*. at 39 n. 9. The Court also stated that structural errors 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.'" *Id*. at 38 (quoting *Arizona v. Fulminante*, 111 S.Ct. 1246, 1265 (1991)).

This Court's footnote in *Johnson* was dicta, but more importantly, *Johnson* was pre-*Rivera*. In *Rivera*, 129 S.Ct. at 1455, the Court plainly stated that the denial of a peremptory challenge is not structural error. Under *Rivera*, the consequences of the denial of a peremptory challenge are to be determined by each state according to its own law.

In Missouri, peremptory challenges are allowed by statute. Section 494.480.4, RSMo 2000, currently provides:

> Within such time as may be ordered by the court, the state shall announce its peremptory challenges first and the defendants thereafter. 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.

The history leading up to the enactment of § 494.480, RSMo 2000, in its current form is significant. In *State v. Schnick*, 819 S.W.2d 330, 333-34 (Mo. banc 1991), this Court held that under the statutes then in effect, the trial court erred in requiring the defendant to use a peremptory challenge to strike a juror who should have been stricken for cause. The Court then invited the legislature to consider changing the statutes so that error would not be found if the jurors who actually sit on a jury are qualified. *Id.*; *see also State v. Wacaser*, 794 S.W.2d 190 (Mo. banc 1990) (reversible error in failing to strike venire member for cause).

In *State v. Lay*, 896 S.W.2d 693, 700 (Mo. App. W.D. 1995), the Court noted that the legislature revised the statute, § 494.480, RSMo, in 1993 in the manner suggested in *Schnick*.[5] The Court stated that the statute clearly states that error may not be alleged based on a claim that the defendant was forced to utilize a peremptory strike to strike an unqualified juror. *Id.*

In *State v. Gray*, 887 S.W.2d 369, 383 (Mo. banc 1994), this Court specifically stated:

> In *State v. Schnick*, 819 S.W.2d 330, 334 (Mo. banc 1991), this Court made clear that the right to a list of qualified jurors from which to make peremptory strikes is not constitutional, but statutory. The relevant statute was amended and now provides that a potential juror's qualifications do not constitute

[5] The legislature is presumed to be aware, at the time it amends a statute, of the courts' interpretation of the prior version of the statute. *State v. Clinch*, 335 S.W.3d 579, 587 (Mo. App. W.D. 2011).

grounds for a new trial or reversal if the juror was removed by a peremptory strike and did not serve.

See also State v. Cole, 71 S.W.3d 163, 173-74 (Mo. banc 2002) (under § 494.480.4, no claim of error may be made when the venireperson is removed with a peremptory challenge).

In *Rodgers v. Jackson County Orthopedics, Inc.*, 904 S.W.2d 385, 391 (Mo. App. W.D. 1995), the Court analyzed the statutory amendments and concluded that "[i]n sum, as of 1993, the mere fact that a litigant, civil or criminal, was erroneously required to use a peremptory strike to remove a juror who should have been stricken for cause does not require grant of a new trial, so long as all 12 jurors who in fact sat on the jury were qualified."

If no error may claimed when a venireperson should have been removed for cause and the defendant had to use a peremptory strike to remove the venireperson, then similarly there is no error when the defendant is denied a peremptory strike and a qualified juror serves. As the Court stated in *Lay*, 896 S.W.2d at 700, § 494.480, RSMo, was amended so that error would not be found if the jurors who actually sit on the jury are qualified. Section 494.480, RSMo 2000, provides that the qualifications of a juror on the panel from which peremptory challenges were made by the defense shall not constitute grounds for reversal or a new trial unless such juror served upon the jury and participated in the verdict. Wiese's qualifications are not at issue, as she was not shown to be unqualified in any way. Section 494.480, RSMo 2000, provides that a remedy is available if a juror should have been struck for cause and a defendant has used all of his peremptory strikes. Under the statute, the qualifications of a juror on the panel from which peremptory challenges by the defense are made may constitute

a ground for the granting of a motion for new trial or the reversal of a conviction or sentence if the juror actually serves on the jury and participates in the verdict, but automatic reversal is not required. In *In the Matter of the Care and Treatment of Wadleigh*, 145 S.W.3d 434, 441 (Mo. App. W.D. 2004), the Court noted that "the loss of a peremptory strike does not automatically violate the right to an impartial jury because such challenges are not constitutionally required." Similarly, leading commentators also agree that the "better rule" is that erroneous denial of a peremptory challenge is harmless "so long as the jury that actually sits is impartial." 7 Wayne R. LaFave, et al., *Criminal Procedure* § 27.6(b) at 103 n. 21 (3rd ed. 2007); *see also* William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 Am. Crim. L. Rev. 1391, 1431-32 (2001) (even under pre-*Rivera* analysis, error is harmless when no demonstrably biased juror sits on the jury).

In a similar situation involving the use of peremptory challenges in a civil case, this Court held that the erroneous denial of the right to a peremptory challenge was subject to a prejudice inquiry. In *Carter v. Tom's Truck Repair, Inc.*, 857 S.W.2d 172, 177-78 (Mo. banc 1993), this Court construed § 494.480.1, RSMo Supp. 1992, which provided that when there are multiple plaintiffs or defendants in a civil case, the trial court "in its discretion may allocate the allowable peremptory challenges among the parties plaintiff or defendant upon good cause shown and as the ends of justice require." In that case, an automobile accident victim sued a truck driver, the trucking company, and Tom's Truck Repair, which had performed work on the truck, asserting that Tom's was negligent in inspecting, testing and repairing the truck brakes. *Id*. at 174. There the trial court gave the plaintiff four strikes and Tom's, which this Court described as "the only true defendant," only two strikes. *Id*. at 177.

This Court stated that "the ends of justice" required that the allocation be made according to the parties' true interest, thus Tom's should have been awarded the defendants' full complement of three strikes. *Id*. This Court stated that "a judgment will not be reversed unless the error in awarding peremptory challenges to a litigant, or to multiple litigants having the same interest, is shown to be prejudicial." *Id*. The Court stated that "[i]n order to prove the existence of prejudice, the complaining party must show that it exhausted its peremptory challenges and that a prospective juror, who the challenging party would have otherwise stricken, served on the jury." *Id*. The Court noted that, from its review of the record in the case, Tom's did not disclose which prospective juror it would have struck had it been allocated three strikes instead of two, nor was there any indication that Tom's would have challenged someone other than the person struck by Consolidated, or that it had any objection to any of the jurors who actually served. *Id*. Further, there was "no claim or suggestion from the record that any of the jurors selected was prejudiced to the extent that he or she should have been removed for cause." *Id*. The Court held that, "[i]n sum, absent a clear demonstration of prejudice, the trial court's error in failing to allocate all three defense strikes to Tom's does not justify reversal." *Id*.

Carter was a civil case and is dissimilar to the present case as to the circumstances surrounding the denial of the right to exercise a peremptory strike. However, the right to exercise a peremptory challenge in a civil case is statutory, as it is in a criminal case, thus the case is illustrative of a line of reasoning that this Court has followed in examining the denial of the exercise of the statutory right to a peremptory challenge. In that case, the Court clearly stated that reversal was not justified, absent a clear demonstration of prejudice. *Id*.

In summary, if error may not be alleged based on a claim that the defendant was forced to utilize a peremptory strike to strike an unqualified juror, *Lay*, 896 S.W.2d at 700, there is similarly no error when the defendant is denied a peremptory strike and a qualified juror serves. Here, Appellant has raised no issue as to Wiese's qualifications and she was not shown to be unqualified in any way. Further, in an analogous situation in a civil case, this Court held that the erroneous denial of the right to a peremptory challenge was subject to a prejudice inquiry, *Carter*, 857 S.W.2d at 177, which, as explained in more detail below, is akin to harmless error review.

b. Harmless error analysis.

The doctrine of harmless error was considered to be "well settled in this state" as early as 1927. *Cloos v. Prussman*, 300 S.W. 315, 315 (K.C. Ct. App. 1927). In *State v. Degraffenreid*, 477 S.W.2d 57, 64-65 (Mo. banc 1972), this Court stated the guiding principle of harmless error review: "[a]n error which in a close case might call for reversal may be disregarded as harmless when the evidence of guilt is strong." Harmless error analysis is a prejudice inquiry: in the absence of any indication of prejudice to the defendant, error is deemed harmless error, not warranting reversal. *State v. Murray*, 630 S.W.2d 577, 580 (Mo. banc 1982).

In *State v. Whitfield*, 107 S.W.3d 253, 260 (Mo. banc 2003), this Court quoted the United States Supreme Court's observation in *Clemons v. Mississippi*, 110 S.Ct. 1441, 1451, 725 (1990), that "[i]n some situations, a state appellate court may conclude that peculiarities in a case make appellate ... harmless error analysis extremely speculative or impossible." This is not such a case. In *State v. Goucher*, 111 S.W.3d 915, 918 (Mo. App. S.D. 2003),

the defendant claimed that the failure to instruct the jury that its verdict must be unanimous resulted in a structural defect in the trial requiring automatic reversal. The Court noted that under federal case law cited by the defendant, such as *Sullivan v. Louisiana*, 113 S.Ct. 2078, 2080–82 (1993); *Arizona v. Fulminante*, 111 S.Ct. 1246, 1264–65 (1991); and *Chapman v. California*, 87 S.Ct. 824, 826–27 (1967), the structural defects or errors found therein required automatic reversal only when they violated rights guaranteed by the U.S. Constitution. Thus, under Missouri law, automatic reversal is not required when, as here, there is no constitutional violation.

Indeed, even errors of constitutional proportions do not necessarily require reversal if the Court determines that the error was harmless beyond a reasonable doubt. *State v. Davidson*, 242 S.W.3d 409, 417 (Mo. App. E.D. 2007). In *Davidson*, *id*., the Eastern District quoted the United States Supreme Court's decision in *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 1436 (1986):

> Since *Chapman* [87 S.Ct. 824], we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

(citations omitted); *see also State v. Greer*, 159 S.W.3d 451, 462 (Mo. App. E.D. 2005). If harmless error analysis applies to errors of constitutional proportions, then it should also apply to the denial of a statutory right. As harmless error analysis is a well-settled standard in Missouri criminal cases, *see Degraffenreid*, 477 S.W.2d at 64-65, the denial of the right to a peremptory challenge in Missouri should be subjected to harmless error analysis. Error is harmless when the defendant's guilt or innocence is determined by a panel of qualified jurors. The defendant may be prejudiced if an unqualified juror sits on the panel.

4. Appellant was not prejudiced by Wiese's presence on the jury.

In the present case, even assuming *arguendo* that the trial court erroneously denied Appellant's peremptory challenge, there is no reason to reverse and remand for a new trial, as Wiese was a qualified juror who was not shown to be biased or partial in any way. Even though her age or a hunch may have been race-neutral reasons to exercise a peremptory challenge removing her from the jury, Appellant suffered no prejudice from having her on the jury panel, as she was a qualified juror.

In a number of cases involving claims of ineffective assistance of counsel, this Court and others have stated that a defendant has a right to a panel of qualified jurors, and is not entitled to his favorite jurors among those who were qualified. *Middleton v. State*, 103 S.W.3d 726, 736 (Mo. banc 2003); *Hightower v. State*, 43 S.W.3d 472, 477 (Mo. App. S.D. 2001); *Ham v. State*, 7 S.W.3d 433, 439 (Mo. App. W.D. 1999). Therefore, in such cases, this Court and others have held that the defendant was not prejudiced by counsel's decision to leave a panel member on the jury. In *Ham*, 7 S.W.3d at 439, the Western District noted that a panel of qualified jurors is one that is free from bias and partiality, and "[u]nder

Section 494.480.4, . . . an unqualified juror must sit in judgment of the defendant on the jury for prejudice to result." *Id*.

Wiese was not an unqualified juror. Appellant cannot show that Wiese would have been biased and partial in any way, thus he was not prejudiced. Further, because Wiese remained on the jury, there was no purposeful discrimination on the part of the State or the defendant, which is the evil that *Batson* and *McCollum* sought to prevent. *Batson*, 106 S.Ct. at 1716-25; *McCollum*, 112 S.Ct. at 2353-54. *McCollum*, 112 S.Ct. at 2353-54, arose in the context of the denial of the State of Georgia's motion to require the defendants to articulate a racially neutral explanation for peremptory challenges, even though the State had contended that counsel for the defendants had manifested a clear intention to use peremptory strikes in a racially discriminatory manner. In the present case, the trial court engaged in a zealous effort to thwart the evil of racial discrimination in jury selection.

In the Illinois Supreme Court's decision in *People v. Rivera*, 879 N.E.2d 876, 888-91 (Ill. 2007), which the United States Supreme Court affirmed, 129 S.Ct. 1446, the Court gave careful consideration to the overwhelming evidence adduced against Rivera, who was convicted of murder in the first degree. The Court thus held that the error in denying the defendant's peremptory challenge was harmless beyond a reasonable doubt. *Rivera*, 879 N.E.2d at 891.

Further, though the United States Supreme Court's opinion in *Rivera*, 129 S.Ct. at 1453-54, plainly allows the states to determine the effect of the mistaken denial of a peremptory challenge as a matter of state law, the Court certainly expressed some intimations on the subject, stating that the states "may conclude, as the Supreme Court of

Illinois did here, that the improper seating of a competent and unbiased juror does not convert the jury into an ultra vires tribunal[.]" *Id*. at 1456. The Court continued: "In sum, Rivera received precisely what due process required: a fair trial before an impartial and properly instructed jury, which found him guilty of every element of the charged offense." *Id*. Appellant, like Rivera, also received a fair trial before an impartial and properly instructed jury.

Additionally, as in *Rivera*, the evidence against Appellant in the present case was overwhelming. In *Degraffenreid*, 477 S.W.2d at 64-65, this Court stated: "[a]n error which in a close case might call for reversal may be disregarded as harmless when the evidence of guilt is strong." Thus, the guilt-based rule of harmless error review is established by Missouri case law. This Court reviews the evidence in the light most favorable to the jury's verdict. *State v. Taylor*, 298 S.W.3d 482, 491 (Mo. banc 2009). Here there is no dispute that Appellant inflicted thirteen knife wounds upon Ibrahemi at various locations on his body (Tr. 411-25). The injuries were serious, necessitating surgeries, placement on a respirator, and five days of hospitalization (Tr. 292-94, 302). Appellant claimed self-defense (Tr. 411-25). However, the credibility and the weight given trial testimony of witnesses is determined by the trier of fact. *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988). The jury, presented with evidence of serious injuries from thirteen knife wounds across various portions of Ibrahemi's body, obviously found that Appellant's claim of self defense was not credible (L.F. 109-10).[6]

[6] Appellant's challenge to the sufficiency of the evidence is addressed in Point IV.

In summary, the evidence of Appellant's guilt was overwhelming, and even assuming for purposes of argument that the trial court erroneously denied Appellant's peremptory challenge as to Wiese, this cannot be shown to have affected the verdict in any way, as Wiese was a qualified juror who stated that she could be fair and impartial and follow the law (Tr. 152). At worst, the trial court engaged in an overly zealous effort to thwart the type of racial discrimination that the United States Supreme Court found impermissible in *McCollum*, 112 S.Ct. at 2353-54. Appellant was not prejudiced, and any error on the part of the trial court was harmless error.

5. An erroneous denial of a defendant's right to exercise a peremptory challenge does not violate the Missouri Constitution.

Mo. Const. art. 1, §18 provides a defendant in a criminal prosecution the right to "a speedy public trial by an impartial jury of the county." For the same reasons that the erroneous denial of a peremptory challenge is not structural error for purposes of federal constitutional analysis, it is not error under the Missouri constitution either. As already discussed, Appellant received a trial by a fair and impartial jury. Assuming *arguendo* that the denial of the peremptory challenge was erroneous, it did not violate Mo. Const. art. 1, § 18.

Appellant cites Mo. Const. art. I, § 14, which provides "[t]hat the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Appellant thus argues *ubi jus, ibi remedium* ("where there is a right, there is a remedy"). However, because Appellant failed to raise any constitutional issue under Mo.

Const. art. I, § 14 at trial (Tr. 181-82; L.F. 114-22), it may not be brought before this Court. "To preserve a constitutional claim for appeal, the claim must have been raised at the earliest opportunity and preserved at each step of the judicial process." *State v. Rogers*, 95 S.W.3d 181, 185 (Mo. App. W.D. 2003). Specifically, a party must: (1) raise the constitutional issue at the first available opportunity; (2) specifically designate the constitutional provision claimed to have been violated by express reference to the article and section of the constitution or by quoting the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review. *Id*. Appellant failed to timely raise this constitutional issue at trial and preserve it for review.[7]

6. Conclusion.

The trial court did not err in sustaining the State's reverse-*Batson* challenge, but if the Court should find error in sustaining the reverse-*Batson* challenge, such error was harmless, and Appellant was not prejudiced. After *Rivera*, 129 S.Ct. at 1455, the erroneous grant of a

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[7] Even if this constitutional claim had been raised at trial and preserved for review, the claim would fail. Mo. Const. art. I, § 14 "was never intended to create rights, but merely to protect citizens in enforcing rights recognized by the law, without discrimination." *Schulte v. Missionaries of La Salette Corp. of Mo.*, 352 S.W.2d 636, 641 (Mo. 1961). As already stated, the harmless error rule is well-settled in Missouri law. *Cloos*, 300 S.W. at 315. There is no legal authority in Missouri for refusing to apply the harmless error rule on the basis of Mo. Const. art. I, § 14. If Mo. Const. art. I, § 14 could be invoked every time a trial court made an error, the harmless error rule would never apply at all.

reverse-*Batson* challenge is not structural error, and the approach adopted by the Oklahoma court in *Robinson*, 2011 WL 154653, and the Ninth Circuit in *Lindsey*, 634 F.3d at 548-51, is not only appropriate, but consistent with Missouri precedent. Thus, here, where the trial court merely attempted in good faith to eliminate discrimination, and where Appellant was tried before a fair and impartial jury, any error in granting the State's reverse-*Batson* challenge was harmless beyond a reasonable doubt. All of the relevant interests under *McCollum*—the venireperson's right to be protected from discrimination, the defendant's right to a fair trial, and the community's interest in a fair administration of justice, free of racial discrimination—have been protected. Here, where the alleged error is the denial of a statutory right, but the end result was a trial before a panel of impartial, qualified jurors, the proposed remedy of granting a new trial would be grossly disproportionate to the magnitude of the alleged error.

Appellant's point should be denied.

II. (prosecutorial misconduct)

The trial court did not err in denying Appellant's motion to dismiss and denying Appellant's motion for judgment of acquittal, as allegations of prosecutorial misconduct during the voir dire in February 2009 are not cognizable in this appeal because the trial court granted a mistrial, and further, the Assistant Circuit Attorney engaged in no misconduct during the February 2009 voir dire or the June 2010 trial.

Appellant argues that the Assistant Circuit Attorney engaged in prosecutorial misconduct during voir dire in February 2009, and that the Assistant Circuit Attorney also engaged in prosecutorial misconduct during the June 2010 trial.

Because the trial court granted a mistrial in February 2009 (February 2009 Tr. 121), allegations of prosecutorial misconduct arising from the February 2009 voir dire are not cognizable in this appeal. Further, Appellant's point is without merit because the Assistant Circuit Attorney engaged in no misconduct during the February 2009 voir dire or the June 2010 trial.

A. Additional facts.

On June 15, 2010, Appellant filed a motion to dismiss in this case, alleging that the Assistant Circuit Attorney's misconduct in the February 2009 voir dire resulted in a mistrial (L.F. 97-98). The trial court took the motion with the case (Tr. 27), and an express ruling on the motion is not found in the record.

On June 15, 2010, Appellant also filed a motion in limine to prevent the Assistant Circuit Attorney from inquiring as to certain subject matter on voir dire during the June 2010 trial (L.F. 99-101). The motion was based on questioning from the February 2009 voir dire,

which Appellant asserted was improper (L.F. 99-101). The trial court took the motion with the case and stated that its ruling would depend on how the questions came up during voir dire (Tr. 19-20).

B. Preservation and the standard of review.

Appellant's allegations of prosecutorial misconduct from the February 2009 voir dire were raised in Appellant's motion to dismiss (L.F. 97-98) and in his motion for new trial (L.F. 115). As further argued herein, the trial court granted a mistrial in February 2009 and no remedy on appeal is available. However, if the claim is deemed to be reviewable, the nature and extent of the questions counsel may ask on voir dire are discretionary with the trial court, and its rulings are reviewed for abuse of discretion. *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1998). Likewise, this Court reviews a circuit court's ruling on a motion to dismiss for an abuse of discretion. *State v. Burns*, 112 S.W.3d 451, 454 (Mo. App. W.D. 2003).

Because Appellant did not object to the voir dire questions when they were asked during the June 2010 trial, Appellant failed to preserve that issue for appeal. *Berra v. Danter*, 299 S.W.3d 690, 695 (Mo. App. E.D. 2009). Appellant's motion for new trial did not raise any allegations of prosecutorial misconduct in voir dire during the June 2010 trial either (L.F. 114-22), thus Appellant has failed to preserve that issue for appellate review. Supreme Court Rule 29.11(d).

Further, Appellant failed to object to the State's opening statement or closing argument during the June 2010 trial, and thus failed to preserve that issue for review. *See State v. Wolf*, 326 S.W.3d 905, 907 (Mo. App. S.D. 2010).

Therefore, the allegations of prosecutorial misconduct from the June 2010 trial are subject to plain error analysis. Supreme Court Rule 30.20 provides that an appellate court may, in its discretion, review plain errors affecting substantial rights when the court finds that a manifest injustice or miscarriage of justice has resulted. Whether or not plain error has occurred is determined by reviewing the circumstances of each case. *State v. Millsap*, 244 S.W.3d 786, 789 (Mo. App. S.D. 2008).

An appellate court has the discretionary authority to review for plain error affecting a defendant's substantial rights "when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Supreme Court Rule 30.20; *State v. Carney*, 195 S.W.3d 567, 570 (Mo. App. S.D. 2006). Plain error review is utilized sparingly, and a defendant seeking such review bears the burden of showing that plain error has occurred. *State v. Lloyd*, 205 S.W.3d 893, 906-07 (Mo. App. S.D. 2006). "Review for plain error involves a two-step process." *State v. Baumruk*, 280 S.W.3d 600, 607-08 (Mo. banc 2009). "The first step requires a determination of whether the claim of error "facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted.'" *Id*. (*quoting State v. Brown*, 902 S.W.2d 278, 284 (Mo. banc 1995) (internal citation omitted). "All prejudicial error, however, is not plain error, and '[p]lain errors are those which are evident, obvious, and clear.'" *Id*. (*quoting State v. Scurlock*, 998 S.W.2d 578, 586 (Mo. App.W.D. 1999) (internal citation omitted)). "If plain error is found, the court then must proceed to the second step and determine 'whether the claimed error resulted in manifest injustice or a miscarriage of justice.'" *Id*. (*quoting Scurlock*, 998 S.W.2d at 586).

C. The trial court did not err in denying Appellant's motion to dismiss and motion for judgment of acquittal, as allegations of prosecutorial misconduct during the voir dire in February 2009 are now irrelevant because the trial court granted a mistrial, and further, the Assistant Circuit Attorney engaged in no misconduct during the February 2009 voir dire or the June 2010 trial.

An allegation of prosecutorial misconduct is a serious charge that is not treated lightly. *State v. Reed*, 334 S.W.3d 619, 625 (Mo. App. E.D. 2011). Any alleged misconduct, standing alone, does not warrant reversal of an otherwise valid conviction. *State v. Brown*, 246 S.W.3d 519, 532 (Mo. App. S.D. 2008). Even conduct that is "undesirable or even universally condemned" does not warrant reversal unless it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id*. The Missouri Supreme Court has held that "[m]isconduct means transgression, dereliction, unlawful, or wrongful behavior, or impropriety that is willful in nature." *In re Conard*, 944 S.W.2d 191, 201 (Mo. banc 1997).

"In situations involving prosecutorial misconduct, the test is the fairness of the trial, not the culpability of the prosecutor." *State v. Forrest*, 183 S.W.3d 218, 227 (Mo. banc 2006). "Where prosecutorial misconduct is alleged, the erroneous action must rise to the level of 'substantial prejudice' in order to justify reversal." *Id*. "The test for 'substantial prejudice' is whether the misconduct substantially swayed the judgment." *Id*.

1. Allegations of prosecutorial misconduct from voir dire in February 2009 are not cognizable in this appeal.

Appellant argues that prosecutorial misconduct from the February 2009 trial may be remedied through the current appeal. Appellant argues that the issue was unripe for review until judgment and sentence were entered in the June 2010 trial.

A mistrial is generally defined as "a trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings." *City of Portage Des Sioux v. Lambert*, 196 S.W.3d 587, 591 (Mo. App. E.D. 2006). It is true that the grant of a mistrial is not a final, appealable order. *Id*.; § 512.020, RSMo 2000. However, this does not mean that issues arising from voir dire in February 2009 were properly raised in this appeal. The trial court declared a mistrial in February 2009 (February 2009 Tr. 121), and no further remedy is necessary for any error that possibly may have occurred in that proceeding.

In *Helton Constr. Co. v. Thrift*, 865 S.W.2d 419, 420 (Mo. App. S.D. 1993), the first judge assigned to the case disqualified himself and declared a mistrial, and the cause proceeded to trial before another judge. There, on appeal, the appellants sought review of the first judge's declaration of a mistrial. *Id*. at 422. There the Court recognized that an order declaring a mistrial is not an appealable order, and stated that the defendants could have challenged, by way of a mandamus proceeding, the order granting a mistrial, but by failing to seek such relief, the defendants waived their right, if any, to challenge the judge's order of a mistrial and self-disqualification. *Id*. at 422-23; *see also Rogers v. Bond*, 839 S.W.2d 292, 293 (Mo. banc 1992) ("[t]he retrial of the case before an appeal is taken waives

any error that could have been alleged at that time. It is too late to complain after the trial produces a different result").

A claim of error resulting in granting a mistrial might properly be claimed on appeal in a situation such as where the defendant is retried and convicted and raises a double jeopardy claim on appeal, *State v. Fassero*, 256 S.W.3d 109 (Mo. banc 2008), but that is not the case here, as Appellant has raised no such claim. In the present case, the trial court's granting of a mistrial cured any error that could have arisen during voir dire, and the granting of a mistrial served as a full and adequate remedy for any alleged errors. Appellant waived his right to challenge any alleged error arising from the February 2009 voir dire. *Helton*, 865 S.W.2d at 420.

2. Even if Appellant's claim of prosecutorial misconduct involving the February 2009 voir dire were cognizable in this appeal, the Assistant Circuit Attorney engaged in no misconduct.

Appellant raises numerous complaints regarding the February 2009 voir dire. Appellant argues that the Assistant Circuit Attorney intentionally disqualified the jury panel. Such an allegation would be serious if it were true. However, Appellant's claim finds no support in the record.

"The purpose of voir dire is to discover bias or prejudice in order to select a fair and impartial jury." *Jones v. State*, 197 S.W.3d 227, 232 (Mo. App. W.D. 2006). Trial courts may exclude questions that misstate the law, arguably seek commitments from the jury panel, or confuse or mislead the venire members. *Id*. Counsel is not permitted to try the case on voir dire nor is voir dire an appropriate occasion for argument. *Id*. A trial judge is

vested with discretion to judge the appropriateness of specific questions and has wide discretion in the conduct of voir dire. *Baumruk*, 280 S.W.3d 600. "The questioning of juries about their qualifications is conducted under the supervision of the trial court, and the nature and extent of the questions counsel may ask are discretionary with the court." *State v. Timmons*, 956 S.W.2d 277, 281 (Mo. App. W.D. 1997). Courts "may exclude questions which are open-ended inquiries into a venire member's beliefs, misstate the law, arguably seek commitments from the jury panel, or confuse or mislead the venire members." *Id.* at 282.

Voir dire requires "the revelation of some portion of the facts of the case." *Clark*, 981 S.W.2d at 147. "An insufficient description of the facts jeopardizes appellant's right to an impartial jury." *Id*. Therefore, some inquiry into the critical facts of the case is essential to a defendant's right to search for bias and prejudice in the jury who will determine guilt and mete out punishment. *Id*. When ruling on the propriety of a particular question, the trial court must consider the question within the context of the case. *Id*. at 146. Most importantly, counsel may not try the case on voir dire. *Id*. For example, argument or "a presentation of the facts in explicit detail" during voir dire is inappropriate. *Id*. Similarly, counsel may not attempt to elicit a commitment from jurors how they would react to hypothetical facts. *Id*. "[W]hen the inquiry includes questions phrased or framed in such manner that they require the one answering to speculate on his own reaction to such an extent that he tends to feel obligated to react in that manner, prejudice can be created. The limitation is not as to the information sought but in the manner of asking." *Id*. "Soliciting responses on the specific facts or circumstances of a case is improper when it appears

calculated to predispose jurors to react to anticipated evidence in a particular way or to commit to a certain outcome." *In the Matter of the Care and Treatment of Wolfe*, 291 S.W.3d 829, 833 (Mo. App. W.D. 2009).

Appellant argues that the Assistant Circuit Attorney engaged in misconduct by asking questions of the venire panel as to whether they would require more than just testimonial evidence; whether they would need to hear from every single witness involved, and not just the victim or the victim and the defendant; whether the prospective jury members would require DNA evidence, fingerprints, or a weapon in order to convict the defendant of a crime; whether the venirepersons would require her to prove every single detail of a crime, such as what type of alcoholic beverage the defendant was drinking in a hypothetical DWI case; and whether they could convict someone without having police reports (February 2009 Tr. 26-27, 51-54, 60-65, 67-81, 91).[8]

Missouri appellate courts have rejected similar claims. In *State v. McCain*, 845 S.W.2d 99, 101 (Mo. App. E.D. 1993), the Court held that the trial court did not abuse its discretion in allowing the prosecutor to ask during voir dire whether the jurors would be able to make a decision on guilt or innocence based on testimonial evidence alone in the event that no physical evidence was presented. The Court stated that "it is necessary for the prosecutor to establish exactly what the potential jurors associate with the prosecutor's burden of proof." *Id*.

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[8] Defense counsel raised a number of objections to these lines of questioning during voir dire (February 2009 Tr. 49-51, 63-64, 70, 72, 78, 91).

In *State v. Jolliff*, 867 S.W.2d 256, 260 (Mo. App. E.D. 1993), the prosecutor asked whether the venirepersons anticipated or would require more than just one witness' testimony or a certain type of evidence to convict, or if they had a preconceived idea of what a murderer looks like. There the defendant claimed that such questions, in effect, asked the jury to return a verdict of guilty should the state's evidence develop as set forth by the prosecutor. *Id.* The Court found no abuse of discretion in allowing the questions, holding that the State's questions "were all in the form of whether the venire members thought certain procedures were fair, and if they had preconceived ideas that would prevent them from following the law." *Id.* The Court further stated that "[t]he state could have directly asked the venire whether they could find a defendant guilty if they believed the testimony of a single eye witness. A question in that form would not commit any juror to a course of conduct." *Id.*

In *State v. Crew*, 803 S.W.2d 669, 670 (Mo. App. E.D. 1991), the prosecutor explained to the venire that the state may bring in one witness to provide the facts which the State had to prove. The prosecutor then stated that it should not matter how many witnesses the State brought in, but only that the State prove the elements of the crime. *Id.* The Court found no abuse of discretion and no prejudice in overruling an objection that the questioning attempted to commit a venire person to a course of conduct, as the statements of the prosecutor were intended to determine whether any venire person had a preconceived prejudice against deciding the issues on the merits based solely on the testimony of a single eye witness, which the Court determined to be proper, and further, no venire person ever answered the various questions interspersed in the comments of the prosecutor. *Id.*

Therefore, the Assistant Circuit Attorney's questions as to whether the veniremembers would require more than just testimonial evidence, or whether they would need to hear from more than one eyewitness, were proper, and the trial court did not abuse its discretion.

In *State v. Dunn*, 7 S.W.3d 427, 432 (Mo. App. W.D. 1999), the Court held that the trial court did not abuse its discretion in allowing the prosecutor to ask the jury panel during voir dire whether anyone there thought that DNA evidence alone could never be enough to prove the State's case. In *State v. Williams*, 291 S.W.3d 373 (Mo. App. E.D. 2009), the defendant argued that the trial court abused its discretion in allowing the State to ask the venire panel if they would require a gun in order to convict the defendant, and this Court affirmed by memorandum opinion. Therefore, the Assistant Circuit Attorney's questions as to whether the veniremembers would require DNA or a weapon in order to convict Appellant were entirely proper.

None of the Assistant Circuit Attorney's questions went to the specific facts and circumstances of this case, or sought to predispose the veniremembers to react in a particular way or to commit to a certain outcome. The questions were proper, and the trial court did not abuse its discretion.

Appellant states that the trial court found twenty-seven potential strikes for cause before defense counsel was able to begin his voir dire examination (February 2009 Tr. 120). However, in context, the trial court stated that "give or take one or two, I'm at 27 cause strikes that the Court is fairly comfortable would be struck for cause on a motion by either side depending upon the answers" (February 2009 Tr. 120). Therefore, this included potential strikes by the defense as well as by the prosecution. For example, Venireperson

Patterson admitted that she could not be fair and impartial because she would give greater credence to a police officer than to a lay witness (February 2009 Tr. 117-18).

The Assistant Circuit Attorney's questions were proper, and certainly do not rise to the level of intentional wrongdoing. *In re Conard*, 944 S.W.2d at 201.

Appellant contends that the Assistant Circuit Attorney erroneously shifted the burden of proof to the defendant, that defense counsel objected to the statement, causing the Assistant Circuit Attorney to rephrase her response, and that the trial judge neither ruled on the matter nor instructed the jury to disregard the statements. Appellant's allegation is misleading in that the Assistant Circuit Attorney only made one statement regarding the burden, rather than multiple statements, and defense counsel did not raise a formal objection. Placed in context, the following exchange occurred:

> VENIREPERSON HELVEY: Yeah, I couldn't just convict somebody on the victim's testimony.
>
> MS. CARMODY: And I expect that Mr. Adler will probably talk to you about his burden, but, you know, as I said they don't—
>
> MR. ADLER: Judge, I don't have a burden.
>
> MS. CARMODY: Sorry, I did misstate that.
>
> MR. ADLER: Okay.
>
> MS. CARMODY: About the way he is going to present—
>
> VENIREPERSON SOLOMON: That's fine, but just your question, I couldn't.
>
> THE COURT: You could or could not?

VENIREPERSON SOLOMON: Could not convict somebody based on one victim's testimony.

(Tr. 80). Not only did the Assistant Circuit Attorney correct her statement as to the burden, but defense counsel expressed his acquiescence to the correction (Tr. 80). Neither misconduct nor prejudice resulted.

In summary, even if this appeal were the appropriate avenue through which to claim prosecutorial misconduct involving the February 2009 voir dire, the record does not establish that the Assistant Circuit Attorney's conduct was improper and that misconduct occurred.

3. The Assistant Circuit Attorney engaged in no misconduct during the June 2010 trial.

Appellant argues that the Assistant Circuit Attorney engaged in misconduct by giving a hypothetical during the June 2010 voir dire, in which the venire members were asked to imagine themselves as victims of a crime, and were then asked if they would need more evidence to convict beyond the victim's testimony (Tr. 76-83). Again, such questioning was proper, *Jolliff*, 867 S.W.2d at 260, and did not demonstrate any intentional wrongdoing. *In re Conard*, 944 S.W.2d at 201.

Appellant also argues that the Assistant Circuit Attorney engaged in misconduct during the June 2010 trial by repeatedly referring to Ibrahemi's injuries as "stabbings," which Appellant argues is contrary to the testimony of the State's own medical expert. In her opening statement and closing argument, the Assistant Circuit Attorney stated that Appellant "stabbed" Ibrahemi fifteen times (Tr. 197, 204, 521, 525-26). The State's medical expert, Dr. Jane Turner, an assistant medical examiner for the City of St. Louis, testified that

Ibrahemi had sharp force injuries to his body, and that there are two different types of sharp force injuries: incised wounds, which are a cutting injury, and stab wounds, which are a penetrating injury (Tr. 284, 288-89). Turner then testified that Ibrahemi had multiple incise wounds and multiple "stab" wounds (Tr. 289-99). The Assistant Circuit Attorney did not commit misconduct simply by using a less technical definition of the term "stab." All of the wounds were unquestionably inflicted with the knife, as Turner identified them as sharp force injuries (Tr. 288), and the Assistant Circuit Attorney merely referred to the common understanding of the word "stab."

Appellant also argues that the Assistant Circuit Attorney engaged in misconduct by stating in closing argument that this was not sudden passion and was not what a reasonable person would do (Tr. 526). Appellant argues that the jury was instructed to consider whether or not his act was caused by or arose out of provocation by Ibrahemi, but he argues that sudden passion does not consider the reasonableness of the actor, and instead depends on whether the defendant's actions arose out of adequate cause sufficient to substantially impair an ordinary person's capacity for self-control. However, the jury is entitled to consider whether the circumstances are "sufficient to create sudden passion in a reasonable, temperate person thereby impairing the capacity for self-control." *State v. Taylor*, 770 S.W.2d 531, 535 (Mo. App. E.D. 1989); *see also State v. Cheek*, 413 S.W.2d 231, 238 (Mo. 1967) (jury to consider whether defendant acted in sudden passion, on a reasonable provocation).

Additionally, in a claim of self-defense, the reasonableness of the defendant's actions *is* at issue; in order to claim self-defense, the defendant: (1) must not have provoked the assault; (2) must have reasonable grounds for believing he faced immediate danger of serious

bodily injury; (3) must not use more force than what appears reasonably necessary; and (4) must do everything in his power consistent with his own safety to avoid the danger and retreat if possible. *State v. Dulaney*, 989 S.W.2d 648, 651 (Mo. App. W.D. 1999); Section 563.031, RSMo 2000. In arguing that Appellant's actions were not reasonable, the Assistant Circuit Attorney was arguing that Appellant did not act in self-defense (Tr. 526).

Similarly, in *State v. Monath*, 42 S.W.3d 644, 651 (Mo. App. W.D. 2001), the Court declined to review for plain error allegations that the trial court erred in failing to declare a mistrial, sua sponte, because the prosecutor's closing argument misstated the facts and law, told the jury facts outside the record, and argued that defendant should be convicted for reasons "wholly irrelevant to his guilt." Appellant relies on *State v. Burnfin*, 771 S.W.2d 908, 912-13 (Mo. App. W.D. 1989), where the Court found reversible error, though not raised in the motion for new trial, when the prosecutor made personal attacks on defense counsel during closing argument. Appellant also relies on *State v. Williams*, 646 S.W.2d 107, 109-10 (Mo. banc 1983), where the Court found reversible error when the prosecutor told the jury during closing argument that it would not be sitting there unless there were enough evidence to support a guilty verdict, and the prosecutor stated that the trial court had already found that there was enough evidence to convict the defendant of all charges. Those cases are readily distinguishable, as no such egregious conduct occurred here.

Appellant also argues that the cumulative effect of the Assistant Circuit Attorney's voir dire examination during the February 2009 trial and conduct prior to and throughout the June 2010 trial resulted in prejudice, requiring reversal of his convictions. However, nothing that occurred in February 2009 could have affected the jurors who served in June 2010.

In any event, as previously discussed, there was no prosecutorial misconduct. The present case is similar to *State v. Cook*, 5 S.W.3d 572, 578 (Mo. App. W.D. 1999), where the Court noted that the defendant listed a number of unrelated incidents, many not objected to at trial, and the defendant endeavored to bundle the averred errors into an argument that, cumulatively, they amounted to prosecutorial misconduct. *Id*. The Court noted that none of the alleged errors amounted to prosecutorial misconduct and none constituted reversible error. *Id*. The Court further noted that the appellate courts have repeatedly rejected such contentions, as cumulative non-errors do not add up to error. *Id*.

The same is true in the present case. Even if allegations of error from the February 2009 proceeding were cognizable here, there was no misconduct during either the February 2009 proceeding or the June 2010 trial, and cumulative non-errors do not add up to error. *Id*.

Appellant's point should be denied.

III. (photographs)

The trial court did not err in admitting State's Exhibits 18, 20, and 21 into evidence, as the photographs were probative of Ibrahemi's injuries, and incisions caused by surgical procedures were fully explained to the jury.

Appellant argues that the admission of photographs of Ibrahemi's injuries after exploratory surgery were inflammatory and prejudicial and lacked probative value as to the material facts at issue in this case.

However, the photographs were probative as to the nature and location of Ibrahemi's injuries, and the incisions resulting from surgery were explained to the jury. The photographs were admissible, as their probative value outweighed any prejudicial effect.

A. Additional facts.

At trial, the Assistant Circuit Attorney raised the issue of photographs, and the trial court stated that because some of the photographs were post-surgery, he would require a doctor to testify to explain the photographs (Tr. 188-91).

Dr. Jane Turner, an assistant medical examiner for the City of St. Louis, testified that State's Exhibits 18 and 19 showed Ibrahemi's abdomen and chest, and that he had an exploratory laparotomy to cut into the middle of his abdomen and examine the abdominal organs for damage (Tr. 284, 292). Turner stated that the photographs showed a long surgical incision in the middle of Ibrahemi's body, from the top of Ibrahemi's body to the bottom, and the surgical incision was closed with surgical staples (Tr. 293). Turner stated that the photographs also showed four stab wounds: one close to the surgical incision, two off to the right, and another on the left side of his abdomen near his hip (Tr. 293-94). She stated that

this was how Ibrahemi looked after he came out of surgery, with the stab wounds closed (Tr. 294).

Turner testified that State's Exhibits 20 and 21 showed three incised wounds on Ibrahemi's left arm (Tr. 298). She stated that he had exploratory surgery of the large wound on the back of his left upper arm to determine if there was injury to the nerves in that area (Tr. 298). She also stated that Ibrahemi had exploratory surgery of the wound on his left forearm close to his wrist, and there the surgeon found that the radial artery was completely cut across, thus it was ligated, or tied off (Tr. 298).

The State offered State's Exhibits 18, 20, and 21 into evidence, and the trial court stated that it would rule on their admissibility after cross-examination of Turner (Tr. 294, 300).

After cross-examination of Turner, the Assistant Circuit Attorney offered State's Exhibits 18, 19, 20, and 21 into evidence, and defense counsel stated that he objected (Tr. 338-39). The trial court stated that he would sustain the objection as to State's Exhibit 19 because State's Exhibits 18 and 19 were cumulative, but State's Exhibits 18, 20, and 21 were received into evidence (Tr. 339-40).

On re-direct examination, Turner again stated that one of the wounds shown in State's Exhibit 18 was from the surgery to explore the abdomen, but the wounds in State's Exhibits 20 and 21 were not caused by surgery (Tr. 341-42).

B. Preservation and the standard of review.

On June 16, 2010, Appellant filed a motion in limine to preclude the admission of prejudicial photographs (L.F. 4, 106).[9] However, the photographs had already been received into evidence on June 15 (Tr. 340). Defense counsel stated that he objected when the photographs were offered into evidence, but the objection was not specific (Tr. 338-39). "The [d]efendant is required to make a timely and specific objection at the time the evidence is sought to be introduced to preserve it for appellate review." *State v. Norman*, 178 S.W.3d 556, 560 (Mo. App. W.D. 2005). Further, to be sufficiently specific, the objection must "call the attention of the Court to the ground or reason for the objection[,]" which gives the court the opportunity to rule and give reasons for its decision. *State v. Sheridan*, 188 S.W.3d 55, 63 (Mo. App. E.D. 2006).

Appellant raised the admissibility of the photographs in his motion for new trial (L.F. 117).

Because Appellant failed to raise a timely and specific objection when the photographs were offered into evidence, this issue is subject to plain error analysis. Plain error review involves a two-step process. *Lloyd*, 205 S.W.3d at 906-07. First, the Court determines whether the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted. *Id*. "Plain errors are evident, obvious, and clear," and the Court determines whether such errors exist based on the facts and circumstances of each case. *Id*. For a defendant to carry his burden of establishing

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[9] Only the first page of the motion is included in the legal file (L.F. 106).

facial plain error, he must show that the alleged error had a decisive effect on the jury's verdict. *Id*. Absent a finding of facial plain error, this Court should decline its discretion to review the claim. *Id*. If plain error is found, the Court proceeds to the second step to consider whether the error actually resulted in manifest injustice or a miscarriage of justice. *Id*.

In cases of preserved error, "[a] trial court has broad discretion in the admission of photographs, and its decision will not be overturned absent an abuse of discretion." *State v. Dorsey*, 318 S.W.3d 648, 657 (Mo. banc 2010). An abuse of discretion occurs when the trial court's decision is clearly against the logic of the circumstances and "is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *State v. Rowan*, 201 S.W.3d 82, 84 (Mo. App. E.D. 2006). In addition, in matters concerning the admission of evidence, this Court reviews for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *Id*.

C. The trial court did not err in admitting State's Exhibits 18, 20, and 21 into evidence, as their probative value outweighed any prejudicial effect.

"Generally, gruesome photographs are admissible if they: (1) show the nature and location of wounds; (2) enable jurors to better understand the testimony at trial; and (3) aid in establishing an element of the State's case." *State v. Johnson*, 244 S.W.3d 144, 161-62 (Mo. banc 2008). "A relevant photograph is not inadmissible because other evidence describes what is shown in the photograph or because it may be inflammatory." *State v. Hawkins*, 58 S.W.3d 12, 24 (Mo. App. E.D. 2001). Usually, if a photograph is shocking or gruesome, it is

because the crime was shocking or gruesome. *Id*. In *Hawkins*, the defendant argued that an autopsy photograph was gory, showed the results of surgery rather than the location of the wound, and was unnecessary to establish the location of the wound, but the Court held that the probative value of the evidence outweighed its prejudicial effect. *Id*. Similarly, in *State v. Finster*, 985 S.W.2d 881, 891 (Mo. App. S.D. 1999), the Court held that a photograph of a stab wound was admissible, even though it also showed a portion of the open autopsy incision. In *State v. Knese*, 985 S.W.2d 759, 768 (Mo. banc 1999), the defendant argued that the trial court erred in admitting graphic videotape footage and photos of the crime scene, in admitting autopsy photos, and in allowing various witnesses to refer to these exhibits while testifying. The defendant's objection was primarily to the repeated presentation of this material to the jury, but the Court noted that the trial court had excluded several photographs of the victim that it deemed duplicative. *Id*. at 769. Similarly, in the present case, the trial court excluded a photograph that would have been cumulative (Tr. 339-40).

Appellant acknowledges *State v. Wintjen*, 522 S.W.2d 628 (Mo. App. Sprfld. Dist. 1975), but argues that it is distinguishable. In that case, the Court held that post-surgery photographs of the victim's stab wounds were admissible. *Id*. at 629-30. The Court stated that the State's theory was that the victim had been stabbed with a ballpoint pen or a metal wire, and the pictures would influence whether the jury believed the State's theory. *Id*. at 629. Appellant argues that the present case is distinguishable because the facts of Ibrahemi's injuries and their seriousness are not in contention, but in *Wintjen* the State needed to prove that instruments that were not inherently dangerous could be used to commit assault with intent to kill with malice aforethought. *Id*. However, in *Wintjen*, the Court rejected the

defendant's argument that the photographs were repetitious of the fact that the victim had been stabbed and served only to inflame the jury. *Id*. Appellant's construction of *Wintjen* is overly narrow and is not in accord with the present state of the law. *E.g.*, *Hawkins*, 58 S.W.2d at 24; *Finster*, 985 S.W.2d at 891. In *State v. Branscomb*, 638 S.W.2d 306, 307 (Mo. App. E.D. 1982), the Court rejected the defendant's contention that the trial court erred in admitting into evidence the bloody shirt and jacket with bullet holes worn by the victim at the time of the assault, after the defendant's attorney had made a judicial admission that the victim had been shot twice in the back. There the Court stated that "the holes in the back of the shirt and jacket corroborated the testimony of the victim and the eyewitnesses and aided the jury in determining the location of the wounds[,]" and further, that since the State had the burden of proving the defendant's guilt beyond a reasonable doubt, it should not be unduly limited in the quantum of its proof. *Id*.; *see also State v. Anderson*, 306 S.W.3d 529, 538 (Mo. banc 2010).

In the present case, the photographs, though post-surgery, aided the jury in understanding the location and nature of the wounds, and their probative value outweighed any prejudicial effect. In fact, the surgical incisions, which were explained to the jury, were highly probative as to the seriousness of Ibrahemi's injuries, which the State bore the burden to prove. The trial court did not err, plainly or otherwise, in admitting State's Exhibits 18, 20, and 21.

Appellant's point should be denied.

IV. (sufficiency of the evidence)

The trial court did not err in overruling Appellant's motions for judgment of acquittal, as there was sufficient evidence that he knowingly caused serious physical injury to Ibrahemi.

Appellant argues that the evidence was insufficient to establish that he attempted to kill or knowingly caused or attempted to cause serious physical injury to Ibrahemi, and that he knowingly did so using the assistance or aid of a dangerous instrument. However, Appellant fails to properly apply the standard of review, and, accepting the evidence and inferences therefrom in the light most favorable to the verdict, there was sufficient evidence to submit to the jury that Appellant attempted to kill or knowingly caused or attempted to cause serious physical injury to Ibrahemi, and that he knowingly did so with the assistance or aid of a dangerous instrument.

A. The standard of review.

"Appellate review is limited to determining whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt." *State v. Schroeder*, 330 S.W.3d 468, 471-72 (Mo. banc 2011). "In deciding whether the evidence is sufficient to convict a defendant of a particular offense, the appellate court must consider the evidence, together with all reasonable inferences drawn therefrom, in the light most favorable to the verdict and disregard all inferences to the contrary." *State v. Biggs*, 333 S.W.3d 472, 480 (Mo. banc 2011)(*quoting State v. Sumowski*, 794 S.W.2d 643, 645 (Mo. banc 1990)). "The Court is required to take the evidence in the light most favorable to the State and to grant the State all reasonable inferences from the evidence." *Id*. The

appellate court does not reweigh the evidence. *State v. Johnson*, 316 S.W.3d 491, 495 (Mo. App. W.D. 2010).

B. The trial court did not err in overruling Appellant's motions for judgment of acquittal, as there was sufficient evidence that he knowingly caused serious physical injury to Ibrahemi.

Section 565.050.1, RSMo 2000, provides that a person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person. Section 562.016.3, RSMo 2000, provides that a person acts knowingly with respect to a result of his conduct "when he is aware that his conduct is practically certain to cause that result." A "knowing" mental state may be established by circumstantial evidence. *State v. Cartwright*, 884 S.W.2d 686, 687 (Mo. App. S.D. 1994).

Appellant states that the evidence was inconclusive as to which party was the initial aggressor, but that is not true if the evidence unfavorable to the State is disregarded. *Biggs*, 333 S.W.3d at 480. Appellant also ignores the principle that the credibility of any witness, including the complaining witness, is a matter for determination by the trier of fact. *State v. Marley*, 257 S.W.3d 198, 2000 (Mo. App. W.D. 2008). By finding Appellant guilty of assault in the first degree and armed criminal action, the jury necessarily rejected Appellant's claim of self defense (L.F. 109-10).

The seriousness of Ibrahemi's injuries is not in dispute. Ibrahemi was in the hospital for five days (Tr. 302). His injuries would have been life-threatening if he had not received medical intervention (Tr. 296, 299). The cut across the front of his neck went down to the Adam's apple and caused injury and swelling to the vocal cord (Tr. 289-90). Ibrahemi

underwent exploratory surgery on his abdomen, which left an additional incision in his abdomen (Tr. 292-94; State's Ex. 18). A chest tube had to be inserted, causing an additional incision in Ibrahemi's chest (Tr. 295; State's Ex. 16). Ibrahemi sustained fifteen cuts in total, two of which were from surgical intervention (Tr. 289-96, 298; State's Exhibits 5, 7, 14, 16, 18, 20-22). Because Ibrahemi had to be placed on a respirator, he was in a medically induced coma for three days (Tr. 302).

Based on the number and severity of the injuries on various parts of Ibrahemi's body (Tr. 289-96, 298; State's Exhibits 5, 7, 14, 16, 18, 20-22), and also Ibrahemi's testimony as to the attack, there was ample evidence from which the jury could find that Appellant attempted to kill or knowingly caused serious physical injury to Ibrahemi. Viewing the evidence in a light most favorable to the verdict, Ibrahemi was unarmed and did not provoke Appellant, yet Appellant pulled a knife and slashed his throat and neck, and Appellant continued to cut Ibrahemi even after Ibrahemi tried to get away and after he was down on the ground (Tr. 224-25, 228-30, 233, 237-38).

Appellant's point should be denied.

V. (sentencing)

The trial court did not plainly err in sentencing Appellant to concurrent fifteen-year sentences, as the sentences were within the statutory range of punishment.

Appellant contends that the trial court abused its discretion in sentencing him to one year for each stab wound. However, the concurrent sentences were within the range of punishment for the crimes of which Appellant was convicted, and Ibrahemi received thirteen wounds from Appellant, plus two incisions from the surgery necessitated by Appellant's actions (Tr. 289-96, 298; State's Exhibits 5, 7, 14, 16, 18, 20-22). Given the gravity and extent of Ibrahemi's injuries, the trial court did not abuse its discretion.

A. Additional facts.

Turner testified as to her recollection of "15 different sharp force injuries" (Tr. 289), though two of them were from surgical intervention (Tr. 289-96, 298; State's Exhibits 5, 7, 14, 16, 18, 20-22).

After the presentation of evidence at the sentencing proceeding, the trial court asked Appellant if there was anything else he would like to say, and Appellant stated that he was an innocent man and had acted in self-defense, even though he acknowledged that he was convicted by a jury of twelve people (Tr. 539-40). The trial court responded, "there's a lot of things you could have said, that is not one of them. You have just sealed the deal for me" (Tr. 540). The trial court then stated that he remembered a portion of the trial when Appellant was on the witness stand, a question was asked, and the court started to rule on it; the court stated, "you look at me, and if looks could kill I would be dead" (Tr. 540). Appellant denied that this had occurred, and the trial court recounted that he was going to tell

Appellant not to answer the question because it wasn't appropriate, but Appellant had said that he wanted to answer the question (Tr. 540). The trial court stated, "I remember 15 stab wounds, is what I remember. I'm going to give you one year for each stab wound" (Tr. 541). Thus, the trial court sentenced Appellant to fifteen years on Count I and fifteen years on Count II, to run concurrently (Tr. 541-42).

B. Preservation and the standard of review.

Because the sentencing proceeding occurred after Appellant filed his motion for new trial, any alleged errors in sentencing should have been brought to the trial court's attention during the sentencing proceeding in order to preserve them for appellate review. *State v. Cowan*, 247 S.W.3d 617, 619 (Mo. App. W.D. 2008). Appellant raised no issue as to his sentence before the trial court (Tr. 541-42), and thus failed to preserve the issue for appellate review. Plain error review involves a two-step process. *Lloyd*, 205 S.W.3d at 906-07. First, the Court determines whether the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted. *Id*. "Plain errors are evident, obvious, and clear," and the Court determines whether such errors exist based on the facts and circumstances of each case. *Id*. For a defendant to carry his burden of establishing facial plain error, he must show that the alleged error had a decisive effect on the jury's verdict. *Id*. Absent a finding of facial plain error, this Court should decline its discretion to review the claim. *Id*. If plain error is found, the Court proceeds to the second step to consider whether the error actually resulted in manifest injustice or a miscarriage of justice. *Id*.

C. The trial court did not plainly err in sentencing Appellant to concurrent fifteen-year sentences, as the sentences were within the statutory range of punishment.

"[T]he sentencing decision is wholly within the discretion of the trial judge." *State v. Baxter*, 284 S.W.3d 648, 652 (Mo. App. E.D. 2009) (quoting *Hutchison v. State*, 150 S.W.3d 292, 300 (Mo. banc 2004)). Generally, this Court does not review the discretion of the trial court in fixing sentences unless an abuse of discretion is shown by motive of partiality, prejudice or oppression, or is induced by corruption. *State v. Barnes*, 245 S.W.3d 885, 894 (Mo. App. E.D. 2008).

Appellant was convicted of the class A felony of assault in the first degree. Section 565.050.1, RSMo 2000. The authorized term of imprisonment for a class A felony is "a term of years not less than ten years and not to exceed thirty years, or life imprisonment." Section 558.011.1(1), RSMo Supp. 2009. Appellant was also convicted of the unclassified felony of armed criminal action. Section 571.015.1, RSMo 2000, provides that a person convicted of armed criminal action shall be punished by a term of imprisonment of "not less than three years[,]" and "[t]he punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon." Appellant's concurrent fifteen-year sentences were within the mid-range of punishment for the crimes committed.

Section 557.036.1, RSMo Supp. 2009, directs courts to "decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the [Appellant] and render judgment accordingly." "Substantial deference is due to the legislature's

determination of proper punishment." *State v. Mort*, 321 S.W.3d 471, 485 (Mo. App. S.D. 2010). "When the sentence imposed is within the range prescribed by statute, it cannot be judged excessive, and the consecutive effect of the sentences does not constitute cruel and unusual punishment." *Id*.

Though Appellant was not proven to have a history of violent acts, the thirteen wounds that he inflicted were severe, covered vital parts of Ibrahemi's body, caused more than one life-threatening injury, and required surgery (Tr. 289-96, 298-99; State's Exhibits 5, 7, 14, 16, 18, 20-22). Viewed with deference to the jury's verdict, the injuries were knowingly inflicted upon an unarmed man without provocation. The sentences were within the range prescribed by statute, and given the nature and circumstances of the offense, this Court should decline to exercise plain error review of the sentences.

Appellant's point should be denied.

CONCLUSION

Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

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TIMOTHY A. BLACKWELL
Assistant Attorney General
Missouri Bar No. 35443

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
tim.blackwell@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 17,144 words, excluding the cover, this certification and the appendix, as determined by Microsoft Word 2007 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 9th day of August, 2011, to:

Steven V. Stenger
1505 S. Big Bend Blvd.
St. Louis, Missouri 63117

_____

TIMOTHY A. BLACKWELL
Assistant Attorney General
Missouri Bar No. 35443
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

APPENDIX

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