No. SC84267

STATE OF MISSOURI,

Plaintiff-Respondent,

vs.

JARED R. DERENZY,

Defendant-Appellant

APPEAL TO THE MISSOURI SUPREME COURT
AFTER TRANSFER FROM THE
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

APPELLANT'S SUBSTITUTE BRIEF

Elizabeth Unger Carlyle
200 S.E. Douglas St., Ste. 200
Lee's Summit, MO 64063
(816) 525-6540
Fax (816-525-1917)
Mo. Bar No. 41930

James R. Wyrsch
Wyrsch, Hobbs & Mirakian, PC
1101 Walnut, Ste. 300
Kansas City, MO 64106
(816) 221-0080

FAX (816) 221-3280
Mo. Bar No. 20730

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

No. SC84267

STATE OF MISSOURI,

Plaintiff-Respondent,

vs.

JARED R. DERENZY,

Defendant-Appellant

JURISDICTIONAL STATEMENT

Mr. Derenzy was convicted of one count of delivery of marijuana by a jury in the circuit court of Callaway County, Missouri on June 27, 2000. L.F. p. 3[1]. A timely motion for new trial was filed on July 21, 2000. L.F. p. 34. The motion was denied on August 14, 2000, and Mr. Derenzy was sentenced to ten years in the Missouri Department of Corrections on August 22, 2000. L.F. pp. 4, 54. Notice of appeal was timely filed on August 31, 2000. L.F. p. 56.

[1] References are to the legal file filed in the Western District Court of Appeals in Cause No. WD58982.

The Court of Appeals affirmed Mr. Derenzy's conviction. On March 20, 2002, this Court ordered that Mr. Derenzy's appeal be transferred from the Missouri Court of Appeals, Western District. Sup. Ct. R. 83.03.

STATEMENT OF FACTS

Mr. Derenzy, a college student, was charged by information with one count of delivery of marijuana within 2000 feet of a school (Westminster College). L.F. p. 5. The evidence showed that on March 20, 1999, undercover officer R.S. Ferrari received approximately 6 grams of marijuana from Mr. Derenzy and left $10.00 in Mr. Derenzy's house for it. Mr. Derenzy did not deny he possessed the marijuana, but denied being predisposed to deliver or sell the drug. The defense was entrapment.

At trial, Trooper Ferrari testified that he was introduced to Mr. Derenzy at a bar in Fulton, Missouri, by Ryan O'Reilly, who was also a student at Westminster College. Tr. pp. 149,

156-157.[2] Trooper Ferrari was working undercover, investigating possible drug dealing at Westminster College. Tr. p. 148. The prosecutor asked Trooper Ferrari,

> Q. Now, did you and Mr. O'Reilly have a discussion about what you were going to do that evening vis-à-vis the investigation during the course of your being in the bar?
>
> A. Yes.
>
> Q. What was that discussion?
>
> **A. After meeting Mr. Derenzy, I had known from previous intelligence that he had sold narcotics.**

A defense objection was sustained. Tr. p. 159, emphasis added. The jury was instructed to disregard the comment. Tr. p. 160. The defendant's motion for mistrial was overruled. Tr. p. 159.

Trooper Ferrari did not hear any conversation between Mr. O'Reilly and Mr. Derenzy concerning marijuana, but Mr. O'Reilly told Trooper Ferrari that they were invited to Mr. Derenzy's house. Tr. pp. 161-162. Trooper Ferrari and Mr.

---

[2] References are to the transcript filed in the Western District Court of Appeals in Cause No. WD58982.

O'Reilly went to Mr. Derenzy's home. Tr. p. 165. Before entering, Trooper Ferrari activated a clandestine recording device and recorded what went on in the home. Tr. p. 164. Marijuana was smoked at the home. Tr. p. 163. Then, Trooper Ferrari asked Mr. Derenzy if he had marijuana to sell. Tr. p. 166. After some discussion, Mr. Derenzy placed a small amount of marijuana in a plastic bag. Trooper Ferrari estimated its weight at 3.5 grams; Mr. Derenzy did not have a scale and did not weigh the marijuana. Tr. p. 195. Trooper Ferrari gave Mr. Derenzy $10.00 for the marijuana. Tr. pp. 170-171. Trooper Ferrari testified that he asked Mr. Derenzy if he could obtain more marijuana the next day, and obtained Mr. Derenzy's telephone number so he could call him. Tr. p. 176. The tape recording was played to the jury. Tr. p. 179. After offering evidence that the substance obtained by Trooper Ferrari was indeed 6.26 grams of marijuana (Tr. p. 200) and that Mr. Derenzy's home was within 2000 feet of Westminster College (Tr. p. 210), the state rested.

Mr. Derenzy presented the testimony of Ryan O'Reilly. Mr. O'Reilly testified that he had participated in the undercover operation because he wanted to become a law enforcement officer; at the time he testified he served as a patrol officer for the city of Holts Summit. Tr. pp. 216, 223. He was asked to provide names of possible investigation targets. Tr. p. 217. Mr. O'Reilly, an acquaintance of Mr. Derenzy, had heard rumors that Mr. Derenzy was involved in drugs, but had never seen him use, sell or transfer marijuana. Tr. p. 218. Based on these rumors, Mr. O'Reilly gave officers Mr. Derenzy's name. Tr. p. 218.

At the bar, Mr. O'Reilly asked Mr. Derenzy whether he could get marijuana for Trooper Ferrari (whom he introduced as "Scott", a friend from out of town). Tr. pp. 225, 226. Perhaps because he had become intoxicated, (Tr. p. 223), his recollection of Mr. Derenzy's response was equivocal. At trial, he testified that he thought Mr. Derenzy had said that he "might be able to help him out." Tr. p. 229. However, in an earlier deposition, Mr. O'Reilly testified that Mr. Derenzy's response was hesitant and he did not recall what it was. Tr.

p. 230. Mr. O'Reilly disclaimed any knowledge of the transaction at Mr. Derenzy's home, although he was present. This was because Mr. Ferrari told him to "butt out." Tr. pp. 232, 234, 235. He believed he was present when Mr. Ferrari asked about additional marijuana, but did not recall Mr. Derenzy's giving Mr. Ferrari his phone number. Tr. pp. 238-239.

Mr. Derenzy also presented the testimony of his friend Nathan Anderson. Mr. Anderson was present at the bar and at Mr. Derenzy's home at the time of the alleged offense. Tr. p. 242. According to Mr. Anderson, while he and Mr. Derenzy were sitting at the bar, Mr. O'Reilly approached with Trooper Ferrari. Mr. O'Reilly told Mr. Derenzy that he wanted some marijuana for his friend. Mr. Derenzy told him, "No." Mr. O'Reilly asked Mr. Derenzy the same question two or three times in the bar, and Mr. Derenzy always declined to sell. Tr. pp. 244-245. However, Mr. Derenzy and Mr. Anderson invited Mr. O'Reilly and Trooper Ferrari to come to Mr. Derenzy's house to smoke some marijuana together. Tr. p. 245. After the smoking of marijuana, Trooper Ferrari became

insistent about purchasing marijuana. Mr. Derenzy kept declining to sell. Tr. p. 247. Finally, Trooper Ferrari "slammed" a $10 bill on the table and picked up the marijuana. Tr. p. 248.

The trial court instructed the jury on entrapment, but refused an instruction proffered by the defense on the lesser included offense of possession of under 35 grams of marijuana. Tr. p. 272, L.F. p. 18.

In final argument, counsel for the state urged the jury to find Mr. Derenzy guilty because he was "ready and willing" to commit the offense. Tr. p. 280. The jury returned a verdict of guilty. The trial court overruled the defense motion for judgment of acquittal or for new trial, sentenced the defendant to ten years' imprisonment, and denied probation. This appeal follows.

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN DENYING MR. DERENZY'S MOTION FOR JUDGMENT OF

ACQUITTAL. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. DERENZY KNEW THAT THE LOCATION WHERE THE DELIVERY OCCURRED WAS WITHIN 2000 FEET OF A SCHOOL. THEREFORE, MR. DERENZY'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED AND A JUDGMENT OF ACQUITTAL MUST BE ENTERED.

State v. White, 28 S.W.3d 391 (Mo. App. 2000)

Jackson v. Virginia, 443 U.S. 307 (1979)

In Re Winship, 397 U.S. 358 (1970)

Mo. Rev. Stat. §195.214

POINT II

THE TRIAL COURT ERRED WHEN SHE REFUSED TO INSTRUCT THE JURY CONCERNING THE LESSER INCLUDED OFFENSE OF POSSESSION OF MARIJUANA AS REQUESTED BY MR. DERENZY. THIS INSTRUCTION WAS SUPPORTED BY EVIDENCE THAT MR. DERENZY WAS GUILTY

ONLY OF THE LESSER INCLUDED OFFENSE. THE FAILURE TO GIVE THE INSTRUCTION VIOLATED MR. DERENZY'S RIGHTS TO DUE PROCESS OF LAW AND HIS RIGHT TO SUBMISSION OF LESSER INCLUDED OFFENSES.

State v. Burnett, 354 Mo. 45, 188 S.W. 51, 54[6] (Mo. 1945)

Lee v. Kemna, 122 S.Ct. 877, 887-888 (2002)

State v. Fowler, 938 S.W.2d 894, 898 (Mo. banc 1987)

Taylor v. Withrow, 2002 U.S. App. LEXIS 5130*14 (6th Cir. March 28, 2002)

POINT III

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN TROOPER FERRARI TESTIFIED THAT HE HAD INFORMATION THAT MR. DERENZY HAD ENGAGED IN PREVIOUS DRUG SALES. THIS TESTIMONY IMPROPERLY INJECTED EXTRANEOUS OFFENSES INTO THE CASE. THE VIOLATION OF MR. DERENZY'S RIGHT TO DUE PROCESS OF LAW WAS SO SERIOUS

THAT IT WAS NOT CURED BY THE INSTRUCTION TO DISREGARD; THE DEFENSE WAS ENTRAPMENT AND MR. DERENZY'S PREDISPOSITION WAS THE MOST IMPORTANT ISSUE BEFORE THE JURY.

State v. Bowles, 23 S.W.2d 775, 781 (Mo. App. 2000)

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998)

State v. Reese, 274 S.W.2d 304, 307 (Mo. banc 1954)

State v. Chapman, 627 S.W.2d 597, 598 (Mo. 1982)

POINT IV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. DERENZY WAS NOT ENTRAPPED. UNCONTROVERTED EVIDENCE WAS OFFERED THAT MR. DERENZY REPEATEDLY REFUSED TO SELL THE MARIJUANA UNTIL HIS WILL WAS OVERBORNE BY TROOPER FERRARI. THEREFORE, MR. DERENZY'S RIGHT TO DUE

PROCESS OF LAW WAS VIOLATED AND A

JUDGMENT OF ACQUITTAL MUST BE ENTERED.

State v. Devine, 554 S.W.2d 442 (Mo. App. 1977)

Jackson v. Virginia, 443 U.S. 307 (1979)

Mullaney v. Wilbur, 421 U.S. 684 (1975)

ARGUMENT AND AUTHORITIES

Standard of review. This Court reviews the case *de novo* as if it had not been reviewed by the court of appeals.

This Court reviews questions of sufficiency of the evidence, as discussed in Points I and IV, by considering all evidence in the light most favorable to the state and determining whether any reasonable juror could have convicted under the evidence presented. *Jackson v. Virginia*, 443 U.S. 307 (1979).

This Court reviews the failure to give a requested jury instruction to determine whether the evidence supported the requested instruction. *State v. Barnard*, 972 S.W.2d 462, 466 (Mo. App. 1998).

This Court reviews the failure to grant a mistrial when improper extraneous offense evidence is admitted for abuse

of discretion. *State v. Chapman,* 627 S.W.2d 597, 598 (Mo. 1982).

POINT I

THE TRIAL COURT ERRED IN DENYING MR. DERENZY'S MOTION FOR JUDGMENT OF ACQUITTAL. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. DERENZY KNEW THAT THE LOCATION WHERE THE DELIVERY OCCURRED WAS WITHIN 2000 FEET OF A SCHOOL. THEREFORE, MR. DERENZY'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED AND A JUDGMENT OF ACQUITTAL MUST BE ENTERED.

In order to convict Mr. Derenzy, the jury was required to find that he delivered the marijuana *knowing* that he did so within 2000 feet of a school. *State v. White,* 28 S.W.3d 391 (Mo. App. 2000). While the state presented evidence that Mr. Derenzy's residence was within 2000 feet of Westminster

College, there was no evidence presented that Mr. Derenzy knew the distance between the two.[3]

In *State v. White,* 28 S.W.3d 391, 397 (Mo. App. 2000), as in this case, the state established the distance between the location of the transaction and the school by means of a map and the testimony of a witness concerning the distance between the two locales. The Court of Appeals held this evidence insufficient:

---

[3] Before the Court of Appeals, the state argued vigorously that *White* was wrongly decided, and that knowledge of the distance between the point of sale and a school need not be proven to obtain a valid conviction under Mo. Rev. Stat. §195.214. The Court of Appeals did not discuss this contention, and this Court need not consider it either. As the State concedes, the jury in this case was instructed that such knowledge was required. L.F. p. 28. The state failed to object to this instruction, and assumed the burden to prove Mr. Derenzy's knowledge. It has therefore waived the contention that the statute does not require knowledge.

> The map and the related testimony are simply insufficient to establish that White knew about the school. The State needed to present some additional evidence to establish that White was knowingly distributing or delivering a controlled substance within 2000 feet of a school.

The only additional relevant evidence in this case was that Mr. Derenzy was a student at Westminster College, the "school" in question. But whether or not he knew that the distance between his house and the college was less than 2000 feet is not shown by any evidence before the jury. There was certainly no showing that the house was on the campus or directly adjacent to it. Nor was there evidence that any part of Westminster College could be seen from Mr. Derenzy's home.[4]

---

[4] The ability to estimate distances is far from universal. In fact, estimating distances accurately is a complex skill. See, *e.g.*, Roland Baddely, (Abstract) *The correlational structure of natural images and the calibration of spatial*

Mr. Derenzy was not shown to have any training or experience that would indicate that he could estimate a distance of 2000 feet. Nor was he shown to have any direct knowledge of the distance. By contrast, in *State v. Crooks*, 64 S.W.3d 887 (Mo. App. 2002), the court found the evidence sufficient where the defendant testified that he knew the school was no more than five or six blocks from his house.

---

representations, COGNITIVE SCIENCE SOCIETY JOURNAL, (visited Apr. 18, 2002) http://www.cognitivesciencesociety.org/abstract/5-98baddely.html (Study of the various types of sensory input which determine judgments of distance); *Shipwrite's Tables – To Estimate Distance Off by Eye*, (visited Apr. 18, 2002) http://www.shipwrite.bc.ca/files/Eyeball.htm (Table indicating how to estimate the distance from ship to shore by appearance of objects on land. For example, at one mile, large branches are distinct, but at two miles, individual trees are just visible.)

Mr. Derenzy did not testify, and no one described any extrajudicial statements indicating knowledge. The only evidence that Mr. Derenzy knew the distance to the school was that he was a student there.

Based on the evidence before it, no reasonable jury could have found the element of knowledge that the sale occurred within 2000 feet of a school beyond a reasonable doubt. Mr. Derenzy's conviction upon insufficient evidence violated his right to due process of law under the United States Constitution, amend. XIV and the Missouri Constitution, art. I, §10. Reversal and the entry of a judgment of acquittal of the charged offense is therefore required. *Jackson v. Virginia*, 443 U.S. 307 (1979) (Conviction on insufficient evidence violates due process); *In Re Winship*, 397 U.S. 358 (1970) (Proof beyond a reasonable doubt required as to each element of the offense).

POINT II

THE TRIAL COURT ERRED WHEN SHE REFUSED TO INSTRUCT THE JURY CONCERNING THE LESSER INCLUDED OFFENSE OF POSSESSION OF MARIJUANA AS REQUESTED BY MR. DERENZY. THIS INSTRUCTION WAS SUPPORTED BY EVIDENCE THAT MR. DERENZY WAS GUILTY ONLY OF THE LESSER INCLUDED OFFENSE. THE FAILURE TO GIVE THE INSTRUCTION VIOLATED MR. DERENZY'S RIGHTS TO DUE PROCESS OF LAW AND TO THE SUBMISSION OF LESSER INCLUDED OFFENSES.[5]

Mr. Derenzy's trial counsel requested that the court instruct the jury as to the lesser included offense of possession of marijuana, and submitted Instruction A:

INSTRUCTION NO. A

If you do not find the defendant guilty of possession of more than five grams of marijuana

with intent to deliver under Instruction No. ____, you must consider whether he is guilty of possessing marijuana under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about March 20, 1999, in the County of Callaway, State of Missouri, the defendant possessed marijuana, a controlled substance, and

Second, that the defendant knew of its presence and nature, then you will find the defendant guilty of possessing marijuana.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, the term "possessed" means either actual or constructive possession of the substance. The person has actual possession if

---

[5] This Point is offered in the alternative to Points I and IV.

he has the substance on his person or within easy reach and convenient control. The person who is not in actual possession has constructive possession if he has the power and intention at a given time to exercise dominion or control over the substance either directly or through another person or persons.

If you find the defendant guilty of possessing marijuana, you will assess and declare one of the following punishments:

1. Imprisonment in the county jail for a term of years fixed by you, but not to exceed one year.

2. Imprisonment in the county jail for a term fixed by you, but not to exceed one year and in addition a fine, the amount to be determined by the Court.

3. No imprisonment but a fine, in an amount to be determined by the Court.

The maximum fine that the court may impose is $1,000.00.

L.F. p. 18.

The trial court declined to give this instruction because she thought the offense of delivery of a controlled substance did not include the offense of possession of the substance:

> But I don't think a possession charge is a lesser included offense of delivery. Because I think you can deliver it without actually possessing it. Drop it in a box somewhere. Someone picks it up. I think that transfer does not have to be a mano a mano type thing. And so I don't think possession or possession with intent to deliver are lesser included ones.
>
> Tr. p. 271.

1. No waiver of error.

The state argued that the requested instruction contained an error, and that therefore Mr. Derenzy had waived even plain error review of the instruction issue. The error was in the initial sentence of the instruction, which directed the jury to consider the instruction if they found the defendant not guilty of "possession with intent to deliver."

Mr. Derenzy was actually charged with "delivery within 2000 feet of a school." The state voiced no objection at trial to this error. The court of appeals agreed with the state's contention.[6]

Both the state and the court of appeals are mistaken. To preserve instructional error, Mr. Derenzy was required to "stat[e] distinctly the matter objected to and the grounds of the objection." Sup. Ct. R. 28.03, The rule does not require that the defendant submit a correct instruction in order to complain of the failure to instruct the jury. Here, the transcript clearly shows that the defense was requesting a charge on the lesser included offense of possession of less than 35 grams of marijuana. The court declined to give the

---

[6] Given the trial court's discretion to refuse instructions that are not "meticulously correct," it is irrelevant that the appellant here stated correctly the elements of the proposed instruction; he failed to state the correct underlying charge. The trial court properly denied the appellant's proffered jury instruction. *State v. Derenzy*, No. WD58982, Slip. Op. p. 8.

instruction not because of any technical defect in Instruction A, but because she erroneously concluded that possession was not a lesser charge of delivery.

The court must instruct the jury on all issues raised by the evidence. *State v. Burnett*, 354 Mo. 45, 188 S.W.2d 51, 54[6] (Mo. Mo. 1945); *State v. Ford*, 344 Mo. 1219, 130 S.W.2d 635, 640[6] (Mo. 1939); *State v. Gibilterra*, 342 Mo. 577, 116 S.W.2d 88, 95[9] (Mo. 1938). See also *State v. Hayes*, 23 S.W.3d 783 (Mo. App. 2000) (Plain error found where instruction submitted was incorrect despite lack of specific objection in motion for new trial.)

The rationale of the cases cited by the court of appeals does not support the conclusion that Mr. Derenzy's trial counsel waived this issue by submitting an incorrect instruction. In *State v. Parkhurst*, 845 S.W.2d 31, 36-37 (Mo. banc 1992), the defendant sought a self-defense instruction. The instruction he proposed, however, incorrectly defined self-defense, the primary subject matter of the instruction. In *State v. Binnington*, 978 S.W.2d 774, 776

(Mo. App. 1998), the comment about the error in the proposed instruction is dictum. The primary holding of *Binnington* is that the requested instructions concerned defenses that were not available to the defendant under the charges he faced. Like the proposed charge in *Parkhurst*, the requested instructions in *Binnington* contained errors in the definition of the defense, not errors in the preliminary portion of the instruction.

The rationale underlying the *Binnington* and *Parkhurst* line of cases is that when an incorrect instruction is requested, the court of appeals cannot be sure that the trial court understood the request. In *State v. Garrette*, 699 S.W.2d 468, 510 (Mo. App. 1985), the court noted that if an incorrect instruction was submitted, a defendant could cure the error and preserve the issue by complaining in a motion for new trial that the court had failed to instruct on all issues. In light of the change in Rule 28.03 since *Garrette*, it is no longer clear that this procedure would preserve the issue. However the *Garrette* decision demonstrates concern

that the trial court have an opportunity to correct the instructional error.

The state could have objected at trial that there was an error in the proposed instruction, but did not do so. The trend of this court's cases in recent years has been to eliminate instances in which a party may "lie behind the log" until appeal to raise an issue. See, e.g., *State v. Kempker*, 924 S.W.2d 909 (Mo. banc 1992) (Defendant was not entitled to complain of prosecutor's comment on defendant's failure to testify because defendant failed to object at trial).

The United States Supreme Court considered the lack of a contemporaneous objection by the state to an alleged procedural defect in *Lee v. Kemna*, 122 S.Ct., 877, 887-888 (2002). There, the Court declined to find a procedural bar to federal review when the Missouri Court of Appeals refused review of the denial of a continuance because the mid-trial continuance was not requested by a sworn motion. As in Mr. Derenzy's case, the state in Lee's case voiced no objection at trial on this ground. The Court noted that if there had been a

trial objection, counsel for Lee could have corrected the error,

> [N]either the prosecutor nor the trial judge so much as mentioned the Rules as a reason for denying Lee's continuance motion. If either prosecutor or judge considered supplementation of Lee's motion necessary, they likely would have alerted the defense at the appropriate time, and Lee would have had an opportunity to perfect his plea to hold the case over until the next day.

The U.S. Supreme Court held that Mr. Lee was entitled to federal review because the requirement that a continuance motion be sworn served no useful purpose in Mr. Lee's case.

> [T]he trial court, at the time Lee moved for a continuance, had in clear view the information needed to rule intelligently on the merits of the motion. . .[U]nder the circumstances of this case, we hold that petitioner Lee, having substantially, if imperfectly, made the basic showings Rule 24.10 prescribes, qualifies for adjudication of his federal,

> due process claim. His asserted right to defend should not depend on a formal "ritual . . . [that] would further no perceivable state interest." [citations omitted].

As in *Lee*, there is no state interest in this case which is advanced by refusing to review a claim that was presented to the trial court, denied on the merits, and reurged in the motion for new trial. The denial of a lesser included offense instruction was erroneous and violated Mr. Derenzy's due process rights.

In addition to due process considerations, strong policy reasons militate against denying review of the trial court's decision to not allow the instruction of the jury on the lesser included offense of possession. It is helpful to trial courts if the parties submit proposed instructions. Such instructions, which are normally prepared before trial, eliminate the need for the trial court to develop instructions in the heat of trial. And, proposed instructions focus the attention of the court on the specific issues as to which the instructions are sought.

Obviously, if a proposed instruction incorrectly states a material matter, the proponent should not be heard to complain that his error was not corrected by the trial court. On the other hand, where a minor error, irrelevant to the issue, is made, the trial court cannot be misled. If the parties to a lawsuit are to be foreclosed from review of instructional error based on any error in a proposed instruction, no matter how trivial, it is likely that fewer proposed instructions will be submitted. And that would be a blow to judicial economy.

Of course, if this Court does not grant relief to Mr. Derenzy, he will have another opportunity to raise the issue of the improper instruction. Since he was foreclosed from review of this issue by his trial counsel's error, he can raise the issue in a motion under Sup. Ct. R. 29.15 as ineffective assistance of counsel. But requiring him to do so will only prolong the disposition of this case, and will unnecessarily tax the resources of the circuit and appellate courts. Because the issue was presented to the trial court, albeit imperfectly, it should be decided now.

The trial of a criminal case should not be a game of "Gotcha" but should afford the defendant due process of law. U.S. Const. amend. XIV; Mo. Const., art. I, §10. The State's only objection to the instruction submitted by Mr. Derenzy was the substantive claim that possession was not a lesser included offense of delivery. The State should not be permitted to wait for the appeal to proceed before making an objection that could have allowed Mr. Derenzy's counsel to correct his error during trial. Mr. Derenzy is entitled to review of his claim.

2. The lesser included offense instruction was required.

When an instruction on a lesser included offense is requested, the court must instruct on the lesser offense if there is a basis for both an acquittal of the higher offense and a conviction of the lesser offense. *State v. Fowler*, 938 S.W.2d 894, 898 (Mo. banc 1997); *State v. Tivis*, 948 S.W.2d 690, 694 (Mo. App. 1997). All doubts concerning the

propriety of a lesser included offense instruction should be resolved in favor of giving the instruction. *State v. Barnard*, 972 S.W.2d 462, 466 (Mo. App. 1998).

The trial court here ruled that possession of marijuana is not a lesser included offense of delivery of marijuana. For that reason, she declined to give the instruction despite the fact that the evidence showed Mr. Derenzy's guilt of possession even if he was acquitted of delivery. In determining whether a particular offense is a lesser included offense, the court must determine whether each element of the lesser offense must be proven in order to prove the greater offense. *State v. Mizanskey*, 901 S.W.2d 95,98 (Mo. App. 1995); *State v. Pacchetti*, 729 S.W.2d 621 (Mo. App. 1987). Here, the court found that "possession" need not be shown in order to prove "delivery," and therefore concluded that the lesser offense included an element not required for proof of the greater. The court's reasoning, as noted above, was that "Transfer does not have to be a mano a mano type thing." Tr. p. 271. That conclusion is correct. What the judge

failed to note, however, is that "possession" does not have to be a "mano a mano type thing" either. In order to prove delivery as defined by the statute, the State must also prove at least constructive possession of the substance delivered.

"Delivery" is defined in the controlled substance statutes as "the actual, constructive, or attempted transfer from one person to another of. . . a controlled substance,. . . and includes a sale." Mo. Rev. Stat. §195.010(8). "Possession" includes both personal or actual possession and constructive possession: "A person who, although not in actual possession, has the power and intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. . ." Mo. Rev. Stat. §195.011(32).

In order to "deliver" a substance, then, a person must either actually transfer it from his actual possession to the other person ("mano a mano"), or must direct someone else to do so. If he directs someone else to do so, he necessarily has "the power and intention at a given time to exercise

control or dominion over the substance," and therefore has constructive possession of it. Thus, under Missouri law, anyone who is guilty of "delivery" of a controlled substance is also guilty of "possession" of that substance.

The court acknowledged in *State v. Corley*, 639 S.W.2d 94 (Mo. App. 1982), that the offense of delivery includes possession: "In a prosecution for selling marijuana, an instruction on the lesser offense of possession of marijuana is required only if the evidence shows that the defendant may be guilty of possession even though he may not be guilty of the offense of selling." In *Corley*, the court held that the evidence did not permit both the acquittal of delivery and the conviction for possession, so the instruction was not required. However, the court acknowledged that had the evidence been so presented, the instruction would have been required.

The delivery cases decided by the courts reinforce the conclusion that delivery necessarily includes possession. In *State v. Dampier*, 862 S.W.2d 366, 371 (Mo. App. 1993), the

court held that a defendant had "delivered" marijuana whether or not he had actually handed it to the transferee. In so holding, the court found that the same actions which constituted delivery also constituted possession:

> Defendant knew the marijuana was in the bag, and was familiar with its quality. Defendant exercised dominion over the marijuana by telling Ford she could have it. We hold these facts sufficient to support a finding that Defendant had constructive possession of the marijuana.
>
> Do these facts also support a finding of delivery of the marijuana by Defendant to Ford? We say yes.

In *State v. Gordon*, 536 S.W.2d 811, 816 (Mo. App. 1976), the court concluded that delivery occurs "when one person divests himself of *possession* of a controlled substance by passing it from himself to another." (Emphasis added.) The possession may be actual or constructive, but a transfer of possession is required for delivery.

Because the trial court concluded that possession is not a lesser included offense of delivery, she made no finding as to whether the evidence in this case would support a conviction of possession but an acquittal of delivery. This is the second requirement for submission of the lesser included offense instruction.

The evidence here clearly supported submission of the lesser offense. Mr. Derenzy's defense was entrapment. The evidence revealed both that he possessed the marijuana at his home and that he transferred some of it to Trooper Ferrari. There was no suggestion that he *obtained* the marijuana for Trooper Ferrari. Had the jury accepted Mr. Derenzy's entrapment defense, he could still have been found guilty of possession.

The right to a charge on a lesser-included offense is of constitutional dimension because it is a part of the right to present a defense guaranteed by U.S. Const. amend. VI. See *State v. Shafer*, 969 S.W.2d 719, 728 (Mo. banc 1998); *Beck v. Alabama*, 447 U.S. 625 (1980); *Keeble v. United States*,

412 U.S. 205 (1973). The failure to give a requested charge on a lesser included offense is reversible error if the evidence supports the charge. *State v. Ellis*, 639 S.W.2d 420, 422-23 (Mo. App. 1982); *State v. Barnard*, 972 S.W.2d 462, 466 (Mo. App. 1998).

The right to present a complete defense is a fundamental part of the right to due process of law. This right includes the right to instructions on any theory supported by the evidence. *Taylor v. Withrow*, 2002 U.S. App. LEXIS 5130*14 (6th Cir. March 28, 2002), citing *Mathews v. United States*, 485 U.S. 58, 63-64 (1988) (Fundamental right to self-defense instruction raised by the evidence).

For the foregoing reasons, Mr. Derenzy's conviction must be reversed and a new trial ordered.

POINT III

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN TROOPER FERRARI TESTIFIED THAT HE HAD INFORMATION THAT MR. DERENZY HAD ENGAGED IN PREVIOUS DRUG SALES. THIS TESTIMONY IMPROPERLY INJECTED EXTRANEOUS OFFENSES INTO THE CASE. THE VIOLATION OF MR. DERENZY'S RIGHT TO DUE PROCESS OF LAW WAS SO SERIOUS THAT IT WAS NOT CURED BY THE INSTRUCTION TO DISREGARD BECAUSE MR. DERENZY'S PREDISPOSITION TO SELL DRUGS WAS THE MOST IMPORTANT ISSUE BEFORE THE JURY.[7]

In a statement which was completely unresponsive to the prosecutor's question, Trooper Ferrari, an experienced drug enforcement officer with the Missouri Highway Patrol,

[7] This Point is offered in the alternative to Points I and IV.

said of Mr. Derenzy, "I had known from previous intelligence that he had sold narcotics." Tr. p. 158.

This statement was made in response to a question about the discussion that Trooper Ferrari had with *Ryan O'Reilly* before he and Trooper Ferrari went to Mr. Derenzy's house. In the context of the questioning, there is no possibility that Trooper Ferrari could have thought that his statement was responsive, and the prosecutor acknowledged as much: "[I]t wasn't the intention of the state to elicit this information." Tr. p. 159.

Mr. Derenzy's objection that the answer was unresponsive and placed before the jury improper evidence of uncharged misconduct was sustained, and the jury was instructed to disregard the comment. Tr. pp. 159, 160. However, Mr. Derenzy's motion for mistrial was denied. Tr. p. 160.

The court of appeals found that the instruction to disregard the statement was sufficient to cure the harm. In

so holding, the court considered the five factors suggested in *State v. Bowles*, 23 S.W.3d 775, 781 (Mo. App. 2000):

> 1) whether the statement was, in fact, voluntary and unresponsive . . . or whether the prosecution "deliberately attempted to elicit" the comments; . . . 2) whether the statement was singular and isolated, and whether it was emphasized or magnified by the prosecution; . . . 3) whether the remarks were vague and indefinite, or whether they made specific reference to crimes committed by the accused; . . . 4) whether the court promptly sustained defense counsel's objection to the statement . . . and instructed the jury to disregard the volunteered statement; and 5) whether in view of the other evidence presented and the strength of the state's case, it appeared that the comment "played a decisive role in the determination of guilt."

State v. Bowles, 23 S.W.3d 775, 781 (Mo. App. 2000), citing *State v. Knowles, 946* S.W.2d 791, 794 (Mo. App. 1997). *State v. Derenzy,* No. WD58982, Slip. Op. p. 11.

The court of appeals reasoned that the first factor militated against reversal because the *prosecutor* did not deliberately elicit the statement. However, the statement was made by an experienced law enforcement officer employed by the State of Missouri. Such conduct should not be rewarded or even condoned by this Court. The third factor likewise militated in favor of reversal. Although there was no reference to a specific drug transaction, the comment concerned drug dealing, the specific type of crime into which Mr. Derenzy asserted that he had been entrapped. The reference had a direct bearing on the defense. As such, it had a decisive role to play in the jury's deliberations.

It is true that the comment was isolated, and that the judge instructed the jury to disregard it. It is also true that, in an apparent attempt to cure the harm from the reference, defense counsel asked Ryan O'Reilly if he had heard

"rumors" that Mr. Derenzy was involved with drugs. Nonetheless, Trooper Ferrari's "intelligence" assertion is a far more concrete reference than Mr. O'Reilly's rumors.

The comment struck at the heart of Mr. Derenzy's defense. The issue before the court was entrapment. The state could have met its burden to show predisposition by showing prior sales of controlled substances by the defendant, if it had evidence of such sales. But the state had no such evidence in this case. The state's only argument was that Mr. Derenzy was "ready and willing" to sell because he invited people he did not know well to his home and possessed marijuana. It is highly likely that, despite the judge's admonition, the jury remembered and considered Trooper Ferrari's statement when they deliberated on Mr. Derenzy's case. Although jurors are presumed to follow instructions, *State v. Brasher*, 867 S.W.2d 565, 569 (Mo. App. 1993), some errors are too great to be cured by instructions alone. Furthermore, this Court should not condone the blatant abuse of the rules of evidence by a

seasoned law enforcement officer who should have been prepared for his testimony by the prosecutor**.**

In *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998), the Missouri Supreme Court held that the prohibition on use of extraneous offense evidence is of constitutional dimension. As one court put it, uncharged misconduct evidence "is clearly not admissible on the theory that, if a person will commit one offense, he will commit another." *State v. Olson*, 854 S.W.2d 14, 16 (Mo. App. 1993).

This rule has been in force since at least 1954. In *State v. Reese,* 274 S.W.2d 304, 307 (Mo. banc 1954) the court held that "other crimes" evidence should not be admitted unless it directly establishes guilt of the charged offense:

> "The well established general rule is that proof of the commission of separate and distinct crimes is not admissible, unless such proof has some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial. . . **Evidence of other crimes, when not**

properly related to the cause on trial, violates defendant's right to be tried for the offense for which he is indicted." *State v. Shilkett*, 356 Mo. 1081, 204 S.W.2d 920, 922-923 [(Mo. 1947)]. (Emphasis added.)

In *State v. Barriner*, 34 S.W.3d 139, 144 (Mo. banc 2000), the court found plain error in the erroneous admission of evidence of a prior homicide. Similarly, in *State v. Conley*, 873 S.W.2d 233, 236 (Mo. banc 1994), the court held that extraneous misconduct is inadmissible to prove that the defendant acted in conformity therewith. See also *State v. Alexander*, 875 S.W.2d 924, 929 (Mo. App. 1994), where it was held, "'Trials of charges for which there is a human abhorrence should be conducted with scrupulous fairness to avoid adding other prejudices to that which the charge itself produces.' *State v. McElroy*, 518 S.W.2d 459, 461[6] (Mo. App. 1975)"; *State v. Wright*, 582 S.W.2d 275, 277 (Mo. banc 1979); *State v. Sexton*, 890 S.W.2d 389, 391 (Mo. App. 1995) ("Evidence of other crimes, when not

properly related to the cause on trial, violates defendant's right to be tried for the offense for which he is indicted.")

In *Michelson v. United States*, 335 U.S. 469, 476 (1948), the Court held that improper prior bad act evidence is extremely harmful to a fair trial:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

The admission of improper uncharged misconduct evidence violates the constitutional guarantees of a fair trial. U.S. Const. amend. XIV; Mo. Const. art. 1, §10. As was stated in *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977): "[A] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." The Eighth Circuit has also acknowledged the constitutional basis of the extraneous offense rule. *Poole v. Wood*, 45 F.3d 246 (8th Cir.), *cert. denied* 115 S.Ct. 2561 (1995); *Kerr v. Caspari*, 956 F.2d 788, 790 (8th Cir. 1991); *Rainer v. Dept. of Corrections*, 914 F.2d 1067 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 993 (1991). See also *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985); *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980); *Government of Virgin Islands v. Toto*, 529 F.2d 278, 283 (3rd Cir. 1976).

In general, the decision as to the relief to be granted when evidence is improperly admitted rests within the judge's discretion. But when an instruction to disregard is

insufficient to prevent the harm caused by the improper statement, a mistrial is required.

In *State v. Chapman*, 627 S.W.2d 597, 598 (Mo. 1982), the prosecutor asked a witness about hearsay information concerning inflammatory statements made by the defendant. The trial court instructed the jury to disregard "the last question and the last response." On appeal, the court held that the comment was sufficiently prejudicial, and the instruction to disregard sufficiently indefinite, that the prejudice was not cured and a mistrial should have been granted.

Similarly, in *State v. Rayner*, 549 S.W.2d 128, 133 (Mo. App. 1977), the court held that an instruction to disregard was insufficient to cure the prejudice from improper extraneous offense evidence, and granted a new trial. The court noted that the error in admitting the evidence was of constitutional dimension and added, "How do you unring a bell?" Recognizing that reversal of the conviction is a drastic remedy, the court held that it was nonetheless required:

> When inadmissible evidence saturates the state's case with prejudice it cannot always be purged by the simple expedient of instructing a jury to disregard it. The attendant delay and cost of a new trial vis-à-vis preservation of the integrity of a fair trial as contemplated by our system of justice never becomes an issue in a criminal case. Delay and cost occasioned by a new trial, however, regrettable, must always yield to a fair trial.

The improper statement in this case occurred during the testimony of the state's first witness, and thus infected the remainder of the trial. The trial court's instruction to disregard, non-specific as it was, was a futile attempt to "unring a bell." The bell was rung because of misconduct of a state law enforcement witness. Under these circumstances, the instruction to disregard was an insufficient remedy, and a mistrial was required. Mr. Derenzy is entitled to a new trial free of improper innuendoes from the state's law enforcement witnesses.

POINT IV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO MEET THE STATE'S BURDEN OF PROOF TO SHOW THAT MR. DERENZY WAS NOT ENTRAPPED. UNCONTROVERTED EVIDENCE SHOWED THAT MR. DERENZY REPEATEDLY REFUSED TO SELL THE MARIJUANA UNTIL HIS WILL WAS OVERBORNE BY TROOPER FERRARI. MR. DERENZY'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED AND A JUDGMENT OF ACQUITTAL MUST BE ENTERED.

The state proved that Mr. Derenzy transferred some 6 grams of marijuana to Trooper Ferrari. Mr. Derenzy raised the defense of entrapment. Therefore, under the instructions, the burden fell upon the State of Missouri to establish beyond a reasonable doubt that Mr. Derenzy was not entrapped. The trial court instructed the jury:

> A person is "entrapped" into conduct if a law enforcement officer or person acting in cooperation with a law enforcement officer, for the purpose of obtaining evidence of the commission of an offense, solicits, encourages, or otherwise induces another person to engage in conduct when he is not ready and willing to engage in such conduct. The state has the burden of proving beyond a reasonable doubt that the defendant was not entrapped into the conduct submitted in Instruction No. 8.
>
> L.F. p. 27.

The state presented evidence that after smoking marijuana at Mr. Derenzy's home, Trooper Ferrari asked Mr. Derenzy to sell him some marijuana. Tr. p. 169. There was no suggestion that Mr. Derenzy made any offer to sell the marijuana before this request. Ryan O'Reilly testified that Mr. Derenzy was "hesitant" when Mr. O'Reilly asked him to sell marijuana to Ferrari at the bar. Tr. p. 230. Nathan Anderson (who, unlike O'Reilly, was not intoxicated that night) testified

that he heard Mr. O'Reilly ask Mr. Derenzy to sell marijuana several times at the bar, and Mr. Derenzy declined each time. Tr. pp. 244-245. Mr. Anderson further testified that Mr. Derenzy was reluctant to sell the marijuana at his home: "He just kept telling him, 'I don't have anything to sell. I don't want to sell anything to you.'" Tr. p. 247.

A tape recording of the transaction itself (but not of the encounter at the bar) was introduced into evidence.[8] The prosecutor argued that the state had met its burden to show lack of entrapment because Mr. Derenzy invited someone he did not know to his home, and because the tape did not indicate his denials. Tr. pp. 286, 289.

This evidence here is quite similar to that which was found sufficient to establish entrapment as a matter of law in *State v. Devine*, 554 S.W.2d 442 (Mo. App. 1977). There, the court found that testimony of the defendant that a person

---

[8] The tape recording has been filed with this Court. The prosecutor noted, "It's a very. . . difficult tape to follow." Tr. p. 178

working with an undercover officer had repeatedly solicited him to sell drugs, corroborated by the testimony of another witness, showed entrapment. There, as here, there was no evidence of other sales by the defendant and no evidence that the defendant initiated the charged transaction.

The evidence here is in sharp contrast to cases holding that the state had disproved entrapment. In *State v. Worstell*, 767 S.W.2d 352 (Mo. App. 1989), for example, the evidence showed that the offer of a bribe was first made by the defendant. No such evidence was offered here.

The state's only evidence to show that Mr. Derenzy was not entrapped was that he invited someone unknown to him into his home and that he possessed marijuana. The State did not present any evidence to refute the testimony of Mr. Anderson that Trooper Ferrari solicited, encouraged, and induced Mr. Derenzy into selling the marijuana to him. By the time the tape recording was started, the inducement had already occurred.

Based on the evidence before it, no reasonable jury could have found beyond a reasonable doubt that Mr. Derenzy was not entrapped. Mr. Derenzy's conviction upon insufficient evidence violated his right to due process of law under the United States Constitution, amend. XIV and the Missouri Constitution, art. I, §10. Reversal is therefore required, and a judgment of acquittal of the charged offense should be entered. *Jackson v. Virginia*, 443 U.S. 307 (1979) (Conviction on insufficient evidence violates due process); *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (State must disprove defense beyond a reasonable doubt once the defendant presents evidence to support it).

CONCLUSION

For the foregoing reasons, appellant prays the court:

For the reasons discussed under Points I and IV, to reverse his conviction and sentence and remand for the entry of a judgment of acquittal; or

In the alternative, for the reasons discussed under Points II and III, to reverse his conviction and grant him a new trial.

Respectfully submitted,

Elizabeth Unger Carlyle
200 S.E. Douglas St., Ste. 200
Lee's Summit, MO 64063
(816) 525-6540
Fax (816-525-1917)
Mo. Bar No. 41930

James R. Wyrsch
Wyrsch, Hobbs & Mirakian, PC
1101 Walnut, Ste. 300
Kansas City, MO 64106
(816) 221-0080
FAX (816) 221-3280
Mo. Bar No. 20730
ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

This brief complies with the limitations contained in Sup. Ct. R. 84.06(b). It contains 8,933 words.

The disk submitted with this brief has been scanned for viruses and is virus-free.

ELIZABETH UNGER CARLYLE

I hereby certify that a copy of the foregoing brief was served upon Phillip Koppe, counsel for respondent, by U.S. Mail on April 20, 2002.

_____
Elizabeth Unger Carlyle