No. SC95110

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

DANIEL D. HARTMAN,

Appellant.

Appeal from Jasper County Circuit Court
Twenty-Ninth Judicial Circuit
The Honorable Gayle L. Crane, Judge

SUBSTITUTE RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756

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

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

Appellant, Daniel Hartman, was charged in the Circuit Court of Jasper County with murder in the first degree, armed criminal action, and burglary in the first degree (L.F. 34-35). On January 28 through January 30, 2014, appellant was tried before a jury, the Honorable Gayle L. Crane presiding (Tr. 120-717). Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

On July 5, 2012, Cody Stephens visited his friend Jonathan Taylor in Jonathan's apartment in Joplin, Missouri (Tr. 390-391).[1] Jonathan lived with his girlfriend Brittany Copeland at the Ambassador's apartments (Tr. 319, 392). Appellant, Elijah, and Marcus Stephens were in Jonathan's apartment when Cody arrived (Tr. 392, 507).[2] The men drank alcohol and used drugs, including the drug "Molly" (Tr. 393-394, 510, 532). At some point, the group decided to rob Jacob Wages (the victim) (Tr. 395). Jonathan or Elijah had bought drugs from the victim in the past (Tr. 395). Jonathan called Travis

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[1] Jonathan Taylor and his brother, Elijah Taylor, have the same last name (Tr. 392). For clarity, respondent will refer to Jonathan and Elijah by their first names.

[2] To avoid confusion, respondent will refer to Cody Stephens and Marcus Stephens by their first names.

Morris, who had also bought drugs from the victim (Tr. 395). Morris said that he could get Jonathan into the victim's house to figure out who was in the house (Tr. 395).

Morris called twenty minutes later and told Jonathan that the victim and his girlfriend were asleep in the house (Tr. 395, 396). Travis Morris and Paul Pena came to Jonathan's apartment (Tr. 396). Appellant, Jonathan, Elijah, Marcus, Morris, and Pena went to the victim's house (Tr. 396, 512). Morris said that the victim had an assault rifle and that he knew karate or kickboxing (Tr. 513). The men talked about taking $5,000 and "Molly" from the victim (Tr. 513). Jonathan did not want to go to the victim's house because he knew the victim (Tr. 534). Appellant, Elijah, Marcus, and Morris went to the victim's house and knocked on the front door (Tr. 514-515). Nobody answered (Tr. 515). They went to the back door and wanted to break in, but nobody from the group wanted to kick in the door (Tr. 515). The men returned to Jonathan's apartment (Tr. 515).

Jonathan woke up Cody and made him go to the victim's house and kick in the door (Tr. 397, 516, 541). Cody, Elijah, appellant, Marcus, and Pena rode in Pena's car (Tr. 399-400). Jonathan and Morris drove in Morris's car (Tr. 399-400). The group parked in a nearby parking lot (Tr. 400). Jonathan, Elijah, Cody, appellant, and Marcus walked to the house (Tr. 400).

Appellant was armed (Tr. 402). Appellant or Cody kicked in the back door and they all went inside (Tr. 403, 517).

The victim and his girlfriend were asleep in the bedroom (Tr. 519). Appellant and Elijah woke up the victim (Tr. 404-405, 519). They told the victim to give them $5,000 and a pound of "Molly" (Tr. 519). The victim got up and stretched (Tr. 519). The victim walked toward appellant, and appellant shot him (Tr. 406, 519). Cody believed that Elijah also had a gun, but he did not know if Elijah fired (Tr. 406). Elijah testified that Marcus had a gun, but he only saw appellant shoot at the victim (Tr. 519, 544). Marcus testified that he took the victim's assault rifle (Tr. 591). Marcus stated that he walked away and that he heard six or seven gunshots (Tr. 592).

After the shooting, the group returned to Jonathan's apartment (Tr. 407). Appellant said that the murder did not matter to him and that it was "just another body" (Tr. 522). Appellant said that this was not "his first rodeo" and that he did not realize that the victim's girlfriend was there or he would have killed her as well (Tr. 522). Elijah, Cody, and Jonathan also claimed that they shot the victim (Tr. 609).

Appellant was angry because the group did not take anything from the victim's house, and he wanted the rest of the group to go back (Tr. 408). Appellant did not want to go back to the victim's house and threatened Cody and Jonathan if they refused to go (Tr. 408).

Cody, Jonathan, Elijah, and Pena went back to the victim's house (Tr. 403). Jonathan looked through the window and saw the victim still lying on the floor (Tr. 409-410). Cody, Jonathan, and Elijah went inside (Tr. 410). Jonathan and Elijah began searching the house (Tr. 410). Jonathan pulled the victim away from a dresser and started taking out drawers (Tr. 410). Elijah searched another dresser (Tr. 410). The victim's girlfriend was still sleeping (Tr. 410). Elijah searched the living room next, and Jonathan searched the dining room (Tr. 410-411). Jonathan found a black box, and said, "Let's go" (Tr. 411). Jonathan walked to Pena's house and asked Pena for a hammer (Tr. 411). He opened the box with the hammer and found a rope and a scale (Tr. 411). The group returned to Jonathan's house (Tr. 411).

Jonathan's cousin came in the morning and asked Jonathan, "Why did you kill him?" (Tr. 411-412). Jonathan denied being involved (Tr. 411-412). Cody, appellant, Elijah, and Marcus went back to Tulsa, Oklahoma (Tr. 412, 527).

Cody and Elijah pleaded guilty and testified for the state (Tr. 428, 559).

Marcus testified for the defense (Tr. 584). Marcus testified that the group used marijuana, cough syrup with codeine, and Xanax, but that no one used "Molly" (Tr. 588). Marcus admitted going to the victim's house, but claimed that he did not know anything about a plan to rob the victim (Tr. 589-592). Marcus admitted seeing appellant with a gun before and after the

murder (Tr. 592, 607). Marcus testified that he saw appellant trying to wake up the victim and that he heard six or seven shots after that (Tr. 592, 605-606). Marcus testified that he also saw Elijah with a gun (Tr. 592).

At the close of all the evidence, the jury found appellant guilty of murder in the first degree, armed criminal action, and burglary in the first degree (Tr. 717-718). After a penalty phase, the jury was unable to decide whether life without parole was a proper punishment for appellant, who was a juvenile at the time of the crime (L.F. 114-115, 125, Tr. 779-794). The court vacated appellant's conviction for murder in the first degree and entered a conviction of murder in the second degree (Tr. 794). The court also vacated the corresponding count of armed criminal action and entered a conviction of armed criminal action associated with murder in the second degree (Tr. 794). After hearing additional evidence and deliberating further, the jury recommended life sentences for murder and armed criminal action, and a fifteen-year sentence for burglary (Tr. 797-783). The court sentenced appellant accordingly, and ordered the sentences to run concurrently to each other (L.F. 145-146).

On June 3, 2015, the Court of Appeals, Southern District, affirmed appellant's conviction and sentence. *State v. Hartman*, SD No.33302 (June 3, 2015). On August 18, 2015, this Court granted appellant's application for transfer of the case to this Court pursuant to Rule 83.04.

ARGUMENT

I.

The trial court did not abuse its discretion in excluding Jonathan Taylor's extrajudicial statements to Harlin King.

In his first point, appellant claims that the trial court abused its discretion in excluding Harlin King's testimony that Jonathan told him that he shot the victim three times (App. Br. 21-32).

Facts

Prior to trial, the state filed a motion in limine to exclude statements by Harlin King that Jonathan Taylor told him that he shot the victim three times (L.F. 81-82). The motion alleged that the statements were inadmissible hearsay (L.F. 82). The court held a hearing on the state's motion (Tr. 100). Appellant argued that Jonathan was a co-conspirator and that he made the statement shortly after the murder (Tr. 103). The court asked appellant whether Jonathan was an unavailable witness, and appellant responded:

[DEFENSE COUNSEL]: Jonathan Taylor is - I mean he's - I got him subpoenaed. He's in the county jail. I think [the prosecutor] may stipulate that he's unavailable. We take his deposition. He took the Fifth Amendment and refused to testify. And I anticipate that when we - I mean when we go through the process of putting him on the stand outside the hearing of the

jury, if you want to and have him [invoke] the Fifth Amendment, but I think that's what's going to happen.

BY THE COURT: Okay.

(Tr. 104).

The prosecutor argued that King was not a close personal friend of Jonathan because King reported the statement to a friend, to his girlfriend's mother and to the police (Tr. 104-105). The prosecutor further argued that the statement did not exonerate appellant because appellant could be found guilty as an accomplice (Tr. 105). The prosecutor also argued that in his statement to the police, Taylor denied shooting the victim and said that appellant shot him (Tr. 105-106). The prosecutor stated that Cody, Marcus, and Elijah gave statements implicating appellant in the shooting (Tr. 105-106).

Appellant argued that the statement may not exonerate him entirely, but that it exonerated him of murder in the first degree (Tr. 106). Appellant argued:

And if Jonathan Taylor came up here and stood on the witness stand and didn't take the Fifth Amendment and said that Daniel Hartman was the shooter, I would be able clearly to impeach him with his statement that he made to Harlin King.

He's not here. They are not going to put him on the stand. I mean he's going to take the Fifth Amendment, so neither one of us can really put him on the stand to get that in. But I think, basically, again, whether the jury believes it or not, the fact that he made the statement to somebody else is certainly incriminating, and we're asking the jury to believe statements of codefendants who are all clearly involved in the shooting. We're asking them to believe those statements beyond a reasonable doubt.

(Tr. 106-107).

Later, the court stated that it read King's deposition, and that the court did not believe that there was corroborating evidence to make the statement admissible as a statement against penal interest (Tr. 349). The court noted that King did not believe Taylor when he said that he shot the victim (Tr. 349).

The court allowed appellant to make an offer of proof by calling Harlin King (Tr. 613-621). King testified that he knew Jonathan Taylor from school and that he saw him "on regular basis" (Tr. 614). King testified that Jonathan called him about twenty times starting at two or three a.m. on the night of the murder (Tr. 615-616). King testified that he finally spoke to Jonathan later in the afternoon (Tr. 616). King testified that he picked up Jonathan and another man whom he did not know and that he took them to "the head shop on Main Street" (Tr. 616). King testified as follows:

A. He told me that he was the person that shot the guy three times.

Q. Now, prior to that the guy - I mean did you know who the guy was?

A. I have never met him.

Q. What did you - had you heard something else about an event happening?

A. Well, what do you mean by that?

Q. Well, I mean - he just didn't out of the clear blue sky say I shot the guy. There must have been some conversation before that?

A. Yeah. I mean he was just freaking out. He was really scared like, oh, I was really scared. And he just brought it up to me, and he pretty much just explained to me what had happened, and told me that he had taken three shots at the guy.

Q. So what did he tell you had happened?

A. He told me that they went in trying to get Molly and their robbery went wrong, and they shot the guy because he was getting out of bed or something.

Q. He told you he shot the guy three times?

A. Yes, sir.

Q. Do you remember anything else he told you about the events of the day or --

A. Not really too much.

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CROSS EXAMINATION BY [PROSECUTOR]:

Q. When he told that, did you believe him?

A. Not really.

[DEFENSE COUNSEL]: Objection to whether he believed him or not at this point. His belief is not relevant. He can't - the witness can't - he can just say what was said. His comment about whether he believed him or not is irrelevant.

[PROSECUTOR]: You are offering it for reliability.

BY THE COURT: I believe it goes to the credibility of the statements.

[DEFENSE COUNSEL]: That's okay. We're not going to offer it for the truth of the matter. That's my objection.

BY THE COURT: It will be overruled.

Q. [by prosecutor]: Did you believe him?

A. No. I didn't really believe him.

Q. And later that day did you tell anybody what he told you?

A. Missy Yarbrough.

Q. You told Ms. Yarbrough?

A. Yes.

Q. Who is she?

A. My ex-girlfriend's mother.

Q. And that was - was that the same day that he told --

A. No. It was not the same day. I don't think I talked to anyone that same day.

Q. Okay. When was it you told Ms. Yarbrough?

A. Probably the next day.

Q. And then did you go tell the police?

A. Yeah.

REDIRECT EXAMINATION BY [DEFENSE COUNSEL]:

Q. Did you tell the police to try to get Jonathan into trouble?

A. No. I know him.

Q Why did you go to the police?

A. Because it's not right to kill somebody. I mean especially over a little drugs. I mean they do arrests of [sic] everyday, and no one has a right to kill somebody over it.

Q. So it wouldn't be right for Jonathan to have killed somebody. Is that right?

A. It wouldn't be right for anybody to kill anybody.

Q. So you believed him enough to go talk to the police and tell them?

A. Right.

Q. And saying that he killed them. Correct?

A. Right. I believe parts of his story. Knowing JT for that long or Jonathan.

Q. Did he tell you anybody else killed him?

A. No. He didn't say anything different. But he could have done it for credibility.

Q. He could have what?

A. He could have done and then like, oh, this is my street reputation on the line here. He could have done it to boost his street ego.

Q. If it had been that way, you would have told that to the police. Correct?

A. I was under a lot of stress then. Things were really crazy at that point in time.

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BY THE COURT: All right. I still don't think there is any corroborating evidence. So the Court is going to deny the statement to come in.

(Tr. 614-621).

Analysis

The trial court has wide discretion in deciding whether to admit evidence, and its decision will only be overturned for an abuse of discretion. *State v. Hosier*, 454 S.W.3d 883, 895 (Mo. banc 2015). "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances

then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. Lemasters*, 456 S.W.3d 416, 420 (Mo. banc 2015). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Id.*

Before *Chambers v. Mississippi*, 410 U.S. 284 (1973), Missouri courts had consistently held that declarations against the penal interests of an unavailable witness were not admissible as an exception to the hearsay rule in criminal proceedings. *State v. Blankenship*, 830 S.W.2d 1, 6-7 (Mo.banc 1992). That rule has not been modified except to the extent required by *Chambers*. *Id. citing State v. Turner*, 623 S.W.2d 4, 9 (Mo. banc 1981). In *State v. Turner*, this Court recognized the applicability of *Chambers*, but cautioned against extending *Chambers* beyond its facts because of the inherent unreliability of extrajudicial statements of a non-party. *Turner*, 623 S.W.2d at 9.

After *Chambers*, Missouri law still prohibits the admission of extrajudicial statements against penal interest as an exception to the hearsay rule. *State v. Robinson*, 90 S.W.3d 547, 552 (Mo. App. S.D. 2002), *State v. Guinn*, 58 S.W.3d 538, 544 (Mo. App. W.D. 2001). However, such statements may be admitted as a due process right only if (1) the declarant is unavailable as a witness; (2) the statements, if true, would exonerate the defendant; and

(3) the statements carry substantial indicia of reliability. *Id; State v. Davidson,* 982 S.W.2d 238, 242 (Mo. banc 1998). Courts recognize three indicia of reliability: (1) the statement must be self-incriminatory and undeniably against self-interest; (2) the statement must be made spontaneously to a close acquaintance shortly after the crime; and (3) the statement must be corroborated by other admissible evidence. *State v. Robinson*, 90 S.W.3d at 552.

The trial court in the present case acted within its discretion in finding that Jonathan Taylor's extrajudicial statement was inadmissible under the narrow exception set forth in *Chambers*.

No showing of unavailability

A witness who asserts at trial his Fifth Amendment right against self-incrimination is unavailable for the purposes of admitting extrajudicial statements under *Chambers*. *State v. Turner*, 632 S.W.2d 4, 8 (Mo. banc 1981). The record in the present case did not show that Jonathan was unavailable as a witness. While Jonathan invoked his Fifth Amendment right during a deposition, there was no showing that Jonathan invoked his Fifth Amendment not to testify at trial. The Fifth Amendment right against self-incrimination is a personal right that can be invoked only by the witness. *McGrady v. State*, 461 S.W.3d 443, 446 (Mo. App., E.D. 2015). Because

Jonathan did not assert his Fifth Amendment right, there was no showing that he was unavailable at trial.[3]

Appellant argues that the state stipulated that Jonathan would invoke his Fifth Amendment right if called at trial (App. Br. 21). Even if the state could make such a stipulation, the record does not support appellant's contention that the state stipulated to Jonathan's unavailability. Defense counsel stated, "I think [the prosecutor] may stipulate that he's unavailable," but the parties never actually stipulated that Jonathan was unavailable (Tr. 104). Accordingly, the narrow exception for admission of extrajudicial statements was inapplicable in the present case.

The statements, if true, would not exonerate appellant

Even if Jonathan admitted to shooting the victim, this admission would not have exonerated appellant. Jonathan was appellant's accomplice and he

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[3] The witness does not have to be called to the stand to invoke his right against self-incrimination. *State ex rel. Jackson County Prosecuting Attorney v. Moorhouse*, 70 S.W.3d 552, 555 (Mo. App. W.D. 2002). The trial court may appoint counsel for a witness, so that the attorney may confer with the witness regarding the claim to the privilege and to assist the court in determining whether the witness is indeed attempting to assert a valid Fifth Amendment privilege claim. *Id.*

was charged with the same crime (Tr. 105-106, 396, 403, 409-410, 512). "Missouri has eliminated the distinction between principals and accessories, and now, all persons who act in concert to commit a crime are equally guilty." *State v. Wurtzberg*, 40 S.W.3d 893, 895 (Mo. banc 2001).

In a similar case, *State v. Bisher*, 255 S.W.3d 29, 33-36 (Mo. App. S.D. 2008), the defendant sought to admit pre-trial statements of two accomplices, arguing that the statements would show that the accomplice wore the blood-stained clothes found by the police and that it would have established that the accomplices, not the defendant, killed the victim. The Court of Appeals rejected this argument and found that the statements would not have exculpated the defendant because he participated in the crime by disposing of the body and destroying evidence, and thus, he was liable as an accomplice. *Id.*

Similarly, in the present case, regardless of whether appellant or Jonathan fired the shot that killed the victim, appellant was liable as an accomplice because he went with the rest of the accomplices to the victim's house to look for drugs and money, and at least one of them shot the victim.

Appellant argues that Jonathan's statements would exonerate him because appellant never admitted his participation in the crime (App. Br. 28). But even if appellant did not admit guilt, the evidence presented at trial established that appellant was involved. The state's witnesses and

appellant's witness, Marcus Stephens, testified that appellant went with the rest of the group to the victim's house, entered the house, was present when one of the men shot the victim, and fled with his accomplices (Tr. 395-396, 404-408, 512-522). This evidence supported a conviction on the basis of accomplice liability. *See State v. Clemmons*, 946 S.W.2d 206, 216-217 (Mo. banc 1997) (statements made by the defendant or in his presence indicated an intention to kill and the defendant continued to play an active role in the death-producing events even after it became abundantly clear that the victims would be killed).

No indicia of substantial reliability

The statement did not carry substantial indicia of reliability. To be reliable, the statements must be "in a very real sense self-incriminatory and unquestionably against interest." *State v. Williams*, 958 S.W.2d 87, 91 (Mo. App. E.D. 1997). Here, King testified that he did not believe Jonathan when he said that he shot the victim, and that he thought that Jonathan could have been trying to boost his "credibility" and his "street reputation" (Tr. 620-621). Furthermore, Jonathan denied allegations that he shot the victim when confronted by his cousin on the morning after the crime (Tr. 411-412).[4] Under

[4] The prosecutor stated that in his statements to the police, Jonathan also denied killing the victim (Tr. 105-106).

these circumstances, the statements were not truly self-incriminatory and against interest. *Id.* (the witness' statements were not truly self-incriminatory because, while the witness made an extrajudicial admission, later he denied any involvement).

Furthermore, the extrajudicial statement was not corroborated by the evidence. Three of the co-defendants identified appellant as the shooter (Tr. 406, 419, 605-606). Cody Stephens testified that appellant shot the victim (Tr. 406). Cody believed that Elijah had also a gun, but he did not know if Elijah fired (Tr. 406). Elijah testified that Marcus had a gun, but he only saw appellant shoot the victim (Tr. 519, 544). Marcus Stephens testified that he saw appellant trying to wake up the victim and that he heard shots after that (Tr. 605-606). Marcus testified that he also saw Elijah with a gun (Tr. 592). Marcus testified that appellant admitted to the group that he shot the victim and that he made a rap verse about it (Tr. 607).

Appellant argues that the evidence corroborated Jonathan's extrajudicial statement because the evidence showed that Jonathan owned a .22 caliber weapon and three .22 caliber bullets were found in the victim's bedroom (App. Br. 26-27). While Cody Stephens testified that Jonathan owned a .22 caliber gun and that he had seen Jonathan with the weapon "one other time" before, he made it clear that appellant had the weapon on the night of the murder (Tr. 403). Cody testified that appellant had Jonathan's

gun both in Jonathan's apartment and at the crime scene and that appellant used Jonathan's weapon to murder the victim (Tr. 402-403). There was no evidence that Jonathan had the weapon in the victim's house or that he fired any shots on the night of the murder.

State v. Stewart, 313 S.W.3d 661 (Mo. banc 2010), cited by appellant is distinguishable. In *Stewart*, DNA on a bloody hat found at the crime scene connected another person to the murder. *Id.* at 664-665. The defendant sought to introduce the person's extrajudicial statement into evidence, but the trial court precluded it. *Id.* This Court held that the DNA's presence at the crime scene corroborated the person's extrajudicial statement and that it was admissible. *Id.*

The ownership of the gun, unlike the DNA evidence in *Stewart*, did not provide a specific and unique connection to the crime. Rather, the gun ownership was too generic to provide a specific link between the owner and the person who used it.

In *State v. Blackman*, 875 S.W.2d 122, 141-142 (Mo. App. E.D. 1994), the Court of Appeals found that the evidence that a witness saw another person with a shiny weapon that had a four inch barrel did not corroborate that person's extrajudicial statement that he killed the victim and that it did not connect him to the victim's missing gun. The Court stated that although

the victim's weapon had a four-inch barrel, this fact was not unique to the victim's weapon and it did not provide a substantial link to the crime. *Id.*

Similarly, in the present case, the evidence that Jonathan owned the gun used in the crime, without more, did not provide corroboration for Jonathan's extrajudicial statement. Jonathan never told King what weapon he allegedly used in the murder, and appellant was the only person the witnesses saw with Jonathan's gun. The trial court did not abuse its discretion in finding Jonathan's extrajudicial statements inadmissible.

Appellant was not prejudiced

Even if Jonathan's extrajudicial statements to Harlin King were admissible, appellant cannot show prejudice from their exclusion. Marcus Stephens testified on appellant's behalf, and he told the jury that after the group returned to Jonathan's apartment after the murder, Jonathan claimed to have killed the victim (Tr. 609). This was substantially the same statement that appellant wanted to admit through King's testimony. A trial court error in the admission of evidence is prejudicial if the error so influenced the jury that, when considered with and balanced against all of the evidence properly admitted, there is a reasonable probability that the jury would have reached a different conclusion without the error. *State v. Miller*, 372 S.W.3d 455, 471 (Mo. banc 2011). Where the excluded evidence would have been cumulative of evidence already before the jury, the exclusion of the evidence is harmless

beyond a reasonable doubt. *State v. Cross*, 421 S.W.3d 515, 518 (Mo. App., S.D. 2013). Because the jury heard evidence that Jonathan claimed to have killed the victim after the murder, appellant cannot show that the exclusion of King's testimony deprived him of due process. Appellant's claim should be denied.

II.

The trial court did not plainly err in failing to intervene sua sponte during the prosecutor's closing argument.

In his second point, appellant claims that the trial court plainly erred in allowing the prosecutor to argue in closing evidence that there was no evidence that Jonathan Taylor shot the victim (App. Br. 33-40).

Facts

In opening statement, appellant told the jury that Jonathan Taylor was in possession of a .22 caliber pistol "up until a few minutes before Jacob Wages was shot" and that appellant "stayed back in Jonathan Taylor's apartment" when the victim was killed (Tr. 295-296). Appellant further argued that appellant was the only person from the group who declared his innocence and that "you are going to hear that from anywhere from 15 to 20 minutes to an hour, an hour and a half all of these people had time to get together and agree that they were going to point the finger at Daniel [appellant] because he was the one who wasn't there." (Tr. 296, 299).

At trial, Cody Stephens testified that Jonathan Taylor owned a .22 caliber weapon and that he had seen Jonathan with the weapon "one other time" before, but that appellant had the weapon on the night of the murder in Jonathan's apartment and at the crime scene, and that appellant used Jonathan's weapon to murder the victim (Tr. 402-403).

Appellant attempted to present the testimony of Harlin King that Jonathan allegedly admitted that he shot the victim three times when the robbery went bad (Tr. 614-621). King's proposed testimony did not contain any detail about the weapon used by Jonathan.

In closing argument, the prosecutor argued as follows:

I'm going to start talking about Instruction One and believability of the witness or witnesses. In determining the believability of a witness and the weight to be given to the testimony of the witness, you may take into consideration the witness' manner while testifying; the ability and opportunity for the witness to observe and remember any matter about which testimony is given; any interest or bias or prejudice the witness may have; the reasonableness of the witness' testimony considered in light of all the evidence in the case; and any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony.

With that in mind, I kind of want to go over some things with you all that were way back when we started this when we gave opening statements. That's where the attorneys kind of presented – [defense counsel and prosecutor] - what they believe the evidence to be. And I want us to not be confused as to what those statements were because those aren't fact and some of the things that were said were never presented to you all.

The first thing, it was told to you that you would hear that Jonathan Taylor had the pistol and went in the house and shot Mr. Wages when he was rushed. You haven't heard that evidence because it has never been presented today. But I don't want you to confuse that fact or that statement made by one of the attorneys.

Second, you were gonna hear - the attorney told you were gonna hear that the defendant was at home at JT's [Jonathan Taylor's] house asleep when this all transpired. There has been no evidence presented that's told you that.

Lastly and most importantly, there was some allegation that there was this kind of conspiracy between these people to make up this story in this amount of time that they had to come up with and pin it on the person who wasn't there. As I already told you, every witness we have places the defendant at the murder scene.

(Tr. 659-661) (emphasis added).

Analysis

Appellant acknowledges that he did not object to the prosecutor's closing argument and requests plain error review (App. Br. 34). "Plain error review is used sparingly and is limited to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice." *State v. Vanlue*, 216 S.W.3d 729, 733 (Mo. App., S.D. 2007). There is a two-prong test

for reviewing claims of plain error. *Id.* In the first prong, the Court determines whether there is a plain error, "which is error that is evident, obvious, and clear." *Id.* If the Court finds such error, then it must determine whether a manifest injustice or miscarriage of justice occurred. *Id*. at 734. "A criminal defendant seeking plain error review bears the burden of showing that plain error occurred and that it resulted in a manifest injustice or miscarriage of justice." *Id*. "The outcome of plain error review depends heavily on the specific facts and circumstances of each case." *Id.*

"Plain error will seldom be found in unobjected closing argument." *Id*. This is because any alleged errors committed in closing argument do not justify relief under the plain error rule "unless they are determined to have a decisive effect on the jury." *Id*. "Relief should rarely be granted in matters such as this 'because, in the absence of objection and request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention.'" *Id.*, *quoting State v. Collins*, 150 S.W.3d 340, 349 (Mo. App., S.D. 2004). Closing arguments must be interpreted with the entire record rather than in isolation. *Id.*

In closing argument the state may argue the evidence, the reasonable inferences from the evidence, and the credibility of the witnesses. *State v. McFadden*, 369 S.W.3d 727, 749 (Mo. banc 2012). Prosecutors are entitled to

point out to the jury the absence of evidence supporting a theory suggested by the defendant. *State v. Barlow*, 162 S.W.3d 135, 143 (Mo. App., W.D. 2005). Here, the prosecutor highlighted a comment made by defense counsel in opening statement. The prosecutor stated, "it was told to you that you would hear that Jonathan Taylor had the pistol and went in the house and shot Mr. Wages when he was rushed. You haven't heard that evidence because it has never been presented today" (Tr. 660). This was not a comment on the excluded evidence. Harlin King never testified in his offer of proof that Jonathan had a pistol or that he shot the victim as he rushed at Jonathan. King testified that Jonathan told him that he shot the victim three times as the victim "was getting out of bed or something." (Tr. 614-621). When the absence of evidence is not attributable to the trial court's ruling, the prosecutor may comment on its absence. *State v. Manzella*, 128 S.W.3d 602, 607 (Mo. App. E.D. 2004).

In *State v. Manzella*, the court excluded evidence that he victim had a pending case for drug distribution, which the defendant sought to introduce in support of his theory that someone other the defendant murdered the victim because the victim had a pending case *Id.* at 606. The prosecutor argued in closing argument that the defendant was the only person angry at the victim and that the jury did not have anyone else in front of them who was angry at the victim. *Id.* at 607. The Court of Appeals found that the

prosecutor was not commenting on the excluded evidence and that the prosecutor did not comment on the defendant's failure to present evidence of the victim's indictment. *Id.* The Court found that the prosecutor could comment on the absence of evidence that was not attributable to the trial court's ruling. *Id.*

Similarly, in the present case, the prosecutor commented on the absence of credible evidence supporting appellant's theory that Jonathan must have killed the victim because he had a .22 caliber pistol "up until a few minutes before Jacob Wages was shot" (Tr. 295-296). The prosecutor did not comment on appellant's failure to call Harlin King as a witness and he did not comment on the excluded evidence, which was that Jonathan shot the victim three times with some unknown weapon as the victim was getting out of bed (Tr. 614-621).

The cases cited by appellant are distinguishable. In *State v. Hammonds*, 651 S.W.2d 537, 538-539 (Mo. App. E.D. 1983), the defendant was precluded from presenting the testimony of an alibi witness as a sanction far a late disclosure. The Court of Appeals found that the prosecutor misrepresented facts when he argued in closing argument that the witness did not testify because he did not want to perjure himself. *Id.*

Unlike in *Hammonds*, the prosecutor did not misrepresent facts when he argued that no credible evidence supported appellant's theory. King's

testimony was not excluded as a sanction for a late disclosure, but it was excluded because it was inadmissible hearsay. The prosecutor never argued to the jury that someone else that appellant shot the victim. Rather, the state commented on the absence of specific evidence that the defense had promised in opening statement, namely that Jonathan had a pistol and that he shot the victim when the victim rushed at him (tr. 660-661).

In *State v. Luleff*, 729 S.W.3d 530 (Mo. App. E.D. 1987), the defendant was on trial for stealing a tractor. The defendant testified that he purchased the tractor answering an advertisement in a newspaper. *Id.* at 532. The defendant tried to introduce, in the jury's presence, a receipt for the sale of the stolen tractor and the state objected. *Id.* at 535. The court sustained the objections and precluded the admission of the receipt *Id.* In closing argument, the prosecutor argued that the tractor cost $7,800 and that there was no receipt for its purchase, and that the jury should not believe the defendant. *Id.* The Court of Appeals applied its earlier holding in *Hammons*. *Id.* The Court held that the prosecutor's argument was not just an observation on the authenticity of the document, which the jury saw the defendant trying to introduce, but that the prosecutor denied the existence of the document, knowing that the defendant had a piece of paper that purported to be a receipt. *Id.* The Court found that the prosecutor's comments were deliberate and that they amounted to an absolute denial of the existence of a receipt. *Id.*

Unlike in *Luleff*, appellant did not testify and try to present a document in the jury's presence. Rather, appellant sought to call King to present inadmissible testimony. The state did not comment on appellant's failure to call King as a witness, but commented on appellant's opening statement in which appellant claimed that Jonathan had a .22 caliber pistol. The court did not exclude evidence that Jonathan was in possession of such weapon, and King himself did not offer evidence of a particular weapon that was in Jonathan's possession. Appellant's case would be more analogous to *Luleff* if the prosecutor had argued that no other person had ever claimed to be the shooter.

In *State v. Weiss*, 24 S.W.3d 198, 200 (Mo. App. W.D. 2000), the state alleged that defendant wrongfully withdrew money from another person's account, while the defendant claimed he believed he was withdrawing employer "buy-out" funds from his own account. *Id.* at 199. The defendant testified that he believed that he was accessing money from an "buy-out" account and attempted to present documents that the court excluded as hearsay. *Id.*

In closing argument, the prosecutor argued that the "buy-out" documents did not exist and that the defendant would have produced them had they existed. *Id.* Court of Appeals noted that the prosecutor had indicated earlier that he did not want the jury to know that appellant was

trying to present some documents, and that he made a positive misrepresentation when he argued that the documents did not exist. *Id.*

As discussed above, the prosecutor in the present case did not misrepresent facts when he commented on the absence of specific evidence that the defense had promised in opening statement but failed to present at trial. The prosecutor's argument that there was no evidence that Jonathan had a pistol or that he shot the victim as he rushed at Jonathan, was a comment on the evidence admitted at trial, it was not a misrepresentation about the existence of excluded evidence. As discussed above, this is not a case where the prosecutor argued that no other person had ever claimed to be the shooter.

In *State v. Williams*, 119 S.W.3d 674 (Mo. App. S.D. 2003), the defendant was charged with criminal nonsupport for failing to make child support payments by sending monthly payment to the circuit court clerk. The defendant's theory was that the defendant gave money directly to the mother of his children and that the mother committed welfare fraud by accepting the payments from the defendant and welfare money given to her as compensation for the defendant's failure to make regular payments. *Id.* at 666. The defendant attempted to introduce a recording of a conversation with the mother, during which the mother acknowledged that the defendant made direct payments to her. *Id.* at 667. The court excluded the recorded

statements as a sanction for late disclosure. *Id.* The prosecutor argued in closing argument that there was no evidence that the mother "double dipped" *Id.* at 679-680.

The Court of Appeals found that the trial court improperly excluded the recordings and that the prosecutor's comments were improper. *Id.* The Court found that the sanction for late disclosure was not warranted and that the prosecutor misrepresented to the jury that there was no evidence of welfare fraud, knowing that the defendant attempted to introduce such evidence. *Id.* at 680-681. The Court stated that "coupled with the trial court's erroneous exclusion of the tape-recording on the basis of discovery sanctions" the prosecutor's purposeful misconduct resulted in manifest injustice. *Id.* at 681.

Unlike in *Williams*, Harlin King's testimony was properly excluded. See point 1. The prosecutor did not comment on King's excluded testimony, but argued the absence of specific evidence that the defense outline in opening statement, but failed to present at trial. The trial court did not plainly err in failing to intervene sua sponte during the prosecutor's closing argument.

Moreover, no manifest injustice resulted from this comment because there was overwhelming evidence of guilt. All three of the co-defendants who testified at trial identified appellant as the shooter (Tr. 406, 419, 605-606). Cody Stephens testified that appellant shot the victim (Tr. 406). Elijah

testified that appellant said that the murder did not matter to him and that it was "just another body" (Tr. 522). Appellant said that this was not "his first rodeo" and that he did not realize that the victim's girlfriend was there or he would have killed her as well (Tr. 522). Marcus Stephens testified that he saw appellant trying to wake up the victim and that he heard shots after that (Tr. 605-606). Marcus testified that he heard five or six shots being fired in the victim's bedroom (Tr. 592, 605-606). Marcus testified that appellant admitted to the group that he shot the victim and that he made a rap verse about it (Tr. 607). In light of this evidence, appellant cannot show manifest injustice from the prosecutor's closing argument. *See State v. Link*, 25 S.W.3d 136, 147-148 (Mo. banc 2000) (no manifest injustice resulted from the prosecutor's improper remarks in closing argument because the evidence of guilt was overwhelming).

CONCLUSION

For the foregoing reasons, appellant's convictions and sentences should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Dora A. Fichter
DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dora.Fichter@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 7,050 words as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on October 28, 2015, to:

Amy Bartholow
1000 West Nifong
Bldg. 7, Ste. 100
Columbia, MO 65203

/s/ *Dora A. Fichter*
DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756

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

ATTORNEYS FOR RESPONDENT