

IN THE  
MISSOURI SUPREME COURT

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STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC95110
	)	
DANIEL HARTMAN,	)	
	)	
Appellant.	)	

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI  
29<sup>TH</sup> JUDICIAL CIRCUIT  
THE HONORABLE GAYLE L. CRANE, JUDGE

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APPELLANT'S SUBSTITUTE REPLY BRIEF

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## **ARGUMENT<sup>1</sup>**

### **I.**

**The trial court abused its discretion and committed reversible error in excluding the testimony of Harlin “Joel” King that his friend, JT, had admitted to shooting Jacob three times on the night in question, because the exclusion of this statement denied Daniel his right to due process of law, a fundamentally fair trial, and to present a defense, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 10 & 18(a) of the Missouri Constitution, in that JT’s statement was an admission against interest made shortly after the murder, to a close friend, and it was sufficiently reliable to be admissible hearsay, and provided a defense which, if believed, would have resulted in an acquittal of the charged offense.**

#### **JT was unavailable**

For the first time in this Court, Respondent claims that the record does not support JT’s unavailability (Resp. Brief 18-19). This issue was neither raised nor argued in the trial court below or in Respondent’s brief in the Court of Appeals. Indeed, it is a non-issue. At pages 570-571 of the trial transcript, the prosecutor and defense counsel discussed whether JT needed to be transported to the courthouse at all given that he was invoking his Fifth Amendment right not to testify. The following stipulation was put on the record:

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<sup>1</sup> Daniel replies to Point I and relies on his Substitute Brief as to Point II.

THE COURT: Anything else on the record?

MR. DALLY (Asst. PA): Bill, just so we're clear on JT you're not needing him tomorrow.

MR. FLEISCHAKER (Defense): Right. We've already agreed to stipulate that he's unavailable.

BY MR. DALLY: And I didn't know if [the Court] could give us a docket sheet that they don't have to pick him up from Barton County.

(TR 570-571).

Previously, defense counsel had noted on the record that JT was unavailable because he was going to plead the Fifth, as he had done at his deposition; and the prosecutor did not dispute the correctness of that statement (TR 104-107). In fact, the prosecutor's arguments were based on the premise that JT was unavailable (TR 347-349). Unavailability includes circumstances where the witness is, or could be, present in the courtroom but, for some legitimate reason, testimony is unavailable, such as where the witness claims the privilege against self-incrimination. *State v. Naucke*, 829 S.W.2d 445, 450-451 (Mo. banc 1992). Clearly, the record reflects that JT was unavailable, and Respondent's belated argument to the contrary must fail.

JT's confession to Harlin King was exonerating as to the conduct charged

The State charged Daniel as the principal actor in this first degree murder case. The information charged that Daniel, after deliberation, knowingly caused the death of Jacob Wages by shooting him with a handgun (LF 23). Daniel was not charged as an accomplice, nor was the jury instructed on accomplice liability. Instruction No. 5, the

verdict director for first degree murder, required the jury to find that Daniel caused the death of Jacob Wages by shooting him, that he knew such conduct was practically certain to cause Jacob's death, and that he did so after deliberation (LF 99). But in evaluating the circumstances surrounding the shooting, the jury did not get to hear that JT had confessed to shooting Jacob, and that he had fired his gun three times – which matched the physical evidence at the scene.

Testimony that JT had confessed to the shooting, and that he was alone the source of the three bullets found in Jacob's bedroom, would have exonerated Daniel under Instruction No. 5, which was not based on accomplice liability. The State's theory was that Daniel was in possession of JT's gun, that three bullets were fired from that gun, and one of the bullets killed Jacob. Without the gun being placed in Daniel's hands, as the State had charged, the State's evidence does not prove that Daniel was an accessory to *first degree* murder, as there was no evidence of a plan to kill Jacob; hence, *deliberation* on the part of the accomplices was not proven. Indeed, the evidence revealed only a plan to rob Jacob of money and drugs. There is a reasonable inference that only the shooter could have deliberated on Jacob's death, and Harlin King's testimony would have shown that the shooter was JT, and not Daniel. If JT was the shooter, there was insufficient evidence of accomplice liability for first degree murder. At the very least, it would have presented a substantial question for the jury to resolve.

The excluded evidence of JT's confession, if admitted, would have changed the entire evidentiary picture of this case. In *State v. Stewart*, 313 S.W.3d 661, 666 (Mo. banc 2010), the inculpatory statements of an unavailable witness, if true, also would not

have completely exonerated Defendant Stewart. The statements would not have proved that Stewart was not present at the scene or that he was not involved in the crime. But this Court did not find that full exoneration was the standard for admission. Both this Court and the dissenting judge in the Southern District found that, if presented to and believed by the jury, the inculpatory statements would have allowed the defendant to present an alternative theory of his innocence and would raise serious doubts about the State's theory of the case. *Id.* at 667. The evidence that someone else confessed to the crime raised substantial doubts and questions as to Stewart's role in the murder, and those questions should have been resolved by a jury. *Id.*

The same is true here. While JT's statements would not have completely eliminated the possibility of Daniel's presence at the scene, they would have presented an alternative theory of his innocence of first degree murder by placing the gun – JT's gun – in JT's hands, rather than Daniel's. Further, had the jury known that JT confessed to firing the gun three times, and that only three bullets were found in the bedroom, it may have credited the defense theory that the State's witnesses were merely replacing JT with Daniel in their testimony, in order to protect JT. JT was their best friend, brother and boyfriend; Daniel was merely an out-of-state visitor.

Respondent's reliance on *State v. Bisher*, 255 S.W.3d 29 (Mo. App. S.D. 2008), is misplaced for several reasons. First, in *Bisher*, the trial court denied the offers of proof regarding statements about what the accomplices were wearing because they were unreliable; they were not spontaneous and not made to a close acquaintance or family member shortly after the crime. *Id.* at 36. The Court of Appeals upheld that finding of

unreliability. *Id.* Further, it was clear that Defendant Bisher participated in a well-thought out plan and participated in conduct that would make him guilty of deliberating upon a first degree murder. *Id.* And finally, the defendant made several incriminating admissions about his involvement in the crime, acknowledging that he had fought with the victim over a gun and that he had shot the victim. *Id.*

The circumstances in this case stand in stark contrast to those of *Bisher, supra*. First, as the Court of Appeals found, JT's statements contained sufficient indicia of reliability under *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973). They were self-incriminatory statements, made to a close friend shortly after the crime, and were corroborated by other evidence. Further, while under one theory, the evidence may have supported Daniel's participation in a robbery, there was absolutely no evidence of a premeditated plan to kill the victim. Contrary to Respondent's assertion, Daniel's presence at the scene, even if true, would not support a conviction of first degree murder on the basis of accomplice liability.<sup>2</sup>

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<sup>2</sup> Respondent's reliance on *State v. Clemons*, 946 S.W.2d 206 (Mo. banc 1997), is misplaced. There, this Court held that Clemons was guilty of first degree murder as an accomplice because he continued to play an active role in the death-producing events – pushing the victims from a bridge - even after it became abundantly clear that the victims would be killed. *Id.* at 217. Here, even if Daniel could be placed at the scene, there was absolutely no evidence and it was entirely unclear that anyone was going to be killed.



JT's confession to King had substantial indicia of reliability

As discussed above, JT's confession to shooting Jacob three times was self-incriminatory and unquestionably against his self-interest. Whether or not King was fully convinced about the accuracy of JT's statement, he was certainly concerned enough to contact the police. And in any event, contrary to Respondent's assertion, the *Chambers* standard is not whether the close friend or acquaintance fully believed the statement.

Further, Respondent's citation to *State v. Williams*, 958 S.W. 2d 87, 91 (Mo. App. E.D. 1997), for the proposition that a declarant's subsequent denial of the allegations makes them not self-incriminatory, is inaccurate. In *Williams*, the extra-judicial statement sought to be admitted was the Defendant's brother's admission to an investigator that he possessed the weapon and drugs. The Eastern District explained that the statement was not reliable for two reasons: 1) During the course of a single interview, Defendant's brother both admitted and denied his involvement, and the statements were, therefore, not self-incriminatory; and 2) it was not made to a close friend or acquaintance shortly after the crime, but to an investigator several months after the crime, while charges were pending against the Defendant. *Id.*

Here, JT's confession to King of shooting Jacob and firing his gun three times was never repudiated to King. While JT would later deny his involvement to the police and another relative, that had no bearing on whether his statement to King, just hours after the shooting, was reliable. It also bears noting that JT admitted to his girlfriend, Brittany, that he was involved (TR 503).

Further, JT's confession to shooting Jacob and firing the gun three times in the bedroom as Jacob was getting out of bed, (TR 617-618), was corroborated by other evidence. Cody said that it was JT's idea to commit the robbery (TR 473). The .22 caliber gun belonged to JT (TR 402). Witnesses placed JT in the bedroom and that the victim was shot as he was getting out of bed (TR 405-406, 520-521). Cody had seen JT with the gun at the JT's apartment (TR 402). Three, and only three, .22 caliber bullets were found in the bedroom (TR 315, 330-331). JT also told Brittany that he was involved in the robbery (TR 503). JT told Marcus that he killed Jacob when they returned to the apartment (TR 609).

Respondent argues that no other evidence corroborates that JT had a gun in Jacob's house that night. But Respondent wholly ignores the critical fact that JT self-identified that number of times that his gun was fired, and that this was corroborated by the physical evidence at the scene. JT said that he fired three times in the bedroom as Jacob was getting out of bed, and three bullets from his gun – a .22 – were found in the bedroom, and no others. And JT confessed not only to the robbery, but to killing Jacob (TR 503, 609).

Respondent's reliance on *State v. Blackman*, 875 S.W.2d 122 (Mo. App. E.D. 1994), is misplaced. There, a generic description of a gun in Maine Woods' possession did not corroborate his statements to two strangers – Hall and Peoples – that he killed a lady police officer, whose gun had been taken. *Id.* at 141-142. First, the Court held that the statements were not reliable because Hall and Peoples were not close friends or acquaintances of Woods. *Id.* Second, the generic description of a gun in Woods'

possession did not establish that that weapon was the one taken from the victim, and so it could not corroborate Woods' statements. *Id.* The Court emphasized that no other evidence placed Woods at the scene of the crime or identified him as the perpetrator.

The exact opposite is true here. Not only did several witnesses place JT at the scene of the crime, he admitted to Brittany that he was there. Further, JT's statement that he fired as Jacob got out of bed was corroborated by witnesses who testified that Jacob was shot as he got out of bed or was getting out of bed. Finally, JT's statement that he fired three times was corroborated by the physical evidence that three bullets were found in Jacob's bedroom, and all were fired by a .22 caliber gun. Several witnesses testified that JT owned the .22 caliber gun. The corroborating evidence in this case is significant.

#### Daniel was prejudiced

Respondent's final contention is that even if JT's statements to Harlin King were admissible, that Daniel was not prejudiced by excluding them (Resp. Br. at 24). Its sole reason for claiming lack of prejudice is that Marcus testified that JT claimed to have killed Jacob when they all returned to JT's apartment after the murder (TR 609). The problem with this logic is that Marcus also testified that Daniel, Cody and Eli also claimed to have shot Jacob (TR 607-609). Marcus' testimony is not cumulative to King's purported testimony, rather, taken as a whole, it is contradictory.

But even if King's testimony and Marcus' testimony could be seen as offering similar information, this only shows that King's testimony was corroborated by other evidence and should have been admitted under *Chambers*, not that it should be excluded as cumulative. After all, defense evidence on a decisive issue in a case is always received

with doubt because of his interest in the result of the case; therefore, corroboration is critical, and corroborative testimony by a single witness can never be discounted as “merely cumulative.” *State v. Hayes*, 785 S.W.2d 661, 663 (Mo. App. W.D. 1990).

Daniel was prejudiced by the exclusion of King’s testimony regarding JT’s confession to being the shooter, and this Court must reverse and remand for a new trial.

## **CONCLUSION**

Because the trial court erred in excluding testimony that JT confessed to shooting Jacob (Point I), and because the trial court plainly erred in allowing the State to then argue to the jury that they had not heard any evidence that JT shot Jacob (Point II), this Court should reverse Daniel's convictions and remand for a new trial.

Respectfully submitted,

*/s/ Amy M. Bartholow*

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**Certificate of Compliance and Service**

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman, size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains **2,525** words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 9th day of November, 2015, electronic copies of Appellant's Substitute Reply Brief was placed for delivery through the Missouri e-Filing System to Dora Fichter, Assistant Attorney General, at Dora.Fichter@ago.mo.gov.

*/s/ Amy M. Bartholow*

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